

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

APPENDIX

John S. Boyden
1000 Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133
Attorney of Record for
Appellant

Of Counsel:

BOYDEN & KENNEDY
WILKINSON, CRAGUN & BARKER

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BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 29, 1970

Appearances:

John S. Boyden, Attorney for Plaintiff in Docket No. 196; Wilkinson, Cragun & Barker, of Counsel; Don A. Stringham on the Brief.

Norman M. Littell, Attorney for Plaintiff in Docket No. 229; Joseph F. McPherson and Charles J. Alexander, of Counsel; Leland O. Graham, on Briefs; Harold E. Mott entered Appearance.

Walter A. Rochow and William H. Lundin, with whom were Assistant Attorneys General Edwin L. Weisl, Jr., and Ramsey Clark, Attorneys for Defendant.

OPINION ON TITLE

Chairman Kuykendall delivered the Opinion of the Commission.

Appendix "A"

This consolidated case involves the overlapping aboriginal title claims of the Hopi Tribe, the plaintiff in Docket No. 196, and the Navajo Tribe of Indians, the plaintiff in Docket No. 229, to a large tract of land in northeastern Arizona and southern Utah.

The Hopi plaintiff contends that, following the attachment of American sovereignty over the area in suit in 1848 by virtue of the Treaty of Guadalupe Hidalgo (9 Stat. 922), the United States thereafter by a series of Presidential executive orders, administrative actions, and the enactment of certain legislation, deprived the Hopi Tribe step by step of all its aboriginal lands without the payment of any compensation. Recovery is sought under Section (2)(4) of the Indian Claims Commission Act. On the other hand the Navajo plaintiff alleges that by virtue of the Navajo Treaty of July 1, 1868 (15 Stat. 667) the Navajo Tribe ceded to the United States its aboriginal rights to the Hopi-Navajo claimed area for an unconscionable consideration for which additional compensation is sought under Sec. 2(3) of the Act. The contested area in this law suit represents the totality of Hopi aboriginal land claims in Docket No. 196, which area is located within and consists of about one-third of a much larger area that is the subject matter of the claims asserted by the Navajo plaintiff in Docket No. 229.

The Hopi or "Moqui" Indians belong to the Pueblo culture, speak a Shoshonean dialect, and are one of the few American Indian tribes still residing in a major portion of their ancestral home. The Hopi origins are lost in antiquity, and their first recorded contact with the white man occurred in 1541, when a Spanish detachment stationed at

Zuni east of the Hopi Tribe was sent by Coronado to visit the province of Tusayan as the Hopi country was referred to. Upon their arrival the Spaniards found the Hopis gathered in permanent villages on three principal mesa tops. These Hopi mesas are situated in the center of the overlap area, and extend upward six hundred feet above the surrounding valleys and range lands. Throughout the period of Spanish rule over the southwestern part of the country, the Mexican period (1821-1848), and even after American sovereignty attached under the provisions of the 1848 Treaty of Guadalupe Hidalgo, the Hopi Indians have been pictured as a relatively inoffensive and timid people, living in six or seven permanent village sites on the Pueblo mesas in the heart of their country. Their agricultural subsistence was supplemented by cattle and sheep raising in the nearby valleys, with some hunting and food gathering in the outer or peripheral areas away from the village sites. While the Hopi were a religious tribe, they resisted to a marked degree the efforts of the Spanish missionaries to convert them to the tenets of Christianity. The focal point of Hopi worship was the eagle, considered the most sacred of birds and a sun symbol. The Hopis had numerous eagle shrines which they visited periodically. Many of these shrines were located at great distances from their village sites, some being located as far west as the San Francisco Mountains and as far south as Chevelon Creek southeast of Winslow, Arizona, both sites being well beyond the boundaries of the area in suit. Many of the outlying shrine areas were also visited by the Navajo, Zunis, Acomas

and other Pueblo and Apache groups. Many of the Hopi shrines had been abandoned some years prior to the time American sovereignty attached in 1848. ^{1/}

The United States officials had but little contact with Hopi Indians during the early years of American sovereignty over the New Mexico Territory. The Hopis, who numbered about 2,500 souls, were then living in seven villages; namely, Walpi, Sichomovi and Hano on the First Mesa; Mishovgnovi, Shungopovi and Shipaulovi on Second Mesa; and Oraibi on Third Mesa. What contact there was usually resulted from Hopi complaints of Navajo raiding, an activity which the Navajo had regularly pursued during both the Spanish and Mexican periods of sovereignty.

The Navajos first entered the southwestern part of the United States sometime between 1300 to 1500 A.D. They are a branch of the Athapaskan people who apparently migrated into the southwestern part of the United States from Canada. With the Apaches the Navajos make up one linguistic group who were first contacted by the Spanish south of the San Juan River early in the seventeenth century.

The Spanish had found the Navajos to be an aggressive people who shunned attachment to permanent village sites. They moved about a

^{1/} By 1848 the Hopi had abandoned the Navajo Mountain shrine on the northern boundary of the overlap area, and the San Francisco Mountain and Chevelon Creek shrines west and south of the claimed area.

great deal gathering food and hunting where the opportunity availed itself. During the Spanish era, the Navajos acquired horses and sheep. The horses provided them with even more mobility, and as the Navajo population increased their territorial demands likewise increased. It was inevitable that there would soon be conflict between the warlike Navajos, the neighboring Indian tribes and the Spanish authorities.

History has shown that Navajo territorial expansion was in a westerly direction. The Utes to the north and Apaches to the south contained Navajo tribal movement in those directions, while the Spanish and Pueblo Indian settlements to the east near the Rio Grande River proved to be a formidable barrier to any eastward Navajo expansion.

In 1848 the heart of the Navajo country lay east of the lands in suit being generally identified as that area in northwestern New Mexico and northeastern Arizona in the vicinity of the San Juan River and its tributary streams west of the Rio Grande, and including Blanco Canyon, Canyon de Chelly, and the Tunicha Mountains. By 1854 the Navajo Tribe numbered 8,000 to 10,000 Indians who could be found as far south and southwest in New Mexico and Arizona as the 35° parallel of north latitude just outside the overlap area.

For all intents and purposes the United States officials inherited the Navajo situation that had plagued the prior Spanish and Mexican authorities for years. There was constant turmoil and warfare between the Navajos, the New Mexican settlers and the neighboring tribes. It was a period when the Hopis to the west were beginning to feel the

mounting pressure from the Navajos. A treaty of peace concluded with the Navajo Tribe in 1849 had failed to stem Navajo raiding activity. In an attempt to check further Navajo encroachments Fort Defiance had been established in 1851 in Arizona at a point just west of the present New Mexico-Arizona boundary line.

In 1855 Governor David Merriwether sought by treaty to establish a Navajo reservation. The western boundary of the proposed new reservation was described as a line running north and south in Arizona, between the confluence of the San Juan River and the Rio de Chelly and the confluence of the Zuni River and the Little Colorado River. This western boundary, as drawn, is situated approximately 20 miles east of the nearest Hopi villages and within the eastern boundary of the lands in suit. As such it represents a compromise of what was believed to be the western limits of Navajo country as gleaned from earlier maps and other information then available. Due to an unfavorable Committee report the proposed 1855 Treaty was never ratified by the United States Senate.

Trouble with the Navajos continued through the 1850's and into the 1860's. In 1863 the military authorities conceived the idea of removing all Navajos and relocating them east of the Rio Grande River on the Pecos River at the Bosque Redondo in New Mexico. Colonel Kit Carson was placed in charge of field operations. By April of 1864 several thousand Navajo Indians had been rounded up and interned at Fort Sumner at Bosque Redondo. Thousands of other Navajos had managed to elude

Carson's troopers by scattering to the winds and moving into remote areas where they had never been seen before.

Faced with the enormous problem of caring for thousands of dissatisfied Navajos interned at Fort Sumner, the United States authorities decided that a permanent Navajo reservation should be established, one that would essentially embrace the limits of lands traditionally associated with the Navajo Tribe. On June 1, 1868, the United States entered into a treaty with the Navajos at Fort Sumner under the terms of which the Navajo Tribe was granted a sizeable reservation lying east of and adjacent to the lands in suit. In exchange for this new reservation the Navajo Tribe agreed to relinquish all occupancy rights to lands situated outside of the reservation except the limited right to hunt on unoccupied lands contiguous thereto.^{2/} Within a short period those Navajo Indians interned at Fort Sumner were released and moved to the newly established reservation. Estimates of the overall Navajo population in 1868 place the figure at twelve to thirteen thousand Indians.

An 1878 Executive Order reestablished the western boundary of the 1868 Navajo Reservation further west at the 110° West Longitude, and an 1880 Executive Order added more land to the southwest part of the reservation. As enlarged the 1868 Navajo Reservation amounted to roughly eight million acres. Despite the vast size of this reservation

^{2/} 15 Stat. 667.

many Navajos ignored its boundaries and moved westward encroaching more and more upon lands considered to have belonged to Hopi Indians. The Indian agents in residence near the Hopi villages began to relay to their superiors in Washington an increasing number of Hopi complaints concerning Navajo encroachments on Hopi lands.

By 1876 it had been recommended that the Hopi Indians be given a reservation to protect them against Navajo trespasses and white intermeddlers. Nothing came of this or subsequent proposals until December 16, 1882, when President Arthur, acting upon the recommendations of Agent J. H. Fleming, issued an Executive Order setting up by metes and bounds a new Indian reservation of roughly 2-1/2 million acres for the immediate benefit of the Hopis ". . . and such other Indians as the Secretary of Interior may see fit to settle thereon." (I Kappler 805) This new Executive Order Reservation rests in the center of the overlap area and abuts the Navajo Reservation on the west, the common boundary line being the 110° of West Longitude. 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 then numbered about 1800 Indians. In addition to the Hopis, there were approximately 300 Navajo Indians living in the Executive Order Reservation as of 1882.

In the Commission's judgment the formal issuances of the December 16, 1882 Presidential Order effectively terminated and put to rest

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all Hopi aboriginal title claims beyond the limits of the 1882 Hopi Executive Order Reservation.

The Commission concludes that the record herein does not support the large aboriginal land area contended for by the Hopi plaintiff. In awarding a much smaller area, we considered among other things the fact that the Hopi Indians were a relatively small tribe, probably never exceeding 2500 Indians prior to 1882, and that by nature the Hopis were inoffensive and somewhat timid Indians whose pueblo oriented culture and environment confined them to permanent village sites.

The Hopis grazed sheep and cattle in the valleys below the mesas and the Commission is of the opinion that its boundary lines include the land used for these purposes. ^{3/}

Finally the Commission does not agree with the Hopi plaintiff that the sporadic and intermittent visits of Hopi Indians to sacred shrines in the outer reaches of the overlap area substantiates Hopi aboriginal title to all those lands lying between the village sites and these distant shrine areas. First of all the record clearly documents a long time Hopi abandonment of many shrine areas as well as common usage by other tribes of other shrines. While admitting to actual physical abandonment of shrines, the Hopi plaintiff insists that Hopi Indian presence is unnecessary to sustain ownership

^{3/} We note in this connection that Hopi Indian agent J. H. Fleming in a letter to the Indian Commissioner Price on December 4, 1882, indicated that boundaries of the proposed new Hopi Reservation embraced sufficient land for their agricultural and grazing purposes. Healing v. Jones, 210 F. Supp. 125 (1962) Aff'd 373 U.S. 958, Hopi E. 78.

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rights to their sacred places as long as spiritual attachment or rapport is sustained. However, even if we were to accept Hopi spiritual attachment as an indicia of aboriginal ownership, the Hopis in our judgment have failed to meet the evidentiary burden of showing continuous and exclusive use of their outlying and remote shrine area. The Confederated Tribes of the Warm Springs Reservation of Oregon v. United States, 177 Ct. Cl. 184 (1966), The Sac and Fox Tribe of Indians of Oklahoma, et al., v. United States, 161 Ct. Cl. 189, 315 F. 2d 896 (1963), cert. denied, 350 U.S. 848. In fact the archaeological evidence of record points to the presence of many abandoned Navajo sites throughout the perimeter of the subject tract although the actual use dates of many of these sites are strictly conjectural.

The Commission is of the opinion that as of December 16, 1882, when the Presidential Order was issued setting up the 1882 Executive Order Reservation, the Hopi Tribe held the Indian title only to those lands within the overlap area as described in the Commission's Finding No. 20. The Commission further concludes that the issuance of the December 16, 1882, Presidential Order setting up the Executive Order Reservation for the benefit of the Hopi Tribe, and for such Indians as the Secretary of Interior might see fit to settle thereon, had the effect of extinguishing, without the payment of any compensation, the Hopi Indian title to all those lands described in the Commission's

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Finding No. 20 lying outside the boundaries of the 1882 Executive Order Reservation.

Following the issuance of the 1882 Presidential Order, certain events and happenings transpired which finally deprived the Hopi Tribe of a major part of its aboriginal title lands within the 1882 Executive Order Reservation. There has been placed in the record in this case a copy of the findings of fact, opinion, and conclusions of law, issued in the case of Healing v. Jones, 210 F. Supp. 125 (1962), Aff'd. 373 U.S. 758 (1963), a matter of which this Commission takes judicial notice. The Healing case was a special action brought by the Hopi Tribe against the Navajo Tribe and the United States before a special three judge court convened pursuant to the Act of July 22, 1958, 72 Stat. 402, for the purpose of resolving the competing Hopi and Navajo claims in and to the 1882 Executive Order Reservation. Where pertinent and material to the disposition of title issues in this case, and where consistent with the record and the law of the case, the Commission had adopted as its own, either in part or in total, directly or indirectly, certain findings of fact and conclusions of law rendered by the court in Healing v. Jones, supra.

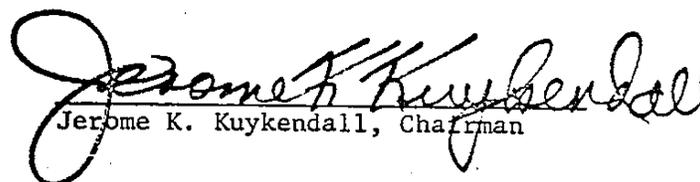
In the Healing case, the Court found, and the Commission concurs, that; (1) The Navajo population in the Executive Order Reservation increased steadily from 1882 from 300 Indians to 8,800 Indians by

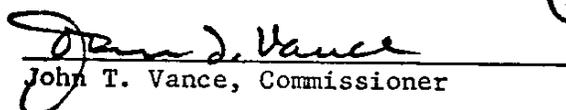
1958, and the Hopi population increased from about 1800 Indians to over 3,200 during the same period; (2) while Navajo Indians were allowed to move on to part of the Executive Order Reservation after 1882, it was not until June 2, 1937, that the Secretary of Interior by the issuance of certain grazing regulations impliedly settled the Navajo Tribe on a part of the Executive Order Reservation pursuant to the valid exercise of the authority conferred in the Secretary by the December 16, 1882 Presidential Order; (3) that Hopi non-use of a large part of the 1882 Reservation can be attributed to Hopi superstition and fear of the more warlike and aggressive Navajos and not to Hopi abandonment of the land; (4) that part of the Executive Order Reservation upon which the Navajo Tribe was officially settled was segregated from that part of the reservation where the Hopi villages and population were concentrated; and (5) that the limitation upon the Navajo tribal use area within the Executive Order Reservation was administratively fixed on April 24, 1943, by the Bureau of Indian Affairs when it circumscribed the boundaries around an area encompassing the Hopi villages, said area being designated as "land management district 6".

In the Commission's judgment, Hopi aboriginal title to the 1882 Executive Order Reservation lands, except for those lands within "land management district 6", was extinguished, without the payment of any compensation, by administrative action on June 2, 1937 when the Navajo Tribe was legally settled on the Hopi reservation.

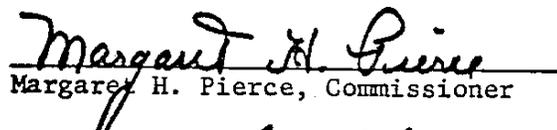
The case shall now proceed to a determination of the acreage and the December 16, 1882 fair market value of the lands awarded to the Hopi Tribe as set forth in the Commission's Finding 20 lying outside the 1882 Executive Order Reservation; to a determination of the June 2, 1937 fair market value of some 1,868,364 acres ^{4/} of Hopi aboriginal title lands within the 1882 Reservation but lying outside the boundaries of land management district 6, and, to a determination of all other issues bearing upon the defendant's liability to the Hopi Tribe.

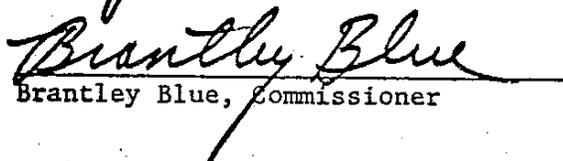
Concurring:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

^{4/} The 1882 Executive Order Reservation contained 2,499,558 acres, and "land management district 6" contained 631,194 acres, Comm. Finding 23.

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 29, 1970

FINDINGS OF FACT

The Commission makes the following findings of fact.

1. The Hopi Tribe, the plaintiff in Docket No. 196, is a corporation organized under the Indian Reorganization Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), the majority of whose members reside on the Hopi Reservation in Arizona. The Hopi Tribe is recognized by the Secretary of Interior as having the authority to represent said Hopi Indians, and as such the Hopi Tribe has the right and capacity under the Indian Claims Commission Act (60 Stat 1049) to bring and maintain this action.

2. The Navajo Tribe of Indians, the plaintiff in Docket No. 229 is a tribe of American Indians that possesses a tribal organization recognized by the Secretary of Interior as having the authority to

Appendix "B"

represent and to act on behalf of said tribe. The Navajo Tribe of Indians has the right and capacity under the Indian Claims Commission Act, supra, to bring and maintain the claims asserted herein.

3. The lands to which the Hopi Tribe asserted aboriginal or Indian title, and, which said tribe claims the United States took without the payment of any compensation, are located in Arizona and Utah. This landed area is bordered on the north and west by the San Juan and Colorado Rivers, on the south by the Little Colorado and Zuni Rivers, and on the east by the "Merriwether Line", a line that extends from the confluence of the San Juan and Rio de Chelly Rivers on the north to the confluence of the Little Colorado and Zuni Rivers on the south.

This tract of land that is aboriginally claimed by the Hopi Tribe in Docket No. 196 lies totally within a larger area to which the Navajo plaintiff in Docket No. 229 is asserting Indian title. In order to resolve all title claims against the United States to this overlap area, or subject tract, the Commission ordered consolidation of the above dockets. (Commission's Order of May 31, 1957.)

4. The Hopi or "Moqui" Indians are a remnant of the western branch of an early house building race which once occupied the southwestern table lands and canyons of New Mexico and Arizona. The Hopi Indians belong to the Pueblo culture, speak a Shoshonian dialect, and are one of the Indian tribes of North America still residing in their ancestral home.

5. Before 1300 A.D. the ancestors of the Hopi were identified in the area between Navajo Mountain in the northwest corner of the overlap area and the Little Colorado River to the south, and between the San Francisco Mountains well south of the overlap area and the Luckachuais Mountains in the northeast portion of the subject tract.

Archaeological evidence indicates that the Hopi village of Oraibi has existed in its present form since the 12th century. Oraibi is located near the center of the subject area and within the confines of the Hopi Reservation that was established by the Executive Order of December 16, 1882 (I Kappler 805).

6. It was in the summer of 1541 that the Hopi Indians first became known to white men. At that time, General Francisco Coronado sent Don Pedro de Tovar and a small detachment westward from the Zuni country to investigate the seven Pueblos in the province of Tusayan, as the Hopi country was then referred to, for the purpose of gaining information relative to the area and its people. There Tovar found the Hopis in villages on the mesa tops. The level summits of these mesas rise about six hundred feet above the surrounding valleys and range lands. The individual village houses, made of stone and mud, were two or three stories high and grouped together in typical pueblo fashion. The Hopis, who are ordinarily a timid and inoffensive people, were at first unfriendly to the Spaniards, but this soon changed and de Tovar's party remained with the Indians, learning from them, among other things, of the existence of the Grand Canyon.

De Tovar found that Hopis of this period wore cotton garments and that they possessed such things as dressed hides, flour, salt, pinon nuts, fowl and jewelry. They also cultivated fields of maize, beans, peas, melons, and pumpkins. The areas away from their village sites provided the Hopi Indians with a hunting ground for bears, mountain lions, wild cats, and other wild life.

In 1582 the Spanish merchant, Antonio de Espejo, journeyed from the Zuni village in New Mexico to the Hopi villages of Awatovi, Walpi, Shungopovi, Mishongnovi, and Oraibi. While there Espejo traveled to the Hopi silver mines that were located on Anderson Mesa near the San Francisco peaks, a location situated southwest of and outside the overlap area.

In 1598 the Spanish Governor and colonizer of New Mexico, Onate, visited the Hopi villages and took possession of the country in the name of the Crown of Spain.

In 1629 the Franciscan missionaries established a series of three missions in the Hopi villages of Awatovi, Shungopovi, and Oraibi. Father Benavides, one of the most important Spanish chroniclers of this period, had visited the Hopis in 1628 and 1630, but in 1633 he was killed at the village of Awatovi.

7. In 1680 the Pueblo Indians of New Mexico rebelled against the Spanish Government. The Hopi Indians joined in the rebellion which resulted in the temporary withdrawal of the Spanish from New Mexico. In 1692 Don Diego de Vargas returned, reconquered New Mexico for Spain,

and reestablished Sante Fe as the capital.

The Spanish reconquest of New Mexico in the 1690's led many of the Pueblo Indians in the Upper Rio Grande Valley to seek protection among the Hopi. About the year 1700 the Tewa Indians, who had come to the "First Mesa" in the heart of the Hopi country at the invitation of the inhabitants of the Hopi village of Walpi, established the village of Hano. Here they have continued to live ever since. During this period the pueblos of the ancient Tusayan (Hopi) province, as known to the Spanish, consisted of Walpi, Sichomovi, and Hano, on First Mesa; Mishongnovi, Shungopovi, and Shipaulovi on Second Mesa; and Oraibi on Third Mesa, all such sites being situated in the center of the Hopi claimed area and within the confines of the 1882 Hopi Executive Order Reservation, supra. The ancient village of Awatovi was destroyed in 1700.

During the years 1775 and 1776, two Catholic priests, Fathers Escalante and Garces, sought to open a way from California to the Hopi villages and on to Santa Fe, New Mexico. Father Escalante started from New Mexico and spent eight days in the Hopi towns. Father Garces started from California and traveled eastward across the Little Colorado River north of the Cameron and arrived at the Hopi village of Oraibi.

8. Although the Hopi Indians are pre-eminently a religiously oriented people, the Spanish missionaries had very little success in converting these Indians to the tenets of Christianity.

The Hopi worship was centered primarily on the eagle, it being considered the most sacred of birds. The Hopi Tribe had many eagle shrines that were visited periodically, although in the minds of the Hopi Indian one's actual presence at the particular shrine was not needed in order to satisfy the required religious attachment. In the buttes and higher mountain regions there were found many eagle shrines that were located forty miles or so from the nearest Hopi village claiming the ownership thereof. Such of the Hopi shrines as were located in San Francisco Peaks, west of the claimed area and at Chevelon Creek southeast of Winslow, Arizona, were quite remote from the principal Hopi villages. Many of these shrines had been physically abandoned over the years and long before the United States acquired sovereignty over the southwest portion of our country. Abandoned Hopi shrines can be found on Navajo Mountain, on the northwest perimeter of the overlap area, in the San Francisco Mountains, and around Winslow, Arizona in the Little Colorado Valley. The Hopi villages that had been located along the Little Colorado near Winslow were moved on to the Hopi mesas and further north to Oraibi, and into the Jeddito Valley, these locations being well within the subject tract and the confines of the 1882 Hopi Executive Order Reservation. In addition to the Hopi, other southwest tribes, such as the Navajos, Zunis, Acomas, Lagunas, and the Apache groups visited religious shrines that were located on many of the prominent mountain peaks.

9. The Navajo Indians, a branch of the Athapaskan people, and, who with the Apaches make up one linguistic unit, apparently migrated into the southwest from Canada. Just when the Navajos entered New Mexico is problematical, perhaps as early as 1300 A.D., or as late as 1500 A.D. Traditionally the Navajos refer to the upper Blanco and Largo Canyons in northern New Mexico as their ancestral lands, an area well east of the Hopi-Navajo claimed area that is involved therein. The lower Navajo Dam Reservoir region, also in New Mexico and east of the overlap area, was first settled by the Navajos in the 1500's and subsequently abandoned in the later 1700's probably due to the increasing hostilities with the Utes. In any event, the Navajos began to range further south and southwestward from the upper San Juan River areas during the Spanish period of sovereignty.

10. It was sometime during the early years of Spanish rule that the Navajo Indians were first introduced to horses and sheep, two items that would markedly increase their tribal mobility and foster a more nomadic existence.

As their population and animal stock increased in number, Navajo territorial demands increased accordingly. They grew more aggressive and warlike, and began with increasing regularity to raid and harass the Spanish settlements and the Pueblo Indian villages lying west of the Rio Grande River. Spanish reprisals against the Navajos were almost immediate, and as the colonial population grew in the Rio Grande Valley, the Navajos were compelled to move farther westward in order

to find the necessary range and to elude their enemies. Spanish slave raids against the Navajos, which were frequently carried out with the assistance of the Pueblo Indians, created more antagonism.

From 1720 until about 1750 an era of relative peace prevailed between the Spanish and the Navajos. This favorable situation was occasioned for the most part by the open hostility of the Ute Indians, who, coming down from the north, kept the Navajos busy and compelled them to move further south.

By the 1740's very few Navajo Indians remained in the Gobernador-La Jara area, most of them having receded southward toward the Big Bend Mesa and into the Cebolleta mountain region east of Mt. Taylor, an area somewhat east of the contested lands in this law suit.

Efforts by the Spanish missionaries in the 1740's to Christianize the Navajos living in the Cebolleta Mountains ultimately failed, and with the Spanish population in the Rio Grande Valley continuing to increase in the years that followed, territorial demands upon the Navajos and the other nomadic Indian tribes caused further migration south and west.

11. There was a renewal of Navajo raiding activity upon the Spanish colonial settlements and the neighboring Pueblo Indian villages that continued intermittently through the remainder of the Spanish regime as well as the entire 1821-1846 period of Mexican sovereignty.

Mexican officials considered themselves at war with the Navajos throughout the entire Mexican period, having conducted campaigns against

them in 1823, 1833, 1836 and 1838. It was also a period when the Hopi villages were no longer immune to Navajo raiding and hostility, although generally speaking the territory of the Navajos was still to the east of the Hopi mesas.

12. It was during the Mexican War between 1846 and 1848 that the Hopi Indians became better known to American authorities. In 1846, Charles Bent, the Superintendent of Indian Affairs for the New Mexico Territory reported to the Commissioner of Indian Affairs as follows:

The Moquis are neighbours of the Navajoes and live in permanent villages, cultivate grain, and fruits and raise all the varieties of stock. They were formerly a very numerous tribe in the possession of large flocks and herds but have been reduced in numbers and possessions by their more warlike neighbours and enemies the Navajoes. The Moquis are an intelligent and industrious people, their manufactures are the same as those of the Navajoes. They number about 350 families or about 2450 souls.

Apparently the Navajo had not yet settled to any extent in the Hopi country, their territory being described as to the east and at Canyon de Chelly. The Navajos along with the Apaches were still raiding the Rio Grande Pueblos to the east, and the Zuni Pueblo to the south. To the west the Navajos were raiding near the Hopi villages, while at the same time they were avoiding any contact with the warlike Utes to the north.

The United States had commenced exerting military pressure against the Navajos as early as 1846. A treaty of peace with the Navajos was sought in the same year but failed ratification. A second peace

treaty in 1848 also failed to be ratified.

13. With the advent of American sovereignty over the Southwest in 1848 under the Treaty of Guadalupe Hidalgo (9 Stat. 922), Navajo depredations seem to increase in frequency despite military operations against them. Ute and Apache raiding activities contributed to the general unrest.

In 1849 American authorities concluded a peace treaty with the Navajo tribe at Canyon de Chelly in the very heart of the Navajo country. This treaty was ratified in 1850 but failed to halt Navajo raids. In the same year a deputation of Hopi Indians arrived in Santa Fe, New Mexico, to complain bitterly to the authorities of the Navajo raiding and stealing in their country.

In an effort to check further Navajo raiding, Fort Defiance was established in 1851 in Arizona at a point just west of the present Arizona-New Mexico boundary line. The military operations emanating from Fort Defiance had a two-fold effect. The Navajo began to range further south, west, and northwest, and the military authorities were brought into closer contact with the Hopi Indians. It was the beginning of the period when the military reported more accurately the movement of the Navajos who obviously were ranging well into the overlap area.

In 1851 Navajos were reported pitching tents on both sides of the Rio de Chelly. In 1853 they were reported west of Jacobs Well (Ojo Redondo) in the southern part of the Hopi-Navajo claimed area. An 1851 map submitted by Lt. John G. Parke of the topographical engineers

depicts the so-called "Navajo country" as extending from the San Juan River and the lower reaches of its northern tributaries in the north to the Zuni Mountains, and Mt. Taylor in the south, and from Canyon Largo and Rio Puerco in the east, to Mesa de La Vaca or Black Mesa in the west. Black Mesa is situated well into the Hopi-Navajo overlap area within the northern boundary of the 1882 Hopi Executive Order Reservation.

A second base map of New Mexico that was prepared by the same Lt. Parke was utilized by Governor David Merriwether in 1855 when he sought by treaty to separate and identify the lands of Indian tribes residing in the New Mexico Territory, among them being the Hopi and Navajo. While the 1855 Merriwether Treaty failed to be ratified, it was the initial attempt by the United States to set up a Navajo reservation, the western boundary of which was a line that began at the mouth of Zuni River where it enters the Colorado River and ran north to the mouth of the Rio de Chelly where it enters the San Juan River. The "Merriwether Line" is almost parallel to and less than 20 miles east of the eastern boundary line of the 1882 Hopi Executive Order Reservation.

14. By 1858 Navajo were reported in the northern part of the overlap area around Calabasa Mesa, North Pass and north of the Hopi villages. To the south of the Hopi villages the Navajo could be located west of Jacobs Well, Navajo Springs and the Puerco River area. In the years that followed the Navajo Indians progressively moved into much

of the area surrounding the Hopi lands, being found even west of the Hopi villages.

The period 1858-1868 can be characterized as the Navajo flight period, one in which the United States military operations finally succeeded in quieting the Navajo raiding, and one in which a permanent Navajo Reservation was finally established.

In the summer of 1863, General James Carleton conceived the idea of collecting all Navajos and placing them on a new reservation on the Pecos River in New Mexico. An area forty miles square was thereafter set aside for the Navajo and the Mescalero Apaches at the Bosque Redondo with Fort Sumner in the center. Colonel Kit Carson was charged with the responsibility of carrying out the new plan. As a result of Carson's determined efforts, more than 8000 Navajos were at Fort Sumner by the end of April 1864.

Meanwhile, the United States had established an Indian agency for the benefit of the Hopi Tribe, with the headquarters at Keams Canyon which is twelve miles east of the nearest Hopi village and well within the area in suit.

15. The Navajos were not happy at Fort Sumner. Confinement in this manner was alien to their nomadic way of life. The fact that many of their fellow tribesmen were still at large only added to their discontent.

In 1868 the Congress sought to settle all matters of mutual concern when it authorized a commission to treat with the Navajo chieftains

at Fort Sumner. The result was the Navajo Treaty of June 1, 1868, (15 Stat. 667). Under the 1868 Treaty, a new Navajo Indian Reservation, some one hundred miles square, was established in northwestern New Mexico and northeastern Arizona, the boundaries of which were to encompass the heartland of what was traditionally considered to be Navajo country. In exchange for this new reservation, the Navajo Tribe agreed among other things to relinquish all occupancy rights to other lands outside of the reservation except the right to hunt on unoccupied lands contiguous thereto.

Following the conclusion of the 1868 Treaty, those Navajo Indians who had been confined at Fort Sumner, were released and began to move on to the new reserve. At this time the overall Navajo population was estimated at between twelve to thirteen thousand souls.

Despite the size of their new reservation, many Navajo Indians failed to acknowledge its boundaries and continued to move into other areas where some established farms. Other Navajo Indians, as was their custom, moved sizeable herds of livestock in a seasonal manner from mountain to valley. A steady stream of Navajo family groups began to move into the Black Mesa region in the northern part of the overlap area, and into the Jeddito Valley to the south.

16. In an effort to cope with the rapidly increasing Indian population and the steady pressure from nearby Mormon settlements, the Indian Agent at Fort Defiance, Arizona, recommended in 1876 that a reservation fifty miles square be set aside for the benefit of the

Hopi Tribe. A second recommendation for a Hopi reservation was forwarded to Washington in 1878. Nothing came of either of these proposals.

By an Executive Order issued on October 29, 1878 (1 Kappler 175) the western boundary line of the 1868 Navajo reservation was extended further west. This new line (110° west longitude) later became the eastern boundary of the 1882 Hopi Executive Order Reservation. More land was added to the southwest corner of the Navajo Indian reservation by another Executive Order issued on January 6, 1880 (1 Kappler 876). These two additions to the 1868 Navajo Indian reservation enlarged it to about 11,875 square miles or 8,000,000 acres.

17. Despite the increased size of the Navajo reservation at this time, it was incapable of supporting the burgeoning Navajo population. By 1882 approximately one half of the Navajo population had camps and farms outside of the reservation, some as far away as one hundred fifty miles. On March 22, 1882, the Hopi Indian Agent, J. H. Fleming, addressed a letter to the Secretary of Interior recommending that a Hopi reservation be established that would include within its boundaries all of the Hopi Pueblos, the agency buildings at Keams Canyon, and sufficient lands for agricultural and grazing purposes. Agent Fleming cited the need of protecting the Hopis from the intrusions of other Indians, Mormon settlers, and white intermeddlers. Other responsible government officials voiced their support for such a reservation.

18. On December 16, 1882, President Arthur issued an Executive Order setting aside for the Hopi Tribe and such other Indians as the

Secretary of Interior may see fit to settle thereon the following reserve in Arizona (I Kappler 805):

"...beginning on the hundred and tenth degree of longitude west from Greenwich, at a point 36 degrees and 30 minutes north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude 35 degrees and 30 minutes north, thence due east to the one hundred and tenth degree of longitude, and thence due north to the place of beginning...

The area so described contains 2,499,558 acres. Some 1800 Hopi Indians and at least 300 Navajo Indians were residing on the new Hopi reservation when the Executive Order was issued. The Hopi Indian population figures of 1882 show a marked decline from figures available for prior years. An 1846 estimate had fixed the Hopi Indian population at 350 families or roughly 2450 Indians. In 1852 the Indian Agent had listed the Hopi population at 2500 Indians.

19. The Navajo Tribe has presented considerable archaeological evidence in support of its title claims to the overlap area. This evidence is recorded upon site sheet reports covering twenty-three volumes. There is included in this archaeological evidence a great deal of "tree ring" data, that was based upon a dendrochronological study of several thousand selected tree ring specimens cut from wood found from abandoned Indian dwellings and alleged to have been Navajo. A separate study was made by the Navajo plaintiff of ancient Indian pottery that had been recovered from various abandoned Indian sites

throughout the overlap area. All such archaeological evidence was supported by the testimony of the Navajo expert witness who made the particular study and prepared the accompanying exhibits. Apart from seeking to identify abandoned Indian sites within the subject tract as being Navajo, this archaeological evidence was also utilized for dating purposes. The Commission has found after careful consideration of all such evidence that the identity as well as the date of construction and date of actual use of many of the abandoned Indian sites within the subject tract was still a matter of conjecture. And even when specific Navajo sites were identified, frequently these Navajo sites were interspersed with non-Navajo sites, and their actual construction dates uncertain. The Commission has concluded that the weight of this archaeological evidence failed to overcome the many historical accounts written during this early American period which do not show any substantial Navajo tribal movement into the overlap area prior to the establishment of the 1868 Navajo Treaty Reservation.

20. Based upon the preceding findings of fact and all the evidence of record, the Commission finds that the issuance of the Presidential order on December 16, 1882, establishing the Hopi Executive Order Reservation effectively terminated and extinguished, without the payment of any compensation to the Hopi Tribe, its aboriginal title claims to all lands situated outside of said reservation. As of December 16, 1882, the Hopi Tribe had Indian

title to the following described tract of land.

Beginning at the northeast corner of the 1882 Hopi Executive Order Reservation, 110° W. Longitude and 36° 30' N. Latitude, thence due south on the 110 W. Longitude to its intersection with the Pueblo Colorado Wash, thence southwesterly following the Pueblo Colorado Wash and the Cottonwood Wash to the Little Colorado River, thence northwesterly along the Little Colorado River to its intersection with 111° 30' W. Longitude, thence northeasterly on a line to the intersection of Navajo Creek and 111° W. Longitude, thence southeasterly to the place of beginning.

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

21. Disagreement continued between the Hopis and the Navajos as to their respective rights to the 1882 Executive Order Reservation. Navajo Indians had been using parts of the 1882 Reservation prior to its establishment, and the Navajo population in the reservation had been increasing steadily, growing from about 300 in 1882 to about 8,800 Indians by 1958. During the same period the Hopi population in the reservation grew from about 1800 to over 3,200 Indians. In order to judicially settle all matters of conflict between the two tribes as to their rights in the 1882 Reservation, Congress passed the Act of July 22, 1958 (72 Stat. 402). Under "sec. 1" of said Act a three judge Court was convened to hear and entertain a suit brought by the Hopi Tribe against the Navajo Tribe. The United States was joined as a nominal or passive defendant. The judgment rendered by the three judge court is reported in the case of Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), Aff'd 373 U. S. 758 (1963). A copy of the

Court's findings of fact, conclusions of law, and judgment appear in the record of this case as "Hopi Ex. 78". The Commission takes judicial notice of all the proceedings and determinations in the case of Healing v. Jones, supra, and hereinafter adopts in whole or in part, directly or indirectly, where pertinent and material to issues to be resolved in the instant case, the Court's findings of fact and conclusions of law.

22. Although there were Navajo Indians living on the 1882 reservation at the time it was created, neither they nor the Navajo Tribe were mentioned in the December 16, 1882 Executive Order. Any rights that the Navajos might enjoy in 1882 Reservation would have to be rights acquired in futuro under that part of the Executive Order reading "and such other Indians as the Secretary may see fit to settle hereon." (I Kappler 805)

Between the years 1882 and 1931 no Secretary of Interior, or any official acting in his behalf, took any action either expressly or by implication, to settle Navajo Indians or the Navajo Tribe on the 1882 Reservation pursuant to his discretionary authority under the 1882 Executive Order.

23. Around the year 1890, Indian agents and other officials assigned to the Hopi-Navajo area began to send back to Washington an increasing number of Hopi complaints of the steady Navajo encroachment upon Hopi grazing and agricultural lands within the 1882 Reservation.

The best grazing lands were in the valleys near the washes below the Hopi mesas. The Hopis' refusal to leave their pueblo villages on the Mesa tops and to take up residence in the valleys had been predicated partly on superstition and partly on their fear of the bolder, more aggressive Navajo Indians. Following repeated exhortation on the part of Government officials to take the initiative and leave their mesa villages, the Hopis began in the late 1920's and early 1930's to move down into the valley areas and to reclaim and use former Hopi lands within the reservation now partly in Navajo hands. The Hopi Tribe never abandoned its right to use and occupy the 1882 Reservation prior to the time the Secretary of Interior settled the Navajos on the reservation as hereinafter indicated.

24. On February 7, 1931, the Secretary of Interior and the Commissioner of Indian Affairs jointly accepted a recommendation that the 1887 Reservation be divided between the Navajos and the Hopis but "that there should be set aside and fenced for the exclusive use of the Hopis a reasonable and fair area of land". (Healing v. Jones, 210 F. Supp. 125, 156).

Under Section 6 of the Indian Reorganization Act of June 18, 1934, (48 Stat. 984) the Secretary of Interior was directed to make rules and regulations for the administration of Indian reservations with respect to forestry, livestock, soil erosion and other matters. On November 6, 1935, the Secretary issued general grazing regulations affecting the carrying capacity and management of the Navajo range, and setting up

separate land management districts, the boundaries of which were undefined at that time. Early in 1936 the boundaries of these land management districts were defined, the result being that the boundaries of "land management district 6" lay entirely within the 1882 Reservation so as to encompass the Hopi villages and all lands used by the Hopi Indians. As originally established "land management district 6" contained about 500,000 acres. On April 24, 1943, the Office of Indian Affairs approved the new boundaries of district 6, and as presently constituted "land management district 6" embraces 631,194 acres. A detailed description of the boundaries of "land management district 6" is set forth in the Court's Finding of Fact "41" in Healing v. Jones, supra, (Hopi Ex. 78, pp. 217-219), and is depicted on the map of the 1882 Executive Order Reservation reproduced in the official report of that case, a copy of which is attached herein at the end of the Commission's findings of fact.

25. Commencing on February 7, 1931, when the Secretary of Interior approved a recommendation calling for a Navajo-Hopi division of the 1882 Executive Order Reservation, administration officials followed a policy designed primarily to exclude Hopi Indians from that part of the 1882 Reservation upon which Navajo Indians were being settled with implied Secretarial consent. This policy of segregating the two tribes was pursued further with the issuance of grazing regulations designed to control the grazing capacity of the lands within the newly formed "land management district 6", which district insofar as the grazing

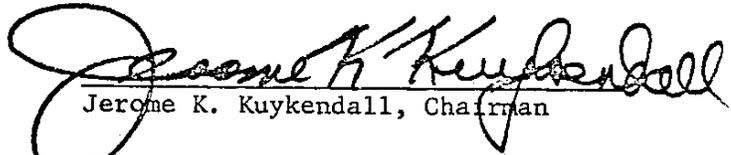
regulations were concerned was designated as a "Hopi Reservation". The Commission finds that administration action on June 2, 1937, effectively terminated all Hopi aboriginal title to the lands within the 1882 Executive Order Reservation outside the boundaries of "land management district 6" as established and approved by the Office of Indian Affairs on April 24, 1943. The entire 1882 Executive Order Reservation contained 2,499,558 acres, and the area outside of "land management district 6" totaled 1,868,364 acres.

26. Pursuant to the provisions of "Sec. 2" of the Act of July 22, 1958, supra, the Court in Healing v. Jones entered a judgment wherein the Hopi Tribe was decreed to be the exclusive owner of the land in "land management district 6" and said tribe was awarded reservation title thereto. (Hopi Ex. 78, p. 223.) The Court further decreed that the Hopi Tribe and the Navajo Tribe held a joint, undivided and equal interest to the balance of the 1882 Reservation. (Hopi Ex. 78, p. 224)

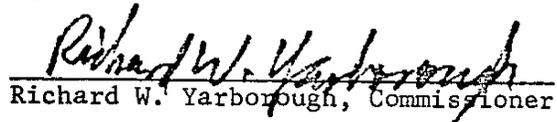
CONCLUSIONS OF LAW

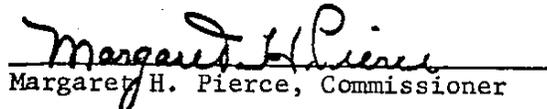
The Commission concludes that the Hopi Tribe is entitled to bring and maintain the suit herein; as of December 22, 1882, the Hopi Tribe held the Indian title to the lands described in Finding of Fact 20, supra; on December 22, 1882, the United States extinguished the Hopi Indian title without payment of compensation to those lands described in Finding of Fact 20 lying outside the boundaries of the

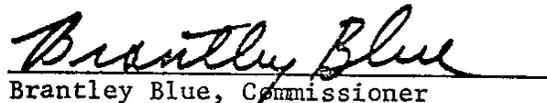
2 Executive Order Reservation; on June 2, 1937 the United States
 inguished the Hopi Indian title to 1,868,364 acres of land in the
 2 Executive Order Reservation, lying outside the boundaries of
 and management district 6"; under the decree of the Court in the
 e of Healing v. Jones, supra, the Hopi Tribe has reservation title
 the lands in "land management district 6" and a joint, undivided,
 equal interest with the Navajo Tribe to the balance of the lands
 in the 1882 Executive Order Reservation; and, the Hopi Tribe did
 have Indian title to the balance of the lands in suit herein.


 Jerome K. Kuykendall, Chairman


 John T. Vance, Commissioner


 Richard W. Yarborough, Commissioner

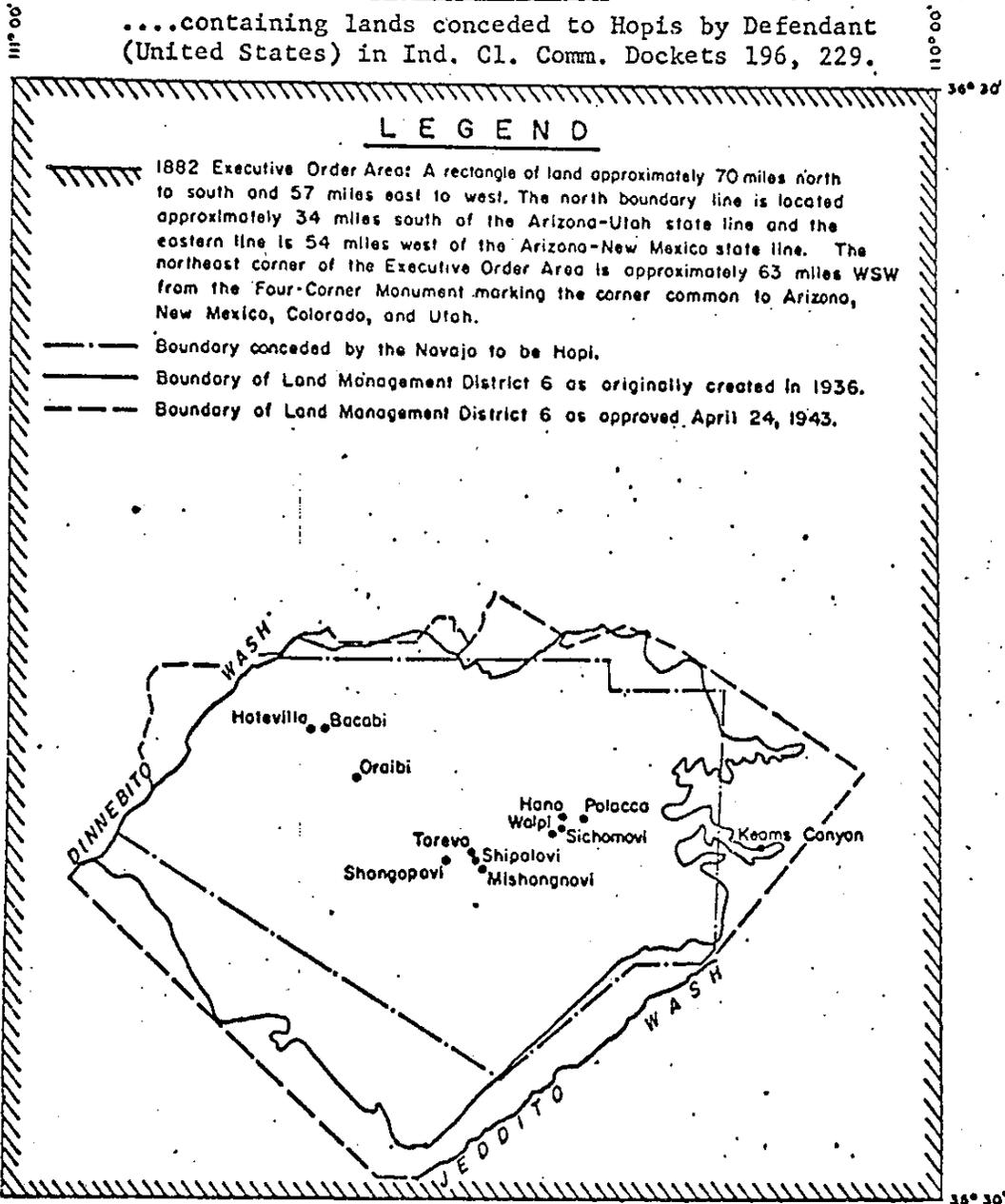

 Margaret H. Pierce, Commissioner


 Brantley Blue, Commissioner

MAP OF LAND MANAGEMENT DISTRICT 6

(from Opinion in Healing v. Jones, 210 F. Supp. 133)

....containing lands conceded to Hopis by Defendant (United States) in Ind. Cl. Comm. Dockets 196, 229.



LEGEND

-  1882 Executive Order Area: A rectangle of land approximately 70 miles north to south and 57 miles east to west. The north boundary line is located approximately 34 miles south of the Arizona-Utah state line and the eastern line is 54 miles west of the Arizona-New Mexico state line. The northeast corner of the Executive Order Area is approximately 63 miles WSW from the Four-Corner Monument marking the corner common to Arizona, New Mexico, Colorado, and Utah.
-  Boundary conceded by the Navajo to be Hopi.
-  Boundary of Land Management District 6 as originally created in 1936.
-  Boundary of Land Management District 6 as approved April 24, 1943.

Note: This map represents a simplified version of one in larger scale filed in the records of the case pursuant to stipulation of counsel for the parties dated August 15, 1962.

BEFORE THE INDIAN CLAIMS COMMISSION

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

INTERLOCUTORY ORDER

Based upon the Findings of Fact and Opinion this day entered herein, which Findings of Fact and Opinion are hereby made a part of this order, the Commission concludes as a matter of law that,

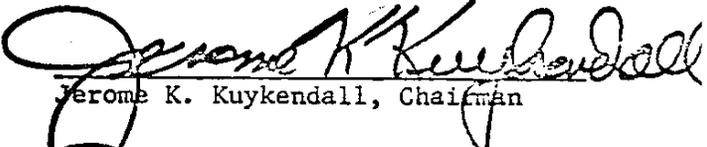
1. The Hopi Tribe and the Navajo Tribe of Indians have the right and capacity to bring and maintain the respective claims herein.
2. As of December 16, 1882, the Hopi Tribe had Indian title to that tract of land described in the Commission's Finding of Fact 20.
3. On December 16, 1882, the United States without the payment of any compensation, extinguished the Hopi Indian title to all lands within the aforesaid tract lying outside the boundaries of the 1882 Executive Order Reservation.
4. On June 2, 1937, the United States extinguished the Hopi Indian title to some 1,868,364 acres of land within the 1882 Executive Order Reservation, said acreage being the balance of the land in the 1882 Reservation lying outside of that part of the reservation known as "land management district 6".

Appendix "C"

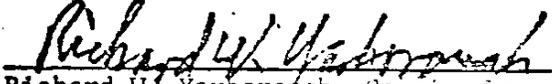
4. The evidence of record does not support Hopi aboriginal title claims to the balance of the land in suit.

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

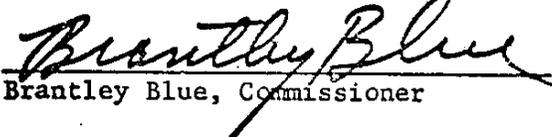
Dated at Washington, D. C., this 29th day of June, 1970.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, an Indian Reorganization Act)
Corporation, suing on its own behalf and)
as a representative of the Hopi Indians)
and the Villages of FIRST MESA (Consolidated)
Villages of Walpi, Shitchumovi and Tewa),)
MISHONGNOVI, SIPAULAVI, SHUNGOPAVI, ORAIBI,)
KYAKOTSMOVI, BAKABI, HOTEVILLA and)
MOENKOPI,)

Docket No. 196

Plaintiff,)

vs.)

THE NAVAJO TRIBE OF INDIANS,)

Plaintiff,)

Docket No. 229

vs.)

THE UNITED STATES OF AMERICA,)

Defendant.)

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

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

Attorney of Record

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

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

Attorneys of Counsel.

BEFORE THE INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, an Indian Reorganization Act Corporation, suing on its own behalf and as a representative of the Hopi Indians and the Villages of FIRST MESA (Consolidated Villages of Walpi, Shitchumovi and Tewa), MISHONGNOVI, SIPAULAVI, SHUNG-OPAVI, ORAIBI, KYAKOTSMOVI, BAKABI, HOTEVILLA and MOENKOPI,

Plaintiff,

vs.

THE NAVAJO TRIBE OF INDIANS,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 196

Docket No. 229

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

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

I

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

taking by the defendant is based upon the following:

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

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

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

II

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

A. ERRORS OF FACT

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

The United States Government commenced exerting military pressure against the Navajo in the winter of 1846 under Col. Alexander Doniphan. Between then and the summer of 1849 no less than five expeditions of American troops took the field against the Navajo. Between 1850 and 1860 large numbers of the Navajo pursued by the United States military forces entered what was then Hopi territory, being forced into areas they had not previously occupied.

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

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

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

2. The Commission erroneously omitted petitioner's requested

Finding of Fact No. 22, as follows:

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

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

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

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

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

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

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

. . . In the travels of both priests, Hopi cattle were found to graze over an extensive area to the west of the Hopi villages. Escalante found an abundance of black cattle and mustangs. Garces noted extensive trade to the west, especially with the Havauspai.

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

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

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

that:

The Hopi villages that had been located along the Little Colorado near Winslow were moved on to the Hopi mesas and further north to Oraibi, and into the Jeddito Valley, these locations being well within the subject tract and the

confines of the 1882 Hopi Executive Order
Reservation. (Emphasis added)

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

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

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

that:

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

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

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

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

that:

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

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

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

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

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

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

Whereas in truth and in fact the Hopi claim to the area outside of the lands described in Finding 20 was not solely based upon sustained "spiritual attachment or rapport" as inferred in the opinion of the Commission at page 286 but was based upon exclusive typical Indian use including shrines, grazing, agriculture, use of timber and plants, hunting, trading and trails, and the collection of salt, minerals and miscellaneous items to the natural boundaries on the north, west and south and to the area of conflict with the Navajo Indians on the east as of July 4, 1848. The evidence relied upon to support the position of petitioner is:

Ex. G 69.

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

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

Ex. G 230a (map) 1856.

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

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

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

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

(See also Tr. Pitrat 9645).

Tr. Pahona 7476-77, 7482. The agreed traditional boundary was solemnized by the delivery of an Indian "Tiponi" by the Navajo to the Hopi as a reminder of the promise. (See also Ex. 55 (Hopi), pg. 2.)

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

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

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

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

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

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

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

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

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

Ex. 2 (Hopi) map showing Merriwether line.

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

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

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

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

Shrine areas were of particular significance because trips to the shrines were coupled with many related activities such as hunting, trapping eagles, gathering herbs, plants, berries, minerals and other items necessary to Hopi life. Dr. Eggan testified, Tr. 7221: "I think they not only made multiple use, but they made a relatively intensive use of their territory both on their reservation and on the neighboring regions."

Dr. Eggan further testified, Tr. 7429: "I think there is clear evidence they hunted over much of this area, they gathered wild plants for a considerable variety of purposes, they herded cattle and sheep over much of this area, that they had agricultural fields mainly in the heart of this area, that they gathered ceremonial products as evidenced both by a continuation of these and by the shrines which we have located on these maps over an even wider area." "In many respects this claim is conservative."

Tr. Eggan 7407. ". . . They don't just take a helicopter to the shrine, however. The area in between is important to them, too. I have suggested they do other things in between. They gather herbs and plants the same way the Navajo do. They may hunt over that territory . . . They may bring back wood or they may bring back ceremonial objects. . ."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tr. Ellis 7567. "Hunting as I said, took place all through this area. . . The area enclosed by the Colorado and the Little Colorado and over to the New Mexico line, but I think that a majority of it for the period with which we are concerned would definitely have been carried on west of Steamboat if that was considered to be the outline of where the Navajos came to."

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

Tr. Ellis 9388. Hunting on visits to shrines.

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

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

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

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

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

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

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

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

Tr. Ellis 7564. Salt in Colorado River Area.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. ERRORS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Pawnee Tribe v. United States, 5 Ind. Cl. Comm. 279, 286, 292 (1957) No abandonment although tribe was materially reduced in numbers by disease and area was raided by Indian war parties where no record that any other tribe ever attempted to establish villages in area claimed and record indicates continued use and occupancy of substantially all territory claimed.

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

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

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

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

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

Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835) Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites.

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

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

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

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

25 USC, Sec. 70a

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

Treaty of Guadalupe Hidalgo, 9 Stat. 922

Constitution of the United States.

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

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

Sac and Fox Tribe of Indians of Oklahoma v. United States, 315 F. 2d 896 (1963) To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy "for a long time" prior to the loss of property.

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

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

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

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

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

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

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

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

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

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

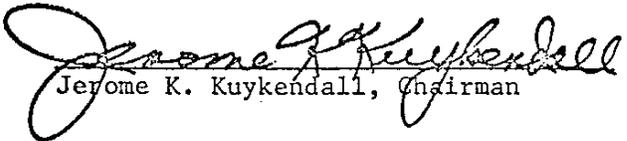
Dated this 27th day of August, 1970.


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

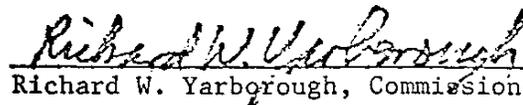
Attorney of Record

IT IS FURTHER ORDERED that the plaintiff in Docket No. 196, The Hopi Tribe, shall serve upon the defendant and the plaintiff in Docket No. 229, The Navajo Tribe, copies of such documentary evidence and memorandum, and that the defendant and the plaintiff in Docket No. 229, The Navajo Tribe, shall have thirty (30) days from the date of service by the plaintiff in Docket No. 196, The Hopi Tribe, in which to file their rebuttal evidence, if any, along with digests of exhibits and memoranda with points and authorities supporting their contentions with regard to the date or dates of taking, and to serve the same on the plaintiff in Docket No. 196, The Hopi Tribe.

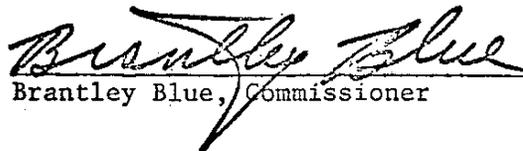
Dated at Washington, D. C., this 2^d day of June 1971.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: July 9, 1973

Appearances:

John S. Boyden, Attorney for Plaintiff in Docket No. 196; Wilkinson, Cragun & Barker, and Stephen G. Boyden were on the Brief.

Harold E. Mott, Attorney for Plaintiff in Docket No. 229.

William F. Smith, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION ON MOTION

Kuykendall, Chairman, delivered the opinion of the Commission.

On June 29, 1970, this Commission issued findings of fact, an ^{1/} opinion, and an interlocutory order in these consolidated cases. Among

1/ 23 Ind. Cl. Comm. 277.

other things, we determined that, as of December 16, 1882, the date on which President Arthur by Executive order established the Hopi Indian Reservation ^{2/} the Hopi plaintiff held aboriginal title to a certain tract of land in Arizona. This tract was described in detail in the Commission's finding of fact 20 , and included within its boundaries the 1882 Executive order reservation as well as additional land, to the north, west, and south of the reserved area. ^{3/} We also concluded that the United States extinguished Hopi aboriginal title to those lands lying outside of the 1882 reservation as of December 16, 1882, ^{4/} and 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." ^{5/}

On August 28, 1970 the Hopi plaintiff filed a motion for further hearings which was supported by an assertion that it had not been afforded an opportunity to present its complete evidence as to the date or dates of taking of its aboriginal lands; that the Commission had failed to find, as requested by the plaintiff, that the Hopi Tribe held aboriginal title to all the land claimed by said tribe as of February 2, 1848, the date the United States obtained sovereignty over the subject lands pursuant to the Treaty of Guadalupe Hildalgo, 9 Stat. 922;

^{2/} I Kappler 805.

^{3/} 23 Ind. Cl. Comm. at 305.

^{4/} Id.

^{5/} 23 Ind. Cl. Comm. at 309.

and, that the Commission's premature decision 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. ^{6/}

Both the Navajo plaintiff in Docket No. 229, and the defendant filed responses in opposition to the Hopi motion. ^{7/} On April 28, 1971, the Commission issued an order wherein it acknowledged that the Hopi plaintiff had not been given adequate opportunity to present evidence on the date(s) of taking and that a rehearing would be granted with the reception of additional evidence limited solely to the question of date(s) of taking of the Hopi aboriginal lands. ^{8/} 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 authorities in support of its contentions. ^{9/}

On May 22, 1972, this entire matter came on for rehearing before the Commission, at which time the Commission received the additional evidence relative to the alleged date(s) of taking. No additional evidence was offered or received in support of the Hopi's claims of aboriginal title.

^{6/} Motion for Further Hearing on Dates of Taking, for Rehearing and for Amendment of Findings.

^{7/} Navajo Brief in opposition to Hopi motion was filed on October 12, 1970. Defendant's Response was filed on January 15, 1971.

^{8/} Journal - Indian Claims Commission, p. 1414.

^{9/} Id. p. 1424.

At the hearing on May 22, counsel for the Hopi plaintiff centered his argument around what earlier had been characterized as three fundamental, but erroneous, determinations made by the Commission in its 1970 decision. These three allegedly erroneous determinations are stated as follows in the Hopi supporting brief: ^{10/}

1. The Commission erroneously held that the Executive Order of December 16, 1882, extinguished the Hopi Indian title to those lands described in Finding of Fact 20, which were outside the boundaries described in said executive order.
2. The Commission erroneously held that on June 2, 1937, when the grazing regulations were approved, being the beginning of the implied settlement of the Navajo Tribe on the Executive Order Reservation of December 16, 1882, as determined in the case of Healing v. Jones, 210 F. Supp. 125 (1962), aff'd 373 U.S. 758 (1963), Hopi Indian title to all land in said Executive Order Reservation lying outside "land management district 6" was extinguished.
3. The Commission erroneously held that the Hopi Tribe did not have Indian Title to its claimed lands lying outside the area described in Finding 20.

We shall deal with each of these contentions, although not in the same order as they are stated above.

Hopi Aboriginal Title

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.

^{10/} Pp. 4, 19, 23 - Brief in Support of Petitioner's Motion for Further Hearing on the Matter of Dates of Taking by the Defendant, etc. Sept. 16, 1970.

It merely has continued to contend that the Hopi Tribe as of 1848 held Indian title to all the land it has claimed in this consolidated case.

Nevertheless, the Commission has carefully reviewed those portions of this enormous record which relate to the extent of Hopi aboriginal land ownership from prehistoric times, through the periods of Spanish (1540-1823) and Mexican (1823-1846) sovereignty, and from the beginning of United States sovereignty in 1848, up to December 16, 1882, when President Arthur created the Executive order reservation in Arizona, ". . . for the use and occupancy of the Moquis and such other Indians as the Secretary of Interior may see fit to settle thereon." ^{11/} The Commission has reconsidered all the evidence offered by each and all of the parties and not just that offered by the Hopi plaintiff. Much of the evidence offered by the Navajo claimant in Docket No. 229, and the Hopi plaintiff in Docket No. 196, is similar in character. Both tribes relied upon archaeological and historical evidence as well as expert testimony in support of their competing claims. In addition, the Commission again examined and considered the available relevant evidence in the case of Healing v. Jones, supra, as well as those findings and conclusions of law reached in that decision insofar as they bear upon the aboriginal title issue in this proceeding. ^{12/}

^{11/} I Kappler 805.

^{12/} 210 F. Supp. 125 (1962), aff'd 373 U.S. 758 (1963). The Hopi plaintiff has introduced as Hopi Exhibit 78 the slip opinion of the Court in Healing v. Jones, as well as the appendix to the opinion, being a chronological account of the Hopi-Navajo controversy, the court's findings of fact, conclusions of law, and final judgment. Any subsequent references in this opinion to portions of Healing v. Jones not published in the Federal Supplement will be cited to Hopi Exhibit 78.

Having completed this reexamination of the record, the Commission concludes (1) that the Commission's 1970 decision delineating the extent of Hopi aboriginal land ownership in 1882 is fully supported by the record; and (in response to plaintiff's request for our opinion), we also find (2) that the extent of Hopi aboriginal land ownership in 1882 is substantially the same as it was in 1848.

The record clearly shows that for a long time prior to the establishment of the 1882 Executive order reservation, and also for a long time prior to the 1848 date of American sovereignty, the Hopi Indians pursued a static, nonnomadic, nonexpansionist, agricultural mode of life. They lived, as they do today, in their ancient pueblos high atop three mesas in east central Arizona. From these protected sites, the Hopi Indians descended to the valleys below to cultivate neighboring fields for grain and fruit and to pasture small flocks of sheep. ^{13/} They also gathered wood and wild plants and, as the occasion demanded, hunted for game. Their most productive land lay to the west and extended a short distance outside of the boundary of the 1882 reservation in the Moencopi area.

Horses played a minor part in the Hopi life style so that the distance from their villages at which they carried on their activities depended on how far they could safely travel by foot. Thus, when danger

^{13/} As the Court of Claims noted in United States v. Seminole Indians, 180 Ct. Cl. 375, 384 (1967), "Cultures that stake their survival upon a close union with the soil, as is the case with primitive food raising economies, would not demand the vast tracts of land required for a nomadic, hunting existence."

arose, the Hopis would quickly return to their village sites where they were comparatively safe. The repeated harassment of and attacks upon the Hopi Indians, which occurred in the Spanish period and continued until the final cessation of hostilities, invariably occurred at or near the Hopi villages. Furthermore, the United States Army's field operations against the Navajo in the 1860's did not in any appreciable way diminish or deprive the Hopi Indians of the lands they were actually using at the time.

Plaintiff argues that the existence of Hopi eagle shrines throughout the area, which it claims to have owned aboriginally, together with evidence that the Hopis visited these shrines at intervals for religious purposes and had a strong spiritual attachment to these holy places support a finding of Hopi aboriginal ownership. However, it is clear that those eagle shrines in the peripheral areas claimed by the Hopi plaintiff as traditionally belonging to the Hopi Tribe had been abandoned for centuries. ^{14/} Archaeological discoveries merely show that at some time in the distant past the Hopis had lived in the outlying regions of the claimed area and used these sites for religious purposes. They also confirm the fact that other Indian tribes in addition to the Hopis made use of eagle shrines throughout the claimed area. Furthermore, many ancient Navajo dwelling sites have been uncovered within the confines of the 1882 Executive order reservation in the very heart of Hopi country. ^{15/}

^{14/} Tr. 7405 - Dr. Eggan, Hopi expert witness "They abandoned them physically. They did not abandon spiritually and they continued to make use of them. They continued to visit them."

^{15/} Healing v. Jones, supra, at 137 n. 8. "As revealed by extensive archaeological studies, there were over nine hundred old Indian sites, no longer in use, within what was to become the executive order area but outside of the lands where the Hopi villages and adjacent farm lands were located. Most of these were Navajo sites. . . ."

It is the Commission's opinion that its 1970 decision is fully supported by the record, and represents a reasonable estimate of the amount of land the plaintiff Hopi tribe had actually and continuously used and occupied to the exclusion of others for a long time prior to the establishment of the 1882 reservation.

The 1882 Executive Order Reservation

The Hopi plaintiff contends that the Commission was wrong in holding that its Indian title to those lands outside the 1882 reservation was extinguished by the December 16, 1882 Executive Order. The plaintiff argues inter alia that the December 16, 1882, Executive Order ^{16/} did not per se terminate Hopi aboriginal rights to the subject lands; that the United States did not remove or confine to the 1882 reservation those Hopi Indians living outside the reservation, particularly those living to the west in the Moencopi area; that the Hopi Tribe never relinquished its claim to all lands outside of the 1882 reservation; and that the defendant has continued to recognize and acknowledge Hopi aboriginal title to a large portion of the claimed area outside of the 1882 reservation. We now answer these contentions as we did in our opinion of June 29, 1970.

^{16/} We do not think that there is any doubt of the power of the President during this period, in absence of prior congressional approval, to withdraw lands from the public domain and reserve them for such public purposes, at military reserves, indian reservations, etc. The underlying rationale is that the long continued practice of executive withdrawal without congressional interference raises the presumption of implied sanction or approval by the Congress. United States v. Midwest Oil Company, 236 U.S. 459 (1914). The validity of the establishment of the 1882 Executive Order reservation can be sustained on this basis. However, we think Congress explicitly recognized its validity in the passage of the Act of July 2, 1958, 72 Stat. 402, when it authorized a three judge court to adjudicate Indian trust and individual rights ". . . to the area set aside by the Executive Order of December 16, 1882 . . ." See Healing v. Jones, supra.

As we have previously stated, the Navajo harrassments of the Hopi village areas had occurred frequently over a period of several centuries prior to American sovereignty and had continued thereafter. By the 1870's these Navajo incursions coupled with the mounting pressure of new white settlements in the south and west, plus the expanding Hopi and Navajo populations, caused official attention to be focused on the need of protecting Hopi interests by reserving specific lands for their use. In short order several recommendations from the field were forwarded to the Commissioner of Indian Affairs calling for the establishment of a Hopi reservation, or a joint Hopi-Navajo reservation. No action was taken on these initial proposals.

On March 7, 1882, the Hopi Indian agent, J. H. Fleming, renewed an earlier request that a reservation be set aside for the Hopi Tribe, which would include the Hopi pueblos, the agency buildings at Keams Canyon and enough land for agricultural and grazing purposes. Later in that year Agent Fleming again wrote to the Commissioner of Indian Affairs advising that he had expelled a white intermeddler from the Hopi villages, and that the United States Army could not eject other trespassers unless the Hopi lands were given reservation status. In response to this plea, the Commissioner requested Fleming to describe the boundaries ". . . for a reservation that will include Moquis villages and agency and large enough to meet all needful purposes and no larger." ^{17/}

^{17/} Healing v. Jones, supra, Hopi Ex. 78, p. 115.

On December 4, 1882, Agent Fleming wrote to the Commissioner outlining the boundaries of the proposed reservation, and included the following observations:

The lands most desirable for the Moquis, & which were cultivated by them 8 or 10 years ago, have been taken up by the Mormons & others, so that such as is embraced in the prescribed boundaries, is only that which they have been cultivating within the past few years. The lands embraced within these boundaries are desert lands, much of it worthless even for grazing purposes. That which is fit for cultivation even by the Indian method, is found in small patches here & there at or near springs, & in the valleys which are overflowed by rains, & hold moisture during the summer sufficient to perfect the growth of their peculiar corn.

* * * *

In addition to the difficulties that have arisen from want of a reservation with which you are familiar, I may add that the Moquis are constantly annoyed by the encroachments of the Navajos, who frequently take possession of their springs, & even drive their flocks over the growing crops of the Moquis. Indeed their situation has been rendered most trying from this cause, & I have been able to limit the evils only by appealing to the Navajos through their chiefs maintaining the rights of the Moquis. With a reservation I can protect them in their rights & have hopes of advancing them in civilization. Being by nature a quiet and peaceable tribe, they have been too easily imposed upon, & have suffered many losses. 18/

Fleming's recommendations were finally approved by the Secretary of Interior and forwarded to President Arthur, who, on December 16, 1882, issued an Executive order establishing the reservation. 19/

18/ Id. pp. 116, 117.

19/ On December 21, 1882, Agent Fleming received a telegram from the Commissioner of Indian Affairs advising "President issued order, dated sixteenth, setting apart land for Moquis recommended by you. Take steps at once to remove intruders." Healing v. Jones, supra, at 137.

At this time it was estimated that there were 1813 Hopis living in the seven permanent villages within the boundaries of the 1882 reservation. There is nothing in the record to indicate the number of Hopis then living outside the reservation.

It is clear that the Government expected that the 1882 Executive order would enable it to protect the Hopis from the Navajos and from white settlers and also provide the Hopis with enough land to sustain them. We now know that the Navajos did not cease their encroachments on the Hopis in 1882. It was intended that the Hopi reservation would be a permanent home for the Hopis. 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. The record does not disclose any Hopi protest or objection at the time as to the size of the new reservation.

The Hopi situation in 1882 was not unlike that faced by the Hualpai Indians (Walapais) during this same period, to which problem the Supreme Court addressed itself in United States v. Santa Fe Pacific Railroad Company.^{20/} In the Santa Fe case, the Act of July 27, 1866, 14 Stat. 292, required the "voluntary cession" of the Walapais' ancestral lands before Indian title could be extinguished. Several abortive attempts by the Government to force the Walapais upon a new reservation had

^{20/} 314 U.S. 339 (1941).

failed to extinguish their Indian title. By 1881 the influx of new settlers and expanding cattle operations caused the Walapais to request that a reservation be set aside for them while sufficient land was still available.

On January 4, 1883, President Arthur signed an Executive order creating the Walapai Indian Reservation in Arizona. ^{21/} For a time only a few Walapais lived on the reservation. For years it remained unsurveyed and cattlemen used it for grazing. Despite this, the Court found that the Walapais had in fact accepted the reservation, and, in doing so, had relinquished any tribal claims to lands outside of the reservation.

In the words of the Court:

. . .But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. The lands were fast being populated. The Walapais saw their old domain being preempted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be

21/ I Kappler 804.

fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seem to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others. 22/

In light of the circumstances surrounding the creation of the Hopi reservation, the actions taken with respect to Hopi presence on the reservation thereafter 23/ point to Hopi acquiescence in and acceptance of their new reservation status. This implied Hopi acceptance coupled with the Government's manifest intent to confine future Hopi tribal activity within the boundaries of the 1882 reservation, terminated the Hopi's aboriginal title to lands outside of the reservation.

One further point deserves some comment. Plaintiff contends that the Commission erred when it stated at page 284 of its opinion:

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

22/ 314 U.S. at 357-58, footnotes and citations omitted.

23/ By 1888 the Hopis were protesting further encroachment of the Navajos "on their reservation". Similar complaints soon followed, and the resolution of this constant and nagging problem occupied the time and energies of numerous administrative officials in the years that followed. See Healing v. Jones, supra, Hopi Exhibit 78, p. 122, and following pages.

Plaintiff proceeds to state that:

The Commission is clearly mistaken in this regard since the Village of Moencopi was not only a permanent Hopi village, but had been in existence for as far back as possibly the year 1400. 24/

Nevertheless, the Hopi plaintiff has stipulated that the village of Moencopi had been abandoned as a permanent Hopi village sometime prior to 1800, and not reestablished until sometime after 1848. 25/

In addition the plaintiff's principal witness, Dr. Eggan, agreed with the defendant that the Paiute Indians had run the Hopis out of Moencopi around 1830 or 1840, and that it was not until the 1870's that an unknown number of Hopis resettled at this site under the protection of the Mormons who had been living at nearby Tuba City. 26/ In Healing v. Jones, supra, the court made the following observation with respect to Moencopi in discussing 1951 Hopi population figures:

Not included in this figure are the several hundred Hopis living a few miles west of the 1882 reservation at Moencopi. The forebears of these Hopi had left "Old Oraibi" in the reservation area, and moved to Moencopi in a 1906 "revolt". 27/

The Commission now adheres to its decision on this point for the reasons stated above and in its 1970 opinion.

24/ P. 5 - Brief In Support of Petitioner's Motion for Further Hearings, etc.

25/ Tr. 1562.

26/ Tr. 7412.

27/ Healing v. Jones, supra. at 169, n. 68.

June 2, 1937 - Hopi Indian Title Terminated for Lands
Within The 1882 Reservation

The plaintiff has challenged the Commission's finding 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."

The establishment of district 6 within the 1882 reservation came about in the following manner. Under Section 6 of the Indian Reorganization Act of 1934, the Secretary of Interior was empowered to make rules and regulations for the administration of Indian reservations relative to forestry, grazing, soil erosion, and other purposes.^{28/} Thereafter, on November 6, 1935, the Secretary issued grazing regulations purportedly limited to the adjoining Navajo Reservation. These regulations established land management districts, several of which embraced not only the Navajo Reservation but also the 1882 reservation. As defined early in 1936, land management district 6 was situated entirely within the 1882 Reservation and was specifically designed to include that area exclusively occupied by the Hopis. No specific metes and bounds description was given for district 6 and it was not until 1943 that the final boundaries were approved.^{29/} On June 1, 1937, a comprehensive set of grazing regulations was made applicable to the Hopi and Navajo reservations. The net effect of these regulations was

^{28/} § 6, 48 Stat. 984, 986; Healing v. Jones, supra, at 168.

^{29/} Healing v. Jones, supra, Hopi Exhibit 78, p. 185.

to restrict practically all Hopi activities within the boundaries of district 6 and to make the remainder of the 1882 reservation available for the exclusive use of the Navajo Tribe. Under these circumstances, the court in Healing v. Jones, concluded as a matter of law as follows:

Beginning on June 2, 1937, the Navajo Indian Tribe, for the common use and benefit of the Navajo Indians, was impliedly settled in that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, pursuant to the valid exercise of the authority conferred in the Secretary by the Executive Order of December 11, 1882. 30/

As we understand it, the plaintiff's contention is that, at least until 1962 when Healing v. Jones was decided, the Hopis still retained Indian title to all the land within the 1882 reservation. As a result of the Healing v. Jones decision, the plaintiff asserts that, since June 2, 1937, it has retained a one-half undivided interest in that part of the reservation outside of district 6. 31/ We understand the plaintiff to argue that this one-half interest is Indian title. In support of its view that Hopi aboriginal rights were not abrogated except to the extent as outlined above, the plaintiff has directed our attention to certain findings and conclusions that the court reached in Healing v. Jones, such as, (1) that at no time had the

30/ Id., at 223.

31/ Hopi Memorandum with Point and Authorities, etc. August 12, 1971, p. 4.

Congress enacted legislation designed to terminate or have the effect of terminating Hopi rights of use and occupancy anywhere in the 1882 reservation, ^{32/} (2) that administrative efforts, through the imposition of restrictive grazing regulations and a permit system, to exclude the Hopis from that part of the 1882 reservation outside of land management district 6 were at all times illegal, ^{33/} (3) that the failure of the Hopis to use a substantially larger part of the 1882 reservation was not a matter of free choice, hence there was no abandonment, ^{34/} and, (4) that administrative officials repeatedly assured the Hopis that none of the aforementioned administrative regulations and practices were designed to affect whatever rights the Hopis then had in the entire 1882 reservation. Based upon these findings and conclusions the plaintiff has summarized its position in the form of a question --

Under the circumstances reiterated above, particularly including the finding of the court that the excluding of any Hopis upon any of the land within the Executive Order Reservation was at all times illegal, how can it be held that any valid administrative action had terminated the Hopi title prior to the time the court determined the Hopis had lost a one half interest? ^{35/}

It suffices to say that the court in Healing v. Jones was concerned with the question of the Hopi reservation rights that were acquired under the Executive Order of December 16, 1882. The court's findings and conclusions bear upon the nature and extent

^{32/} Healing v. Jones, supra, Hopi Exhibit 78, p. 220.

^{33/} Id. at 224.

^{34/} Id. at 221.

^{35/} Brief in Support of Petitioner's Motion, etc., Sept. 16, 1979, p. 22.

of the Hopi reservation rights. ^{36/} The court was not concerned with the question of the aboriginal or Indian title of the Hopis to these lands. Hence, plaintiff's reliance upon these particular findings of the court in Healing v. Jones, as determinative of the issue of Indian title is misplaced.

The Hopi Indians have already demonstrated to the Commission's satisfaction that they held the Indian title ^{37/} to the 1882 reservation at the time they acquired nonexclusive reservation rights in the same lands under the Executive Order of December 16, 1882. Since the reservation had been set aside for Hopis ". . . and such other Indians as the Secretary of Interior may see fit to settle thereon," ^{38/}

^{36/} For example, the illegal or unlawful acts cited by the court in Healing v. Jones had reference to the fact that, following the passage of the Act of May 25, 1918 (40 Stat. 570), wherein it was provided that henceforth only the Congress could create new Indian reservations or make additions to existing reservations in Arizona and New Mexico, it was not possible administratively without the consent of the Hopi Indians to terminate Hopi reservation rights in the 1882 reservation or to award exclusive rights to the Navajos in any part of the reservation. There is no question as to the legality of the actions taken by the Secretary of Interior in impliedly settling either individual Navajos or the Navajo Tribe on the 1882 reservation pursuant to the authority conferred by the 1882 Executive order.

^{37/} With utmost consistency the Court of Claims has reiterated that aboriginal or Indian title rests on actual, exclusive and continuous use and occupancy for a long time prior to the loss of the property. Lummi Tribe of Indians v. United States, 181 Ct. Cl. 753 (1967); United States v. Seminole Indians, 180 Ct. Cl. 375 (1967), Confederated Tribes of the Warm Springs Reservation v. United States, 177 Ct. Cl. 184 (1966) and cases cited therein.

^{38/} I Kappler 805.

it was only a matter of time until the growing Navajo population and multi-purpose use of the 1882 reservation resulting from governmental policies would make Hopi exclusive use and occupancy of the same lands impossible.

In 1882, nearly 300 Navajo Indians were living on the reservation. Thereafter the Navajo population steadily increased, so that in 1900 there were 1826 and in 1911 approximately 2000 Navajos. By 1921 there were 2760 Navajos and 2236 Hopis living on the reservation. By 1930 there were 3319 Navajos, and by 1936, almost 4000 on the reservation. Throughout this entire period, and up until June 2, 1937, when the Secretary of Interior impliedly "settled" the Navajo Tribe on the reservation pursuant to his authority under the 1882 Executive order, the Government made no serious effort to remove the Navajos. On the contrary, we find acquiescence both explicit and sub silentio, by responsible administrative officials in the growing Navajo presence. The record herein fully supports the conclusion reached in Healing v. Jones:

The evidence is overwhelming that Navajo Indians used and occupied parts of the 1882 reservation in Indian fashion, as their continuing and permanent area of residence, from a long time prior to the creation of the reservation in 1882 to July 22, 1958, when any rights which any Indians acquired in the reservation became vested. 39/

Indeed it could be argued that the Hopi Indian title to portions of the 1882 reservation actually terminated when the Navajo population exceeded that of the Hopis. However, the Commission chose June 21, 1937, as the climactic date, since on that date the restrictive grazing regulations

39/ 210 F. Supp. at 144-45. The Act of July 22, 1958, 72 Stat. 402, confirmed reservation rights in the 1882 reservation.

as approved by the Secretary of Interior were put into effect, thus substantially confining future Hopi activity within the boundaries of land management district 6, and freeing the balance of the reservation for uninterrupted Navajo use and occupancy. In sum, the Commission finds nothing in plaintiff's additional evidence, or in its argument with respect to "dates of taking", that would cause the Commission to recede from its earlier position that Hopi Indian title to that part of the 1882 Reservation outside of land management district 6 was effectively terminated on June 2, 1937.

In its supporting brief the Hopi plaintiff referred to certain other claims remaining to be tried in this docket, namely "counts 5 through 8" which counts,

. . . are based upon the fact that the petitioner, the Hopi Tribe, retained the Indian title to the lands and that the United States deprived the Hopi Tribe of the use of these lands. 40/

In further explanation of the above the plaintiff states,

The matter yet to be tried is whether the United States must pay the reasonable rental value the land it allowed the Navajos to use during the period prior to the actual taking. 41/

40/ Hopi Brief in Support of Petitioner's Motion for Further Hearing, etc., p. 22.

41/ Id.

To date the Commission has not been made aware of any judicial de-
 or rule of law that would permit one tribe to retain such residual rights
 claim rent for Indian title lands after the Government has allowed another
 tribe to exercise identical rights of use in occupancy in the same property.
 At the moment the Commission is of a mind to dismiss "counts 5 through 8"
 of plaintiff'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 phase of these proceedings.

Conclusion

Accordingly, for the reasons stated in this opinion, the Commission
 has denied the Hopi plaintiff's motion to amend the Commission's findings
 previously entered herein with respect to the extent of plaintiff's
 aboriginal or Indian title to the claimed area, and the dates said Indian
 title was extinguished by the United States. This case as previously
 ordered shall proceed to a determination of the acreage of lands awarded
 herein, their value as of the respective dates of taking, and all other
 matters bearing upon the extent of defendant's liability to the Hopi
 plaintiff.

Concurring:

John T. Vance
 John T. Vance, Commissioner

Richard W. Yarborough
 Richard W. Yarborough, Commissioner

Margaret H. Pierce
 Margaret H. Pierce, Commissioner

Brantley Blue
 Brantley Blue, Commissioner

Jerome K. Kuykendall
 Jerome K. Kuykendall, Chairman

BEFORE THE INDIAN CLAIMS COMMISSION

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

ORDER DENYING HOPI MOTION TO AMEND FINDINGS

On August 28, 1970, the Hopi plaintiff in Docket No. 196 filed a motion herein captioned, "Motion For Further Hearing On Dates of Taking, For Rehearing And For Amendment of Findings". Oppositions to the Hopi motion were filed by the Navajo plaintiff in Docket No. 229 on October 12, 1970, and by the defendant on January 15, 1971. On April 28, 1971, the Commission granted the Hopi motion for rehearing for the purpose of permitting the parties to present all evidence "relating to the date(s) of taking of the aboriginal lands of the Hopi Tribe". On May 22, 1972, the matters as set forth above came on for hearing before the Commission. The Commission, now being fully advised in the premises,

IT IS ORDERED that the Hopi plaintiff's motion, as set forth above, to amend the Commission's findings of fact with respect to the nature and extent of the Hopi aboriginal title lands and the "date(s) of taking" thereof, be, and the same is hereby, denied.

Dated at Washington, D. C., this 9th day of July 1973.

Jerome K. Kuykendall
 Jerome K. Kuykendall, Chairman

Margaret H. Pierce
 Margaret H. Pierce, Commissioner

John T. Vance
 John T. Vance, Commissioner

Brantley Blue
 Brantley Blue, Commissioner

Richard W. Yarborough
 Richard W. Yarborough, Commissioner

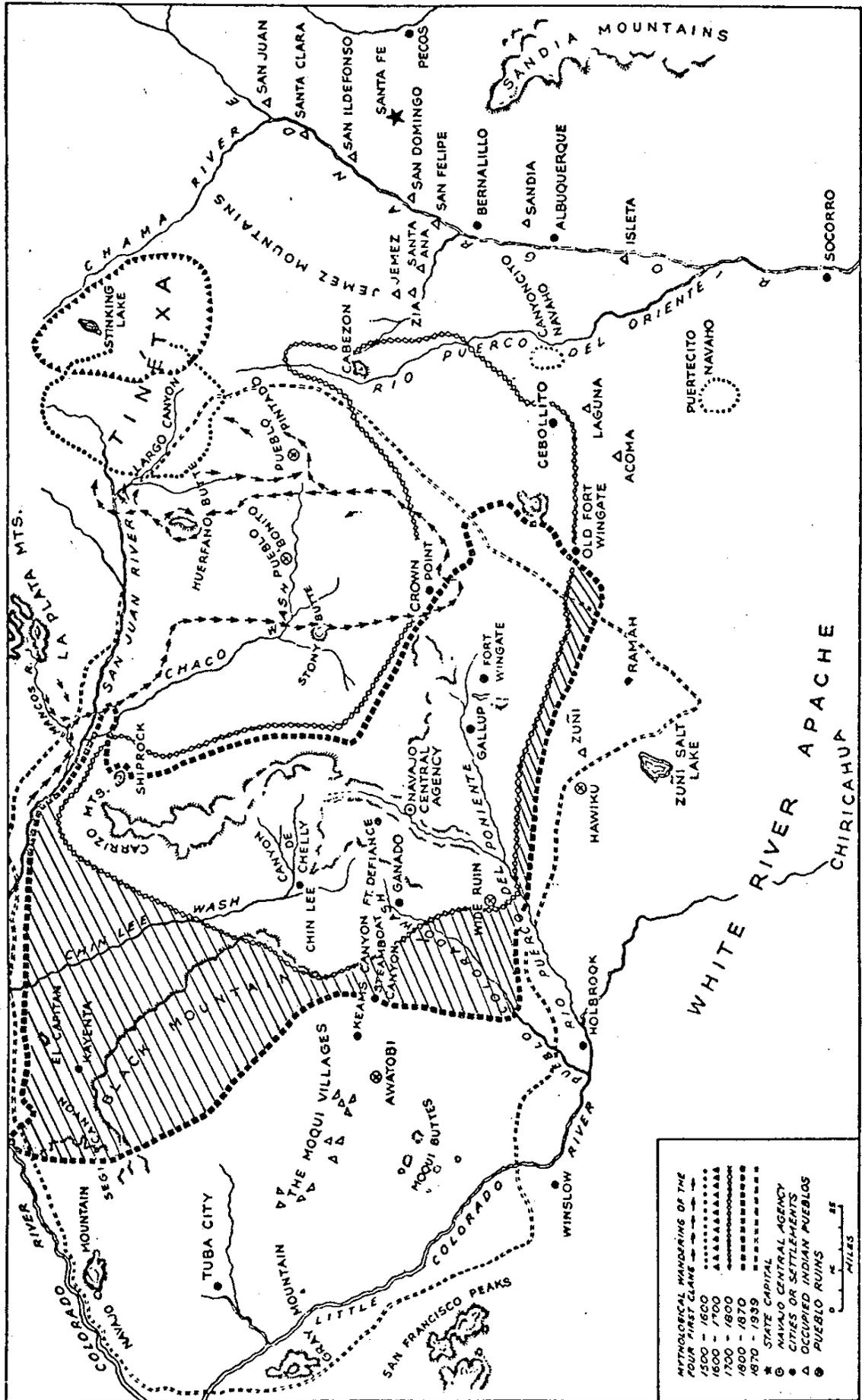
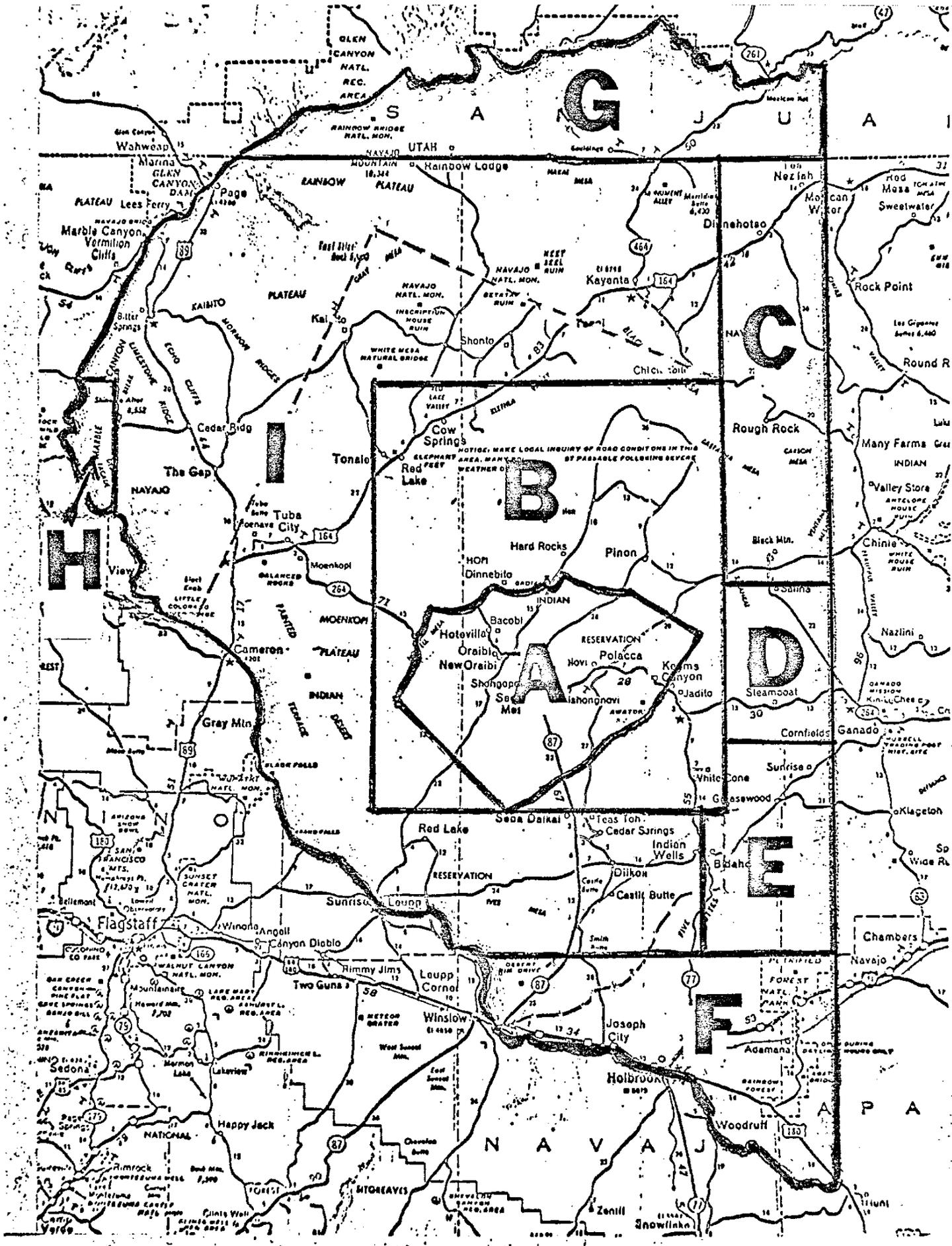


FIG. 32.—Navaho limits at different dates.



Appendix "I"