

## II

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**Before the Indian Claims Commission**

Docket Nos. 196 and 229

THE HOPI TRIBE, THE NAVAJO TRIBE, PETITIONERS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

**DEFENDANT'S REQUESTED FINDINGS OF FACT, OBJECTIONS TO HOPI AND NAVAJO PROPOSED FINDINGS, AND BRIEF**

**PRELIMINARY STATEMENT**

The Hopi petition in Docket 196 was filed August 3, 1951, and since all of the area claimed by that petitioner on the basis of aboriginal ownership, or "Indian title," was within the area similarly claimed by the Navajo Tribe in Docket 229, defendant moved to consolidate the *Hopi* case with the *Navajo* case for the purposes of trial. An order effecting such consolidation was issued by the Commission May 31, 1957.

The findings with which we are now concerned relate only to the Navajo-Hopi overlap area.

**DEFENDANT'S REQUESTED FINDINGS OF FACT RELATING TO THE HOPI CLAIM**

**FINDING 1**

The Hopi Tribe, petitioner in Docket 196, is an identifiable group of American Indians residing with-

(1)

in the present State of Arizona, is recognized by the Secretary of the Interior, and is authorized to maintain this action under the provisions of section 2 of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

FINDING 2

The Hopi Tribe timely filed its claim for recovery of compensation for a large tract of land in north-eastern Arizona which it claims to have exclusively used and occupied from time immemorial until deprived of such use and occupancy by the United States on or about December 16, 1882, when defendant issued an Executive Order<sup>1</sup> and set aside a portion of such aboriginal territory as a reservation for the Hopi<sup>2</sup> "and such other Indians as the Secretary of the Interior may see fit to settle thereon."

FINDING 3

The United States acquired sovereignty over the lands in question under the Treaty of Guadalupe Hidalgo in 1848 (9 Stat. 922). Petitioner could not increase its aboriginal holdings of land in the Southwest against any title of the United States after that date.<sup>3</sup>

<sup>1</sup> 1 Kapp. 805; Nav. Ex. 740, Def. Ex. G-238(a), p. 16.

<sup>2</sup> The Hopi were formerly referred to as *Mogui*, the term used in the 1882 Executive Order.

<sup>3</sup> *Iowa Tribe of Kansan v. United States*, 6 Ind. Cl. Comm. 464, 502 (1958); *Pueblo de Isleta v. United States*, 7 Ind. Cl. Comm. 619, 622 (1959), aff'd 152 C. Cls. 866 (1961), cert. den., 368 U.S. 822 (1961); *Osage Nation v. United States*, 11 Ind. Cl. Comm. 733, 838 (1962).

FINDING 4

The Hopi Indians belong to the Pueblo culture, speak a Shoshonean dialect, and are one of the Indian tribes of North America still residing in their ancestral home.<sup>4</sup>

FINDING 5

The ancestors of the present-day Hopi first settled around the springs along the southern margins of Black Mesa<sup>5</sup> in what is a part of the Hopi Executive Order Reservation of December 16, 1882 (1 Kapp. 805). They lived in small villages or pueblos. They cultivated corn, beans, and squash and hunted deer, antelope, rabbits, mountain sheep, and gathered a variety of wild plant food.

According to Dr. Harold S. Colton,<sup>6</sup> a well known archaeologist in northern Arizona (Tr. 7303) and student of the Hopi, as of 1275 A.D. there were some 36 Hopi villages but, primarily because of a great drought between 1276 and 1299 A.D., after 1300 A.D. there were only 11 such pueblos. Furthermore, according to Dr. Colton, archaeological surveys show that between 600 and 1300 A.D. the Hopi occupied a much larger area than at present; "an area bounded on the west by the Little Colorado, Colorado and San Juan Rivers; on the east by a line running south from Monument Valley, west of Chinle Wash, to the Little Colorado." (Hopi Exhibit 4, page 5, and Dr. Eggan quoting Colton, Tr. 7172.) This is substantially the

<sup>4</sup> Eggan, Tr. 7165.

<sup>5</sup> Eggan, Tr. 7165-7166.

<sup>6</sup> Hopi Ex. 4.

same area that the Hopi claim as their aboriginal territory and for which compensation is sought in this proceeding. As Dr. Eggan stated under cross-examination by Mr. Littell (Tr. 7319):

In 1300 they [the Hopi] were spread out in a much greater number of villages and over a wider area. They were not concentrated as they are today. \* \* \* The village organization, the coming together in larger villages, just began at that period and was not perhaps completed until around 1700' perhaps.

Q. Then by 1846 and 1848, where were the Hopis?

A. That period the Hopis were living on First, Second, and Third Mesa and the surrounding area farming at least Moencopi.

Thus, while the Hopis may once have occupied a larger area, in 1848 they were living in seven pueblos or villages, all within the 1882 Executive Order Reservation—namely, Walpi, Hano and Sichomovi on First Mesa; Shipaulovi, Shungopovi, and Mishongnovi on Second Mesa; and Oraibi on Third Mesa. (Ellis, Tr. 7552-7553.)

#### FINDING 6

The Hopi first became known to white men in the summer of 1540 when Coronado, then at Cibola (Zuni), dispatched Pedro de Tovar and Fray Juan Padilla to visit the province of Tusayan, as the Hopi

\* According to Colton the Hopi sites occupied after 1700 A.D. totalled 11 and were identified as follows (Hopi Ex. 4(b), Table IV): Payupki, Walpi, Sichomovi, Tawa (Hano), New Mishongnovi, Shipaulovi, New Shungopovi, Kikochomovi, Hotavilla, Bakabi, and Moencopi.

country was then referred to. At first the Spaniards were not received with friendliness by the natives but this soon changed and the party remained among the Hopis several days, learning from them of the existence of the Grand Canyon of the Colorado.\*

In 1583 the Spaniard Espejo traveled 28 leagues<sup>1</sup> from Zuni to the nearest Hopi villages, and in 1598 Oñate, Spanish governor and colonizer of New Mexico, visited the Hopi villages, took possession of the country for the Crown of Spain, and made the Indians swear to obedience and vassalage.<sup>2</sup> In 1628 and 1630 Benavides visited them but in 1633 was killed at Awatobi.<sup>3</sup> Other Spaniards to contact them in later years were Escalante in 1775 and Garcés in 1776.<sup>4</sup>

#### FINDING 7

In 1680 the Pueblo Indians of New Mexico rebelled against the Spanish Government. The Hopi joined

\* Ellis, Tr. 7527-7529; Def. Ex. E-500, p. 1; Hodge, *Handbook of American Indians*, Def. Ex. 3(a) in Docket 91; "Narratives of the Coronado Expedition, 1540-1542," by George P. Hammond and Agupito Rey, Hopi Ex. 6.

The names of the Tusayan towns are not recorded by Coronado's chroniclers, so that with the exception of Oraibi, Shungopovi, Mishongnovi, Walpi, and Awatobi, it is not known with certainty what villages were inhabited when the Hopis first became known to the Spaniards. Omitting Awatobi, which was destroyed in 1700, with the possible exception of Oraibi none of these towns now occupies its sixteenth century site. (*Handbook*, Def. Ex. 3(a), *supra*.)

<sup>1</sup> The Spanish league is approximately 2.6 miles.

<sup>2</sup> Ellis, Tr. 7527-7529; Def. Ex. E-500, p. 1; Def. Ex. G-138; and Hopi Ex. 11.

<sup>3</sup> Bartlett, Def. Ex. G-138.

<sup>4</sup> Ellis, Tr. 7527-7529; Def. Ex. E-500, p. 3; Bartlett, Def. Ex. G-138; Kluckhohn, Tr. 1228.

in the rebellion which resulted in the temporary evacuation of the Spanish from New Mexico. In 1692, however, de Vargas returned, reconquered New Mexico for Spain, and reestablished Santa Fe as the capital.<sup>12</sup>

#### FINDING 8

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. And so, about the year 1700, Hano was established as a village on First Mesa, near Walpi, by Tewa Indians who came to First Mesa on the invitation of the inhabitants of Walpi. Here they have continued to live ever since.<sup>13</sup>

Two other villages, Sichomovi on First Mesa, and Shipaulovi, on Second Mesa, are both of comparatively recent origin, having been established in their present location about the middle of the eighteenth century. Thus, the pueblos of the ancient Tusayan province, as known to the Spanish, consisted of Walpi, Sichomovi,

<sup>12</sup> *Handbook of American Indians*, Def. Ex. 3(a) in Docket 91; and Bartlett, Def. Ex. G-138 in Docket 220.

<sup>13</sup> *Idem*; Ellis, Def. Ex. E-500, pp. 2-3.

In 1692, de Vargas returned to reconquer New Mexico, and after Santa Fe was reestablished and the Spanish settlers had taken over most of the good land, the governor was told that another group of Spaniards was on their way from Mexico. He decided that the best place to locate this group was in the valley north of Santa Fe, an area then occupied by two southern Tewa pueblos. Upon learning that they had to move to make room for the Spaniards, most of the Tewas accepted an invitation to move over to the Hopi mesas, with the understanding that they would receive land there in exchange for fighting any raiders when they appeared. Hano, on First Mesa, was thus established. (Ellis, Def. Ex. E-500, pp. 2-3.)

and Hano on First Mesa; Mishongnovi, Shongopovi, and Shipaulovi on Second Mesa; and Oraibi on Third Mesa.<sup>14</sup>

#### FINDING 9

When American sovereignty attached to the Southwest in 1848 under the Treaty of Guadalupe Hidalgo (9 Stat. 922), the Hopi Indians lived in the same seven villages referred to above and located on the same sites where they are today.<sup>15</sup> Their population then numbered about 2,450.<sup>16</sup> When the Hopi Reservation was established under the Executive Order of December 16, 1882 (1 Kapp. 805) their population had been reduced to about 1,800.<sup>17</sup>

#### FINDING 10

Until their organization under the Indian Reorganization Act of 1934,<sup>18</sup> the Hopi could not be called a tribe in the political sense. Apart from their participation in the Pueblo Revolt of 1680, there is no record of a cooperative action embracing all the Hopi towns.<sup>19</sup>

The social structure of every Hopi town in 1848, as well as in 1882, was made up of a number of matrilineal clans, each comprising one or more closely related households. Despite a nominal allegiance to the village chief, each clan was to a large extent auton-

<sup>14</sup> *Idem*. First Mesa is also known as East Mesa, Second Mesa as Middle Mesa, and Third Mesa as West Mesa.

<sup>15</sup> Ellis, Tr. 7532-7553.

<sup>16</sup> Eggan, Tr. 7320; Def. Exs. E-300, p. 36 and G-29, p. 7. Ellis, Tr. 7531 and 7550; Kluckhohn, Tr. 1232-1233.

<sup>17</sup> *Healing v. Jones*, 210 F. Supp. 125, 134 (D.C. Ariz., 1962), aff'd 373 U.S. 758 (1963).

<sup>18</sup> 48 Stat. 980, amended 49 Stat. 378.

<sup>19</sup> Ellis, Def. Ex. E-500, p. 102; Titiev, Def. Ex. E-574, p. 67.

omous, choosing its own officers and transacting its own affairs with a good deal of independence. In short, Hopi society consisted of a number of closely-knit matrilineal clans which were loosely combined into villages.<sup>21</sup>

#### FINDING 11

The Hopi are pre-eminently a religious people, much of their time being devoted to ceremonies for rain and the growth of crops. Missionaries have had little success in their endeavors to convert them to Christianity although they have accepted some Christian teachings.<sup>22</sup>

The Hopi have many shrines which are visited periodically.<sup>23</sup> The eagle is the most sacred of birds. He is a symbol of the sun and his plumes are thought to carry prayers to the supernaturals.<sup>24</sup> The buttes on which eagle nest shrines are found are frequently as much as forty miles from the village in which

<sup>21</sup> Ellis, Def. Ex. E-500, p. 103 and Titiev, Def. Ex. E-574, p. 69.

<sup>22</sup> *Idem*; Ellis, Def. Ex. E-500, p. 106.

In 1629, the Franciscans established a series of three missions in the Hopi villages. In 1680, however, the Hopi joined the Pueblos of New Mexico in their revolt against the Spanish, killed the missionaries, and expelled the Spaniards. (Ellis, Def. Ex. E-500, pp. 1-2.)

<sup>23</sup> Eggan, Tr. 7321.

Actual presence at a shrine is not essential. Thus, a "visit" may mean only going near a shrine—e.g., an eagle nest—"and looking at it with field glasses or seeing whether birds are nesting in that area so that when they come back in the spring they will know where to come." (Charles Pitrat, Tr. 7460-7461.)

<sup>24</sup> The Hopi capture eagles to bring to their villages. Here they are caged or tied so that their feathers can be used in making plume offerings.

the clan claiming ownership of the shrine is located. Some Hopi shrines, in fact, were as far away as the San Francisco Peaks, to the west, and Chevelon Creek, southeast of Winslow, to the south. These remote shrines, however, were for the most part abandoned over the course of the years.<sup>25</sup>

#### FINDING 12

The Hopi concept of their land is two-fold. The land comprising their village locations and immediate vicinity falls in one category while the outlying area, known as the "sacred area," falls into another.<sup>26</sup>

The basic Hopi home territory of villages with nearby gardens and fields might be called the "home area" and is much smaller than the "outer" or "sacred area" referred to above.<sup>27</sup> Within the village terri-

<sup>25</sup> Ellis, Def. Ex. E-500, pp. 146-148; Beaglehole, Def. Ex. E-503, p. 18; *Healing v. Jones*, slip opinion, Hopi Ex. 78, p. 111. (The Appendix in *Healing v. Jones*, which begins at page 110 of the slip opinion is not found in the official opinion reported in 210 F. Supp. 125.)

<sup>26</sup> Ellis, Def. Ex. E-500, p. 105; Eggan, Tr. 7186, 7188-7190.

Cattle and sheep were grazed primarily away from the villages and mesas, out in the valleys, because of the scarcity of water. Whatever water was near the villages was required by the population for drinking. (Eggan, Tr. 7188-7190.)

<sup>27</sup> According to Gordon Page, the Hopi country away from their villages is an area of shrines, sacred natural features, eagle trapping locations, and regions where salt is obtainable. Actual use of the area is not important to the Hopi. What is important to them is that this area be recognized as a sacred area. Use is made of it by priests who visit the shrines to perform certain rites, to trap eagles, and to gather various herbs and minerals necessary to their rites. The Hopi do not think of this region as an area to be used for agriculture or

tories the greater part of the arable land is divided and apportioned among the clans.<sup>20</sup> The families composing each clan cultivate fields within the clan lands, but rarely more than half of the lands are devoted to cultivated fields since flood and windblown sand are continually spoiling much of the land.<sup>21</sup>

In addition to their agricultural pursuits, primarily near their villages, the Hopi gathered many wild plants which they utilized to supplement their diet or for medicinal purposes. Many of these were found for exploitation of the natural resources. (Def. Ex. G-142, p. 29.)

The area representing the Hopi "home land" is subject to greater use. "Here the Hopi has his home, his fields, and his flocks. Sheep are herded and corralled within a radius of ten or fifteen miles of each village \* \* \*." (Page, Def. Ex. G-142, p. 30.)

<sup>20</sup> See map 3 following page 112, Def. Ex. E-500, showing clan lands of First Mesa.

<sup>21</sup> Ellis, Def. Ex. E-500, pp. 112-115; "Hopi Agriculture and Land Ownership," by C. Daryll Forde, Def. Ex. E-534, pp. 366-370.

Hopi subsistence has always primarily centered upon agriculture, supplemented by sheep and cattle raising with some hunting and gathering of wild plants. Their best lands were around the villages themselves. (Eggen, Tr. 7186-7188.)

Concerning land ownership, Titiev (Def. Ex. E-574, p. 181) says that the village chief is the theoretical owner of all his town's lands. These lands are divided among the clans residing in his village and each individual farms a specified portion of his clan's holdings. In addition, there is a large piece of unassigned land, part of which may be used by any villager with the chief's consent. Thus, under such a system land is never bartered or sold and only rarely exchanged. Ownership is restricted to the privilege of use, but this right is so carefully recognized that if a man decides to allow some of his fields to lie fallow, no other farmer may use them without the specific permission of the owner. (See Def. Ex. E-500, pp. 118-110.)

in the "outer" area at some distance from their villages.

The Hopi were fond of meat and did considerable hunting in the "outer" area.<sup>22</sup> And here they sometimes encountered the Navasupai and other Indians on similar expeditions.

#### FINDING 13

Little contact was had by United States officials with the Hopi during the early years of American sovereignty over New Mexico and what is now Arizona. Whatever contact did exist usually resulted from Hopi complaints against the Navajos. In fact, Spanish, Mexican and American documents reveal almost constant complaining by the Hopi against the Navajos, who were repeatedly robbing them and driving them away from water so as to use it for the Navajo flocks and herds.<sup>23</sup>

Between 1876 and 1882 various recommendations were submitted by the Indian agents in Arizona that a reservation be set apart for the Hopi. Nothing was done, however, until the present reservation was created by the Executive Order of December 16, 1882. (1 Kapp. 805.)

On July 31, 1882, United States Indian Inspector C. H. Howard wrote to the Secretary of the Interior recommending that a new reservation be set aside for the "Arizona Navajos," and for the Hopi whose seven villages would be encompassed within the proposed new reservation.<sup>24</sup> Three months later, on October 25,

<sup>20</sup> Ellis, Def. Ex. E-500, p. 145.

<sup>21</sup> Def. Ex. S-635, p. 24.

<sup>22</sup> *Healing v. Jones*, 210 F. Supp. at page 136.

1882, Howard forwarded an extensive report to the Secretary renewing his suggestion that a joint reservation be established for the Hopis and western Navajos.<sup>33</sup> Nothing was done immediately but on November 11, 1882, J. H. Fleming, the Hopi agent, was requested by the Commissioner of Indian Affairs to describe boundaries of a tract of land suitable for a reservation that would include the Hopi villages and agency and be large enough to meet all needful purposes.<sup>34</sup> Whereupon Fleming responded by letter dated December 4, 1882, specifying as boundaries of the proposed reserve the area later described in the Executive Order of December 16.<sup>35</sup>

The reservation recommended by Howard for both the Hopis and Western Navajos was considerably larger than the reservation proposed by Fleming. The boundaries recommended by Howard embraced an area approximately one hundred miles square. The northern boundary would be the Utah-Arizona line; the eastern boundary would coincide with the western boundary of the Navajo reservation as then established; the western boundary would be a line parallel with the eastern boundary but one hundred miles to the west and running from the Utah-Arizona line southward to a point far enough south to include the southernmost Hopi village and its contiguous farms, cultivated by the Hopis; its southern boundary would be an east and west line to connect the south-

<sup>33</sup> Nav. Ex. 735.

<sup>34</sup> Def. Ex. G-242 and *Healing v. Jones*, 210 F. Supp. at page 136.

<sup>35</sup> *Healing v. Jones*, 210 F. Supp. at page 137; also Nav. Ex. 737.

ern tip of the western boundary with the southwestern corner of the Navajo Reservation.<sup>36</sup>

#### FINDING 14

On December 16, 1882 the President issued an Executive Order creating a reservation "for the use and occupancy of the Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to settle thereon."<sup>37</sup> The lands so reserved were described as follows:

\* \* \* beginning on the one hundred and tenth degree of longitude west from Greenwich, at a point 36° 30' north, thence due west to the one hundred and eleventh degree of longitude west, thence due south to a point of longitude [sic] 35° 30' north; thence due east to the one hundred and tenth degree of longitude west, thence due north to the place of beginning \* \* \*.

By inadvertence the land description set out in the Executive Order makes reference to "longitude 35° 30' north," whereas the reference should have been to "latitude 35° 30' north." As correctly described the tract encloses a rectangular area about 70 miles long, north to south, and 55 miles wide. It contains approximately two and a half million acres of land or 3,900 square miles.<sup>38</sup>

#### FINDING 15

The Executive Order Reservation of December 16, 1882 (1 Kapp. 805), was established for four pur-

<sup>36</sup> Howard's report of November 29, 1882, Nav. Ex. 736.

<sup>37</sup> *Healing v. Jones*, slip op., p. 208, fdg. of fact 4.

<sup>38</sup> *Healing v. Jones*, supra, pp. 208-209, fdg. of fact 5.

poses: (1) to reserve for the Hopi Indians sufficient living space against advancing Mormon settlers and Navajos, (2) to minimize Navajo depredations against Hopi, (3) to provide a legal basis for curbing white intermeddlers who were disturbing the Hopi, and (4) to make available a reservation area in which Indians other than Hopi could later, in the discretion of the Secretary of the Interior, be given rights to use and occupancy."

## FINDING 16

When the Executive Order Reservation was created in 1882, great numbers of Navajos had already wandered into that country with their families and their flocks. Both the Navajos and Hopi had sacred places within the newly reserved tract, both tribes utilizing eagle feathers in their religious ceremonies."

## FINDING 17

The population of the Navajos grew by leaps and bounds. The reserve which had been set aside for them by the Treaty of June 1, 1868 "grew more and more inadequate as their numbers mounted and their flocks increased. Additions to their reserved tract, therefore, became necessary and were made by the United States.

Early population figures for the Navajos are more or less only estimates. In 1848 they probably numbered no more than 8,500 (Tr. 7955-7957); in 1868

<sup>20</sup> *Healing v. Jones*, p. 212, fdg. of fact 18.

<sup>21</sup> *Healing v. Jones*, App. to slip op., pp. 112-113.

<sup>22</sup> 15 Stat. 667, 2 Kapp. 1015.

they had increased in numbers to about twelve or thirteen thousand and by 1882 to about sixteen thousand. (*Healing v. Jones*, Appendix to slip opinion, page 112; also see defendant's requested finding 26 and Navajo proposed finding 3.)

## FINDING 18

Although the Hopi villages, as well as their agricultural and grazing lands that had been used and occupied by them in 1848, were located within the boundaries of the newly created reservation, Navajo Indians had also gradually moved into this area and encroached upon lands that the Hopi regarded as belonging to them, even though all of the reservation area had never been used by them.<sup>23</sup> Navajo depredations in the 1850's had brought on greater and greater difficulty with the white settlers of New Mexico and had resulted in military action against them. As a consequence many Navajos had fled westward from their former places of habitation east of the Hopi mesas and had moved into this reservation country.

## FINDING 19

The Hopi were a timid and inoffensive people, peaceable and friendly with outsiders. The Navajos, on the other hand, were far more aggressive in nature. Desert life made them a sturdy, virile and industrious people. They were more warlike than their Hopi neighbors. Although they had many small farms

<sup>23</sup> Cf. *Healing v. Jones*, *supra*, pp. 220-221; also Ellis' map, Def. Ex. E-503 and the area later included in and Management District 6 as outlined in *Healing v. Jones*, 210 F. Supp. at p. 133.

which held them to fixed locations, they were semi-nomadic and migratory, moving into new areas at times and then moving seasonally from mountain to valley and back again with their livestock.<sup>43</sup>

#### FINDING 20

The Hopi Indians, as stated before, are a very religious people. Many geographic features, such as mountains, a salt lake, a cave, or a spring, are revered as shrines and visited from time to time as a part of their religious way of life.

The Hopis, however, are not the only Indians in the Southwest with such religious shrines. The San Francisco Peaks, although outside of the overlap area, were a shrine to many tribes, including the Hopi, Navajo, Havasupai, certain Apaches, and others. Mt. Taylor (also outside the Navajo-Hopi overlap) was a shrine to the Hopis, Navajos, Zunis, Acomas, Lagunas, and other pueblo and Apache groups. Thus, prominent mountain peaks were frequently the shrines of more than one Indian tribe. (Rands, Def. Ex. 89, p. 135—Docket 266.)

Although hunting and gathering activities were carried on by both Hopis and Navajos in the course of their travels between their fields and their shrines, the country so used was not the exclusive territory of either tribe in the sense that such tribe had "Indian title" thereto.

#### FINDING 21

The area exclusively used and occupied by the Hopi while under United States sovereignty was far less in

<sup>43</sup> *Healing v. Jones*, 210 F. Supp. 134-135.

extent than the country used and occupied by them while under Spanish sovereignty. Even before the Spanish contacted them, the Hopi had abandoned lands and territory formerly used by them.<sup>44</sup> Thus, sometime between 1300 and 1500 A.D. the Hopi withdrew from the Moqui Bntte country between the Little Colorado and the southern boundary of the Hopi Executive Order Reservation; "the villages along the Little Colorado near Winslow were moved to the Hopi Mesas farther north, to Oraibi, and into the Jeddito Valley. Even after the Spanish came this withdrawal by the Hopi continued, and by 1700 they were only occupying the Mesas that they occupy today."<sup>45</sup>

The Hopi abandoned many of their old shrines long before the United States acquired sovereignty over the Southwest. Thus, they abandoned their shrine on Navajo Mountain, north of the Executive Order Reservation, their shrines in the San Francisco Mountains, and their shrines around Winslow in the Little Colorado Valley.<sup>46</sup> But in spite of such physical abandonment of that country, says Dr. Colton, the Hopi still feel "that those places belong to them. For that reason certainly Hopi are making claims to all this old land although it is not land that has been used by them for many generations."<sup>47</sup>

<sup>44</sup> Colton, Tr. 7404.

<sup>45</sup> See Hopi Ex. 2.

<sup>46</sup> Colton, Tr. 7404.

<sup>47</sup> Colton, Tr. 7405.

<sup>48</sup> Tr. 7405.

Although Dr. Eggen indicates general agreement with the above statement by Dr. Colton, he qualifies such agreement with the following testimony (Tr. 7405): "They abandoned them physically. They did not abandon spiritually and they

## FINDING 22

The Commission finds that in 1848 the Hopi exclusively used and occupied the lands on First, Second and Third Mesa where their villages were located and the country nearby that was farmed and where they grazed their flocks.<sup>40</sup> The so-called "outer" area, where they hunted, gathered wild food products, and maintained their religious shrines, was not exclusively used and occupied by them in 1848 or at the time the 1882 Executive Order Reservation was established.<sup>41</sup>

continued to make use of them. They continued to visit them."

According to Katharine Bartlett, the valley of the Little Colorado had not been occupied since 1400 A.D., though it once supported a good population; south of the valley is an extensive highland covered with heavy pine forest, which was without permanent inhabitants, but was often used as a hunting ground by Apache, Yavapai and Havasupai. (Def. Ex. G-136, p. 44.)

<sup>40</sup> At the hearing in Grand Canyon, Arizona, November 19, 1960, it was stipulated that Moencopi (some distance west of Third Mesa) was abandoned as a permanent dwelling place by the Hopi prior to 1800 A.D. but was reestablished by them as a permanent place of habitation sometime after 1848. (Tr. 1562.)

The evidence indicates that Hopi lived at Moencopi for a long time but sometime between 1830 and 1846 they abandoned that area because of Paiute attacks on the village. In the 1870's, however, Moencopi was rebuilt by the Hopi under the protection of the Mormons who had settled not far away at Tuba City. Moencopi has been continuously occupied by the Hopi since that time. (Colton, Hopi Ex. 15.)

Although Dr. Eggan agrees with the above factual situation, he points out that although the Hopi abandoned Moencopi as a place in which to live in the 1830's or 1840's, they continued to farm the area around the village and never did abandon it to that extent. (Eggan, Tr. 7413.)

<sup>41</sup> Katharine Bartlett's map of Arizona, showing the distribution of Indians in that part of the Southwest in 1848, clearly depicts vast areas of unoccupied lands between neighboring

"Indian title," therefore, has not been proved to that territory.

Between 1868 and 1882 Navajos had moved into the Hopi Executive Order Reservation but not into the area where the Hopi villages were located and the country nearby that was farmed by the Hopis and where they customarily grazed their flocks. Thus, the area exclusively used and occupied by the Hopis in 1848 and in 1882 when the Hopi Executive Order Reservation was established was much the same. Those boundaries are the same as the boundaries approved on April 24, 1943 for Land Management District 6 and are described as follows:

Starting at the section corner between Sections 3 and 4, Township 28 North and Range 14 East. This corner is located 24.75 chains due South and then 54.35 chains due West from Windmill M-174. The corner is steel and is

Indian tribes. Thus, a large unoccupied area is shown south of the Hopi and another unoccupied area between them and the Havasupai to the west. And so Dr. Bartlett says (Def. Ex. G-136):

"In 1848, the Indians of Arizona had been only very slightly affected by Spanish colonization when compared with their neighbors of New Mexico, Sonora, and California.

"In preparing the map of distribution of the Indians, an effort has been made to place each tribe in its correct location, based upon the most reliable data available (see Bibliography), but it is entirely possible that everyone will not agree with the author upon some controversial points. In order to make the map clear and understandable, no overlapping boundaries between tribes has been shown, though there was some, especially between the Apache and southeastern Yavapai, and between Hopi and Navajo.

"The valley of the Little Colorado had not been occupied since 1400, though it once supported a good population; \* \* \*"

located on the West Bank of the Dinehbito Wash. It is located a few chains West of the wash. The boundary runs South of this corner to the center of the wash which distance is about 2 chains. From the above mentioned corner the boundary runs North 25°10' West to Howell Mesa escarpment in Section 20, Township 29 North, Range 14 East. It then goes in a northerly direction along said escarpment until the Tuba City-Hotevilla road is intersected in the South half of Section 28, Township 30 North, Range 14 East. The boundary then follows the road until it reaches the center of the Dinehbito Wash about on the section corner common to sections 22, 23, 26 and 27, Township 30 North, Range 15 East. The boundary then follows the center of the Dinehbito Wash in a northeasterly direction until it intersects a line going North 45° West from the quarter corner between Sections 17 and 20, Township 30 North and Range 16 East. This line is approximately 43 chains long. The boundary then follows said line Southeast to the quarter corner between Sections 17 and 20, Township 30 North, Range 16 East. The boundary then follows the section line due East from the said quarter corner for 4.5 miles to the section corner common to Sections 13 and 24, Township 30 North, Range 16 E, and Sections 18 and 19, Township 30 North, Range 17 East, then turns an angle and goes North 42° East for a distance of approximately 2.2 miles until the escarpment on the East side of the valley is encountered in the NW1/4 of Section 8, Township 30 North, Range 17 East. The boundary then follows this escarpment in

a southerly direction until the most southerly point in the escarpment is reached in the E/2 of Section 16, Township 30 North, Range 17 East. The boundary then goes .4 miles South 23° East at which point it reaches the Oraibi Wash in the NW1/4, Section 22, Township 30 North, Range 17 East. The boundary then follows the West bank of the Oraibi Wash in a northeasterly direction until a point 200 yards above the Hardrocks Diversion Dam is reached. The boundary then turns an angle and follows a line south 57°30' East for a distance of approximately five miles until it reaches the buck pasture fence in the SW1/4, Section 15, Township 30 North, Range 18 East.

The boundary then follows the buck pasture fence Southwesterly for approximately .4 miles in the NW1/4, Section 22, Township 30 North, Range 18 East. Thence Southeasterly along the buck pasture fence for approximately .4 mile in the NW1/4, Section 22, Township 30 North, Range 18 East. Thence Northeasterly along the buck pasture fence for approximately 3 miles to a point in the NW1/4, Section 18, Township 30 North, Range 19 East. Then Southeasterly along the buck pasture fence for approximately 1 mile to the SE1/4, Section 18, Township 30 North, Range 19 East. Thence Northeasterly along the buck pasture fence approximately .2 mile to the point on the section line between the SW quarters of Sections 17 and 18, Township 30 North, Range 19 East. Then South 76°30' East following the Existing Boundary fence to a point 1,879 feet due North of Section corner between Sections 23, 24, 25 and 26, Township 30 North, Range 19 East.

This section corner is located near water well H 11 which is known as Cat Springs. Then South 54°15' East following the Existing Boundary fence to a point in Bingham's Lake approximately 8 miles South of Latitude 36°00' and 4.25 miles West of Longitude 110°00'.

From this point in Bingham's Lake the boundary then runs South 38°00' West following the Existing Boundary fence until it intersects the Jeddito Wash. The intersection takes place at the same point as Longitude 110°15' intersects the wash. The boundary then follows the center of the wash to the point where the Township line between Townships 24 and 25 North intersects the wash. The boundary then follows the Township line due West following the Existing Boundary fence for 2.3 miles at which point it goes North 45°57' West following the Existing Boundary fence for approximately 25.6 miles until it intersects the Dinehbito Wash at the same point as the Township line between Townships 27 and 28 North. The boundary then follows the center of the Wash 8 miles up to the point where it intersects the line running due South of the corner between Sections 3 and 4 Township 28 North, Range 14 East. [See outline map following page 8 of slip opinion in *Healing v. Jones*, Hopi Ex. 78 and 210 F. Supp. 133.]

DEFENDANT'S REQUESTED FINDINGS OF FACT RELATING TO  
THE NAVAJO CLAIM TO THE NAVAJO-HOPI OVERLAP

FINDING 23

The Navajo Tribe, petitioner in Docket 229, is and has been from time immemorial an identifiable group of American Indians residing within the territorial

limits of the United States, is recognized by the Secretary of the Interior, and is authorized to maintain this action under the provisions of section 2 of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

FINDING 24

The Navajo Tribe timely filed its claim for recovery of additional compensation for a large tract of land which it claims to have ceded to the United States under the Treaty of June 1, 1868. (15 Stat. 667, 2 Kapp. 1015.) These lands are outlined upon Navajo Exhibit 510 and are located in northwestern New Mexico, northeastern Arizona, southeastern Utah, and southwestern Colorado but are not specifically described in the treaty referred to. Petitioner claims that the consideration received from defendant "was grossly out of proportion to and unconscionably less than the value of the land ceded by the Tribe." (Amended petition, paragraph 14.) Petitioner bases its claim to the lands in question on aboriginal ownership or "original Indian title." Thus, petitioner claims that the Navajo Tribe of Indians exclusively used and occupied the lands claimed in regular Indian fashion from time immemorial until ceded to the United States in 1868. All of the lands claimed by the Hopi Tribe in Docket 196, except an area outlined in green upon Navajo Exhibit 511-A "within the 1882 Hopi Executive Order Reservation (1 Kapp. 805), are also claimed by the Navajo Tribe in Docket 229 under a claim of aboriginal ownership.

<sup>51</sup> Correll, Tr. 2185 and 5621. This area comprises approximately 480,000 acres of land. (Tr. 5621.)

## FINDING 25

The Navajos are a branch of Athapaskan people who migrated into the Southwest from Canada.<sup>22</sup> With the Apaches they make up one linguistic unit and form the Southern Athapaskan group.<sup>23</sup>

The term "Apache," probably from "Apachu," meaning "enemy," appears to have originated with Zuni Pueblo and was applied by the Spanish to Apaches and Navajos alike. The first known specific reference to the "Apaches de Nabaju" was by the Spaniard Geronimo Zarate-Salmeron, who placed them north of Santa Fe on the Rio Grande but gave no more specific location.<sup>24</sup>

## FINDING 26

There are no accurate figures on the Navajo population in 1848, when the United States acquired sovereignty over this territory. Dr. Frank D. Reeve, one of defendant's expert witnesses, so testified but also stated that his best judgment on their population at that time was that they numbered from 6,000 to 8,500.<sup>25</sup> Mr. Albert H. Schroeder, another witness for the defendant, estimated their number at about 8,000 but stated quite frankly that this figure "is only a guess."<sup>26</sup> Dr. Clyde Kluckhohn, one of petitioner's expert witnesses, estimated their population at 12,000

<sup>22</sup> Ellis, Nav. Tr. 9011.

<sup>23</sup> "A Survey of Navajo Archaeology," by Carroll L. Riley, Def. Ex. E-87, p. 45 and Def. Ex. E-51(a), pp. 1 and 2 in Docket 229.

<sup>24</sup> Def. Ex. E-51(a), p. 49 in Docket 229.

<sup>25</sup> Tr. 7955-7957.

<sup>26</sup> Tr. 8606-8607.

in 1848, but once again, this figure is only an estimate.<sup>27</sup>

Other estimates to be found in various official reports are: 7,000 reported November 10, 1846 by Charles Bent, newly appointed Governor of New Mexico;<sup>28</sup> 12,000 reported the same year by Col. A. W. Doniphan;<sup>29</sup> 7,000 reported in 1852 by Michael Steck, Indian Agent in New Mexico;<sup>30</sup> 8,000 to 10,000 estimated by Lt. J. H. Simpson in 1852;<sup>31</sup> 10,000 estimated by Agent Dodge in 1853;<sup>32</sup> 8,000 estimated by David Meriwether, Governor and Superintendent of Indian Affairs in New Mexico in 1854;<sup>33</sup> 9,000 to 12,000 estimated by J. L. Collins, Superintendent of Indian Affairs in New Mexico in 1857;<sup>34</sup> and 12,000 to 15,000 estimated by Major Kendrick in 1863.<sup>35</sup>

## FINDING 27

Just when the Navajos entered New Mexico is uncertain, some fixing this time at about 1500 A.D. and others around 1300 A.D.<sup>36</sup> The earliest phase of

<sup>27</sup> Tr. 782 and 1232.

<sup>28</sup> Def. Ex. G-29, p. 8.

<sup>29</sup> Def. Ex. G-25, p. 316.

<sup>30</sup> Def. Ex. G-188.

<sup>31</sup> Def. Ex. G-39.

<sup>32</sup> Nav. Ex. 104.

<sup>33</sup> Def. Ex. G-12 and Nav. Ex. 517.

<sup>34</sup> Def. Ex. G-14.

<sup>35</sup> Nav. Ex. 308.

<sup>36</sup> Ellis, Nav. Tr. 9014. Dr. Dittert, who has done much archaeological work in the Navajo Reservoir District, writes (Def. Ex. S-614, p. 244 in Docket 229):

"The beginning of the Navajo occupation of the Navajo Reservoir District can not be dated with accuracy at present. Probably the Reservoir area was settled in the late 1500's by Navajos who lived there until approximately A.D. 1775. At

Navajo history is represented only in the upper San Juan and its tributaries east of Blanco, New Mexico, where the Largo joins the San Juan. Here they settled in the areas commonly referred to as the Gobernador-Largo and Navajo Reservoir districts and here they lived until after the middle of the eighteenth century.<sup>47</sup>

The Navajo Reservoir District (from Navajo Dam where the Rio Arriba county line intersects the San Juan River and up as far as Caracas, Colorado) probably was first settled by the Navajos in the 1500's and was not abandoned until about 1750 to 1775. The Gobernador-Largo area was occupied at about the

that time, the area as abandoned. The general migration of the Navajo has been to the south and west.<sup>48</sup>

Continuing Dittert says (p. 245):

"Pertinent historical events with respect to the Navajo Reservoir District have been summarized by Bartlett (1932), and Amsden (1932), and include the following facts: (1) The Navajo had come into the Southwest as early as A.D. 1622, probably living on the upper San Juan and Chama Rivers. (2) The period A.D. 1622 to 1680 was one of initial contacts between the Pueblo Indians and the Navajo with the major influences coming after this period as a result of the Pueblo Revolt. (3) By A.D. 1700 or slightly earlier the Navajo started to move to the south and west of the Navajo Reservoir. (4) By A.D. 1800 the center of the Navajo occupation was in the area of the present day Navajo Reservation."

<sup>47</sup> Ellis report, Def. Ex. E-51(h), p. 267 in Docket 229; Def. Ex. E-87, pp. 47-48 and 58 in Docket 229. As Schroeder points out, by 1748 the Gobernador and Canyon Largo areas were completely abandoned by the Navajos due to Ute pressure from the north. Although a few Navajo sites are shown by later tree ring dates in this area, these belong to the period of alternate peace and war with the Utes—namely from the 1770's to around 1800. (See Navajo archeological sites for this area reported on Def. Ex. S-506 F and Nav. Exs. 520-F and 520-G in Docket 229.)

same time. Here the Navajos received a heavy Pueblo increment of population just before 1700 A.D. It would appear that the upper San Juan was indeed the Navajo homeland well into the eighteenth century although a few Navajos may have filtered south and southwest to Wide Belt Mesa, to Chacra Mesa, to the vicinity of Mt. Taylor, and to the Chuska Mountains.<sup>49</sup>

Ute raids and hostilities, as much as any other single factor, were probably responsible for causing the Navajos to move from the upper San Juan. Thus, by 1775 no Navajos lived east of Blanco on the San Juan and most of the Navajo Reservoir area was abandoned.<sup>50</sup>

From this originally occupied eastern wooded area, the Navajos slowly moved westward and southwestward into more open areas, a move resulting from increasing Ute and Comanche pressure. The movement appears to have been under way by the early 1700's. Chacra Mesa now became a Navajo center. Some

<sup>48</sup> Def. Ex. E-51(a), p. 57 in Docket 229; Def. Ex. E-51(b), p. 267 in Docket 229. According to Dr. Carroll L. Riley of the University of Southern Illinois, in his publication "A Survey of Navajo Archeology" (Def. Ex. E-87 in Docket 229) the earliest known sites regarded as Navajo are from the Canyons of Gobernador, Largo, and Blanco that drain westward into the San Juan River. This country is referred to by modern Navajos as *dinétah* (land of the People) and was largely abandoned or deserted by 1800 A.D.

Big Bead Mesa on the eastern slopes of Mt. Taylor was an early site of Navajo occupation as was Chaco Canyon, Chacra Mesa, and Canyon de Chelly. In the country west of Mt. Taylor, in the vicinity of Ramah, Navajo occupation dates from post-Fort Sumner days.

<sup>49</sup> Def. Ex. E-51(b), p. 260 in Docket 229; Def. Ex. E-87 in Docket 229.

Navajos moved on westward to Canyon de Chelly, a region apparently beyond Ute range at that time.<sup>70</sup> A scattering of Navajos moved as far west as the Navajo-Hopi contact area east of the Hopi mesas.

#### FINDING 28

Before the advent of European settlers, the Navajos lived by gathering nuts, wild seeds, berries and edible fruits, by farming small tracts of land, by hunting and by raiding their Pueblo neighbors.<sup>71</sup>

Sometime in the sixteenth or seventeenth century the introduction of the horse and sheep by the Spanish into Navajo culture<sup>72</sup> set in motion the trend of events that revolutionized Navajo life. The horse not only provided mobility, but greatly expanded opportunities for hunting, raiding, and food gathering. The sheep provided a staple food supply and, although agriculture remained an important source of food, the Navajos rapidly underwent a change to become basically a pastoral society.<sup>73</sup>

The tribe grew warlike and with population and stock increases it became vital to expand. Warlike tribes to the east barred the way in that direction; Apaches in the south and Utes to the north prevented expansion into those areas. The bulk of the Navajos, therefore, moved westward and soon concentrated

<sup>70</sup> Def. Ex. E-51(b), p. 268.

<sup>71</sup> *The Navajo Yearbook*, Def. Ex. G-206, p. 257.

<sup>72</sup> Dr. Dorothy Keur places this time as somewhere between 1630 and 1700 A.D. (Def. Ex. S-646.)

<sup>73</sup> Def. Ex. S-646 and Def. Ex. G-206, pp. 4-5.

in Canyon de Chelly and the Tunicha-Lukachukai-Carrizo Mountains.<sup>74</sup>

#### FINDING 29

Although not historically nomadic in the sense of aimless continued wandering, the Navajo people have long been a mobile group, shifting residence from season to season in accordance with the climatic fluctuations which control food supply and forage. Thus, many people living near the mountains maintained a summer place at the higher elevations and a winter place at lower elevations or on the plains. Family movements were generally confined to well defined areas of seasonal residence however, and during the planting and growing season all or a part of the family usually remained in the locality where they made their fields.<sup>75</sup>

The acquisition of livestock not only changed the way of life of the Navajo Tribe from a somewhat precarious hunting-agricultural economy, in which there was little opportunity or incentive to accumulate wealth, to a pastoral economy in which an adequate food supply was virtually assured, but also the advent of livestock introduced the opportunity to accumulate property. As a result many early Navajos became wealthy stock owners, and were commonly

<sup>74</sup> "A Short History of the Navajo People," by Richard Van Valkenburgh, Def. Ex. G-205, p. 5. Also see map of the Navajo country in 1776 following page 5 in Def. Ex. G-205. This is the general area shown on modern maps as the Chuska Mountains region.

<sup>75</sup> Def. Ex. G-206, p. 258; Ellis, Tr. 0084.

called the "Ricos" (the rich) by the Spanish colonists.<sup>70</sup>

It was the mobility of the Navajos that brought them into conflict with the Spanish and Mexican settlers, and later with the United States Government. Never down-dwellers like the Pueblo Indians, the advent of livestock had encouraged ever wider dispersion of Navajo families to assure sufficient forage for their increasing herds. They raided the settlements and vanished in the face of punitive expeditions vainly sent after them. As the colonial population grew in the Rio Grande Valley, the Navajos moved westward into the wild broken country where they could find necessary range and elude their enemies. The Spanish-Mexican period was one of almost constant unrest and warfare.<sup>71</sup>

#### FINDING 30

At the time of the Spanish conquest of New Mexico the Navajos were the first of the wild tribes to cause trouble.<sup>72</sup> They repeatedly raided the Spanish settlements and the Pueblo Indian villages. Nevertheless, they were not the only wrongdoers during the Span-

<sup>70</sup> Def. Ex. G-206, p. 258; Def. Ex. G-126, p. 94.

In 1846, Governor Bent reported that the Navajos had 30,000 head of horned cattle, 500,000 sheep, and 10,000 head of horses, mules, and asses. (Kluckhohn, Tr. 871; Nav. Ex. 40; Def. Ex. G-29, p. 6).

In 1855, Governor Meriwether estimated that the Navajos owned 200,000 sheep and more than 10,000 horses. (Kluckhohn, Tr. 871-872; Nav. Ex. 130).

<sup>71</sup> Def. Ex. G-206, p. 258.

<sup>72</sup> "The Navaho During the Spanish Regime in New Mexico," by Donald E. Worcester, Nav. Ex. 501, p. 103.

ish regime, for Spanish officials frequently forced Pueblo Indians to assist them in slave raids against the Navajos. Slave raiding, in fact, was apparently one of the principal reasons for continued Navajo hostility and the participation of Pueblo Indians in these campaigns greatly increased the animosity of the Navajos toward both the Spanish and the Pueblos.<sup>73</sup>

During the 18th century, the region of Cebolleta Mountain, topped by Mt. Taylor, became an area of conflict between the Navajos and the Spanish.<sup>74</sup> In 1730, Benito Crespo, Bishop of Durango, visited New Mexico hoping to assert control over religious affairs by the secular church rather than by the Franciscan missionaries. The time and circumstances, however, were not propitious for such change.<sup>75</sup>

Journeying through the territory the Bishop saw possibilities for further work among the pagans or unchristianized Indians—including the Navajos. The Pueblos had accepted Christianity and the Bishop believed that missionary work among the Navajos at Cebolleta and their kinsmen to the north would be well worthwhile. For a time progress apparently was made. A number of Navajos were baptized. Missions were established at Cebolleta and Encinal in 1749 and many Navajos were persuaded to move to these locations. But a wide gulf lay between Christian concepts and the ingrained beliefs of the Navajo people with the result that the Spanish padres never

<sup>73</sup> *Idem*, p. 108.

<sup>74</sup> Reeve, Def. Ex. G-132, p. 9.

<sup>75</sup> *Idem*, p. 10.

did succeed in truly converting the Navajos to the Christian faith.<sup>42</sup>

The rejection of the missionaries did not mean the end of Navajo-Spanish relations. Instead the basic relation between them shifted from a religious to a territorial problem. Spanish settlers slowly penetrated the Puerco Valley and the Cebolleta area in the mid-eighteenth century where numerous land grants were made by the Spanish Crown.<sup>43</sup>

#### FINDING 31

Early historical documentation of the Navajos is notably scant, indicating neither intimate nor long continued contact with the Spanish. After the acquisition of horses from the Spanish, the Navajos apparently spread southward, making raids on both Pueblo Indians and the Spanish.<sup>44</sup> From 1720 to

<sup>42</sup> Reeve, Tr. 7783, Def. Exs. G-132, pp. 10-11 and G-137; Worcester, Nav. Ex. 501, pp. 110-111.

<sup>43</sup> *Idem*, p. 29. For more details on these grants see patents issued therefor by the United States and identified as Def. Ex. G-211 through G-224 and G-233 through G-235.

As Dr. Reeve points out (Def. Ex. G-132, pp. 29-30), the population of New Mexico increased slowly at this time, but still it was great enough so that sufficient pressure developed within the narrow confines of the Rio Grande Valley to make expansion necessary. Thus, the first movement into the valley of the Puerco occurred in the 1750's. The five sons of José Montano, unable to make a living from their few acres in the Albuquerque district, petitioned the Governor for a grant of land which was made to them on Nov. 25, 1753. The Montano boys, however, were not alone in this first venture westward from the Rio Grande. A total of twelve families, or about 80 persons, were involved. The new settlement was officially named Nuestra Señora de la Luz, San Fernando y San Blas.

<sup>44</sup> Keur, Def. Ex. S-646, p. 5.

about 1770, however, an era of peace prevailed between the Spanish and the Navajos.<sup>45</sup> By 1720 raids and reprisals had ceased and the Navajos were no longer numbered among the enemies of the province. This favorable situation was not caused by Spanish success in winning the friendship of the Navajos but rather because of Ute and Comanche hostility toward the Navajos and raids deep into their territory.<sup>46</sup>

Shortly after 1714 strong raids by the Utes, which continued until about the 1740's, acted as a deterrent to Navajos raiding the Pueblo and Spanish settlements and were largely responsible for causing the Navajos to move farther south away from the Utes.<sup>47</sup> And so, because of Ute pressure, the Navajos were forced to use fortified crags for protection<sup>48</sup> and by the 1740's began to vacate the Gobernador-La Jara area and move south toward Big Bend Mesa and into the vicinity of Cebolleta east of Mt. Taylor.<sup>49</sup>

<sup>45</sup> Reeve, Tr. 7781.

<sup>46</sup> Worcester, Nav. Ex. 501, p. 109.

According to Reeve, at this time the Navajos lived as far south as Cebolleta Canyon, which drains the southeastern slopes of Cebolleta Mountain. (Tr. 7782.)

<sup>47</sup> Schroeder, Tr. 8481.

<sup>48</sup> Schroeder, Tr. 8491 and Def. Ex. S-502(b).

<sup>49</sup> Def. Ex. S-503, S-503(c) and S-621.

According to Father Juan Miguel, in 1748 the Navajos were brought to Cebolleta "to the south of the said province of Navajo." (Def. Ex. G-132, pp. 19-20. Schroeder, Tr. 8496-8497.) In other words, the Navajos were brought to Cebolleta and out of their homeland farther to the north, out of Gobernador-La Jara area. (Schroeder, Tr. 8496.)

## FINDING 32

Except for an era of peace between 1720 and 1770, Navajo-Spanish relations were generally of a hostile nature through the many years of Spanish sovereignty over this part of the country, which was then a part of the Province of New Mexico.<sup>10</sup> Navajo raids upon the Pueblo Indians and Spanish settlements in the Rio Grande Valley, and in the country to the west, were a common occurrence throughout that period which ended with the independence of Mexico in 1821.<sup>11</sup> Thus, raiding by Navajos was a common practice during the Spanish and Mexican periods<sup>12</sup> and frequently resulted in retaliation by the Spanish who set out in hot pursuit of the raiders, chasing them to their lands west and northwest of the Pueblo and white settlements.<sup>13</sup>

Intermittent conflicts between the Navajos and Spanish continued into the early years of the nineteenth century. Thus, in 1800 the Governor of New Mexico planted a colony of white settlers in Cebolleta Canyon. The Navajos protested that this was their land but the Governor insisted that the settlement should remain and staged a military campaign against them.<sup>14</sup>

<sup>10</sup> "The Navaho during the Spanish Regime in New Mexico," by Donald E. Worcester. (Nav. Ex. 501.)

<sup>11</sup> Schroeder, Nav. Tr. 8501-8522 and Def. Exs. in Docket 229: S-503 and S-503(c), S-505 and S-505(e), S-507 and S-507(g), S-508 and S-508(h), S-513 and S-513(m), and S-514 and S-514(n).

<sup>12</sup> Reeve, Def. Ex. R-150, p. 17 in Docket 229.

<sup>13</sup> Def. Ex. G-236 and S-507, S-507(g), S-562 and S-576 in Docket 229.

<sup>14</sup> Reeve, Nav. Tr. 7795-7796.

Between 1805 and 1818 relations remained more or less friendly between the Navajos and the settlers. In 1818, however, hostilities again broke out<sup>15</sup> and not long afterwards Mexico declared its independence and inherited the Navajo problem.

The Navajos, who had been held in check by the Spanish Government by bribes and occasional punitive expeditions, could not be controlled by the weak Mexican Government in Santa Fe. Thus, Mexican officials considered themselves at war with the Navajos almost throughout the entire Mexican period of 1821-1846.<sup>16</sup>

When General Stephen Watts Kearny took over New Mexico for the United States he found a war existing, a war which had existed for many years between the Navajo Indians and Mexican settlers.<sup>17</sup> As he entered Santa Fe on August 18, 1846, Kearny assured the New Mexicans that the American military would give protection against any marauding Indian tribes. He soon had opportunity to keep his promise, for the Navajos broke out into a series of depredations against their common enemies, the Mexican settlers and Pueblo Indians.<sup>18</sup>

Raid by the Navajos, as well as by other Indians, especially Utes and Apaches, continued on Spanish

<sup>15</sup> Reeve, Nav. Tr. 7804.

<sup>16</sup> Minge, Nav. Tr. 6966. Minge lists between 50 and 60 raids officially reported during this period but says that many more actually occurred. (Tr. 6969-6970: Acoma-Laguna Ex. 530.)

<sup>17</sup> Def. Ex. G-31, p. 540 in Docket 229 and Nav. Ex. 174, p. 5.

<sup>18</sup> Van Valkenburg, Def. Ex. G-205, p. 10 in Docket 229.

and Pueblo Indian settlements. Navajo depredations continued to increase despite the American military expeditions against them. Thus, in 1846 Lt. Abert reported that although the valley of the Chama River<sup>100</sup> was a favorite settlement of the Spanish and Mexican settlers, because of Ute and Navajo depredations, all attempts at settlement above Abiquiu had failed.<sup>100</sup> Furthermore, in the vicinity of Santo Domingo (between Santa Fe and Albuquerque), said Abert, little use was made of the land because of fear of the Navajos "who descend from the mountains, and sweep away the 'cabaladas'<sup>101</sup> of the Pueblos and Mexicans, who look on unresistingly."<sup>102</sup> "Not a day passes without hearing of some fresh outrage; and the utmost vigilance of the military force in this country is not sufficient to prevent murders and depredations," was the report of James S. Calhoun, Indian Agent, to the Commissioner of Indian Affairs, on October 1, 1849.<sup>103</sup> And so Navajo raids continued through the early years of American sovereignty over the Southwest.<sup>104</sup>

<sup>100</sup> The Chama is a tributary of the Rio Grande in northern New Mexico.

<sup>100</sup> Def. Ex. S-630 in Docket 229.

<sup>101</sup> According to McDonald's Spanish-English dictionary "caballada" means "stud of horses or mares." Therefore, as Abert uses the term "cabaladas," he was referring to herds of horses stolen by the Navajos.

<sup>102</sup> Def. Ex. S-630 in Docket 229.

<sup>103</sup> Def. Ex. R-17, p. 998 in Docket 220.

<sup>104</sup> An examination of the report submitted by the Commissioner of Indian Affairs on March 2, 1857 shows that of the claims filed by the settlers Navajos were accused of depredations in 114 cases. (Def. Ex. G-165 in Docket 229.) Stolen by the Navajos in the course of these raids were more than 80,000 sheep, plus many goats, oxen, cattle and horses.

In 1843 Navajos attacked the Pueblo of Santo Domingo; in 1849 they raided the Pueblo of Zuni, and the same year killed some Mexicans at a village 15 miles northwest of Laguna.<sup>105</sup> In fact, Navajo raids upon Zuni were made so often that the chiefs of the Pueblo finally sought and obtained permission from the commanding officer of the military to make war on the Navajos.<sup>106</sup>

As pointed out by the Navajos in their proposed finding 9, the Navajo Tribe concluded a number of treaties with representatives of the United States, most of which were never ratified by the Senate. The first of these was the Doniphan Treaty of 1846.

Captain Reid of the United States Army had been dispatched with 30 men on a venturesome trip to meet with the Navajos. Guided by the friendly Sandoval, chief of a small band of Navajos living near Cebolleta, and after several days travel, the Reid party met about thirty Navajo warriors and eight or ten squaws. Rushing onward they finally met another party under Chief Narhonna. A conference was held and a promise obtained from the Indians to meet in Santa Fe to make a treaty of peace with all their enemies.<sup>107</sup>

The Navajos failed to appear in Santa Fe as they had promised and continued with their depredations along the Rio Grande. As a result, on October 2, 1846 General Kearney ordered Colonel Doniphan to march against the Navajos with instructions to require

<sup>105</sup> See Def. Exs. R-15, G-29 and Nav. Ex. 51 in Docket 229.

<sup>106</sup> Def. Ex. G-29 and Nav. Exs. 55 and 57 in Docket 229.

<sup>107</sup> "The Government and the Navaho, 1840-1858," by Frank D. Reeve. (Def. Ex. G-126, p. 84 in Docket 229.)

the restoration of prisoners and stolen property and that Navajo hostages be given to assure future good conduct by the tribe.<sup>108</sup>

Doniphan acted promptly. At a council held at Bear Spring, he informed the Navajos that the United States claimed the country by right of conquest and that both the New Mexicans and the Navajos are "our children;" that they must decide whether to live at war or peace, and if a treaty of peace was made, they must observe it since the United States would make no second treaty.<sup>109</sup>

In reply to these strong words, "One of their chiefs, Sarcilla Largo, a young man very bold and intellectual, spoke for them: 'He was gratified to learn the views of the Americans. He admired their spirit and enterprise, but detested the Mexicans.'" <sup>110</sup> Since the Americans were at war with Mexico, he could not understand the objection of the Americans to the Navajos warring upon the same people.<sup>111</sup>

The difference in point of view, however, did not prevent the signing of the first of a series of treaties between the Navajos and representatives of the United States.

According to the Doniphan Treaty of November 22, 1846, there was to be peace between the two peoples; the "American people" also included the Mexicans and Pueblo Indians; there was to be freedom of trade and mutual restoration of prisoners; and all

<sup>108</sup> *Idem.*

<sup>109</sup> *Idem.*, p. 85.

<sup>110</sup> *Idem.*

<sup>111</sup> *Idem.*

property taken after August 18, 1846, was to be restored by both sides. The agreement was signed by fourteen Navajos, but the ink was not dry before the document was meaningless<sup>112</sup> and perhaps this had something to do with the fact that the treaty was never ratified.

During the fall of 1846 the depredations of the Navajos continued. They even stole part of Doniphan's supply of sheep near Socorro as he was en route to Mexico. A theft of sheep usually brought a party of Pueblo Indians, or Mexicans, or American soldiers in pursuit. Sometimes the marauders were caught and punished and the property recovered; other times the victims had to endure their loss.<sup>113</sup>

In 1848 Col. Newby led a campaign against the Navajos but accomplished nothing except to negotiate another treaty of peace to which the Indians paid no attention but continued their depredation even more than previously.<sup>114</sup> This treaty, too, was never ratified.

On September 9, 1849, Lt. Col. John M. Washington, Governor of New Mexico, and James S. Calhoun, Indian Agent at Santa Fe, New Mexico, concluded another treaty with the Navajos. This was negotiated in Canyon de Chelly, the very heart of the Navajo country, and became the first ratified treaty between the Navajos and the United States. Like the others, however, the treaty was not signed in good faith as evidenced by the fact that before

<sup>112</sup> Reeve, Def. Ex. G-126, p. 85 in Docket 229.

<sup>113</sup> *Idem.*, pp. 85-86.

<sup>114</sup> Def. Ex. G-31, p. 540 and Nav. Ex. 174 in Docket 229.

Col. Washington returned to Albuquerque, the Navajos had already raided in the vicinity of Santa Fe.<sup>118</sup> Nevertheless, exactly one year after the treaty was signed by the Indians it was ratified by the Senate and later proclaimed by the President.<sup>119</sup>

In spite of the Washington-Navajo treaty concluded in Canyon de Chelly, the Indians continued with their depredations. On June 25, 1850 the military reported that Navajos had driven off 15,000 sheep from the Puerco Valley;<sup>120</sup> and later the same year a delegation of Hopi Indians came to Santa Fe to complain bitterly of Navajo depredations against them and their flocks.<sup>121</sup> In October 1850 raids were staged by Navajos on the west side of the Rio Grande and on the Agua Salada where they ran off stock and killed two men.<sup>122</sup> The same month several thousand sheep were stolen by Navajos from settlers near Cebolleta;<sup>123</sup> on November 16, 1850 Navajos stole 2,000 sheep at Valverde;<sup>124</sup> and on December 7, 1850 they ran off stock from the Rincon de Concha.<sup>125</sup>

Navajo raids continued into 1851 so that finally, as a bulwark to check the increasing Navajo depredations, Fort Defiance was established. It became the first military post in the present State of Arizona.<sup>126</sup>

<sup>118</sup> Def. Ex. G-4, pp. 89-91 and G-205, pp. 10-11 and Nav. Ex. 174 in Docket 220.

<sup>119</sup> Ratified September 9, 1850, and proclaimed Sept. 24, 1850, 2 Kapp. 583 and 0 Stat. 974.

<sup>120</sup> Def. Ex. G-248 in Docket 220.

<sup>121</sup> Def. Ex. G-20 and Nav. Ex. 57 in Docket 220.

<sup>122</sup> Def. Ex. G-20 and Nav. Ex. 58 in Docket 220.

<sup>123</sup> Def. Ex. G-20 in Docket 220.

<sup>124</sup> *Idem.*

<sup>125</sup> *Idem.*

<sup>126</sup> Def. Ex. G-205, p. 11 and Nav. Ex. 174 in Docket 220.

Unrest and depredations by the Navajos continued more or less through the next few years until finally David Meriwether, Governor of New Mexico, was appointed special commissioner to effect a treaty with them. He met with them at Laguna Negra in July 1855 and by the 18th had concluded a treaty. Because of an unfavorable committee report, however, the treaty was never ratified by the Senate.

#### FINDING 33

The Meriwether Treaty of July 18, 1855 was the first attempt by the United States to set up a reservation for the Navajos. Under the proposed treaty the area to be reserved for the Indians was described as follows:<sup>127</sup>

Beginning on the South bank of the San Juan river, at the mouth of the Rio de Chelly, thence up the San Juan to the mouth of the Cañada del Amarillo, thence up the Amarillo to the top of the dividing ridge between the waters of the Colorado and Rio Grande [Continental Divide], then southwestwardly along said dividing ridge to the head of the main branch of the Zuni river, thence down the north side thereof to its mouth or entrance into the Colorado Chiquito, thence north to the beginning, excluding the lands owned by the Pueblos of Zuni and Moqui, and reserving to them all their rights and privileges, and reserving to the United States a tract of country embracing fifty square miles around Fort Defiance, to be laid off under the

<sup>127</sup> Article 4 of Def. Ex. G-200 and Nav. Ex. 127.

directive of the commanding officer of the department, and in such manner as he may see proper: reserving to the Navajos the right to gather salt at the Salt Lake near Zuñe.

As above indicated, lands belonging to Zuni Pueblo and to the Hopi Indians were specifically not to be included within the proposed reservation and a tract fifty square miles around Fort Defiance was also excluded.<sup>123</sup>

The eastern boundary proposed for the Navajos was approximately the Continental Divide and Meriwether was probably right in stating that this divide was well known to the Indians. The Amarillo was the name for present-day Largo Canyon, a southeastern tributary of the San Juan River which heads in the Continental Divide near the headwaters of the Rio Puerco.<sup>124</sup> Westward of this divide lay the old Navajo country—namely, the southeastern tributaries of the San Juan: Largo Canyon, Blanco Canyon, and

<sup>123</sup> When discussing the proposed reservation boundaries, Manuelito, one of the Navajo chiefs, remarked that the Navajos claimed a much larger country and that they could not get salt unless they were allowed to visit the salt lake near Zuni and gather salt there. He pointed out that the Navajos were accustomed to go to Mount Polonia as one of their sacred mountains and that they were loth to give up these mountains. He was shown a map of New Mexico, identified as Parke's map, and assured that Mount Polonia was within the boundaries proposed for their reservation. (Def. Ex. R-111.) According to Parke's map, Mount Polonia is the Carrizo Mountain of today which is a prominent landmark in the northeast corner of Arizona. (Def. Ex. R-150, p. 35; Def. Ex. R-180.)

<sup>124</sup> Def. Ex. R-150, p. 35.

Gobernador Canyon where the Navajos were centered in the Spanish period of New Mexican history.<sup>127</sup>

The western boundary fixed by the treaty was a north and south line some distance east of the Hopi mesas. It extended from the confluence of the Zuni River with the Little Colorado on the south to the San Juan on the north where the Rio de Chelly empties into the San Juan.

Why a western boundary was stipulated is not at all clear because the land beyond Canyon de Chelly was little known.<sup>128</sup> The western limit of the Navajo country in the early period is difficult to ascertain. Few Spaniards penetrated very far into the region, and those who did made varying guesses at the width of the territory.<sup>129</sup>

#### FINDING 34

The period 1858-1868 was one of stress for the Navajos and has frequently been referred to as the "fight period."

When the United States took over New Mexico, the Spanish-speaking inhabitants were assured that their difficulties with the Navajos would be speedily ended. As indicated above, this was easier said than done.

Difficulties continued between the Navajos and New Mexicans and Pueblo Indians throughout the late 1850's and into the 1860's.<sup>130</sup> As time passed on and

<sup>127</sup> *Idem*, p. 36.

<sup>128</sup> Reeve, Def. Ex. G-126, p. 109.

<sup>129</sup> Apache, Ex. T-8, p. 25.

<sup>130</sup> Def. Exs. R-150, pp. 38-40, R-69, R-79, R-81, R-82, R-152, and S-511 in Docket 229.

In 1859 Lt. Freedley received complaints from the people at

matters did not improve in spite of the threats and expeditions of the troops against the Navajos, a series of operations, often referred to as the "Navajo war," were carried on by the military, which had been greatly augmented in numbers by volunteer citizens and Pueblo Indians.<sup>131</sup>

In the fall of 1862, the Navajos and Apaches, taking advantage of the army's attention to the Civil War,<sup>132</sup> increased their raids upon the Rio Grande settlements.

Cubero that Navajos were continually stealing stock that was grazing on the outskirts of the town. (Def. Ex. R-69 in Docket 220.) At Cebolleta, Freedley received complaints from the residents that there were thieving Navajos in their immediate area who had come from the Tunicha and Chusca Mountains. (Def. Ex. R-80 in Docket 220.) In the same year Navajos stole sheep from the valley of the Puerco just west of Los Lunas on the Rio Grande and were pursued to the Zuni Mountains. (Def. Ex. S-511 in Docket 220.)

In 1880 Agent Steck learned that Navajos had stolen stock at Tomé. (Def. Exs. R-148 and S-511 in Docket 220.)

On October 8, 1861 Supt. Collins reported that the Navajos "have never entirely ceased their depredations and warlike incursions upon our people since the war of 1858." (Def. Ex. G-34, p. 733 in Docket 220.)

On November 26, 1862 the Commissioner of Indian Affairs stated (Def. Ex. G-35, p. 188 in Docket 220): "Equally powerful and hostile, and even more dreaded than the Apaches, are the Navajos. During the past four years they have been a continual scourge to the people of New Mexico, and have committed innumerable depredations upon their settlements. There is absolutely no security, except armed force, in any part of the large region of the country through which they roam; and the last has proved even more disastrous than former years."

<sup>131</sup> Def. Ex. G-205, p. 22 in Docket 220.

<sup>132</sup> In July 1861 the troops were removed from Fort Defiance for Civil War duty and the fort was temporarily deserted. A small command was left at Bear Spring to build Fort Fauntleroy on the present site of Fort Wingate. (Def. Ex. G-205, p. 18.)

The Navajos attacked from the west while the Mescalero Apaches swept in from the southeast.<sup>133</sup>

In September 1863, General James Carleton conceived the idea of moving all the Navajos to Fort Sumner on the Pecos River in eastern New Mexico. He believed that there the Navajos would acquire new ideas, new ways of life, would settle down, and that gradually the old Indians would die off and a new and peaceful generation would develop.<sup>134</sup> Carleton ad-

<sup>133</sup> Def. Ex. G-205, p. 19 in Docket 220.

<sup>134</sup> Def. Ex. G-262.

Carleton believed that the Navajos could not be trusted but simply had to be taken out of their country and put on a distant reservation where they would gradually acquire a new way of life and become less of a burden to the United States. And so in his report to the Adjutant General on September 6, 1863 he said:

"The purpose \* \* \* is to send all captured Navajos and Apaches to that point [Bosque Redondo], and there to feed and take care of them until they have opened farms and become able to support themselves, as the Pueblo Indians of New Mexico are doing. \* \* \*

"At the Bosque Redondo there is arable land enough for all the Indians of this family \* \* \* and I would respectfully recommend \* \* \* that the only peace that can ever be made with them must rest on the basis that they move to these lands, and like the Pueblos become an agricultural people, and cease to be nomads. \* \* \* They have no government to make treaties. \* \* \* One set of families may make promises, but the other set will not heed them. They understand the direct application of force as a law. If its application be removed, that moment they become lawless. \* \* \* The purpose now is never to relax the application of force with a people that can no more be trusted than you can trust the wolves that run through their mountains. To gather them together little by little on to a Reservation away from the haunts and hills and hiding places of their country, and then be kind to them; there teach their children how to read and write: teach them the arts of peace: teach them the truths

vised and convinced his superior that it would be cheaper to feed the Navajos than to fight them. The result was that an area 40 miles square was set aside as a reservation for them and the Mescalero Apaches at the Bosque Redondo with Fort Sumner in the center of the reserve.<sup>137</sup>

Upon orders from General Carleton, Col. "Kit" Carson proceeded against the Mescaleros, subdued them, and then moved against the Navajos.

When the Navajos got word that Carleton was determined to subdue them, a group of eighteen headmen visited him in Santa Fe and protested that all Navajos should not be punished but only those that were guilty of murdering settlers and stealing livestock. Carleton told them that he had no faith in their promises and that there could be no peace until they could reliably assure him that the peace would be kept.<sup>138</sup>

The Navajos met the situation exactly as they had in the mid-1700's when Spaniards and Utes made their strength felt against them in the Gobernador

of Christianity. Soon they will acquire new habits, new ideas, new modes of life; the old Indians will die off and carry with them all latent longing for murdering and robbing: the young ones will take their places without these longings: and thus, little by little, they will become a happy and a contented people, \* \* \*"

<sup>137</sup> Def. Ex. G-205, pp. 22-23.

The Navajos were fearful of the Carleton plan and refused to come in. They continued to scatter and seek to avoid the military forces that were in the field against them.

<sup>138</sup> Def. Ex. G-205, p. 18 in Docket 229.

area.<sup>137</sup> Some of them fled while others continued to raid.<sup>138</sup>

Small scouting parties moved throughout the Navajo country, hunting and capturing Navajos, killing their stock and destroying their planted fields.<sup>139</sup>

The Navajos continued to flee, often moving into areas not previously occupied by Navajo Indians.<sup>140</sup> So, some moved to the northern end of Black Mesa in the very heart of the Navajo-Hopi overlap and from there farther north into the country near Navajo Mountain.<sup>141</sup> Some moved into the rough country north of the San Juan, outside the Navajo-Hopi overlap. Here they hoped to avoid any encounter with the troops and here they stayed until the troops had left the area, after which they returned to Black Mesa.

West of the Hopis, the Navajos moved into the regions of the San Francisco Mountains;<sup>142</sup> southward

<sup>137</sup> The Gobernador area lies in the northeastern part of the Navajo land claim and is the area wherein they first settled when they arrived in New Mexico from country farther north. (See Nav. Ex. 510.)

<sup>138</sup> Def. Ex. G-205, pp. 19-20 in Docket 229.

<sup>139</sup> See Def. Exs. G-93, G-94 and G-95 in Docket 229.

<sup>140</sup> Ellis, Def. Ex. E-51(c), p. 493 in Docket 229.

As Schroeder pointed out, the army campaign of 1858-1859 drove many Navajos from their usual places of abode into the country far south of Zuni into lands occupied by Apaches. (Def. Ex. S-511(k) in Docket 229 and Nav. Tr. 8547.)

<sup>141</sup> Def. Ex. E-51(c), p. 493.

<sup>142</sup> In his report to the Assistant Adjutant General on December 24, 1860, Major E. R. S. Canby stated that "the great body of the wealthy Navajos with their flocks and herds are now in the vicinity of the San Francisco Mountains." (Nav. Ex. 256.) And in a later report dated January 6, 1861, Canby advised

fuge in the Escudilla Mountains and in y south of Zuni.<sup>144</sup> Their trials were their travels lengthy. The only direc- they did not flee was eastward, for in was the site of their enemies.<sup>145</sup> Thus, avajos were fleeing from one area to confinual state of fear with "Kit" pursuit destroying everything in his avajos were a displaced and miserable time passed, more and more of them living up was preferable to a life of and misery.<sup>146</sup>

and been so harassed by the military pursuing lived in constant dread of surprise and attack; t constantly moving and rarely spend more nights in the same place \* \* \*." (Nav. Ex.

. 8548; Def. Exs. S-511, S-511(k), S-505, R-171, R-231, R-150, pp. 81-98, and G-58; , 297, 298, 320, 367, and 386 through 394.

1863, a report was sent to the Assistant Adju- ing him that at a rancheria in the Datil 00 miles south of Fort Wingate, a party of ndians had attacked a group of Navajos and ordo, and 16 others, and captured 44 squaws l as 1,000 sheep. This scattered the Navajos ntains after which they were reported mov- usca Range.

(c), pp. 494-495; Def. Exs. R-150, pp. 81-84,

8550-8551.

avejos, however, never did surrender. In e, a Navajo chief, reported that six Navajo e group was south and west of the Little group was east of that river, another was th at Pueblo Colorado Wash, a fifth at and a sixth at Mesa de la Calabasa. . 8553; Def. Ex. S-511 in Docket 229 and

The Navajos gradually learned that although Car- son was waging a vigorous campaign against them and destroying everything they possessed he was not out to destroy them. He only wanted them to surrender at Fort Canby or Fort Defiance so that they could be sent to the Bosque Redondo.<sup>147</sup> Therefore, not long after Carson's campaign into Canyon de Chelly 500 Navajos voluntarily appeared at Fort Canby, bring- ing their flocks with them.<sup>148</sup> Soon bands of Navajos began to arrive almost daily. By February 15, 1864, 1,500 were at the Fort and by March 6, there were 2,400 who started the long walk of approximately 300 miles eastward to Fort Sumner and the Bosque Re- dondo. On March 14, 700 more began the walk, and on March 15, 2,300 more arrived at Fort Defiance.<sup>149</sup>

The Navajos were not happy at Fort Sumner. Con- finement of this kind was contrary to their way of life. Conditions went from bad to worse until finally it became apparent that some other solution had to be found for the Navajo problem.<sup>150</sup>

Finally, in the spring of 1868, an Indian Peace Commission, authorized by Congress, sent General William T. Sherman and Col. Francis Tappan as delegates and peace commissioners to Fort Sumner to

<sup>147</sup> Def. Ex. G-205, p. 24 in Docket 229.

<sup>148</sup> *Idem.*

<sup>149</sup> *Idem.* Although New Mexico celebrated the end of the Navajo War on April 9, 1864, this same day a band of Navajos, still at large, stole 40 head of cattle from the Pueblo of Laguna. It is estimated that 2,000 Navajos still roamed about the coun- try. By the end of April, however, more than 8,000 Navajos were at Fort Sumner. (Def. Ex. G-205, p. 24 in Docket 229.)

<sup>150</sup> Def. Ex. G-205, p. 24 in Docket 229.

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<sup>151</sup> Def. Ex. G-125, p

<sup>152</sup> 15 Stat. 687; 2 Ka

<sup>153</sup> Nav. proposed fdg

<sup>154</sup> Nav. Exs. 400 and

<sup>155</sup> Nav. Ex. 401, p. 3.

<sup>156</sup> Nav. Ex. 410, p. 1.

they sought refuge in the Escudilla Mountains and in Apache country south of Zuni.<sup>144</sup> Their trials were appalling and their travels lengthy. The only direction in which they did not flee was eastward, for in that direction was the site of their enemies.<sup>145</sup> Thus, by 1863 the Navajos were fleeing from one area to another in a continual state of fear with "Kit" Carson in hot pursuit destroying everything in his path.<sup>146</sup> The Navajos were a displaced and miserable people and, as time passed, more and more of them decided that giving up was preferable to a life of constant hiding and misery.<sup>147</sup>

that the Navajos had been so harassed by the military pursuing them, that "they lived in constant dread of surprise and attack; that they are kept constantly moving and rarely spend more than one or two nights in the same place \* \* \*." (Nav. Ex. 258.)

<sup>144</sup> Schroeder, Tr. 8548; Def. Exs. S-511, S-511(k), S-505, R-23, R-08, R-90, R-171, R-231, R-150, pp. 81-98, and G-56; also Nav. Exs. 227, 207, 208, 329, 367, and 386 through 394.

On October 6, 1863, a report was sent to the Assistant Adjutant General advising him that at a rancharia in the Datil Mountains about 100 miles south of Fort Wingate, a party of about 300 Pueblo Indians had attacked a group of Navajos and killed their chief, Sordo, and 16 others, and captured 44 squaws and children as well as 1,000 sheep. This scattered the Navajos from the Datil Mountains after which they were reported moving north to the Chusca Range.

<sup>145</sup> Def. Ex. E-51 (e), pp. 404-405; Def. Exs. R-150, pp. 81-84, R-167, and R-171.

<sup>146</sup> Schroeder, Tr. 8550-8551.

<sup>147</sup> All of the Navajos, however, never did surrender. In 1865 Herrera Grande, a Navajo chief, reported that six Navajo groups were out; one group was south and west of the Little Colorado, a second group was east of that river, another was at Colletas, a fourth at Pueblo Colorado Wash, a fifth at Canyon de Chelly, and a sixth at Mesa de la Calabasa. (Schroeder, Nav. Tr. 8753; Def. Ex. S-511 in Docket 229 and Nav. Ex. 357.)

The Navajos gradually learned that although Carson was waging a vigorous campaign against them and destroying everything they possessed he was not out to destroy them. He only wanted them to surrender at Fort Canby or Fort Defiance so that they could be sent to the Bosque Redondo.<sup>148</sup> Therefore, not long after Carson's campaign into Canyon de Chelly 500 Navajos voluntarily appeared at Fort Canby, bringing their flocks with them.<sup>149</sup> Soon hands of Navajos began to arrive almost daily. By February 15, 1864, 1,500 were at the Fort and by March 6, there were 2,400 who started the long walk of approximately 300 miles eastward to Fort Sumner and the Bosque Redondo. On March 14, 700 more began the walk, and on March 15, 2,300 more arrived at Fort Defiance.<sup>150</sup>

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<sup>148</sup> Def. Ex. G-205, p. 24 in Docket 229.

<sup>149</sup> *Idem.*

<sup>150</sup> *Idem.* Although New Mexico celebrated the end of the Navajo War on April 9, 1864, this same day a band of Navajos, still at large, stole 40 head of cattle from the Pueblo of Laguna. It is estimated that 2,000 Navajos still roamed about the country. By the end of April, however, more than 8,000 Navajos were at Fort Sumner. (Def. Ex. G-205, p. 24 in Docket 229.)

<sup>151</sup> Def. Ex. G-205, p. 24 in Docket 229.

try to work out a solution with the Navajo leaders.<sup>152</sup> The result was the Navajo Treaty of June 1, 1868<sup>153</sup> providing for the creation of the Navajo reservation.

Although the Navajos now say<sup>154</sup> that the Indians felt that they had not been dealt with in a fair manner in the negotiation of the Treaty of 1868, exactly the opposite is indicated by the minutes of that treaty council.<sup>155</sup> Thus, in discussing the proposed treaty, General Sherman, one of the treaty commissioners, and Barboncito, head chief and principal spokesman for the Navajos, had this to say:<sup>156</sup>

May 29, 1868.

Barboncito said: You spoke to me yesterday about putting us on a reservation with a boundary line. I do not think it right to confine us to a certain part; we want to have the privilege of going outside the line to hunt and trade.

General Sherman said: You can go outside the line to hunt. You can go to Mexican towns to trade but your farms and homes must be inside the boundary line, beyond which you have no claim to the land.

Barboncito said: That is the way I like to be and return the Commissioners my best thanks. \* \* \*

The council adjourned to the next day, May 30, 1868, when the treaty was read by General Sherman, interpreted to the Indians and approved by them.<sup>157</sup>

<sup>152</sup> Def. Ex. G-125, p. 33 in Docket 229.

<sup>153</sup> 15 Stat. 687; 2 Kapp. 1015.

<sup>154</sup> Nav. proposed fdg. 5, p. 142.

<sup>155</sup> Nav. Exs. 409 and 410 in Docket 229.

<sup>156</sup> Nav. Ex. 401, p. 3.

<sup>157</sup> Nav. Ex. 410, p. 1.

The following discourse then took place.

General Sherman said: We have marked off a reservation for you, including the Canon de Chelly, and part of the valley of the San Juan, it is about (100) one hundred miles square. It runs as far south as Canon Bonito [Fort Defiance], and includes the Chusea Mountain, but not the Mesa Calabasa you spoke of; that is the reservation we suggest to you, it also includes the Ceresca [Carriso] Mountain, and the bend of the San Juan river, not the upper waters.

Barboncito said: We are very well pleased with what you have said, and well satisfied with that reservation; it is the very heart of our country and is more than we ever expected to get.

#### FINDING 35

The Navajos failed to respect the boundaries fixed for their reservation by the 1868 Treaty, especially the western boundary. They grazed their stock wherever forage could be found but did not cross the San Juan because of Utes in that area. They reoccupied the good grazing lands of Mesa Calabasa in the Navajo-Hopi overlap, some seventy miles west of the reservation boundary, and even moved into the country west of the Hopi villages.<sup>158</sup>

<sup>158</sup> Def. Ex. G-125, p. 44.

Apparently there was some misunderstanding about the western boundary of the 1868 reservation and because of this when Sherman visited the Navajo reservation in 1878 he recommended a change in that boundary to make certain that it included all of the Canyon de Chelly. This recommendation was adopted and the western boundary was extended by Executive Order of October 29, 1878 (1 Kapp. 875) to the 110th meridian between 36° and 37° north latitude. This encouraged the Indians to do

## FINDING 36

The early Spanish map of 1769<sup>199</sup> outlines very generally areas then considered to be the lands of the various Indians in the Southwest or what was then known as New Spain. Later maps, of course, show many topographical inaccuracies of such early maps.<sup>200</sup> The home of the Navajo Indians is outlined as "Provincia de Nabajo" and extends from north of the San Juan (Rio de Nabajo) almost as far south as Zuni. South of the San Juan the various Hopi villages are depicted but no boundary is indicated separating them from the Navajos. The eastern Navajo boundary is a line extending approximately north and south through the vicinity of Mt. Taylor and the Cebolleta Mountains although these names are not found on the map. And so the Navajo eastern boundary is outlined as the western boundary of the Province of New Mexico; in other words, it was the frontier separating the Spanish settlers and Pueblo Indians from the wild and unchristianized Navajos.<sup>201</sup>

mand more and resulted in an extension of the eastern boundary by Executive Order of January 6, 1880 (1 Kapp. 876), when that line was extended 15 miles up the San Juan River, southward to a point six miles below the southeast corner of the original reservation line, westward to the 110th meridian, and then north to the southwest corner of the reservation as enlarged in 1878. (See Def. Ex. G-125, pp. 46-48 and Map, Def. Ex. G-231.)

<sup>199</sup> Nav. Ex. 875.

<sup>200</sup> E.g., the 1769 map in question shows the Gila River emptying into the Colorado at about 35° north latitude whereas current maps show their juncture to be at Yuma, Arizona, south of 33° north latitude.

<sup>201</sup> This eastern boundary for the Navajos is considerably west of the Rio Puerco and, of course, decidedly west of the eastern boundary claimed by them in the present litigation.

On March 7, 1851, Lt. John G. Parke of the army topographical engineers submitted a map of the Navajo country together with detailed notes on that country and the use made thereof by the Navajo Indians.<sup>202</sup> Parke's information was furnished by one Rafael Carrovajal, an old guide who had been found reliable in earlier operations with the army and who had extensive knowledge of the country.<sup>203</sup> But Parke did not rely upon Carrovajal's information and knowledge alone. Instead he "called in several persons who are well acquainted with the Navajo Country and they all agree with Carrovajal in the general direction of streams and routes, the localities of Springs, and also the most cultivated portion of that country."<sup>204</sup>

Examination of Parke's map shows that the so-called "Navajo Country" extended from the San Juan River and the lower reaches of its northern tributaries, namely—the Mancos, La Plata, Florida, Las Animas, and Los Pinos rivers in the north, to the Zuni Mountains and Mt. Taylor in the south; and from Mesa de la Vaca or Black Mesa in the west to Canyon Largo and the Rio Puerco in the east.<sup>205</sup>

<sup>202</sup> Def. Ex. G-152.

<sup>203</sup> Carrovajal had also been with Lt. Col. John M. Washington on the 1849 expedition against the Navajos. That expedition penetrated the very heart of the Navajo country, including Canyon de Chelly. (See Lt. Simpson's report, Def. Ex. G-4.)

<sup>204</sup> Def. Ex. G-152.

<sup>205</sup> It is remarkable how much this territory of the Navajo country corresponds with the areas outlined for that tribe by defendant's three expert witnesses. (See Def. Exs. R-180, S-807, and E-100. Parke's map (Def. Ex. G-152) is really an

A second base map of New Mexico prepared by Lt. Parke was utilized by Governor Meriwether in 1855 to outline the reservation set aside for the Navajos under the treaty negotiated with them that year.<sup>164</sup> Although some of the topographical locations of mountains and streams upon Parke's map do not correspond with present-day cartography,<sup>167</sup> the map does show the general locations of the territory claimed by the Navajos as well as areas claimed by other Indian tribes.<sup>168</sup>

An examination of the Meriwether map shows that all lands north of the San Juan River were claimed by the Utes;<sup>169</sup> that lands northeast of Cañada del Ojo Amarillo (Canyon Largo on Navajo Exhibit 510)

is an excellent map for the Commission's consideration in ascertaining what was Navajo aboriginal territory in 1848. The Commission should also compare this country with the area outlined by Lt. A. W. Whipple as Navajo country in 1851. (Def. Ex. G-108.)

<sup>164</sup> Cf. Def. Ex. G-227 with Nav. Ex. 505 and Nav. Ex. 507. Although no boundaries are shown upon the Parke map as prepared in 1851 (Def. Ex. G-227), this map clearly reveals the Navajos to be located northeast of the Hopi and northwest of Mt. Taylor.

<sup>167</sup> For example, Parke shows the Little Colorado River flowing west almost along the 35th parallel while modern maps show this stream flowing much more in a northwesterly direction and emptying into the Colorado some distance north of the 36th parallel.

<sup>168</sup> Cf. other early maps showing general locations of Indian Tribes in the Southwest—viz., Def. Ex. G-6, G-7, G-8, G-9, G-108, G-230(a), (b), and (c); also Hopi Exs. 1, 59, 60, 61, and 62. None of these maps shows specific boundaries but all show the Navajos to be east of the Hopi, south of the San Juan and northwest of Mt. Taylor.

<sup>169</sup> Nav. Ex. 507.

lay outside the Navajo territory;<sup>170</sup> that the eastern boundary extended in a general northeasterly direction from Mt. Taylor to Canyon Largo and from Mt. Taylor directly south to about 34° 30' north latitude; that the southern boundary extended approximately along an east-west line at 34° 30';<sup>171</sup> while the western boundary followed the Colorado River north to the San Juan;<sup>172</sup> the northern boundary, of course, was the San Juan.

#### FINDING 37

Considerable archaeological evidence has been presented by the Navajo Tribe in support of its aboriginal land claim, including its claim to the Navajo-Hopi overlap. This evidence is found recorded upon site sheet reports in twenty-three volumes identified as Navajo Exhibit 520 A-W. The Commission has

<sup>170</sup> This boundary of Canyon Largo also corresponds with the boundary fixed by defendant's experts. (See Def. Exs. R-190, S-807, and E-100.) The Jicarilla Apache Reservation is shown in the extreme northeastern section on Nav. Ex. 507 and the Capote Ute Reservation immediately to the north and northwest. Meriwether's map shows quite clearly that the Navajos were not then claiming lands east of Mt. Taylor—i.e., between Mt. Taylor and the Puerco River.

<sup>171</sup> This southern boundary is considerably north of the southern boundary on the Navajo Land Claim Map (Nav. Ex. 510). The southeastern corner is at a point on or near Alamocito Creek, west of station 19 on Nav. Ex. 510.

<sup>172</sup> Although Meriwether shows an area for the Hopi in the approximate location later set aside for those Indians under Executive Order dated December 16, 1882 (1 Kapp. 805), and another area is blocked off as Zuni territory, none of the Spanish and Mexican land grants is shown. These grants had not been confirmed by the United States at that early date. The earliest confirmation by Congress of any granted lands was under the Act of December 22, 1858 (11 Stat. 374).

given much thought and study to such evidence in an effort to determine just how that evidence can be of help in determining areas of exclusive use and occupancy by the Indians with whom we are presently concerned.

#### FINDING 38

Included in the archaeological evidence submitted by the Navajo Tribe is considerable tree ring data reported by the Tree Ring Laboratory or Laboratory of Dendrochronology at the University of Arizona. The Navajo Tribe submitted approximately 3,600 tree ring specimens to the laboratory for analysis and dating. These were processed by the laboratory and reports were made upon about 2,400 specimens, although less than half of the specimens examined could be dated by the laboratory.<sup>173</sup>

#### FINDING 39

During the growing season trees form new cells and tissues resulting in a growth ring each year. Dendrochronology, or tree ring dating, is defined as the study of the chronological sequence of annual growth-rings in trees.<sup>174</sup>

<sup>173</sup> Correll, Nav. Tr. 1825. Correll testified that a tree ring date could be determined by the laboratory upon only 1,019 specimens at the time of the hearing before this Commission in April 1961. Additional specimens were processed and reported upon later. (Tr. 5537.)

<sup>174</sup> Bryant Bannister and Terah L. Smiley, Def. Ex. G-145, p. 177; also Smiley, in Preface to Nav. Ex. 522. Terah L. Smiley, Director of the Laboratory of Dendrochronology at the University of Arizona, testified as an expert for the Navajo Tribe on tree ring dating. He is the author of several publications on dendrochronology and a recognized authority in this field.

Since a tree ring date can be defined as the year in which the last ring present on a specimen was formed, it is important to realize that the date may or may not represent the year in which the parent tree died. Consequently, there are two fundamental types of tree ring dates—namely, cutting dates and non-cutting dates.<sup>175</sup>

Since a tree ring date represents a particular year with which that ring is equated, the only irrefutable conclusion that can be drawn about a tree ring date is that the tree could not have died or been cut before the time of that particular dated ring.<sup>176</sup> Any conclusion beyond that fact is in the realm of interpretative conjecture and uncertainty.<sup>177</sup> Thus, tree ring dates alone can never date a structure<sup>178</sup> and a dendrochronologist never dates the site or structure from which a specimen came. He only dates the wood or specimen being examined.<sup>179</sup>

Since the last ring formed by a tree is found immediately under the bark, the presence of bark on a specimen is evidence that the outermost ring represents the last seasonal growth of that tree. Thus, a bark date, designated by the symbol "B" following the date, is the dying or cutting date of that tree.<sup>180</sup>

<sup>175</sup> Bannister, Def. Ex. E-52, p. 17.

<sup>176</sup> Bannister and Smiley, Def. Ex. G-145, p. 188.

<sup>177</sup> *Idem.*

<sup>178</sup> *Idem.*

<sup>179</sup> Smiley, Nav. Tr. 2067.

<sup>180</sup> Smiley, Nav. Tr. 1963-1968; Ellis, Def. Ex. E-51(b), p. 288 in Docket 229.

Other so-called "cutting dates" are based on assumptions only and must be so interpreted.<sup>181</sup>

Although the only conclusive way in which a cutting date may be proved is to find bark or bark cells on the outside of the specimen, two other reasonably reliable methods have been devised for the determination of cutting dates since the presence of bark cells on archaeological specimens is something of a rarity.<sup>182</sup> These are the determination of "G" and "C" tree ring dates. Thus, if bark or bark cells are not present on a specimen another form of terminal growth evidence which is taken into account is the presence of beetle galleries on the wood. These insects attack living trees that are weakened for some cause; they never attack a healthy tree.<sup>183</sup> Once they attack a tree they soon kill it.<sup>184</sup> The symbol "G" is placed after the date on specimens attacked by beetles and is almost as accurate as a "B" date since beetles never penetrate the tree more than a very few rings.<sup>185</sup>

A third symbol used to designate a probable cutting date is the symbol "C." The "C" stands for constancy, in that the outermost ring present can be traced completely around the circumference of the log.<sup>186</sup> Such a date is considered quite reliable for determining the terminal growth of the tree from which the specimen was derived.<sup>187</sup>

<sup>181</sup> Smiley, Nav. Ex. 522, p. 22; Bannister, Def. Ex. E-52, p. 18 in Docket 229.

<sup>182</sup> Bannister, Def. Ex. E-52, p. 18.

<sup>183</sup> Smiley, Nav. Tr. 1960-1971 and 2049.

<sup>184</sup> Smiley, Nav. Tr. 1969.

<sup>185</sup> Smiley, Nav. Tr. 1970-1973 and 2027.

<sup>186</sup> Smiley, Nav. Ex. 522, p. 24.

<sup>187</sup> Ellis, Nav. Tr. 8836-8837; Smiley, Tr. 1973 and 2028.

Dates which have no "B," "G," or "C" symbol attached are simply "bare" or "plus" dates. Thus, a "bare" date is reported where the last exterior ring is not consistent or complete and there may be some rings missing.<sup>188</sup> A "plus" date is reported where the outer rings are crowded and some are probably missing from the exterior.<sup>189</sup> There is no method of study known at this time which allows one to determine how many rings are missing from the outside of specimens reported with a "bare" or "plus" date. Thus, Smiley testified that a "plus" date may be 30 years or more off from the date when the tree actually died, and a "bare" date may be off even more.<sup>190</sup> Dates of this kind only become important through numbers.<sup>191</sup>

Two other types of tree ring dates are found in the Navajo archeological site sheets. These are dates submitted by the Laboratory of Dendrochronology with the suffix small "e" or "inc" added. The small "e" indicates that the tree completed its growth for that year but it may or may not indicate the year when the tree was cut or died.<sup>192</sup> The suffix "inc" simply indicates incomplete growth for that year. It cannot be relied upon as representing a "cutting date" for the tree.<sup>193</sup>

<sup>188</sup> Bannister and Smiley, Def. Ex. G-145, p. 191 in Docket 229.

<sup>189</sup> Ellis, citing Bannister, Def. Ex. E-51(b), footnote at p. 294.

<sup>190</sup> Smiley, Nav. Tr. 2031, 2040, 2056-2057 and 2063.

<sup>191</sup> Smiley, Nav. Ex. 522, p. 25.

<sup>192</sup> Smiley, Nav. Tr. 2029-2030.

<sup>193</sup> *Idem*.

If there is a clustering of dates (e.g., 5 or more from as many specimens) *within a year or two*, it is reasonably sure that the date on such specimens represents the approximately date of the terminal growth. This is true because it is very unlikely that all of such specimens would erode so homogeneously that exactly the same number of rings would be missing from all specimens.<sup>194</sup> With only one date, however, even if that date is a "B", "G", or "C" date, there is little that can be deduced from such tree ring evidence as to when the structure from which that specimen came was built. Unless you have a cluster of dates relatively close in years it cannot be determined with any degree of certainty when any structure was built.<sup>195</sup>

A cluster of dates about a single point in time—even though such dates be "plus" or "bare" dates—will probably permit a reasonably accurate determination of the site construction date. This is based upon the assumption that the original trees from which the specimens came were cut and used within a short period of time. Consequently, the very fact that clustering is evident suggests that very few outside rings have been lost and the date represented by the cluster is undoubtedly the cutting date.

Tree ring dates alone can never date a structure; they can, at best, date events with which they can be directly associated, can be helpful in delimiting periods, and can indicate time horizons from associ-

<sup>194</sup> Smiley, Nav. Ex. 522, p. 25 and Bannister, Def. Ex. E-52, pp. 23-24.

<sup>195</sup> Ellis, Nav. Tr. 8911.

ated materials.<sup>196</sup> Just as one potsherd is of no value in describing a site, so one tree ring date can be equally misleading in deciding the chronological placement of a ruin.<sup>197</sup> Thus, says Smiley, "It should be self-evident that using three ring dates indiscriminately for interpretative purposes, without first determining the relationship of the specimen to its context, can lead to completely invalid conclusions."<sup>198</sup>

That use of tree ring dates alone can be very misleading is pointed out by Smiley in connection with some of the Hopi pueblos. For example, tree ring dates of 1345 to 1779 are reported for the Pueblo of Oraibi in an article published by Smiley in 1950, but the true period of occupation is known to be from 1150 A.D. to 1950, the date of Smiley's article.<sup>199</sup> As to the Pueblo of Shungopovi, tree ring dates reported are 1365 to 1770 whereas the true period of occupation is 1750 to 1950.<sup>200</sup> Pueblo of Shipaulovi shows tree ring dates of 1537+ to 1588 while the true period of occupancy is known to be 1700 to 1950. Walpi Pueblo shows tree ring dates of 1368 to 1691 but the period of occupancy is known to be 1700 to 1950.<sup>201</sup> And so we can understand why Dr. Ellis testified:<sup>202</sup> "We do not use tree ring dates alone except to say that a specific tree ring date belongs to a specific tree. It does not necessarily date the architecture. For

<sup>196</sup> Bannister and Smiley, Def. Ex. G-145, p. 188.

<sup>197</sup> *Idem.*, p. 190.

<sup>198</sup> *Idem.*, p. 191.

<sup>199</sup> Def. Ex. G-144, p. 10; Smiley, Nav. Tr. 2125.

<sup>200</sup> Smiley, Nav. Tr. 2126.

<sup>201</sup> *Idem.*

<sup>202</sup> Ellis, Nav. Tr. 8913.

that you have to interpret all the rest of the information you may have in connection with the situation, to the best of your ability."

The major problem in connection with the tree ring dates in this case is not whether the dates reported by the dendrochronologist or tree ring laboratory are accurate or inaccurate but rather the application or use made of those reported dates by the Navajo archaeologists.<sup>202</sup>

As Mr. Schroeder pointed out in his testimony,<sup>203</sup> J. Lee Correll (the Navajo archaeologist) assigned tree ring dates to his archaeological sites on the basis of reports by the tree ring laboratory and used those dates as construction dates for the site regardless of the kind of date reported and even if only one tree ring date was determined for the specimen submitted to the laboratory. As hereinbefore pointed out, only a bark date represents a true cutting date for any wood although "G" and "C" dates are also considered reliable to represent the approximate cutting date of the timber or tree from which the dated specimen came.

#### FINDING 40

When archaeological interpretations are made on the basis of tree ring dates it is always necessary to proceed with caution.<sup>204</sup> This is true because the tree ring date can only be applied with absolute authority to the specimen itself and that date may or may not

<sup>202</sup> Ellis, Nav. Tr. 8868; Ellis report, Def. Ex. E-51(b), p. 280, and Bannister, Def. Ex. E-52, p. 9.

<sup>203</sup> Nav. Tr. 7902.

<sup>204</sup> "The Interpretation of Tree-Ring Dates," by Bryant Bannister, Def. Ex. E-52, p. 9.

date the structure from which it was taken. The word "caution," however, is a word that Mr. Correll did not appreciate the meaning of when he dated innumerable archaeological sites reported in Navajo Exhibit 520 A-W on the basis of a single tree ring date. Thus, there is nothing wrong with the tree ring dates reported in this case; the fault lies in the way those dates were utilized and interpreted by Correll.

The most common type of error encountered in the interpretation of tree ring dates from a structure is caused by the presence of reused beams. Considering the labor involved in felling a tree with a stone ax or other crude aboriginal tools, it is hardly surprising that the early Navajos salvaged logs from abandoned hogans whenever feasible. Obviously, such reuse of timbers in later structures can result in erroneous dating of such structures. The tree ring itself may be correct, but its application to the structure from which the specimen came would produce an earlier date than the actual time of construction. And that is exactly what happened on many of the sites dated by Correll.

#### FINDING 41

Generally speaking, there are two main ways of solving time relationship problems—namely, the clustering of tree ring dates and the clustering of archaeological traits. Thus, if there are a number of tree ring dates from a single structure which cluster about a single point of time, then dates that deviate from the cluster represent reused or repair timbers, depending upon whether they are earlier or later than the

majority or cluster group. But if only a few dates are available and these extend over a considerable expanse of time, accurate dating of that structure becomes most uncertain.

The Navajos contend that "Tree-ring dates from Navajo hogans or sites rarely cluster within a few years of one another; this is evidence in itself of \* \* \* Navajo cultural practices."<sup>206</sup> The Commission does not agree but is of the opinion that there is no reason why tree ring dates from a Navajo site should not cluster if enough specimens from the same structure or structures from that site are examined. Even though some timbers from an old hogan might be reused in building a new hogan, most of the poles used in such new construction should bear tree ring dates of approximately the same year. Consequently, if specimens from such newly cut timber were examined by the Tree-Ring Laboratory a cluster of dates would be reported and would indicate the date of such construction. If, on the other hand, Navajo cultural practices were such that clusters of tree ring dates do not occur, then tree ring dates have no place in determining the date of Navajo sites.

#### FINDING 42

As pointed out in finding 39 above, using tree ring dates indiscriminately for interpretative purposes, without first determining the relationship of the specimen to its context, can lead to completely invalid conclusions. Thus, a tree ring date by itself is

<sup>206</sup> Nav. Fdg. 10, p. 392.

of little or no intrinsic value until it has been integrated with the natural and cultural environment from which it came. Counsel for the Navajos admit this<sup>207</sup> but their archaeologists did not follow this practice in dating many of the sites reported in the twenty-three volumes of Navajo Exhibit 520 A-W. Some examples of their failure to follow this practice include the following:

#### In Navajo Exhibit 520-W

W-LLC-UO-A	A single tree ring date of 1879+	Dates the site as 1873.
W-LLC-UO-B	A single tree ring date of 1819+	Dates the site as 1819.
W-LLC-UO-E	A single tree ring date of 1744+	Dates the site as 1744.
W-LLC-UO-F	A single tree ring date of 1779+	Dates the site as 1779.
W-LLC-UO-H	A single tree ring date of 1809	Dates the site as 1809.
W-LLC-UO-P	A single tree ring date of 1792+	Dates the site as 1792.
W-LLC-UO-T	A single tree ring date of 1816	Dates the site as 1816.
W-LLC-UO-BB	A single tree ring date of 1815+G	Dates the site as 1815.
W-LLC-UO-KK	A single tree ring date of 1850 UB	Dates the site as 1850.
W-LLC-WE-H	A single tree ring date of 1865+	Dates the site as 1867.
W-LLC-WE-M	A single tree ring date of 1921+G	Dates the site as 1921.
W-LLC-WE-O	A single tree ring date of 1890+	Dates the site as 1890.

#### In Navajo Exhibit 520-V

W-LLC-UD-D	A single tree ring date of 1834+G	Dates the site as 1834.
W-LLC-UD-I	A single tree ring date of 1836+G	Dates the site as 1836.
W-LLC-UD-W	A single tree ring date of 1842+	Dates the site as 1842.

#### In Navajo Exhibit 520-U

W-LLC-MO-L	A single tree ring date of 1838G	Dates the site as 1838.
W-LLC-NJ-B	A single tree ring date of 1793	Dates the site as 1793.
W-LLC-NJ-K	A single tree ring date of 1797+	Dates the site as 1797.
W-LLC-NJ-L	A single tree ring date of 1809+G	Dates the site as 1809.
W-LLC-NJ-AA	A single tree ring date of 1858	Dates the site as 1858.
W-LLC-NJ-BB	A single tree ring date of 1816	Dates the site as 1816.
W-LLC-NJ-DD	A single tree ring date of 1898 G	Dates the site as 1898.
W-LLC-NJ-EE	A single tree ring date of 1809+	Dates the site as 1809.
W-LLC-OP-P	A single tree ring date of 1804	Dates the site as 1804.
W-LLC-OP-T	A single tree ring date of 1711	Dates the site as 1711.
W-LLC-OD-U	A single tree ring date of 1890 G	Dates the site as 1890.
W-LLC-P-F	A single tree ring date of 1710	Dates the site as 1710.
W-LLC-P-I	A single tree ring date of 1734+	Dates the site as 1734.
W-LLC-P-R	A single tree ring date of 1917+G	Dates the site as 1917.
W-LLC-SM-A	A single tree ring date of 1760+	Dates the site as 1760.
W-LLC-SM-B	A single tree ring date of 1736+	Dates the site as 1736.
W-LLC-SM-P	A single tree ring date of 1821+	Dates the site as 1821.
W-LLC-SM-Q	A single tree ring date of 1794+	Dates the site as 1794.
W-LLC-SM-U	A single tree ring date of 1826+	Dates the site as 1826.
W-LLC-SM-W	A single tree ring date of 1800+	Dates the site as 1800.
W-LLC-TS-B	A single tree ring date of 1817	Dates the site as 1817.
W-LLC-TS-E	A single tree ring date of 1866	Dates the site as 1866.
W-LLC-TS-I	A single tree ring date of 1893 G	Dates the site as 1893.

<sup>207</sup> Nav. Fdg. 10, p. 389.

*In Navajo Exhibit 520-T*

W-LLC-MB-BB	A single tree ring date of 1887 G.D.	Dates the site as 1887.
W-LLC-MB-JJ	A single tree ring date of 1898.	Dates the site as 1898.
W-LLC-MB-KK	A single tree ring date of 1898.	Dates the site as 1898.
W-LLC-MB-PP	A single tree ring date of 1875 G.	Dates the site as 1875.
W-LLC-MJ-WWW	A single tree ring date of 1880 G.	Dates the site as 1880.
W-LLC-MJ-AI	A single tree ring date of 1891+	Dates the site as 1891.
W-LLC-MJ-AB	A single tree ring date of 1884+B.	Dates the site as 1884.

*In Navajo Exhibit 520-S*

W-LLC-M-D7	A single tree ring date of 1860 G.	Dates the site as 1860.
W-LLC-M-DH	A single tree ring date of 1900+G.	Dates the site as 1900.

*In Navajo Exhibit 520-R*

W-LLC-J-K	A single tree ring date of 1778+G.	Dates the site as 1778.
W-LLC-J-I	A single tree ring date of 1819+G.	Dates the site as 1819.
W-LLC-J-E	A single tree ring date of 1808+G.	Dates the site as 1808.
W-LLC-LM-G	A single tree ring date of 1773+G.	Dates the site as 1773.
W-LLC-BC-I	A single tree ring date of 1803+G.	Dates the site as 1803.
W-LLC-BC-S	A single tree ring date of 1824+G.	Dates the site as 1824.
W-LLC-DO-D	A single tree ring date of 1874+G.	Dates the site as 1874.
W-LLC-DO-E	A single tree ring date of 1854+G.	Dates the site as 1854.
W-LLC-DO-H	A single tree ring date of 1844+G.	Dates the site as 1844.
W-LLC-DO-I	A single tree ring date of 1869.	Dates the site as 1869.
W-LLC-DO-Q	A single tree ring date of 1858.	Dates the site as 1858.
W-LLC-DZ-K	A single tree ring date of 1805+G.	Dates the site as 1805.
W-LLC-DZ-K	A single tree ring date of 1809.	Dates the site as 1809.
W-LLC-DZ-N	A single tree ring date of 1701+G.	Dates the site as 1701.

*In Navajo Exhibit 520-Q*

W-NM-OC-B	A single tree ring date of 1857+G.	Dates the site as 1857.
W-GH-LC-A	A single tree ring date of 1821 G.	Dates the site as 1821.
W-NM-NC-F	A single tree ring date of 1878+G.	Dates the site as 1878.

*In Navajo Exhibit 520-P*

W-LLC-B-E	A single tree ring date of 1909.	Dates the site as 1909.
W-LLC-B-M	A single tree ring date of 1828 G.	Dates the site as 1828.
W-LLC-C-G	A single tree ring date of 1788+G.	Dates the site as 1788.
W-LLC-C-H	A single tree ring date of 1737+G.	Dates the site as 1737.
W-LLC-C-T	A single tree ring date of 1823+G.	Dates the site as 1823.
W-LLC-SF-M	A single tree ring date of 1893+G.	Dates the site as 1893.
W-LLC-SF-O	A single tree ring date of 1851+G.	Dates the site as 1851.

The foregoing examples of dating a claimed Navajo archaeological site by a single tree ring date have been compiled from only the western sector of the large area represented by the Navajo claim in Docket 229 and include many sites in the Navajo-Hopi overlap. Undoubtedly the northern, eastern and southern sectors of the Navajo claimed territory contain just as many sites dated in the same manner.

To date a site by a single tree ring date is wholly unreliable.<sup>208</sup>

## FINDING 43

Next to tree ring dates, upon which Correll relied most heavily (and too often improperly), typology<sup>209</sup> was relied upon more than any other criterion for dating the sites reported in Navajo Exhibit 520 A-W. In such typology Correll adopted certain criteria to indicate a pre-Fort Sumner construction and other criteria for a post-Fort Sumner construction.<sup>210</sup>

Included as indicative of pre-Fort Sumner construction were the following: (a) contiguous hogan and corral,<sup>211</sup> (b) slanting tree or projecting tree branch as the western fork in a forked pole hogan,<sup>212</sup> (c) hogan with floor diameter of less than 10 feet,<sup>213</sup>

<sup>208</sup> Schroeder, Nav. Tr. 8368; Ellis, Tr. 8911. Bannister repeatedly points out that with only one date reported for specimens from one structure "there is little that can be deduced from the tree-ring evidence." (Def. Ex. E-52, pp. 149 and 151.)

<sup>209</sup> Correll, Nav. Tr. 1883.

When asked by his counsel (McPherson) what he meant by "typology," Correll stated (Nav. Tr. 1860-1861):

"That is the technique that is widely used by archaeologists. After correlating certain structural features and characteristics of the 1,384 Navajo sites which we had recorded, \* \* \* after correlating these structural features and characteristics with the tree ring dates, an analysis of this correlation revealed that certain typological features were characteristic of sites dating pre-Fort Sumner, and others of sites dating post-Fort Sumner."

<sup>210</sup> Pre-Fort Sumner represented construction before 1868 and post-Fort Sumner after 1868.

<sup>211</sup> This is construction represented by one or more hogans and a corral having one wall in common. (Correll, Nav. Tr. 1861.)

<sup>212</sup> Nav. Tr. 1863.

<sup>213</sup> Nav. Tr. 1865.

(d) ash dump within 15 feet of hogan,<sup>214</sup> (e) felling timbers by burning standing trees,<sup>215</sup> (f) defensive structures,<sup>216</sup> and (g) four-sided cribbed log hogan with flat roof.<sup>217</sup>

Typological characteristics adopted as indicating a post-Fort Sumner construction included: (a) presence of tin cans or other late trade material at the site,<sup>218</sup> (b) presence of wood chopping areas,<sup>219</sup> (c) ash dump more than 20 feet from the hogan,<sup>220</sup> (d) extensive use of the metal ax in felling trees,<sup>221</sup> and (e) the shaping of stones used in masonry.<sup>222</sup>

<sup>214</sup> *Idem.*

<sup>215</sup> Correll said: "Another factor used in dating was burning of timbers as a method of felling. Although the Navajos did have some metal axes prior to Fort Sumner, which they acquired either through raiding or trading, burning timbers and felling them with stone axes were the principal techniques used. Stone axes \* \* \* were continued in use for a period after Fort Sumner, but we don't find that burning as a felling technique was." (Tr. 1866).

<sup>216</sup> Under the term "defensive structures" Correll included watch pits, defensive walls or loopholes, as well as concealment on steep slopes or mesa benches. (Tr. 1867.)

<sup>217</sup> In this connection Correll testified as follows: "There is one type hogan which we located a few examples of, which occurred only before Fort Sumner. That is the four-sided crib log hogan plus the entry and the flat roof. This type of hogan was usually very small and was no doubt the result of the lack of tools and axes during that period." (Tr. 1869).

<sup>218</sup> Nav. Tr. 1875.

<sup>219</sup> *Idem.*

<sup>220</sup> In this connection Correll said: "Another post-Fort Sumner characteristic was the distance of the ash dump from the hogan. With the acquiring of shovels they had a tendency to carry the ashes a great deal farther from the hogan." (Tr. 1875.)

<sup>221</sup> Nav. Tr. 1875.

<sup>222</sup> Nav. Tr. 1876.

Typology is considered to be one of the weakest methods for establishing a dependable chronology in archaeology. Where only a surface survey is conducted (as in this case) so that there is no stratigraphy, typology is of little use in setting up a chronology. Typology is only of use when tied into historical material associated with the site study.<sup>223</sup>

Even Correll did not consistently follow his own typology.<sup>224</sup> If tree ring dates at any site disagreed with the time period designated by his typology he invariably dated the site on the basis of the tree ring date, even though only one date might be reported.<sup>225</sup>

<sup>223</sup> Schroeder, Nav. Tr. 7998-7999.

<sup>224</sup> Schroeder, Tr. 8005-8007.

Although Correll had set up as a typological characteristic of pre-Fort Sumner construction "ash dumps less than 15 feet from a hogan," many site reports show that in actual practice he himself did not agree with such dating. This is clearly illustrated by the following site reports:

N-LSJ-CH-B reported in Nav. Ex. 520-A and Def. Ex. S-806, sheet 1.

N-LSJ-CC-G(1) reported in Nav. Ex. 520-A and Def. Ex. S-806, sheet 3.

N-LSJ-MC-X(3) reported in Nav. Ex. 520-B and Def. Ex. S-806, sheet 5.

N-LSJ-MC-DB(3) reported in Nav. Ex. 520-B and Def. Ex. S-806, sheet 5.

N-LSJ-MC-KKK(1) reported in Nav. Ex. 520-B and Def. Ex. S-806, sheet 6.

N-LSJ-MC-XXX (1 and 3) reported in Nav. Ex. 520-B and Def. Ex. S-806, sheet 7.

N-LSJ-MEC-I (4 and 5) reported in Nav. Ex. 520-C and Def. Ex. S-806, sheet 8.

N-LSJ-MEC-II reported in Nav. Ex. 520-C and Def. Ex. S-806, sheet 9.

<sup>225</sup> At sites S-AS-GB-E and S-AS-GB-G (Nav. Ex. 520-L) we find hogan diameters and tree ring dates in reverse of what

As we have already found, that kind of dating cannot be relied upon.

The evidence before this Commission clearly shows that the floor diameter of a hogan does not determine whether that hogan was built before or after 1868,<sup>220</sup> the Fort Sumner date used by Correll. Furthermore, we are more concerned with Navajo use and occupancy of the lands claimed in 1848. In our opinion, however, we do not believe that the size of the Navajo hogan was any different in 1848 than it was in 1868 or later. Then, as now, the size of the family determined the size of the hogan to be built more than any other factor. If the family was large a large hogan was built; if the family was small a small hogan would serve its needs. The present record if filled with such statements by aged Navajos who appeared before this Commission and it makes sense.

Nor do we believe that the distance of an ash dump from a hogan is any reliable indication that such site Correll established as criteria for pre- and post-Fort Sumner dating.

At the former site we have a hogan with a diameter of 11 feet. Under Correll's use of typology this would indicate post-Fort Sumner construction. Tree ring dates of 1827+G and 1848+G, however, caused Correll to date the site pre-Fort Sumner.

At the second site above referred to, we encounter the reverse of what the first site shows. Here the hogan was only 8 feet in diameter, indicating pre-Fort Sumner construction. The tree ring date reported, however, is 1922 G and this caused Correll to date the site in 1922. All of which merely shows how unreliable even Correll found his typology on hogan diameters to be in determining time of construction.

<sup>220</sup> Ellis, Tr. 8047. Also see analysis of hogan diameters by Dr. Ellis as reported in Def. Ex. E-53. This analysis clearly shows the unreliability of this dating criterion.

was constructed before or after 1868.<sup>221</sup> Human nature is much the same with all people. Lazy as well as energetic Navajos lived in hogans before and after 1868 and it undoubtedly required just as much initiative to dispose of the ashes in 1860 as it did in 1870. We do not believe that this is a reliable dating criterion and many sites are reported which show that it is not.

Neither can a modified forked stick hogan, where a standing tree is utilized as one fork, be considered as reliable evidence of pre-Fort Sumner construction on the basis of the evidence here presented.<sup>222</sup>

<sup>221</sup> Ellis, Tr. 8949.

Correll testified that tree ring dates were reported for 49 sites where ash dumps were found and on 34 of these the ash dump was 15 feet or less from the hogan. The tree ring dates for these 34 sites all pre-dated 1868. Here again no differentiation was made by Correll in the use of the reported dates. A single bare date was treated the same as any other dates or cluster of dates. And what about sites with ash dumps where no tree ring dates were reported? They were not even considered in determining what percentage of such sites had dumps nearby or what number had distant dumps. Thus, in fixing this criterion for dating sites with ash dumps Correll did not consider all such sites but only selected sites with tree ring dates. And to make matters even worse, he used such dates as construction dates when there was no cluster and thus had no real basis for determining the time of construction.

<sup>222</sup> Ellis, Tr. 8965.

Out of 53 hogans in which a slanting tree was used as one fork, tree ring dates earlier than 1868 were reported in about 80% of the cases. (Tr. 5572.) Correll felt that this indicated pre-Fort Sumner construction for hogans of this kind. (Tr. 5571-5575.) Correll could not state, however, how many of such dates were "B," "G," or "C" dates nor if any cluster of dates was included. Without such a breakdown no one can determine the value of this criterion as indicating pre-1868 construction.

Furthermore, it is only in the areas west of the Hopi villages that this type of construction is reported in Navajo Exhibit 520 A-W. Many of these ruins, Schroeder and Ellis believe, were the remains of former Havasupai structures since the Havasupai commonly incorporated a standing tree with extended ridge pole as one of the main supports for the Havasupai house. (See Schroeder and Ellis comments on Defendant's Exhibit S-806, pages 64 and 67; also compare photographs identified as Havasupai Exhibit 157 in Docket 91 and Hogan #1 at site W-LLC-C-KK in Navajo Exhibit 520-P. Both unquestionably represent ruins from the same type of construction.)

As to Correll's other three characteristics indicating pre-Fort Sumner construction, the art of felling trees by burning was probably utilized by Navajos long before 1868 and, with perhaps rare exception, was discontinued long before that time. As Correll himself testified, and no one denies, the Navajos received metal axes long before their confinement at Fort Sumner. So 1868 is not a realistic date indicating the end of construction of Navajo hogans utilizing timbers felled by burning.

Defensive structures indicating pre-Fort Sumner Navajo occupancy falls into the same category as timbers felled by burning. It is in the Gobernador-Largo area, in the northeastern part of the area claimed by the Navajo Tribe, that the great majority of such structures are found. This, it is admitted, was the area of early Navajo occupancy which was abandoned by 1775. Thus the time of construction

was undoubtedly much earlier than 1868. Assigning a pre-Fort Sumner date means nothing in the way of advising this Commission when the Navajos actually built such structures.<sup>229</sup>

Finally, the four-sided cribbed log hogan with entry and flat roof is given by Correll as evidence of pre-Fort Sumner Navajo use and occupancy. As Correll stated, however, only a few such structures or their ruins, were found and are reported in Navajo Exhibit 520 A-W.<sup>230</sup> Unless reliable tree ring dates are also reported for such sites the mere fact that such a hogan may have been built by Navajos does not inform the Commission as to its probable date of construction. This typological feature, therefore, is not a dependable criterion for dating a site with such a hogan upon it.

Evidence of post-Fort Sumner construction, with no evidence of Navajo occupancy of such sites in 1848, is of no help to this Commission in resolving the question presently before it—namely, were the Navajos, and only the Navajos, there in 1848?

Another criterion utilized by Correll to date some of the reported Navajo sites was described as "state of preservation of site."<sup>231</sup> If the structure looked very old and dilapidated he usually dated such a site "pre-Fort Sumner," i.e., earlier than 1868; but if the structure did not show extreme age the time

<sup>229</sup> Def. Exs. E-51(a), p. 57, E-51(b), p. 267; and E-87.

The Gobernador-Largo area is in the extreme northeastern part of the Navajo land claim. It is not in the Navajo-Hopi overlap area.

<sup>230</sup> Tr. 1869.

<sup>231</sup> Tr. 1860.

period fixed was usually "post-Fort Sumner." This is not a reliable method for dating any site<sup>222</sup> since it is a well known fact that climate and location materially affect the state of preservation of any structure built of wood. The Commission, therefore, disapproves and refuses to recognize the validity of such a dating technique. In the Commission's opinion it is impossible to tell from mere observation of a site, or a structure upon such site, whether that structure was built, used and occupied before or after 1868.<sup>223</sup> Furthermore, to date any site "pre-Fort Sumner" tells the Commission nothing as to whether that site was used and occupied in 1848.

Still another Correll criterion for dating sites within the Navajo claimed area was the presence of trade material at certain sites. "By 'trade material' I mean the presence of glass, ceramics or metal, or other material of Anglo-European origin," Correll explained.<sup>224</sup>

Examination of the site reports in Navajo Exhibit 520A-W reveals that in only a few instances did Correll actually rely upon trade material to date any

<sup>222</sup> According to Dr. Ellis, condition or state of preservation of a site is an insecure criterion for dating. (Tr. 8970.)

<sup>223</sup> Some of the sites dated by Correll on state of preservation were so dated before reports were obtained from the tree ring lab. When tree ring dates were later reported on specimens obtained from such sites the tree ring dates were frequently found to be much later than the time period fixed by Correll on "state of preservation." Thus, for some sites which Correll had dated "pre-Fort Sumner" because the site appeared old, the tree ring dates later received were in the 1880's and even as late as the 1920's. (Schroeder, Tr. 8378; Ellis, Tr. 8969.)

<sup>224</sup> Tr. 1858.

site. Since such trade material usually consisted of some article that history shows the Navajos did not receive until after the middle of the 19th century, most of those sites were dated "post-Fort Sumner" and are not material to the question where the Navajos were in 1848.

All of Correll's typological characteristics were based upon his wholly unjustified interpretation of the tree ring data reported on the specimens submitted to the tree ring laboratory. Since he misinterpreted the tree ring dates it follows that his typological characteristics for dating are not dependable.<sup>225</sup>

<sup>225</sup> E.g., Correll tried to justify his pre-Fort Sumner construction date for hogans with floor diameters of less than 10 feet by pointing out that pre-Fort Sumner tree ring dates were reported on 112 hogans out of 153. This date he regarded as the construction date regardless of the kind of date that was reported. How many such hogans there were in the claimed area for which no tree ring date was obtained Correll could not say. Thus, he did not consider the size of all hogans in deciding upon this criterion for pre-Fort Sumner construction but only those hogans for which he had some kind of a tree ring date. (Tr. 5570-5577.) This is not a valid criterion for determining the probable time of construction when resulting from such loose use of tree ring data as the evidence here shows Correll to be guilty of.

Out of some 1,300 Navajo sites reported in Navajo Exhibit 520 A-W Schroeder and Ellis disagree with 430, something like 350 of these were on dating and 80 on identity. (Schroeder, Tr. 8172-8173; Def. Ex. S-806.) Thus, Schroeder and Ellis refused to accept Correll's dating of any site unless the site report showed a cluster of dates or there was a reasonable representation of "B," "G," or "C" dates. Bare dates and plus dates they regarded as wholly unreliable and worthless. Not so Correll, however. He accepted every date as the probable date of construction.

## FINDING 44

Although Correll testified that he was responsible for dating all sites reported in Navajo Exhibit 520 A-W, and that one of the dating techniques utilized by him included a study of potsherds<sup>220</sup> found at such sites, he relied upon his associate Mr. David Brugge, "who has studied the pottery more thoroughly," to advise him of the time period represented by sherds found at such sites. Therefore, to acquaint the Commission with the kind of sherds found and the time when such pottery was manufactured Mr. Brugge prepared a written report relating to the pottery found within the Navajo claimed area.<sup>221</sup>

Although the Navajos made pottery and acquired some through trade, pottery was not as important in their culture as among the Pueblo Indians, including the Hopi.<sup>222</sup>

During the first half of the eighteenth century, when Pueblo influence was very strong due to the Pueblo refugees who had fled from the Spanish to join the Navajos, quite a lot of pottery was made. The principal types were *Gobernador Polychrome*, a painted type which shows the influence of Pueblo pottery of that time, and various varieties of *Dinetah Utility*.<sup>223</sup> These types were manufactured until about 1800 A.D.<sup>224</sup> and were gradually replaced by a

<sup>220</sup>Pieces of broken pottery.

<sup>221</sup> Nav. Ex. 557.

<sup>222</sup> Brugge, Tr. 6134 and 6373.

<sup>223</sup> Dittert, Def. Ex. S-634 and Brugge, Nav. Ex. 557.

<sup>224</sup> Brugge, Tr. 6314-6315 and 6411-6412. All parties seem to agree that you cannot put an absolute year on the beginning

variety known as *Navajo Polychrome*, two types of *Navajo Utility* and *Pinyon Utility*, all of which have been manufactured since about 1800 A.D.<sup>225</sup>

As a part of his report on Navajo pottery,<sup>226</sup> Mr. Brugge prepared two maps, one for pre-1800 pottery distribution (Map 1) and the other for post-1800 distribution (Map 2).

Upon Map 1 Brugge has bounded an area with a pink line to indicate the outer perimeter of territory within which sherds of *Dinetah Utility* pottery were found in the course of his field investigation. Within this boundary three smaller areas are outlined in green representing sections where sherds of three varieties of *Dinetah Utility* were found; and in orange still another area is outlined where sherds of *Quemado Utility*<sup>227</sup> were found. No pottery of the kind shown on Map 1 has been manufactured since about 1800 A.D.

Upon Map 2 Brugge has bounded in pink an area within which sherds of *Pinyon Utility* pottery were found and with an orange line he has outlined the

and end of any particular type of pottery. (Ellis, Tr. 9045.) As Correll himself testified: "The pottery we found can only be used to date a site pre-1800 or post-1800." (Tr. 5549.)

<sup>225</sup> Brugge, Tr. 6316-6317 and 6413-6414. See chart on Navajo pottery types in Nav. Ex. 557.

<sup>226</sup> Nav. Ex. 557.

<sup>227</sup> The name *Quemado Utility* is used for a type of pottery found in the southern part of the area claimed by the Navajos near Quemado, New Mexico and is very similar to *Dinetah Utility*. It was probably manufactured throughout the eighteenth century but perhaps not very far into the nineteenth. "I can't assign a complete date range. We don't have sufficient data to know the full range of it, either its beginning or its end." (Brugge, Tr. 6480.)

outer boundaries of sites at which sherds of *Navajo Utility* were found. All pottery represented on Map 2 has been manufactured since about 1800 A.D.

The areas outlined on Maps 1 and 2, although indicating the outer boundaries within which Navajo potsherds were found, are not, by reason of that fact, necessarily areas of exclusive use and occupancy at any time by Navajo Indians. As Mr. Brugge himself admitted under cross-examination, "That would be drawing conclusions beyond that inherent within that data."<sup>244</sup> Thus Brugge's lines only indicate areas within whose borders some sherds of the pottery indicated were found. Sherds were not found at all sites within the areas outlined and were not found at all sites on the outer perimeter of such areas.

Brugge's tabulation of archaeological sites in the Navajo-Hopi overlap area shows that in addition to Navajo sherds many sherds of Hopi<sup>245</sup> and other non-Navajo pottery were found at various sites throughout the area. Therefore, if this evidence means anything at all it shows nonexclusive use and occupancy of that area by any one group of Indians during the period when such pottery was being manufactured.

#### FINDING 45

As to the area herein claimed by the Hopi, Brugge's Map 2 indicates that Navajo pottery known as *Pinyon Utility* was found at some location or other throughout the entire area encompassed by the Hopi claim.

<sup>244</sup> Tr. 6658-6659.

<sup>245</sup> See Hopi Ex. 4(d) for chronology of Hopi pottery.

Since this pottery has been manufactured continuously from 1800 down to the present day the presence of such potsherds alone means absolutely nothing insofar as showing Navajo exclusive use and occupancy of that area in 1848, or any other time since 1800. And although potsherds of various types of *Dinetah Utility*, a Navajo pottery manufactured prior to 1800 A.D., were found in the eastern part of the Hopi claim, the presence of such sherds also indicates nothing to this Commission in the way of establishing exclusive use and occupancy of that area by Navajo Indians in 1848, or any other time.

#### FINDING 46

After reviewing all of the evidence presented herein relating to the Navajo-Hopi overlap area the Commission finds that neither the Navajo Tribe nor the Hopi Tribe exclusively used and occupied all of that area in 1848, or any other time after American sovereignty attached thereto. Because of additions from time to time enlarging the Navajo Reservation the Navajos are presently using and occupying more of the area herein claimed by the Hopi Tribe than the Hopis themselves use and occupy. The Navajos, however, did not use and occupy the overlap area until the late 1850's or early 1860's and could not acquire "Indian title" to such lands after American sovereignty attached in 1848.<sup>246</sup> As pointed out in previous findings

<sup>246</sup> *Iowa Tribe of Kansas v. United States*, 6 Ind.Cl.Comm. 464, 502 (1958); *Pueblo de Isleta v. United States*, 7 Ind.Cl. Comm. 619, 622 (1959), aff'd 152 C.Cls. 866 (1961), cert. den., 368 U.S. 822 (1961); *Osage Nation v. United States*, 11 Ind. Cl.Comm. 733, 838 (1962).

this was a period of distress for all Navajos and an era of flight, particularly to lands west of their customary places of use and occupancy. The Commission finds, therefore, that the Navajo Tribe has no claim under "original Indian title" to any of the Navajo-Hopi overlap area.

DEFENDANT'S OBJECTIONS TO HOPI PROPOSED FINDINGS OF FACT

HOPI FINDINGS 1, 2 AND 3

No objection.

HOPI FINDING 4

Defendant objects to this finding as indefinite and confusing. For example, it is impossible at this time for defendant to take any position with regard to the "claims herein allowed" to the Hopi Tribe or "upon the claims herein found to be due" since the Commission has made no determination upon the Hopi claim.

HOPI FINDINGS 5 AND 6

No objection.

HOPI FINDING 7

Defendant has no objection to the statement that, commencing about 1275 A.D., the ancestors of the modern Hopi began to concentrate their dwellings near the center of the territory used by them. Defendant does object, however, to the remainder of this proposed finding, particularly to the statements and implications that the Hopis used or continued to use the larger area described in finding 6—namely, "the

area between Navajo Mountain and the Little Colorado River and between the San Francisco Mountains and the Lukachukais." As pointed out in defendant's requested finding 22, the so-called "outer area" where the Hopis hunted, gathered wild food products, and maintained their religious shrines, was not exclusively used and occupied by Hopi Indians in 1848 or at the time the 1882 Executive Order Reservation was established. The area exclusively used and occupied by the Hopis when American sovereignty attached in 1848 and when the Hopi Executive Order Reservation was established in 1882 is described in defendant's requested finding 22 and is the area to which the District Court found that the Hopi Tribe alone had title.

HOPI FINDING 8

Defendant objects only to the next to last sentence in this proposed finding. The Havasupai tribe lived, or at least utilized some of the area, between the Hopi villages and the Grand Canyon.

HOPI FINDINGS 9 THROUGH 12

No objection.

HOPI FINDING 13

Defendant's only objection to this finding is to the implication that all of de Vargas' travels were within the area herein claimed by the Hopis.

HOPI FINDINGS 14 AND 15

No objection.

## HOPI FINDING 16

Defendant objects to this finding insofar as it alleges Hopi exclusive use and occupancy of the area herein claimed by the Hopi Tribe. The absence of any other Indians in the area does not necessarily mean that the entire area claimed was used and occupied by Hopi Indians.

## HOPI FINDINGS 17 AND 18

No objection.

## HOPI FINDING 19

Defendant has no objection insofar as this finding recites the provisions of the Treaty of Guadalupe-Hidalgo between the United States and Mexico in 1848. Defendant does object, however, to any legal conclusions herein expressed by counsel for the Hopi.

## HOPI FINDING 20

Defendant objects to this finding and says that the evidence clearly shows that the Hopi Tribe abandoned and ceased to use much of the area described before American sovereignty attached in 1848. As pointed out in defendant's requested finding 21, even before the Spanish contacted them, the Hopi had abandoned lands and territory formerly used by them.<sup>247</sup> Thus, sometime between 1300 and 1500 A.D., the Hopi withdrew from the Moqui Butte country between the Little Colorado and the southern boundary of the Hopi Executive Order Reservation;<sup>248</sup> the villages

<sup>247</sup> Colton, Tr. 7404.

<sup>248</sup> See Hopi Ex. 2.

along the Little Colorado near Winslow were moved to the Hopi Mesas farther north, to Oraibi, and into the Jeddito Valley. After the Spanish came this withdrawal by the Hopi continued and by 1700 they were only occupying the Mesas that they occupy today.<sup>249</sup>

The Hopi abandoned many of their old shrines long before the United States acquired sovereignty over the Southwest. Thus, they abandoned their shrine on Navajo Mountain, north of the Executive Order Reservation, their shrines in the San Francisco Mountains, and their shrines around Winslow in the Little Colorado Valley.<sup>250</sup> But in spite of such physical abandonment of that country, says Dr. Colton, the Hopi still feel "that those places belong to them. For that reason certainly Hopi are making claims to all this old land although it is not land that has been used by them for many generations."<sup>251</sup>

Although Dr. Fred Eggan, the expert witness for the Hopi Tribe, indicates general agreement with the above statement by Dr. Colton, he qualifies such agreement by saying (Tr. 7405), "They abandoned them physically. They did not abandon spiritually and they continued to make use of them. They continued to visit them."

Defendant insists that actual exclusive use and occupancy of lands for a long time before American sovereignty is a condition precedent to a valid claim against the United States on the basis of "Indian

<sup>249</sup> Colton, Tr. 7404.

<sup>250</sup> Colton, Tr. 7405.

<sup>251</sup> Tr. 7405.

title." Such exclusive use and occupancy is not fulfilled by the Hopis merely because they feel that they own the lands where their religious shrines are or were located as well as all of the territory between those shrines and the villages they occupy. The mere fact that members of the Hopi Tribe pay occasional visits to religious shrines located many miles from the lands regularly used by them for habitation purposes or for farming, grazing their sheep, goats and cattle, or for hunting and gathering wild food plants, will not support a claim to the sites of such shrines or the land in between under "Indian title."

#### HOPi FINDINGS 21 AND 22

Defendant has no objection to these findings if the phrase "Hopi territory" is changed to "claimed territory of the Hopi."

#### HOPi FINDINGS 23 THROUGH 29

No objection.

#### HOPi FINDING 30

Defendant's only objection to this finding is as follows:

(a) Defendant is unfamiliar with and is unable to locate "Collabana Mountain," referred to in line 3 of this finding. Defendant believes that the reference intended is "Calabasa Mesa."

(b) The 1862 map referred to in the last paragraph of this finding (Def. Ex. G-230c) is a sketch of public surveys in New Mexico to accompany the annual report of the Surveyor General. This map outlines

no boundaries for any of the Indian tribes shown thereon. It only indicates general areas of location for the various tribes. It is, therefore, not possible to make a positive statement (as petitioner does) that the Navajos are shown "extending from the Rio de Chelly south and east to the Rio San Jose, with the majority of the Navajo lands still located in New Mexico."

#### -HOPi FINDING 31-

Defendant's only objection to this finding is to use of the phrase "Hopi country." If this is changed to "country herein claimed by the Hopis," there is no objection to the finding.

#### HOPi FINDING 32

Defendant's objection to this finding is directed to the phrases "Hopi country" and "in direct competition to long established Hopi use." If the first phrase is changed to "country herein claimed by the Hopis" and the last phrase deleted defendant does not object to the finding.

#### HOPi FINDING 33

Defendant objects to this finding. The evidence before the Commission does not support a finding that "there was sufficient Hopi population to utilize, in customary Indian manner, the area claimed by the Hopi Tribe for the entire period during which aboriginal title was established."

When American sovereignty attached to this part of the United States in 1848, the population of the Hopi probably numbered only about 2,450 men,

women and children:<sup>222</sup> or as Charles Bent, Superintendent of Indian Affairs, reported to the Commissioner of Indian Affairs on November 10, 1846 (Def. Ex. G-29, p. 7): "They number about 350 families or about 2,450 souls."<sup>223</sup> Thus, the average Hopi family consisted of husband and wife and five children; and there is nothing in the record to indicate that this is not a fair estimate of the size of the average Hopi family in 1846 or 1848.

#### HOPi FINDING 34

Defendant's objection to this finding relates to the closing statement which is, in effect, that as of 1848 the Meriwether line represented the eastern boundary and the Colorado River the western boundary of lands exclusively used and occupied by the Hopi Tribe and that the Havasupai lived to the west. Defendant refers the Commission to defendant's requested finding 22 for a reference to the area that defendant believes was exclusively used and occupied by the Hopi Indians in 1848.

#### HOPi FINDING 35

Defendant objects to this finding. Defendant does not deny that it took control of the lands herein claimed under "Indian title" by the Hopi Tribe as

<sup>222</sup> Eggan, Tr. 7320; Hopi Ex. 4(c).

Ellis, Tr. 7531 and 7550; Klueckholm, T., 1232-1233.

<sup>223</sup> Bent reported a Hopi population of 2,450 in November 1846 and Indian Agent Michael Steck reported a figure of 2,500 on June 28, 1852. (Def. Ex. G-188.) It seems to be a fair statement, therefore, to say that the Hopi probably numbered only about 2,450 in 1848.

described in Hopi proposed finding 20. Defendant denies, however, that all of such lands were exclusively used and occupied by that petitioner in 1848 when United States sovereignty attached. Defendant has no objection to that portion of the finding which states that by decree of the court in the case of *Healing v. Jones*, 210 F. Supp. 125, the area described by metes and bounds in this finding—namely, the lands within Land Management District 6, as defined on April 24, 1943, constituted a reservation for the Hopi Indian Tribe. (See judgment in *Healing v. Jones*, pages 225-228 of Hopi Ex. 78.)

#### HOPi FINDING 36

Defendant's objection to this finding relates only to the last phrase—namely, "notwithstanding its aboriginal title." Defendant does not believe that the evidence supports a finding that the Hopi Tribe had aboriginal title to all of the 1882 Executive Order Reservation lands in 1848, the crucial date as of which such "title" must be determined.

#### DEFENDANT'S OBJECTIONS TO NAVAJO PROPOSED FINDINGS OF FACT

##### NAVAJO FINDINGS 1 AND 2

No objection.

##### NAVAJO FINDING 3

Defendant's only objection to this finding is directed to the declaration on page 24 that "The number of Navajos usually had been underestimated." The authority for this statement is Indian Agent

Dodge's letter to W. W. H. Davis, Superintendent of Indian Affairs in New Mexico in 1856. Dodge was only referring to the situation in the middle of the nineteenth century. His statement is no evidence that this has been common practice throughout Navajo history.

#### NAVAJO FINDING 4

Defendant objects to this finding.

This finding is filled with material that means absolutely nothing to this Commission when we consider that the question before the Commission is, "What lands did the Hopi and Navajo tribes respectively use and occupy in 1848 under a claim of Indian title within the area described in Hopi proposed finding 20?" Defendant objects to all of such irrelevant material.

In addition to population figures herein reported for the Hopi Indians from as early as 600 A.D. to 1937 (to which defendant has no objection), the finding stresses the following:

(a) Throughout most of the years of Spanish sovereignty over this part of the Southwest, and at the time of United States sovereignty in 1848, the Hopi Indians lived in seven pueblos or villages, located on First, Second and Third Mesa. Those pueblos are the same villages mentioned in defendant's requested finding 8—namely, Hano, Sichomovi and Walpi on First Mesa; Shongopovi, Shipaulovi and Mishongnovi on Second Mesa; and Oraibi on Third Mesa.

(b) Throughout the years of Spanish sovereignty, and at the time of United States sovereignty in 1848,

the Hopi Indians customarily farmed in fields within a few miles of their villages.

(c) Throughout the years of Spanish sovereignty, and at the time of United States sovereignty in 1848, the Hopi Indians customarily herded and grazed their flocks of sheep, and what few cattle they had, within 25 miles of the three mesas they occupied.

(d) As the population of the Navajos increased, their need for additional lands resulted in a Navajo expansion westward. Thus, Navajos moved into much of the country bordering the Hopi mesas. This frequently resulted in strained relations and at times even warfare between the two peoples. Thus, some of the Hopi Executive Order Reservation was already occupied by Navajos when it was created on December 16, 1882.

Defendant agrees with the summary statements above set forth. Defendant's objection to the finding is that there is no reason for Navajo counsel to incorporate so much irrelevant material and thus use 43 pages to detail these conclusions. We have no intention of suggesting how the Navajos should submit their findings but it is because of such irrelevant material that the proposed findings herein submitted by the Navajos are so extremely long and detailed.<sup>254</sup> There is no justification, in presenting the Navajo claim to the area, for counsel to submit findings covering 710 pages, plus 4,502 footnotes, and 90 pages of appendices.

<sup>254</sup> The very next finding submitted by the Navajos starts at page 71 and ends on page 291. It is simply ridiculous for any finding to be this detailed.

## NAVAJO FINDING 5

Defendant objects to this finding since it is not supported by the evidence.<sup>223</sup>

Throughout this entire finding (and literally hundreds of references are noted) the Navajos draw wholly unwarranted conclusions from every tree ring date that is reported for an archaeological site. Thus, for every single date that is reported by the tree ring laboratory, whether this be a "bare" date, a "plus" date, or any other kind of a date, the Navajos contend that they were present at that site on the date indicated. This is wholly unwarranted since a "bare" date and a "plus" date do not necessarily represent the time that timber was cut. As Mr. Smiley, the Navajo tree ring expert, testified, a "plus" date may be thirty years or more off from the date when the tree actually died, and a "bare" date may be off even more.<sup>224</sup> Furthermore, even if we assume that Navajos cut the trees for which dates have been reported, this does not prove exclusive use and occupancy of the area in question at that time, or any other time material to this aboriginal land claim.

In defendant's requested findings 39-42, to which reference is now made, defendant describes and explains in detail just how tree ring data should be utilized to determine the probable date of construction at the site from which the tree ring specimen was derived. Only by obtaining a cluster of dates,

<sup>223</sup> Although this proposed finding covers something like 221 pages, the heart of it is in the first paragraph.

<sup>224</sup> Tr. 2031, 2040, 2056-57 and 2063.

within a year or two, can anyone determine a probable construction date for that site.

Although the Navajos say (Navajo footnote 441, page 72 A) that the tree ring dates cited by them in these proposed findings are not intended to be construed as "construction" dates, but only to demonstrate the presence of Navajos at a particular place at the approximate date yielded by the tree ring specimen, this was not their contention throughout the trial of the case. And the site sheet reports in Navajo Exhibit 520 A-W also indicate otherwise since the description there set forth, in every instance, is: "Probable Age." That can only mean: When were the hogans and other structures described on the site sheet built, used and occupied by the Navajo Indians who built them?

Defendant disagrees with the Navajo assertions on page 74 relating to the 1686 report of the Spaniard Posadas.

Although Bandelier interpreted the report by Posadas that "in 1686 it was stated that the tribe [Cosminos] was sorely pressed by the Navajos," an examination of the Spanish document referred to reveals that Posadas did not use the word "Navajo" but rather the word "Apacha." Bandelier interpreted this to mean Navajo Indians since Navajos were originally described as Apaches. Schroeder and Euler disagree with Bandelier and are of the opinion that the Apaches referred to were Yavapai Apaches and not Navajo Apaches<sup>225</sup> since the document states that the Apache nation lived to the south of the

<sup>225</sup> Def. Ex. 5, p. 49 in Docket 91 and Havasupai Ex. 24, p. 7.

Coninas and that the Sierra Azul (Mingus Mountain near Jerome, Arizona) was in the Apache territory (which is Yavapai country).

Another point of disagreement between Euler and Schroeder on the one side and the historian Donald E. Worcester<sup>258</sup> on the other concerns the relationship between the Navajos and the Havasupai in 1686. Worcester writes as follows (Navajo Exhibit 501, page 107):

According to the report of Fray Alonso Posadas in 1686, the Cosninas (Havasupai) had been subdued by the Navaho.

Euler and Schroeder, again relying upon the Peñalosa account, believe that this report indicates the enmity existing between the Havasupai and Yavapai and not enslavement of the Havasupai,<sup>259</sup> and definitely not subjugation by the Navajos.

On page 92 of this finding the Navajos refer to many areas within which sherds of Navajo pottery were found. The mere fact that various kinds of broken Navajo pottery were found at the archeological sites named is no proof of Navajo exclusive use and occupancy of such sites *at any time* and may or may not result from Navajo use and occupancy of those areas. After all, the Navajos did trade some of their pottery even though it was not of the quality of Hopi pottery.

At page 105 of this finding, counsel for the Navajos contend that after 1800 and before confinement of the Navajos at Fort Sumner, "not only did the Navajos

<sup>258</sup> See Nav. Ex. 501, p. 101, fn.

<sup>259</sup> Havasupai Ex. 24, p. 7.

consider the area west of Hopi and north of Flagstaff as their country, but the Yavapais, Hopis, the Western Apaches, and the Havasupais also recognized this area as Navajo territory." *The authorities cited do not support such finding.*

The first authority cited is a statement in 1942 by George Hunt, a 76-year-old Yavapai Indian. Mr. Hunt was testifying before two Department of the Interior attorneys—Felix Cohen and Abe Barber—who were conducting an investigation of Hualapai and Havasupai land claims. Included in the questions propounded to Mr. Hunt were the following:<sup>260</sup>

Mr. COHEN. Do you understand maps?

GEORGE HUNT. Yes.

Mr. COHEN. Suppose you point out on this map your understanding of the boundary of the Yavapai country.

GEORGE HUNT. The boundary of the Yavapai country line is from Signal south to the Gila River, then along the Gila River to the Agua Fria River, then up the Agua Fria River to a point about half way to Lake Pleasant, then east to include Camp McDowell Reservation, then up the Verde River to Camp Verde, then northeast to Flagstaff (circling to include Mormon Lake), then west to Seligman, then south to Camp Wood, then along the south side of Burro Creek to Signal.

Mr. COHEN. Were there any other Indians living on the east [of the Yavapai]?

GEORGE HUNT. Yes, Tonto Apaches, San

<sup>260</sup> Havasupai Ex. 8 in Docket 91. Statement of George Hunt identified as Exhibit W in Havasupai Ex. 8.

Carlos Apaches; the Navajo to the north and east, and on the north the Supai.

MR. COHEN. From whom did you learn of this boundary?

GEORGE HUNT. From my parents, grandfather, great-grandfather and uncle.

It is clear from the above questions and answers that the only conclusion to be drawn from George Hunt's statement is that the Yavapai Indians knew and recognized the fact that Navajos lived north and east of the Yavapai whose northeastern boundary, he said, reached Flagstaff.<sup>201</sup> The statement tells us nothing of the time to which the witness' testimony related although the finding here proposed relates such period of habitation to "After 1800 and prior to Fort Sumner."

The next authority cited is the Hopi Journal of Alexander M. Stephen.<sup>202</sup> The events described relate to the year 1863 when Kit Carson was in hot pursuit of all Navajos. There is not a word in the reference that justifies a finding, as the Navajos suggest, that "After 1800 and prior to Fort Sumner" the Hopi Indians considered the area west of Hopi and north of Flagstaff to belong to the Navajos.

The third authority cited is Grenville Goodwin to the effect that the Western Apache recognized the fact that after 1800 and before the Fort Sumner period, all land west of the Hopi mesas and north of

<sup>201</sup> Mormon Lake is shown on the Navajo Land Claim Map (Nav. Ex. 510) directly east of Station 28 and southeast of Flagstaff.

<sup>202</sup> Def. Ex. E-45, pp. 1016-1017.

Flagstaff belonged to the Navajos. Goodwin's writings do not justify such a finding. He merely says that north of the Western Apache bands lived the Navajos and that fear of the Navajos prevented the Western Apaches from penetrating that part of Arizona located north of the region around Snowflake.<sup>203</sup> Furthermore, Goodwin's Map II on page 65 of Navajo Exhibit 645 shows the areas designated by him for the respective Indian tribes surrounding the Western Apaches in 1850. The Navajo western boundary, as outlined by Goodwin, is a north and south line running almost through the center of what became the 1882 Hopi Executive Order Reservation (1 Kappler 805).

The last authority cited is Dr. Robert A. Manners, defendant's expert in the Havasupai case. There is nothing in Dr. Manners' report (Defendant's Exhibit 1 in Docket 91) at page 131, to which the Navajos refer (or anywhere else), that justifies the statement that "the Havasupais also recognized this area as Navajo territory."

When Major Kendrick wrote to Governor Meriwether on January 25, 1857 that the "Seven Pueblos of Moqui" were situated near the western border of the Navajo country, between 86 and 110 miles from Fort Defiance (Navajo Exhibit 158), he was clearly pointing out that the Hopi villages lay west of the

<sup>203</sup> Nav. Ex. 645, pp. 16 and 71.

Snowflake is shown on Navajo Exhibit 510 on Silver Creek south of Holbrook, Arizona and directly east of Station 27 on that map. This is far south of the Navajo-Hopi overlap and within the Navajo-Western Apache overlap.

lands then regarded to be the country occupied by Navajos. Counsel for the Navajos indicate agreement with Major Kendrick's statement but at the same time negate such "agreement" by saying that the Hopi pueblos were surrounded by country in which the Navajos held exclusive dominion and control and that the "western boundary of Navajo land extended west of the Hopis to the Colorado River." (See page 185 of this proposed finding.) Defendant insists that if Major Kendrick's description of the western limits of Navajo country in January 1857 meant anything at all it meant that the Navajo lands lay wholly east of the Hopi villages.

The historical events cited in this finding, beginning at about page 187, all give clear indication of Navajo families being in flight in 1858 and through the ensuing years. This coincides with defendant's contention that the years 1858-1868 represented a period of flight for the Navajos when they were moving from one place to another trying to avoid the military forces that were in the field against them. Thus, we find reported statements in this finding as follows:

On November 3, 1858, Colonel Miles wrote of his plans for a campaign against the Navajos. Leaving the Chinle Valley he intended to strike southwest "to Calabasha Sierra and mesa to the west of Moqui where most of the Indians with their families are now."<sup>204</sup> (Pages 192-193.)

On July 14, 1859, Major Shepherd's command was ordered to proceed "to a mountain beyond the Moquis villages, where it was reported sev-

<sup>204</sup> All emphasis is ours.

eral of the *wealthy Navajos have taken their stock and flocks, and where it is supposed some of the depredators and disaffected make their hiding.*" (Page 198.)

In August 1859 an Army expedition encountered only a few Navajos near the Hopi villages, but found evidence that *large herds had been near Moqui, in Keams Canyon, and in Steamboat Canyon the previous winter. Navajos also had been north and northwest of the Hopis.* (Page 200.)

On September 29, 1860, Major Sibley learned from a wounded Navajo that many *Navajos were fleeing from the troops to the Chelly (Chinle Valley), Callabasa Mountain, Pueblo Colorado and Moqui Villages.* (Page 201.)

In September of 1859 there were many abandoned Navajo huts on Black Mesa. (Page 201.)

In the fall of 1860 hostilities against the Navajos by the Army caused many to take their flocks to the Calabaza Mountain, the Moqui villages, and the Sierra Leraita. (Page 207.)

Colonel Canby wrote on December 24, 1860: "I have the honor to report that from information derived from the Navajos recently captured, and from the delegations that have visited this post and Fort Defiance to ask for peace, indicate that the great body of the wealthy Navajos with their flocks and herds *are now in the vicinity of the San Francisco Mountains.* This information derived from different sources is confirmed by our own observations. (Page 212.)

The passages emphasized in the above references all indicate Navajo flight or recent occupation of the

respective areas referred to and not aboriginal use and occupancy thereof by that tribe.

None of the evidence cited at pages 222 through 243 supports the contention here advanced that the "Navajos had established exclusive occupancy and use rights throughout the Western area" long before 1868—the Fort Sumner period. Although the evidentiary references here cited (*assuming that they are reliable*) may indicate the presence of Navajo families at the various places named, such evidence does not prove exclusive use and occupancy of that area by the Navajos either in 1848 or any time in the next twenty years.

What we have said above regarding the evidence cited for the pre-Fort Sumner period also applies with equal force to the so-called Fort Sumner period of 1863–1868 (pages 244–277 of this proposed Navajo finding). An examination of these numerous documents gives clear indication of the stress and strain under which the Navajos were living at this time and that their presence in the western portion of the large area herein claimed was of quite recent origin.

Although the evidence cited for the post-Fort Sumner period clearly indicates the presence of Navajos within the Navajo-Hopi overlap area shortly after their release from the Bosque Redondo and that they have continued to use and occupy most of that area throughout the years since that time, such evidence does not show exclusive use and occupancy thereof by members of that tribe in 1848, 1868, or any other time. The fact that they moved into the area west of their 1868 treaty reservation and ex-

tended their use and occupancy of such lands more and more throughout the ensuing years as their population increased by leaps and bounds, did not vest the tribe with original Indian title in those lands. Such "title" could not be obtained by moving upon lands that were then a part of the public domain of the United States and which the Navajos had not exclusively used and occupied in 1848 when United States sovereignty attached.

#### NAVAJO FINDING 6

Defendant objects to this finding.

Defendant agrees with many of the statements of fact herein submitted by the Navajo Tribe. Defendant, however, cannot agree with the ultimate conclusion set forth which is, in effect, that the Southern Paiutes who used and occupied the area east of the Colorado River between the San Juan River on the north, Moenkopi Plateau on the south, and Black Mesa on the east were a part of the Navajo Tribe when American sovereignty attached to this territory in 1848 and that consequently the Navajo Tribe had "Indian title" to that area. Such a finding would be based entirely on conjecture and supposition.

The evidence is quite clear that the San Juan band of Southern Paiutes, at least since 1776, lived in the area above mentioned and shown on the map accompanying Isabel Kelly's ethnographic publication in 1934 entitled "Southern Paiute Band." (Def. Ex. G-16.) That territory is now a part of the Navajo Reservation but in 1907 and 1908 the

northern portion of it, which is located in the State of Utah and is known as the Piute strip, was set aside by administrative action as a reservation for the Southern Paiute Indians. (Nav. Ex. 612.)

Omer Sewart, who has made an extensive study of the Paiutes and has testified in a number of cases before this Commission, acknowledged in testimony in the Southern Paiute case (Dockets 88 and 330) on September 12, 1961 that Escalante met groups of Southern Paiutes who were living in this area when he traveled through the territory in 1776 (So. Paiute Tr. 1126) and that the occupants of Paiute Canyon near Navajo Mountain and in the country immediately north of Tuba City, at least since 1776, were Southern Paiute Indians. (Stewart, So. Paiute Tr. 1126-1127.) The evidence cited by petitioner for the years between 1776 and 1865 (pages 295-298) shows that although the Navajos and Paiutes were "friendly" they were spoken of separately and not as an amalgamated group. As late as 1873, they were still reported as a separate Paiute group. The fact that in 1873 they were "nearly isolated from the other [Paiute] tribes" and that they "affiliate to a greater or less extent with the Navajos" (Nav. Ex. 679) does not support petitioner's conclusion (page 302) that "at all times material herein, the Paiutes were absorbed into and a part of the Navajo Tribe and ceased to be an identifiable band."

Although at some time prior to 1938 some Paiutes apparently became integrated with the Navajos, it does not appear when this occurred or whether it occurred through intermarriage of individuals or a

merger of groups. The testimony of Mr. Stewart which petitioner intimates (pages 294-295) would support a very early "assimilation" of the Paiutes east of the Colorado by the Navajos does not do so. Thus, Commissioner Scott asked Mr. Stewart (So. Paiute Tr. 1131):

Q. From all your findings and your studies here, are you in a position to state whether or not that integration was quite formally established for some years prior to, say, 1859 or 1864?

A. It might have already started in 1776. \* \* \* I am not sure. \* \* \*

Q. But at least, you are in a position to say that they definitely integrated, and that integration was accomplished at a later date than 1864?

A. At which date it was accomplished I wouldn't know.

\* \* \*  
But I would say it must have been \* \* \* before or in the period between 1776 and considerably in the past. Exactly what date I wouldn't know, but it is ancient, an ancient integration.

It may have already started before 1776, because I have a limited knowledge of the area. (So. Paiute Tr. 1132.)

\* \* \*  
Q. So that the essence of what you have said here is that although your findings are not definite as to the date \* \* \* certainly in 1938 [when Stewart conducted a field investigation] there was a definite amalgamation which might

be characterized as Navajo. Am I right?  
(So. Paiute Tr. 1134.)

A. Right.

Testimony of this kind (and it is the best that has been submitted) is clearly incapable of supporting the Navajos' claim of original Indian title to the area herein referred to.

NAVAJO FINDING 7

Defendant objects to this finding and especially to the conclusion expressed on page 313 that the practice of slave raiding in Navajo territory, a practice originating in the period of Spanish and Mexican occupation, "was carried on vigorously by the defendant United States after acquisition of the Territory of New Mexico by the United States in 1848." This statement charges the United States with officially engaging in the practice of slave raiding against the Navajo Indians. There is absolutely no evidence to support that charge. Defendant does not deny that slave raiding against the Navajos was carried on when this part of the Southwest was under Spanish and Mexican rule. Defendant, however, is not responsible for what may have been done, either officially or unofficially, to the Navajos before United States sovereignty in 1848. Nor is defendant responsible for or liable to the Navajo Tribe for misconduct by individual white settlers in taking Navajo women and children captive or forcing them into bonds of slavery. In fact, the Commission will take judicial notice of the fact that laws were enacted by the United States and every effort possible was made by this Govern-

ment to prevent and end all forms of slavery and involuntary servitude in this country. Defendant, therefore, objects to this finding since it has no relevancy to the question before the Commission and is only submitted as an excuse, not a true reason, for the raiding and marauding of the Navajo Tribe in the early years of American sovereignty over this part of the country.

NAVAJO FINDING 8

Defendant objects to this finding and especially to the conclusion set forth on pages 326 and 327. Apparently the Navajos believe in the old maxim that a good offense is the best defense. Thus, instead of acknowledging that their marauding and raiding of the white settlers was responsible for the military action taken against them both before and after American sovereignty, they would have the Commission find that the whites were the instigators of all wrongs and that the Navajos only retaliated to protect themselves. The historical records clearly show otherwise. In order to get a clear picture of the historical events involving the Navajo Indians and the settlers of New Mexico before and after American sovereignty over this Territory in 1848, the Commission's attention is invited to defendant's requested findings 29 through 35. Those findings must be considered at the same time that this proposed finding by the Navajo Tribe is weighed.

NAVAJO FINDING 9

Defendant has no objection to this finding insofar as historical facts are related as reported in the

documents cited. Defendant does object, however, to the conclusions expressed on pages 360 and 361 since the facts in no way support or justify such findings. Defendant also objects to the use of such terms as "Navajo land" and "Navajo country" frequently found in this finding and to petitioner's describing certain acts of the United States as injustices committed against the Navajo Tribe.

We do not believe that the facts herein referred to are of any real help to the Commission in determining what lands the Navajo Tribe exclusively used and occupied from time immemorial and especially in 1848. In fact, the events cited and places referred to in this finding and the historical events described in defendant's requested findings 29-35, to which the Commission's attention is invited, clearly show nonexclusive use and occupancy of those areas. Defendant's requested findings 29-35 must be considered in conjunction with this proposed finding by the Navajo Tribe if the Commission is to get a true picture and understanding of the situation that led up to the negotiation of the treaties herein referred to.

As defendant points out in defendant's requested finding 34, the Navajos did not feel that they had received unfair treatment in their negotiations with General Sherman and Col. Tappan when the 1868 Treaty was concluded and a reservation was agreed upon for them. Barboneito, whom they had chosen as their principal leader, expressed the feeling of all Navajo representatives at the treaty council when he said (Nav. Ex. 410, p. 1):

We are very well pleased with what you have said and well satisfied with that reservation; it is the very heart of our country and is more than we ever expected to get.

#### NAVAJO FINDING 10

Defendant objects to this finding and respectfully refers the Commission to defendant's requested findings 39 through 42 for an understanding of tree ring dating and the limitations upon the use of such dates for determining the probable date of construction at various archaeological sites.

Defendant does not question the Navajo assertion at the beginning of this proposed finding that the Navajo archaeological survey was made to obtain evidence of Indian use and occupancy of the area claimed for which historical data was lacking, to determine the extent of the territory formerly used by the Navajo Indians, and to ascertain what other Indians may have lived within the area claimed. Defendant does, however, categorically deny the Navajo claim that "Every effort was made to maintain high professional standards in following the techniques and procedures normally pursued by archaeologists." As defendant has pointed out in defendant's requested findings 39 through 42, and will show in its objections to this proposed finding, the Navajo archaeologists failed completely to use the tree ring data reported by the tree ring laboratory in the manner in which such data should be utilized in determining when construction took place upon the sites for which such data was reported.

Defendant agrees with the Navajo statement on page 364 that the Navajo archaeological survey within the area herein claimed by that tribe was extensive rather than intensive. That is no excuse, however, for unjustified and erroneous interpretation of the data compiled. And that is precisely what the Navajo archaeologists have done in this case.

Defendant has no quarrel with the general discussion herein set forth by the Navajos (pages 366-388) relating to the ethnic identification of Navajo versus Hopi sites and the descriptions outlined for Navajo hogans and other structures herein named. Defendant does not agree, however, with the conclusion stated on pages 367 and 388 that of the 666 sites recorded within the Navajo-Hopi overlap area, 638 are unmistakably Navajo.

Counsel for the Navajos point out on page 389 of this proposed finding that there is no way to determine whether a number of structures on a Navajo archaeological site were built at the same time or at different times. Defendant agrees one hundred percent. But in spite of the above statement, the Navajo archaeologists have consistently dated the sites where tree ring dates were obtained as being occupied by Navajos at the time of the tree ring date. The incorrectness of such dating technique has been pointed out in defendant's requested findings to which reference has been made. As elderly Navajos freely admitted, and as counsel for that tribe acknowledge, Navajos constantly rebuilt and repaired their hogans and reused sound wood from older hogans in such new construction. Because of this, the initial con-

struction date of such a hogan at any site cannot be determined. As the writings of Smiley and Bannister, the tree ring experts, clearly indicate,<sup>255</sup> a cluster of dates within a year or two (not within 25 or 30 years as Mr. Correll stated—Tr. 4300A), will probably suggest a construction date since it is very unlikely that all of the dated specimens would erode so homogeneously that exactly the same number of rings would be missing from all specimens.

As defendant has emphasized in its findings on tree ring dating, only a bark ("B") date represents truly a cutting date for the tree from which that specimen was derived. However, even a single "B" date cannot tell us when the structure from which that timber came was built. It might have been a repair timber newly cut or it might have been a timber taken from an older structure. Thus, *a cluster of dates is essential to date the probable construction of any structure.*

The chart that the Navajos have prepared on page 417 of this finding means absolutely nothing to this Commission. Here the Navajos list the total number of "B," "C," and "G" dates in one column and the total number of "bare" and "plus" dates in another in an attempt to point out their relationship over 10-year periods from "pre-1700" to "post-Fort Sumner." The fact that 280 "B," "C," and "G" dates were reported by the tree ring laboratory as against 223 "bare" and "plus" dates is meaningless since nothing is shown in the way of a cluster that would help date any site within the areas in question.

<sup>255</sup> Nav. Ex. 522, p. 25 and Def. Ex. E-52, pp. 23-24; also Ellis, Tr. 8911.

Two charts attempting to show some sort of correlation between tree rings and pottery and tree rings and typology are shown on page 398 of this finding. Correlation I involves Navajo pottery manufactured prior to 1800 and pottery manufactured only after 1800. As defendant points out in defendant's requested finding 44, the presence of Navajo potsherds at an archaeological site is no evidence of exclusive use and occupancy of that site by Navajo Indians and certainly does not tell this Commission when such pottery was deposited at the site where it was found. Furthermore, since many sherds of Hopi pottery were also found at various sites where Navajo potsherds were found, if the presence of such pottery means anything it shows nonexclusive use and occupancy of such sites by any one group of Indians during the period when such pottery was being manufactured.

Correlation II attempts to show a type of agreement between tree rings and typology. The traits listed in Appendix B include Navajo and non-Navajo. Furthermore, as defendant has pointed out in defendant's requested finding 43, hogans of less than 10 feet in diameter and hogans larger than 10 feet are not necessarily of pre-Fort Sumner and post-Fort Sumner construction respectively. And the same applies to the distance of the ash dump from the hogan. It is unfortunate that the Navajo archaeologists did not interpret and apply the tree ring data as their own tree ring expert testified must be done in order to obtain the true meaning of such dating. The use of the tree ring data by Correll is not in line with the

accepted practice now in use as described by Smiley and Bannister and as pointed out in defendant's requested findings 39 through 42.

At pages 410-414 of this finding the Navajos list spans of tree ring dates from all over the large area represented by the Navajo claim. Such tree ring summation means nothing. If the Navajos would show the Commission clusters of dates for structures at particular sites, then such tree ring data, when correlated with other evidence found at the site, might help the Commission determine the probable date of construction there and by whom (i.e., what Indians) the site was probably occupied.

Schroeder's maps of the over-all area claimed by the Navajo Tribe (identified as Defendant's Exhibits S-802 through S-805 and referred to on page 428 of this finding) are not intended to delineate areas of exclusive use and occupancy by the Navajos for the respective periods represented by such maps. As Mr. Schroeder testified (Tr. 8133):

The four maps, S-802, 3, 4 and 5, are for reference so that we can point to the overall picture.

They are not indicative of exclusive use and occupancy of the area herein claimed—either by the Navajo Tribe or any other Indians. They only show the places where particular Indians were reported to be at the time indicated, even though their presence might only be on a raiding expedition.

Defendant agrees with the Navajo statement on page 429 that prior to Fort Sumner (i.e., prior to 1868), the Navajos possessed only a limited number of metal axes. Consequently before their release from

Fort Sumner they undoubtedly built more hogans with timbers felled by burning or with stone axes than after their period of confinement at that encampment. The mere fact that the poles of a hogan might have been felled by burning, defendant agrees, is not conclusive evidence that the hogan was built before 1868; and the reverse is also true—namely, the mere fact that poles of a hogan were felled by a metal ax is not conclusive proof that the hogan was built after 1868.

Counsel for the Navajos devote much of this finding trying to justify their method of dating by typology many of the archaeological sites described in Navajo Exhibit 520 A-W. Defendant does not agree that the typological criteria adopted by Mr. Correll can correctly determine the time period of construction at a particular site or Navajo use and occupancy thereof.

Counsel for the Navajos criticize the expert witnesses Ellis, Schroeder, Campbell, and Euler who appeared for the defendant and other overlapping claimants and who analyzed the archaeological site sheet reports (Navajo Exhibit 520 A-W) submitted by the Navajos in support of their over-all land claim. Their contention is that these experts arrived at wholly unjustified conclusions because of their failure to analyze all of the archaeological data available to them and that their opinions "are based on a totally inadequate sampling and analysis of a selected portion of the total available to them." (Page 448 of this finding.) Thus, they contend that Dr. Ellis analyzed data pertaining to 264 hogans and failed to consider similar data for 1,770 other hogans

when she concluded that the Navajo archaeologists could not justifiably say that a hogan with a floor diameter of 10 feet or less was probably constructed before 1868—i.e., in the pre-Fort Sumner period.

Dr. Ellis refused to consider *all* hogans with reported diameters of 10 feet or less in this analysis because she did not feel that the date of probable construction could be determined from the data recorded on the archaeological site sheet reports for the 1,770 structures that she did not include in her analysis. Thus, she only analyzed the data reported for the sites upon which the Navajo archaeologists and the Government witnesses (Schroeder and Ellis) could agree as to the probable time of construction. (See Defendant's Exhibit E-53, p. 1.) This was enough to show that the size of the hogan did not necessarily indicate whether the hogan was constructed pre- or post-Fort Sumner and, therefore, to show how completely fallacious Correll's dating technique was.

At pages 449 and 450 of this finding the Navajos have tabulated all sites within the over-all area claimed at which they claim Navajo hogans, or ruins of Navajo hogans, were found. A total of 2,034 hogans from 885 sites are recorded. They contend that 626 hogans measuring 10 feet or less in diameter date pre-Fort Sumner—i.e., were constructed before 1868, that 204 date pre- and post-Fort Sumner, that 122 date post-Fort Sumner, and that 207 cannot be dated from the information or evidence at hand. Of those measuring more than 10 feet in diameter, the Navajos contend that 288 date pre-Fort Sumner, that

275 date pre- and post-Fort Sumner, that 224 date post-Fort Sumner, and that 88 cannot be dated.

Although counsel for the Navajos criticize Schroeder and Ellis and other expert witnesses for not making use of all data available to them in their analysis of the Navajo archaeological reports, they deliberately restrict their own analysis of such data in this proposed finding. Thus, at page 443 we find a Navajo analysis of hogans 10 feet or less in diameter. Although 1,159 such hogans are reported here, only 748 are given consideration in the analysis there set forth. And so the Navajos point out, "of 748 hogans measuring 10 feet or less in diameter, 626, or 84 per cent, date pre-Fort Sumner, 122, or 16 per cent, date post-Fort Sumner, a ratio of about 5 to 1, and sufficiently significant to be utilized as a criterion to indicate a pre-Fort Sumner date."

Why were only 748 hogans analyzed when 1,159 in the same category (10 feet or less in diameter) were reported? The answer is obvious; the percentage would not have been convincing.

However, defendant's experts do not concede that even 748 hogans in this size category can truly be dated as pre-Fort Sumner construction. The evidence recorded on the site sheets simply does not warrant such a determination. Therefore, let us examine some of the site sheet reports for the sites tabulated by the Navajos on pages 449 and 450 of this proposed finding.

At Site *N-LSJ-MC-M* (for site sheet see Nav. Ex. 520 B) three hogans are recorded, all 10 feet or less in diameter. The Navajo archaeologists conclude

that this is a Navajo site and that construction took place probably in the pre-Fort Sumner period. No tree ring dates are reported but the determination of when construction took place is made "on basis of structural type and abundance of pottery." The potsherds found here, however, are *Pinyon Utility*, a type of Navajo pottery manufactured from about 1800 A.D. up to the present. (Brugge, Nav. Ex. 557.) The Commission should refuse to accept such evidence as reliably dating construction at this site as pre-Fort Sumner, or any other definite period.

The next site in this same general area with hogans of 10 feet or less in diameter is *N-LSJ-MC-V*. (Nav. Ex. 520 B.) Here three hogans are reported but only one is said to have a floor diameter of less than 10 feet. No tree ring dates are reported but the site is dated "possibly pre-Ft. Sumner on basis of tradition and condition." This, in spite of the fact that hogans with floor diameters greater than 10 feet (and two such hogans are reported here) were generally considered to be representative of a post-Fort Sumner construction. Defendant refuses to accept this kind of evidence to establish a pre-Fort Sumner construction at this site.

The next site is *N-LSJ-MC-BB*. Here one hogan with a diameter of nine feet is reported. No tree ring dates are reported, but 10 sherds of *Navajo Polychrome* or *Navajo Painted* pottery are recorded. This type of pottery was manufactured from about 1750 A.D. to the present. (Brugge, Nav. Ex. 557.) Nevertheless, Correll dates the site as possibly pre-Fort Sumner "on the basis of structural type and

lithic and ceramic associations." Except for Correll, the Navajo expert witness, none of the experts who testified would accept such evidence as truly establishing a pre-Fort Sumner construction at this site.

The next site shown in the pre-Fort Sumner period is *N-LSJ-MC-KKK*. Here we find one hogan reported with a floor diameter of 10 feet. No pottery, no tree ring dates, and no artifacts of any kind are reported for the site. Nevertheless, the age determination is reported as pre-Fort Sumner (page 449 of this finding) but the site sheet says "occupied before guide was born—pre-1883." (Nav. Ex. 520 B.) This is not evidence proving that construction of that hogan took place prior to 1868.

At Site *N-LSJ-MC-PPP* we find some confusion as to the size of several of the hogans. Nevertheless, the age determination made is pre-Fort Sumner on the basis of the structural types found, the state of preservation, and nearness of ash heaps to the hogans. Eight sherds of *Pinyon Utility* pottery were found. This pottery dates from 1800 A.D. to the present. No tree ring dates were reported. This evidence does not prove a pre-Fort Sumner construction at this site.

Rather than review each and every site tabulated by the Navajos, we shall now turn to the next page (namely, page 450) and review some of the sites tabulated and lying within the Navajo-Hopi overlap area. And so, near the top of the page, we find a tabulation for the Navajo Mountain area. These site sheets are found in Navajo Exhibit 520 Q.

The first site tabulated with hogans 10 feet or less in diameter is *W-NM-NC-G*. Although five hogans

are reported for this site, the data recorded on the site sheet does not clearly establish the sizes of such hogans. Nevertheless, on the Navajo tabulation and on the site sheet report, a pre-Fort Sumner construction period is determined upon, although no tree ring date was reported by the tree ring laboratory for the many specimens submitted for analysis. There is nothing here to prove a pre-Fort Sumner construction.

At *W-NM-NC-M*, the next site tabulated, two hogans with diameters of 10 feet or less are reported. No pottery and no tree ring dates are recorded but the age determination made is pre-Fort Sumner "on basis of small size of hogan, nearness of ash heap, use of wood felled by burning and state of preservation." Defendant insists that this kind of evidence does not prove a pre-Fort Sumner construction at this site.

At *W-NM-NC-N*, the next site tabulated, two hogans under 10 feet in diameter are reported. Here a number of tree ring dates are reported—namely, 1804+ inc, 1788+ inc G, 1776+ inc G, 1788+ inc G, 1815 inc G, and 1807+ inc G. All of these dates come from specimens that were a part of Hogan #5 and represent fairly good evidence of construction late in the eighteenth century or early years of the nineteenth. Although the Navajo archaeologists do not seem to have had this tree ring data available when they determined upon a pre-Fort Sumner construction date for this site, the tree ring reports later received support their determination. Defendant agrees that this site does represent construction long before 1868.

Sites *W-NM-NC-O* and *W-NM-NC-Q* show one hogan on each site. Both sites are dated pre-Fort Sumner on the basis of one elderly informant's knowledge of the area. Only one tree ring date is reported—namely, 1818 inc G for *W-NM-NC-O*. More substantial evidence is required to establish pre-Fort Sumner construction at these sites.

Site *W-NM-NC-X* shows two hogans, one with a floor of about 10 feet and the other about 7 feet. No tree ring dates are reported and no other datable artifacts are recorded. The site is dated pre-Fort Sumner on the basis of wood felled by burning, nearness of ash dump to hogans, and tradition. The history reported on the site sheet gives strong indication that this was a flight site for the Navajos seeking to avoid capture and incarceration at Fort Sumner.

Moving down the tabulation sheet we come to the subarea of Upper Oraibi. Numerous sites are tabulated from Navajo Exhibit 520 W, an examination of which reveals the following:

A site *W-LLC-UO-C* one hogan is recorded. This has a floor diameter of 12 feet. Three tree ring dates are reported for the hogan—namely, 1833+G, 1835+G, and 1854+G. Although one thinks of a cluster of tree ring dates as more than two, yet defendant is certainly willing to admit that the data here submitted is more evidence to support petitioner's contention regarding this site than is present for most sites. Even so, however, the Navajo archaeologists can do no more than surmise that this

hogan *may* have been built about 1835 and repaired about 1854.

Site *W-LLC-UO-E* shows six hogans, all 10 feet or less in diameter. Only one tree ring date is reported—namely, 1744+. The Navajos date the site 1744 on the basis of that tree ring date for Hogan #2. As defendant clearly points out in defendant's requested finding 42 one tree ring date is never enough to date construction upon a site; and certainly a single "plus" date can never be relied upon to date such construction.

Site *W-LLC-UO-F* reveals five hogans. Once again only one tree ring date is reported for the site. On the basis of that single date (1779+) the Navajo archaeologists date the site 1779. This is wholly unjustified and unreliable dating.

Site *W-LLC-UO-G* reveals two hogans and one corral. No tree ring dates and no artifacts are reported. The site is dated pre-Fort Sumner on the basis of a contiguous hogan and corral and state of preservation. This is wholly unreliable dating for construction at the site. Dr. Ellis clearly points this out in Defendant's Exhibit E-54.

Site *W-LLC-UO-H* shows three hogans, all probably 10 feet or less in diameter. Only one tree ring date is reported—namely, 1809. This single, bare date is relied upon by the Navajo archaeologists to date construction at the site "about 1809." We repeat—this is wholly unjustified and unreliable dating.

Site *W-LLC-UO-O* shows two hogans, one with a floor diameter of 13 feet and the other with dimen-

sions not determinable. On the basis of two tree ring dates separated by almost a hundred years—namely, 1728 and 1817+G—the Navajo archaeologists date the site “about 1817.” This is not reliable dating.

Site *W-LLC-UO-P* shows two hogans, one with a floor diameter of 13 feet and the other 10 feet. No tree ring data is reported for the larger structure but a 1792+ date is reported for the base pole on the west side of the smaller hogan. On the basis of that single tree ring date the site is dated “about 1792.” Need we repeat that such dating is wholly unreliable and unjustified?

Site *W-LLC-UO-Q* reports one hogan with a tree ring date of 1795. The Navajo archaeologists neglected to date the site.

Site *W-LLC-UO-R* shows one hogan. Tree ring dates of 1622+G and 1804+ are reported for the hogan and a date of 1672+ for a sweathouse on the site. The determination made by the Navajo archaeologists is that the hogan was “built about 1804 on basis of tree ring dates.” The two dates are almost 200 years apart. Such dating is altogether unjustified.

Site *W-LLC-UO-S* reports one hogan with a contiguous corral. Because of this type of construction on the site the Navajo archaeologists have dated it pre-Fort Sumner. As Dr. Ellis points out in her analysis of such site reports this type of construction cannot be considered a reliable criterion to date such site either before or after the Fort Sumner period. (See Def. Ex. E-54.)

Site *W-LLC-UO-T* reports four hogans. Only one tree ring date was recorded—namely, 1816 for Hogan #1. On the basis of that lone date the Navajo archaeologists date the site “about 1816.” This is not reliable dating.

Site *W-LLC-UO-V* reports six hogans, all with a floor diameter of 10 feet or less. One tree ring date of 1809+ was obtained from Hogan #1 and an 1818+ date from Hogan #5. Based on that data alone the Navajo archaeologists date the site “about 1808-9.” Dating on such scant evidence cannot be justified.

Site *W-LLC-UO-X* reports five hogans. Three of the hogans had floor diameters of about 12 feet; the other two could not be determined. Potsherds of *Pinyon Utility* and one tree ring date of 1743+ are reported. On the basis of that date and the pottery the site is dated “18th & 19th centuries.” Since this pottery dates from 1800 to the present (Nav. Ex. 557) there is no justification for dating this site for any time period.

Site *W-LLC-UO-BB* shows two hogans. One tree ring date of 1815+G is reported and on the basis of that date the site is dated “about 1815.” As we have said before, one tree ring date never justifies dating any site.

Site *W-LLC-UO-EE* shows one hogan and a granary. No tree ring dates and no artifacts of any kind are reported. A Navajo informant, however, reported that his uncle lived here during the Fort Sumner period. Evidently this was a Navajo flight site.

The site is accordingly given a pre-Fort Sumner construction date.

Site *W-LLC-UO-FF* reports one hogan. Two tree ring dates of 1857 and 1857+G are reported. Although this is not much of a "cluster" and would not be relied upon by an archaeologist without other supporting evidence, it is superior to most of the evidence relied upon by petitioner to date a site.

Site *W-LLC-UO-GG* shows two hogans, one with a floor diameter of 12 feet and the other 15 feet. A few ancient potsherds (Anasazi) were found but not collected. No tree ring dates are recorded. On the basis of the state of preservation and structural details the site was dated "19th century, probably about Ft. Sumner period." Further observations noted on the site sheet report, however, are that timbers were felled by burning and that this indicates a pre-Fort Sumner occupation. Defendant does not believe that this evidence is sufficient to identify the probable time period of construction at this site.

Site *W-LLC-UO-II* shows one hogan. No tree ring dates are reported but some Anasazi potsherds were noted at the site. The Navajo archaeologists date the site pre-Fort Sumner on the basis of nearness of ash to the hogan, "use of a large boulder in the wall, state of preservation & tradition." Defendant says that such data does not reliably fix a time period of construction.

Site *W-LLC-UO-JJ* shows two hogans, one with a floor diameter of 10 feet and the other 8 feet. No artifacts and no tree ring dates are reported but the site is dated pre-Fort Sumner (1) on the basis that

the hogan was a modified forked pole hogan, (2) the state of preservation of the site, and (3) oral tradition to the effect that a Navajo lived here before Fort Sumner. If any of this evidence is reliable to date the site defendant would probably choose the oral tradition.

Site *W-LLC-UO-KK* shows five hogans, four with floor diameters of 10 feet or less and one with a diameter of 11 feet. One tree ring date is reported—namely, 1850 GB and on the basis of that single date the Navajo archaeologists have dated the site "about 1850." This is wholly unjustified.

Defendant has made no attempt to analyze all of the archaeological site sheet reports tabulated in this proposed finding but has only reviewed enough for the Commission to see how wholly unjustified and unreliable the Navajo dating of the archaeological sites reported in Navajo Exhibit 520 A-W has been. An analysis of all such site sheet reports was made by defendant's expert witnesses Schroeder and Ellis. Their conclusions are reported in Defendant's Exhibit S-806.

The same unreliable dating techniques pointed out above were adopted by the Navajo archaeologists in dating every site upon which a site sheet report was made. Since the dating of such sites was unreliable it necessarily follows that the criteria adopted as representing pre and post-Fort Sumner construction must also be unreliable insofar as such criteria reflect a probable date of construction.

Defendant has no objection to the historical facts related and referred to in this finding under the sub-

heading "Trade Material" (pages 479-492), but asserts that the evidence cited is of no help to the Commission for purposes of dating Navajo occupancy of the area claimed. Defendant objects to such general references herein as "Navajo country."

Defendant also respectfully disagrees with and objects to the Navajo conclusions set forth at the end of this proposed finding. As defendant has clearly pointed out, although the tree ring dates reported by the tree ring laboratory are accurate, the fault lies with the manner in which the Navajo archaeologists utilized this tree ring data. With but few exceptions such data was wholly insufficient to date any archaeological site included in the 23 volumes of Navajo Exhibit 520 A-W. Nevertheless, the Navajo archaeologists repeatedly dated such sites upon only one, or sometimes two or three widely separated tree ring dates. Not once (that we can recall) was a true cluster of dates reported for any site.

And not a single site could be accurately dated by the pottery that was found within the area claimed. As Mr. Brugge's report clearly shows (Nav. Ex. 557) certain pottery was manufactured by Navajos until about 1800 A.D. and other pottery was manufactured from 1800 to the present. Quite obviously the presence of any potsherds at a site cannot date use and occupancy of such site with any degree of accuracy.

As Dr. Ellis pointed out in her analysis of the typological features relied upon by the Navajo archaeologists not a single feature or criterion adopted by

Mr. Correll is an accurate or reliable indication of when construction probably took place at such sites.

#### NAVAJO FINDING 11

This finding is divided into three parts—namely, A, B and C.

Defendant has no objection to part "A" except to repeated use of such terms as "Navajo country," "their country," and "their own country" and to the implication that Navajo mobility establishes long and continued occupancy of all or most of the area claimed.

Defendant objects to the last paragraph of part B of this finding. (See p. 526.) Exclusive use and occupancy of an area by the Navajo Tribe does not necessarily follow because Navajo Indians may be familiar with particular locations and geographical features such as springs, buttes, and other landmarks in the area herein claimed.

Defendant objects to part "C." To describe the years from 1858 to 1868 as the "Navajo flight period," as defendant's expert witnesses have done in their testimony before the Commission, is fully justified by the events and manner of living by most of the Navajo Indians during that period. Such a descriptive phrase gives the Commission a good picture of what the Navajo Indians were experiencing during those years. Although the early 1860's undoubtedly represented the period of greatest flight, especially 1863 and 1864 when "Kit" Carson was in hot pursuit of all Navajos, the years before and after the early 1860's also included periods of Navajo flight because

of their many depredations. The Commission's attention is invited to defendant's requested finding 34 for a more detailed description of Navajo activities in this period.

NAVAJO FINDING 12

Defendant objects to this finding and particularly to the conclusion stated on page 639 that, prior to 1848 and during the early years of American sovereignty over this territory, all areas within the exterior boundaries of the Navajo claim, excepting those conceded by the Navajos to be exclusively Hopi, Acoma, Laguna, or Zuni, were exclusively used and occupied by Navajos and were subject to dominion and control by the Navajo Tribe. The evidence simply does not support such a finding.

Defendant does not deny that the Navajo Indians were and still are an agricultural people. They had small farms and gardens wherever they could plant and raise food for their subsistence. Like all other Indians in the Southwest, the Navajos also went on food gathering expeditions. Thus, they gathered various seeds, roots, berries, and other wild foods that grew in the country which is herein claimed. We do not take issue with petitioner as to whether or not the Navajos raised or used all of the food products named herein. Even if they did, this does not mean that Navajos exclusively used and occupied the territory where such products might be found.

And defendant certainly does not deny that the Navajos had large flocks of sheep, and many goats, cattle and horses. But this does not mean that they

exclusively used and occupied the areas where they herded and grazed those animals.

NAVAJO FINDING 13

No objection.

NAVAJO FINDING 14

Defendant objects to this finding and would suggest the following in place thereof.

Although it was the policy of the Spanish Government to protect the Indians in the use and possession of lands occupied and used by them, Spain at no time recognized that the Indians had "aboriginal title" to such lands in the legal sense in which that term is used in our courts today. (*Pueblo de Zia v. United States*, 11 Ind. Cl. Comm. 131, 133 (1962), reversed on other grounds, Court of Claims Appeal No. 9-62, April 17, 1964.) Furthermore, the Spanish Government never adopted the policy of purchasing the "Indian title," though clearly recognizing that the Indians had rights in the lands they occupied. The King of Spain claimed title to all lands within the American dominions but recognized the right of the Indians to use such tracts as were left in their possession. (*Zia* case, page 134.) Thus, the Spanish Government allowed the Indians to occupy and use so much of the Crown lands as they could and protected them against trespasses until the Crown might desire to terminate such use and occupancy. The possession and use of lands by the Indians while under Spanish sovereignty was at the will of the Spanish government and that government made grants of lands to Indians

and to non-Indians without regard to any so-called aboriginal rights of the Indians. (*Pueblo de Cochiti v. United States*, 7 Ind. Cl. Comm. 422, 423 (1959); *Pueblo de Isleta v. United States*, 7 Ind. Cl. Comm. 619, 620 (1959), aff'd 152 C. Cls. 866 (1961), cert. den. 368 U.S. 822 (1961).) No grant of land was ever made by Spain to either the Navajo Tribe or the Hopi Tribe.

When Mexico declared its independence and set up its own government, the Government of Mexico assumed ownership of all vacant lands formerly held by the Spanish Crown. Grants of land made by Spain were recognized by Mexico. No change in private property rights occurred as a result of the change in sovereignty from Spain to Mexico. Except where specifically changed by the new government the Mexican authorities were governed by the laws and decrees which had originally been promulgated by the Spanish Government. (*United States v. Knight's Admr.*, 1 Black 227, 242 (1861); *United States v. Vallejo*, 1 Black 541 (1861); *United States v. Percheman*, 7 Pet. 51 (1833); *Cochiti case*, p. 426; *Isleta case*, pp. 621-622; *Zia case*, pp. 132-133.)

The period of Mexican control over New Mexico was comparatively short when compared with the era of Spanish rule over this territory. The Plan of Iguala, adopted by the revolutionary government of Mexico February 24, 1821, declared that all the inhabitants of New Spain (Mexico) without distinction, whether Europeans, Africans, or Indians, were citizens of that monarchy, with the right to be employed in any post according to their merit and virtues and

that the person and property of every citizen would be respected by the Government. These principles were recognized in the Treaty of Cordova between Spain and Mexico August 24, 1821, and in the Mexican Declaration of Independence September 28, 1821. (*United States v. Ritchie*, 17 How. 525, 538 (1854); *Isleta case*, p. 621; *Zia case*, p. 133.)

The United States acquired sovereignty over the area in which we are presently interested by virtue of the Treaty of Guadalupe Hidalgo February 2, 1848. (9 Stat. 922.) Under the provisions of Articles VIII and IX of that treaty the United States agreed to respect and protect all property rights within the ceded area. (9 Stat. 929-930.) Thus, it became the duty of Congress to recognize and establish every title and right to property which Mexico recognized as good and valid before the cession. The change in sovereignty worked no change with respect to private rights and titles. (*Zia case*, p. 135; *Isleta case*, p. 622; *Ely's Admr. v. United States*, 171 U.S. 220, 223 (1898).) But neither the Navajo Tribe nor the Hopi Tribe ever received a grant of land from Mexico and had no legal rights in any of the lands herein claimed. It is only because of the policy of the United States to respect "original Indian title" that these petitioning tribes may have any claim subject to the jurisdiction of this Commission. As Mr. Justice Reed, speaking for the Supreme Court in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281-282 (1955) said:

No case in this Court has ever held that taking of Indian title or use by Congress required

compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat. 1050.

#### NAVAJO FINDING 15

Defendant objects to this finding since it is not supported by the evidence. Furthermore, the area described in the second paragraph of page 709 is greater than the area herein claimed by the Hopi Tribe. (See Hopi proposed finding 20.) The land involved in this proceeding (Dockets 196 and 229) is only the territory claimed by the Hopi Tribe, all of which, except the small area outlined in green on Nav. Ex. 511A, is also claimed by the Navajos. Lands outside the area claimed by the Hopis are not before the Commission in the consolidation of Dockets 196 and 229. Although the claim of the Hopi Tribe as originally pleaded extended eastward to the New Mexico-Arizona state line, the eastern boundary of the claim was moved some distance to the west as the trial proceeded so that the so-called Meriwether Treaty line of 1855 was stressed by counsel for the Hopi as the eastern boundary of Hopi aboriginal territory. Thus, Hopi Exhibit 2 has superimposed upon it the Meriwether line which extends in a north and south direction from the point where the Rio de Chelly (Chinle Creek) meets the San Juan to the mouth of the Zuni

River as it empties into the Little Colorado. (See Tr. 7243, 7287-7288.)

Defendant also objects to this finding insofar as it places all responsibility for Navajo raids and depredations upon the United States. This is truly an effort to reverse the true state of affairs. As defendant has clearly pointed out in defendant's requested findings 29 through 34 the Navajos were a troublesome lot long before the United States acquired sovereignty over this part of the country and they continued their raids and depredations after American sovereignty in spite of all efforts by the United States civil and military authorities to put an end to such conduct. The Navajo allegations set forth in this proposed finding are wholly without merit.

#### BRIEF

##### I. What the evidence proves

Defendant believes that the preponderance of the evidence before the Commission shows and establishes the following facts:

(a) Since approximately 1400 A.D. the Hopi Indians have gradually decreased their area of land use and occupation. Even before the Spanish contacted them, the Hopi had abandoned lands and territory formerly used by them. Thus, sometime between 1300 and 1500 A.D. the Hopi withdrew from the Moqui Butte country, between the Little Colorado and the southern boundary of the Hopi Executive Order Reservation;<sup>200</sup> the villages along the Little Colorado near Winslow were moved to the Hopi Mesas farther

<sup>200</sup> Colton, Tr. 7404 and Hopi Ex. 2.

north, to Oraibi, and into the Jeddito Valley. Even after the Spanish came this withdrawal by the Hopi continued and by 1700 they were only occupying the Mesas that they occupy today.<sup>207</sup>

(b) The Hopi abandoned many of their old shrines long before the United States acquired sovereignty over the Southwest. Thus, they abandoned their shrine on Navajo Mountain, north of the Executive Order Reservation, their shrines in the San Francisco Mountains and their shrines around Winslow in the Little Colorado Valley.<sup>208</sup>

(c) When American sovereignty attached to this part of the country in 1848, the Hopi exclusively used and occupied the lands on First, Second and Third Mesa where their villages were located and the country nearby that was farmed and where they grazed their flocks. This area is described in defendant's requested finding 22 and is also identified as Land Management District 6, as defined April 24, 1943. The so-called "outer" area, where they hunted, gathered wild food products, and maintained their religious shrines, was not exclusively used and occupied by them in 1848 or at the time the 1882 Executive Order Reservation was established. As the court pointed out in *Healing v. Jones* (Finding of Fact 44, Hopi Ex. 78, p. 220):

*Only a very few Hopis have ever resided, or grazed livestock, in that part of the reservation lying outside of [land management] district 6, as defined on April 24, 1943. During*

<sup>207</sup> Colton, Tr. 7404.

<sup>208</sup> Colton, Tr. 7405.

the years, however, they have continuously made some use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines, and hunting. [Emphasis ours.]

As the district court pointed out in its finding of fact 49:

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

Much of the territory herein claimed, therefore, it seems clear was not exclusively used by the Hopi Tribe at the time of American sovereignty in 1848 and in the years following, but was abandoned and gradually taken over in part by the Navajo Tribe. (Cf. *Caddo Tribe of Oklahoma v. United States*, 8 Ind. Cl. Comm. 354, 374 (1960).)

II. "Indian title" to lands may be lost but cannot be acquired after United States sovereignty attaches

The law is well settled that an Indian tribe cannot increase its claim to lands on the basis of "Indian title" after United States sovereignty attaches. (*Iowa Tribe of Kansas v. United States*, 6 Ind. Cl. Comm. 464, 502 (1958); *Pueblo de Isleta v. United States*, 7 Ind. Cl. Comm. 619, 622 (1959), aff'd 152 C. Cls. 866 (1961), cert. den. 368 U.S. 822 (1961); *Osage Nation v. United States*, 11 Ind. Cl. Comm. 733, 838 (1962).)

An Indian tribe, however, can lose "Indian title" to lands formerly used and occupied by abandoning such lands after United States sovereignty attaches. (*Quapaw Tribe v. United States*, 128 C. Cls. 45, 49 (1954); *Osage Nation v. United States*, *supra*.) The Court of Claims made this clear in the *Quapaw* case when it said:

Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land; and the United States cannot be required to pay therefor on the same basis as if it were a recognized treaty reservation. [Emphasis ours.]

And so defendant believes that the evidence shows that the Hopi Tribe abandoned a large part of the territory herein claimed before and after American sovereignty attached to this territory and that the primary reason for such abandonment was pressure from the Navajos as they moved westward into the country customarily used by the Hopi Indians.

The Navajo Tribe, however, moving into the Navajo-Hopi overlap area for the first time after United States sovereignty had attached thereto, could not require "Indian title" in the lands from which

they were instrumental in forcing the Hopis. As the Court of Claims pointed out in *Sac and Fox Tribe of Indians of Oklahoma v. United States*, 315 F. 2d 896 (C. Cls. 1963) at page 905:

The status of aboriginal ownership is not accorded to tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy "for a long time." This is as it should be—especially under the Indian Claims Commission Act which is the charter for doing justice between the Indians and the United States. Justice would not be vindicated if a tribe were able to claim a monetary award, on the ground that it was unfairly deprived by the Government of its original ownership of the property, where the lands were but recently seized by conquest from another tribe. The right of aboriginal title must have time to take root, transforming a conquered province into domestic territory. The Claims Commission Act, which seeks to repair damage caused by United States conquest of Indian lands, should not be turned into an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before.

The Navajos have set up an arbitrary "aboriginal period" which they have designated "pre-Fort Sumner." According to their archaeologist Correll this means *any time before 1868*. Thus, when he describes Navajo use and occupancy of a site as "pre-Fort Sumner" this could mean 1867, or it might mean 1767, or any other time before 1868. The designation "pre-Fort Sumner" tells the Commission

nothing to help it determine if Navajos exclusively used and occupied, or even were present, at the site so designated in 1848, the crucial date as of which their aboriginal rights must be determined. Thus, "pre-Fort Sumner" has no meaning and no relevancy in determining the Navajo aboriginal land claim.

### III. Exclusive use and occupancy essential to a claim of "Indian title"

As the Supreme Court clearly pointed out in *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941), "Indian title" is a question of fact to be determined as any other question of fact and the essential requirement to effectuate such title is exclusive use and occupancy from time immemorial of a definable territory.

As the district court said in *Healing v. Jones* (Finding of Fact 20, Hopi Ex. 78, p. 213):

Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, from long prior to the creation of the reservation in 1882 to July 22, 1958 [the date of the special jurisdictional Act]. The Navajo population in the reservation has steadily increased all of these years, growing from about three hundred in 1882 to about eighty-eight hundred in 1958. During the same period the Hopi population in the reservation increased from about eighteen hundred to something over thirty-two hundred.

The district court was not concerned with any aboriginal claim of the Hopi Tribe to lands outside the 1882 Executive Order Reservation. It made no find-

ing, therefore, as to Hopi use and occupancy of any lands beyond the borders of that reservation.

The evidence before this Commission, however, clearly shows that because of Navajo expansion westward, into the area herein claimed by the Hopi Tribe, much of the area outside the 1882 reservation, as well as land within that reservation, was used and occupied by Navajos. This Navajo use and occupancy started in the late 1850's when the so-called Navajo flight period had its beginning and continued or was resumed after the Navajo Reservation was established in 1868 and proved to be insufficient for the Navajo needs.

Defendant says, therefore, that the area exclusively used and occupied by the Hopi Tribe, and to which it may justly assert a claim on the basis of "Indian title," is limited to the area encompassed within the boundaries of Land Management District 6 as established April 24, 1943 and described in defendant's requested finding 22. It is this area that includes the Hopi villages, as well as the country nearby where they farmed and where they grazed their flocks. The lands beyond the boundaries of Land Management District 6 but within the Hopi reservation were gradually taken over by more and more Navajos as they expanded westward beyond their own reservation boundaries. It is this area within the 1882 Executive Order Reservation that the district court found was used and occupied by Navajos and Hopis and that both tribes have joint, undivided, and equal interests in and to that part of the reserva-

tion. (Conclusion of Law 14, *Healing v. Jones*, Hopi Ex. 78, p. 224.)

#### IV. Conclusion

In view of all the evidence before the Commission, therefore, defendant submits that when the Hopi Executive Order Reservation was established on or about December 16, 1882 the Hopi Tribe exclusively used and occupied substantially the same area so used and occupied in 1848, when United States sovereignty attached to this territory. That area is described in defendant's requested finding 22. The Navajo Tribe had not moved into the Navajo-Hopi overlap in 1848 and, therefore, could not acquire "Indian title" to lands in that area after American sovereignty attached thereto.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I hereby certify that on the — day of August 1964, copies of the foregoing *Defendant's Requested Findings of Fact, Objections to the Hopi and Navajo Tribes' Proposed Findings, and Brief* were mailed to the respective attorneys for the petitioners indicated in the cases below:

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