Appeal No. 13-74

IN THE

UNITED STATES COURT OF CLAIMS

THE HOPI TRIBE,

Appellant,

v.

THE UNITED STATES,

Appellee,

THE NAVAJO TRIBE,

Appellee.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

BRIEF OF THE HOPI TRIBE, APPELLANT

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INTRODUCTION

It will be observed that the questions presented for consideration on this appeal stimulate conjecture as to the familiarity with the facts in the case on the part of the Commission rendering the opinion. Error may be anticipated under the adverse circumstances which attended the decision. We deem it appropriate as an introductory matter to call to the attention of the Court the facts to which we refer.

1. The case was tried before the Honorable Arthur V. Watkins, Chief Commissioner, William M. Holt and T. Harold Scott, Associate Commissioners and the record closed with respect to the issue of aboriginal title on May 22, 1963. Various orders concerning the filing of additional exhibits and extending time to file proposed Findings of Fact, etc. intervened, but over seven years later, on June 29, 1970, the Indian Claims Commission, without a single commissioner who had heard the case participating, rendered its opinion. (Appendix A) Insofar as we have been able to determine, even the staff employee assigned to audit the case was not with the Commission at the time the judgment was rendered. No commissioner concurring in the opinion, findings of fact or interlocutory order had any opportunity to consider the deportment of the witnesses upon the witness stand as an aid in determining the apparent frankness or candor, or the want of it, on the part of such witnesses. The demeanor of the witnesses under cross examination was never observed by those who in the course of events became the judges of the credibility of such witnesses.

2. On the 13th day of October, 1958, the Commission entered its order fixing time for hearing the case, specifically stating therein that the "hearing shall be confined to the issue of title." While the Clerk's calendar under date of May 10, 1960, set September 12, 1960, for the hearing on Dockets 229 and 196 on all the issues, it is clear from the subsequent

declaration of the Commission that this setting was on all issues pertaining to aboriginal title only. The order of the Commission closing the record and fixing the dates for filing proposed findings of fact and brief under order of May 22, 1963, stated:

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

The Hopi Tribe in its opening statement presenting the petitioners requested findings on issues of title and liability contains the following paragraph:

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

It is significant to note that the Hopi petitioner, now the Appellant, made no request for a finding on the specific dates of taking. Separation of issues for trial was not an unusual situation since the Commission had employed such tactics in hearing only restricted portions of the case on previous occasions. See Shoshone Nation et al. v. United States, 11 Ind. Cl. Comm. 387, 416 (1962), Pueblo de Acoma et al. v. United States, 18 Ind. Cl. Comm. 154, 240 (1967). Notwithstanding its previous orders and the lack of opportunity for the Appellant to even present its case with respect to the

dates of taking, the Commission made its determination on June 29, 1970, as to dates of taking, both in and outside of the 1882 Hopi Executive Order Reservation. (Appendix A, B and C) On motion of the Hopi Tribe for further hearing on dates of taking and for rehearing and amendment of findings, the Indian Claims Commission on June 2, 1971, granted the motion in part, but limited the evidence to be presented to "its documentary evidence on the date or dates of taking, which is not already a part of the record of the case, including the digest of the new exhibits." [Emphasis added.] The Hopi exhibits on this subject were accordingly filed with the memorandum as required. The matter was argued before the Commission. On July 9, 1973, the Indian Claims Commission entered its opinion on the motion (Appendix F) and entered an order denying the Hopi motion to amend findings (Appendix G).

As preface to its opinion, the Commission stated inter alia:

> On June 2, 1971, the Commission ordered the Hopi plaintiff to file such additional evidence "on the date or dates of taking" not already part of the record along with a memorandum of points and authority in support of its conclusion." (Appendix F-3) [Emphasis added.]

While it is admitted in the opinion prologue that the Hopi plaintiff complained "that it had not been afforded an opportunity to present its complete evidence as to date or dates of taking its aboriginal lands," (Appendix F-2), the June 2, 1971, order was captioned "Order Permitting

Filing of Documentary Evidence . . . " and the order specifically directed the Hopi Tribe to file "its documentary evidence on the date or dates of taking, which is not already a part of the record of this case . . ." (Appendix E-1) The characterization by the Commission of its June 2, 1971, order as one requiring the Hopi plaintiff "to file such additional evidence 'on the date or dates of taking' not already a part of the record" is something less than candid. (Appendix F-3) Furthermore, since the order properly restricted the evidence to be introduced to the "date or dates of taking," what inference is to be drawn from the Commission's opinion statement?

> At the outset it should be noted that the plaintiff has produced no new or additional evidence in support of its claims of aboriginal title. (Exhibit F-4)

It suffices to say that the Commission definitely determined that the conclusion it had reached before it had even listened to the Hopi evidence or learned of the Hopi position was anticipatorily accurate.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commission erred in limiting the Hopi aboriginal claim to the lands described in Finding of Fact 20. (Appendix B-17)

2. Whether the Commission erred in determining that the Executive Order of December 16, 1882, extinguished

the Hopi Indian title to all lands which were outside the boundaries described in said Executive Order. (Appendix B-16)

3. Whether the Commission erred in determining that on June 2, 1937, Hopi Indian title to all lands in the Executive Order Reservation of December 16, 1882, lying outside "Land Management District 6" was extinguished. (Appendix B-22)

STATEMENT OF THE CASE

On the 29th day of June, 1970, the Commission rendered its opinion on title (Appendix A), Findings of Fact (Appendix B) and an Interlocutory Order (Appendix C) in these consolidated Hopi and Navajo cases. Among other things, the Commission determined that as of December 16, 1882, the date on which President Arthur by Executive Order established the Hopi Indian Reservation, the Hopi Plaintiff held aboriginal title to a certain tract of land in Arizona. That tract was described in detail in the Commission's Finding of Fact 20. (Appendix B-16, 17) The Commission also concluded that the United States extinguished aboriginal title to those lands lying outside of the 1882 Reservation as of December 16, 1882. (Appendix B-16) In addition, the Commission held that on June 2, 1937, the United States extinguished Hopi Indian title to an additional 1,868,364 acres of land within the 1882 Reservation but lying outside the boundaries of what is designated as "Land Management District 6." (Appendix B-21)

Thereafter, on August 28, 1970, the Hopi Tribe filed a motion for further hearings on the dates of taking, for rehearing and for amendment of findings. As grounds Appellant contended inter alia that it had not been afforded an opportunity to present its complete evidence as to the date or dates of taking of the original lands, that the Commission had failed to find that the Hopi Tribe had aboriginal possession to all of the lands claimed by said tribe as of July 4, 1848, the date the United States obtained sovereignty over the subject lands pursuant to the Treaty of Guadalupe Hidalgo. 9 Stat. 922; and that the Commission's premature decision on date of taking was based on erroneous findings of fact and conclusions of law which distorted the nature and extent of Plaintiff's aboriginal holdings as of 1848 and thereafter. (Appendix D)

On October 12, 1970, the Navajo Tribe filed a brief in opposition, and on January 15, 1971, the United States filed a response to the motion. On June 2, 1971, the Commission ordered that the Hopi Tribe file its documentary evidence on the date or dates of taking, setting dates for the filing of the same and for the responses of the other parties to the action. (Appendix E) The matter was argued by counsel before the Commission on May 22, 1972. On July 9, 1973, the Commission rendered its opinion on the motion (Appendix F) and on the same day entered an order denying Appellant's motion to amend the

findings of fact with respect to the nature and extent of the Hopi aboriginal title of lands and the dates of taking thereof (Appendix G). The questions raised by Appellant's motion were fundamentally the same as hereinabove set out under Questions Presented For Review. Because of the limitations on the length of the brief as provided in Rule 144 and because the questions raised require the consideration of extensive factual matters, it is deemed advisable to set out those factual matters in the course of the argument making appropriate reference to the exhibits and transcripts.

ARGUMENT

I. THE COMMISSION ERRED IN LIMITING THE HOPI ABORIGINAL CLAIM TO THE LANDS DESCRIBED IN FINDING OF FACT 20.

A. Scope of Court of Claims Review.

Since the question is essentially factual in nature, with matters of law incidentally involved, we will first consider the scope of review by this Court. We are aware of the limitations on review of the facts by an appellate court as contrasted with the broad latitude of the original tribal tribunal. However, we believe the Indian Claims Commission has called upon supposition and implication in arriving at its decision in direct opposition to evidence so substantial as to detract from the reasonableness of the finding leaving it supported by less than substantial evidence.

25 U.S.C.§70s (b) deals with the subject of "Review by Court of Claims and Supreme Court" of determinations of the Indian Claims Commission and provides in relevant part as follows:

> On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. [Emphasis added.]

The standard of review is that of determining whether there exists "substantial evidence" in the record as a whole to support the Commission's factual findings. See e.g. Sac and Fox Tribe of Indians of Okl. v. United States, 161 Ct. Cl. 189, 315 F.2d 896 at 906 (1963). The question has been said to be one of reasonableness, not rightness. See Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians v. U.S., 178 Ct. Cl. 570, 372 F.2d 951 (1967).

Evidence is not substantial where there is opposing evidence so substantial in character as to detract from the weight of the finding and thus render it less than substantial

on the record as a whole. See Confederated Tribes of the Warm Springs Reservation of Oregon, 177 Ct. Cl. 184 (1966). "Substantial Evidence," as a standard of review under the Administrative Procedure Act (5 U.S.C. §706), has been said by the Supreme Court to require the following considerations:

> We have defined "substantial evidence" as "such relevant evidence as reasonable mind might accept as adequate to support a conclusion." [Citation.] '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' [Citation.] This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. [Citation].

Consolo v. Federal Meritime Comm., 383 U.S. 607, 620, 16 L.Ed. 2d 131, 86 S.Ct. 1018 (1966). See also Ill. Cent. R. Co. v. Norfolk & Western R. Co., 385 U.S. 57, 66, 17 L.Ed. 2d 162, 87 S.Ct. 255 (1966).

The Court of Claims will order a remand for more specific findings and reasoning in any case in which the Indian Claims Commission's opinion and findings

> * * * are so summary, conclusory, unexplained, sparse and unspecific that the Court is unable to say whether the ultimate conclusions * * * are adequately supported by substantial evidence and untainted by legal error.

Seminole Indians of State of Florida v. U.S., 197 Ct. Cl. 350, 455 F.2d 539 at 540 (1972). See also U.S. v. Nez Perce Tribe,

194 Ct. Cl. 490 (1971) cert. den. 404 U.S. 872; and Sac and Fox Tribe of Indians of Okl. v. U.S., 196 Ct. Cl. 548 (1971).

Recognizing that it is its duty and not this Court's to comb the entire record, Appellant Hopi Tribe will provide specific record references in support of its claim of lack of substantial evidence in the whole record. Lumni Tribe of Indians v. United States, 181 Ct. Cl. 753 (1967).

B. 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.

Although the evidence on aboriginal possession presented by the Hopi Tribe at the trial was directed to the year 1848, when the United States acquired jurisdiction over the area in question, the Commission prematurely made its determination as of 1882. As more fully set out in the introduction of this brief, the Commission's judgment was rendered before the Hopi Tribe had been given an opportunity to present its evidence on the dates of taking. In its opinion on the Hopi motion for further hearing, the Commission very conveniently, but without factual substance, attempted to palliate its error with a further conclusion,

> that the extent of the Hopi aboriginal land ownership in 1882 is substantially the same as it was in 1848. (Appendix F-6)

No one can conscientously read the record in this case without

concluding that Hopi possession diminished in direct proportion to Navajo expansion into Hopi territory.

In 1855 Governor David Meriwether established a treaty boundary to separate Indians tribes in the New Mexico territory, including the Hopi and Navajo, the Navajo being east of the line and the Hopi being west thereof. [Exhibit G-69] Meriwether reported that he drew the line according to the boundaries "generally conceded to the tribes and bands respectively." [Exhibit 118 (Navajo)] But Meriwether on his map [Exhibit 62 (Hopi)] enclosed the Pueblos of Moencopi 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. [Exhibit 157 (Navajo) p. 2, Exhibit G 230a map 1856]

Dr. Fred Eggan, a recognized expert on Hopi Indians, was of the opinion that the Meriwether line divided the Hopi-Navajo country as of 1848 and for reasonable time before. (Tr. Eggan 7416) His opinion in this regard was substantially confirmed by the Defendants' witnesses. Dr. Ellis at Tr. 7580, 7706 and 9389 by Dr. Reeves at Tr. 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 as a line running east of, but parallel to the Meriwether line west of Ganado. (Tr. Petrat 9644-5, 1978-80, 9693) This line is marked with a boundary marker.

[Exhibit 69-1, m, n and o (Hopi)] The agreed tradition 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 747677, 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 sometime 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 limits of the reservation. [Exhibit 55, p. 2 (Hopi)] [Emphasis added.]

This report was written 13 years before the Hopi filed its petition with the 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.

The United States Government commenced exerting military pressure against the Navajo in the winter of 1846 under Colonel Alexander Doniphan. Between then and the summer of 1849 no less than five expeditions of American troops took the field against the Navajo. This fact is substantiated by the Government's own Exhibit G-205 p. 10. This is also shown

by Government Exhibit G-22, G-23 and G-24. Between 1850 and 1860, large numbers of the Navajos, pursued by the United States military forces, entered what was then Hopi territory, being forced into areas they had not previously occupied. These facts are established by Government exhibits as well as Hopi and Navajo exhibits.

> Ex. G 57; Ex. G 56; Ex. 6 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, 362-386; 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. 6 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).

Government Exhibit E-51b in support of Government witness Dr. Ellis stated that some of the Navajos took heed from the repeated warnings of reprisals from the United States Government and in about 1860 began a push westward into the peripheral areas never before occupied. Government Exhibit R-

105 p. 3 supporting the testimony of Government witness Dr. Reeve stated that the Navajo under military pressure from the American army in the 1860's fled far to the west of the Hopi villages; but that region was not their customary home-site nor was it needed by them. Many other exhibits and the testimony of witnesses substantiating the facts upon which we rely are in evidence in this case as above set out.

The Hopi Indians sensed the responsibilities of the United States Government, to whom they have become subject just two years before, when in October of 1850 and August of 1851, Hopi delegations visited Agent Calhoun at Santa Fe to seek aid against the Navajo whose depredations had reduced them to great poverty. The exhibits in this case are so numerous as to prohibit reproduction in the appendix. We, therefore, summarize some of the essential facts established to verify the Hopi position in this matter.

> 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 Navajo 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.

A simple statement by the Commission "Furthermore, the United States army's field operation against the Navajo in 1860 did not in any appreciable way diminish or deprive the Hopi Indians of the lands they were usually using at the time" (Appendix F-7) is less than substantial evidence to outweigh the numerous exhibits and oral testimony as above recited. When the Commission determined aboriginal possession of the Hopi people as of 1882, it slighted the series of events to which we have made reference and the responsibility of the United States in the shrinking of Hopi country prior to that date.

The continual westward movement of the Navajo Indians into Hopi territory is exemplified in Hopi Exhibit 67 which is taken from Volume 100 of Smithsonian Miscellaneous Collections, p. 514. Appendix H depicts that exhibit upon which we have taken the liberty of cross hatching the westward expansion of the Navajo from 1800 to 1870.

The Hopi Tribe contends that through this miliary pressure and neglect of the United States, Hopi lands that the tribe had occupied in 1848 and long prior thereto were gradually taken over by the Navajo until on October 29, 1878, an Excutive Order took the Hopi country described in that Executive Order west of the Meriwether line and set it apart as an addition to the reservation for the Navajo Indians. (Exhibit DT-16) This action placed the Navajo west to what was four years later designated as the east boundary of the Hopi Reservation.

It is the contention of Appellant that when the United States drove Navajo Indians into Hopi territory it had an obligation to protect the weaker and outnumbered Hopi Indians from their natural enemy. This Court has held that if an Indian claimant can show that the United States forces or its officials drove the claimant tribe from its lands to which it held Indian title, the tribe has established a claim against the United States under the "fair and honorable dealing" clause 5 of 25 U.S.C.A. §70a. See Lipan Apache Tribe v. U.S., 180 Ct. Cl. 487, 500-1 (1967); Six Nations v. U.S., 173 Ct.

Cl. 899, 904 (1965); and Seneca Nation v. U.S., 173 Ct. Cl. 912 (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.

The Supreme Court has recognized that a taking can result from the action or inaction of the United States executive and legislative departments whereby a tribe or group of Indians are deprived of their right of use and occupancy of their lands.

> Confusion is likely to result from speaking of the wrong to the Shoshones as a destruction of their title. Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. [Citation] What those incidents are, it is needless to consider now. [Citation] The right of occupancy is the primary one to which the incidents attach, and division of the right with strangers is an appropriation of the land pro tanto in substance, if not in form. Shoshone Tribe v. United States, 299 U.S. 476, 496, 81 L.Ed. 360, 57 S.Ct. 244 (1937). [Emphasis added.]

In the case of Pueblo de Acoma v. United States, 18 Ind. Cl. Comm. 154 at 239 (1967) the Commission held that

> [P]etitioner lost the use of said lands because of the failure of defendant to protect petitioner's rights therein, and, therefore, that defendant is liable to petitioner for the loss of said lands; and that under clause 4 of section 2 of the Indian Claims

> Commission Act petitioner is entitled to recover from defendant the fair market value of these lands, * * *.

See also Creek Nation v. United States, 26 Ind. Cl. Comm. 410 at 420 (1971); Pueblo of Laguna v. United States, 17 Ind. Cl. Comm. 615 at 697 (1967); Northern Piute Nation v. United States, 7 Ind. Cl. Comm. 322 at 419 (1959).

This Court has further held that whether or not in a particular case the United States has the technical status of a guardian or a fiduciary toward an Indian tribe, it does have an obligation greater than that of a nonparticipating bystander, and the relationship is a special one and from it stems a special responsibility. The measure of accountability depending, however, upon the whole complex of factors and elements which must be taken into consideration. Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487, cert. denied 379 U.S. 946 (1964). There is very little difference between driving the Hopi Indians from their lands and driving Navajo Indians into their lands to raid, loot, overrun the springs and take possession of the soil. The relief brought to the citizens of New Mexico by United States military forces did not abate the Navajo problem, it simply transferred the problem from New Mexico to the Hopi country.

The foregoing serves to illustrate the inequity in failing to determine Hopi aboriginal title as of July 4, 1848. But the injustice is not limited to the lands described in the Executive Order of October 29, 1878.

C. The Commission Erroneously Failed to Properly Consider the Extent of Aboriginal Boundaries.

The Hopi claim to the area outside of the lands described in Finding 20 was not solely based on sustained "spiritual attachment or rapport" as inferred in the opinion of the Commissioner at page 286. (Appendix A-9, 10) The Hopi claim was based upon exclusive typical 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 findings of the Indian Claims Commission seem to be based upon the supposition that the Hopi Indians were static in their mode of life; that from their protected sites on the top of the mesas they descended to the valleys below to cultivate neighboring fields for grain and fruit and to pasture small flocks of sheep; and that horses played a minor part in the Hopi lifestyle so that the distance from their village to which they carried on their activities depended on how far they could safely travel by foot. 31 Ind. Cl. Comm. 16, 21. (Appendix F-6) The Commission does not state the source of the evidence from which they drew their conclusion that horses played a minor part in Hopi lifestyle.

Friar Dominquaez with Father Escalante in the late 1700's made the following observation:

> We travelled by extensive plains on which the herds of cattle and horses of Moquis graze . . . .. [Exhibit 23b (Hopi) p. 10] [Emphasis added.]

In 1776 there were large herds of cattle drifting out to the west, out of Moencopi, and north of there illustrating 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. [Exhibit 15a (Navajo) p. 7; Exhibit 22 (Hopi) pp. 1, 2] In the same year, Escalante passed some uninhabited houses where horses and cattle had been pastured by the Hopi Indians. [Exhibit 24 (Hopi) p. 12]

Escalante further discovered that Moqui was composed of:

> . . . seven pueblos totalling 7,494 soles who devoted themselves to raising mustangs, horses, sheep, cattle and other animals . . . [Exhibit 25a (Hopi) p. 4] [Emphasis added.]

It is, therefore, obvious that the Hopis had many horses in the 1700's but they were not confined to that century. In 1878, history records that although the Hopis had been plundered for years by the Navajos and occasionally by the Apaches, they still owned a number of horses and cattle and extensive herds of sheep. [Exhibit 416] Moreover, in 1878, records indicate that burros were used by the Hopi. [Exhibit 43 (Hopi)] Thus we see that the Hopis possessed horses long

before the United States obtained sovereignty over their territory and extending to the period in question. The summary of exhibits on the horse matter are inserted simply for the purpose of showing a false premise upon which the Commission worked.

The Commission further stated:

> It is clear that those eagle shrines in the peripheral areas claimed by the Hopi plaintiffs as traditionally belonging to the Hopi Tribe had been abandoned for centuries. 33 Ind. Cl. Comm. 16, 22. (Appendix F-7)

Footnote 14 on the same page of the Commission opinion contradicts the very statement it purports to prove. Quoting a very limited part of the testimony of Dr. Eggan, they state:

> They abandoned them physically. They did not abandon spiritually and <u>they continued to make use of them. They continued to visit them</u>. [Emphasis added.]

There is no question that shrines far outside of the area claimed by the Hopis on Navajo Mountain and San Francisco peaks were abandoned, but a reading of the entire testimony of Dr. Eggan will establish clearly that there were many shrines within the area claimed which were visited for many Hopi purposes. As the footnote continues, they continued to make use of them and they continued to visit them. Dr. Eggan testified (Tr. 7221):

> 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. I think they not only made

> multiple use, they made a relatively intensive use of their territory, both on their reservation and on the neighboring regions.

Dr. Eggan further 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 the area, that they gathered commercial 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. 7429)

If the Commission relies on Dr. Eggan's testimony that shrines were abandoned, it seems only fair that his complete testimony should be considered.

For maps locating various shrines in all parts of the claimed area as above described, see Exhibit 66 (Hopi); Map of Eagle Shrines, Exhibit 68 (Hopi); Map of Active Hopi Eagle Shrines and Eagle Shrines Areas (discussed by Dr. Eggan at Tr. Eggan 7460); Exhibit 69 (Hopi), Map of Hopi Shrines Other Than Eagle Shrines; Exhibit E502 map.

Hopi use of the claimed area is explained by various other exhibits and testimony. Ives describes Moqui grazing and agriculture in 1858. (Exhibit G-24, pp. 116, 129) For Hopi use on the Little Colorado in 1878, see Exhibits E-51a, pp. 186-187, Exhibit E-112, p. 18, Exhibit 44 (Hopi), p. 1. In 1869 it was reported the Hopi grazed cattle as far south

as Prescott which is outside of the area claimed by the Hopi. (Exhibit G-37, pp. 22, 90, 91, 93) The Havasupai Indians to the west obtained cotton seed from the Hopi. (Exhibit G-18, p. 105) Hopi Exhibit 3 and Government Exhibit E-538, pp. 35, 36 disclosed:

> It is true that the Hopi extended their environment by long journeys for various substances. Every berry patch for many miles around was 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.

Wood was obtained from Black Mesa and San Francisco peaks (Exhibit E-555, p. 22), timber from Black Mesa (Exhibit E-504, pp. 50, 56). Hopis travelled great distances to obtain pinon nuts, juniper berries and mesquite beans and prickly bears. (Exhibit E-570, p. 11) Again the Government witness, Dr. Ellis, testified at p. 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 was for period with which we are concerned would definitely had been carried on west of Steamboat if that was considered to be the outline of where the Navajos came to be.

Exhibit 54 (Hopi), pp. 1 and 2 state that antelope, deer, turtles were obtained by the Hopi.

> It has been stated by some students that Hopi hunting assumes more the character of a religious ritual than an economic enterprise. It is surely incorrect. The quest for food or for the objects to be later used in everyday or in ceremonial activity is fundamental.

It is interesting to note that there was not conflict between Navajo and Hopi hunting grounds until the 1840's or 50's. [Exhibit 15a (Navajo) p. 47, Exhibit 15 (Hopi) p. 3, Tr. Dr. Eggan 7388] The trapping of eagles was illustrated by Exhibit E-503, p. 18, Exhibit 550, p. 29, Exhibit G-142, p. 29. Use of the natural boundaries is exemplified by the fact that trails to the Havasupai to the west were recognized (Exhibit E-44, p. 365) and with the Utes to the north (Exhibit G-41, p. 101), with the Zunis to the southeast [Exhibit 49 (Hopi) p. 1] and with the Navajos to the northwest [Exhibit 55 (Hopi) p. 3]. In fact, commercial relations were shown in all directions. [Exhibit 47 (Hopi) p. 5] Dr. Ellis testified of obtaining the salt from the Colorado River area. (Tr. Ellis 7564, Exhibit E-504, pp. 52, 56) Pigments for paint were obtained in Cataract Canyon. (Exhibit E565, pp. 469-70) Hopi Exhibit 66 map shows the salt locations. See also Exhibit E-571, p. 638, Exhibit G-24 p. 117. Surely this evidence establishing the extensive use for Indian purposes of lands to the natural borders of the country is so conclusive as to render

very unsubstantial an imaginary line drawn simply upon a feeling that the Hopis were running home every night without the use of the horses, mustangs and burros known to be in their possession. The Puyallup Tribe of Indians v. United States, 17 Ind. Cl. Comm. 1, 17-20 (1966) employed the reasonable hypothesis that natural boundaries established aboriginal boundaries because evidence indicates the Indians do not go beyond, but merely go to the edge of rugged country. The Nez Perce Tribe of Indians v. United States, 18 Ind. Cl. Comm. 1, 130 (1967) followed the same theory accepting a natural boundary as the aboriginal boundary. The Hopis were using as their country as of 1848 land south of the San Juan River to their villages, from the east where their contact was with the Navajo Tribe near the Meriwether line, to the west where the San Juan River joins the Colorado River, at the western boundary they used up to the edge of the Colorado River from the San Juan to the Little Colorado, on the south the Little Colorado and the Zuni River forms the boundary. The western boundary of the Hopi aboriginal land as found by the Commission is neither a natural boundary nor is it supported by the evidence in the case.

In 1958 the Commission held in the Quinaielt v. United States cases, 7 Ind. Cl. Comm. 1, 29 and 7 Ind. Cl. Comm. 31, 60, that use of land for fishing, going after roots and berries and travelling the area for the purpose of hunting constitute use and occupancy in the sense of "Indian title."

Again in 1971 the Commission in the case of Swinomish Tribe v. United States, 26 Ind. Cl. Comm. 371, 374-5, considered a case of temporary seasonable use sites:

> With respect to the recurring question of the permanency of a particular village or camp site, the Commission views the matter in this case as not being of great significance. The evidence indicates that temporary fishing or hunting sites while used only seasonably were considered to be traditionally owned by Swinomish Indians even though they may have been used permissively by non-Swinomish fishermen or hunters.

The limited raiding of the Navajos and the limited encounters of the Paiutes from the north did not detract from the continual claim and use of the Hopi Tribe to the area they claimed as of 1848.

D. Hopi Population.

The Commission cited the population figures of the Hopi Tribe as a reason for restricting the amount of territory claimed as aboriginal lands. (Appendix A-9, Appendix F-14) We feel a careful reading of the exhibits and testimony will establish that the 1880 figure given by the Commission did not include the Moencopi Hopi Indians who are located outside of the Executive Order Reservation. It is obvious from a study of all of the exhibits that the population figures before the census taken by Donaldson in 1893 were very unreliable. In the Hopi requested Finding No. 33, the Hopi Tribe prepared a

table as to the sources of the population figures. Great variance will be noted. We call to the attention of the Court Pawnee v. United States, 5 Ind. Cl. Comm. 268 at 279, 286, 292 (1957), where it was held that there was no abandonment although the tribe was materially reduced in numbers by disease and area was raided by Indian war parties where there is no record that any other tribe attempted to establish villages in the area claimed and records indicate continued use and occupancy of substantially all territory claimed. The Navajo movement into the Hopi area was after 1848. It will be noted from petitioner's population table that Exhibit 25a (Hopi) p. 3, shows a drop from 7500 to less than 1000 Hopi Indians from 1777 to 1780. Exhibit E-50, p. 38, introduced by the government, shows that between 1780 and 1781 there were 6698 deaths from small pox reported while Exhibit 21 (Hopi) p. 17, shows 5000 deaths from small pox reported. Exhibit 25c (Hopi) p. 11 shows that in 1782 there were 6698 deaths from small pox reported. Exhibit G9, p. 23, and Exhibit G-10, p. 75 show a decrease in population due to small pox in the year 1853 to 1854. Exhibit G-38, p. 145, reports small pox had almost totally destroyed the Moqui, 1855 to 1856. Equity and justice cannot allow this population decrease caused by disease to automatically reduce the territory which this tribe had been accustomed to using for centuries and continued to use subsequent to such population decrease.

II. THE COMMISSION ERRED IN DETERMINING THAT THE EXECUTIVE ORDER OF DECEMBER 16, 1882 EXTINGUISHED THE HOPI INDIAN TITLE TO ALL LANDS WHICH WERE OUTSIDE THE BOUNDARIES DESCRIBED IN SAID EXECUTIVE ORDER.

A. Title to Some Lands Was Extinguished Prior to 1882.

It is contended by the Hopi Tribe that part of its aboriginal lands was taken before 1882. The Comission made its determination of Hopi aboriginal lands as of 1882. For the convenience of the Court and for the purpose of aiding counsel in discussing the various dates of taking, we have divided the land claim into parts, designating each part with a letter. A map depicting such designation is included as Appendix I.

The 1882 Executive Order could not have extinguished title to lands where title had previously been extinguished. We, therefore, discuss those lands first. They are designated on Appendix I as C, D, E and F.

(1) Area C. The Area West of the Meriwether Line and Contained Within the Executive Order of October 29, 1878.

We have heretofore explained in some detail that the Meriwether Line was the separation line between the Hopi and Navajo Tribes as established by both the Hopi and defendant witnesses.

There is little doubt that the Hopi Tribe proved its aboriginal possession in the overlap area as of 1848. A question before the Commission was 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 interferred 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 Pueblo de Acoma 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 anual 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 extent and nature of the military pressure has heretofore been discussed under Section I-B of this brief.

The 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 1851, 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 1850's and 60's 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 occuped 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. (Exhibit 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, 84 L.Ed. 482, 58 S. Ct. 384 (1938). The Supreme Court had held:

> A fair approximation or average of values may be adopted to avoid burdensom 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.

(2) 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 brief 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 <u>added it to the Navajo Reservation</u>. (Exhibit 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. (Exhibit DT 21) Dr. Ellis, witness for the defendent 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 brief 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 the Commission. In Uintah Ute Indians v. United States, 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.

(3) Area E. The 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. (Exhibit 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 <u>as an addition to the present Navajo Reservation</u>." (Exhibit 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.

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 Exhibit 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 Exhibit 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.

> (4) 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 to 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 [Exhibit E-500, p. 5; Tr. Reeves 7822, et seq.; Exhibit 61 (Hopi); Exhibit 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 [Exhibit 61 (Hopi); Exhibit G-1; Exhibit 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 (Exhibit G-1, p. 6; Exhibit E-542, 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 (Exhibit 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 (Exhibit G-10, pp. 67, 67, 72 and 75). The Navajo country was described as bounded on the west by Moqui (Exhibit G-10, p. 119). The Navajo country in Whipple's time included areas that are east of the Meriwether Line (Exhibit 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 (Exhibit E-500; p. 5; Exhibit R-21, p. 39: Exhibit 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 (Exhibit R-21, p. 39, 40, 84; Exhibit G-151).

As shown in Exhibit 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.

The Commission in the Navajos 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 and later with the Navajo gradually moving to the west, 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 brief, 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. Appellant, therefore, asserts that the average date of taking in Area F was 1878.

B. The Executive Order of December 16, 1882 Did Not Extinguish Hopi Title Outside of Said Executive Order Area.

There is no dispute that on March 27, 1882, J. H. Fleming, the United States Indian Agent at the Hopi Agency, wrote to the Secretary of the Interior recommending that a "small" reservation which would include the Hopi Pueblos, the agency buildings at Keams Canyon, and sufficient land for agricultural and grazing purposes, be set aside for the Hopi. [Exhibit 78 (Hopi) p. 115] On November 27, 1882, Commissioner H. Price sent a telegram to Fleming, asking him to describe boundaries "for a reservation that will include Moquis villages and agency and large enough to meet all needful purposes and no larger . . ." [Exhibit 78 (Hopi) p. 116] But it will be noted that the Navajo population in the reservation was steadily increased after 1882, growing from about 300 in 1882 to about 8,800 in 1958. [Exhibit 78 (Hopi) p. 213, Finding of Fact 20] Thus we see that the creation of the 1882 reservation did not exclude the Navajo. On the other hand, there was no effort on the part of the United States to keep the Hopi

Indians within the reservation so established. Healing v. Jones, 210 F.Supp. 125, aff'd 373 U.S. 758 (1962) was not concerned with the Moencopi area and therefore Exhibit 78 made no findings with regard to the number of Hopi still remaining in Moencopi at the time of the creation of the 1882 reservation and thereafter.

The Commission concluded:

> Responsible government officials believed that sufficient land had been set aside to accommodate present and future Hopi tribal needs and therefore the Hopis would confine their activities within the boundaries of the reservation. (Appendix F-11)

The Commission simply assumed that the Hopis would confine their activities within the boundaries of the reservation, but the evidence in the case establishes the situation to be to the contrary. While a feeble gesture was made to exclude Navajos from the Hopi Reservation, the record is completely void of any effort on the part of the government to restrain the Hopi Indians within such reservation.

Moencopi was established between 1400 and 1600 A.D. [Exhibit 15 (Hopi)] and it is not inside the Executive Order Reservation of 1882. There should be no controversy regarding the location of Moencopi since that village still exists. The Commission stated:

> The record does not disclose any Hopi protest or objection at the time as to the size of the new reservation. 31 Ind. Cl. Comm. 16, 26. (Appendix F-11)

Since there was no attempt to move the Hopi Indians outside of the Executive Order into the Executive Order Reservation, there was no need for the Hopi people to complain nor was there any Hopi acquiescence in the acceptance of their new reservation status.

The Government even recognized and acquiesced in Hopi use of the Hopi territory outside the 1882 Executive Order Reservation. Dr. Ellis, in the report above mentioned at page 23 thereof, quoted Jones saying:

> Jones makes a compact statement of the resulting situation:
>
> The land use unit and part of Moencopi are administered as if they were the Hopi reservation. This area is often referred to as the "Hopi Jurisdiction", but on at least one map issued by the office of Indian Affairs, the land management unit is actually labeled the "Hopi Indian Reservation" and the original outlines of the Hopi Indian Reservation are not even indicated [Reference is here made to U.S. Office of Indian Affairs map of the "Navaho Country", 1937, revised 1945.] [Emphasis added.]

In stipulating the testimony of Dr. Colton, Hopi counsel did not stipulate that,

> The village of Moencopi had been abandoned as a permanent Hopi village sometime prior to 1800, and not reestablished until sometime after 1848. (Appendix F-14) [Emphasis added.]

The exact stipulation was as follows:

> It is further stipulated that the Hopi village of Moencopi was abandoned as a permanent dwelling by the Hopis prior to the year 1800 and was reestablished by the Hopis as a permanent dwelling subsequent to the year 1848. (Tr. 1562) [Emphasis added.]

There is a vast difference abandoning the village and abandoning the same as a dwelling. To further illustrate, we quote from the record. Here Hopi counsel stated:

> May I just say by way of explanation, and not by way of argument or proof, that this period is before the period that the United States acquired this territory, but the connection that we will attempt to prove later on by two anthropologists will be that the Hopi returned to these sites for specific purposes and made specific uses of them, so that this part is not in the controversial area. (Tr. 1564, 1655) [Emphasis added.]

Dr. Colton in his article "Report on Hopi Boundary" [Exhibit 15 (Hopi)] stated:

> Outside of the Executive Order Moqui Reservation of 1882, there has lived, for a long period, a group of Hopi at Moencopi, 40 miles northwest of Hotevilla. Archeologists recognize that Hopi were living there in a permanent village between 1400 and 1600 A.D. The ruins of this pueblo lie on the east mesa of the present village. p. 1
>
> 1. Hopi have been living in the pueblo at Moencopi continuously since the 1870's; they used the springs for irrigation and have their fields below the pueblo and

> in Pasture Canyon. They graze their flocks on both sides of the Moencopi Wash. p. 3. [Emphasis added.]

Again we call to the attention of the Court that living at Moencopi as a permanent dwelling is different than living at Oraibi in order to be safe from the attack of others, and commuting to Moencopi for purposes of tilling fields. Simply failing to live on the spot does not detract from the use to which the territory was actually put.

> The village was settled permanently about seventy years ago, but for several centuries has been Hopi ground and is the site of earlier Hopi pueblos and the cotton fields of Oraibi. [Exhibit 55, p. 2 (Hopi)]

Before Moencopi was resettled in the 1870's, casual reference to Oraibi Hopi farming was made as follows:

> Lololoma asked his associate chiefs and ceremonial headmen to volunteer to settle Moencopi, the summer farming place of Oraibi. (Exhibit 55, p. 4) [Emphasis added.]

Dr. Ellis, in her treatise "The Hopi Their History and Use of Lands," writing of the time the 1882 Hopi Reservation was created, stated:

> At Moenkopi, to the west, the location of large springs and the only perennial stream in the area used by the Hopi, the village of Oraibi had maintained an agricultural community for generations. Here most of the Hopi cotton and wheat, plus other produce, was grown, but the Moenkopi area was not included in the Hopi reservation at all. [Exhibit E ____ p. 22] [Emphasis added.]

Superintendent George W. Leihy in 1865 reported to the Commissioner of Indian Affairs that the Moencopi Indians living on a reservation still maintain their friendly relations with the whites and are even assisting the military in their operations against the Apaches. [Exhibit 38 (Hopi) p. 2] On October 21, 1872, the journal of Walter Clement Powell indicates that the party visited the buffalo land lying within the Moencopi Wash. A footnote to the journal indicates that the party visited Moencopi village on its return. [Exhibit 41 (Hopi) p. 1] A report of Gordon MacGregor, anthropologist to the Commissioner of Indian Affairs John Collier on August 6, 1938 gave a complete account of the history of Moencopi and the Moencopi lands, describing the Moencopi claims outside of the Executive Order Reservation. [Exhibit 56 (Hopi)] Perhaps sufficient references have been cited to illustrate that when the Executive Order Reservation was established in 1882, there were Hopi Indians using and occupying lands outside of the reservation area. Although the record clearly shows that the Hopi had been using the Moencopi area for centuries and that the new village of Moencopi was established in the 1870's, yet the Commission in its opinion p. 284, Appendix A-8, stated:

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

The basing of findings upon obvious errors of fact and conclusions of conjecture does violence to the substantiality of the evidence upon which the Commission's opinion is predicated. In view of the fact that there was no effort made to confine the Hopi Tribe to within the boundaries of the 1882 Executive Order Reservation nor any substantial effort made to prevent the Navajo Tribe from moving into the Reservation, it strains the tests for extinguishment of Indian aboriginal title as already laid down by the courts. The Commission has held that an executive order per se does not constitute a taking of Indian title. Coeur d 'Alene Indians v. United States, 6 Ind. Cl. Comm. 1, 42 (1957). The Commission has found that because the Spokane Indians had never moved into the Colville Reservation created by Executive Order, a taking of Indian title did not occur. Spokane Indians v. United States, 9 Ind. Cl. Comm. 236 (1961). Whether the Hopi Tribe accepted the Reservation by moving into it, thereby extinguishing its aboriginal title to the land outside of the Reservation is a primary question. The Commission has held that because the Indians had not moved into the Malheur Reservation when it was established, no taking resulted until 1879 when the Government forced their removal. Snake or Piute Indians v. United States, 4 Ind. Cl. Comm. 571a (1956). In Uintah Ute Indians v. United States, 5 Ind. Cl. Comm. 1 (1957) the Commission rejected the date of the Executive Order

which created the Uintah Valley Reservation as the date of taking stating that the Indians came and went whenever they saw fit and at one period nearly all of them left the Reservation, and it took considerable effort to get them back without a fight. Here it will be remembered there was no effort to enclose the Hopi within the new Reservation, but on the contrary, the Government thereafter recognized and acquiesced in Hopi use of lands outside the Executive Order Reservation. In the landmark case of United States v. Santa Fe Pacific Railroad, 314 U.S. 339, 86 L.Ed. 260, 62 S.Ct. 248 (1942), the Supreme Court refused to find an extinguishment of Indian aboriginal title even though the Colorado River Reservation was created by an act of Congress. The Court stated that it could not find any indication that Congress intended to extinguish the Indians' claim nor did it conclude either that the Walapais intended to abandon its original land if Congress would create a Reservation or that the Indians had accepted Congress' offer for a Reservation. Extinguishment of title did not occur until the Walapai made a proposal to the Government by majority vote of the Tribe that a Reservation be set aside for them because of the encroachment of the White Man after which President Arthur signed an Executive Order creating such a Reservation. The primary factor evidenced in the decisions of the courts is whether the Indians have accepted the reservation by moving on to it,

either voluntarily or by force, and thereby extinguished their aboriginal title to the lands outside of the reservation. If the Indians move on to the reservation, a taking of the aboriginal title results. If they do not move on to the reservation, the aboriginal title remains in the Indian. In Dr. Colton's treatise (Exhibit 15, Hopi, page 3) illustrations of Hopi use since 1882 outside the Executive Order Reservation can be found in the following:

> 2. After the abandonment of Moenave by the Mormons, Frank Tewanemtewa and Numkina Bros. made abortive efforts to plant fields, using the old irrigation works. They were run out by the Navajos.
>
> 3. Below Red Lake (Tonalea), 1/4 mile south of Trade Post, Numkina Brothers, Poli, Joseph Talas, and George Neveistewa have farms (Honani). Moenkopi procures its wood from the hills east of Red Lake and north of the Dinnebito, and north of Tuba City (J.S.).
>
> 4. On and about the mesas between Moenkopi and the Dinnebito, Numkina reports twenty people now having fields. (Honani).
>
> 5. In the Little Colorado, Hopi run their cattle with some Navajo cattle between Cameron and Howell Mesa. They water at the Little Colorado. (Numkina and Honani).
>
> 6. 14 miles north of Tuba, west of White Mesa, since 1914, two bands of Hopi sheep have been run. (Numkina and Honani).
>
> 7. In 1908 or 1909, Big Phillip ran sheep in the region of Lower Moenkopi Dam. (Honani).

The record will not justify the assumption that the Hopi Indians either relinquished their claim to the lands outside

the Executive Order Reservation or voluntarily withdrew therefrom.

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

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

C. Areas to Which Title was Extinguished After 1882.

(1) 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. We repeat the testimony of Dr. Eggan, witness for the petitioner, Hopi Tribe, who 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 Quinaielt v. United States cases, 7 Ind. Cl. Comm. 1, 29 (1958), 7 Ind. Cl. Comm. 31, 60 (1958); Samish v. United States, 6 Ind. Cl. Comm. 159, 173 (1958); California v. United States, 8 Ind. Cl. Comm. 1, 36 (1959); 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. Pitrar 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, 18 Ind. Cl. Comm. 1, 130 (1967)]. The Hopis 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). 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.

(2) Area H. The Areas Contained Within the Tusayan National Forest East of the Colorado River, and the Little Colorado River.

The Appellant 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 [T]ineit 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)].

(3) 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 at its present location from 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 Nex 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). Onate, 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, Richard 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 there." 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 Reservation 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 from 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, Ex. 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, supra, [Ex. 78, pp. 224 and 228 (Hopi)] in which each tribe was adjudged to have an undivided one-half interest when the Navajo Tribe was settled in the Hopi 1882 Executive Order Reservation. The 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.

The Hopi aboriginal title and subsequently its reservation title after the 1934 Act has never been extinguished as to the balance of Area I. There is now before the Congress a bill to partition that area between the Navajo and the Hopi Tribes, H. R. 10337, 93d Congress, 1st Session. That bill has passed the House of Representatives, has been amended and favorably reported out of the Senate Interior Committee. It is scheduled for action in the Senate as this brief is being printed.

III. The Commission Erred in Determining That On June 2, 1937, Hopi Indian Title To All Lands In the Executive Order Reservation of December 16, 1882, Lying Outside "Land Management District 6" Was Extinguished.

The Commission in its opinion on the motion (Appendix F-15) stated:

> The plaintiff has challenged the Commission's findings and conclusion that, on June 2, 1937, the Hopi Indian title was extinguished to that land within the 1882 Reservation situated outside the boundaries of an area officially designated as "Land Management District 6" or simply "District 6."

There may be a misunderstanding between counsel for appellant and the Commission on a question of semantics. The Hopi Indian Tribe contends that the Hopi Indian title was both an aboriginal title and a reservation title after 1882. The situation here is to be distinguished from the Sioux Tribe of Indians v. United States, 316 U.S. 317, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942), which held that Executive Order Reservation rested no title and the taking thereof was not compensable. The Indian Claims Commission was given jurisdiction of any claim accruing before 1946 and arising under executive orders of the president as well as under other circumstances. The compensability for taking executive order reservation title under the Indian Claims Commission Act has been clearly recognized by this Court. The case of Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 390 F.2d 686 at 696 (1968) held:

> This amounts to a holding by the Commission that Executive Order title is not compensable, and with this holding we must disagree.
>
> In so doing we pretermit any consideration of compensability under general Indian law, for we find it abundantly clear that Executive order title is compensable under the Indian Claims Commission Act. We need only look at the plain language of the statute which expressly provides that the Commission shall hear and determine " * * * claims in law and equity arising under the Constitution, laws, treaties of the United States, and Executive Orders of the President * * * [Emphasis added.] Ch. 959 §2, 60 Stat. 1050, 25 USC §70a. Similarly, section 24 of the act, now 28 USC §1505, gives this court jurisdiction of any claim accruing after 1946 arising under the "Constitution, laws or treaties of the United States, or Executive Orders of the President * * *." [Emphasis added (by the Court)]."

The Hopi Tribe has always contended that a one-half interest in the 1882 Reservation outside of District 6 was taken and Hopi title to one-half extinguished for use of the Navajo Tribe. The only question raised with respect to this matter is the date at which such title extinguishment took place; i.e. whether it was on June 2, 1937, when the Navajo Tribe was impliedly settled in the reservation as determined in the case of Healing v. Jones [Exhibit 78 (Hopi) pp. 217] or whether such extinguishment took place on September 28, 1962, when the three judge federal court determined that the Navajo Tribe had been settled thereon.

With respect to the other one-half interest which has been decreed to, and title quieted in, the Hopi Tribe by

said Healing v. Jones decision, the appellant contends that Hopi title thereto has not been extinguished.

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

> Hopi leaders in effect told officials of the Office of Indian Affairs that the Hopis continued to claim the 1882 Reservation lands outside of district 6.
>
> Perhaps these Hopi claims subsequent to the settlement of Navajos would have been more persistent and vehement had it not been for the constant assurance given to them by government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims. Healing v. Jones, Ex. 78 (Hopi) p. 98.

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

> It is true that the Hopis have never made much use of the part of the 1882 Reservation outside of district 6 for residence or grazing purposes. But non-user alone, as the court said in the case last cited (Fort Berthold Indians v. United States, 71 C. Cls. 308, 334) is not sufficient to warrant a finding of abandonment. The non-user must be of such character or be accompanied by such other circumstances as to demonstrate a clear intention to abandon the lands not used. Healing v. Jones, Ex. 78 (Hopi) p. 92.

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

> Beginning with the approval, on June 2, 1937, of grazing regulations the authority for which rests in part on a resolution of the Navajo Tribal Council, dated November 24, 1935, the Navajo Indian Tribe itself was impliedly settled in the 1882 reservation pursuant to an exercise of the authority conferred by the Executive Order of December 16, 1882. [Emphasis added.] Healing v. Jones, Finding of Fact 38, Ex. 78 (Hopi) p. 217.

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

> Over a period of many years efforts have been made to resolve the controversy by means of agreement, administrative action, or legislation, all without success. The two tribes and officials of the Department of the Interior finally concluded that resort must be had to the courts. This led to the enactment of the Act of July 22, 1958, 72 Stat. 403. Healing v. Jones, Ex. 78 (Hopi) p. 2.

In the Act of July 22, 1958 Congress declared:

> That lands described in the Executive Order dated December 16, 1882, are hereby declared to be held by the United States in trust for

> the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. 72 Stat. 402 (1958).

The United States, the appellee in this action and a defendant in Healing v. Jones, did not contend that Navajos had been settled upon the reservation, but acting through the Attorney General, interposed the defense,

> . . . That the United States is a stakeholder with respect to the lands involved in this suit. For this reason, it was alleged, the Attorney General would take no position as between the claims of the other Indian or Indian Tribe. Throughout the procedures, after denial of its first defense, the Attorney General, represented by the office of the United States Attorney in Phoenix, Arizona has, consistent with its position as stakeholder, assumed the passive role of observer. Healing v. Jones, Ex. 78 (Hopi) p. 7.

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

> The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy, for purposes of residence

> and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943 has at all times been illegal. Healing v. Jones, Ex. 78 (Hopi) p. 224, Conclusions of Law 12. [Emphasis added.]

It could certainly not serve the ends of justice within the spirit of the Indian Claims Commission Act to hold that the territory in the Executive Order Reservation outside of district 6 was taken from the Hopis in 1937 and then a one-half interest as an offset returned to them in 1962.

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

The Hopi Tribe in another motion attempted to have the Commission make a determination as to liability with respect to Counts 5 through 8, but the Commission held:

> To date the Commission has not been aware of any judicial decision or rule of law that would permit one tribe to retain such residual rights to claim rent for

> Indian title land after the government has allowed another tribe to exercise identical rights of use and occupancy in the same property. At the moment the Commission is of a mind to dismiss "Counts 5 through 8" of petitioner's petition. However, we shall withhold final action on the matter until after the plaintiff has had further opportunity, if it so desires, to argue the matter at the value stage of these proceedings. (Appendix F-21)

The same bill which is now before Congress for its action (H. R. 10337, supra) authorizes the Court to partition the undivided joint use lands of this Reservation. It would not appear to us to be "fair dealings" on the part of the government to hold that all of the land outside of District 6 in the 1882 Reservation was taken from the Hopi in 1937, and then when a one-half interest is restored by the government in a partition suit to allow an offset for the value of one-half of that land. If this were the case, the government would be able to appease the Hopi Indians by saying that they were not determining a boundary by establishing the grazing districts, and then some 37 years later let the Hopi Tribe have its one-half but not be responsible for any rent during the time the Tribe had been deprived of its use.

We conclude that under the circumstances as above recited the Hopi Indian Tribal title, both aboriginal and Executive Order Reservation after 1882, to said one-half interest decreed to be theirs was never intended by the United States government to have been taken. The Hopi Tribe has never acquiesced in such purported taking.

CONCLUSION

We do not request a mere reweighing of the evidence. The facts here brought to the attention of this Court were by the Commission first overlooked then distorted into consistency with its original opinion. Hopi aboriginal title should be determined as of 1848 and the dates of taking of both aboriginal and reservation title fixed in accordance with the facts.

Respectfully submitted,

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