

1 will go ahead and I will then number this map the next plain-  
2 tiff's exhibit for identification.

3 JUDGE HAMLEY: We needn't wait for that numbering now,  
4 give us the identification of the map and the Clerk will give  
5 it a proper number.

6 MR. LITTELL: That is what I meant to convey, go ahead  
7 with the map, and I offer this as the next plaintiff's exhibit  
8 to be marked by the Clerk for identification with the next  
9 succeeding number. This map, in order to identify it, I will  
10 read the legend; "Navajo-Hopi Problem Base Map. Map compiled  
11 during December 1958 and January 1959 from a mosaic of nine  
12 Arizona State Highway Department Maps covering portions of  
13 Apache, Navajo and Coconino Counties; corrections and the  
14 addition of place names by Benny B. Robbins, Draftsman, under  
15 the supervision of J. Lee Correll." And the legend on the  
16 other side.

17 JUDGE HAMLEY: I think you have given enough to identify  
18 it. That will be given the next succeeding number.

19 THE CLERK: It will be Defendant's Exhibit 240.

20 MR. LITTELL: This map showing identified hogan groups  
21 reflects what is in the archeological report, Part 1, called  
22 Navajo Site Report which I now offer for identification to  
23 bear the next number.

24 JUDGE HAMLEY: Be Defendant's 241.

25 MR. LITTELL: The same statement goes for Part 2, which

1 the area of Hopi established historic, actual and legal occu-  
2 pancy is and we do prove occupancy elsewhere, both by document-  
3 ary proof, archeological and other physical proof, some of  
4 which, in view of the contentions now made by counsel, contend-  
5 ing to the whole area, will be supplemented. We are not quite  
6 through with that body of proof.

7 JUDGE YANKWICH: Mr. Littell, it is my understanding  
8 that it is stipulated there has been no allotment.

9 MR. LITTELL: That is correct.

10 JUDGE YANKWICH: In the case of the Navajo there is both  
11 individual occupancy and then there are common law.

12 MR. LITTELL: You mean the hogan proof?

13 JUDGE YANKWICH: Hogan. Then they have lands they  
14 cultivate in common and go down and do that. I think the  
15 Congress in using "use and occupancy," must have had that in  
16 mind, that the hogan is a particular piece where the Indian  
17 and his family resided. The use is other lands which are used  
18 for common law purpose, such as commonly planted lands, and  
19 so on and so forth in their economy. I am just drawing on my  
20 general knowledge in asking this question, so as to raise the  
21 question of whether the word -- Congress knowing of this situ-  
22 ation, that an Indian might occupy a plot of land where he has  
23 his home and his garden and might use in common with others,  
24 a large tract which he helps plant and cultivate --

25 MR. LITTELL: And graze.

1 MR. BOYDEN: That is correct. That is the only thing I  
2 am trying to steer away from.

3 JUDGE HAMLEY: May I inquire of the defendants if "use  
4 and occupancy" is the only test or is that only one of the  
5 factors to consider in settling it?

6 MR. LITTELL: Your Honor, bearing in mind that we have  
7 first eliminated the other form by stipulation, allotment.  
8 So we are asking the phrase "use and occupancy" as, I dare say  
9 Your Honor's opinion did, as an accepted terminology in the  
10 description of Indian occupancy of tribal title, or short of  
11 the trust title which goes with the allotment. We will bridge  
12 the gap from "use and occupancy" to show the character of the  
13 interest as one which was recognized, sanctioned and approved  
14 by the Secretary of Interior.

15 JUDGE YANKWICH: Couldn't that be clarified by adding  
16 Sub-section (d) that the use of this terminology shall not be  
17 considered restricting the word "interest" as used in the  
18 statute. Couldn't we do that, in taking both your points of  
19 view, then become a question of interpretation. Otherwise,  
20 counsel will say, and properly, use of the phrase which he  
21 thought was very apt, as used in Judge Hamley's opinion, that  
22 to allow them to show the other, because there can be other  
23 interests. It is diversionary interest and leasehold interest.  
24 All sorts of things can be carved out in a condemnation case.  
25 I keep referring to that, because it contains more analogy to a

1 the identity of the Indians themselves, the name of Maxwell  
2 Yazzi, for instance, is of no consequence if he was a Navajo  
3 or using and occupying the lands or settled, in the Court's  
4 connotation of that word, then his identity as such would not  
5 be material.

6 JUDGE HAMLEY: The defendants are contending that no  
7 individual Navajo has an individual right or interest.

8 MR. McPHERSON: That is correct, Your Honor. Whatever  
9 right or benefit or legal result there may be from individual  
10 Navajo use and occupancy or as the Court says, settlement, in-  
11 ures, in our opinion to the Navajo tribe and not to the indi-  
12 vidual.

13 MR. LITTELL: Might I add to that, Your Honor, if this  
14 question were asked, the Bureau of Census itself, with all of  
15 its skilled employees, would probably take at least two years  
16 to answer it. Unless you accept the theory of tribal occupa-  
17 tion, and there is no other, you are dragged into a controversy  
18 of fact which is entirely unnecessary by asking this question.  
19 If the Court should ultimately reach this conclusion, which it  
20 will not, I state that quite confidently, there are individual  
21 interests involved here; of course you would some day wish to  
22 determine who those individuals are, but this is inconceivable  
23 in the law as it now is.

24 MR. BOYDEN: May it please the Court, the other side of  
25 that, we contend if Navajos have been settled, not conceding

1 JUDGE YANKWICH: I think the entire thing as an abstract  
2 question would not mean anything, because you can't recognize  
3 the right. Either these people are sufficient number to repre-  
4 sent the tribe or they acquired no individual rights. Therefore  
5 that part of 4 is superfluous because it is relating to an issue  
6 we are not called upon to determine. How would we determine  
7 their rights? Would they say a portion of the land is held  
8 jointly, pick out members or individuals who are in joint owner-  
9 ship with your tribe? How could they do it under the statutes?

10 JUDGE WALSH: The title of the bill that raises the  
11 question reads:

12 "To determine the rights and interests of the Navajo  
13 tribe, Hopi tribe, and individual Indians to the area set aside  
14 by Executive Order of December 16, 1882, and for other purposes."

15 JUDGE HAMLEY: It seems to me the rights of the individual  
16 Indians initially was involved; I wonder if it wasn't washed  
17 out as soon as the parties stipulated there were no Indian  
18 allotments. That is, what it seems to me, disposes of any in-  
19 dividual rights.

20 MR. LITTELL: That is precisely correct, Your Honor.  
21 It was washed out -- well, it was put in in the first instance  
22 with the intent of Congress to be comprehensive, if there were  
23 any. When we drafted this Act we didn't know for sure that  
24 there weren't, we thought maybe there were some allotted lands  
25 in here. There doesn't prove to be any, and we can't escape

1 that there are two types of Indian holdings. Mr. Boyden can't  
2 create a third. The Cherokee case that he refers to is not a  
3 case in point. They were moved bodily from one place to another  
4 These Navajos were already there. In the Solicitor's opinion  
5 which he invokes, which is very sound in many respects, as we  
6 all recognize the ability of the author in the manner in which  
7 he subsequently wrote it, Cohen, let me give you one line from  
8 it, after pointing there were eight thousand Navajos west of  
9 the Navajo Reservation, as it then existed. There were eight  
10 thousand Navajos west of the Navajo Reservation and two thou-  
11 sand Hopis. That is inclusive of this area not yet created  
12 until 1882 by Executive Order. We don't know how many of those  
13 were in this specific area. But he says: "The factual situation  
14 delineated above shows clearly, in my opinion, that it was the  
15 intention in creating the reservation to set aside the land for  
16 the use and occupancy of Hopi Indians and for the use and occu-  
17 pancy of Navajos then living there and to permit the continued  
18 settlement of Navajos within the discretion of the Secretary of  
19 the Interior." He couldn't have been more clear in his language.  
20 The only place where Felix Cohen got off in his opinion, and  
21 where we would have to dissent, and dissented in the administra-  
22 tive proceedings of the Department, which are now adjourned and  
23 abandoned in deference to this Court, is that he does use the  
24 language first quoted by Mr. Boyden about joint occupancy. He  
25 was confused by the facts, and there was no field examination

1 point made by counsel, a band of Indians might have acquired  
2 certain rights.

3 JUDGE HAMLEY: But you are not claiming any rights for  
4 less than the whole tribe.

5 MR. LITTELL: We are not. They were already there,  
6 settled for the tribe and I do not wish to leave in the record,  
7 at the risk of digressing a moment, the uncompromised statement  
8 that the letter that counsel read, there were errors on both  
9 sides. And we will in due time overwhelm the Court with evi-  
10 dence of the fact that the Secretary settled the Navajos there  
11 and recognized and acquiesced in it. Even counsel made an  
12 admission tantamount of that when he insists upon the date of  
13 October 24th, 1936, upon the grounds that for the reasons that  
14 the Secretary there held there would be no further settlement  
15 of Navajos.

16 JUDGE HAMLEY: We are not getting into that. Counsel  
17 presented it to show the nature of his proof.

18 JUDGE YANKWICH: If the word "identifiable" is elimin-  
19 ated doesn't that postulate a possibility that the Court might  
20 hold that the tribe as a whole did not acquire rights, but a  
21 certain group. So as to really present a question of law  
22 whether the group was large enough to represent the Navajos.  
23 It doesn't do any harm, but gives us an alternative for the  
24 position, because the Court might find a group was not large  
25 enough to give rights, so that the matter is open for argument.

1           JUDGE YANKWICH: The substitute that Judge Hamley has  
2 drawn avoids that because it avoids the word "individual," it  
3 avoids the requiring of disclosure of the identity. It merely  
4 leaves the question whether the group occupying was representative  
5 enough to have acquired it for the Indians, because we all agree  
6 they did not acquire individual rights. This merely preserves  
7 some of the thoughts counsel may have had in mind without  
8 getting into the pitfall of postulating individual rights.

9           MR. LITTELL: I can see the reasons for the Court's pro-  
10 posing it and it is a great improvement over counsel's question,  
11 and it may be a tenable one. I would like to give it a little  
12 more thought.

13           MR. BOYDEN: May I ask one question. Is it intended  
14 there that would preclude the Court from finding that a band  
15 of Navajos had settled there.

16           JUDGE HAMLEY: It doesn't contemplate such a finding. I  
17 wouldn't say precludes it, but it doesn't contemplate it either.  
18 I will read it again: "Does the showing made as to the physical  
19 presence and activities of the individual Navajo Indians or  
20 bands thereof provide a basis for finding that the Navajo tribe  
21 has been settled thereon."

22           MR. BOYDEN: Would it be objectionable to "Navajo tribe  
23 or a band thereof have been settled thereon."

24           MR. LITTELL: There isn't any such animal.

25           JUDGE YANKWICH: You say yourself, you with all your

1 knowledge assume the individual allotment, discovered they  
2 weren't.

3 JUDGE HAMLEY: The defendants are not asserting claims  
4 on behalf of any bands.

5 MR. LITTELL: No bands have intervened in this case.

6 JUDGE YANKWICH: You insist the group represent the  
7 whole, if they represent anybody. The presence of that word  
8 doesn't deprive you of that right to insist whatever they did  
9 they did for the tribe.

10 MR. LITTELL: I think we might state in the record at  
11 this point too it is proper to assume in the absence of any  
12 intervention from the Government there are no other parties,  
13 either bands or individuals or other tribes of Indians, because  
14 the Government is participating in all these proceedings and  
15 as trustee for all the Indians would, under the obligations of  
16 the trustee, set forth their case for them.

17 JUDGE HAMLEY: Before this conference gets through I  
18 want to go into that point to be sure that we have all the  
19 parties. But let's leave this for the time being, think about  
20 it and we will come back to it before the end of the conference,  
21 and give you time to consider it.

22 This brings us to the fourth and final one of the pro-  
23 posed questions submitted by the plaintiff.

24 MR. BOYDEN: If it please the Court, if that (a) is  
25 adopted on 2 we will abandon this one.

1 JUDGE HAMLEY: Any observation anyone wants to make con-  
2 cerning that? That of course will depend upon the findings of  
3 fact in the case, or to a good part.

4 We go then to 2.

5 "2. If so, was the action of the Secretary of the In-  
6 terior in making such settlement valid?"

7 Any comment concerning that proposed question of fact?

8 Then we go to Number 3:

9 "3. What is the nature of the rights acquired by those  
10 who have been settled on the reservation, if any?"

11 I inquire just what that question contemplates. By the  
12 nature of the rights are you meaning to distinguish between  
13 exclusive and joint or some other --

14 MR. BOYDEN: I think part of it has been settled, Your  
15 Honor. We had in mind several things. We did have exclusive  
16 and joint, but also had in mind whether or not those rights  
17 given to the particular people who are on the reservation or  
18 were they to the tribe. Now I think that we have an understand-  
19 ing that the only rights that the defendants have are tribal  
20 rights, that we will need to have some modification of some of  
21 it. It was on that theory we did it that way.

22 JUDGE YANKWICH: Don't you think that could be eliminated?

23 JUDGE HAMLEY: It is still pertinent whether they are  
24 exclusive or joint rights?

25 MR. BOYDEN: Yes, but I think we have that covered in a

1 question of law, and I take it that they do, this provides a  
2 place for that point of law to be determined.

3 MR. LITTELL: Yes. We are in hopes -- we of course think  
4 this can be stricken, but it was what he wanted in. We are in  
5 hopes that in line with your opinion, which is not in your pre-  
6 trial order, contentions of counsel would be made clear and  
7 would be particularly apt at this point. We would like to know  
8 what the contentions of counsel are, whether he intends to  
9 assert that there is a different estate than anything we have  
10 known in Indian law. In other words, what I call a horizontal  
11 division of the interest, surface rights separated from the sub-  
12 surface rights. If that contention is to be made and you en-  
13 courage the clarification of counsel's contentions, I hope he  
14 will make it and the Court will ask him to make it.

15 JUDGE HAMLEY: I think it would be appropriate to have a  
16 statement from plaintiff at this time as to what the scope of  
17 your contention is in that respect.

18 MR. BOYDEN: May I have a definite understanding with  
19 counsel in this one regard. Mr. McPherson has stated in Phoenix  
20 and it has been reiterated here today; may it be stipulated  
21 that the only claims the plaintiffs have are tribal claims, as  
22 distinguished from individual --

23 JUDGE HAMLEY: You mean defendants.

24 MR. BOYDEN: I mean defendants have are tribal claims,  
25 as distinguished from individual or from any part of the tribe.

1 That is going to make a lot of difference on what my answers  
2 are otherwise.

3 MR. LITTELL: Yes, we have discussed this at length and  
4 it can be stated in a little different way. Whatever benefits  
5 inure by reason of individual settlement which this Court may  
6 find of the land by the Navajos, inure to the benefit of the  
7 tribe and not to the individual. In other words, the tribal  
8 interest is what we are contending for.

9 JUDGE YANKWICH: In that the individual was the means  
10 of the instrumentality to which they acquire, the tribe  
11 acquired them, if they acquired them at all.

12 MR. LITTELL: Quite right, and as usual, Your Honor, in  
13 Indian law.

14 JUDGE HAMLEY: Does that mean your --

15 MR. BOYDEN: I think so. Do I take it, Mr. Littell,  
16 that you are pressing no claim on behalf of individual Navajo  
17 Indians or on behalf of any portion of the Navajo tribe; your  
18 claims are exclusively on behalf of the tribe?

19 JUDGE YANKWICH: I think that is the containment of the  
20 purpose of Mr. Littell's stipulation, except insofar as the  
21 individual by acquiring the rights represented the tribe. You  
22 have to put that exception.

23 MR. BOYDEN: I take it that if it is claimed for the  
24 tribe by reason of the individual that the answer is clear.  
25 That would be satisfactory with me.

1           MR. LITTELL: That is the purport. I think my own words  
2 were more precise, that the individual settlement follows the  
3 usual pattern of Indian use and occupancy, on behalf of the  
4 tribe. We have found no individuals, as we have already stipu-  
5 lated, that had allotted interests, and I assume the government  
6 has found none because it is not spoken of.

7           MR. BOYDEN: I think I can proceed further then and ex-  
8 plain to the Court, that we believe that the Navajo tribe can-  
9 not be settled upon this reservation, having a reservation of  
10 its own, and we believe that any attempt of the Secretary during  
11 this period to carve a portion of the reservation out for the  
12 Navajos exclusively is unauthorized. Therefore, if there is any  
13 use of the reservation it would not be the usual Indian title  
14 carrying with it of the other rights that go with the reserva-  
15 tion, because their rights are not exclusive. And to illustrate  
16 that, the Secretary has repeatedly refused to allow any leasing  
17 of the lands of either of these, within any of the Executive  
18 Order reservation without the consent of both tribes. Then  
19 there are very many other limitations. That is our position.  
20 It is a little bit difficult to answer this. I am not trying  
21 to be evasive to the Court's question, but it is a little bit  
22 difficult to answer. I think, as I projected myself -- of  
23 course I am from the standpoint of the plaintiff -- I cannot  
24 see how a part of an interest can be given. On the other hand,  
25 I do not see how a grazing right which was so limited by the

1 whether granting to the Government in trust or to anyone else,  
2 is the granting of the whole thing.

3 JUDGE HAMLEY: I think we had better leave that Question  
4 3 in there. It is agreed to anyway and with this explanation  
5 we know about the intended scope.

6 4 and 5, as I read it here, seems to be directed to the  
7 question of whether the interest of one tribe or the other  
8 is an exclusive interest, is that correct?

9 MR. BOYDEN: That is correct, Your Honor. However in  
10 view of the understanding taken perhaps on 4 it is not necessary  
11 now to determine any individual Navajo Indians have any claim  
12 under their own right.

13 JUDGE HAMLEY: Is it agreeable to defendants to strike  
14 the words, "or do individual Navajo Indians" from Question 4?

15 MR. LITTELL: It would be, Your Honor, if it be under-  
16 stood, our explanation given several times and which we have  
17 discussed here, the tribal rights stems from the location of  
18 individuals. You don't settle a tribe, you settle individuals.

19 JUDGE HAMLEY: I think that is understood, but the way  
20 it now reads it would raise the question of whether individual  
21 Navajo Indians have exclusive interests.

22 MR. LITTELL: If that is so understood, we have no ob-  
23 jection to striking those words.

24 JUDGE HAMLEY: I think it is the understanding. We  
25 will strike the words then: "or do individual Navajo Indians."