

Before the
INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, THE NAVAJO TRIBE,)
)
 Petitioners,)

v.)

THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket Nos. 196 and 229

PETITIONER, THE HOPI INDIAN TRIBE, OBJECTIONS
TO NAVAJO TRIBE AND UNITED STATES GOVERNMENT
PROPOSED FINDINGS AND BRIEF

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STATEMENT

The Hopi claim as presented in Docket 196 conflicts with the Navajo claim, Docket 229. Since the Hopi claim does not conflict with any of the other cases consolidated for trial before the Indian Claims Commission, the scope of this undertaking is limited to the Hopi Tribe's objections to the findings of fact affecting the conflict area, proposed by the Navajo Tribe and those proposed by the government, as defendant, in both Dockets 196 and 229.

HOPI TRIBE'S OBJECTION TO PROPOSED FINDINGS OF FACT OF NAVAJO TRIBE

NAVAJO FINDING 1

No Objection.

NAVAJO FINDING 2

Petitioner, Hopi, has no objection to a finding designating the various names under which the Navajo Tribe has been known. It is neither necessary, material nor relevant for this Commission to make a finding as to how various authors and cartographers have made reference to the Navajo people.

NAVAJO FINDING 3

A finding upon the approximate number of Navajos living within the claimed area on the crucial dates based upon the estimates of population introduced in evidence would be helpful to the ultimate findings by this Commission. However, a tabulation of various estimates throughout the entire Navajo history including comments of both knowledgeable and uninformed persons is neither helpful nor a subject for a proper finding. To request the Commission to make a finding that, "As can be seen from this table, there has been a wide variation in the Navajo population figures from any given point of time," ignores the most elementary requirement of a proper finding. Further objection is made to the statement, "The number of Navajos usually have been underestimated," upon the ground that such statement is not supported by the evidence. We submit that a review of all of the population data can lead only to the conclusion that the population figures are based on loose estimates at all periods of time relevant to the issues of this case.

Petitioner, Hopi, further objects to the statement that, "The historic Navajo way of life is in contrast with the Hopis, whose population to this day is concentrated within a few villages." We acknowledge the difference in the way of life

of the Navajo and the Hopi, but the assertion that the Hopi population is concentrated within a few villages is a statement of counsel not founded upon the evidence. The Hopi people make their homes within village areas, but the testimony of witnesses for both the Hopi Tribe and the government acknowledge that the land use pattern of the Hopi extends far beyond the villages. (See footnotes 1 and 2 to Hopi objections to Navajo Finding 4.)

NAVAJO FINDING 4

The 44 pages of proposed finding 4 are simply "dumped" upon the Commission in much the same fashion as Navajo evidence was submitted during the trial, with reckless abandonment of the objectives or relevancy and probative value but with the obvious hope that the Commission might be impressed with the sheer bulk of the paper. We do not feel we can be helpful in creating a proper finding through sentence by sentence objections. The conglomeration is badly in need of legal attention. Hopi proposed findings 6 through 18, and 21 through 33 cover the relevant period included in Navajo finding 4 and they were designed to assist the Commission in finding the essential facts upon which a fair judgment may be predicated. Petitioner, Hopi, generally objects to the form and structure of Navajo finding 4, and to the material that throws no light upon the aboriginal occupation of lands to the year 1848, upon the ground that it is irrelevant. Specific objection is also made as follows:

(A) Although there is no factual dispute concerning the Hopi Indians being village dwellers, still this one finding twenty times redundantly states the Hopi lived in seven villages, five times states they lived in six villages, four times states they lived in five villages, and on two other occasions states they lived in either four or eight villages. A finding of fact is a written

statement of the ultimate facts. A proper requested finding is not a recitation of favorite bits of evidence nor is it a vehicle to impress the Commission through psychological repetition, even as a radio tobacco commercial or TV spot announcements. The question is not on what part of the land the Indians dwelt, but what land did they aboriginally occupy up to 1848. In view of the scholarly testimony of Dr. Eggan⁽¹⁾ and Dr. Ellis,⁽²⁾ supported by the documents and other evidence upon which they relied, the assertions and implications of this finding that the Hopi people occupied only the villages and the lands within a few miles thereof are contrary to fact and reason.

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- (1) Dr. Eggan testified, Tr. 7221: "I think they not only made multiple use, but they made a relatively intensive use of their territory both on their reservation and on the neighboring regions."

Dr. Eggan further testified, Tr. 7429: "I think there is clear evidence they hunted over much of this area, they gathered wild plants for a considerable variety of purposes, they herded cattle and sheep over much of this area, that they had agricultural fields mainly in the heart of this area, that they gathered ceremonial products as evidenced both by a continuation of these and by the shrines which we have located on these maps over an even wider area."

"In many respects this claim is conservative."

Dr. Eggan testified, Tr. 7417:

"They obviously were not living on every square mile of that area but they were, I think, using essentially that area."

Tr. Eggan 7407. ". . . They don't just take a helicopter to the shrine however. The area in between is important to them, too. I have suggested they do other things in between. They gather herbs and plants the same way the Navajo do. They may hunt over that territory. They may bring back wood or they may bring back ceremonial objects. . ."

- (2) After noting that the Hopi cattle have traditionally drifted over a wide expanse of territory "far from the Hopi villages," Dr. Ellis testified as follows: (Tr. Ellis 9387-89)

"Q. Now, were not many of the activities of the Hopi in gathering and hunting both the fauna and flora of their land connected with ceremonies and with shrines which marked the boundaries of the lands used and occupied by them?

"A. If I understand you correctly, a good deal of their gathering was involved with ceremonial activities and then I would add certainly a lot of their gathering was not involved with anything more than economic activities. They are both represented.

"Q. Now, when a Hopi went to a shrine, he gathered plants, he hunted animals, did he not?

"A. Yes, sir.

"Q. We know from many of the studies made that as of 1848 he relied considerably upon those things, did he not?

"A. Yes, he did.

"Q. And there were great ceremonies, particularly with respect to hunting, many of which have been recorded?

"A. Yes, sir.

"Q. That connected the hunting with the shrines?

"A. Yes.

"Q. So I assume, Dr. Ellis, that in using the shrines in limiting territory you had that in mind in fixing the Hopi exclusive area, did you not?

"A. Well, the Hopis certainly pay more attention to the shrines and are more involved with religion in connection with their economic activities than many of the other Indians.

"Q. In arriving at the area that you determined as exclusively Hopi, you took into consideration the type of use that the Hopi made of his lands as of the year you fixed that?

"A. Yes, sir.

"Q. So that it included all of those uses?

"A. Yes, it did.

"Q. That are shown in the various exhibits?

"A. Yes, sir."

(B) The last sentence of the proposed finding on page 43 is of characteristic irrelevance, but coupled with footnote 281 it is obviously intended as an indictment against Hopi veracity. Such a charge, even when not bearing upon the issues, encourages a scrutator. Dr. Reeve is quoted as saying, "this horrendous tale is hard to believe." How in fairness can the last part of the sentence quoted be omitted when a reading of the entire sentence completely reverses the meaning? The full sentence by Dr. Reeve is as follows:

"This horrendous tale is hard to believe, but
the source of the information is valid enough."
(emphasis ours)(3)

The failure of counsel to capitalize the beginning of the quotation suggests that it is taken from the end of a sentence, which is not the case. In fact, the sentence as we have quoted it is the beginning of a paragraph.

(C) Petitioner, Hopi, objects to the statement on page 49, "At the time of the Hopis' first relations with the United States, they claimed only a small area," as being contrary to the fact.

The only authority cited for this statement is Royce's Cessions.

This Commission has considered the work of Royce in the Eighteenth Annual Report of the Bureau of American Ethnology (Ex G-239) a sufficient number of times to take judicial notice of the fact that this document is neither accurate proof of Indian claims nor aboriginal possession.

Since Hopi requested finding No. 20 fully documents the claims of the Hopi Indians as of 1848, a reiteration of these citations can

(3) Ex. E40, pg. 216

serve no useful purpose at this point.

Early in the contacts of the Hopi people with the United States, Merriwether on September 29, 1854 stated, "It should be borne in mind, however, that these Indians (including Hopi) claim and roam over a much greater extent of country than that which I have assigned to them on the map." (Ex. 118 (Navajo); Ex. G69)

(D) Petitioner, Hopi, objects to the statement on page 49, "In the 1850s the Hopi did not visit far from their mesas and their fields were in the vicinity of their mesas." This statement is based entirely upon the testimony of Navajo witness Correll (Tr. 4241-43). We do not deny that the Hopi had fields in the vicinity of the mesas, but to say that they did not visit far from their mesas is contrary to the fact. In October, 1850 and August, 1851 Moqui deputations visited Agent Calhoun at Santa Fe to seek aid against the Navajos whose depredations had reduced them to great poverty. (4)

(E) On page 52 it is stated that the Merriwether map of December, 1856 shows the Hopi as possessing only a limited amount of land around the pueblos, and further states that in 1857 the Hopi still occupied their seven pueblos, and a map dated 1857 a in shows the Hopi clustered in a few pueblos within a limited territory. Such assertions are made for the purpose of implying that the Hopi territory was limited to their mesa homes. Merriwether on his map Ex. 62 (Hopi), encloses the pueblos in red lines stating that he did not

(4) Ex S635, pg. 25; Ex. G29, pgs. 264, 415.

intend to indicate the boundaries of their claims, and he had no information as to the extent or boundary thereof. The objection is, therefore, made that the proposed finding is neither an ultimate fact nor does it accurately portray the factual situation. Any description of the Merriwether map should indicate that the Navajo at that time were east of the Merriwether line. (Ex. G-69, Ex. 118 (Navajo)).

NAVAJO FINDING 5

The first paragraph of this finding is in effect a synopsis of that which petitioner, Navajo, attempts to prove in the remainder of the finding. A person with even a modest background of knowledge concerning all the evidence pertaining to the Hopi-Navajo overlap area cannot read the balance of the Navajo proposed finding 5 without being profoundly impressed that it is a two hundred and seven page herculean effort to place the Navajo where they were not at the crucial time. The few relevant but isolated sentences supported by fact are unworthy of the salvage time. Therefore, petitioner, Hopi, objects to the entire proposed finding as irrelevant and contrary to the facts and will proceed in its own way to illustrate that in 1848 the Navajo Tribe was east of the Hopi claim, as reduced from the Arizona-New Mexico border to the Merriwether line. The factual conclusion is inescapable that the Hopi Indians aboriginally occupied a much larger tract of land than that claimed by the Hopi petition in Docket 196. By 1848 the east line of the claim had been receded for various reasons. Since this fact is apparent to those who have no interest in the Hopi claim, we take the liberty of quoting from the summary on Hopi land use area from the

government witness Dr. Florence H. Ellis in Ex. E 500.

Summary on Hopi land use area.

Hopi territory in the period known as P IV (1300-1700) could be summarized as extending from the Colorado River on the west to Navajo Mtn. on the north and Cheylon on the south. The eastern line would make an angle, running from Black Mesa to Steamboat Canyon and then southwest to Cheylon. This does not take account of the Canyon de Chelly area which formerly had served as home for certain of the clans for longer or shorter periods and which continued to be occupied for occasional brief intervals even after the Navahos took over that area in the 1700's. In the period customarily referred to as P V (post 1700), the Hopis have been pushed and crowded by the expanding Navahos. Nevertheless the Hopi continued to use the outer portions of this outlined territory for hunting, gathering, small farms with houses occupied in the summer, and shrines periodically visited and revered as in former centuries. After the Americans, Mexicans, and Pueblos began their concerted efforts to quell the ever-increasing raids by Navahos (1858), the Navahos moved out from their previously occupied areas and hid in peripheral districts known as the territory customarily utilized by other adjacent tribes. For some the period of hiding was brief, but others - as small family groups or small bands - continued to hide through part of or even all of the Ft. Sumner period, 1864-1868. When the Navahos were returned from Ft. Sumner they were placed on a reservation which proved to be too small for the entire group, as - although some had lived in the west previous to the Ft. Sumner period - others had formerly lived farther to the east in Chaco Canyon, along the west side of Mt. Taylor, etc., and these eastern locations now were largely abandoned. (Officially they were abandoned; unofficially, some Navahos - but not as many as earlier - continued to utilize some of the non-reservation lands.) The problem of over-crowding of the original reservation was increased by a series of drought years. The natural result was that the Navaho did not remain within the new reservation - even after it had been enlarged. Hopi complaints of Navahos having pushed into their territory continued periodically from the statements mentioned by Donaldson pertaining to Navahos infringing on the eastern Hopi lands about 1819 (Donaldson, Thomas, Moqui Pueblo Indians of Arizona and Pueblo Indians of New Mexico. Extra Census Bull., Washington, 1893) to the present years. Like the other Pueblos, the Hopi were prohibited by United States law from resorting to arms to drive off invading peoples; the result was loss of exclusive utilization of their old territory after 1858.

We specifically call to the attention of the Commission that this government witness unequivocally stated that the exclusive utilization of the old territory of the Hopi was not lost until after 1858, ten years after the United States acquired the territory from Mexico.

Ex. E 100 illustrates the conclusion of Dr. Ellis as to the west line of Navajo use as of 1848, which she also defines as the east line of Hopi aboriginal and exclusive possession on the same date. The line is a short distance west of the Merriwether line but her testimony in this regard was based upon the Ives' visit 10 years after 1848, Tr. Ellis 9380-81.

The Navajo migration is carefully traced in Hopi proposed finding 34. We again call to the attention of the Commission, footnotes 154 through 164 supporting the Hopi request which set out the evidence specifically refuting Navajo proposed finding 5.

The Navajo have progressively enveloped more territory as their population has increased. To gain possession of territory held aboriginally by the Hopi does not vest aboriginal possession in the aggressor. While we do not entirely agree with government witness Dr. Reeve for the reasons set out at page 68 in the brief supporting petitioner, Hopi's, requested findings of fact, his testimony to the effect that Navajo use and occupancy of the Hopi overlap area occurred after 1848 is indeed convincing. Petitioner, Navajo, in its requested finding 5 requests the Commission to make findings in direct contradiction to the following evidence:

1. Neither Tovar nor Lopez nor Coronado who visited the Hopi in 1540 and later made any mention of the Navajo. Ex. G 205, pg. 1.
2. In 1540 Lopez de Cardenas traversed the area west of the Hopi mesas on his way to the Colorado River. He made no mention of the Navajo. Ex. 9 (Hopi), pg. 1.
3. There is no proof that Navajo were in Arizona before

1600. Ex. E 511, pg. 338 (Colton); Petitioner Hopi proposed finding 34.

4. Onate saw no Navajo at Moencopi in 1604. Ex. E 510, pg. 46.

5. Vargas (1692) in his numerous contacts with the Hopi made no reference to the Navajo. Ex. S 590, pg. 356.

6. In 1692 the Apaches who came to Zuni to attempt to induce them to come to their villages said the road to Moki was guarded by Apaches not Navajos, Ex. S 589, pg. 205.

7. A sketch of the northern frontiers of Spanish territory in the 17th century spoke of Moqui and Zuni, but made no mention of Navajo. Ex. G 200, pg. 212.

8. On the basis of the documents the Navajo could not have lived west of the Hopi Mesas in the 1700's. Tr. Schroeder 8577.

9. The Apache, in the early part of the 18th century, exerted pressure on the Hopi along the Little Colorado River. No mention was made of the Navajo. Ex. 50 (Hopi), pg. 2.

10. Neither Escalante in 1776 nor Garces in 1776 saw Navajo north or west of the Hopi; and they both referred to the Navajo as living to the east of the Hopi. See Euler Report on Havasupai pg. 7; Ex. 19 (Hopi); Ex. 15A (Navajo), pg. 7; Ex. E 51(b), pgs. 380-81; Ex. G 46; Ex. G 26.

11. Navajo witness Brugge testified there are no pre-eighteen hundred Navajo sites in the lower Chinle area. Tr. Brugge 6583-84.

12. There are no pre-eighteen hundred Navajo Sites in the upper Moencopi area. Navajo witness Brugge. Tr. 6583.

13. Dr. Reeve testified, "the Navajos were not living southwest of Fort Defiance as far as the region between the Puerco River of the west, and the Rio Zuni." (In 1848) "the furthestmost group southwest of Fort Defiance were at the Colletas in Black Creek Canyon." (Tr. Reeve 7919)

14. There is no evidence of any Navajo settlements in the Western Claims Area in 1848. Tr. Eggen 7312; Tr. Correll 5633; Tr. Schroeder 8093; Ex. E 51(b), pg. 269.

15. There is an obvious dearth of specific Navajo site information during the period 1848 to 1858. Tr. Ellis 9391.

16. In 1850, in both Spanish and American Records, the Apaches, and not the Navajos, were left of the trail from Zuni to the Hopi; hence the Navajo could not have been in the western claims area at that time. Tr. Schroeder 8471.

17. Sitgreaves was south of the conflict area; and Whipple, if he was in the area at all, was at the extreme southern boundary in 1853, and he saw only two Navajo Hunters from the Canyon de Chelly. Tr. Reeve 7926-28.

18. Beale, in 1857, following the Whipple Trail, missing the South Area completely, reported no Navajos. Tr. Reeve 7929.

19. Ives, on his trip through the Hopi Villages in 1858, stated he saw his first Navajos east of the Hopi Villages. See Euler Report on Havasupai pg. 14.

20. Mr. Schroeder recounts a Ute raiding party who in 1858 attacked the Navajo in the Canyon de Chelly. He states (Tr. 8541-42) that they came from the west through the area north of the Hopi Mesas, and encountered no Navajo until reaching the extreme north-eastern corner of Arizona. Ex. S 512-L; Ex. S 514-N; Ex. R 67; Ex. S 805.

21. Captain Shepherd, in 1859, stated the Navajos never go as far as the San Francisco Mountains to secrete themselves or property. Ex. G 59, pg. 327.

22. Captain Walker's expedition in 1859 from Fort Defiance through the area north of the Hopi Mesas and the Mesa de la Vaca reported no Navajos in that area. Ex. G 61; Ex. G 205, pg. 16; Ex. 19 (Hopi) pg. 1; Ex. G 258. He first encountered Navajos upon reaching the Arroyo de Chelly on his trip east.

23. There are no Navajo sites southwest of Fort Defiance until 1863. Ex. S 501-A to S 516-P.

24. There are a number of reports of an old Navajo who lived at Keams Canyon as a boy in 1863. He was reportedly the furthest west of any Navajo. Ex. E 3, pg. 32; Ex. G 137, pgs. 31 and 32.

25. The first evidence of Havasupai and Navajo getting together was in 1864. Tr. Schroeder 8578-9.

26. The Navajo first penetrated the Glen Canyon Area around 1864. Ex. 656 (Navajo), pg. 14.

27. Dr. Ellis testified that very few Navajos filtered into the central claim area before the period following Fort Sumner. Tr. Ellis 7586.

28. There are no Navajo signs at the junction of the Little and Big Colorado Rivers until post Fort Sumner. Tr. Schroeder 8624; Ex. G 18, pgs. 362-68; Ex. E 51(b), pgs. 269, 433, and 437.

The last seventy pages of Navajo proposed finding 5 purports to cover the period after 1862. Since we are attempting to determine use and occupancy as of 1848, testimony and other "evidence" as to use after 1862 can reflect no light upon the situation as it prevailed in 1848. We, therefore, object to all of this material, particularly on the grounds that it is irrelevant to the issues of this case.

NAVAJO FINDING 6

The Navajo position in this finding is at least unique. They assert that lands south of the San Juan River were Paiute, but the Paiute Indians were absorbed by the Navajo and, therefore, the Paiute San Juan land became Navajo land. An effort is made to analogize with the Tewa Indians who came to live with the Hopi in the Village of Hano on First Mesa (Navajo proposed finding 6, page 302). The Hopi-Tewa migration legend recounts the journey of the Tewa-Hopi from their ancestral home in New Mexico to their present village on First Mesa. (Ex. E 563, pg. 176) The Hopi assert no claim for New Mexico land. The adopted Tewa Indians simply share in whatever the Hopi may receive. The Hopi claim is not enlarged by their presence. The matter of time is of great importance in both situations. The Tewa Indians came to the Hopi Mesas over 250 years ago. (Ex. E 563, pg. 176) The Hopi aboriginal claim must be defined as of 1848 when the territory was acquired by the United States. Isabelle T. Kelly asserts that the Navajo "incursion", (which is defined as an unfriendly entry or invasion by Webster's New Twentieth

Century Dictionary), into this area seems to have started in the 1860's. (Ex. G 16, pg. 550) Katharine Bartlett is given as a supporting authority on this point. (Ex. G 37, pgs. 31 and 32) Petitioner, Navajo, seeks to weather this storm by simply asserting "Experts' opinions are divided with respect to the priority of Navajo or Paiute occupancy in the area." (Navajo proposed finding 6, pg. 294) If the Paiute Indians came into the Hopi claim area after the 1860's, it would have no bearing upon the claim as of 1848. The only authority cited by Navajo petitioners for the proposition that the Navajo came before the Paiute Indians is their own witness, Dr. Kluckhohn (Tr. 1202-03) who died before being cross-examined on this point, and whose testimony was admitted over the objection of petitioner, Hopi.

We do know that Escalante, on November 9, 1776, found some tents of Yutas Payuchis (presumed to be Paiutes) just south of the San Juan River (Map Ex. G 46). Escalante said these Indians were very hostile towards the Moquinos (Moqui or Hopi) (Ex. 24 (Hopi) pg. 6). The ancient Hopi Bear Clan Shrines extend all along this part of the Colorado and Lower San Juan Rivers. Ex. 68 (Hopi). There are also other Hopi Shrines in this area. (Ex. 69 (Hopi)) The Hopi religious and economic use of their lands was tenaciously tied to their Shrines (See notes 2 and 1 to Hopi Objections to Navajo Finding 4). In view of all the evidence it seems very reasonable to assume that the Paiute tents were in hostile Hopi territory.

Isabelle T. Kelly, in the map accompanying her Article in the American Anthropologist (Ex. G 16) includes this territory as part of the Paiute Country. It is interesting to examine her own apology in this connection contained in her notes for the paper:

San Juan

These pitifully scant and uncertain notes on the San Juan Paiute are offered with apology. They were obtained in the course of three or four days, without opportunity of subsequent checking, and are included here only because there is no published material on this group, save casual mention in the Reports of the Commissioner of Indian Affairs. The material is from two informants, Joeie (J), at Marble Canyon, and Joe Francis (JF), at Tuba City. Work with the former would have been more profitable had an interpreter been available; we were obliged to work in pidjin English, supplemented by my halting Kaibab vocabulary. JF was worked with a Navaho-English interpreter. Potentially an excellent informant, JF disappeared at the end of the first day's work and could not be located, either then or a year later when I again visited Tuba City. If one could take time to go to Paiute Canyon, where virtually all the remaining San Juan are clustered, it is almost certain that good material could be obtained. To be on the safe side it might be well to take along an interpreter, perhaps Kaibab. Certainly the San Juan have had less white contact than any other Southern Paiute; but Navaho, Ute, and perhaps even Pueblo influence, must have been strong. (Ex. G 135, pg. 156) (Emphasis ours)

Reason dictates that natural barriers such as the Colorado and the San Juan Rivers are much more realistic dividing lines between Paiute and Hopi than those drawn from such scanty evidence.

Counsel for the Paiute Indians, Mr. Cragun, stipulated before trial that it was not contemplated that any claim for joint occupancy would be made by the Southern Paiute Indians and further that it was not intended to make any claim to a right of compensation for lands by whatever title east of the Colorado River in either Dockets 88 or 330 (Ex. G 168, pg. 6).

Petitioner, Hopi, objects to Navajo Finding 6 as contrary to the weight of the evidence.

NAVAJO FINDING 7

This entire finding represents a controversy between the petitioner, Navajo, and the defendant concerning the respective culpability of the two parties during the period covered and is a matter in which the petitioner, Hopi,

has little interest. Petitioner, Hopi, therefore objects to this finding upon the ground that it is not relevant to the issues of the case, and is not founded upon fact.

NAVAJO FINDING 8 .

As in the previous finding, the subject matter of finding 8 is primarily an issue between the petitioner, Navajo, and defendant, the United States Government. Petitioner, Hopi, having suffered the depredations and the encroachments of the Navajo Tribe for centuries, can not be expected to agree with the theme of the finding. The Navajo Tribe has increased in numbers from somewhere in the vicinity of 10,000 in 1848 to the present staggering population probably in excess of 80,000. The United States has responded to their needs with extensions to the Navajo Reservation. (Ex. 2 (Hopi)) It is difficult to comprehend the Navajo wailings, "in defense of their Country", with the indomitable heel of the aggressor still firmly implanted on the Hopi tribal back. An expression typical of the eighty-six Exhibits cited in the case of Healing V. Jones to prove Navajo aggression against the Hopi is set out in the letter from the Commissioner of Indian Affairs, T. J. Morgan, to the Honorable Secretary of the Interior, on December 18, 1890:

The Navajos have been for some time intruding upon the Moqui reservation, pasturing their herds, appropriating to themselves the water supply, in some instances stealing the farm products of the Moquis, and in one instance at least which came to my knowledge while there, assaulting violently one of the Moquis. The Moquis are a peaceable, law-abiding people, utterly unable to cope with the Navajos, and they have complained very bitterly at what they regard as the neglect of the Government to protect them from their insolent, aggressive neighbors.

It is very desirable that the Navajos should be forced to retire from the Moqui reservation, and, if practicable, those who have despoiled the Moquis should be arrested and punished by at least compelling them to restore the equivalent of what they have taken. Whether this is practicable or not I do not know. (Healing V. Jones, Plaintiff's Ex. 29) (210 F. Supp. 125, 10 L.Ed 2d 703)

Petitioner, Hopi, objects to this proposed finding on the ground that it is inconsistent with the evidence.

NAVAJO FINDING 9

Petitioner, Hopi, does not object to a finding concerning the execution and contents of the 1868 Navajo Treaty since it was ratified by Congress and became effective on the 12th day of August, 1868, when it was signed by the President of the United States. Petitioner, Hopi, objects to the failure to include in said finding a significant part of Article IX of the Treaty which is as follows:

ARTICLE IX.

In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; . . .
(Ex. 412 (Navajo) pg. 5)

Petitioner, Hopi, further objects to the statement on page 360, "The Navajos felt that they had not been dealt with in a fair manner in the negotiations of the Treaty of 1868", as contrary to the evidence. The Navajo leader, Barboncito, stated to General Sherman:

"We are very well pleased with what you have said, and well satisfied with that reservation; it is the very heart of our country and is more than we ever expected to get."
(Ex. 410 (Navajo) pg. 1)

Petitioner, Navajo, seeks to support the opposite view with the testimony of present-day Indians who supplied the missing links in this case from beginning to end with the certainty and repetitive rhythm of a large herd of dairy cows

returning to their stanchions one by one at milking time, and with the testimony of the expert witnesses whose testimony could not be tested by cross examination. There may be some justification for relaxing the rules of evidence to admit facts of historical value although not significant in the determination of the issues. But Petitioner, Hopi, objects to the mass of detail here offered, as immaterial and irrelevant, and to the editorial comments and conclusions as not founded in fact. The Navajo excessive devotion for swelling the mass is here evident when they add to the immaterial and meaningless aggregate the names of each of the many signers of the unratified treaties.

NAVAJO FINDING 10

Petitioner, Hopi, objects to this finding on the ground that it is contrary to the evidence. Petitioner, Navajo, commences proposed finding 10 with a statement of three purposes for the conducting of the Navajo Archaeological Survey. Let us examine these purposes more carefully.

The first purpose is to "(1) obtain evidence of Indian use and occupancy of areas for which no historical documentary data exists". The sincerity with which the investigation was made for Indian use other than Navajo use will be treated later. We think it would be fair to say that the Navajo archaeologist in this case sought evidence to support the Navajo claim and in defiance of the historical documentary data that did exist. Early Spanish explorers in 1771 located the Navajo Indians far to the east of the Hopi (Ex. 57 (Hopi)). Escalante's map drawn in 1778 clearly shows the "Provincia de Na ba-joo" to the east of the Moqui. (Ex. R 5). In 1848 the Disturnell map of 1847, which was referred to in the Treaty of Guadalupe Hidalgo still placed the Navajo well east and north of the Moqui. (Ex. 1 (Hopi)); (Ex. G 229). Other historical data that does exist is set forth in our objections to Navajo proposed Finding 5 and will not again

be here repeated. It is sufficient to observe that when early explorers failed to locate Navajo Indians in the conflict area, Petitioner, Navajo, simply asserts that the Navajo were there but that the explorers failed to discover them. In view of all of the evidence, this is an unfair assumption and must be classed in the same category as the Navajo assumption that whenever a Navajo is contacted, whether on a hunting or raiding trip or otherwise, the territory is immediately claimed as aboriginal lands of the Navajo.

The second avowed purpose of the survey is "(2) to determine the extent of territory Navajos formerly used and occupied". A more realistic statement of the policy pursued would be to say that the attempt was to find evidence, of whatever character available, to support the theory that the Navajo used and occupied all of the claimed area.

The third purpose stated was "(3) to ascertain from archaeological remains what other Indians, if any, might have been resident in the area." Archaeologist Correll admitted that more than 75 to 100 Navajo informants were used in obtaining the Navajo data and that not a single Hopi informant was used in any of the conflicting area outside of the 1882 Executive Order Reservation. Within the Reservation, on one occasion two Hopi witnesses were used to guide Mr. Correll to Burro Springs. The only excuse used for not using Hopi witnesses was "because I don't know of any Hopis who live in that area who would know the area". (Tr. Correll 5779). Since Mr. Correll chose not to use Hopi informants to locate Hopi sites, he relied heavily upon his own knowledge for such purposes. Unfortunately his knowledge of Hopi ways and customs was woefully lacking. The witness, Correll, testified that prayer sticks are what the Hopi call "pahos", and are left at the shrines which Hopi Indians visit. By the presence of paho sticks

you can tell whether Hopi Indians have visited a particular area within any recent time. (Tr. Correll 5785-86.) During the cross examination, witness, Correll, was then asked: "Now, Mr. Correll, you were unable to describe to us what a paho looked like at the other trial. (healing V. Jones). Have you looked into this since?" His answer was: "No sir; I am afraid I haven't." (Tr. Correll 5786). The further question was then asked: "You still wouldn't know just what a paho was?", to which he answered, "Well, I couldn't describe it minutely. I know it was a stick with feathers attached and some painting ordinarily."

After the statement of purpose in the proposed finding, a general statement is made to which the Navajo ask this Commission to subscribe, as follows: "Every effort was made to maintain high professional standards in following the techniques and procedures normally pursued by Archaeologists." This statement also bears examination. On page 286 of volume 3 in the transcript in the case Healing V. Jones Supra, Mr. Correll was asked the question if the only personal experience he had had, other than while he was going to school was since he had been employed by the Navajo, to which he replied "This is right."

There are certain fundamental rules of logic that apply in deductive and inductive reasoning whether a person is a qualified archaeologist or not. Some of the obviously fallacious reasoning of the witness, Correll, is as follows:

(1) He seems to find either that all material at the various sites is Navajo, or if it is not Navajo, he terms it as trading material. Failure to find anything but Navajo sites when Hopi sites are present suggests not very objective archaeology.

(2) He proves the site by the claim of Navajo vicinity and then proves the vicinity by the sites.

(3) He explains any dating of tree rings by reasoning how it fits into his theory.

(4) He assumes continuous occupation of hogans from any date he feels he has established by any means.

(5) If he finds the structure it proves his case; and if he does not find it, it proves his case because they have not been preserved.

(6) Without sufficient evidence but with hair trigger zeal he jumps at conclusions to support his cause. "Of 666 sites recorded 638 are unmistakably Navajo." (Navajo proposed Findings pg. 367). This is probably the highest percentage of identifications on record.

Professional criticism of the manner in which the Navajo archaeological survey was taken was made during the course of the trial. The Petitioner, Hopi, calls to the attention of the Commission the following:

(1) The Navajo inconsistency in the manner of collecting and recording details makes it impossible to reach general consistent conclusions. Tr. Schroeder 8002.

(2) Much Navajo site recording was done by non-archaeologists, who were in many instances Navajo Indians. Describing hogan ruins as pre 1868 simply because these laymen found them to be 10 feet or less in diameter is not a scientific recording. Tr. Schroeder 8003.

(3) Witness Correll's dating criteria such as distances of ashpits from hogans, do not determine whether such ashpits were post or pre Fort Sumner. Such classification is not a valid criterion. Tr. Schroeder 8007, 8012 and 8017.

(4) Correll's admissions that the hogans in the northern claim area show some inconsistencies could be attributed to the fact that they were built by Paiutes or Hopis, who had copied from the Navajo. Tr. Schroeder 8022.

(5) The felling of trees by burning and lack of metal axe cutting as pre-Fort Sumner tests are not sufficient without other criteria to support them. Tr. Schroeder 8026.

(6) Game traps as a criterion for pre-Fort Sumner dating is insufficient without other supporting data. Tr. Schroeder 8027, 8033.

(7) Correll's door slab criterion is questioned as inconclusive if not erroneous. Tr. Schroeder 8029.

(8) The determination that sites are Navajo merely by the discovery of burnt timbers is erroneous since other tribes felled timbers by the same method. Tr. Schroeder 8050, 8051.

(9) Tree ring dates can be accepted only in clusters. Yet, the Navajo archaeologists based many conclusions on a single date. Tr. Schroeder 8057.

(10) History is a good criterion but Navajo site reports did not rely thereon. Traditions beyond one or two generations must be distinguished from history. Tr. Schroeder 8057.

(11) The determination that sites are pre-Fort Sumner simply because they bear no American trade items is erroneous, especially in the areas further removed from American contacts. Tr. Schroeder 8060, 8061.

(12) Certain sites classified as Navajo by the Navajo are more likely Hopi according to the features and pottery associated with these sites. Tr. Schroeder 8080.

(13) A defensive work and construction on the Little Colorado River is pre-historic and Hopi in nature, and not Navajo as claimed in the Navajo survey. Tr. Schroeder 8081.

(14) There is great inconsistency in the work done by the Navajo

Indian informants who did much recording in the absence of trained archaeologists.
Tr. Schroeder 8084.

(15) Certain late 1700 and early 1800 sites in the western claim area are Havasupai and not Navajo. The few scattered Navajo structures in that area date from the late 1850's and 1860's. Tr. Schroeder 8093.

(16) The Navajo site claims on the Coconino Plateau are not even of Navajo type. Tr. Schroeder 8101.

(17) There is great inconsistency between tradition and tree ring material used in the Navajo survey. Tr. Schroeder 8103, et seq.

(18) Some sites are dated by structural type, and in some of these cases the structural type is not even recorded on the Navajo work sheets. Tr. Schroeder 8105.

(19) Pottery taken from the upper Little Colorado, the upper Puerco River area was inconsistently dated in the Navajo survey. Tr. Schroeder 8105.

(20) Although Mr. Correll set up six criteria he did not always follow the same. Tr. Schroeder 8107.

(21) Pottery dates in Dinetsah Utility (as pre-1800) are incorrect since this type was used up to 1866 and even as late as 1898. Tr. Schroeder 8109.

(22) Pottery dating as used by the Navajo for pre or post 1868 determination is not as helpful as dating pre or post 1800. Tr. Schroeder 8111.

(23) It should be remembered that it was the Ute Indians who pressed on the Hopi from the North and Northeast in 1680, not the Navajo. Tr. Schroeder 8147.

(25) State of preservation or appearance should be rejected as a criterion for determining pre or post Fort Sumner sites. Tr. Schroeder 8457.

(26) Typology is the least helpful criterion to archaeologists. Tr. Schroeder 8457.

(27) Since the Navajo Indians had a custom of re-utilizing wood or using dead wood, structure dating by the tree ring method becomes increasingly difficult. Tr. Ellis 8897.

(28) In 86 instances where structures incorporating a tree were considered to be of the pre-Fort Sumner period by the Navajo archaeologists, about 46 of these have no secure dating criteria whatsoever. Tr. Ellis 8963, et. seq.

(29) The presence of game traps as a criterion should be rejected since many tribes use them, both pre and post Fort Sumner. Tr. Ellis 8970.

(30) Little reliance can be placed upon the word of an Indian as to his own age, yet the Navajo relied thereon in many instances. Tr. Ellis 8982.

(31) Sweat houses are common to both Navajo and Pueblo. Hence standing alone, their presence constitutes inconclusive proof of Navajo occupancy of an area. Tr. Ellis 9001.

(32) Existence of Navajo shrines in an area is only an indication of the presence of the Navajo, particularly considering the roving propensities of these people. Ex. E51 (a), pg. 123.

To illustrate the insubstantial evidence upon which the Navajo archaeologist was, nevertheless, willing to draw a general conclusion in support of the Navajo claim, reference should be made to the west claim area. The west claim area is that area red cross hatched on Hopi Exhibit A and comprises a strip of land over 150 miles long and 60 miles wide at the widest place. Navajo Exhibit 555 shows only one document relating to this entire area. Witness Correll

admitted that this document could be placed anywhere on Exhibit 555 with equal facility in or out of the western claim area. (Tr. Correll, 5854.) Only six sites were shown as dating before 1868, and those by reason of typology only, and without tree ring dates. There were no sites pre-dating 1848. (Tr. Correll 5854.) Yet under these circumstances the conclusion was still readily drawn by the Navajo that the entire area was aboriginally Navajo and continued to be so to 1848.

From the foregoing it is apparent that no reasonable effort was made by the Navajo witnesses to maintain high professional standards in following the techniques and procedures normally pursued by archaeologists. The willingness to draw desired conclusions from such scanty evidence places serious question upon the entire procedure of the Navajo survey.

Even if the Navajo archaeological survey were competently conducted, the Navajo pre and post 1868 determination date is of no value in this case, since the crucial date involved is 1848.

In considering the weight to be given the archaeological material, it should be borne in mind that the habits and traits of the Navajo and Hopi Indians are entirely different with reference to their dwellings. The Navajo built simple, quickly constructed dwellings wherever they went, regardless of the length of their stay. The Hopi people, on the other hand, built more permanent pueblo structures and the nature of their use away from the dwellings was such that evidence of such use was not well preserved. Cattle seen by Escalante left no signs visible today. Hopi extensive use of the area can be determined only in the light of their tendencies as explained by Dr. Eggan and Dr. Ellis.

NAVAJO FINDING 11

We appreciate the dilemma of the petitioner, Navajo, in being obliged to admit the mobility of the Navajo Indians and at the same time endeavoring to establish aboriginal and continual use and occupancy of the claim area up to 1848. Petitioner, Hopi, agrees with the proposed conclusions as to the mobility and general descriptions of Navajo habits, but objects to any implication that the Navajo occupied any area west of the Merriwether line prior to 1848.

Objection is further made to the use of such terms as "Navajo Country," and "Country of the Navajo" as begging the question.

Specific objection is made to the statement on page 512 of the proposed finding: "By 1846 the Navajo used and occupied a vast expanse of country." The mobility of the Navajo during this period and their pursuit by the United States Army during the same period caused the Navajo to flee in vast areas of country far beyond the Navajo country, but this sort of traveling must be distinguished from occupation or aboriginal possession.

Petitioner, Hopi, does not object to the statement that Navajo Indians have their own names for geographical physical features, but specific objection is made to the implied association of these terms with exclusive use and occupancy by the Navajo as of the crucial date of 1848.

Objection is made to the statement "The flight of Navajos before attacking troops became noteworthy only after 1860 and especially after 1863." (Navajo proposed findings, pg. 528.) Without reiterating references the petitioner Hopi respectively calls to the attention of the Commission Hopi proposed finding 21 showing that the exertion of military pressure upon the Navajo commenced in the winter of 1846 and continued thereafter. The tactical

mobility of the Navajo as a method of defense is admitted, but petitioner Hopi objects to the statement of page 530 of the proposed finding: "that kept them within their own country and a use which they made of their country to protect their families and resources." The facts are to the contrary. In 1846 when Colonel Alexander Doniphan commenced military pressure against the Navajo they fled from east to west and into what was then exclusively Hopi country.

NAVAJO FINDING 12

Petitioner, Hopi, admits that the Navajo Indians have practiced agriculture for a long time, but prior to 1848 very little farming was done by the Navajo Indians in the present state of Arizona outside of the Canyon de Chelly. Petitioner, Hopi, objects to this finding upon the ground that a great portion thereof does not apply to the Hopi-Navajo overlap and upon the further ground that much of the substance of said finding applies to dates that shed no light upon the crucial date involved in this litigation.

Further objection is made that the reference to "Navajo Country" at the top of page 539 of the proposed finding begs the question which is to be determined by this Commission.

Further specific objection is made to the statement on page 543 of proposed finding, that certain Navajo Indians farmed in Tuba City before being taken to Fort Sumner, upon the ground that no Navajo Indians were farming at Tuba City in 1848 or prior thereto. Data bearing upon all other periods is irrelevant.

Petitioner Hopi further specifically objects to the statement on page 548 of the proposed Navajo findings wherein it is stated that the Navajo

practiced agriculture to the exclusion of others prior to and immediately following Fort Sumner, on the ground that the statement is contrary to the facts.

Further objection is made to the site information set out from pages 548 to and including page 571 of the proposed findings upon the ground that such information is contrary to the fact and for the further reasons that are particularly set out in petitioner Hopi objections to Navajo proposed finding 10.

Hopi petitioner also admits that the Navajo Indians owned and ran livestock, particularly horses and cattle, but objects to this portion of the finding because of insufficiency of evidence upon which the Navajo statements are predicated and upon the further ground that said statements are contrary to the facts established at the trial of this cause.

Further objection is made to the proposed finding regarding herding for the reason that all of the material set forth in said finding bearing on the period more than ten years after 1848 is of no probative value to this cause and upon the further ground that such information was obtained from questionable sources including unreliable archeological data and Indian testimony to which no credence can be given under the circumstances. Petitioner Hopi has no objection to a finding that hunting was an important part of the Navajo economy, but objects to the direct statements and implications of said finding indicating that hunting in the conflict area was proof of aboriginal possession by the Navajo Tribe prior to 1848, or evidence of a joint use thereof by said Navajo Tribe. The proposed finding with respect to hunting is further objected to on

the ground that a great portion thereof relies solely upon uncorroborated and unreliable Indian testimony and upon the further ground that it is based upon information bearing upon the period before Fort Sumner. Hunting long after 1848 is meaningless in view of the fact that exclusive occupation in 1848 and prior thereto must be established.

Petitioner Hopi specifically objects to the sentence on page 654 of the proposed findings: "In this manner, Navajo territory was expanded at the expense of neighboring groups long before the American occupation." The evidence before this Commission clearly establishes, as hereinbefore specified, that the Navajo Indians did not permanently encroach upon Hopi territory west of the Merriwether Line until after 1848.

Petitioner, Hopi, admits that Navajo Indians gathered many wild plants but denies that the evidence in this case establishes that any such activities were carried on within the disputed area to any extent prior to 1848 at which time all of the claims area was exclusively Hopi territory.

Specific objection is made to the statement on page 682 of the proposed finding: "The Navajos make a greater use of their plant environment than did the Hopi." The only authority cited for this statement is footnote 4402 wherein it is stated that Dr. Ellis contends that the contrary is the case. The fact that Dr. Ellis has an opinion contrary to the writer of the proposed finding is certainly no evidence that the proposed finding is correct.

Petitioner Hopi further objects to the second paragraph on page 684 on the ground that it is contrary to the facts. Dr. Whiting in footnote 4412 is quoted as stating that "the Hopi floral environment...consists of practically all of the plants in the immediate vicinity and selected elements at

a greater distance." Certainly this is no evidence that the Hopi did not utilize the outlying claims area. For evidence bearing on Hopi use beyond the immediate vicinity of their mesas see Ex. 3 (Hopi) and Ex. E 538, pp. 35, 36.

Petitioner Hopi objects to that portion of proposed finding 12 beginning on page 685 and concluding on page 689, including the conclusions respecting the whole finding, as irrelevant, immaterial and in contradiction to the facts and for the other reasons hereinbefore stated.

NAVAJO FINDING 13

Petitioner Hopi objects to finding 13 upon the ground that portions thereof are immaterial and irrelevant while other portions are not founded upon the evidence introduced in this case. On page 696 of the proposed findings Dr. Ellis's position contrary to the proposed finding is cited for authority for the finding. Dr. Ellis testified:

"Well, the Hopis certainly pay more attention to the shrines and are more involved with religion in connection with their economic activities than many of the other Indians." Tr. Ellis 9387-89.

NAVAJO FINDING 14

Petitioner Hopi objects to the statement on page 697: "Navajo economy was more mobile than that of the sedentary Hopi and other Pueblo groups." We admit that the Navajo were more mobile in the sense of roaming over large territories, including those of other tribes. However, the Hopi were mobile in another sense, that sense being that although they lived upon the mesas, they covered large tracts of territory surrounding them for their particular purposes as hereinbefore specifically set out.

Petitioner Hopi objects to the first paragraph on page 701 of the proposed finding upon the ground that the statement of Calhoun is not a

statement of law by which this Commission is bound and does not prove aboriginal possession within the legal definition of those terms.

Petitioner, Hopi, further objects to the statement on page 702 of the proposed findings: "In land disputes with the Hopis, the fact that Navajos controlled lands and springs near the Hopi villages sustained their right to the lands and springs." This statement is not substantiated by the evidence. The only authority submitted in support of the statement was dated July 11, 1889, many years after the crucial date in this litigation. Further objection is here repeated that the evidence does not sustain any assertion that Navajo dominion or control extended west of the Merriwether line in 1848 or prior thereto.

NAVAJO FINDING 15

Petitioner, Hopi, objects to any finding holding that the Navajo in 1848 either jointly or exclusively possessed any land in the disputed area west of the Merriwether line. These objections are based upon the facts heretofore set out.

CONCLUSIONS ON OBJECTIONS TO NAVAJO FINDINGS

After a careful consideration of the proposed findings submitted by the Navajo Tribe we respectively submit that there are few statements in the entire three volumes submitted that are not out of context, slanted, or used to draw conclusions unwarranted by the evidence.

PETITIONER HOPI TRIBE'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS
OF FACT RELATING TO THE HOPI CLAIM

DEFENDANT'S FINDING 1

No objection.

DEFENDANT'S FINDING 2

Petitioner, Hopi, objects to a finding as to the date of taking upon the ground that it is not within the scope of the issues at this time, the matter of taking having been reserved for further hearing contingent upon the establishment of the liability of the defendant. (See Order of the Commission dated October 13, 1958.)

DEFENDANT'S FINDING 3

No objection.

DEFENDANT'S FINDING 4

No objection.

DEFENDANT'S FINDING 5

Petitioner, Hopi, objects to the statement as to the settlement of the ancestors of the Hopi in the 1882 Executive Order Reservation without specific reference to the date of such settlement upon the ground that the proposed finding is indefinite and uncertain. Further objection is made to defendant's reference to the opinion of Dr. Harold S. Colton, since the purpose of the finding is to determine the ultimate fact from consideration of all of the evidence, and upon the further ground that the phrase "than at present" is indefinite, uncertain and misleading.

DEFENDANT'S FINDING 6

No objection; but for more specific findings see Hopi Proposed Findings 8 through 16.

DEFENDANT'S FINDING 7

No objection.

DEFENDANT'S FINDING 8

No objection.

DEFENDANT'S FINDING 9

No objection.

DEFENDANT'S FINDING 10

Petitioner, Hopi, objects to this finding upon the ground that it is immaterial to the issues hereof, the Hopi Tribe having been organized under the Indian Reorganization Act of June 18, 1934. (48 Stat. 984,) as amended by the Act of June 15, 1935 (49 Stat. 378).

DEFENDANT'S FINDING 11

No objection.

DEFENDANT'S FINDING 12

Petitioner, Hopi Tribe, objects to the first paragraph of said finding upon the ground that the phrase "sacred area" is not descriptive of the Hopi economic uses of the land lying outside the immediate vicinity of the villages. Use of the term "sacred area" in paragraph 2 of said finding is also the subject of objection upon the same ground. Objection is also made to the last paragraph of said finding upon the ground that it is misleading. If defendant is speaking of land outside of the claims area, it is immaterial; if it is speaking of lands within the claims area, it is contrary to the fact.

DEFENDANT'S FINDING 13

Petitioner, Hopi, objects to the use of the words "present reservation" in the second paragraph hereof upon the ground that the present reservation was defined in the case of *Healing v. Jones*, supra, and is not co-extensive with the Executive Order Reservation of December 16, 1882. Further objection

is made on the ground that the period 1876-1882 is irrelevant to the issue of aboriginal title.

DEFENDANT'S FINDING 14

No objection.

DEFENDANT'S FINDING 15

No objection.

DEFENDANT'S FINDING 16

Petitioner, Hopi, objects to the statement that when the Executive Order Reservation was created in 1882 great numbers of Navajos had already wandered into that country with their families and their flocks. The authority for the statement is found in the appendix to the opinion of the court in *Healing v. Jones*, supra, at pages 112 and 113. There it is stated that great numbers of Navajos wandered far beyond the paper boundaries of their 1868 reservation as enlarged by the Executive Orders of 1878 and 1880. A further statement is made in said appendix that by 1882 Navajos comprising hundreds of bands amounting to about half of the Navajo population had camps and farms outside the 1868 reservation and as far therefrom as 150 miles. It is also stated that some Navajo groups which had passed westward because of drought were attracted to the Hopi country to trade for corn and melons, but nowhere does the court state that even at this late date large numbers of Navajos were in the Hopi reservation. Objection is also made to the last sentence of said proposed finding upon the ground that it is misleading in that it does not tell the entire story. The three judge court stated in the *Healing v. Jones* case: "but the Navajos had less need than the Hopi for the use of the eagle feathers in their ceremonies." (pg. 113)

DEFENDANT'S FINDING 17

No objection.

DEFENDANT'S FINDING 18

Petitioner, Hopi, objects to the first sentence of said finding upon the ground that it is not supported by the evidence. The court in *Healing v. Jones* did not hold that the Hopi Villages as well as their agricultural and grazing lands used and occupied by them in 1848 were located within the boundaries of the newly created reservation. The court was dealing with a period of time much later than 1848. It did hold that a very few Hopi ever resided or grazed livestock in that part of the reservation lying outside of District 6, but then added, "during the years, however, they have continuously made some use of a large part of the area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines and hunting." (pg. 220)

DEFENDANT'S FINDING 19

No objection.

DEFENDANT'S FINDING 20

Petitioner, Hopi, objects to the implications of paragraph 2 of this finding upon the ground that it tells a half truth and does not cover the intensive use of the Hopi shrines within the disputed claims area. Further objections is made to the last paragraph of said finding upon the ground that it is contrary to fact. (See Hopi Proposed Finding 20 and the footnotes thereunder.) Particular objection is made to the statement "that the country so used was not the exclusive territory of either tribe in the sense that such tribe had 'Indian title' thereto." The statement may be true in later years but in 1848 it was exclusively Hopi.

DEFENDANT'S FINDING 21

Petitioner, Hopi, objects to this finding upon the ground that the alleged abandonment of the lands outside of the claims area by the Hopi is

irrelevant to the issues of this case. Further objection is made to this proposed finding upon the ground that essential facts pertinent to those purported to be covered are omitted in that a continued aboriginal use of the area now claimed by the Hopi, existed to and including the year 1848 and for some time thereafter. There is no substantial evidence of an abandonment within the claims area.

DEFENDANT'S FINDING 22

Petitioner, Hopi, objects to this proposed finding upon the ground that such finding is contrary to fact. (See Hopi Proposed Finding 20, and the materials cited thereunder.)

PETITIONER HOPI TRIBE'S OBJECTIONS TO DEFENDANT'S PROPOSED FINDINGS OF FACT RELATING TO THE NAVAJO CLAIM TO THE NAVAJO-HOPI OVERLAP

Making specific objections to defendant's proposed findings 23 through 46 can serve no useful purpose since these are the findings proposed with particular reference to the Navajo claim. To attempt such a reply would result in a duplication of the objections already made to those findings proposed by the defendant in connection with the Hopi claim, and to a certain extent would inject the Hopi Tribe into matters of controversy between the Navajo Tribe and the defendant, in which the Hopi Tribe has no real interest. Petitioner Hopi objects to all of said findings wherein they are inconsistent with the Hopi claim to the disputed area, particularly including claims of the defendant that said lands were held by many Indians and not held exclusively by the Hopi Tribe.

REPLY TO BRIEF OF DEFENDANT

I. WHAT THE EVIDENCE PROVES

Counsel for defendant cannot be expected to concede the Hopi claim but he must have certainly spoken with tongue in cheek when he suggested that the weight of the evidence limited exclusive Hopi occupancy to an area smaller than his own witness had conceded to the Hopi. The insignificant variation between the lines delimiting exclusive Hopi use and occupancy drawn by Petitioner Hopi witness Dr. Eggan and by witnesses for the defendant, Dr. Reeve, Dr. Ellis and Mr. Schroeder, was remarkable, but it is not astounding that competent witnesses using a fair and impartial approach and equipped with the same evidence should arrive at a remarkably close decision. The Petitioner, Hopi, submits that the preponderance of the evidence before the Commission establishes that the Hopi Indians exclusively occupied the entire claims area west of the Merriwether line in the year 1848, and for many years prior thereto.

It is further quite evident that the Navajo Tribe was driven into Hopi territory in 1846 by the United States Army, which was in pursuit of those they felt were offending the property rights of American citizens. After 1848, the defendant, United States, became the guardian of both the Navajo Tribe and the Hopi Tribe. Since that time the government has failed to protect the law abiding Hopi from the more aggressive ward, the Navajo. As a direct result of the defendant's neglect, the Navajo have overrun even the Hopi Reservation. It is further unfortunately true that even though the Hopi Tribe has sustained its claim to certain lands within the 1882 Executive Order Reservation by a court decree, subsequently affirmed by the Supreme Court of the United States, the defendant still refuses to take any action to deliver

that property to the Hopi Indians or prevent the Navajo from possessing the same. It is under these circumstances that the Hopi lands have been gradually taken over by the Navajo Tribe, but never abandoned by the Hopi.

II. "INDIAN TITLE" TO LANDS MAY BE LOST BUT CANNOT BE ACQUIRED AFTER UNITED STATES SOVEREIGNTY ATTACHES

We agree that the law is well settled that an Indian tribe cannot increase its claim to lands on the basis of Indian title after United States sovereignty attaches. The government does not, however, cite any authority to the effect that after sovereignty does attach and the United States becomes the guardian over the property of two tribes, it can allow one tribe to overrun the other and thus reduce the liability of the government to the tribe that has been imposed upon through the neglect of the government. Such conduct on the part of the government would be dealing unfairly and dishonorably. The Hopi Tribe was entitled to the protection of its property by the guardian.

III. EXCLUSIVE USE AND OCCUPANCY ESSENTIAL TO CLAIM OF "INDIAN TITLE"

We do not quarrel with the Supreme Court decision in the case of United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 345 (1941) defining Indian title. The Healing v. Jones decision, supra, decided only the question of ownership of the Executive Order Reservation of 1882, pursuant to a special act of congress (Act of July 22, 1958, 72 Stat. 402). Any findings prior to that time were relevant to the issues of that case only to the extent that they threw some light upon circumstances surrounding the creation of the reservation and the event occurring thereafter. At no place in the decision of the three judge court in Healing v. Jones can a fair implication be drawn that the Navajo Indians held any portion of the

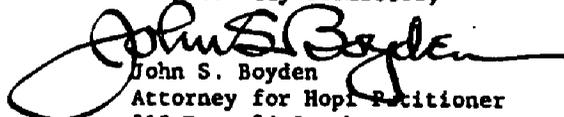
lands west of the Merriwether line in 1948 or prior thereto. Exclusive use by the Hopi Tribe of the area it now claims from time immemorial to the year 1848, establishes Indian title in conformity with the decisions of the Supreme Court of the United States.

IV. CONCLUSION

The original Hopi claim was conservative in many respects, as Dr. Eggan testified. Reduction of the claim at the time of trial was a realistic approach to fairly conform to the after-discovered evidence. Agreement of government expert witnesses with those of the petitioner can result only when both sides are voluntarily controlled by reason. Government counsel may abandon his witnesses and petitioner's counsel, being dissatisfied with the net result, may grasp for more, but the facts so developed remain firmly rooted.

It must be remembered that the Hopi Executive Order Reservation was established by the government to prevent further Navajo encroachment upon Hopi aboriginal territory after nearly forty years of Hopi suffering at the hands of the Navajo while both tribes were under the sovereign rule of the United States. To meet the growing needs of the Navajo population explosion the Navajo were later settled by the government upon the Hopi Reservation, confirming Navajo aggression. Abandonment must be a voluntary act. Justice will not allow governmental sanction of unlawful acts by one of its wards against another ward that patiently awaits the promised day of reckoning.

Respectfully submitted,


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