

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,)

Docket No. 196

Plaintiff,)

vs.)

THE NAVAJO TRIBE OF INDIANS,)

Plaintiff,)

Docket No. 229

vs.)

THE UNITED STATES OF AMERICA,)

Defendant.)

MOTION FOR FURTHER HEARING ON DATES OF TAKING,
FOR REHEARING AND FOR AMENDMENT OF FINDINGS

JOHN S. BOYDEN,
315 E. Second South Street,
Salt Lake City, Utah. 84111

Attorney of Record

WILKINSON, CRAGUN & BARKER,
1616 H Street N.W.,
Washington, D.C. 20006

STEPHEN G. BOYDEN,
315 E. Second South Street,
Salt Lake City, Utah. 84111

Attorneys of Counsel.

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Petitioner, The Hopi Indian Tribe, et al., moves the Commission for a further hearing on the matter of dates of taking by the defendant, and pursuant to 25 C.F.R., § 503.33 for a rehearing and for amendment of findings upon the grounds and for the reasons as hereinafter stated. Note: Unless otherwise specifically indicated all references to petitioner refer to the Hopi Tribe and all references to findings of the Commission refer to the Commission's findings in Docket No. 196 dated the 29th day of June, 1970.

I

Petitioner's motion for a further hearing on the matter of dates of

taking by the defendant is based upon the following:

A. By direction of the Commission, the hearing on the conflict of claims in Docket No. 229 and No. 196 was confined to the issue of title.

B. Petitioner, The Hopi Tribe, has had no opportunity to present its complete evidence on the dates of taking, it being the express intention of the parties to present evidence concerning dates of taking at a later time.

C. Premature decision by the Commission, based upon incomplete evidence as to the dates of taking, have resulted in erroneous findings of fact and conclusions of law as more particularly set out in petitioner's motion for rehearing in Part II hereof.

II

Petitioner's motion for a rehearing and for amendment of findings of fact is based upon the following:

A. ERRORS OF FACT

1. The Commission erroneously omitted petitioner's requested Finding of Fact No. 21, as follows:

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. Between 1850 and 1860 large numbers of the Navajo pursued by the United States military forces entered what was then Hopi territory, being forced into areas they had not previously occupied.

After 1848 the Navajo commenced to settle upon land previously used by the Hopi. Military correspondence of the period clearly indicates the scattering of the Navajo to the west.

The evidence relied upon to support the position of petitioner is:

Ex. G 57; Ex. G 56; Ex. G 59; Ex 55 (Hopi),
pg. 4; Ex. G 205, pgs. 10, 15; Ex. G 22;
Ex. G 23; Ex. G 24; Ex. G 31, pgs. 540-43;
Ex. G 137, pgs. 31-32; Ex. G 95; Ex. G 126,
pg. 107; Ex. E 82, pg. 69; Ex. 656 (Navajo),
pg. 14; Ex. E 568, pg. 17; Ex. E 51b, pgs.
269, 397, 408-474; Ex. G 105; Ex. 15A (Navajo),
pg. 4; Ex. E 51a, pgs. 57, 102, 253; Tr. Ellis
7637, 7639, 7641, 7587; Tr. Schroeder 8152-53,
et. seq., 8625, et seq.; Tr. Correll 5617, et
seq., 5701, et seq., 5886, et seq., 5899, et seq.,
5960, 6221, et seq., Ex. G 18, pgs. 95, 362-368;
Ex. 56 (Hopi); Ex. 28 (Hopi); Ex. 19 (Hopi),
pgs. 1, 2, 3; Ex. 15 (Hopi), pg. 2; Ex. E 550,
pg. 34; Ex. E 8, pg. 390; Ex. E 10, pgs. 2, 3;
Ex. G 135, pg. 156; Ex. E 51c, pgs. 491-494;
Ex. G 32, pg. 718. The Navajo entered what is
now the Hopi claim area under military pressure
during the 1850's and 1860's. Ex. E 51a, pg.
102; Ex. E 51a, pgs. 253, 269; Tr. Ellis 9065,
9069; Tr. Ellis 7641, et seq.; Ex. G 93; Ex. G
11; Ex. G 32, pgs. 706-7; Ex. G 36, pg. 230;
Ex. G 39; Ex. G 55, pgs. 297, 303, 305, 307-39;
Ex. G 56; Ex. G 57; Ex. G 59; Ex. G 93; Ex. G
98; Ex. 35 (Hopi); Ex. S 616, pgs. 225, 230;
Ex. S 690; Tr. Eggan 7381; Tr. Reeve 7859, et
seq.; Ex. 64 (Navajo).

2. The Commission erroneously omitted petitioner's requested
Finding of Fact No. 22, as follows:

A few scattered Navajo bands visited the Hopis
to trade or raid during the period from 1848
to 1851, but they did not remain permanently,
and there were no Navajo settlements in the
Hopi territory during this time.

In October, 1850, and August, 1851, Moqui
deputations visited Agent Calhoun at Santa Fe
to seek aid against the Navajo whose depredations
had reduced them to great poverty. Calhoun re-
ported that a trip from Zuni to the Moqui would
be dangerous since the Apache were upon the left
of the route and the Navajo on the right. He
further observed that the Moqui were 'beyond the
Navajo country.'

Maps of the period placed the Navajo east of Fort
Defiance.

Further military expeditions were undertaken against the Navajo during this period, and the expeditions to the north and east of Fort Defiance were said to be through the 'very heart of their country.'

The evidence relied upon to support the position of petitioner is:

Ex. S 608, pg. 263. The Navajo also continued to raid Zuni during this period, and the Pueblo of Laguna in 1851 challenged the Navajo rights to any land in that area since the Navajo were relatively newcomers. Tr. Eggan 7349. "As far as I know in 1846 and 48 the Navajo who are reported in the documents at that time were groups who either came out to trade or came out to raid. I know of no permanent settlements in the Hopi country by Navajo at this time." See also Tr. Eggan 7312. Ex. 15 (Hopi); Ex. E 51c, pg. 491; Tr. Eggan 7388. Ex. 60 (Hopi) Map 1849-52. Navajo east of Fort Defiance. The Navajo grazing area did not conflict with the Hopi hunting and grazing until about 1840-1850. Ex. 64 (Navajo). The Captains of the Navajo described their habitat in 1851 as between the Chelly and Laguna, Colorado. Ex. S 635, pg. 25; Ex. G 29, pgs. 264, 415. Tr. Schroeder 8625. He restated his reasons for so placing the Navajos in 1848 as "in 1812 the Navajos were still said to have lived 25 leagues to the right or northeast of the trail that ran from Zuni to Hopi and again in 1850. I pointed out that the first historical reference we get to Navajos west of the Marsh Pass - Hopi pueblo area all indicate that they would flee to the west from troop movements being undertaken in the Canyon de Chelly country and also I believe actually the first mention of some of them fleeing was as early as 1851." According to Schroeder the first mention of Navajo fleeing to the west under military pressure was in 1851. Tr. Correll 5960, et seq. Although there was very little known about the movements of Navajo population prior to 1848. Ex. R 1, pg. 342; Ex. G 29, pg. 342. Agent Calhoun reported to his superiors that in 1851 the Navajos started removing from the de Chelly to the San Juan, and pitching their lodges on both sides of the river; Ex. G 6; Ex. G 7; Ex. G 152 shows the Navajo cornfields east of Mesa de la Vaca in 1851; Ex. R 16; Ex. R 17; Ex. R 18; Ex. G 4, pgs. 56, 89, 107; Tr. Correll 5955. Correll testified that the Navajo close to Fort Defiance under military pressure spread out in all directions during this period.

3. The Commission erroneously omitted from its Finding No. 7 that part of petitioner's requested Finding of Fact 15, as follows:

. . . In the travels of both priests, 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 Havauspai.

The evidence relied upon to support the position of petitioner is:

Tr. Ellis 7589; Ex. 15 (Hopi); Tr. Ellis 7737-8; Ex. 25c (Hopi); Ex. 25d (Hopi); Ex. 23a (Hopi); Ex. 23b (Hopi); Ex. 24 (Hopi); Ex. 15a (Navajo), pg. 7. In 1776 there were large herds of cattle drifting out to the west, out to Moenkopi, and north of there, explaining that the Hopi had to keep their sheep, horses and cattle far enough from their farm lands so that these creatures did not eat their corn patches. Consequently the animals had been taken out at least a distance of 15 miles from the farm lands. Ex. 22 (Hopi), pgs: 1, 2; Ex. 24 (Hopi), pgs. 1,2; Ex. G 18, pg. 105; Ex. 14 (Hopi). The Hopi carried on extensive trade, especially with their neighbors to the south and west. As Garces traveled from the Mojave toward the Hopi Reservation he saw several groups of Hopi traveling in the opposite direction carrying material to trade. The Hualapais wore Hopi shirts and castilian belts showing communication between the two regions hundreds of miles apart. Havasupai obtained cotton seed from the Hopi. Hopi articles were found in Western Arizona. Euler Report, pg. 5, in Havasupai case; Abalone shells from Pacific were traded. Tr. Schroeder 8088-89; Ex. 70h (Hopi); Ex. G 41. Schroeder said that Garces found only the Havasupai west of the Hopi, and that the Navajo were not the Indians who left structures and ruins west of Moenkopi prior to 1882; Tr. Eggan 7178.

4. The Commission erroneously found in Finding 8 at page 295

that:

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)

Whereas in truth and in fact the Village of Moencopi, near Tuba City, is outside the confines of the 1882 Hopi Executive Order Reservation, and has been a permanent Hopi Village as far back as 1400. The evidence relied upon to support the position of petitioner is as follows:

Ex. 15 (Hopi); Ex. 38 (Hopi); Ex. 41
(Hopi); Ex. 55 (Hopi); Ex. 44 (Hopi)

5. The Commission erroneously found in Finding 18 at page 304

that:

. . . Some 1800 Hopi Indians and at least 300 Navajo Indians were residing on the new Hopi reservation when the Executive Order was issued. The Hopi Indian population figures of 1882 show a marked decline from figures available for prior years. An 1846 estimate had fixed the Hopi Indian population at 350 families or roughly 2450 Indians. In 1852 the Indian Agent had listed the Hopi population at 2500 Indians. (Emphasis added)

Whereas in truth and in fact the "some 1800" did not include the Moencopi Hopi Indians who were located outside the Executive Order Reservation of 1882, and population estimates before the census taken by Donaldson in 1893 were generally unreliable. The evidence relied upon to support the position of petitioner is:

Ex. E 511, pg. 341; Ex. 6 (Hopi), pg. 4;
Ex. 34 (Hopi), pg. 1; Ex. 11 (Hopi), pg. 2;
Ex. E 500, pg. 38; Ex. 11 (Hopi), pg. 1; Ex. S 635
Ex. 16 (Hopi), pg. 1; Ex. 11 (Hopi), pg. 4;
Ex. E 524, pg. 15; Ex. 25a (Hopi), pgs. 3,4;
Ex. 25d (Hopi), pg. 9; Ex. 21 (Hopi), pg. 17;
Ex. 25c (Hopi), pg. 11; Ex. G 29, pg. 7; Ex. E 524;
Ex. G 188; Ex. G 9, pg. 23; Ex. G 10, pg. 75;
Ex. G 38 pg. 135; Ex. G 116, pg. 614; Ex. G
34, pg. 828; Ex. E 8, pg. 390; Ex. G 37, pgs.
20, 91, 460.; Ex. 78 (Hopi), Healing v. Jones, 118, 119

6. The Commission erroneously found in Finding 20 at page 305

that:

. . . The Commission finds that the issuance of the Presidential order on December 16, 1882, establishing the Hopi Executive Order Reservation effectively terminated and extinguished, without the payment of any compensation to the Hopi Tribe, its aboriginal title claims to all lands situated outside of said reservation . . .

Whereas in truth and in fact the issuance of the Presidential Order on December 16, 1882, establishing the Hopi Executive Order Reservation did not extinguish the Hopi aboriginal title claims to all lands situated outside of said reservation. No attempt was then made to move the Moencopi Hopi Indians into said Executive Order Reservation or to restrict any of the Hopi Indians from use outside said Executive Order Reservation. The Hopi Indians neither relinquished their claim to lands outside of the Executive Order Reservation nor voluntarily withdrew therefrom. The defendant has continued to recognize and acknowledge the Hopi aboriginal title to a large portion of the Hopi aboriginal claim outside of said Executive Order Reservation while at the same time denying the full use of said lands to petitioner. The evidence relied upon to support the position of petitioner is set out under Error of Fact number (4), the Act of June 14, 1934, 48 Stat. 960, Ex. 78 (Hopi), 114-120, and such evidence as may be admissible to prove dates of taking upon further hearing as requested under Part I of this motion illustrated by the following:

Letter from Special Commissioner Haggerman to Commissioner of Indian Affairs Rhoads dated May 28, 1932 (Gallup Area Office file); letter from Rhoads to Haggerman dated June 14, 1932, (L-A 28237-32 JS); petition of Hopi Indians (cl. file 8970-30-308.2 Western Navajo, Part I); Rhoads to Hopi Indians, letter dated August, 1932 (cl. file 8970-30-308.2 Western Navajo, Part I); Request of Hopi to Rhoads for explanation (cl. file 8970-30-308.2 Western Navajo, Part I); explanation of Rhoads in letter to Hopi dated September 24, 1932 (same file); memorandum

from Associate Solicitor of Indian Affairs Richmond F. Allen of July 1, 1966, to the Commissioner of Indian Affairs; letter of Assistant Secretary of the Interior Harrison Loesch to Arizona Public Service et al dated September 24, 1969; letter to Superintendent of the U.S. Bureau of Indian Affairs, Keams Canyon, Arizona, from Leroy Michael, Jr., Director of Legal Services, Salt River Project dated December 30, 1969.

7. The Commission erroneously found in Finding 20 on page 306 that:

. . . the evidence of record does not substantiate Hopi aboriginal title claims to the balance of the overlap area.

Whereas in truth and in fact the Hopi claim to the area outside of the lands described in Finding 20 was not solely based upon sustained "spiritual attachment or rapport" as inferred in the opinion of the Commission at page 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, minerals and miscellaneous items to the natural boundaries on the north, west and south and to the area of conflict with the Navajo Indians on the east as of July 4, 1848. The evidence relied upon to support the position of petitioner is:

Ex. G 69.

Ex. 118 (Navajo). Merriwether reported that he drew the lines according to the boundaries "generally conceded to the tribes and bands respectively."

Ex. 157 (Navajo), pg. 2. But Merriwether on his map (Ex. 62 (Hopi)) enclosed the pueblos of Moqui in red lines stating that he did not intend to indicate the boundaries of their claims, for he had no information as to the extent or boundary thereof.

Ex. G 230a (map) 1856.

Ex. G 82, pgs. 1, 2; Ex. R 150, pg. 34.

Tr. Eggan 7416. Dr. Eggan was of the opinion that the Merriwether line divided the Hopi and Navajo country as of 1848 and for some reasonable time before.
(See also Ex. 2 (Hopi) map)

Tr. Pitrat 9644-5, 9678-80, 9693. Hopi tradition establishes the east boundary of Hopi land and the west boundary of Navajo land as a line running east of, but parallel to, the Merriwether line, west of Ganado.

Exs. 69 l, m, n and o (Hopi). This line is marked with a boundary marker.

(See also Tr. Pitrat 9645).

Tr. Pahona 7476-77, 7482. 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. (See also Ex. 55 (Hopi), pg. 2.)

Tr. Reeve 7905-6. Dr. Reeve was of the opinion the Navajo corn fields then extended further to the west than the Merriwether line, but on cross-examination admitted the line was intended to separate the Hopi and Navajo corn fields, and further admitted that he did not have a single document to substantiate his contention in this regard in the period 1848 to 1855. (See also Tr. Reeve 7950)

Dr. Reeve admitted that his conclusion to extend the northern part of his line west of the Merriwether line was based on two army letters of very little value and admitted he had never read the Pettit diary. For trail of Pettit Journey see Ex. 70 (Hopi) large plastic relief map; Exs. 70a-70i (Hopi) supporting documents; Ex. 71 (Hopi) small plastic relief map; Ex. 72 (Hopi) diary comparison and log of 1962 observation trip; and Tr. Pitrat 9648 et seq., testimony of Charles Pitrat who made the 1962 trip.

Tr. Reeve 7917-19. (See also Ex. R 180 map)

Tr. Schroeder 8591. In describing what Schroeder felt was exclusive Navajo land in 1848, he described the western portion as (in terms of use and occupancy) "starting at a point on the San Juan north of the

Carrizo mountains and between the Mancas and McElmo drainage, I would come southwest across the middle waters of Walker Creek in which the Navajoes were reported in 1829 in the upper waters by Armijo, and would come across the Chinle Wash in an area below or north of Rock Point, where in 1855 some farm lands were noted and up the Chinle Valley including the middle drainages below Black Mesa, more or less in a straight north-south line to the pueblo Colorado wash southwest of Ganado, and including the area around Cornfields, Arizona, and then would turn south-southeast in a line that would be to the west of wide ruins or pueblo grande in the region of the Hopi-Zuni trail in the vicinity of LaJarra Springs and then east." (See also Ex. S 807 map).

Ex. E 100. Dr. Ellis drew the dividing line just west of the Merriwether line. (See also Tr. Ellis 9380-81)

Tr. Ellis 9101, 9112. Dr. Ellis described the area of 1848 exclusive use and control by the Navajo (in the west) as leaving out the Painted Desert since it was so important to the Hopi. She indicated the western line ran from there north to Steamboat and up to the San Juan. Her line is indefinite but a good approximation and as close as anyone could draw it. She indicated that the Navajo had taken over the area between the Arizona-New Mexico state line and her boundary line by 1848. (See also Tr. 7580-1; Ex. 69a Hopi).

Ex. G 108 (Map). It should be noted that the pencil lines and lettering were added after Whipple made the map. Whipple's Expedition was in 1853. The Merriwether line, in pencil is inaccurately located and was not established until 1855, 2 years after the Whipple journey.

Ex. G 209. Description of Merriwether line taken from original treaty; Ex. 127 (Navajo).

Ex. 2 (Hopi) map showing Merriwether line.

Ex. 36 (Hopi). As late as 1864 an Arizona paper stated: "We cannot, however, understand his (a rival editor's) reason for putting forth such an uncommon proposition as that perpetuated in his paper of April 12th, wherein he calls the Navajos an Arizona Indian, and favors

their reservation on the Colorado Chiquito. He should have known that few if any of the Navajos have lived west of Navajo Springs, and that they are essentially and notoriously a New Mexican savage."

Ex. 59 (Hopi) Map. The Disturnell map published in New York in 1847 was referred to in the Treaty of Guadalupe-Hidalgo of 1848, Ex. 1 (Hopi) Map. The pertinent part is reproduced in this Exhibit. While the map is very inaccurate in the location of some of the geographical features it will be noted the Navajo country is to the north and east of the Moqui.

Euler Report pgs. 7, 8, in Havasupai case, noted that neither Escalante nor Garces saw Navajo north or west of the Hopi as late as 1776, and Escalante reported in 1775 that the Hopi country was bounded by the Cosninas on the west and northwest and the Navajo on the east.

Shrine areas were of particular significance because trips to the shrines were coupled with many related activities such as hunting, trapping eagles, gathering herbs, plants, berries, minerals and other items necessary to Hopi life. 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."

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. . ."

For maps locating various shrines in all portions of the claimed area as above described see: Ex. 66 (Hopi), Map of eagle shrines; Ex. 68 (Hopi), Map of active Hopi eagle shrines and eagle shrine areas, (discussed by Eggan at Tr. Eggan 7460), by clans or mesa; Ex. 69 (Hopi), Map of Hopi shrines other than eagle shrines; Ex. E 502 Map.

Ex. 69a (Hopi), Map of additional active Hopi eagle shrines and eagle shrine areas by clans or mesa.

Ex. 15A (Navajo), pg. 7. The Hopis have traditionally in the past made use of the land within 40 or 50 miles of their villages for hunting, grazing and agriculture, etc.

Tr. Ellis 7590. Dr. Ellis explained that the Hopi were required to keep their sheep, horses and cattle far enough from their farmlands so that these creatures would not eat their cornpatches, noting that they were far beyond the Hopi cornfields, which themselves extend out 15 miles from Moenkopi. See also Tr. Ellis 7738.

Ex. 23b (Hopi), pg. 10. "We traveled by extensive plains on which the herds of cattle and horses of Moqui graze. . ." (Fray Dominquez with Escalante)

Ex. G 42, pgs. 116, 129: Ives describes Moqui grazing and agriculture in 1858.

Ex. E 51a, pgs. 186-187; Ex. E 112, pg. 18; Ex. 44 (Hopi), pg. 1. Hopi on Little Colorado 1878.

Ex. G 37, pgs. 22, 90, 91, 93. In 1869 it was reported the Hopi grazed cattle as far south as Prescott.

Ex. G 18, pg. 105. The Havasupai obtained cottonseed from the Hopi.

Ex. 3 (Hopi); Ex. E 538, pg. 35, 36. "It is true that the Hopi extend their environment by long journeys for various substances. Every berry patch for many miles around is known and visited; a journey of 200 miles or so for salt from the Grand Canyon, wild tobacco from the Little Colorado, sacred water from Clear creek, or pine boughs from San Francisco mountain, the home of the snow, is thought of little moment. To my knowledge, an Oraibi man made a continuous run of 160 miles as bearer of a note and answer. The knowledge of the resources of a vast territory possessed by the

Hopi is remarkable, and the general familiarity with the names and uses of plants and animals is surprising. Even small children were able to supply (sic) the names, corroborated later by adults."

Ex. E 555, pg. 22. Wood from Black Mesa and San Francisco Peaks.

Ex. E 504, pgs. 50, 56. Timber from Black Mesa.

Ex. E 570, pg. 11. Great distances to obtain pinion nuts, juniper berries and mesquite beans and prickly pears.

Ex. 53 (Hopi). Material for bows at San Francisco Peaks area.

Ex. E 570, pg. 11; Ex. E 544, pg. 23. Black oak for dye; Ex. E 40, pg. 202; Ex. E51a, pg. 74; Ex. 49 (Hopi), pg. 1; Ex. 43 (Hopi); Tr. Ellis 7566; Ex. E 91, pg. 11.

Tr. Ellis 7567. "Hunting as I said, took place all through this 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."

Ex. 54 (Hopi), pgs. 1,2. Antelope, deer, turtles. "It has been stated by some students that Hopi hunting assumes more the character of a religious ritual than an economic enterprise. This is surely incorrect. The quest for food or for objects to be later used in every day or in ceremonial activities is fundamental."

Tr. Ellis 9388. Hunting on visits to shrines.

Tr. Egan 7388. No conflict between Navajo and Hopi hunting grounds until 1840's or 50's; Ex. 15A (Navajo), pgs. 4, 7; Ex. 15 (Hopi), pg.3.

Tr. Egan 7393. Hopi traditionally hunted within an area 40 to 50 miles from their villages.

Ex. E 503, pg. 18; Ex. E 550, pg. 29; Ex. G 142, pg. 29. Trapping eagles.

Ex. E 44, pg. 365. Trail to Havasupai on the west.

Ex. G 41, pg. 101. With Utes to north.

Ex. 49 (Hopi), pg. 1. With Zuni to southeast.

Ex. 55 (Hopi), pg. 3. With Navajo of the northeast.

Ex. 47 (Hopi), pg. 5. Commercial relations in all directions.

Tr. Ellis 7564. Salt in Colorado River Area.

Tr. Ellis 7564; Ex. E 504, pgs. 52, 56. Salt and cottonwood roots from Little Colorado.

Ex. E 565, pgs. 469-70. Pigments in Cataract Canyon.

Ex. E 571, pg. 638; Ex. G 42, pg. 117; Ex. 66 (Hopi) Map showing salt locations.

8. The Commission erroneously omitted to find and determine the facts as to the aboriginal possession and title of the Hopi Indians as of July 4, 1848, as requested by petitioner in its requested Finding No. 20. The evidence relied upon to support the position of petitioner is set out under Errors of Fact numbered 1, 2 and 7.

9. The Commission erroneously found in Finding 24 at page 309 that:

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)

Whereas in truth and in fact the Hopi Village of Moenkopi was outside district

6 and the Hopi Indians were using other lands outside of district 6 for grazing livestock, cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines and hunting. Hopi Indians were granted permits to graze in land management district 3, within and without the Executive Order Reservation of December 16, 1882. The evidence relied upon to support the position of petitioner is:

Ex. 15 (Hopi); Ex. 38 (Hopi); Ex. 41 (Hopi); Ex. 55 (Hopi); Ex. 44 (Hopi); Ex. 78 (Hopi), pg. 220, and such evidence as may be admissible to prove dates of taking upon further hearing as requested under Part I of this motion illustrated by the following: Records of Hopi grazing permits in districts outside grazing district 6 from the Bureau of Indian Affairs records at Keams Canyon, Arizona. Memorandum to H. E. Holman from George A. Herion dated April 20, 1937; Memorandum to W. G. McGinnies from H. E. Holman dated April 26, 1937; Letter to A. G. Hutton, Supt. Hopi Reservation from Ray Walker, Asst. Director Land Management, Navajo Service dated May 15, 1937; Letter Supt. Hutton to Guy B. Dickerson, Moencopi Day School, Tuba City, Ariz. dated May 21, 1937; Letter Supt. Hutton to Ray Walker dated May 21, 1937; Memorandum of Understanding between The Navajo Service and The Hopi Indian Agency relative to Regulation regarding Woodland Utilization on District 4 and District 6; map of Hopi farms in the December 16, 1882 Executive Order Reservation and supporting data in B.I.A. files at Keams Canyon, Arizona.

10. The Commission erroneously found in Finding 25 at page 310 that:

The Commission finds that administration action on June 2, 1937, effectively terminated all Hopi aboriginal title to the lands within the 1882 Executive Order Reservation outside the boundaries of "land management district 6" as established and approved by the Office of Indian Affairs on April 24, 1943.

whereas, in truth and in fact, the administrative action on June 2, 1937 was only the beginning of the implied settlement of the Navajo Tribe and Navajo Indians on the 1882 Executive Order Reservation. District 6 was thereafter enlarged and government officials in response to Hopi claims constantly assured the Hopi Indians that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims. The Hopi Indians never abandoned their claims to the entire area. It was not until September 28, 1962, that the Hopi title was extinguished and then to only a one-half interest in the area outside of district 6 and within the Executive Order Reservation of December 16, 1882. The evidence relied upon to support the position of petitioner is:

Ex. 78 (Hopi), pgs. 92 through 98, 217, 221, 224 and such evidence as may be admissible to prove dates of taking upon further hearing as requested under Part I of this motion illustrated by the following: Letter from Commissioner of Indian Affairs Robert W. Bennett to Graham Holmes, Area Director, Navajo, dated April 14, 1966; mining lease between Sentry Royalty Company and the Hopi Tribe dated June 6, 1966 and approved by an authorized agent of the Secretary of the Interior on June 20, 1966; letter from Commissioner of Indian Affairs, Robert W. Bennett to Graham E. Holmes, Area Director, Navajo, dated July 8, 1966; Evidence specifically set out under alleged Error of Fact No. 9.

Petitioner's motion is further based upon errors of fact in Docket No. 229 (Navajo) wherever the Findings of Fact of the Commission in said Docket No. 229 are inconsistent with the position of petitioner, the Hopi Tribe, as set out in Errors of Fact numbered 1 through 10, supra, and the evidence relied upon by petitioner as set out under each of said alleged errors of fact, and particularly as follows:

(a) The Commission erroneously found in Finding 8 at page 261, 262 of Docket No. 229 that:

There is evidence of Navajo use or occupation of some of the more peripheral sections of the claimed area such as Big Bead Mesa, the Cebolleta Mountains, Mt. Taylor, Rio Puerco and the Puerco of the West, the Zuni Mountains, Largo Canyon, Ramah, Bear Springs, St. Johns, Mesa Redondo, Chevelon Creek and Chevelon Butte, upper Oak Creek Canyon, Carrizon Wash, the valley of the Little Colorado River, Black Canyon, Anderson and Diablo Canyons, Pueblo Colorado, Pueblo Colorado Wash, Steamboat Canyon, Black Mesa, Calabasa Mesa, Navajo Mountain, and both sides of the San Juan River, at the time of the beginning of the American Period in 1848.

Whereas in truth and in fact there is no substantial evidence of Navajo use or occupation in 1848 of any lands west of the Merriwether Line.

The evidence relied upon to support the position of petitioner is:

Tr. Eggan 7416, Cross Examination of Dr. Reeve; Tr. 7905-06, 7950-51, Ex. 70 (Hopi); Ex. 70a through 70 (Hopi); Ex. 71 (Hopi); Ex. 72 (Hopi); Tr. Pitrat 4648, 9644-45, 9678-80, 9693; Ex. E 100, Tr. Ellis 9380-81, 9389, et seq.); Ex. S 807, (Tr. Schroeder 859 et seq.), (Tr. Pahona 7476-77, 7482).

(b) The Commission erroneously found in Findings 16 and 17 at pages 271, 272 of Docket No. 229 that the Navajo Tribe had aboriginal title to lands west of the Merriwether Line. Whereas in truth and in fact there is no substantial evidence of Navajo aboriginal use or occupancy west of the Merriwether Line. The evidence relied upon to support the position of petitioner is set out under Error of Fact (a) supra.

B. ERRORS OF LAW

1. 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.

In support of its position petitioner relies upon the following authorities:

Couer d' Alene Indians v. U.S. 6 Ind. Cl. Comm. 1, 42 (1957) rejecting the Executive Order as the date of taking, stating the U.S. realized that the Indian title had never been extinguished.

Act of June 14, 1934, 48 Stat. 960 acknowledging the Hopi interest in the lands described in the act, excepting the area described in the Executive Order Reservation of December 16, 1882.

Spokane Indians v. U.S. 9 Ind. Cl. Comm. 236 (1961) where the Indians had never moved on to the Executive Order Reservation.

Snake or Paiute Indians v. U.S., 4 Ind. Cl. Comm. 571 (a) (1956); Shoshone Indians v. U.S., 299 U.S. 476, 495 (1936); Uintah Ute Indians v. U.S., 5 Ind. Cl. Comm. 1 (1957); Yavapai Indians v. U.S., 15 Ind. Cl. Comm. 68 (1965); San Carlos Apache Indians v. U.S., 21 Ind. Cl. Comm. 189 (1969); Apache Indians v. U.S., 21 Ind. Cl. Comm. 223 (1960); Jicarilla Apache Indians v. U.S., 17 Ind. Cl. Comm. 338 (1966); Fort Sill Apache Indians v. U.S., 19 Ind. Cl. Comm. 212 (1968); Fort Sill Apache Indians v. U.S., 22 Ind. Cl. Comm 527, 528-29 (1970). Each holding that an Executive Order does not necessarily extinguish Indian title outside the Executive Order Reservation and requiring that the Indians either accept or be forced to accept the Executive Order Reservation before Indian title outside the reservation is extinguished; U.S. v. Santa Fe Pacific Railroad, 314 U.S. 339, (1946) construing congressional intent to extinguish Indian title.

2. 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), off'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.

In support of its position petitioner relies upon the following authorities:

The Act of July 22, 1958, 72 Stat. 402, not as affecting the liability of the United States in this case but in explanation of the decision in Healing v. Jones, supra, which did determine a crucial point affecting the liability of the United States herein.

Healing v. Jones, supra, holding that the Hopi Indian title to lands outside of district 6 was not extinguished and the Navajo tribe does not have an exclusive interest in the same. The case further held on September 28, 1962, that the Hopi title to a one-half interest in the area outside of district 6 was extinguished.

3. 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.

In support of its position petitioner relies upon the following authorities:

Pawnee Tribe v. United States, 5 Ind. Cl. Comm. 224, 279-80 (1957) Prior decisions of the Commission in setting boundaries for abutting tribes considered in establishing boundary of neighboring tribe.

The Uintah Ute Indians of Utah v. United States, 5 Ind. Cl. Comm. 1, 44 (1957) Report of early

travelers that after passing a certain point on the edge of petitioner's land they met another tribe establishes boundary between tribes at that point. The most logical placement of boundaries of aboriginal lands follows natural boundaries.

The Puyallup Tribe of Indians v. United States, 17 Ind. Cl. Comm. 1, 17-20 (1966) Natural boundary established aboriginal boundary because evidence indicated Indians did not go beyond but merely to edge of rugged country.

The Nez Perce Tribe of Indians v. United States, 18 Ind. Cl. Comm. 1, 130 (1967) Natural boundary accepted as aboriginal title boundary.

Snake or Piute v. United States, 125 Ct. Cls. 241, 268-9 (1953) Actions of group over a period of years indicating strong home ties to a certain area are indicative of aboriginal ownership.

Pawnee Tribe v. United States, 5 Ind. Cl. Comm. 279, 286, 292 (1957) No abandonment although 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 area claimed and record indicates continued use and occupancy of substantially all territory claimed.

Quinalelt v. United States, 7 Ind. Cl. Comm. 1, 29 (1958); Quinalelt v. United States, 7 Ind. Cl. Comm. 31, 60 (1958) Use of land for fishing, going after roots and berries and traversing the area for the purpose of hunting constitutes use and occupancy in the sense of Indian title.

Flathead v. United States, 8 Ind. Cl. Comm. 40, 74 (1959) Attack by outside tribe hindering petitioners activities had no effect on Indian title to area raided where raiders made no attempt to occupy or make permanent use of lands.

Samish v. United States, 6 Ind. Cl. Comm. 159, 173 (1958) Culture and economic life of tribe must be considered in determining aboriginal title.

California v. U.S. 8 Ind. Cl. Comm. 1, 36 (1958) Indian land claims cannot be limited to only such lands which provided the common necessities of life, since

requirements of Indians were so varied they could only be obtained from a much larger area.

Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835) Indian possession or occupation 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.

See also Snake or Piute Indians v. U.S., 112 F. Supp. 543, 125 Ct. Cl. 241, 254 (1953); the Quapaw Tribe of Indians v. U.S., 120 F. Supp. 283 285, 128 Ct. Cl. 45, 49 (1954); Alcea Band of Tillamooks v. U.S., 59 F. Supp. 934, 965, 103 Ct. Cl. 494, 557 (1945), aff'd 329 U.S. 40 (1946)

4. 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.

In support of its position petitioner relies upon the following authorities:

Lipsan Apache Tribe v. U.S., 180 Ct. Cl. 487, 500-1 (1967); Six Nations v. U.S., 173 Ct. Cl. 899, 904 (1965); Seneca Nation v. U.S., 173 Ct. Cl. 912 (1965); Seneca Nation v. U.S., 173 Ct. Cl. 917 (1965) Holding that the U.S. may be liable for having military troops drive an Indian Tribe from its aboriginal lands, the crucial test being whether the demonstrated course of dealings successfully ties the central government to the damage inflicted, albeit by another.

25 USC, Sec. 70a

Pueblo de Acama, et al. v. United States, 18 Ind. Cl. Comm. 154, 237, 239 (1967) Tribes lost the use of said lands because of the failure of defendant, United States, to protect tribe's interest therein, therefore defendant is liable for the loss of said lands. Presence of Navajo in some of recovery area is not inconsistent with exclusive use and occupancy of such area by the Pueblo de Acama.

Treaty of Guadalupe Hidalgo, 9 Stat. 922

Constitution of the United States

5. 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).

In support of its position petitioner relies upon the following authorities:

Sac and Fox Tribe of Indians of Oklahoma v. United States, 315 F. 2d 896 (1963) 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.

The Confederated Tribes of the Umatilla Indian Reservation v. United States, 14 Ind. Cl. Comm. 14, 116-120 (1964) The words "for a long time" while not definable in specific number of years, held to encompass at least several generations.

Osage Nation v. U.S., 11 Ind. Cl. Comm. 733, 838 (1962)

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941); Mohave Tribe of Indians of Arizona, California, and Nevada, et al., v. United States, 7 Ind. Cl. Comm. 219 (1959).

Pueblo de Zia, et al. v. United States, 11 Ind. Cl. Comm. 147, 164-167 (1962)

Red Lake Band, et al. v. U.S., 7 Ind. Cl. Comm. 576 (1959); C. W. McGhee v. U.S., 122 Ct. Cls. 380, 396; Potawatomi Indians v. U.S., 27 Ct. Cls. 403, 414; Potawatomi Indians of Michigan and Indiana v. U.S., 148 U.S. 691, 705; Iowa Tribe of Kansas v. U.S., 6 Ind. Cl. Comm. 464, 501-502 (1958)

Warm Springs v. U.S. 8 Ind. Cl. Comm 557, 605, 606 (1960)

Minnesota Chippewa Tribe, et al., v. United States 8 Ind. Cl. Comm. 781, 819-20 (1960)

Sac and Fox Tribe of Indians of Oklahoma v. United States, 383 F. 2d 991 (1967)

Pueblo of Laguna et al. v. United States, 17 Ind. Cl. Comm. 615, 668-70 (1967)

Alcea Band of Tillamooks v. United States, 329 U.S. 40 (1946)

Dated this 27th day of August, 1970.


JOHN S. BOYDEN
215 E. Second South Street
Salt Lake City, Utah 84111

Attorney of Record