

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, Shitchunovi 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. :

MEMORANDUM WITH POINTS AND AUTHORITIES
SUPPORTING ALLEGATIONS AS TO THE DATE
OR DATES OF TAKING PURSUANT TO THE ORDER
OF THIS COMMISSION DATED THE 2ND DAY OF
JUNE 1971

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SCOPE OF DOCUMENTARY EVIDENCE, DIGEST
AND MEMORANDUM

On April 28, 1971 this Commission granted the motion of petitioner, the Hopi Tribe, "for the sole purpose of permitting the parties to present all evidence relating to the date(s) of taking of the aboriginal lands of the Hopi Tribe."

On June 2, 1971 the Commission further ordered:

[T]hat the plaintiff in Docket No. 196, The Hopi Tribe, shall file on or before June 25, 1971, its documentary

evidence on the date or dates of taking, which is not already a part of the record of this case, including a digest of the new exhibits, and that there shall be filed by the plaintiff in Docket No. 196, The Hopi Tribe, along with its documentary evidence and digest a memorandum with points and authorities supporting its allegations as to the date or dates of taking . . .

By orders dated July 14, 1971 and July 21, 1971 an extension of time until August 9, 1971 within which said documents may be filed was granted.

In its order of April 28, 1971 the Commission further held that no new evidence had been presented by the plaintiff to support a re-examination or amendment of the findings other than those that specifically pertained to date(s) of taking.

The only finding of the Commission as to the area of aboriginal possession in its Interlocutory Order of June 29, 1970 was as follows:

2. As of December 16, 1882, the Hopi Tribe had Indian title to that tract of land described in the Commission's Finding of Fact 20. [23 Ind. Cl. Comm. 227, 312 (1970)]

In the Commission's said interlocutory order it also ordered, among other things:

IT IS ORDERED, that this case shall proceed to a determination of the acreage and December 16, 1882 fair market value of the lands described in the Commission's Finding of Fact 20 lying outside of the boundaries of the 1882 Executive Order Reservation, the June 2, 1937 fair market value of the 1,868,364 acres within the 1882 Executive Order Reservation lying outside the boundaries of "land management district 6," and all other issues bearing upon the question of the defendant's liability to the Hopi Tribe. (emphasis added) [23 Ind. Cl. Comm. 277, 313 (1970)]

Construing the foregoing orders as a composite directive, we conclude:

1. That we may submit new documentary evidence only on the date

or dates of taking, which is not already a part of the record of the case.

2. Since the Commission has made no finding with respect to the aboriginal holdings of the Hopi Tribe prior to 1882, the petitioner may produce new evidence of dates of taking prior to 1882 to any territory claimed by the Hopi Tribe in its original petition, and refer to testimony and exhibits now in evidence where they are pertinent.

3. Since the Commission has fixed the area of Hopi aboriginal possession as of 1882, proof of taking outside the area, as found by the Commission, after 1882 may be introduced to perfect petitioner's record on appeal.

4. Since the interlocutory decree of June 29, 1970 provided that the case would proceed to determination of market value and "all other issues bearing upon the question of the defendant's liability to the Hopi Tribe," the claims of the Hopi Tribe for damages in an amount equal to the value of the use of the land, as set forth in Counts 5, 6, 7 and 8, under 25 U.S.C. §70a(1), (2) and possibly (5) of the Indian Claims Commission Act, together with evidence on Count 9 for an accounting, will be heard at a later date.

The scope of the evidence presented with this memorandum and the contents of this memorandum will, therefore, be limited in accordance with the orders of the Commission, omitting proof of damages under Counts 5, 6, 7 and 8. But evidence negating the premature findings of the Commission that the Hopi Indian title to all lands described in the Commission's Finding of Fact 20, but lying outside the boundaries of the 1882 Executive Order Reservation, was extinguished on that date will be included. Evidence negating the Commission's premature finding that the entire Hopi Indian title

to some 1,868,364 acres of land within the 1882 Executive Order Reservation exclusive of land management district 6 was extinguished on June 2, 1937 will also be included.

With the limitations imposed upon petitioner by the previous orders of this Commission, as above outlined, this memorandum will cover specific areas within the Hopi alleged claim, presenting the contentions of the Hopi Tribe as to the date or dates of taking, together with points and authorities supporting its allegations.

DATES OF TAKING
OF SPECIFIC AREAS

AREA A: Land Management district 6, as defined on April 24, 1943, and as set out in paragraph numbered 1 in the Judgment of Healing v. Jones, Exhibit 78.

Petitioner makes no claim that this area has been taken by the defendant. The area now constitutes a Hopi Reservation [Healing v. Jones, Judgment, ¶ 1, Ex. 78, pp. 225-228, 210 F.Supp. 125 (1962), 373 U.S. 758 (aff'd)].

AREA B: 1882 Executive Order Reservation outside of District 6.

Petitioner contends that only an undivided one-half interest in the area of the 1882 Executive Order Reservation outside of district 6 was taken on June 2, 1937 (Healing v. Jones, supra, Ex. 78, p. 228). Petitioner's evidence with respect to deprivation of the use of the other one-half of this area is already partially in evidence, but additional evidence, together with the value of the surface use of the same will be presented when the Commission proceeds with "all other issues bearing upon the question of the defendant's liability to the Hopi Tribe."

The Exhibits* delineated herewith and numbered DT 1 through DT 13 amply illustrate the continual assurance of the Secretary of the Interior, two Commissioners of Indian Affairs and other government officials that the establishment of district 6 would not confine the Hopi rights to that district. Findings of the court in Healing v. Jones clearly summarize the position of the petitioner herein.

44. Only a very few Hopis have ever resided, or grazed livestock, in that part of the reservation lying outside of district 6, as defined on April 24, 1943. During the years, however, they have continuously made some use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines, and hunting.

45. Congress at no time enacted legislation designed to, or having the effect of, terminating Hopi rights of use and occupancy anywhere in the 1882 reservation.

46. Beginning on February 7, 1931, administrative officials followed a policy designed to exclude Hopis, for the most part, from the part of the reservation in which Navajos were being settled by implied Secretarial action. At first they sought to accomplish this by legislation in the form of a provision in the bill which was to become the Navajo Indian Reservation Act of 1934. This attempt failed of realization. Thereafter, and beginning about 1937, the administrative effort to exclude Hopis from the part of the reservation in which Navajos were being permitted to settle, took the form of grazing regulations and a permit system under which Hopi use of reservation lands was restricted.

47. In 1941, Indian Affairs officials sought to formalize this exclusion policy by means of an order of the Secretary of the Interior defining areas of exclusive occupancy. But the solicitor of the department, on February 12, 1941, ruled that this could not be done without the consent of the Hopis, and no such consent was sought or obtained. Despite this legal advice the Office of Indian Affairs, through enforcement of the grazing regulations and permit system, continued the practice of excluding Hopis without their consent from that part of the reservation lying outside of district 6, insofar as residential or grazing use was concerned.

* The prefix DT is added to all documents offered for introduction by the Hopi Tribe in proof of dates of taking to distinguish from exhibits already in evidence.

48. None of these administrative regulations and practices, however, were designed to affect whatever rights the Hopis then had in the entire 1882 reservation. This is established by the repeated and consistent representations made by administrative officials during all of this period.

49. The failure of the Hopis, prior to the settlement of Navajos, to use a substantially larger part of the 1882 reservation than is embraced within district 6, was not the result of a free choice on their part. It was due to fear of the encircling Navajos and inability to cope with Navajo pressure.

50. After the official settlement of Navajos in the 1882 reservation, the failure of the Hopis to make substantial use of the area beyond district 6 was not due to a lack of desire or a disclaimer of rights on their part, but to their exclusion from that area by Government officials. Throughout this entire period they continued to assert their right to use and occupy the entire reservation area. These Hopi protestations would doubtless have been even more persistent and vehement had it not been for the constant assurances given to them by Government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims.

51. As a practical matter, the Secretarial settlement, of Navajos in the part of the 1882 reservation outside of district 6, even without Governmental restraint, probably would have greatly limited the amount of surface use the Hopis could have made of that part of the reservation. But there still would unquestionably have been a substantial movement of Hopis into the area had it not been for the administrative barrier and improper Navajo pressure.

52. Neither before nor after the Secretarial settlement of Navajos, did the Hopis abandon their previously-existing right to use and occupy that part of the 1882 reservation in which Navajos were settled.

(Ex. 78, pp. 220-221)

The Commission in this case [23 Ind. Cl. Comm. 277, 287 (1970)] had adopted as its own, either in part or in total, directly or indirectly, certain findings of fact and conclusions of law rendered by the court in Healing v. Jones, supra. The above quotations from Healing v. Jones are pertinent and

material to the disposition of title issues in this case and determine petitioner's position that only one-half of the interest of the Hopi Indians outside of district 6 and within the 1882 Executive Order Reservation was taken from the Hopi Tribe at the time the Navajo Tribe was settled upon the Reservation on June 2, 1937, as held by the court. The petitioner is not anxious to reduce the area granted by this Commission, but a judgment to stand the test on appeal must be factual. There are also other events to be considered by this Commission. The remaining one-half was conceded and acknowledged by all to belong to the Hopi Indians, but the government, through its management or mismanagement, manipulation and control, refused to allow the Hopi Tribe to use the lands it acknowledged to be the property of that tribe and is, therefore, responsible in law and equity for its action. These are claims sounding in tort with respect to which the claimant would have been entitled to sue in a court of the United States if the United States were subject to suit. By its actions, the United States, in administering the lands so as to deprive the Hopi Tribe of its acknowledged rights, dealt unfairly and dishonorably with the petitioner. The failure on the part of the defendant to maintain and protect such rights was in violation of the obligations undertaken by the defendant under the Treaty of Guadalupe Hidalgo (9 Stat. 922, 930) and in violation of the Constitution of the United States, thus creating a valid claim in the petitioner against the defendant for the value of the use of the land which the government has prevented the Hopi Tribe from utilizing. Since the decree in Healing v. Jones, the Commissioner of Indian Affairs has acknowledged the right of the Hopi as determined by the court. (See Exhibits DT 14 and DT 15). Under these circumstances it seems illogical

and unreasonable to contend that the Hopi Tribe has been deprived of more than one-half of the area outside of district 6 and within the 1882 Executive Order Reservation. It is equally fundamental that under the circumstances the United States is responsible for the damages naturally flowing from its mismanagement of the Hopi interest as alleged in Counts 5, 6, 7 and 8 of the Hopi petition filed and docketed as No. 196 on August 3, 1951.

AREA C: The area West of the Meriwether line and contained within the Executive Order of October 29, 1878.

In 1848 the Meriwether Line was the separation line between the Hopi and Navajo Tribes, as established by both the Hopi and defendant witnesses. Dr. Eggan, at page 7416 of the official transcript of his testimony, delineated the East side of the Hopi territory as the Meriwether Line. This was confirmed substantially by the defendant's witnesses, Dr. Ellis at pages 7580, 7706 and 9389, by Dr. Reeves at 7901 and 7918, and by Dr. Schroeder at page 8591 of the transcript. 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 Meriwether Line, West of Ganado (Tr. Petrat 9644-5, 9678-80, 9693). This line is marked with a boundary marker [Exs. 69-1, m, n and o (Hopi)]. 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. A Hopi witness produced the tiponi before the Commission (Tr. Pahona 7476-77, 7482). The anthropologist, Gordon MacGregor, in a report to the Commissioner of Indian Affairs in 1938 stated 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, p. 2 (Hopi)]

This report was written 13 years before the Hopi filed its petition with this Commission. Meriwether's knowledge or lack of knowledge of these facts is not determinative of the issue. The fact that the evidence supports the line where he drew it is crucial.

At the time of the trial in Docket 196 in the years 1961 and 1962, this Commission had theretofore determined in the case of Sac and Fox v. United States [6 Ind. Cl. Comm. 464, 501, 502 (1958)] that the Sac and Fox Tribe of Indians of Oklahoma must satisfy the Commission that it owned in Indian fashion the claimed subject lands or any portion thereof as of 1803, and that it reasonably maintained such ownership until the treaty of cession in 1824. In the Sac and Fox Case the year 1803 was the year the United States obtained the land in question by virtue of the Louisiana Purchase on April 30 (8 Stat. 200). The rule of law of this Commission at the time the consolidated Hopi and Navajo issues of aboriginal title were tried required the petitioner to meet the burden of proof by showing Indian title in the tribe as of 1848 when the United States obtained sovereignty over their lands. Subsequent to the hearing in Dockets 196 and 229 on aboriginal title, the Court of Claims reversed the rule of law laid down in the Sac and Fox Case:

In refusing to consider the post 1803 evidence, the Commission appeared to have confused Indian title with sovereign or legal title, although there is a great difference between them. At any rate, the Commission took the position that once sovereign title attached to land, Indian title could not thereafter be established. We do not agree. [Sac and Fox Tribe of Indians of

Oklahoma v. United States, 383 F.2d 991, 997 (1967)]

The net result of the Sac and Fox Case before the Court of Claims was to allow consideration by the Commission of Navajo claims of aboriginal title in the Hopi/Navajo overlap area subsequent to 1848.

The case at bar must be distinguished in that the land in question was acquired by the Treaty of Guadalupe Hidalgo, supra, when in 1848 the United States entered into its treaty with the Mexican Government. Articles VIII, IX and the protocol Querétaro of the Treaty guaranteed the Indians as former citizens of Mexico free enjoyment of their liberty and property and particularly that their property of every kind established within the territory should become inviolably respected. The territory involved in the Sac and Fox Case, of course, was acquired by the Louisiana Purchase. There is little doubt that the Hopi Tribe proved its aboriginal possession in the overlap area as of 1848. A question before this Commission is whether the Hopi Tribe lost the use of any of its aboriginal lands involuntarily and if the defendant was the cause of such involuntary loss in the period after 1848. The Hopi Tribe has consistently taken the position that its ancestral lands were never voluntarily relinquished. The constant depredations by the never ceasing influx of Navajos into their area forcibly caused disruption of the Hopi way of life and interfered with the overall use and occupancy of the Hopi lands. The responsibility for the extinguishment of Hopi Indian title in the overlap area lies at the feet of the United States for failing to protect the rights of the Hopis by preventing encroachment on their lands when requested to do so on numerous occasions. See Laguna v. United States, 17 Ind. Cl. Comm. 615, 697, 698 (1967) and Accma v. United States, 18 Ind. Cl. Comm. 154, 239 (1967). As an example of Hopi

requests for help it will be noted that in October of 1850 a Hopi delegation went to Santa Fe to complain concerning the Navajo depredations to J. S. Calhoun, Superintendent of Indian Affairs. [Ex. 28, p. 2 (Hopi); Ex. 30 (Hopi)]. John Ward, Indian Agent, reported to Superintendent of Indian Affairs, D. M. Steck, at Santa Fe, New Mexico in 1865:

A short time previous to my visit to them, they had been attacked and robbed by the hostile Navajos, and to make their condition worse, the independent campaigns from this Territory against the Navajos, had also gone to their village, and had taken from them even the very corn they had in store for their subsistence. . . .

* * *

. . . I can safely say that there never was a tribe of Indians so completely neglected, and so little cared for than these same Moqui Indians, indeed for some time they seem to have belonged, no where. For several years previous to the creation of Arizona Territory they were not even mentioned in the annual reports of predecessor.

(Ex. DT 20)

Further, the United States not only refused to protect the rights of the Hopi Indians, but aggravated the situation by exerting constant military pressure on the Navajo Tribe. The United States commenced exerting military pressure against the Navajo in the winter of 1846 under Colonel Alexander Doniphan (See Exs. G-22, G-23, G-24, G-205, p. 10). Between 1850 and 1860 large numbers of the Navajo pursued by the United States military forces [Exs. G-57; G-56; G-59; 55 (Hopi), p. 4; G-205, pp. 10, 15; G-22; G-23; G-24; G-31, pp. 540-43; G-137, pp. 31-32; G-95; G-126, p. 107; E-82, p. 69; 656 (Navajo), p. 14; E-568, p. 17; E-51b, pp. 269, 397, 408-474; G-105; 15A (Navajo), p. 4; E-51a, pp. 57, 102, 253; Tr. Ellis 7637, 7639, 7641, 7587; Tr. Schroeder 8152-53, et seq., 8625, et seq.; Tr. Cornell 5617, et seq., 5701, et seq., 5886, et seq., 5899, et seq., 5960, 6221, et seq.; G-18, pp.

95, 362-368; 56 (Hopi); 28 (Hopi); 19 (Hopi), pp. 1, 2, 3; 15 (Hopi), p. 2; E-550, p. 34; E-8, p. 390; E-10, pp. 2, 3; G-135, p. 156; E-51c, pp. 491-494; G-32, p. 718) entered what was then Hopi territory (Exs. E-51a, p. 102; E-550, p. 34), being forced into areas they had not previously occupied (Exs. E-51a, pp. 253, 269; E-51b, pp. 397, 408-474; Tr. Ellis 9065, 9069; E-10, pp. 2,3).

This Commission found in Docket 229 Navajo [23 Ind. Cl. Comm. 244, 262 (1970)] that General Kearney ordered Colonel Doniphan to march against the Navajos on October 2, 1846; Colonel Newby led a campaign against the Navajo in 1848; and in 1951, Fort Defiance was established to check increasing Navajo depredations. The Commission further held that the increasing depredations against the New Mexicans and Pueblo Indians throughout the 1850s and 60s made further action against the Navajo necessary, and that the government under the direction of General Charlton sent Kit Carson to subdue the Navajos in 1863. It is well recognized that many of the Navajos escaped into the Hopi territory. The Hopi Tribe contends that through this military pressure and neglect of the United States this part of Hopi land that the tribe had occupied in 1848 and long prior thereto was gradually taken over by the Navajos until on October 29, 1878 the Executive Order took the Hopi country described in Said Executive Order West of the Meriwether Line and set it apart as an addition to the reservation for the Navajo Indians (Ex. DT 16).

The average date of taking between 1848 and 1878 is 1863. The United States Court of Claims in 1968 determined that in order to avoid burdensome detailed computations it was within the discretion of the Indian Claims Commission to use an average value [Fort Berthold Reservation v. United States, 390 F.2d 686, 700, 701 (1968)]. The Fort Berthold decision

cited as its authority Creek Nation v. United States, 302 U.S. 620, 622 (1938). The Supreme Court had held:

A fair approximation of average of values may be adopted to avoid burdensome detailed computation of value as of the date of disposal of each separate tract.

We acknowledge that in this case the problem is one of average dates of taking rather than average values. However, this matter has already been considered by this Commission in The Creek Nation v. United States of America, 21 Ind. Cl. Comm. 278, 287 (1967). There this Commission held:

It may be argued that "an average of values" is different than an average evaluation date. However, in this case it appears to be a distinction without a difference. It would be difficult to get an "average of values" in a literal sense, and still avoid the "burdensome detailed computation of value as of the date of disposal of each separate tract."

In our case the taking commenced as of the time the United States acquired jurisdiction over the territory in 1848 when it drove Navajos into the area and failed to protect the Hopi Indians. While it would be exceedingly difficult to determine just how much of the territory was taken by the westward movement of the Navajo at any particular time, the fact that the taking of the entire area here under discussion was completed when the Executive Order in 1878 added the land to the Navajo Reservation is beyond dispute. The reasoning of this Commission, the Court of Claims and the Supreme Court of the United States gives a practical solution to this complex problem by allowing an average date of taking or average evaluation date.

AREA D: The area West of the Meriwether Line and contained within the Executive Order of January 6, 1880.

The evidence as set out in the preceding Area C of this memorandum

applies with equal force to the land within the Executive Order of January 6, 1880 and West of the Meriwether Line, excepting the fact that the United States did not complete the taking of this tract until 1880 when an additional executive order added it to the Navajo Reservation (Ex. DT 17).

Dr. Euler reported in the Havasupai Case, Docket 91, that in 1858, ten years after the sovereignty of the United States attached to this area, Lieutenant Joseph C. Ives came East through the Hopi villages and saw no Navajo Indians until he had passed through the villages. Dr. Euler was of the opinion that the eastern neighbors of the Havasupai were Hopi (Ex. DT 21). Dr. Ellis, witness for the defendant in this case, estimated that Ives first saw Navajo Indians and their flocks East of Steamboat Springs which is only 9 miles West of the Meriwether Line (Tr. Ellis 7533, et seq., 9390).

Petitioner's contention that the average date of taking under this heading should be the average date between 1848 and 1880, or 1864, cannot be far afield under this evidence. The authorities cited under the preceding Area C of this memorandum are the same authorities relied upon under this section for arriving at such average date. The gradual taking or taking by degrees of Indian lands by the United States is not foreign to this Commission. In the Uintah Ute Case [8 Ind. Cl. Comm. 620, 641 (1960)], in passing upon a compromise settlement, the opinion indicated:

The theory of our interlocutory order was that the defendant actually took parts of the area in question from time to time. When and how much were facts to be determined in hearings which have never been held.

In view of such a situation we think we should in this proceeding, assume that if the case were litigated to a conclusion, that the plaintiffs would recover the surface and sub-surface value of the said 6,369,280 acres based on one or more taking dates beginning with February 23, 1865, and ending with the last taking. Ordinarily the later the

taking date the higher the market value of the lands would be.

AREA E: That area West of the Meriwether Line and contained within the Executive Order of January 28, 1908.

There is no evidence to indicate that the Navajo westward penetration in this area was any different than it was in Areas C, D and in Area F as will subsequently be considered. However, the reason for making this a separate area is that it was contained within the Executive Order of January 28, 1908, creating a different final taking date (Ex. DT 19). The Executive Order of November 9, 1907 withdrew the area described therein from sale and settlement and set it apart "for the use of the Indians as an addition to the present Navajo Reservation." (Ex. DT 18). The description contained within that order was erroneous in that it covered lands not intended to be covered and did not have a proper closing. Therefore, the Executive Order of January 28, 1908 was issued as a corrective order. Under that order the lands described therein, West of the Meriwether Line, took the Hopi territory that was definitely held by them in Indian fashion in 1848 and long prior thereto. The 1908 Executive Order purported to amend the description of the tract set apart as an addition to the Navajo Reservation.

It will be noted that in the Executive Order of 1907, the addition to the Navajo Reservation carried a proviso as follows:

That this withdrawal shall not affect any existing valid rights of any person.

The Act of July 27, 1866 (14 Stat. 292, Sec. 3, p. 294)

[G]ranted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation

of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections of land per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, . . .

There were other provisions that make little material difference to the present consideration which we will not discuss at this point. Patents were issued to the successor Santa Fe Pacific Railroad Company, an example of which is set out in Ex. DT 22. Without encumbering the record for reasons hereinafter stated, it appears that, commencing on the 22nd day of August 1910 and ending on the 20th day of June 1929, the Santa Fe Pacific Railroad Company, by successive deeds, conveyed to the United States of America, land within the boundaries of this Executive Order. In each deed a statement is made that the grantor

has agreed to relinquish said land to the United States of America, and to select in lieu thereof nonmineral, surveyed public lands of equal area and value and situate in the same State, as provided for by the Act of Congress approved April 21, 1904 (33 Stat. 211).

An example of such conveyances is set forth in Ex. DT 23.

It has been held by the Supreme Court of the United States that where the right of occupancy of an Indian Tribe is not extinguished prior to the date of definite location of a railroad to which land has been granted subject to encumbrances of Indian title, the railroad takes the fee subject to the encumbrance of Indian title, the railroad's title attaching as of the date of the grant. [Buttz v. Northern P. R. Company, 119 U.S. 55, 30 L.Ed. 330, 7 S.Ct. 100 (1886); United States v. Santa Fe Pacific Railroad Company, 314 U.S. 339, 347, 86 L.Ed. 260, 62 S.Ct. 248 (1941)].

In the presently considered situation the lands were ultimately returned to the Federal Government. Petitioner does not contend that patent selection and later release or reconveyance constitutes a compensable taking [Yakima Tribe v. United States, 5 Ind. Cl. Comm. 636, 637 (1957); 158 Ct. of Cl. 672 (1962)]. In view of the law in this regard, we have felt it unnecessary to make further reference as to the patents and deeds to and from the railroad company. The incidents concerning the railroad are of no significant effect except as they may form a part of the government's intention to ultimately divest the Hopi Indians of title to this land. The controlling factor being the creeping usurpation commencing in 1848 and the ultimate taking in 1908. Thus the practical solution to the extinguishment of title to this area lies in the same category as detailed under Areas C and D. Here the average date of taking is 1878.

AREA F: Commencing at the Southwest Corner of the Executive Order Reservation of January 28, 1908, thence East on the South line of said Executive Order to a point where the same intersects the Meriwether Line, thence South on the Meriwether Line to the confluence of the Zuni and Little Colorado Rivers, thence Northwesterly down the Little Colorado River to its intersection with the township line common to Townships 20 and 21 North, G. & S. R., B. & M., thence East along said township line to point of beginning.

Lieutenant L. Sitgreaves was ordered by the United States to see whether the Zuni and the Little Colorado Rivers were navigable to the sea. He passed down the Zuni to the Little Colorado in 1851 (Tr. Reeves 7927, et seq.), then followed the Little Colorado to Grand Falls, concluding that the venture was quite impossible. He then cut North of the San Francisco Mountains and West to California [Ex. E-500, p. 5; Tr. Reeves 7822, et seq.; Ex 61 (Hopi); Ex. G-1, p. 6]. It will be noted that Sitgreaves followed the line claimed by the Hopis as the southern line of its aboriginal territory. At that time,

in 1851, Sitgreaves' map placed the Navajos Northeast of Fort Defiance [Ex. 61 (Hopi); Ex. G-1; Ex. R-19; Ex. G-228 (Map by Eastman)]. The lieutenant further reported that the Moqui, at that time, had over 10,000 acres of corn under cultivation, as well as some cotton (Ex. G-1, p. 6; Ex. E-543, p. 53).

In 1853 Lieutenant A. W. Whipple crossed Arizona near the 35th parallel, which centrally traverses the area now under consideration, for the purpose of making a preliminary survey for a railroad route to California (Ex. E-500, p. 5; Tr. Reeves 7927, 28). It is interesting to note that Whipple attempted to obtain Moqui guides who were supposed to have a knowledge of the region, but was unsuccessful because of smallpox among the Moqui (Ex. G-10, pp. 66, 67, 72 and 75). The Navajo country was described as bounded on the West by Moqui (Ex. G-10, p. 119). The Navajo country in Whipple's time included areas that are East of the Meriwether Line (Ex. G-10, p. 13).

Governor Meriwether's conclusions in 1885 have heretofore been fully discussed.

In 1857 E. F. Beal, then Superintendent of Indian Affairs for California, followed the general course of Whipple's route South of the San Francisco Peaks, approximating the present route of the Santa Fe Railroad, introducing camels, as well as mules and wagons, into his train in an experiment on their adaptability to the Southwest terrain (Ex. E-500, p. 5; Ex. R-21, p. 39; Ex. G-151; Tr. Reeves 7928, 29). No Navajos were reported further West than Jacob's Well except for a few at Navajo Springs in the southern end of the Hopi claims area, but the Moquis were reported to be to the northwest (Ex. R-21, p. 39, 40, 84; Ex. G-151).

As shown in Ex. DT 21, Lieutenant Ives, in 1858, made an expedition which supports the proposition that the Meriwether Line was the East line of the Hopi territory at that time. He first found Navajos not more than 9 miles West of that line.

This Commission in the Navajo claim, Docket No. 229, has held that a good portion of this area was held by the Navajos in 1868 and that the western portion of this area was held by the Hopis in 1882. While we do not agree with the Commission that the Navajos had been in this territory a sufficient length of time for their aboriginal title to take root since the Hopis exclusively occupied this area in 1848, nevertheless, the relative findings of the Commission indicate the westward movements of the Navajos.

We further, for reasons reiterated at a later place in this memorandum, disagree with the Commission's finding that the Hopi area on the West side of this tract was taken in 1882 because of the establishment of the Executive Order Reservation of December 16, 1882, but we have concluded that the final taking was somewhere near that date since our records reveal that the first patent was issued to a non-Indian in 1883. We have not introduced in evidence the homestead patents, railroad grant patents, railroad lieu selections, or other indications of conveyance from the United States since they are all later than the date petitioner contends the land was taken from the Hopi Tribe. Area F differs from Area E in that the Navajo taking in Area F preceded the later non-Indian use in that area, while the Navajo taking in Area E was followed by the annexing of the territory to the Navajo Reservation. The United States patents to the Santa Fe Pacific Railroad Company contained the following whereas clause:

Whereas, official statements bearing dates, December 17, 1880, April 19, 1881, January 7 and December 16, 1882, and November 3, 1883, have been filed in the General Land Office, showing that the Commissioners appointed by the President, under the provisions of the fourth section of said Act of Congress, approved July 27, 1866, have reported to him that the line of said railroad and telegraph from a point in township eight north, range two east, Territory of New Mexico, and ending at a point on the west bank of the Colorado River, in the State of California, has been constructed and fully completed and equipped in the manner prescribed by the said Act of Congress; and

It is general public knowledge that the coming of the railroad was the opening of a new non-Indian era in this part of the country, as it was in other places. Where the Navajo had taken from the Hopi, it was the Navajo who suffered the pressure from non-Indian expansion. But there is no substantial reason for contending that the average date of taking in Area F is different than in Area E. Petitioner, therefore, asserts that the average date of taking in Area F was 1878.

AREA G: Commencing at the Northeast Corner of the Executive Order of May 17, 1884, thence East on the Arizona-Utah State Line to a point where said line intersects the Meriwether Line, thence North on the Meriwether Line to the San Juan River, thence following down the meandering of the San Juan River and the Colorado River to a point where the Colorado River intersects the Utah-Arizona State Line, thence East on the Arizona-Utah State Line to the point of beginning.

While the Commission is not bound to accept the opinion of experts, the opinion of a person who makes a thorough and scholarly study of a problem is entitled to be given weighty consideration, particularly when all of the exhibits in this case have been made available to him and he has been made subject to cross examination by adverse counsel. Dr. Eggen, witness for the petitioner, Hopi Tribe, testified:

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.
(Eggan, Tr. 7429)

This type of use is typical Indian use which has consistently been held by this Commission to constitute Indian occupation. See Quinaiet v. United States Cases, 7 Ind. Cl. Comm. 1, 29 (1958), 7 Ind. Cl. Comm. 31, 60; Samish v. United States, 6 Ind. Cl. Comm. 159, 173 (1958); California v. United States, 8 Ind. Cl. Comm. 1, 36 (1958); Mitchell v. United States, 34 U.S. (9 Pet.) 711, 745 (1835).

Dr. Schroeder's map, introduced as Ex. S-807 in Docket 229 for the government, indicated no Navajo territory in Area G now under consideration as of 1848. Dr. Reeve, another witness for the government, who was more charitable to Navajo westward movement as of 1848, did not place the Navajo territory in Area G (Docket 229, Ex. R-180). Dr. Ellis' map indicates a line between the Navajo in this area slightly West of the Meriwether Line (Docket 229, E-100). Charles Petrat, in Docket 196, placed the line in this area East of the Meriwether Line based upon tradition of the Hopi Indians and agreement between the Navajo and Hopi Tribes (Tr. Pitrat 9644-5, 9678-80, 9693). The testimony of these expert witnesses undoubtedly employs the natural and reasonable hypothesis that natural boundaries establish aboriginal boundaries because evidence indicates the Indians do not go beyond, but merely to the edge of rugged country [Puyallup Tribe of Indians v. The United States, 17 Ind. Cl. Comm. 1, 17 to 20 (1966); Nez Perce Tribe of Indians v. United States, 8 Ind. Cl. Comm. 1, 130 (1967)]. The Hopi

were using as their country, as of 1848, the lands in Utah South of the San Juan River, North of the Arizona border, and West of the Meriwether Line.

The land in Area G was never set aside by an Executive Order, but the major portion thereof was unequivocally made a part of the Navajo Reservation by the Act of March 1, 1933 (47 Stat. 1418; Ex. DT 24). We have before drawn to the attention of this Commission that at the time Kit Carson pursued the Navajos, some of them escaped into the McCracken Mesa District within this area. They were not escaping to their home, but they were escaping to places they were not accustomed to inhabit in order to evade the pursuing soldiers of the United States Army. It is not denied that after the return of the Navajos from Bosque Redondo, the Navajos began to make more extensive use of this area until Hopi use became incompatible. Again we have a situation of the impossibility of determining the exact date the taking occurred since it was a gradual taking from 1848 until the time the United States Congress added the last of the territory to the Navajo Reservation. It is, therefore, contended that the date of taking in this area was 1890.

AREA H: The areas contained within the Tusayan National Forest East of the Colorado River, and the Little Colorado River.

Since these areas were taken subsequent to 1882 and are outside of the area awarded to the Hopi Tribe in the judgment of this Commission under Docket 196, the position of the tribe is stated for purposes of clarification and to perfect its record on appeal. The petitioner claims that this area was taken by Presidential Proclamation of February 20, 1893 (Ex. DT 25) and June 28, 1910 (Ex. DT 26). The taking of Indian aboriginal lands for

forestry purposes is a compensatory taking [Tlingit and Haida of Alaska v. United States, 147 Ct. Cl. 315, 177 F.Supp. 452 (1959); 182 Ct. Cl. 130, 389 F.2d 778 (1968)].

AREA I: The area contained within the Act of June 14, 1934 (48 Stat. 960) and West of the Meriwether Line excepting Areas A, B, C, D, E and H.

The Act of June 14, 1934 (48 Stat. 960, 961) provided:

All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. (Ex. DT 27)

From the foregoing language of the act we must conclude:

1. That the Act encompasses all of the specified land "within the boundaries defined by this Act."

It will particularly be noted that within the boundary thus delineated are situated the December 16, 1882 Executive Order lands, "withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui (Hopi), and such other Indians as the Secretary of the Interior may see fit to settle thereon."

2. That the above described lands were withdrawn "for the benefit of the Navajo and such other Indians as may already be located thereon." In other words, the above described lands were withdrawn for the Navajo and such other Indians as were then (June 14, 1934) already located within the boundaries defined by the Act.

There can be no serious dispute concerning the fact that Hopi Indians were then already located thereon. The village of Oraibi, has existed in its present form for at least 1100 - 1150 A.D., giving rise to claims that Oraibi

is the oldest continually inhabited village in the United States (Ex. G-144, p. 10; Ex. E-574, p. 69). In 1582 Antonio de Espejo, a Spanish merchant from New Mexico, organized an expedition that eventually took him through Zuni and on to the Moqui country where he visited Awatovi, Walpi, Shungopovi, Mishingnovi, and Oraibi (Ex. E-500, p. 1; Ex. E-524, p. 20). Oate, who had been sent in 1598 to the Moqui to gain submission of the Moqui Indians to Spain and the Catholic Church, saw the Moqui farms at Moenkopi in 1604 (Ex. E-510, p. 46). It is common knowledge that all of the presently existing Hopi villages were inhabited by the Hopi Indians in 1934.

Thus we see that all of the Hopi villages were included within the area in question at the crucial time. Associate Solicitor, Richmond F. Allen, accurately analyzes the situation in the following language:

It is beyond question that Hopi Indians resided in the area defined by the Act at the time of its passage. The history of the Act discloses beyond quibble that Congress recognized this fact and included the "other Indians" provision for the express purpose of protecting Hopi rights. (Ex. DT 28).

Since all of the Hopi villages were included within the described area the Act in effect permanently withdrew the lands for the benefit of the Navajo and Hopi Indians. There is no provision in the Act that any of the Indians of the area should be confined in their use and benefit to the area of lands they were then occupying and using.

The language of the Act, as above analyzed, is modified by inclusion of a phrase after the semi-colon as follows:

However, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive Order of December 16, 1882. (Ex. DT 27).

Scrutiny of the modification logically leads to these conclusions:

- (a) The 1882 Executive Order Reservation was not excluded from the description of the land withdrawn for the

benefit of the Indians specified in the Act.

If the Congress had withdrawn the described lands, except the 1882 Executive Order Reservation, a large number of the Hopi Indians would not have been "located thereon." However, by leaving the 1882 Reservation within the description and providing that its status should not be affected, Congress unequivocally included the Hopis in the villages of the Executive Order among "other Indians as may already be located thereon." Status is defined as the condition or position with regard to law. The existing status is the status quo; thus, we see that the condition or circumstances in which the Hopi Indian within the 1882 Executive Order Reservation stood at that time with regard to their property remained unchanged. Later the Act of July 22, 1958 provided the means to determine the rights and interests of the Navajo Tribe, Hopi Tribe and individual Indians to the area set forth in said Executive Order (72 Stat. 402). Those rights were adjudicated by the United States District Court for the District of Arizona in the case of Healing v. Jones, supra. [Ex. 78 (Hopi)].

- (b) The beneficiaries of the Act of June 14, 1934 remained unchanged by the modification.

While there is no doubt that the Executive Orders embraced within this area were intended to accommodate Navajo Indians, the language to protect the rights of the Hopi people was specific. The Executive Order of May 17, 1884 (Ex. DT 29) was "withheld from sale and settlement and set apart as a reservation for Indian purposes." The Executive Order of January 8, 1900 (Ex. DT 30) provided that the lands described be "withdrawn from sale and settlement until further ordered." The Executive Order of November 14, 1901 (Ex. DT 31) provided that the lands described therein be "withdrawn from sale and settlement until such time as the Indians residing thereon shall have been settled permanently under the provisions of the

homestead laws of the general allotment act, approved February 8, 1887 (24 Stat. 388), and the act amendatory thereof, approved February 28, 1891 (26 Stat. 794). Withdrawal for the Navajo alone is conspicuously absent.

The Act of July 12, 1960 (Ex. DT 32) resulted from the introduction of duplicate bills in the Senate and House (S. 2322 and H.R. 8295) (Ex. DT 33). These bills were introduced for the purpose of authorizing the Secretary of the Interior to transfer to the Navajo Tribe all of the right, title and interest of the United States to any irrigation project works constructed by the United States within the Navajo Reservation and for other purposes. When the Hopi learned that these bills were before Congress for consideration, and after the Interior Department had made favorable reports upon the Legislation, they objected that this would be in direct opposition to the rights of the Hopi Indians within the 1934 Reservation. As a result of that objection the bills were amended to include the exception "except the Reservoir Canyon and Moenkopi-Tuba Project works" (Ex. Dt 34; Ex. DT 35; Ex. DT 36; Ex. DT 32). The framers of the bill were very careful to avoid any implication of a determination of the rights of the parties as between the Hopi and Navajo Tribes. Two other exceptions in the bill exemplify this point. It was provided "that exclusion of Reservoir Canyon and Moenkopi-Tuba project works from the scope of this Act shall not be construed to affect in any way present ownership of or rights to use the land and water thereof." This was left for later determination. Section III of the Act, also in a precautionary manner, provided "the transfer to the Navajo Tribe pursuant to this Act of any irrigation project works located in whole or in part within the boundaries of the reservation established by the Executive Order dated December 16, 1882 for

the use and occupancy of the Moqui (Hopi) and such other Indians as the Secretary of Interior may see fit to settle thereon shall not be construed to affect in any way the merits of the conflicting claims of the Navajo and Hopi Indians to the use or ownership of the lands within said 1882 Reservation." In this manner, any implication of a determination of the rights of either tribe to the Executive Order Reservation or the Hopi rights in the 1934 Reservation was studiously avoided.

The continual Hopi interest in this area has had recent official recognition (Ex. DT 14, Ext. DT 37), and the Hopi Tribe has received monetary consideration for the granting of rights of way within the area (Ex. DT 38; Ex. DT 39). Historical records are replete with evidence that the Hopi Tribe was never restricted to the 1882 Executive Order Reservation after the issuance of that order (Ex. DT 40; Ex. DT 41; Ex. DT 42; Ex. DT 43; Ex. DT 44; Ex. DT 45). Hopi activity outside of the Executive Order Reservation of 1882 and within this area is amply illustrated, continuously, years before the establishment of the Hopi Executive Order Reservation (Ex. DT 46; Ex. DT 47). A careful examination of the documents pertaining to the establishment of the 1882 Reservation reveals no indication on the part of the government to confine the Hopis within that area [Ex. 78, pp. 114-120 (Hopi)]. Depredations against the Hopi continued after the establishment of the reservation and the government neglected to perform its duty in protecting the Hopi (Ex. DT 48; Ex. DT 49; Ex. DT 50; Ex. DT 51; Ex. DT 52; Ex. DT 53; Ex. DT 54; Ex. DT 55; Ex. DT 56; Ex. DT 57; Ex. DT 58; Ex. DT 59; Ex. DT 60; Ex. DT 61; Ex. DT 62; Ex. DT 63; Ex. DT 64; Ex. DT 65; Ex. DT 66; Ex. DT 67; Ex. DT 68; Ex. DT 69; Ex. DT 70; Ex. DT 71; Ex. DT 72; Ex. DT 73; Ex. DT 74; Ex. DT 75; Ex. DT 76; Ex. DT 77; Ex. DT 78; Ex. DT 79).

The Hopi Tribe contends that the entire area designated as Area I

was possessed aboriginally in 1848 by the Hopi Indian Tribe, thereby securing Indian title to the area; that by the enactment of the 1934 legislation a Navajo one-half interest was imposed upon that area, but reserving and continuing the other one-half interest for the Hopi Tribe. We employ the reasoning in Healing v. Jones [Ex. 78, pp. 224 and 228 (Hopi)] where each tribe was adjudged to have an undivided one-half interest when the Navajo Tribe was settled in the Hopi 1882 Executive Order Reservation. This Commission has similarly held in Uintah Ute Indians of Utah v. United States, [8 Ind. Cl. Comm. 620, 644 (1960)] that the Uintah Utes:

. . . were entitled to, and were in the rightful and exclusive possession of the Uintah and Ouray Reservation lands in the Uintah River Valley in the then Territory of Utah and that the defendant in placing the Band of White River Utes thereon, without the consent of the plaintiffs, and without compensating them therefor, is liable to plaintiffs for the value of an undivided one-half interest in the lands of said reservation.

Therefore, in 1934 an undivided one-half interest in Area I was taken from the Hopi Tribe and given to the Navajo Tribe with the exception of the checkerboard sections South and West of the 1882 Executive Order Reservation which were taken prior thereto for the railroad by virtue of the Act of July 27, 1866 (14 Stat. 292) and ultimately conveyed to the defendant in trust for the Navajo Tribe pursuant to the Act of June 14, 1934, supra. Exact dates of taking of the railroad sections cannot be determined without exceedingly burdensome research and computations. The Santa Fe Pacific Railroad Co. (Ex. DT 80), the New Mexico and Arizona Land Co. (Ex. DT 81), the A & B Schuster Co. (Ex. DT 82) and other corporations and individuals all conveyed railroad sections within Area I to the United States in trust for the Navajo Tribe pursuant to the Act of June 14, 1934, supra. The precise dates of taking, depending upon loss of Indian use and control by the

railroad and its successors, raises questions of fact almost insurmountable, invoking a practical averaging between 1848 and 1934. The petitioner asserts that the average date of taking in the railroad lands was 1891.

Reference by the Commission to some 1800 Hopi Indians in paragraph 18 of its Findings of Fact (23 Ind. Cl. Comm. 277, 304), is probably taken from the letter of Superintendent Fleming under date of December 4, 1882 where he reported some 1813 Hopi souls [Ex. 78, p. 118 (Hopi)]. It is not clear from this letter whether this number includes the Hopi Indians outside of the Executive Order area and particularly the Moencopi Hopi. However, it is probable that it does not, since Centerwall's report indicated there were about 1800 Hopis and a few hundred Navajos living within the recommended boundaries of the proposed reservation at the time [Ex. 78, p. 117 (Hopi)]. Other reports indicate that the Hopi population in 1852 was 8000 (Ex. E-500, p. 38; Ex. E-224, p. 15), that in 1853-54 a decrease took place due to smallpox. The population was then estimated at 6720 (Ex. E-500, p. 38; Ex. E-524, p. 15). Further smallpox disease took its toll and, in 1869, the Hopi population was reported as 4000 (Ex. E-524, p. 15; Ex. G-37, pp. 20, 91, 460; Ex. E-500, p. 38). While population estimates during this period of time undoubtedly were generally unreliable, there were always sufficient Hopis to utilize in customary Indian fashion the area claimed by the Hopi Tribe until its taking. In the case of the Seminole Indians v. United States (13 Ind. Cl. Comm. 226, 363), the Commission rejected the suggestion that use and occupation must be determined by the low tide of Indian population when there were Indians thinly spread through the area claimed. While the facts are not identical, the analogy is persuasive since the Hopis did not lose the exclusive possession of the area until the

Navajos completed their westward push as hereinbefore illustrated. See Mescalero Apaches v. United States, 17 Ind. Cl. Comm. 100, 159 (1966).

The area occupied by the Hopi Indians is not dissimilar to the area inhabited by the Hualapai Indians to the West. This Commission found in the Hualapai Case that:

The Hualapai Indians in aboriginal times were barred by the very nature of the lands they used and occupied to make extensive, rather than intensive, use of the land and thus, in general, lived thinly distributed over a relatively sizable area. The pre-conquest Hualapai population numbered about 1000, and the country inhabited could not support any greater population under then existing conditions. Hualapai Tribe v. United States, 11 Ind. Cl. Comm. 447, 450 (1962).

Likewise, the area to the Southeast is of like character and was found by this Commission to be incapable of supporting a large population:

In aboriginal times the Mescalero Apache obtained from their territory a meager existence. . . . It was therefore necessary for them to continue to use these vast areas of land which, without due consideration of the relationship of their necessities to the existent geographic availability of resources might seem disproportionate to their population.

The Mescalero Apache Tribe v. United States, 17 Ind. Cl. Comm. 100 at 159 (1966).

Another finding of this Commission is helpful because of its reasoning, the geographic proximity of the lands considered, and the Navajo Tribe as a common adversary:

In finding that the Pueblo of Acoma exclusively used and occupied the area described in Finding 32 herein, much of which is also claimed by the Navajo petitioner in Docket 229, we have recognized that the significance of much of the evidence is in dispute. However, it seems clear to us from the many different kinds of evidence which has been presented in this case that the Acoma Indians were in the general location of the claimed area for centuries prior to the arrival of the Navajo, that Acoma use of this area was widespread, and that they did not voluntarily abandon lands which they had used from early times, but on the contrary, whenever they were forced to restrict their land usage because of drought, disease, raids by other Indian tribes or other outside factors, they re-asserted control of these areas as soon as they could.

Assuming that the Navajo were present at times in some of the recovery area, such presence therein is not inconsistent with the exclusive use and occupancy of such area by the Pueblo de Acoma. The recovery area was the ancestral home of the Pueblo de Acoma.

Pueblo de Acoma v. United States, 18 Ind. Cl. Comm. 154, 236, 237 (1967).

CONCLUSION

Lest the true perspective of the issues be lost in the maze of specifics, let us remember that the three judge court in Healing v. Jones, with multitudinous exhibits and a solid month of trial, found that:

Before 1300 A.D., and perhaps as far back as 600 A.D., the ancestors of the Hopis occupied the area between Navajo Mountain and the Little Colorado River, and between the San Francisco Mountains and Luckachukas.

Ex. 78, p. 109 (Hopi)

and that:

From all historic evidence it appears that the Navajos entered what is now Arizona in the last half of the eighteenth century.

Ex. 78, p. 111 (Hopi)

The true burden of this Commission is to determine how much of, and at what times, the Hopi territory was taken by the United States, by the Navajo Tribe under the military pressure of the United States, and as a result of the failure of the United States to protect the friendly Hopi Indians. The petitioner, the Hopi Tribe, submits the westward movement of the Navajo resulted in dates of taking in the areas as depicted in Appendix A, and as described in this memorandum, as follows:

AREA A: No claim that this area has been taken by the defendant.

AREA B: An undivided one-half interest in this area was taken on June 2, 1937 when the Navajo Tribe was settled on the Hopi Reservation.

AREA C: The average date of taking of this area was 1863.

AREA D: That the average date of taking of this area was 1864.

AREA E: That the average date of taking of this area was 1878.

AREA F: That the average date of taking of this area was 1878.

AREA G: That the average date of taking of this area was 1890.

AREA H: This area was taken on February 28, 1893 and June 28, 1910, as described in Presidential Proclamations (Ex. DT 25 and Ex. DT 26), respectively.

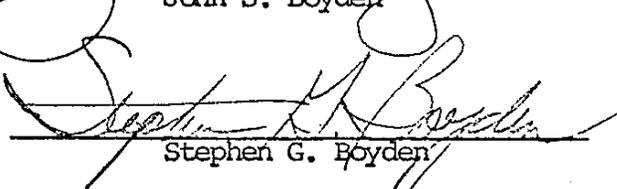
AREA I: This area was taken in 1934 with the exception of the checkerboard railroad sections South and West of the 1882 Executive Order Reservation which were taken prior thereto on the average date of 1891.

These calculations from historical documents find vindication and support in the Smithsonian Miscellaneous Collection, Vol. 100, Fig. 32, depicting "Navajo Limits at Different Dates" [Ex. 67 (Hopi), reproduced and attached to this memorandum as Appendix "B" for ready reference.]

Buoyed by the knowledge that its claim is substantiated by fact and equity the Hopi Tribe respectfully submits its case on dates of taking.

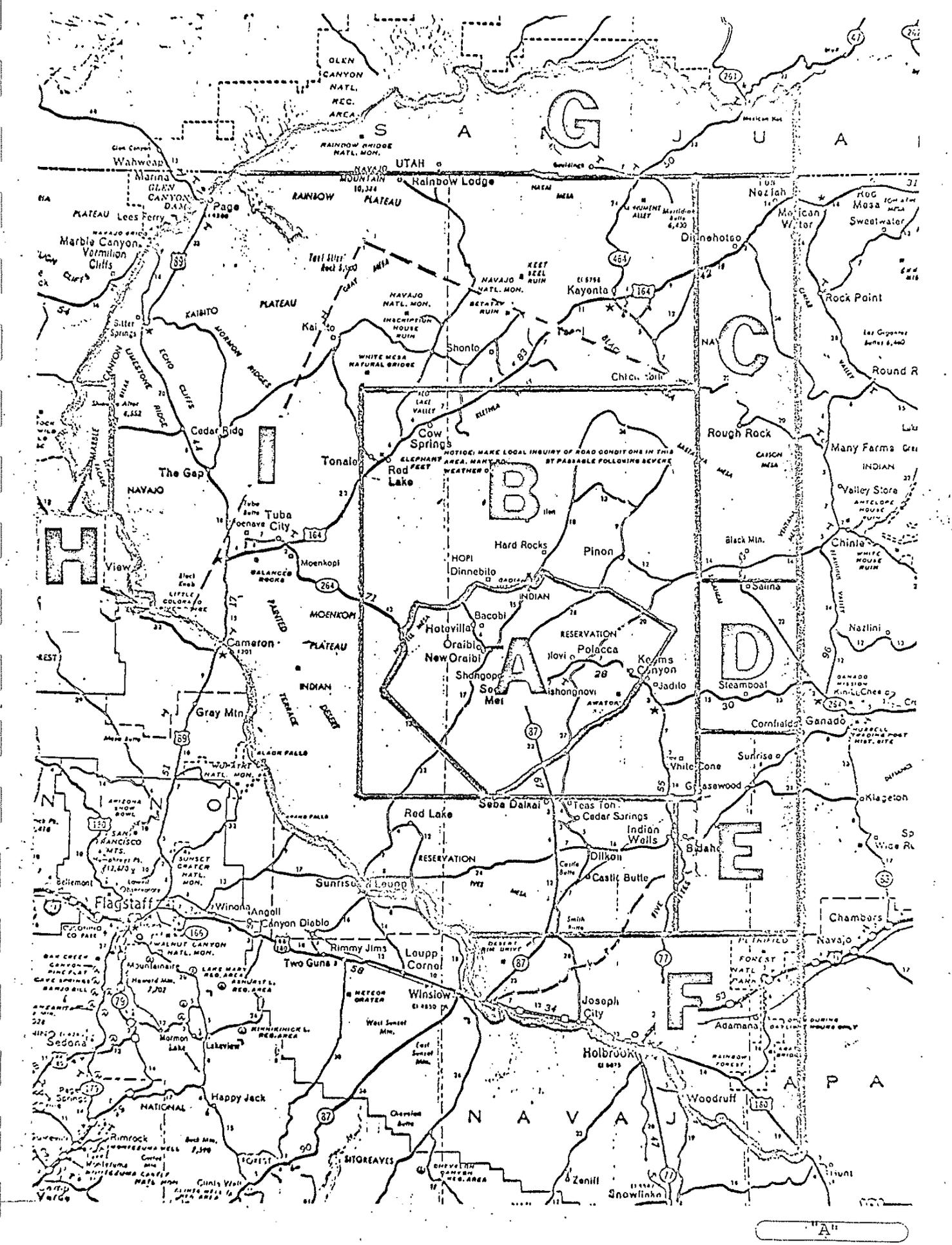


John S. Boyden



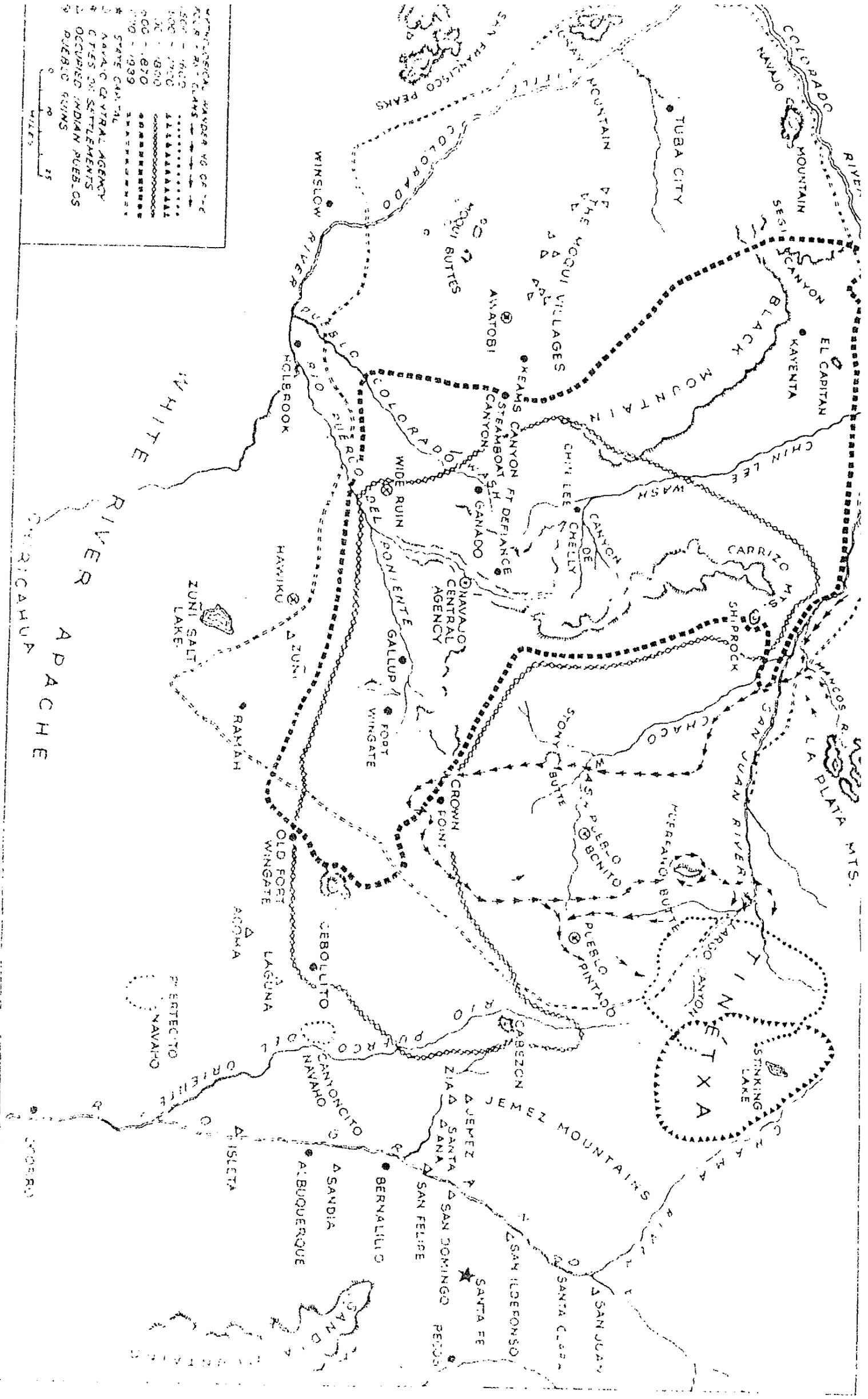
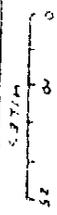
Stephen G. Boyden

APPENDIX



10 Miles

* STATE CAPITAL
 * NAVAJO CENTRAL AGENCY
 * TIES OF SETTLEMENTS
 * OCCUPIED INDIAN PUEBLOS
 * PUEBLO RUINS



CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of August 1971 copies of the Hopi Tribe's, the Hopi Tribe, Memorandum with Points and Authorities regarding Allegations as to the Date or Dates of Taking Pursuant to the Order of This Commission Dated the 2nd Day of June 1971 and List of Exhibits Submitted by Hopi Tribe, Petitioner in Docket No. 196, Pursuant to Order No. 503.23(4) and the Order of the Indian Claims Commission Dated August 10, 1971, and copies of Exhibits DT 1 to DT 82, were mailed to the following attorneys as indicated below.

Honorable John N. Mitchell
Attorney General of the United States
Washington, D. C.

Attention: Mr. William F. Smith
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