



BEFORE THE INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, an Indian Reorganization Act :  
Corporation, suing on its own behalf and as :  
a representative of the Hopi Indians and the :  
Villages of FIRST MESA (Consolidated Villages :  
of Walpi, Shitchumovi and Tewa), MISHONGNOVI, :  
SIPAULAVI, SHUNGOPAVI, ORAIBI, KYAKOTSMOVI, :  
BAKABI, HOTEVILLA and MOENKOPI, :  
Plaintiff, : Docket No. 196  
v. :  
THE NAVAJO TRIBE OF INDIANS, :  
Plaintiff, : Docket No. 229  
v. :  
THE UNITED STATES OF AMERICA, :  
Defendant. :

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BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR  
FURTHER HEARING ON THE MATTER OF DATES OF  
TAKING BY THE DEFENDANT, AND PURSUANT TO  
RULE 25 C.F.R. §503.33 FOR A REHEARING AND  
FOR AMENDMENT OF FINDINGS

I

MOTION FOR FURTHER HEARING ON THE MATTER  
OF DATES OF TAKING BY THE DEFENDANT

On the 13th day of October 1958 the Commission entered its Order fixing time for hearing, specifically stating therein that the "hearing shall be confined to the issue of title." While the Clerk's calendar under date of March 10, 1960 set September 12, 1960 for the hearing on Dockets 229-196 on all issues, it is clear from the subsequent declaration of the Commission that this setting was on all issues pertaining to aboriginal title

only. The Order of the Commission closing the record and fixing the dates for filing proposed Findings of Fact and briefs under date of May 22, 1963 stated:

IT IS HEREBY ORDERED that the record in Docket 196 be closed with respect to the issue of aboriginal title relative to the claims asserted therein, and the record in Docket 229 be closed with respect to the issue of aboriginal title to that portion of the claimed area in Docket 229 which overlaps the area claimed in petition by petitioner in Docket 196 herein. . . (Emphasis added)

The Hopi Tribe in its opening statement presenting the petitioner's requested Findings of Fact on issues of title and liability contains the following paragraph:

While these proposed findings are primarily on the issue of title in accordance with the Order of the Commission of October 13, 1958, some phases of liability are incidentally and necessarily included.

It is significant to note that the petitioner, the Hopi Tribe, made no request for a finding on the specific dates of taking. Under such state of the record it is clear that counsel acted in good faith in omitting specific matters as to dates of taking upon the assumption that the Commission would make findings and conclusions in conformity with its previous orders restricting the proof to aboriginal title. Past practice lends credence to the assumption since this is exactly what the Commission did in the Goshute Shoshone case in which attorney for petitioner was of counsel, wherein the Commission held:

The Commission, however, finds that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date.

Shoshone Nation, et al., v. United States, 11 Ind. Cl. Comm. 387, 416 (1962)

Under similar circumstances this Commission held that the Pueblo de Acoma Tribe:

lost the use of said lands because of the failure of defendant to protect petitioner's rights therein and, therefore, that defendant is liable to petitioner for the loss of said lands; and that under clause 4 of section 2 of the Indian Claims Commission Act petitioner is entitled to recover from defendant the fair market value of these lands, the date or dates of these losses and the value thereof to be determined at a future hearing before this Commission. (Emphasis added)

Pueblo de Acoma, et al. v. United States,  
18 Ind. Cl. Comm. 154, 240 (1967)

Notwithstanding its previous order, this Commission in the case now before it determined that on December 22, 1882 the United States extinguished the Hopi Indian title without payment of compensation to those lands described in Finding of Fact 20 lying outside the boundaries of the 1882 Executive Order Reservation; and on June 2, 1937 the United States extinguished the Hopi title to 1,868,364 acres of land in the 1882 Executive Order Reservation lying outside the boundaries of "land management district 6." Facts pertaining to dates of taking that were in the possession of petitioner but withheld by reason of the court's order do not properly fall under the category of newly discovered evidence, but they are nevertheless facts pertinent to further issues of this case beyond aboriginal title. While there is no specific rule of this Commission covering this unique situation, findings upon untried issues are so manifestly unfair as to require correction by this Commission.

II,

MOTION FOR REHEARING AND FOR  
AMENDMENT OF FINDINGS

In support of its motion for a rehearing and for amendment to findings

of fact pursuant to Rule 25 C.F.R. §503.33, petitioner, the Hopi Indian Tribe, assigned numerous errors of fact and errors of law, both in Docket No. 196 and Docket No. 229. Each assignment has a material and relevant bearing upon one of three fundamental determinations by the Commission. Those three determinations, which are hereinafter set out, constitute the basis for petitioner's motion for a rehearing. Each error of fact and law as set forth in petitioner's motion will be discussed with specificity under the erroneous determination to which it is applicable.

Determination I

The Commission erroneously held that the Executive Order of December 16, 1882 extinguished the Hopi Indian title to those lands described in Finding of Fact 20, which were outside the boundaries described in said executive order. (Error of Law 1, Error of Fact 6)

Petitioner cites as Error of Fact 4 the Commission's statement found in Finding 8 at page 295 as follows:

The Hopi villages that had been located along the Little Colorado near Winslow were moved on to the Hopi mesas and further north to Oraibi, and into the Jeddito Valley, these locations being well within the subject tract and the confines of the 1882 Hopi Executive Order Reservation. (Emphasis added) (Error of Fact 4)

Moencopi was established between 1400 and 1600 A.D. (Ex. 15 [Hopi]) and is not inside the Executive Order Reservation of 1882. There should be controversy regarding the location of Moencopi since that village still exists. Dr. Harold S. Colton, former Director of the Museum of Northern Arizona at Flagstaff, in his article "Report on Hopi Boundary" (Ex. 15 [Hopi]) stated:

Outside of the executive order Moqui Reservation of

*Moencopi*

1882, there has lived, for a long period, a group of Hopi at Moenkopi, forty miles northwest of Hotevilla. Archaeologists recognize that Hopi were living there in a permanent village between 1400 and 1600 A.D. the ruins of this pueblo lie on the mesa east of the present village. (Page 1)

1. Hopi have been living in the pueblo at Moencopi continuously since the 1870s; they use the springs for irrigation and have their fields below the pueblo and in Pasture Canyon. They graze their flocks on both sides of the Moenkopi Wash. (Page 3)

Superintendent George W. Leihy, in 1865, reported to the Commissioner of Indian Affairs that the Moencopi Indians living on a reservation still maintain their friendly relations with the whites and are even assisting the military in their operations against the Apache (Ex. 38 [Hopi] p. 2).

On October 21, 1872 the journal of Walter Clement Powell indicates that the party visited the buffalo land lying within the Moencopi Wash. A footnote to the journal indicates that the party visited Moencopi Village on its return (Ex. 41 [Hopi] p. 1).

A report of Gordon Mac Gregor, anthropologist, to the Commissioner of Indian Affairs, John Collier, on August 6, 1938 gave a complete account of the history of Moencopi and the Moencopi lands, describing the Moencopi claims outside of the Executive Order Reservation (Ex. 55 [Hopi]).

There is other evidence in the record as to the location of Moencopi and the fact that it is a permanent village of Hopi Indians, but since there is no evidence to the contrary, perhaps sufficient references have been cited to illustrate that when the Executive Order Reservation was established in 1882, there were Hopis living outside of that area. Yet the court in its opinion at page 284 stated:

As established the 1882 Reservation contains within its boundaries all of the Hopi permanent villages, the agency buildings at Keams Canyon, and what Agent Fleming considered to be sufficient land to meet the needs of the Hopi population which was then numbered about 1800.

The Commission is clearly mistaken in this regard since the Village of Moencopi was not only a permanent Hopi village, but had been in existence for as far back as possibly the year 1400 (Ex. 15 [Hopi] p. 1).

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.  
(Ex. 78, p. 212, Finding 16)

It was not a purpose in establishing the reservation to confine the Hopi Indians within that area and no steps were taken to move the Hopis or to request their settling within the 1882 reservation. The Hopi Indians neither relinquished their claim to lands outside the Executive Order Reservation nor voluntarily withdrew therefrom.

Hopi Indian title could only be terminated "by Congressional enactment, valid administrative action, or abandonment." Healing v. Jones, 210 F. Supp. 125, 175 (1962). Since this Commission has held that the Hopi title was extinguished outside of the Executive Order Reservation by Executive Order, we will proceed to consider whether in fact the Hopi interest outside the Executive Order Reservation was extinguished or terminated by valid administrative action.

Originally, reservations for Indians were created by treaties.

In 1871, however, Congress prohibited further use of the treaty power in Indian affairs, and the President, assuming the function formerly exercised by Congress, thereafter set aside twenty-three million acres of the public domain by the executive order for the use and occupancy of Indian tribes.

(Note: Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right: 69 Yale L.J. 627, 628 (1960))

Since there did not exist any specific, statutory authority for this presidential power, the practice of establishing Indian reservations by executive order has been said to rest on an "uncertain legislative foundation."

United States Department of Interior, Federal Indian Law 613 (1958).

In fact, so uncertain was the legislative foundation for the exercising of the power by the executive that the Attorney General in upholding its legality in an opinion rendered in 1882, did so chiefly on the basis that the practice had been followed for many years and Congress had never objected. Id. at 614.

Perhaps the questionable basis of the executive order reservation explains why the practice was eventually terminated by Congress. Act of June 30, 1919, §27, 41 Stat. 3, 34. As will be analyzed further, this historical background may well be the reason why the courts have consistently required something in addition to an executive order creating a reservation before finding a taking of aboriginal Indian title.

An important and significant rule of interpretation in all Indian cases is that ambiguous meanings must be construed in the Indians' best interests. This rule was first enunciated by the Supreme Court in Choate v. Trapp, 244 U.S. 665, 675 (1912), when it stated that the interpretations of vague writings ". . . are to be resolved in favor of a weak and defenseless

people, who are wards of the nation, and dependent wholly upon its protection and good faith." This policy has been repeatedly acknowledged by the federal courts. Squire v. Capoeman, 331 U.S. 1, 6-7 (1956). Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Assiniboine and Sioux Indians v. Nordwick, 378 F.2d 426, 430 (9th Cir. 1968). Maley v. Seaton, 281 F.2d 720, 623 (D.C. Cir. 1960). Undoubtedly, this rule has also contributed to courts requiring specific acts and authority to warrant extinguishment of Indian aboriginal title.

The decisions of the Indian Claims Commission offer the most lucid analysis of extinguishment of Indian aboriginal title to land by executive orders. The Commission has apparently felt that an executive order, per se, does not constitute a taking of Indian title. In Coeur d'Alene Indians v. United States, 6 Ind. Cl. Comm. 1, 42 (1957), the Commission rejected the executive order as the date of taking, remarking:

[T]he Indians continually sought a council with representatives of the United States to discuss their claim to compensation for their lands outside of the reservation and officials of the United States realized that the Indian title to said lands had never been extinguished.  
(Emphasis added) Id.

This conclusion is further supported in the decision of Spokane Indians v. United States, 9 Ind. Cl. Comm. 236 (1961). The Commission found that because the Indians had never moved onto the Colville Reservation, created by executive order, a taking of Indian title did not occur. There was no evidence that any Spokane Indians ever moved onto the reservation before 1887. Id. at 272. The Commission stated:

Both sites [of the reservation] were outside Spokane Territory and the Spokane Indians refused to leave their homes, fisheries and root grounds or sever tribal relations

to go upon it, or to become citizens and take out individual homesteads or land claims. . . . Many of the few individual Spokanes who did attempt to establish claims were ejected from their land by whites. Id. at 259.

A primary question, as the decisions below will indicate, is whether the particular Indian tribe has accepted the reservation by moving onto it, thereby extinguishing its aboriginal title to land outside of the reservation.

In Snake or Paiute Indians v. United States, 4 Ind. Cl. Comm. 571a (1956), the Commission found the Indians had never ceded or relinquished their aboriginal title even though a reservation had been created by an executive order. The Commission held that because the Indians had not moved onto the Malheur Reservation when it was established, no taking resulted until 1879 when the government forced their removal:

The petitioner bands or tribe of Snake or Piute Indians . . . were deprived of their original Indian use and occupancy title to [their lands] in January 1879 by action of the United States in forcibly removing them from said lands to the Yakima Reservation in Washington and restoring such lands to the public domain without their consent and without the payment of compensation therefor. (Emphasis added) Id. at 607.

The Commission also emphasized that the removal, whether intended to be permanent or not, was permanent in fact, since the Indians were never permitted to return to their aboriginal land. This forced removal of the Indians to the reservation was sufficient to extinguish the Indian title. Id. at 625. See Shoshone Indians v. United States, 299 U.S. 476, 495 (1936) ("Permanent in fact" occupancy of reservation held sufficient to extinguish aboriginal title.)

In Uintah Ute Indians v. United States, 5 Ind. Cl. Comm. 1 (1957),

the Commission, in rejecting the date of the executive order which created the Uintah Valley Reservation as the date of taking, referred to "concentration" of the Indians to affect extinguishment of title:

The reports of the Superintendent of Indian Affairs and agents for the next ten to fifteen years deal with the efforts to get the Indians throughout the Utah area concentrated on the reservation. It was very much of a seesaw affair. Indians came and went whenever they saw fit and at one period nearly all of them left the reservation and it took considerable effort to get them back without a fight. (Emphasis added) Id.

In addition, because the United States had failed to adequately provide for the Indians' needs once they had been placed on the reservation, many left to avoid starving. Id. at 30-1. Even though the Commission found that the reservation had been established by executive order in 1861, confirmed by Act of Congress in 1865, and reserved to the Indians by the Treaty of 1865, nevertheless, it also found that the Indians had not ceded their aboriginal title to their lands and the government had not taken their title, except as provided in the unratified Spanish Fork Treaty of 1865. Id. at 30, 40. Where the Indians in Snake or Paiute Indians v. United States, supra, were forcibly removed to the reservation, the Uintah Utes were not even encouraged to move. Id. at 10. The Indians continued hunting and gathering in their aboriginal land area after the 1861 executive order. Id.

The classic illustration of forced removal of Indians constituting extinguishment of Indian title stems from the military campaigns against the Indians in the early 1870. In Yavapai Indians v. United States, 15 Ind. Cl. Comm. 68 (1965), the Commission found the date of taking to be when the Yavapai Indians had been defeated and removed to the reservation, rather than the date of the executive order which created the reservation. The

military campaign against the Yavapai was the instrumentality by which extinguishment was accomplished:

[H]ostilities continued for a number of years until the Yavapai were completely defeated by General Crook in the fall and winter of 1872-73. The great bulk of all three groups of Yavapai were then placed on the Camp Verde Reservation which had been established by executive order dated November 9, 1871 where they remained until March 1875 when they were removed to the San Carlos Reservation in Eastern Arizona. Id. at 102-3.

The Commission found the date of taking to be May 1, 1873 when the Yavapai, numbering about 2,000, were forcibly removed to the Camp Verde Reservation. Id. at 80, 114. This particular date of extinguishment was also recognized and adopted in San Carlos Apache Indians v. United States, 21 Ind. Cl. Comm. 189 (1969), when General Crook's campaign against the Indians of Central Arizona concluded. Id. at 195. The date of the executive order which created the White Mountain Indian Reservation was rejected by the Commission as the date of taking. Id. The Commission also held the identical date of taking in Northern Tonto Apache Indians v. United States, 21 Ind. Cl. Comm. 223 (1960). The Commission stated:

Unlike some of the Western Apache, the Northern Tonto along with the Yavapai utterly refused to go on to the reservations provided for them. It was only after a vigorous military campaign by General Crook during the fall and winter of 1872-1873 that the Northern Tonto were finally forced to the Camp Verde Reservation. By May 1873 virtually all the Northern Tontos had been placed on the Camp Verde Reservation, and in this manner and at this time were deprived of their aboriginal lands outside the reservation. (Emphasis added) Id. at 228.

Two other cases present a similar situation with other military campaigns against the Indians. In Jicarilla Apache Indians v. United States, 17 Ind. Cl. Comm. 338 (1966), the Commission found that the executive orders of 1873, 1876 and 1880 were merely "abortive attempts" to provide the Jicarilla

with a permanent reservation. Id. at 415. The date of taking was found to be the date the United States began the removal of the Jicarilla to Fort Stanton. Id. at 420-21.

The move carried out by the military . . . resulted in a sufficient disruption of their way of life and interference with their overall use and occupancy of their lands to constitute an extinguishment of their title thereto. Id. at 421.

The Commission cited Snake or Paiute Indians v. United States, supra, as controlling precedent. Id. at 418. This "forced removal" aspect of extinguishment of title was further adopted in Fort Sill Apache Indians v. United States, 19 Ind. Cl. Comm. 212 (1968), where the court stated:

The Apaches, though forcibly and temporarily ejected by actions of the United States from portions of their residence from time to time . . . never ceased to proclaim their right of ownership. Furthermore, they employed every means available to regain possession and to oust the trespasser. They engaged in no act of relinquishment or abandonment. They were temporarily repulsed, defeated, deprived and ousted, but the fight continued with ferocity and perseverance until further effort became impossible - with the final conquest and complete surrender under Geronimo on September 4, 1886. Until that event the United States was not completely or permanently in continuous, open, notorious possession of these lands. From that date further resistance by the Apaches ended. (Emphasis added) Id. at 263-64.

The date of taking was confirmed in Fort Sill Apache Indians v. United States, 22 Ind. Cl. Comm. 527, 528-29 (1970).

In the case at bar it should be noted that the Hopi Indians have never been contained within the 1882 Reservation - even to this day, and the United States has never attempted to move the Hopi Indians onto that reservation.

In at least three cases, the date of the executive order corresponded with the date of forced removal. In Quechan Indians v. United States, 8 Ind.

Cl. Comm. 111 (1959), the Commission held that the creation of a reservation for the Yuma Indians, coupled with the removal of the tribe onto the reservation, was a relinquishment as of that date of tribal rights in the lands outside the reserve. Id. at 136-37, 148. The removal coincided with the creation of the reservation by the executive order. Likewise, in Confederated Tribes of the Colville Reservation v. United States, 4 Ind. Cl. Comm. 151, 186 (1956), the Commission found that the locating of various tribes on the reservation, even though it required many years, was sufficient to constitute extinguishment of aboriginal title. The date of the executive order which created the Colville Reservation was held to be the date of taking, but the acceptance by the Indians of the reservation was the primary factor. Id. In Mescalero Apache Indians v. United States, 17 Ind. Cl. Comm. 100 (1966), the Commission found that the date of the executive order which created the Fort Stanton Indian Reservation was the date of taking because the Indians were on the reservation when it was established and were kept there after the signing of the executive order. The Commission's record indicated that following the 1873 executive order the Mescalero Apaches continuously attempted to leave the reservation, but were eventually returned either by persuasion or force. Id. at 118-19.

The Court of Claims has decided only two cases which deal with executive order reservations. However, both are cases involving a treaty approved by Congress, coupled with the executive order "administering" the intent of the treaty in terms of reservation establishment. The Department of the Interior publication states such a "coupling" to be of "unquestioned validity." Federal Indian Law, supra at 622. In any case, since both cases involve treaties, they are easily distinguished from the present situation.

In Quinaielt Indians v. United States, 102 Ct. Cl. 822 (1943), the Court of Claims found that the executive order formally designated the Quinaielt Reservation, which was provided for by the Treaty of 1859 between the United States and the Quinaielt Tribe. However, the court did not examine the question of date of taking.

Similarly, in Mole Lake Band of Chippewa Indians v. United States, 134 Ct. Cl. 478 (1956), certain large land areas had been ceded to the United States by the Chippewa Indians. In an effort to speed up the Chippewa movement to their lands west of the Mississippi, the following occurred:

On February 6, 1850, President Zachary Taylor issued an executive order revoking the privilege of the Indians to occupy and hunt and fish and gather wild rice on, the lands ceded by the Chippewas to the United States by the treaties of 1837 and 1842. Id. at 481.

However, the court did not discuss the issue of whether and when a taking of Indian aboriginal title to land occurred. There are other distinguishable cases indicating either that removal is unnecessary or that partial removal may be sufficient to extinguish Indian title. Shoshone v. United States, 11 Ind. Cl. Comm. 387 (1962); Havasupai Tribe and Navajo Tribe v. United States, 20 Ind. Cl. Comm. 210 (1968); Papago Indians v. United States, 21 Ind. Cl. Comm. 403 (1969). It is interesting to note, however, that the executive order which created the San Xavier del Bac Reservation and the Gila Bend Reservation for the Papagos did not constitute a taking. Papago Indians v. United States, 19 Ind. Cl. Comm. 394, 433 (1968). In Mohave Indians v. United States, 7 Ind. Cl. Comm. 219 (1959), a reservation was created by an act of Congress, rather than by an executive order. In that

case it was held that the setting aside of the reservation and the acceptance thereof by removal thereto of many of the Mohave Indians amounted to a relinquishment of the land held by Indian title.

The subject of extinguishment of aboriginal land title has been before the Supreme Court in the landmark case of United States v. Santa Fe Pacific Railroad, supra, which involved a suit by the government to enjoin the railroad from interfering with the possession and occupancy by the Indians of certain land in Northwestern Arizona. Even though the Colorado River Reservation was created by an act of Congress, the Supreme Court refused to find an extinguishment of Indian aboriginal title. Id. at 361, 353-54.

The court stated that it could not find any indication that Congress intended to extinguish the Indians' claims, nor did it conclude either that the Walapais intended to abandon its aboriginal lands if Congress would create a reservation, or that the Indians had accepted Congress' offer for a reservation. Id. The court concluded that the forcible removal to the reservation of the Walapais, in light of the fact that they left it in a body the following year was ". . . nothing more than an abortive attempt to solve a perplexing problem." Id. at 355. This analysis would seem to follow the many decisions of the Indian Claims Commission. However, the court was construing the parties' claims in light of the act under which the railroad's claimed rights derived, Section 2 of the Act of July 27, 1866, which provided:

The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the Act.  
(Emphasis added)

It becomes obvious the court was examining the record for indication of the Indians' desire to voluntarily cede their lands to the railroad. The court recited: "Certainly a forced abandonment of their ancestral home was not a 'voluntary cession.'" Id. at 356.

The situation, however, changed in 1881. Following a Walapai proposal made by a majority of the tribe asking that a reservation be set aside for them because of the encroaching white man, President Arthur signed an executive order creating the Walapai Indian Reservation. Id. at 357.

The court discussed the situation as it developed:

There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattlemen used it for grazing and for some years the Walapais received little benefit from it. But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claim to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of §2 of the Act of July 27, 1866. Id. at 357-58.

Therefore, the 1883 executive order establishing the Walapai Reservation must be read in light of the 1866 Congressional act which specifically required that the title to Indian aboriginal land be extinguished " . . . only by [the Indians'] voluntary cession." The court's analysis was directed to this requirement in the 1866 act. Consequently this case is distinguishable from the present situation because it involves extinguishment of aboriginal title by executive order according to special statutory authority.

However, an examination of the case leads one to conclude that the creation of the executive order reservation did not constitute extinguishment

by itself. Rather, the creation of the reservation at the Indians' request and the existence of the 1866 act which required their consent to extinguishment, coupled with the executive order, extinguished the Indians' aboriginal title. It is reasonable to conclude that there is no per se taking by executive order.

The primary factor evidenced in the decisions of the Indian Claims Commission is whether or not the Indians have accepted the reservation by moving onto it, either voluntarily or by force, and thereby extinguishing their aboriginal title to the lands outside of the reservation. If the Indians move onto the reservation, a taking of the aboriginal title results; if they do not move onto the reservation, the aboriginal title remains in the Indians.

In Dr. Colton's treatise (Ex. 15 [Hopi] p. 3) illustrations of Hopi use since 1882 outside the Executive Order Reservation can be found in the following:

2. After the abandonment of Moenave by the Mormons, Frank Tewanentewa and Numkina Bros. made abortive efforts to plant fields, using the old irrigation works. They were run out by the Navajos.
3. Below Red Lake (Tonalea), 1/4 mile south of Trading Post, Numkina Brothers, Poli, Joseph Talas, and George Neveistewa have farms (Honani). Moenkopi procures its wood from the hills east of Red Lake and north of the Dinnebito, and north of Tuba City (J.S).
4. On and about the mesas between Moenkopi and the Dinnebito, Numkina reports twenty people now having fields. (Honani).
5. In the Little Colorado, Hopi run their cattle with some Navajo cattle between Cameron and Howell Mesa. They water at the Little Colorado. (Numkina and Honani).

6. 14 miles north of Tuba, west of White Mesa, since 1914, two bands of Hopi sheep have been run. (Numkina and Honani).

7. In 1908 or 1909, Big Phillip ran sheep in the region of Lower Moenkopi Dam. (Honani).

The record will not justify the assumption that Hopi Indians either relinquished their claims to land outside the Executive Order Reservation or voluntarily withdrew therefrom. If petitioner is not denied the right to introduce its proof on dates of taking, the Hopi claims to the area outside the Executive Order Reservation of 1882, and the defendant's acknowledgment of continued Hopi rights can be adequately established.

The Congress of the United States, by the Act of June 14, 1934, 48 Stat. 960, acknowledged the Hopi interest in the lands described in the act when it permanently withdrew "from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon." Nearly all of the lands to which the Hopi Tribe has consistently asserted its aboriginal claim as of 1848, are within the area described in that Congressional act. All of the Hopi Indians, including those at Moenkopi, were, at the time of its passage, living on the lands described in the 1934 act. Of particular significance is an additional provision in the act protecting other Hopi interests:

However, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882.  
48 Stat. 960, 961.

It is not easily conceived that the Commission would hold it to be "fair and honorable dealings" to take the Hopi title at the values of 1882 and then return only an interest with the Navajos at 1934 values, thus probably preventing any money judgment for the Hopi Tribe.

Determination II

The Commission erroneously held that on June 2, 1937, when the grazing regulations were approved, being the beginning of the implied settlement of the Navajo Tribe on the Executive Order Reservation of December 16, 1882 as determined in the case of Healing v. Jones, 210 F. Supp. 125 (1962), aff'd 373 U.S. 758 (1963), Hopi Indian title to all land in said Executive Order Reservation lying outside of "land management district 6" was extinguished. (Error of Law 2, Error of Fact 10.)

Healing v. Jones, supra, dealt exclusively with the land described in the Executive Order of December 16, 1882. The court in that case made many determinations of fact that have an important bearing upon the question we now consider.

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 assurance 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. Healing v. Jones, Ex. 78 (Hopi) p. 98.

The Hopi claim, so expressed in 1945, and the government's constant assurances that its administrative action after settlement of the Navajos did not prejudice the merits of the Hopi claims, negate the assumption of a taking as found by the Commission.

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 (Fort Berthold Indians v. United States, 71 C. Cls. 308, 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. Healing v. Jones, Ex. 78 (Hopi) p. 92.

The court's holding that there was no abandonment is specific.

Beginning with the approval, on June 2, 1937, of grazing regulations the authority for which rests 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. (Emphasis added) Healing v. Jones, Finding of Fact 38, Ex. 78 (Hopi) p. 217.

Beginning with the approval on June 2, 1937 the Navajo Tribe was settled upon the reservation, but the nature and extent of the interest of the tribe was not determined on that date. As a matter of fact, the final boundary line of district 6 was not determined until April 24, 1943 (Ex. 78 [Hopi] p. 217, Finding of Facts 40 & 41). What interest the Hopi Indians had in the area outside of district 6 was not determined until the court's decision of September 28, 1962. At the time the law suit was filed, the Hopi Indian Tribe had long contended that it had the exclusive interest in all the 1882 Reservation for the common use and benefit of the Hopi Indians, trust title being conceded to be in the United States (Ex. 78 [Hopi] p. 2).

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. 403.

Healing v. Jones, Ex. 78 (Hopi) p. 2.

In the Act of July 22, 1958 Congress declared:

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.

72 Stat. 402 (1958).

The United States, the defendant in this action and a defendant in Healing v.

Jones, did not contend that Navajos had been settled upon the reservation, but acting through the Attorney General, interposed the defense,

. . . 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 procedures, 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.

Healing v. Jones, Ex. 78 (Hopi) p. 7.

Thus, it will be seen that the court has held that the United States did not claim that it had taken the Hopi title and the Hopis were still contending that they owned the full title to the land outside of district 6 at the time Healing v. Jones was tried. When the decision in Healing v. Jones was rendered on September 28, 1962 the court declared that the Hopi Tribe still had an undivided one-half interest in all lands outside of district 6. Under these circumstances, it is evident that the Hopi Indian Tribe has not been deprived of a one-half interest in all of the lands outside of district 6 and that it was not determined that it had lost a one-half interest until September 28, 1962. At that time the court held:

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.

Healing v. Jones, Ex. 78 (Hopi) p. 224,  
Conclusions of Law 12.

It could certainly not serve the ends of justice within the spirit of the Indian Claims Commission Act to hold that the territory in the Executive Order Reservation outside of district 6 was taken from the Hopis in 1937 and

then a one-half interest as an offset returned to them in 1962.

The Hopi Tribe has other claims yet to be tried in Docket 196. Counts 5 through 8 are based upon the fact that the petitioner, the Hopi Tribe, retained the Indian title to the lands and that the United States deprived the Hopi Tribe of the use of those lands. The United States, while assuring the Hopi Tribe that the establishment of grazing districts would have no bearing upon their claim, allowed the Navajos to use that land and deprived the Hopis of such use. The matter yet to be tried is whether the United States must pay the reasonable rental value of the land it allowed the Navajos to use during the period prior to the actual taking.

Error of Fact 9 contests Finding of Fact 24 at page 309 wherein it was stated:

Early in 1936 the boundaries of these land management districts were defined, the result being that the boundaries of "land management district 6" lay entirely within the 1882 Reservation so as to encompass the Hopi Villages and all lands used by the Hopi Indians.

(Emphasis added)

This finding by the Commission is erroneous with respect to the Village of Moencopi, which was, during all periods involved, being used by the Hopi Indians and still continues to be used by the Hopi Indians. Petitioner is in a position to prove, if it is not deprived of that opportunity with reference to dates of taking, that the lands outside of district 6 and within the Executive Order Reservation were used for grazing livestock, cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines and hunting. And further, the petitioner can show that Hopi Indians were granted permits to graze in land management district 3,

both within and without the Executive Order Reservation of December 16, 1882, and that those permits are still in existence and that the Hopis are still using the grazing privileges thus accorded to them. The evidence relied upon to support the position of petitioner is fully set out in the Motion at page 15. Actual areas for the gathering of wood were set up outside of district 6 where the Hopis were to obtain their fuel. Farms were tilled by the Hopi Indians outside of district 6 and within the Executive Order Reservation after 1937 and until the present time.

In summary Healing v. Jones, supra, determined that there was no abandonment by the Hopi Tribe in the area beyond district 6 and within the Executive Order Reservation. It is not claimed that Indian title was terminated by any Congressional enactment. Under the circumstances reiterated above, particularly including the finding of the court that the excluding of any Hopis upon any of the land within the Executive Order Reservation was at all times illegal, how can it be held that any valid administrative action had terminated the Hopi title prior to the time the court determined the Hopis had lost a one-half interest?

#### Determination III

The Commission erroneously held that the Hopi Tribe did not have Indian title to its claimed lands lying outside the area described in Finding of Fact 20.  
(Error of Law 3)

Errors of Law 4 and 5 are subsidiary to the position of the Hopi Tribe that it had Indian title to lands beyond those described in Finding of Fact 20. Those errors will, therefore, be discussed under this heading.

A. The Commission erroneously failed to determine the Hopi aboriginal title as of July 4, 1848, the day the United States acquired jurisdiction and sovereignty over the lands involved in this action, notwithstanding the fact that the defendant during the same period of time exerted military pressure upon the Navajo Indians, driving them into Hopi aboriginal lands, and at the same time failing and neglecting to protect the interests of the Hopi Indians in their said aboriginal lands. (Error of Law 4, Error of Fact 8).

It is the contention of petitioner that when the United States drove Navajo Indians into Hopi territory it had an obligation to protect the weaker and outnumbered Hopi Indians from their natural enemy. The Court of Claims has held that if an Indian claimant can show that the United States forces or its officials drove the claimant tribe from its lands to which it held Indian title, the tribe has established a claim against the United States under the "fair and honorable dealing" clause 5 of 25 U.S.C.A. §70a. Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967). The Court of Claims has further held that whether or not in a particular case the United States has the technical status of a guardian or a fiduciary toward an Indian tribe, it does have an obligation greater than that of a non-participating bystander, and the relationship is a special one and from it stems a special responsibility. The measure of accountability depending, however, upon the whole complex of factors and elements which must be taken into consideration. Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487, Cert. Denied 379 U.S. 946, (1964). There is very little difference between driving the Hopi Indians from their lands and driving Navajo Indians into their lands to raid, loot, overrun the springs and take possession of the soil. The relief brought to the citizens of New Mexico by United States

military forces did not abate the Navajo problem, it simply transferred the problem from New Mexico to the Hopi country.

The facts upon which petitioner relies are not disputed by the government. Their own exhibit G-205, p. 10, states that the United States Government commenced exerting military pressure against the Navajo in the winter of 1846 under Col. Alexander Doniphan. Between then and the summer of 1849, no less than five expeditions of American troops took the field against the Navajo. This is also shown by government exhibits G-22, G-23 and G-24. Between 1850 and 1860 large numbers of the Navajos pursued by the United States military forces entered what was then Hopi territory, being forced into areas they had not previously occupied. These facts are also established by government exhibits which are listed under Error of Fact 1 in petitioner's Motion. Government exhibit E-51b in support of government witness Dr. Ellis stated that some of the Navajos took heed from the repeated warnings of reprisals from United States Government and in about 1860 began a push westward into the peripheral areas never before occupied. Government exhibit R-150, p. 3, supporting the testimony of government witness Dr. Reeve stated that the Navajo under military pressure from the American Army in the 1860's fled far to the west of the Hopi Villages; but that region was not their customary homesite nor was it needed by them. Many other exhibits and the testimony of witnesses substantiating these the facts upon which we rely are set out under Error of Fact 1, p. 3, of petitioner's Motion. The Hopi Indians sensed the responsibility of the United States Government to whom they had become subject just two years

before when in October 1850 and August of 1951 Hopi deputations visited Agent Calhoun at Santa Fe to seek aid against the Navajos whose depredations had reduced them to great poverty. (See authorities cited under Error of Fact 2 of petitioner's Motion.)

When the Commission determined aboriginal possession of the Hopi people as of 1882, it ignored the series of events to which we have made reference and the responsibility of the United States for the shrinking of Hopi country.

B. Natural boundaries should be accepted as aboriginal boundaries.

The Puyallup Tribe of Indians v. United States, 17 Ind. C. Comm. 1, 17-20 (1966), employed the reasonable hypothesis that natural boundaries establish aboriginal boundaries because evidence indicates the Indians do not go beyond, but merely go to the edge of rugged country. The Nez Perce Tribe of Indians v. United States, 18 Ind. Cl. Comm. 1, 130 (1967), followed this same theory, accepting a natural boundary as the aboriginal boundary. The Hopis were using as their country as of 1848 land south of the San Juan River from the east where their contact was with the Navajo Tribe to the west where the San Juan River joins the Colorado River. At the western boundary, they used up to the edge of the Colorado River from the San Juan to the Little Colorado. On the south, the Little Colorado and the Zuni River form the boundary. The western boundary of the Hopi aboriginal land as found by the Commission is neither a natural boundary nor is it supported by the evidence in the case. The land outside of the area described in Finding 20 was not solely based upon sustained "spiritual attachment or repose" as inferred in the

opinion of the Commission at p. 286, but was based upon exclusive typical Indian use, including shrines, grazing, agriculture, use of timber and plants, hunting, trading and trails, and the collection of salt, materials and miscellaneous items to the natural boundaries on the west. The same may be said of the territory lying north of aboriginal lands as found by the Commission to the San Juan River and, on the south, to the Little Colorado's junction with the Zuni River. Dr. Ellis, a government witness, testified at page 7567 of the transcript:

Hunting as I said took place all through the area.  
. . . the area enclosed by the Colorado and the Little Colorado and over to the New Mexico line, but I think that a majority of it for the period with which we are concerned would definitely have been carried on west of Steamboat, if that was considered to be the outline of where the Navajos came to.

Dr. Egan, witness for the petitioner, testified at page 7407 of the Transcript:

They didn'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 where the Navajos do. They may hunt over that territory . . . They may bring back wood or they may bring back ceremonial objects. . .

The evidence upon which petitioner relies on this matter is given in considerable detail under Error of Fact 7 in petitioner's Motion pages 8 to 14.

In 1958 this Commission held in the Quinaielt v. United States cases 7 Ind. Cl. Comm. 1, 29 and 7 Ind. Cl. Comm. 31, 60:

[Use of land for fishing, going after roots and berries and traveling the area for the purpose of hunting] constitutes use and occupancy in the sense of "Indian title."

The Commission further held in Samish v. United States, 6 Ind. Cl. Comm. 159, 173 (1958),

Culture and economic life of the tribe must be considered  
[in determining aboriginal title.]

The Commission in California v. United States, 8 Ind. Cl. Comm. 1, 36 (1958), held that Indian land claims cannot be limited to only such lands which provided the common necessities of life, since the requirements of the Indians were so varied they could only be obtained from a much larger area. The Supreme Court of the United States in Mitchell v. United States, 34 U.S. (9 Pet.) 711, 745 (1835), held possession or occupancy was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites.

On the east side of the Hopi claim, the boundary was formed by the West boundary of the Navajo country in 1848. Pawnee Tribe v. United States, 5 Ind. Cl. Comm. 224, 279-80 (1957) stated that prior decisions of the Commission in setting boundaries for abutting tribes were considered in establishing boundary of neighboring tribe. In the Uintah Ute Indians of Utah v. United States, 5 Ind. Cl. Comm. 1, 44 (1957), it was held that reports of early travelers, after passing a certain point on the edge of petitioner's land, that they met another tribe establishes boundary between the tribes at that point. Other cases upon which petitioner relies are cited under Error of Law 3, petitioner's Motion, p. 19-21. We urge that consideration of all the evidence accepted in the cases very firmly establishes that the boundary line between the Navajo and the Hopi Tribes in 1848 was at the Merriwether Line or thereabouts.

There wasn't a no man's land between the two tribes as indicated by the Commission in its finding. West of the Navajo was the Hopi. East of the Hopi was the Navajo.

The agreed traditional boundary was solemnized by the delivery of an Indian "Tiponi" by the Navajo to the Hopi as a reminder of the promise. The agreement was at the Merriwether Line and the witness produced the "Tiponi" at the hearing. It was related how the ancient "Tiponi" had been kept in the possession of the clan. (Tr Pahona 7476-77, 7482). The anthropologist, Gordon MacGregor, in his report to Commissioner of Indian Affairs John Collier in 1938 reported the incident as follows:

The First Mesa or Walpi people made an agreement with the Navajo some time about 1850 establishing a boundary line. The Navajo were to cross it only on condition of good behavior. As a sign of good faith the Navajo are said to have presented a feather shrine or symbol, which First Mesa still preserves. A pile of rock some distance west of Ganado and on the old road once marked this line. First Mesa, of course, would like to see this line form the eastern limit of the reservation. (emphasis added) (Ex. 55 (Hopi) p. 2)

We call particular attention to Errors of the Commission bearing upon the general subject of the boundaries of Hopi use. Error of Fact 2 cites the omission of the Commission to determine that in 1848 to 1851 only a few scattered Navajo bands visited the Hopi to visit or to raid. There were no Navajo settlements in the Hopi territory during that time. As cited in Error of Fact 3, the Commission failed to find that in the travels of both priests, Escalante and Garces, Hopi cattle were found to graze over an extensive area to the west of the Hopi villages.

Escalante found an abundance of black cattle and mustangs. Garces noted extensive trade to the west, especially with the Havasupai. As cited in Error of Fact 4, the Commission erroneously found that all Hopi villages were located well within the 1882 Hopi Executive Order Reservation. As cited in Error of Fact 7, the record does substantiate Hopi aboriginal title to the area claimed by the Hopi. In Error of Fact 5, it is noted that the Commission found the Hopi Indian population figure of 1882 showed a mark decline from figures available for prior years. It also showed that the number of Hopi Indians amounted to 1800. We feel a careful reading of the authorities cited will establish that the 1800 did not include the Moencopi Hopi Indians who were located outside of the Executive Order Reservation. It is obvious from a study of all the exhibits that the population figures before the census taken by Donaldson in 1893 were very unreliable. In requested Finding 33 of petitioner, the Hopi Tribe, we have prepared a table as to the sources of the population figures. Great variances will be noted. We assume the matter of population had a bearing upon the Commission's limitation of the amount of territory granted to the Hopi Tribe as aboriginal holding. We call to the attention of the Commission Pawnee Tribe v. United States, 5 Ind. Cl. Comm. 279, 286, 292 (1957), where it was held that there was no abandonment although the tribe was materially reduced in numbers by disease and area was raided by Indian war parties where no record that any other tribe ever attempted to establish villages in the area claimed and records indicate continued use and occupancy of substantially all territory claimed. It will be noted from petitioner's population table

that Ex. 25a, (Hopi) p. 3, shows a drop from 7500 to less than 1000 Hopi Indians from 1777 to 1780. Ex. E-50, p. 38, introduced by the government, shows that between 1780 and 1781 there were 6698 deaths from small pox reported while Ex. 21 (Hopi) p. 17, shows 5000 deaths from small pox reported. Ex. 25c (Hopi) p. 11, shows that in 1782 there were 6698 deaths from small pox reported. Ex. G-9, p. 23, and Ex. G-10, p. 75, show a decrease in population due to small pox in the year 1853 to 1854. Ex. G-38, p. 145, reports small pox had almost totally destroyed the Moqui, 1855 to 1856. Equity and justice cannot allow this population decrease caused by disease to automatically reduce the territory which this tribe had been accustomed to using for centuries and continued to use subsequent to such population decrease.

C. The Commission erroneously based its decision concerning Navajo aboriginal title in Docket No. 229 (Navajo) upon purported Navajo occupancy as of 1868, without meeting the standards of aboriginal title requiring "actual, exclusive, and continuous use and occupancy for a long time" (time immemorial). (Error of Law 5)

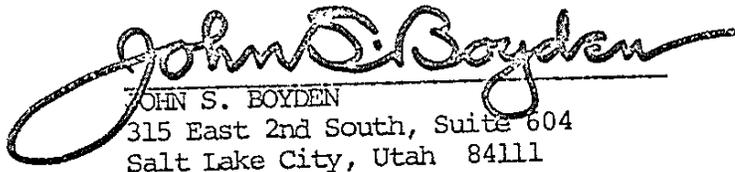
It cannot be denied that from 1848 to 1868 the Navajos had taken over a considerable portion of the Hopi territory, but under circumstances leaving a monumental blemish upon the good faith record of the United States. Errors of Fact A and B are directed particularly to Docket 229 for it is in this territory, granted to the Navajos on its overlap of claims with the Hopi, that the Navajos moved in after 1848. The short occupancy of the Navajo of the territory west of the Merriwether Line cannot justify a finding of aboriginal possession in favor of that tribe, if any of the standards that have been laid down by the Commission are to be given credence in the decision. Sac and Fox Tribe of Indians

of Oklahoma v. United States, 315 F. 2d 896 (1963), held that in order to be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive and continuous use and occupancy for a long time prior to the loss of property. (Emphasis added). The Confederated Tribe of the Umatilla Indian Reservation v. United States, 14 Ind. Cl. Comm. 14, 116-120 (1964), held that "for a long time, encompassed at least several generations." The Commission held in Flat Head v. United States, 8 Ind. Cl. Comm. 40, 74 (1959) that frequent attacks by outside tribes hindering petitioner's activities had no effect on Indian title to the area raided where raiders made no attempt to occupy or make permanent use of the land. Even if it were held that there is no obligation on the part of the United States to protect the Hopi Indians from the Navajos who were driven into their territory, still, the Navajos were not in the overlap territory awarded to them a sufficient length of time to constitute aboriginal possession.

#### CONCLUSION

We were convinced that it was apparent to the Commissioners who heard the case, not one of whom participated in the judgment, that the Hopi claim, as reduced to the Merriwether Line, was fully supported by the evidence. The expert witnesses for the petitioner and the government were in substantial agreement. We respectfully submit that the petitioner should be granted a further hearing on the matter of dates of taking by the defendant and pursuant to Rule 25 C.F.R. §503.33, be granted a rehearing on the matters covered in its Motion.

Dated this 4th day of September, 1970.

  
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 1970 copies of petitioner's, the Hopi Tribe, Motion for Further Hearing on Dates of Taking, for Rehearing and for Amendment of Findings, were mailed to the respective attorneys indicated below.

I further certify that on the 5th day of September, 1970 copies of the foregoing brief in support of said motion were mailed to the respective attorneys indicated below.

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