

FEB 23 1970

BEFORE THE INDIAN CLAIMS COMMISSION

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

BRIEF IN SUPPORT OF PETITIONER'S MOTION FOR
 FURTHER HEARING ON THE MATTER OF DATES OF
 TAKING BY THE DEFENDANT, AND PURSUANT TO
 RULE 25 C.F.R. §503.33 FOR A REHEARING AND
 FOR AMENDMENT OF FINDINGS

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SIPAULAVI, SHUNGOPAVI, ORAIBI, KYAKOTSMOVI, :
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I

MOTION FOR FURTHER HEARING ON THE MATTER
OF DATES OF TAKING BY THE DEFENDANT

On the 13th day of October 1958 the Commission entered its Order fixing time for hearing, specifically stating therein that the "hearing shall be confined to the issue of title." While the Clerk's calendar under date of March 10, 1960 set September 12, 1960 for the hearing on Dockets 229-196 on all issues, it is clear from the subsequent declaration of the Commission that this setting was on all issues pertaining to aboriginal title

only. The Order of the Commission closing the record and fixing the dates for filing proposed Findings of Fact and briefs under date of May 22, 1963 stated:

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

The Hopi Tribe in its opening statement presenting the petitioner's requested Findings of Fact on issues of title and liability contains the following paragraph:

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

It is significant to note that the petitioner, the Hopi Tribe, made no request for a finding on the specific dates of taking. Under such state of the record it is clear that counsel acted in good faith in omitting specific matters as to dates of taking upon the assumption that the Commission would make findings and conclusions in conformity with its previous orders restricting the proof to aboriginal title. Past practice lends credence to the assumption since this is exactly what the Commission did in the Goshute Shoshone case in which attorney for petitioner was of counsel, wherein the Commission held:

The Commission, however, finds that the United States, without payment of compensation, acquired, controlled, or treated these lands of the Goshute Tribe and the Western Shoshone group as public lands from date or dates long prior to this action to be hereinafter determined upon further proof unless the parties may agree upon a date.

Shoshone Nation, et al., v. United States, 11 Ind. Cl. Comm. 387, 416 (1962)

Under similar circumstances this Commission held that the Pueblo de Acoma Tribe:

lost the use of said lands because of the failure of defendant to protect petitioner's rights therein and, therefore, that defendant is liable to petitioner for the loss of said lands; and that under clause 4 of section 2 of the Indian Claims Commission Act petitioner is entitled to recover from defendant the fair market value of these lands, the date or dates of these losses and the value thereof to be determined at a future hearing before this Commission. (Emphasis added)

Pueblo de Acoma, et al. v. United States,
18 Ind. Cl. Comm. 154, 240 (1967)

Notwithstanding its previous order, this Commission in the case now before it determined that on December 22, 1882 the United States extinguished the Hopi Indian title without payment of compensation to those lands described in Finding of Fact 20 lying outside the boundaries of the 1882 Executive Order Reservation; and on June 2, 1937 the United States extinguished the Hopi title to 1,868,364 acres of land in the 1882 Executive Order Reservation lying outside the boundaries of "land management district 6." Facts pertaining to dates of taking that were in the possession of petitioner but withheld by reason of the court's order do not properly fall under the category of newly discovered evidence, but they are nevertheless facts pertinent to further issues of this case beyond aboriginal title. While there is no specific rule of this Commission covering this unique situation, findings upon untried issues are so manifestly unfair as to require correction by this Commission.

II

MOTION FOR REHEARING AND FOR AMENDMENT OF FINDINGS

In support of its motion for a rehearing and for amendment to findings

of fact pursuant to Rule 25 C.F.R. §503.33, petitioner, the Hopi Indian Tribe, assigned numerous errors of fact and errors of law, both in Docket No. 196 and Docket No. 229. Each assignment has a material and relevant bearing upon one of three fundamental determinations by the Commission. Those three determinations, which are hereinafter set out, constitute the basis for petitioner's motion for a rehearing. Each error of fact and law as set forth in petitioner's motion will be discussed with specificity under the erroneous determination to which it is applicable.

Determination I

The Commission erroneously held that the Executive Order of December 16, 1882 extinguished the Hopi Indian title to those lands described in Finding of Fact 20, which were outside the boundaries described in said executive order. (Error of Law 1, Error of Fact 6)

Petitioner cites as Error of Fact 4 the Commission's statement found in Finding 8 at page 295 as follows:

The Hopi villages that had been located along the Little Colorado near Winslow were moved on to the Hopi mesas and further north to Oraibi, and into the Jeddito Valley, these locations being well within the subject tract and the confines of the 1882 Hopi Executive Order Reservation.
(Emphasis added) (Error of Fact 4)

Moencopi was established between 1400 and 1600 A.D. (Ex. 15 [Hopi]) and it is not inside the Executive Order Reservation of 1882. There should be no controversy regarding the location of Moencopi since that village still exists. Dr. Harold S. Colton, former Director of the Museum of Northern Arizona at Flagstaff, in his article "Report on Hopi Boundary" (Ex. 15 [Hopi]) stated:

Outside of the executive order Moqui Reservation of

1882, there has lived, for a long period, a group of Hopi at Moenkopi, forty miles northwest of Hotevilla. Archaeologists recognize that Hopi were living there in a permanent village between 1400 and 1600 A.D. the ruins of this pueblo lie on the mesa east of the present village. (Page 1)

1. Hopi have been living in the pueblo at Moencopi continuously since the 1870s; they use the springs for irrigation and have their fields below the pueblo and in Pasture Canyon. They graze their flocks on both sides of the Moenkopi Wash. (Page 3)

Superintendent George W. Leihy, in 1865, reported to the Commissioner of Indian Affairs that the Moencopi Indians living on a reservation still maintain their friendly relations with the whites and are even assisting the military in their operations against the Apache (Ex. 38 [Hopi] p. 2).

On October 21, 1872 the journal of Walter Clement Powell indicates that the party visited the buffalo land lying within the Moencopi Wash. A footnote to the journal indicates that the party visited Moencopi Village on its return (Ex. 41 [Hopi] p. 1).

A report of Gordon Mac Gregor, anthropologist, to the Commissioner of Indian Affairs, John Collier, on August 6, 1938 gave a complete account of the history of Moencopi and the Moencopi lands, describing the Moencopi claims outside of the Executive Order Reservation (Ex. 55 [Hopi]).

There is other evidence in the record as to the location of Moencopi and the fact that it is a permanent village of Hopi Indians, but since there is no evidence to the contrary, perhaps sufficient references have been cited to illustrate that when the Executive Order Reservation was established in 1882, there were Hopis living outside of that area. Yet the court in its opinion at page 284 stated:

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

The Commission is clearly mistaken in this regard since the Village of Moencopi was not only a permanent Hopi village, but had been in existence for as far back as possibly the year 1400 (Ex. 15 [Hopi] p. 1).

The Executive Order Reservation of December 16, 1882 was established for the following purposes:

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

(Ex. 78, p. 212, Finding 16)

It was not a purpose in establishing the reservation to confine the Hopi Indians within that area and no steps were taken to move the Hopis or to request their settling within the 1882 reservation. The Hopi Indians neither relinquished their claim to lands outside the Executive Order Reservation nor voluntarily withdrew therefrom.

Hopi Indian title could only be terminated "by Congressional enactment, valid administrative action, or abandonment." Healing v. Jones, 210 F. Supp. 125, 175 (1962). Since this Commission has held that the Hopi title was extinguished outside of the Executive Order Reservation by Executive Order, we will proceed to consider whether in fact the Hopi interest outside the Executive Order Reservation was extinguished or terminated by valid administrative action.

Originally, reservations for Indians were created by treaties.

In 1871, however, Congress prohibited further use of the treaty power in Indian affairs, and the President, assuming the function formerly exercised by Congress, thereafter set aside twenty-three million acres of the public domain by the executive order for the use and occupancy of Indian tribes.

(Note: Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right: 69 Yale L.J. 627, 628 (1960))

Since there did not exist any specific, statutory authority for this presidential power, the practice of establishing Indian reservations by executive order has been said to rest on an "uncertain legislative foundation."

United States Department of Interior, Federal Indian Law 613 (1958).

In fact, so uncertain was the legislative foundation for the exercising of the power by the executive that the Attorney General in upholding its legality in an opinion rendered in 1882, did so chiefly on the basis that the practice had been followed for many years and Congress had never objected. Id. at 614.

Perhaps the questionable basis of the executive order reservation explains why the practice was eventually terminated by Congress. Act of June 30, 1919, §27, 41 Stat. 3, 34. As will be analyzed further, this historical background may well be the reason why the courts have consistently required something in addition to an executive order creating a reservation before finding a taking of aboriginal Indian title.

An important and significant rule of interpretation in all Indian cases is that ambiguous meanings must be construed in the Indians' best interests. This rule was first enunciated by the Supreme Court in Choate v. Trapp, 244 U.S. 665, 675 (1912), when it stated that the interpretations of vague writings ". . . are to be resolved in favor of a weak and defenseless

people, who are wards of the nation, and dependent wholly upon its protection and good faith." This policy has been repeatedly acknowledged by the federal courts. Squire v. Capoeman, 331 U.S. 1, 6-7 (1956). Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). Assiniboine and Sioux Indians v. Nordwick, 378 F.2d 426, 430 (9th Cir. 1968). Haley v. Seaton, 281 F.2d 720, 623 (D.C. Cir. 1960). Undoubtedly, this rule has also contributed to courts requiring specific acts and authority to warrant extinguishment of Indian aboriginal title.

The decisions of the Indian Claims Commission offer the most lucid analysis of extinguishment of Indian aboriginal title to land by executive orders. The Commission has apparently felt that an executive order, per se, does not constitute a taking of Indian title. In Coeur d'Alene Indians v. United States, 6 Ind. Cl. Comm. 1, 42 (1957), the Commission rejected the executive order as the date of taking, remarking:

[T]he Indians continually sought a council with representatives of the United States to discuss their claim to compensation for their lands outside of the reservation and officials of the United States realized that the Indian title to said lands had never been extinguished.
(Emphasis added) Id.

This conclusion is further supported in the decision of Spokane Indians v. United States, 9 Ind. Cl. Comm. 236 (1961). The Commission found that because the Indians had never moved onto the Colville Reservation, created by executive order, a taking of Indian title did not occur. There was no evidence that any Spokane Indians ever moved onto the reservation before 1887. Id. at 272. The Commission stated:

Both sites [of the reservation] were outside Spokane Territory and the Spokane Indians refused to leave their homes, fisheries and root grounds or sever tribal relations

to go upon it, or to become citizens and take out individual homesteads or land claims. . . . Many of the few individual Spokanes who did attempt to establish claims were ejected from their land by whites. Id. at 259.

A primary question, as the decisions below will indicate, is whether the particular Indian tribe has accepted the reservation by moving onto it, thereby extinguishing its aboriginal title to land outside of the reservation.

In Snake or Paiute Indians v. United States, 4 Ind. Cl. Comm. 571a (1956), the Commission found the Indians had never ceded or relinquished their aboriginal title even though a reservation had been created by an executive order. The Commission held that because the Indians had not moved onto the Malheur Reservation when it was established, no taking resulted until 1879 when the government forced their removal:

The petitioner bands or tribe of Snake or Piute Indians . . . were deprived of their original Indian use and occupancy title to [their lands] in January 1879 by action of the United States in forcibly removing them from said lands to the Yakima Reservation in Washington and restoring such lands to the public domain without their consent and without the payment of compensation therefor. (Emphasis added) Id. at 607.

The Commission also emphasized that the removal, whether intended to be permanent or not, was permanent in fact, since the Indians were never permitted to return to their aboriginal land. This forced removal of the Indians to the reservation was sufficient to extinguish the Indian title. Id. at 625. See Shoshone Indians v. United States, 299 U.S. 476, 495 (1936) ("Permanent in fact" occupancy of reservation held sufficient to extinguish aboriginal title.)

In Uintah Ute Indians v. United States, 5 Ind. Cl. Comm. 1 (1957),

Red Lake Band, et al. v. U.S., 7 Ind. Cl. Co
(1959); C. W. McGhee v. U.S., 122 Ct. Cls. 3
Potawatomi Indians v. U.S., 27 Ct. Cls. 403,
Potawatomi Indians of Michigan and Indiana v
148 U.S. 691, 705; Iowa Tribe of Kansas v. U
Ind. Cl. Comm. 464, 501-502 (1958)
SRP002170

Warm Springs v. U.S. 8 Ind. Cl. Comm 557, 60
(1960)

the Commission, in rejecting the date of the executive order which created the Uintah Valley Reservation as the date of taking, referred to "concentration" of the Indians to affect extinguishment of title:

The reports of the Superintendent of Indian Affairs and agents for the next ten to fifteen years deal with the efforts to get the Indians throughout the Utah area concentrated on the reservation. It was very much of a seesaw affair. Indians came and went whenever they saw fit and at one period nearly all of them left the reservation and it took considerable effort to get them back without a fight. (Emphasis added) Id.

In addition, because the United States had failed to adequately provide for the Indians' needs once they had been placed on the reservation, many left to avoid starving. Id. at 30-1. Even though the Commission found that the reservation had been established by executive order in 1861, confirmed by Act of Congress in 1865, and reserved to the Indians by the Treaty of 1865, nevertheless, it also found that the Indians had not ceded their aboriginal title to their lands and the government had not taken their title, except as provided in the unratified Spanish Fork Treaty of 1865. Id. at 30, 40. Where the Indians in Snake or Paiute Indians v. United States, supra, were forcibly removed to the reservation, the Uintah Utes were not even encouraged to move. Id. at 10. The Indians continued hunting and gathering in their aboriginal land area after the 1861 executive order. Id.

The classic illustration of forced removal of Indians constituting extinguishment of Indian title stems from the military campaigns against the Indians in the early 1870. In Yavapai Indians v. United States, 15 Ind. Cl. Comm. 68 (1965), the Commission found the date of taking to be when the Yavapai Indians had been defeated and removed to the reservation, rather than the date of the executive order which created the reservation. The

military campaign against the Yavapai was the instrumentality by which extinguishment was accomplished:

[H]ostilities continued for a number of years until the Yavapai were completely defeated by General Crook in the fall and winter of 1872-73. The great bulk of all three groups of Yavapai were then placed on the Camp Verde Reservation which had been established by executive order dated November 9, 1871 where they remained until March 1875 when they were removed to the San Carlos Reservation in Eastern Arizona. Id. at 102-3.

The Commission found the date of taking to be May 1, 1873 when the Yavapai, numbering about 2,000, were forcibly removed to the Camp Verde Reservation. Id. at 80, 114. This particular date of extinguishment was also recognized and adopted in San Carlos Apache Indians v. United States, 21 Ind. Cl. Comm. 119 (1949), when General Crook's campaign against the Indians of Central Arizona concluded. Id. at 195. The date of the executive order which created the White Mountain Indian Reservation was rejected by the Commission as the date of taking. Id. The Commission also held the identical date of taking in Northern Pomo Apache Indians v. United States, 21 Ind. Cl. Comm. 223 (1951). The Commission stated:

Unlike some of the Western Apache, the Northern Pomo along with the Yavapai utterly refused to go on to the reservations provided for them. It was only after a vigorous military campaign by General Crook during the fall and winter of 1872-1873 that the Northern Pomo were finally forced to the Camp Verde Reservation. By May 1873 virtually all the Northern Pomos had been placed on the Camp Verde Reservation, and in this number and at this time were deprived of their aboriginal lands outside the reservation. (Emphasis added) Id. at 223.

Two other cases present a similar situation with other military campaigns against the Indians. In Coconino Apache Indians v. United States, 17 Ind. Cl. Comm. 318 (1951), the Commission found that the executive orders of 1871, 1876 and 1881 were merely "abortive attempts" to provide the desirable

with a permanent reservation. Id. at 415. The date of taking was found to be the date the United States began the removal of the Jicarilla to Fort Stanton. Id. at 420-21.

The move carried out by the military . . . resulted in a sufficient disruption of their way of life and interference with their overall use and occupancy of their lands to constitute an extinguishment of their title thereto. Id. at 421.

The Commission cited Snake or Paiute Indians v. United States, supra, as controlling precedent. Id. at 418. This "forced removal" aspect of extinguishment of title was further adopted in Fort Sill Apache Indians v. United States, 19 Ind. Cl. Comm. 212 (1968), where the court stated:

The Apaches, though forcibly and temporarily ejected by actions of the United States from portions of their residence from time to time . . . never ceased to proclaim their right of ownership. Furthermore, they employed every means available to regain possession and to oust the trespasser. They engaged in no act of relinquishment or abandonment. They were temporarily repulsed, defeated, deprived and ousted, but the fight continued with ferocity and perseverance until further effort became impossible - with the final conquest and complete surrender under Geronimo on September 4, 1886. Until that event the United States was not completely or permanently in continuous, open, notorious possession of these lands. From that date further resistance by the Apaches ended. (Emphasis added) Id. at 263-64.

The date of taking was confirmed in Fort Sill Apache Indians v. United States, 22 Ind. Cl. Comm. 527, 528-29 (1970).

In the case at bar it should be noted that the Hopi Indians have never been contained within the 1882 Reservation - even to this day, and the United States has never attempted to move the Hopi Indians onto that reservation.

In at least three cases, the date of the executive order corresponded with the date of forced removal. In Quechan Indians v. United States, 8 Ind.

Cl. Comm. 111 (1959), the Commission held that the creation of a reservation for the Yuma Indians, coupled with the removal of the tribe onto the reservation, was a relinquishment as of that date of tribal rights in the lands outside the reserve. Id. at 136-37, 148. The removal coincided with the creation of the reservation by the executive order. Likewise, in Confederated Tribes of the Colville Reservation v. United States, 4 Ind. Cl. Comm. 151, 186 (1956), the Commission found that the locating of various tribes on the reservation, even though it required many years, was sufficient to constitute extinguishment of aboriginal title. The date of the executive order which created the Colville Reservation was held to be the date of taking, but the acceptance by the Indians of the reservation was the primary factor. Id. In Mescalero Apache Indians v. United States, 17 Ind. Cl. Comm. 100 (1966), the Commission found that the date of the executive order which created the Fort Stanton Indian Reservation was the date of taking because the Indians were on the reservation when it was established and were kept there after the signing of the executive order. The Commission's record indicated that following the 1873 executive order the Mescalero Apaches continuously attempted to leave the reservation, but were eventually returned either by persuasion or force. Id. at 118-19.

The Court of Claims has decided only two cases which deal with executive order reservations. However, both are cases involving a treaty approved by Congress, coupled with the executive order "administering" the intent of the treaty in terms of reservation establishment. The Department of the Interior publication states such a "coupling" to be of "unquestioned validity." Federal Indian Law, supra at 622. In any case, since both cases involve treaties, they are easily distinguished from the present situation.

In Quinaielt Indians v. United States, 102 Ct. Cl. 822 (1943), the Court of Claims found that the executive order formally designated the Quinaielt Reservation, which was provided for by the Treaty of 1859 between the United States and the Quinaielt Tribe. However, the court did not examine the question of date of taking.

Similarly, in Mole Lake Band of Chippewa Indians v. United States, 134 Ct. Cl. 478 (1956), certain large land areas had been ceded to the United States by the Chippewa Indians. In an effort to speed up the Chippewa movement to their lands west of the Mississippi, the following occurred:

On February 6, 1850, President Zachary Taylor issued an executive order revoking the privilege of the Indians to occupy and hunt and fish and gather wild rice on, the lands ceded by the Chippewas to the United States by the treaties of 1837 and 1842. Id. at 481.

However, the court did not discuss the issue of whether and when a taking of Indian aboriginal title to land occurred. There are other distinguishable cases indicating either that removal is unnecessary or that partial removal may be sufficient to extinguish Indian title. Shoshone v. United States, 11 Ind. Cl. Comm. 387 (1962); Havasupai Tribe and Navajo Tribe v. United States, 20 Ind. Cl. Comm. 210 (1968); Papago Indians v. United States, 21 Ind. Cl. Comm. 403 (1969). It is interesting to note, however, that the executive order which created the San Xavier del Bac Reservation and the Gila Bend Reservation for the Papagos did not constitute a taking. Papago Indians v. United States, 19 Ind. Cl. Comm. 394, 433 (1968). In Mohave Indians v. United States, 7 Ind. Cl. Comm. 219 (1959), a reservation was created by an act of Congress, rather than by an executive order. In that

case it was held that the setting aside of the reservation and the acceptance thereof by removal thereto of many of the Mohave Indians amounted to a relinquishment of the land held by Indian title.

The subject of extinguishment of aboriginal land title has been before the Supreme Court in the landmark case of United States v. Santa Fe Pacific Railroad, supra, which involved a suit by the government to enjoin the railroad from interfering with the possession and occupancy by the Indians of certain land in Northwestern Arizona. Even though the Colorado River Reservation was created by an act of Congress, the Supreme Court refused to find an extinguishment of Indian aboriginal title. Id. at 361, 353-54.

The court stated that it could not find any indication that Congress intended to extinguish the Indians' claims, nor did it conclude either that the Walapais intended to abandon its aboriginal lands if Congress would create a reservation, or that the Indians had accepted Congress' offer for a reservation. Id. The court concluded that the forcible removal to the reservation of the Walapais, in light of the fact that they left it in a body the following year was ". . . nothing more than an abortive attempt to solve a perplexing problem." Id. at 355. This analysis would seem to follow the many decisions of the Indian Claims Commission. However, the court was construing the parties' claims in light of the act under which the railroad's claimed rights derived, Section 2 of the Act of July 27, 1866, which provided:

The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the Act.
(Emphasis added)

It becomes obvious the court was examining the record for indication of the Indians' desire to voluntarily cede their lands to the railroad. The court recited: "Certainly a forced abandonment of their ancestral home was not a 'voluntary cession.'" Id. at 356.

The situation, however, changed in 1881. Following a Walapai proposal made by a majority of the tribe asking that a reservation be set aside for them because of the encroaching white man, President Arthur signed an executive order creating the Walapai Indian Reservation. Id. at 357.

The court discussed the situation as it developed:

There was an indication that the Indians were satisfied with the proposed reservation. A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattlemen used it for grazing and for some years the Walapais received little benefit from it. But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claim to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of §2 of the Act of July 27, 1866. Id. at 357-58.

Therefore, the 1883 executive order establishing the Walapai Reservation must be read in light of the 1866 Congressional act which specifically required that the title to Indian aboriginal land be extinguished " . . . only by [the Indians'] voluntary cession." The court's analysis was directed to this requirement in the 1866 act. Consequently this case is distinguishable from the present situation because it involves extinguishment of aboriginal title by executive order according to special statutory authority.

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However, an examination of the case leads one to conclude that the creation of the executive order reservation did not constitute extinguishment

by itself. Rather, the creation of the reservation at the Indians' request and the existence of the 1866 act which required their consent to extinguishment, coupled with the executive order, extinguished the Indians' aboriginal title. It is reasonable to conclude that there is no per se taking by executive order.

The primary factor evidenced in the decisions of the Indian Claims Commission is whether or not the Indians have accepted the reservation by moving onto it, either voluntarily or by force, and thereby extinguishing their aboriginal title to the lands outside of the reservation. If the Indians move onto the reservation, a taking of the aboriginal title results; if they do not move onto the reservation, the aboriginal title remains in the Indians.

In Dr. Colton's treatise (Ex. 15 [Hopi] p. 3) illustrations of Hopi use since 1882 outside the Executive Order Reservation can be found in the following:

2. After the abandonment of Moenave by the Mormons, Frank Tewanemtewa and Numkina Bros. made abortive efforts to plant fields, using the old irrigation works. They were run out by the Navajos.

3. Below Red Lake (Tonalea), 1/4 mile south of Trading Post, Numkina Brothers, Poli, Joseph Talas, and George Neveistewa have farms (Honani). Moenkopi procures its wood from the hills east of Red Lake and north of the Dinnebito, and north of Tuba City (J.S).

4. On and about the mesas between Moenkopi and the Dinnebito, Numkina reports twenty people now having fields. (Honani).

5. In the Little Colorado, Hopi run their cattle with some Navajo cattle between Cameron and Howell Mesa. They water at the Little Colorado. (Numkina and Honani).

6. 14 miles north of Tuba, west of White Mesa, since 1914, two bands of Hopi sheep have been run. (Nunkina and Honani).

7. In 1908 or 1909, Big Phillip ran sheep in the region of Lower Moenkopi Dam. (Honani).

The record will not justify the assumption that Hopi Indians either relinquished their claims to land outside the Executive Order Reservation or voluntarily withdrew therefrom. If petitioner is not denied the right to introduce its proof on dates of taking, the Hopi claims to the area outside the Executive Order Reservation of 1882, and the defendant's acknowledgment of continued Hopi rights can be adequately established.

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

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

It is not easily conceived that the Commission would hold it to be "fair and honorable dealings" to take the Hopi title at the values of 1882 and then return only an interest with the Navajos at 1934 values, thus probably preventing any money judgment for the Hopi Tribe.

Determination II

The Commission erroneously held that on June 2, 1937, when the grazing regulations were approved, being the beginning of the implied settlement of the Navajo Tribe on the Executive Order Reservation of December 16, 1882 as determined in the case of Healing v. Jones, 210 F. Supp. 125 (1962), aff'd 373 U.S. 758 (1963), Hopi Indian title to all land in said Executive Order Reservation lying outside of "land management district 6" was extinguished. (Error of Law 2, Error of Fact 10.)

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

Hopi leaders in effect told officials of the Office of Indian Affairs that the Hopis continued to claim the 1882 Reservation lands outside of district 6.

Perhaps these Hopi claims subsequent to the settlement of Navajos would have been even more persistent and vehement had it not been for the constant assurance given to them by government officials, that their exclusion from all but district 6 was not intended to prejudice the merits of the Hopi claims. Healing v. Jones, Ex. 78 (Hopi) p. 98.

The Hopi claim, so expressed in 1945, and the government's constant assurances that its administrative action after settlement of the Navajos did not prejudice the merits of the Hopi claims, negate the assumption of a taking as found by the Commission.

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

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

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

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

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

Healing v. Jones, Ex. 78 (Hopi) p. 2.

In the Act of July 22, 1958 Congress declared:

That lands described in the Executive Order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order.

72 Stat. 402 (1958).

The United States, the defendant in this action and a defendant in Healing v.

Jones, did not contend that Navajos had been settled upon the reservation, but acting through the Attorney General, interposed the defense,

. . . That the United States is a stakeholder with respect to the lands involved in this suit. For this reason, it was alleged, the Attorney General would take no position as between the claims of the other parties and would assert no claim on behalf of any other Indian or Indian Tribe. Throughout the procedures, after denial of its first defense, the Attorney General, represented by the office of the United States Attorney in Phoenix, Arizona has, consistent with its position as stakeholder, assumed the passive role of observer.

Healing v. Jones, Ex. 78 (Hopi) p. 7.

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

The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy, for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943 has at all times been illegal.

Healing v. Jones, Ex. 78 (Hopi) p. 224,
Conclusions of Law 12.

It could certainly not serve the ends of justice within the spirit of the Indian Claims Commission Act to hold that the territory in the Executive Order Reservation outside of district 6 was taken from the Hopis in 1937 and

then a one-half interest as an offset returned to them in 1962.

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

Error of Fact 9 contests Finding of Fact 24 at page 309 wherein it was stated:

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

(Emphasis added)

This finding by the Commission is erroneous with respect to the Village of Moencopi, which was, during all periods involved, being used by the Hopi Indians and still continues to be used by the Hopi Indians. Petitioner is in a position to prove, if it is not deprived of that opportunity with reference to dates of taking, that the lands outside of district 6 and within the Executive Order Reservation were used for grazing livestock, cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines and hunting. And further, the petitioner can show that Hopi Indians were granted permits to graze in land management district 3,

both within and without the Executive Order Reservation of December 16, 1882, and that those permits are still in existence and that the Hopis are still using the grazing privileges thus accorded to them. The evidence relied upon to support the position of petitioner is fully set out in the Motion at page 15. Actual areas for the gathering of wood were set up outside of district 6 where the Hopis were to obtain their fuel. Farms were tilled by the Hopi Indians outside of district 6 and within the Executive Order Reservation after 1937 and until the present time.

In summary Healing v. Jones, supra, determined that there was no abandonment by the Hopi Tribe in the area beyond district 6 and within the Executive Order Reservation. It is not claimed that Indian title was terminated by any Congressional enactment. Under the circumstances reiterated above, particularly including the finding of the court that the excluding of any Hopis upon any of the land within the Executive Order Reservation was at all times illegal, how can it be held that any valid administrative action had terminated the Hopi title prior to the time the court determined the Hopis had lost a one-half interest?

Determination III

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

Errors of Law 4 and 5 are subsidiary to the position of the Hopi Tribe that it had Indian title to lands beyond those described in Finding of Fact 20. Those errors will, therefore, be discussed under this heading.

A. The Commission erroneously failed to determine the Hopi aboriginal title as of July 4, 1848, the day the United States acquired jurisdiction and sovereignty over the lands involved in this action, notwithstanding the fact that the defendant during the same period of time exerted military pressure upon the Navajo Indians, driving them into Hopi aboriginal lands, and at the same time failing and neglecting to protect the interests of the Hopi Indians in their said aboriginal lands. (Error of Law 4, Error of Fact 8).

It is the contention of petitioner that when the United States drove Navajo Indians into Hopi territory it had an obligation to protect the weaker and outnumbered Hopi Indians from their natural enemy. The Court of Claims has held that if an Indian claimant can show that the United States forces or its officials drove the claimant tribe from its lands to which it held Indian title, the tribe has established a claim against the United States under the "fair and honorable dealing" clause 5 of 25 U.S.C.A. §70a. Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967). The Court of Claims has further held that whether or not in a particular case the United States has the technical status of a guardian or a fiduciary toward an Indian tribe, it does have an obligation greater than that of a non-participating bystander, and the relationship is a special one and from it stems a special responsibility. The measure of accountability depending, however, upon the whole complex of factors and elements which must be taken into consideration. Oneida Tribe of Indians of Wisconsin v. United States, 165 Ct. Cl. 487, Cert. Denied 379 U.S. 946, (1964). There is very little difference between driving the Hopi Indians from their lands and driving Navajo Indians into their lands to raid, loot, overrun the springs and take possession of the soil. The relief brought to the citizens of New Mexico by United States

military forces did not abate the Navajo problem, it simply transferred the problem from New Mexico to the Hopi country.

The facts upon which petitioner relies are not disputed by the government. Their own exhibit G-205, p. 10, states that the United States Government commenced exerting military pressure against the Navajo in the winter of 1846 under Col. Alexander Doniphan. Between then and the summer of 1849, no less than five expeditions of American troops took the field against the Navajo. This is also shown by government exhibits G-22, G-23 and G-24. Between 1850 and 1860 large numbers of the Navajos pursued by the United States military forces entered what was then Hopi territory, being forced into areas they had not previously occupied. These facts are also established by government exhibits which are listed under Error of Fact 1 in petitioner's Motion. Government exhibit E-51b in support of government witness Dr. Ellis stated that some of the Navajos took heed from the repeated warnings of reprisals from United States Government and in about 1860 began a push westward into the peripheral areas never before occupied. Government exhibit R-150, p. 3, supporting the testimony of government witness Dr. Reeve stated that the Navajo under military pressure from the American Army in the 1860's fled far to the west of the Hopi Villages; but that region was not their customary homesite nor was it needed by them. Many other exhibits and the testimony of witnesses substantiating these the facts upon which we rely are set out under Error of Fact 1, p. 3, of petitioner's Motion. The Hopi Indians sensed the responsibility of the United States Government to whom they had become subject just two years

before when in October 1850 and August of 1951 Hopi deputations visited Agent Calhoun at Santa Fe to seek aid against the Navajos whose depredations had reduced them to great poverty. (See authorities cited under Error of Fact 2 of petitioner's Motion.)

When the Commission determined aboriginal possession of the Hopi people as of 1882, it ignored the series of events to which we have made reference and the responsibility of the United States for the shrinking of Hopi country.

B. Natural boundaries should be accepted as aboriginal boundaries.

The Puyallup Tribe of Indians v. United States, 17 Ind. C. Comm. 1, 17-20 (1966), employed the reasonable hypothesis that natural boundaries establish aboriginal boundaries because evidence indicates the Indians do not go beyond, but merely go to the edge of rugged country. The Nez Perce Tribe of Indians v. United States, 18 Ind. Cl. Comm. 1, 130 (1967), followed this same theory, accepting a natural boundary as the aboriginal boundary. The Hopis were using as their country as of 1848 land south of the San Juan River from the east where their contact was with the Navajo Tribe to the west where the San Juan River joins the Colorado River. At the western boundary, they used up to the edge of the Colorado River from the San Juan to the Little Colorado. On the south, the Little Colorado and the Zuni River form the boundary. The western boundary of the Hopi aboriginal land as found by the Commission is neither a natural boundary nor is it supported by the evidence in the case. The land outside of the area described in Finding 20 was not solely based upon sustained "spiritual attachment or repose" as inferred in the

opinion of the Commission at p. 286, but was based upon exclusive typical Indian use, including shrines, grazing, agriculture, use of timber and plants, hunting, trading and trails, and the collection of salt, materials and miscellaneous items to the natural boundaries on the west. The same may be said of the territory lying north of aboriginal lands as found by the Commission to the San Juan River and, on the south, to the Little Colorado's junction with the Zuni River. Dr. Ellis, a government witness, testified at page 7567 of the transcript:

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

Dr. Eggan, witness for the petitioner, testified at page 7407 of the Transcript:

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

The evidence upon which petitioner relies on this matter is given in considerable detail under Error of Fact 7 in petitioner's Motion pages 8 to 14.

In 1958 this Commission held in the Quinaielt v. United States cases 7 Ind. Cl. Comm. 1, 29 and 7 Ind. Cl. Comm. 31, 60:

[Use of land for fishing, going after roots and berries and traveling the area for the purpose of hunting] constitutes use and occupancy in the sense of "Indian title."

The Commission further held in Samish v. United States, 6 Ind. Cl. Comm. 159, 173 (1958),

Culture and economic life of the tribe must be considered
[in determining aboriginal title.]

The Commission in California v. United States, 8 Ind. Cl. Comm. 1, 36 (1958), held that Indian land claims cannot be limited to only such lands which provided the common necessities of life, since the requirements of the Indians were so varied they could only be obtained from a much larger area. The Supreme Court of the United States in Mitchell v. United States, 34 U.S. (9 Pet.) 711, 745 (1835), held possession or occupancy was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites.

On the east side of the Hopi claim, the boundary was formed by the West boundary of the Navajo country in 1848. Pawnee Tribe v. United States, 5 Ind. Cl. Comm. 224, 279-80 (1957) stated that prior decisions of the Commission in setting boundaries for abutting tribes were considered in establishing boundary of neighboring tribe. In the Uintah Ute Indians of Utah v. United States, 5 Ind. Cl. Comm. 1, 44 (1957), it was held that reports of early travelers, after passing a certain point on the edge of petitioner's land, that they met another tribe establishes boundary between the tribes at that point. Other cases upon which petitioner relies are cited under Error of Law 3, petitioner's Motion, p. 19-21. We urge that consideration of all the evidence accepted in the cases very firmly establishes that the boundary line between the Navajo and the Hopi Tribes in 1848 was at the Merriwether Line or thereabouts.

There wasn't a no man's land between the two tribes as indicated by the Commission in its finding. West of the Navajo was the Hopi. East of the Hopi was the Navajo.

The agreed traditional boundary was solemnized by the delivery of an Indian "Tiponi" by the Navajo to the Hopi as a reminder of the promise. The agreement was at the Merriwether Line and the witness produced the "Tiponi" at the hearing. It was related how the ancient "Tiponi" had been kept in the possession of the clan. (Tr Pahona 7476-77, 7482). The anthropologist, Gordon MacGregor, in his report to Commissioner of Indian Affairs John Collier in 1938 reported the incident as follows:

The First Mesa or Walpi people made an agreement with the Navajo some time about 1850 establishing a boundary line. The Navajo were to cross it only on condition of good behavior. As a sign of good faith the Navajo are said to have presented a feather shrine or symbol, which First Mesa still preserves. A pile of rock some distance west of Ganado and on the old road once marked this line. First Mesa, of course, would like to see this line form the eastern limit of the reservation. (emphasis added) (Ex. 55 (Hopi) p. 2)

We call particular attention to Errors of the Commission bearing upon the general subject of the boundaries of Hopi use. Error of Fact 2 cites the omission of the Commission to determine that in 1848 to 1851 only a few scattered Navajo bands visited the Hopi to visit or to raid. There were no Navajo settlements in the Hopi territory during that time. As cited in Error of Fact 3, the Commission failed to find that in the travels of both priests, Escalante and Garces, Hopi cattle were found to graze over an extensive area to the west of the Hopi villages.

Escalante found an abundance of black cattle and mustangs. Garces noted extensive trade to the west, especially with the Havasupai. As cited in Error of Fact 4, the Commission erroneously found that all Hopi villages were located well within the 1882 Hopi Executive Order Reservation. As cited in Error of Fact 7, the record does substantiate Hopi aboriginal title to the area claimed by the Hopi. In Error of Fact 5, it is noted that the Commission found the Hopi Indian population figure of 1882 showed a mark decline from figures available for prior years. It also showed that the number of Hopi Indians amounted to 1800. We feel a careful reading of the authorities cited will establish that the 1800 did not include the Moencopi Hopi Indians who were located outside of the Executive Order Reservation. It is obvious from a study of all the exhibits that the population figures before the census taken by Donaldson in 1893 were very unreliable. In requested Finding 33 of petitioner, the Hopi Tribe, we have prepared a table as to the sources of the population figures. Great variances will be noted. We assume the matter of population had a bearing upon the Commission's limitation of the amount of territory granted to the Hopi Tribe as aboriginal holding. We call to the attention of the Commission Pawnee Tribe v. United States, 5 Ind. Cl. Com. 279, 286, 292 (1957), where it was held that there was no abandonment although the tribe was materially reduced in numbers by disease and area was raided by Indian war parties where no record that any other tribe ever attempted to establish villages in the area claimed and records indicate continued use and occupancy of substantially all territory claimed. It will be noted from petitioner's population table

that Ex. 25a, (Hopi) p. 3, shows a drop from 7500 to less than 1000 Hopi Indians from 1777 to 1780. Ex. E-50, p. 38, introduced by the government, shows that between 1780 and 1781 there were 6698 deaths from small pox reported while Ex. 21 (Hopi) p. 17, shows 5000 deaths from small pox reported. Ex. 25c (Hopi) p. 11, shows that in 1782 there were 6698 deaths from small pox reported. Ex. G-9, p. 23, and Ex. G-10, p. 75, show a decrease in population due to small pox in the year 1853 to 1854. Ex. G-38, p. 145, reports small pox had almost totally destroyed the Moqui, 1855 to 1856. Equity and justice cannot allow this population decrease caused by disease to automatically reduce the territory which this tribe had been accustomed to using for centuries and continued to use subsequent to such population decrease.

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

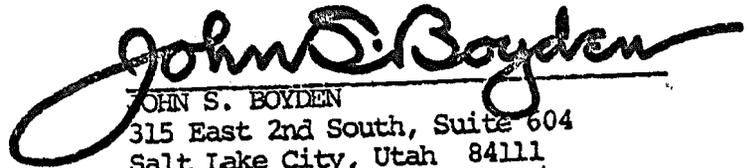
It cannot be denied that from 1848 to 1868 the Navajos had taken over a considerable portion of the Hopi territory, but under circumstances leaving a monumental blemish upon the good faith record of the United States. Errors of Fact A and B are directed particularly to Docket 229 for it is in this territory, granted to the Navajos on its overlap of claims with the Hopi, that the Navajos moved in after 1848. The short occupancy of the Navajo of the territory west of the Merriwether Line cannot justify a finding of aboriginal possession in favor of that tribe, if any of the standards that have been laid down by the Commission are to be given credence in the decision. Sac and Fox Tribe of Indians

of Oklahoma v. United States, 315 F. 2d 896 (1963), held that in order to be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive and continuous use and occupancy for a long time prior to the loss of property. (Emphasis added). The Confederated Tribe of the Umatilla Indian Reservation v. United States, 14 Ind. Cl. Comm. 14, 116-120 (1964), held that "for a long time, encompassed at least several generations." The Commission held in Flat Head v. United States, 8 Ind. Cl. Comm. 40, 74 (1959) that frequent attacks by outside tribes hindering petitioner's activities had no effect on Indian title to the area raided where raiders made no attempt to occupy or make permanent use of the land. Even if it were held that there is no obligation on the part of the United States to protect the Hopi Indians from the Navajos who were driven into their territory, still, the Navajos were not in the overlap territory awarded to them a sufficient length of time to constitute aboriginal possession.

CONCLUSION

We were convinced that it was apparent to the Commissioners who heard the case, not one of whom participated in the judgment, that the Hopi claim, as reduced to the Merriweather Line, was fully supported by the evidence. The expert witnesses for the petitioner and the government were in substantial agreement. We respectfully submit that the petitioner should be granted a further hearing on the matter of dates of taking by the defendant and pursuant to Rule 25 C.F.R. §503.33, be granted a rehearing on the matters covered in its Motion.

Dated this 4th day of September, 1970.


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Attorneys of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August, 1970 copies of petitioner's, the Hopi Tribe, Motion for Further Hearing on Dates of Taking, for Rehearing and for Amendment of Findings, were mailed to the respective attorneys indicated below.

I further certify that on the 5th day of September, 1970 copies of the foregoing brief in support of said motion were mailed to the respective attorneys indicated below.

Honorable John N. Mitchell
Attorney General of the United States
Washington, D.C. 2 Copies

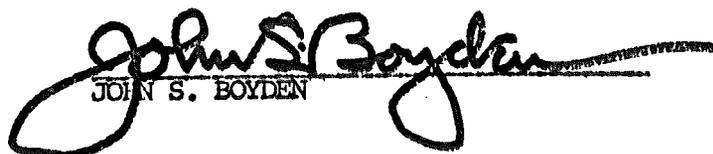
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JOHN S. BOYDEN

END

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BEFORE THE INDIAN CLAIMS COMMISSION

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

v. :

THE NAVAJO TRIBE OF INDIANS, :
Plaintiff, : Docket No. 229

v. :

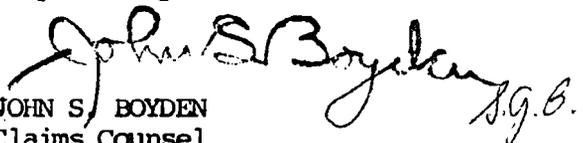
THE UNITED STATES OF AMERICA, :
Defendant. :

MOTION FOR LEAVE TO FILE CONSOLIDATED
BRIEF TO ANSWER BRIEFS OF NAVAJO TRIBE AND
THE UNITED STATES

Petitioner, Hopi Indian Tribe, et al., moves the Commission for leave to file, By February 22, 1971, a consolidated reply brief to the answer briefs of the Navajo Tribe and the United States regarding petitioner's motion for further hearing on dates of taking and for rehearing and for amendment of findings upon the ground that said consolidated reply brief will be helpful to the Commission in considering the conflicting claims presented in the above entitled case and that said consolidated reply brief will avoid unnecessary duplication and upon the further ground

that attorney for petitioner has been called away from the office on other matters for an extended period of time.

Respectfully submitted,


JOHN S. BOYDEN
Claims Counsel
Hopi Indian Tribe

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of February 1971 I mailed a copy of the foregoing Motion For Leave to File Consolidated Brief to Answer Briefs of Navajo Tribe and the United States to the attorney for the defendant and the attorney for the Navajo Indian Tribe, first class postage prepaid, addressed as follows:

Mr. William F. Smith
Indian Claims Section, Room 8121
Land & Natural Resources Division
Department of Justice
Washington, D. C. 20530

Mr. Harold E. Mott
Attorney at Law
Navajo Indian Tribe
Window Rock, Arizona 86515


SRP002147

END

EX-100-1000

BEFORE THE INDIAN CLAIMS COMMISSION

FEB 23 1971

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

Plaintiff,

Docket No. 196

v.

THE NAVAJO TRIBE OF INDIANS,

Plaintiff,

Docket No. 229

v.

THE UNITED STATES OF AMERICA,

Defendant.

PETITIONER'S REPLY BRIEF ON MOTION FOR FURTHER HEARING ON THE MATTER OF DATES OF TAKING, FOR A REHEARING AND FOR AMENDMENT OF FINDINGS

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BEFORE THE INDIAN CLAIMS COMMISSION

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

v. :

THE NAVAJO TRIBE OF INDIANS, :

Plaintiff, : Docket No. 229

v. :

THE UNITED STATES OF AMERICA, :

Defendant. :

PETITIONER'S REPLY BRIEF ON MOTION
FOR FURTHER HEARING ON THE MATTER
OF DATES OF TAKING, FOR A REHEARING
AND FOR AMENDMENT OF FINDINGS

I

FURTHER HEARING ON THE MATTER
OF DATES OF TAKING BY THE
DEFENDANT

Petitioner, the Hopi Tribe, set out in its brief:

- (1) That the hearing in this matter was by direction of the Commission confined to the issues of title;
- (2) That petitioner's evidence on dates of taking was not introduced;
- (3) That petitioner made no request for a finding on the specific dates of taking;

(4) That past practice of the Commission established precedent for confining proof at the first hearing to issues of aboriginal title;

(5) That petitioner acted in good faith in confining its proof in accordance with the order of the Commission.

(6) That the Commission nevertheless has made finding upon the untried issues pertaining to dates of taking.

The Navajo Tribe declined to submit a response to the foregoing.

(Navajo Brief 1)

Since counsel for the government referred to the proceedings at Grand Canyon, Arizona in November 1960 (Gov't Brief 5), it would have been helpful to the Commission on the point we now discuss had he gone a little further to draw to the Commission's attention the pertinent statement of his predecessor. We submit there was no mistake on the part of government counsel concerning the confining of the issues to aboriginal title.

Mr. Lundin. If your Honor please, it is the understanding of the defendant that the first stage of the consolidated Navajo-Hopi hearings, including the hearings in Washington, related to the question of aboriginal title. Aboriginal title is basically a question as to where these various indian groups were and what areas they occupied in or around the year 1848. Insofar as testimony is offered concerning the areas that Mr. Boyden illustrated on Hopi Exhibit Number 2, such testimony will only go, if at all, to the date of taking based upon the assumption that those areas were occupied aboriginally by the Hopi Indians.

Secondly, the date of taking would only be of importance if it is also shown that thereafter the Hopis were excluded from such areas. The Government is not prepared at present to either cross examine intelligently or to produce any witnesses concerning a date of taking. It was the Government's understanding that this hearing was concerned with the question of aboriginal title. The Government, however, does not wish to prevent, even if it had the right to object, to the Hopis presenting such testimony, but wishes the record to be clear that at this time the Government is

in no position to either cross examine intelligently or to make any comment with respect to the date of taking of the areas marked on Hopi Exhibit Number 2. (emphasis added) (Grand Canyon Tr. 1443).

However, the government now simply ignores petitioner's argument for further hearing on date of taking and proceeds to argue the merits of the findings of the Commission from the existing state of the record without a Hopi day in court relating to taking dates. (Def. Br. 8, 11).

Such light treatment of a precept so fundamental to simple justice is an obvious confession of error.

Defendant's response to petitioner's motion in Sections III (p. 8), IV (p. 11), and VI (p. 17), of its argument relates exclusively to the time of taking. Section V (p. 16) is predicated upon the assumption that Indian title had been extinguished (p. 17). When the petitioner, the Hopi Tribe, has been allowed to present its evidence on dates of taking it will clearly distinguish the facts of this case from the facts in the cases cited by the United States. Until petitioner has been afforded the opportunity to complete its evidence, a reply to the above cited sections of defendant's brief is premature.

II

REHEARING AND AMENDMENT OF FINDINGS

The defendant concludes that "Plaintiff has failed to present any new evidence" and that the Hopi motion and brief "represent only a reargument of the law and facts considered by the Commission at the prior hearing" (p. 20). Counsel misconceives the Hopi position. It is not contended that the evidence on aboriginal title is new. Neoteric circumstances have created

new and unusual handicaps that motivate the petitioner. When a completely new Commission, with not one member who heard the case, aided by new attachés who were not present when the case was tried eight years earlier, is required to enter its order on facts to be extracted from over 10,000 pages of transcript in Docket 229 above (23 Ind. Cl. Com. 244, 245) and mountains of documents, it is no reflection on the ability or diligence of those saddled with such an onerous responsibility to point out matters that might have been overlooked. It should astound no one that under these circumstances the Commission:

1. Failed to recognize its own order limiting the issues to aboriginal title.
2. Failed to make any finding at all upon the Hopi claims for rent or land use while recognizing Hopi title as set out in counts 5, 6, 7 and 8, although it ordered the parties to now proceed to a determination of acreage and fair market value.
3. Failed to consider the obligation of the defendant when the Navajo Indians were driven into Hopi territory by force of United States military pressure, both before and after 1848. (See Hopi proposed finding 21).
4. Failed to recognize that in 1882 the Hopi Indians of Moencopi Village were living outside of the Executive Order Reservation. (Opinion 196, p. 284).

The third and new legal counsel for the defendant now differs with his own expert witnesses. To illustrate the testimony of the government experts we have prepared a composite map of the lines dividing Navajo and Hopi territory in 1848 as drawn by witnesses Schroeder (Ex. S. 807), Reeve (Ex. R. 180) and Ellis (Ex. E. 100) (Appendix A). The dividing lines drawn

by petitioner's witness Eggan (Hopi Ex. 2) and the traditional line from Hopi Indian testimony as illustrated by witness Pitrat (Hopi Ex. 2) are also shown, together with the lines drawn in accordance with the finding of the Commission in Dockets 229 and 196. Dr. Reeve extended the 1848 Navajo line to the West further than any of the other witnesses, but on cross examination he admitted that with particular reference to the two triangular pieces where the line extends to points West of the Merriweather Line he was not supported by documentary evidence as of 1848. Referring to the lower triangular piece to Moencopi Buttes or the South triangle he stated, "I don't think I have documents of 1848 specifically." (Tr. 7901). He stated that the first helpful document was the record of the Whipple journey. Whipple came up the Zuni trail to the Puerco and then came South, missing the triangle completely. (Tr. 7902). He did refer to two Navajos, both of whom were from Canyon De Chelly. They were both hunters and those were the only Navajos Whipple had seen. Dr. Reeve based his testimony on cornfields in the Pueblo-Colorado Wash, but could make no specific reference to cornfields West of the Merriweather line. He frankly admitted he had not seen Hopi Exhibit 32 and he did not take it into consideration. Merriweather drew the line in 1855 demarking the Western boundary of Navajo lands where the Navajo selected their lands and planted their corn. (Tr. 7904, 7905). Later Dr. Reeve admitted that he did not have a single document between 1848 and 1855 that placed any Navajo fields West of the Merriweather Line. (Tr. 7906). Dr. Reeve argued concerning Hopi Exhibit 56 which stated, "from all historical evidence it appears that the Navajo entered Arizona in the last half of the 18th century but their grazing areas did not conflict with those of the Hopi

until about the year 1850." (Tr. 7908). With respect to the upper protrusion, he admitted that his conclusion was based upon two army letters of very little value and further admitted he had never read the Pettit diary. (Tr. Reeve 7950-51). The petitioner, with substantial proof, showed that the Pettit journey in 1855 was far to the East of the point to which Dr. Reeve referred (Ex. 70 Hopi); Ex. 70a through 70i (Hopi); Ex. 71 (Hopi); Ex. 72 (Hopi); Tr. Pitrat 4648) and that Pettit first came upon the Navajo Indian lodges at a point East of the Merriweather Line, which point is now known as Whiskey Creek. (Ex. 72 Hopi). Dr. Ellis defined as Hopi exclusive territory all of the Hopi claimed land up to the East boundary where she defined the Navajo line as shown in Appendix A, concluding with the following answer:

Question: You have drawn this line, using your best judgment defining exclusive occupation as you have already stated on the stand?

Answer: Yes.

(Tr. 9389, 9392)

The other government expert, Mr. Schroeder, (Ex. S. 807) conceded territory to the Hopis without substantial difference from the testimony of petitioner's expert witness, but gave the Navajo less territory on both ends of the Merriweather line (Tr. Schroeder 8191, et seq.).

With this concensus of opinion of the adversary witnesses to the petitioner, the testimony of Dr. Fred Eggan, as witness for the petitioner, becomes very persuasive:

I think they not only made multiple use, but they made relatively intensive use of their territory both on their reservation and on the neighboring regions. (Tr. 7221)

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

In many respects this claim is conservative.

(Tr. 7429)

They obviously were not living on every square mile of that area but they were, I think, using essentially that area.

(Tr. 7417)

The finding of the Commission that the Navajo territory extended even beyond the point that could not be sustained by Dr. Reeve might have some justification by 1868, but in 1848 the evidence is overwhelming that the territory belonged to and was used by the Hopi Indians exclusively.

It can perhaps serve no useful purpose to further reiterate the details of the Hopi claim as established by the evidence. We submit that it has been amply demonstrated that counsel for the Hopi Tribe, being the only surviving member of courtor counsel still connected with the case, should be given opportunity to assist the Commission in arriving at a more accurate determination.

CONCLUSION

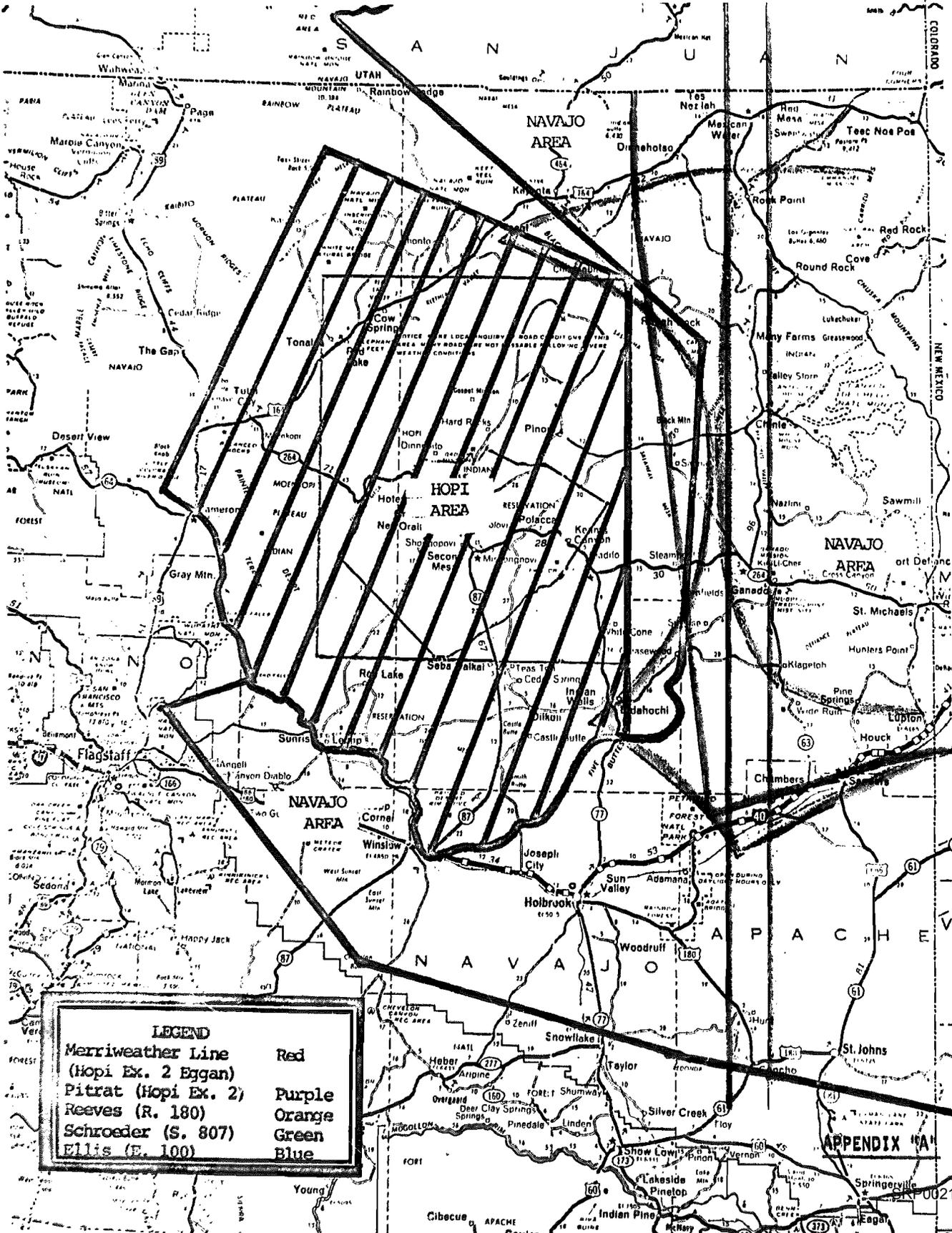
We respectfully submit that the petitioner should be granted a further hearing on the matter of dates of taking by the defendant and pursuant to Rule 25 C.F.R. §503.33, be granted a rehearing on the matters covered in its motion.

Dated this 20th day of February 1971.


JOHN S. BOYDEN
Attorney of Record

SRP002154

APPENDIX



| LEGEND | |
|---------------------|--------|
| Merriwether Line | Red |
| Hopi Ex. 2 Eggan) | Purple |
| Pitrat (Hopi Ex. 2) | Orange |
| Reeves (R. 180) | Green |
| Schroeder (S. 807) | Blue |
| Ellis (E. 100) | |

APPENDIX "A"

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of February, 1971, copies of petitioner's, the Hopi Tribe, reply brief on motion for further hearing on the matter of dates of taking, for a rehearing and for amendment of findings, were mailed to the respective attorneys indicated below.

Honorable John N. Mitchell
Attorney General of the United States
Washington, D.C. 20001 2 Copies

Mr. Harold E. Mott
First National Bank Bldg. East--Suite 304
5301 Central Avenue, N.E.
Albuquerque, New Mexico 87108 1 Copy

Mr. Royal D. Marks
Attorney at Law
Title and Trust Building
Phoenix, Arizona 85004 1 Copy

Mr. I. S. Weissbrodt
Attorney at Law
1614 Twentieth Street N.W.
Washington, D.C. 20009 1 Copy

Mr. Jay H. Hoag
Attorney at Law
Suite 400 Providence Building
Duluth, Minnesota 55802 1 Copy

Mr. Samuel L. Dazzo
Attorney at Law
615 Simms Building
Albuquerque, New Mexico 87102 1 Copy


JOHN S. BOYDEN

END

NOV 16 1971

BEFORE THE INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, an Indian Reorganization Act Corporation, suing on its own behalf and as a representative of the Hopi Indians and the Villages of FIRST MESA (Consolidated Villages of Walpi, Shitchumovi and Tewa), NISHONAGHOVI, SIPAHLAVI, SHUNGGAVI, OHAISI, HYAKOTSINOVI, DAMIABI, INVERVILLA and KOERKOVI,

Plaintiff, Docket No. 196

v.

THE NAVAJO TRIBE OF INDIANS,

Plaintiff, Docket No. 229

v.

THE UNITED STATES OF AMERICA,

Defendant.

MEMORIAL IN OPPOSITION TO CERTAIN MATTERS

Comes now Harold B. Mott, Attorney for the Navajo Tribe of Arizona in Docket No. 229, and respectfully requests that extraneous matter included in the "Memorandum with Points and Authorities Supporting Allegations as to the Date or Dates of Taking Pursuant to the Order of This Commission Dated the 2nd Day of June 1971" by the Hopi Tribe be stricken. In support thereof movant declares that:

1. The Petition of the Hopi Tribe filed August 28, 1970, asked that the Commission reopen the record in this proceeding to permit petitioner to show (1) a different date

1964-229 Copies of copy handwritten 11-26-71 to copy

84

of taking from that found by the Commission, and (2) an award of additional territory as the aboriginal lands of the Hopi Tribe.

2. At a hearing before the Commission on April 23, 1971, the Navajo Tribe did not oppose the petition as to dates of taking, but strenuously opposed reopening the proceeding to allow the presentation of evidence as to whether additional lands should be found to have been wrongfully taken by the U. S. Government from the Hopi Tribe.

3. On April 28, 1971, the Commission granted the aforesaid petition "for the main purpose of permitting the parties to present all evidence relating to the date(s) of taking of the aboriginal lands of the Hopi Tribe." (underlining supplied)

4. Harking back to the interlocutory order of the Commission of June 23, 1970, the Hopi Tribe pointed to the ordering clause, and specifically the "catch all" language of the Order "and all other issues bearing upon the question of the defendant's liability to the Hopi Tribe." It then assumed that such language, among other things, permitted it to present other evidence other than that relating solely to dates of taking. It justifies this on the grounds that it is necessary to perfect its record on appeal.

5. Manifestly, dates of taking of lands not granted the Hopi Tribe in this proceeding are of no moment in this

further proceeding. The Commission specifically refused to reopen this record to show that additional areas should be awarded to the Hopi Tribe as a part of its aboriginal lands taken by the Government.

6. The difficulties occasioned by the Hopi Tribe in the 1332 area following the decision in Marling v. Jones, and the damages claimed therefor, are the subject of appeal now pending in the Ninth Circuit Court of Appeals from an Order of the District Court declaring that it had no jurisdiction to consider a Writ of Assistance requested by the Hopi Tribe. Such matters are not now before this Commission for determination.

7. Such broad and extraneous allegations in effect call for a full and further hearing on matters which this Commission refused to reopen this record to consider.

8. If allowed to stand, appellant will be compelled to rebut the allegations of the Hopi Tribe, and further delay the final decision of the Commission.

WHEREFORE, THE PREMISES CONSIDERED, it is respectfully requested that the extraneous matter as to additional territories alleged in the aforesaid petition of the Hopi Tribe, as a part of its aboriginal lands, be stricken from the said petition, and the petitioner be restricted, in

the further hearing, to a showing of the dates of taking of the designated aboriginal lands of the Hopi Tribe in the decision of June 23, 1970.

Respectfully submitted,

/s/ HAROLD E. MOTT

HAROLD E. MOTT
 Greyhound Tower, Suite 216
 111 W. Clarendon Avenue
 Phoenix, Arizona 85013

Claims Attorney,
 Navajo Tribe of Indians

Attorney at Board.

CERTIFICATION OF SERVICE

I hereby certify that on the 11th day of November, 1971, a copy of the foregoing PETITION TO SET ASIDE EXPLANATORY LETTER was mailed to each of the following attorneys:

William F. Smith, Attorney
 U. S. Dept. of Justice
 Indian Claims Section
 Land and Natural Resources Division
 Washington, D. C. 20530
 Attorney for Defendant

John H. Boydin, Attorney
 21 West National Gas Bldg.
 Suite 501
 215 West Second South Street
 Salt Lake City, Utah 84111
 Attorney for The Hopi Tribe,
 Plaintiff, Pocket No. 134

/s/ HAROLD E. MOTT

HAROLD E. MOTT

Claims Attorney,
 Navajo Tribe of Indians

END

196

*Navajo and Hopi Tribe
Strike Extraneous Matter*

NOV 26 1971

BEFORE THE INDIAN CLAIMS COMMISSION

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

Plaintiff,

THE NAVAJO TRIBE OF INDIANS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 196

Docket No. 229

84

HOPI TRIBE RESPONSE
TO NAVAJO TRIBAL MOTION TO
STRIKE EXTRANEEOUS MATTER

Comes now the plaintiff, The Hopi Tribe, and opposes the motion of the plaintiff, The Navajo Tribe, to strike extraneous matter upon the grounds and for the reasons as follows:

1. The motion of the Navajo Tribe to strike extraneous matter was untimely filed and is an obvious circumvention of the rules of this Commission after said tribe has failed to file its response to the memorandum, evidence and authorities cited by the Hopi Tribe within the time required by the order of this Commission.

2. This Commission has made no finding as to the aboriginal lands of the Hopi Tribe prior to 1882 or the taking thereof by the defendant prior

to 1882, but confined its determination as to that year.

3. If the construction of the findings of this Commission can be distorted, as the Navajo Tribe, plaintiff, attempts to do, to mean that the aboriginal lands possessed by the Hopi Tribe in 1848 when the United States acquired jurisdiction of this territory, were no greater than in 1882, such finding would be manifestly contrary to the facts and evidence in this case.

4. If the construction of the findings of this Commission can be further distorted to mean that there was no taking of Hopi aboriginal lands prior to 1882, such finding would be premature since they were made before plaintiff Hopi Tribe had been given the opportunity to present the evidence as to date or dates of taking, and would be manifestly contrary to the facts and evidence in this case.

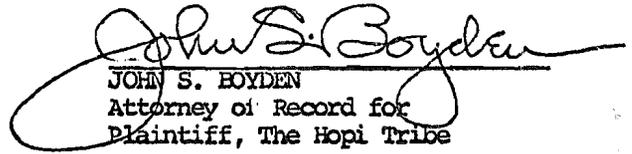
5. The right of the Hopi Tribe to an undivided one-half interest in the 1882 Executive Order Reservation outside of District 6 is not on appeal. That right has been affirmed by the Supreme Court of the United States, 373 U.S. 758. The appeal on supplementary proceedings for a writ of assistance may determine the right of the court to enforce its own judgment and terminate the continued damage to the Hopi Tribe, but it will neither mitigate the damages nor absolve the United States from damages already suffered, Hamilton v. Nakai, Case No. 26588, C.C.A. 9th Circuit.

6. Movant complains that if its motion is not granted it will be compelled to rebut the allegations of the Hopi Tribe, and further delay the final decision of this Commission. The Navajo Tribe was granted until September 12, 1971 to rebut the allegation of the Hopi Tribe. That opportunity

expired on said 12th day of September 1971. No extension of time was requested by the Navajo Tribe and no further delay is compelled or justified.

WHEREFORE, the plaintiff, The Hopi Tribe, prays that the motion be denied.

DATED this 24th day of November 1971.


JOHN S. BOYDEN
Attorney of Record for
Plaintiff, The Hopi Tribe

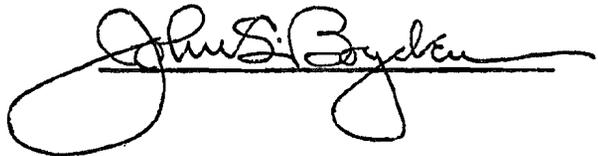
CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November 1971 a copy of the foregoing Hopi Tribe Response to Navajo Tribal Motion to Strike Extraneous Matter was mailed to each of the following attorneys as indicated below, first class postage prepaid:

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

Attention: Mr. William F. Smith
Indian Claims Section Room 8121
Land & Natural Resources Division
Washington, D. C. 20530

Mr. Harold E. Mott
Attorney at Law
Greyhound Tower, Suite 216
111 West Clarendon Avenue
Phoenix, Arizona 85013

A handwritten signature in cursive script, appearing to read "John S. Byrd", is written over a horizontal line.

JUN 6 1973

BEFORE THE INDIAN CLAIMS COMMISSION

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

ORDER DENYING NAVAJO MOTION TO STRIKE
EXTRANEOUS MATTER

UPON CONSIDERATION of the Navajo motion of November 16, 1971, as captioned above, the Hopi plaintiff's response of November 26, 1971, in opposition thereto,

IT IS ORDERED that the Navajo motion, as captioned above, be, and the same is hereby, denied.

Dated at Washington, D. C., this 6th day of June, 1973

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance
John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Margaret H. Pierce
Margaret H. Pierce, Commissioner

Brantley Blue
Brantley Blue, Commissioner

END

EXTRA COPY DEC 6 1971

BEFORE THE INDIAN CLAIMS COMMISSION

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

Plaintiff,

Docket No. 196

v.

THE NAVAJO TRIBE OF INDIANS,

Plaintiff,

Docket No. 229

v.

THE UNITED STATES OF AMERICA,

Defendant.

HOPI TRIBE'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE EXTRANEOUS MATTER AND REPLY TO DEFENDANT'S RESPONSE

Comes now the plaintiff, The Hopi Tribe, and in opposition to the motion of the defendant to strike extraneous matter, and in reply to defendant's response to plaintiff's memorandum, asserts as follows:

The proof as to aboriginal possession introduced by the Hopi Tribe was directed to the day the United States' sovereignty attached on July 4, 1848.¹ Its requested finding 20 sought a determination of Hopi aboriginal possession as of that date.² The defendant's requested findings of fact,

1. Petitioner's Requested Findings of Fact on Issue of Title and Liability and accompanying Brief. Footnotes, pp. 28 thru 36. 2. Page 28, Ibid.

objection to Hopi and Navajo proposed findings, and brief acknowledged 1848 to be "the crucial date as of which their aboriginal rights must be determined."³ The Navajo Tribe in answering Hopi claims contended "at the time of the Treaty of Guadalupe Hidalgo with Mexico, February 2, 1848, the Navajo Tribe exclusively used and occupied" the land it claimed.⁴

Nevertheless, the present attorneys for the defendant, and for the Navajo Tribe, abandon the theory upon which their predecessors tried the case, seeking the tenuous shelter of a premature determination by this Commission as to the 1882 date of taking of Hopi aboriginal land.

This Commission did not purport to determine Hopi aboriginal lands for any date except December 16, 1882 when it held that the Presidential Order on December 16, 1882 terminated and extinguished the Hopi title to lands outside the Executive Order Reservation. Finding of Fact 20, among other things, stated "as of December 16, 1882, the Hopi Tribe had Indian title to the following described tract of land."⁵ (emphasis added) The Hopi Tribe was convinced that the evidence clearly established a larger area of Hopi Indian title even as of December 16, 1882. It, therefore, filed a motion for a rehearing and for amendment of findings, together with a motion for further hearing on dates of taking. The Commission allowed the motion on rehearing "for the sole purpose of permitting the parties to present all evidence relating to the date(s) of taking of the aboriginal lands of the Hopi Tribe."⁶

3. Page 134.

4. Navajo Proposed Findings of Fact, Vol. 111, p. 709.

5. 23 Ind. Cl. Comm. 306.

6. Order of April 28, 1971

The Hopi Tribe was thereby precluded from any further evidence or argument as to the aboriginal possession on December 16, 1882, but it was at the same time allowed to produce its evidence on other dates of taking. There is nothing in the order of this Commission from which it can be reasonably implied that whatever date or dates of taking could be established by the Hopi Tribe would be limited to the aboriginal title it held on December 16, 1882. Were it otherwise, the Hopi Tribe would have taken an immediate appeal. The law is too well established to require citation of cases that the plaintiff may recover for the lands to which it held Indian title on the date such lands were taken from them. This case is replete with evidence that the Navajo usurpation of Hopi lands, irrespective of governmental liability on the part of the defendant has been, and continues to be, a perpetual creeping arrogation of Hopi aboriginal lands. (Our contention as to the liability of the defendant is a matter we have heretofore disclosed to the Commission.) This fact is well illustrated in Plaintiff's Exhibit #67 (Hopi) found in Smithsonian Miscellaneous Collection, Volume 100, page 514, also attached at Appendix "B" to the Hopi memorandum supporting allegations as to dates of taking. The earlier the date of taking, the greater is the Hopi land area and, conversly, the later the date of taking, the smaller is the area of Hopi land. No procedural maneuvering can deprive the Hopi Tribe of its legal right to prove the dates of taking and to assert its contention as to the Indian title held on the dates of such takings. The documents submitted by the Hopi Tribe are pertinent, relevant and clearly within the limitations of the Commission orders of April 28, 1971 and June 2, 1971. The claim for each new exhibit is

succinctly stated in the List of Exhibits submitted pursuant to Rule §503.23(4). It seems incongruous that the defendant would seek to exclude such important evidence⁷ and at the same time assert that no newly discovered evidence has been made available.⁸ The Hopi Tribe does not contend that this evidence is newly discovered. This is the first opportunity it has had to produce evidence on dates of taking, except that which was incidentally involved in the original proof of aboriginal title. Connecting the dates of taking with matters already in evidence as to Indian title we regard as our duty to assist this Commission in reaching conclusions on matters it has not yet passed upon.

Defendant complains that argument and proof submitted bearing on Hopi counts 5, 6, 7 and 8 are outside the limits of the Commission's orders and are irrelevant, immaterial and extraneous matter.⁹ The Commission in its interlocutory order directed that the case would proceed to a determination of "all other issues bearing upon the question of the defendant's liability to the Hopi Tribe."¹⁰ When the Commission does so proceed, the Hopi Tribe will prove the rental value of the lands to which its title is acknowledged and decreed, but which has been wrongfully withheld from the Hopi by defendant. These counts deserve a more serious consideration than has been afforded them by the defendant.

7. Defendant's Response, page 5.

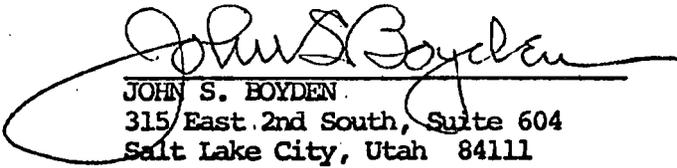
8. Ibid, page 7.

9. Ibid, page 6.

10. 23 Ind. Cl. Comm. 313

CONCLUSION

Defendant's motion to strike extraneous matter should be denied and since defendant has filed no rebuttal evidence, the Commission should proceed with the oral arguments on dates of taking.


JOHN S. BOYDEN
315 East 2nd South, Suite 604
Salt Lake City, Utah 84111

Attorney of Record

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

STEPHEN G. BOYDEN
315 East 2nd South, Suite 604
Salt Lake City, Utah 84111

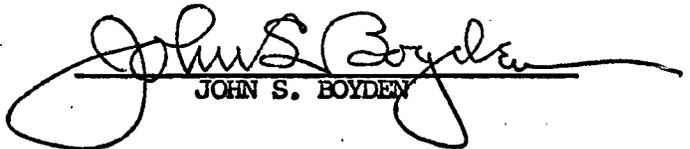
Attorneys of Counsel.

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of December 1971 I mailed copies of the foregoing Hopi Tribe's Response to Defendant's Motion to Strike Extraneous Matter and Reply to Defendant's Response to the attorney for the defendant United States and the plaintiff Navajo Tribe, first class postage prepaid, addressed as follows:

Mr. William F. Smith (2 copies)
Indian Claims Section Room 8121
Land & Natural Resources Division
Department of Justice
Washington, D. C. 20530

Mr. Harold E. Mott
Attorney at Law
Greyhound Tower, Suite 216
111 West Clarendon Avenue
Phoenix, Arizona 85013


JOHN S. BOYDEN

END

OCT 4 1978

BEFORE THE INDIAN CLAIMS COMMISSION

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

MOTION FOR LEAVE OF COMMISSION TO HEAR FURTHER ARGUMENT ON LIABILITY PHASE OF COUNTS 5 THROUGH 8, AND TO AMEND FINDINGS AND ORDERS IN RELATION THERETO TO MAKE FINAL DEPOSITION OF THE LIABILITY PHASE OF SAID COUNTS

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Petitioner, the Hopi Indian Tribe, et al, moves for leave of this Commission to further argue the liability phase of Counts 5 through 8 of the original petition in Docket 196 and that the findings and orders in relation thereto be amended to make final disposition of the liability phase of said counts, and as grounds for said motion alleges:

1. This Commission in its opinion on Petitioners' Motion for Amendment of Findings stated inter alia:

To date the Commission has not been made aware of any judicial decision or rule of law that would permit one tribe to retain such residual rights to claim rent for Indian title lands after the Government has allowed another tribe to exercise identical rights of use in occupancy in the same property. At the moment the Commission is of a mind to dismiss "counts 5 through 8" of plaintiff's petition. However, we shall withhold final action on the matter until after the plaintiff has had further opportunity, if it so desires, to argue the matter at the value phase of these proceedings. Ind. Cl. Comm. 16, 36.

2. Neither the interlocutory order of June 29, 1970 nor the order denying Hopi Motion to Amend Findings made any order on liability under Counts 5 through 8 of the original petition in Docket 196. 23 Ind. Cl. Comm. 277, 312; 31 Ind. Cl. Comm. 16, 37.

3. As a practical consideration in determining whether an appeal will be taken from the decision of this Commission, determination of liability under Counts 5 through 8 is of major importance.

4. If an appeal is taken to the Court of Claims, determination of liability under Counts 5 through 8 prior to such appeal would prevent fractional appeals thus minimizing expense and expediting the judicial processes.*

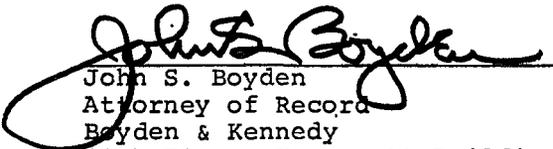
WHEREFORE, Petitioner prays:

1. That this Commission grant leave to your Petitioner to further argue the question of the liability of the United States under Counts 5 through 8.

2. That this Commission amend its findings and order making a final determination on the liability phase of said Counts 5 through 8 of Plaintiffs' petition in Docket 196.

3. And for such other and further relief as to this Commission may seem fair and just.

DATED this 4th day of October, 1973.


John S. Boyden
Attorney of Record
Boyden & Kennedy
10th Floor, Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133

Wilkinson, Cragun & Barker
Of Counsel

*Should Counts 5 through 8 be dismissed, Petitioner expressly reserves the right to present and have considered the rental claims set out in said counts in its accounting claim Count 9 of its petition.

SRP002178

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing document was mailed this 4th day of October, 1973, to William C. Schaab, Post Office Box 1888, Albuquerque, New Mexico 87103, and to Dean K. Dunsmore, U.S. Department of Justice, Indian Claims Section, Lands and Natural Resources Division, Safeway International Building, Room 674, Washington, D.C., by first class mail, postage prepaid.

A handwritten signature in cursive script, reading "John S. Boyden", written over a horizontal line.

OCT 4 1973

BEFORE THE INDIAN CLAIMS COMMISSION

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

MEMORANDUM IN SUPPORT OF HOPI TRIBAL MOTION FOR LEAVE OF COMMISSION TO HEAR FURTHER ARGUMENT ON LIABILITY PHASE OF COUNTS 5 THROUGH 8 AND TO AMEND FINDINGS AND ORDERS IN RELATION THERETO TO MAKE FINAL DISPOSITION OF THE LIABILITY PHASE OF SAID COUNTS.

On June 29, 1970, this Commission issued Findings of Fact, an Opinion and an Interlocutory Decree in the above-entitled case. 23 Ind. Cl. Comm. 277. It was then determined by the Commission that as of December 16, 1882, the date on which President Arthur by executive order established the Hopi Indian Reservation (1 Kappler 805), the Hopi Tribe held aboriginal title to a certain tract of land in Arizona that encompassed more than the Executive Order Reservation so established by President Arthur. The Petitioner's claims were not based upon the executive order. The executive order merely confirmed title to a portion of the land to which the Petitioner proved the Hopi Tribe had aboriginal title.

The lands described in the executive order were the subject of litigation in a three-judge federal court.

Healing vs. Jones, 210 F. Supp. 125 (Ariz. 1962) affirmed 373 U.S. 758 (1963). A copy of the court's findings of fact, Conclusions of Law and Judgment appear in the record of this case as Hopi Exhibit 78. This Commission took judicial notice of all the proceedings and determinations in the case of Healing vs. Jones, supra 23 Ind. Cl. Comm. 277, 307. The judgment in Healing vs. Jones provided among other things the following:

3. The Hopi Indian Tribe and the Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and sub-surface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of land management district 6, as defined on April 24, 1943, such boundaries being described in paragraph 1 of this judgment, and title in and to all of that reservation except the described district 6, is accordingly quieted in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation. Hopi Exhibit 78, pg. 228.

At Page 223 of the same exhibit, the Court found:

8. Beginning on June 2, 1937, the Navajo Indian Tribe, for the common use and benefit of the Navajo Indians, was impliedly settled in that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, pursuant to the valid exercise of the authority conferred in the Secretary by the Executive Order of December 16, 1882.

The same findings also held:

12. The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy, for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, has at all times been illegal. Ex. 79, p. 224.

The exclusion dates in Finding 12 undoubtedly are based upon the previous finding of the court that the Navajo Tribe was impliedly settled on the Hopi Reservation in 1937, and the Act of July 22, 1958, expressly stating:

The lands described in the Executive order dated December 16, 1882, are hereby declared to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order. Exhibit 78, page 3.

The unique situation with respect to the lands here in question is presented by the foregoing facts which indicate that part of the aboriginal lands of the Hopi Indians were recognized by an executive order which was later confirmed by the Congress of the United States. But after settling Navajo Indians upon the Hopi Reservation, the exclusion of the Hopi Indians was illegal according to the finding of the court.

It is acknowledged that 25 U.S.C. 70a among other things provides, "No claim accruing after August 13, 1946, shall be considered by the Commission." But the first decree in Healing vs. Jones, supra established that the illegal acts of the United States extended from 1937 to 1958, therefore, constituting a continuous claim which did not accrue subsequent to 1946. The continuation of these acts of the government are further exemplified by further proceedings in the same action where the court held:

29. The defendant United States, by and through its officers, the Department of the Interior, the Bureau of Indian Affairs, employees and agents, since September 28, 1962, to the present time has vacillated, equivocated, delayed and denied the Hopi Tribe and its members any substantial possession or use of the surface of said Joint-Use Area. (Exs. 10, 31-35; Tr. Vol. I, pp. 83, 94, 100, 118, 133)

30. The defendant United States of America still continues to procrastinate, vacillate, and refuse to deliver to the Hopi Indians or to assist the Hopi Tribe in obtaining their one-half undivided interest in the surface of said Joint-Use Area outside of District 6, or the resources thereof, notwithstanding requests, supplications, and demands of the Hopi Tribe for

such use and possession. (Tr. Vol. I, pp. 83, 94, 127, 133; Exs. 35, 16, 19, 34) Exhibit A, attached hereto.

It will be noted that the illegal acts of the government continued until September 7, 1972 when the court entered its Findings of Fact in the supplementary proceedings. Thereafter, on October 14, 1972, the same court by Order of Compliance directed that the United States grant and permit the joint use and possession of the surface including all resources in and to all of the executive order reservation of December 16, 1882 lying outside of the boundaries of Land Management District 6 as defined on April 24, 1943 to the Hopi Tribe and the Navajo Indian Tribe, share and share alike. Exhibit B attached hereto.

On the 31st day of October, 1972, a Writ of Assistance was issued by the United States District Court to accomplish the objects as set out in the Order of Compliance. Exhibit C attached hereto. These continuing illegal acts commencing in 1937 to the present time clearly have constituted claims in both law and equity, including those sounding in tort, as authorized by title 25 U.S.C. 70a.

Counts 5 through 8 of the Hopi petition allege that the conduct of the Defendant in seizing and depriving Petitioner of the use of the land to which the Hopis were entitled constituted unfair and dishonorable dealings on the part of the United States, failing to protect the right of the Petitioner in violation of the obligations of the United States under the treaty of Guadalupe Hidalgo, and constituting unfair and dishonorable dealings with the Petitioner, notwithstanding, the fact that Hopi title was preserved.

This Commission in its opinion on Petitioner's Motion for Amendment of Findings stated inter alia:

To date the Commission has not been made aware of any judicial decision or rule of law that would permit one tribe to retain

such residual rights to claim rent for Indian title lands after the Government has allowed another tribe to exercise identical rights of use in occupancy in the same property. At the moment the Commission is of a mind to dismiss "counts 5 through 8" of plaintiff's petition. However, we shall withhold final action on the matter until after the plaintiff has had further opportunity, if it so desires, to argue the matter at the value phase of these proceedings. Ind. Cl. Comm. 16, 36.

The reason the Commission has not been made aware of any judicial decision or rule of law that would permit the Hopi Tribe to retain such residual rights to claim rent for Indian title after the Government has allowed the Navajo Tribe to exercise identical rights of use and occupancy of the same property is because this is an unparalleled situation in the history of dealing with Indians in the United States. To say that the United States took the entire Indian title to the area now described as the Joint Use Area when it illegally kept the Hopi Indians from utilizing their land in the Executive Order Reservation outside of District 6 ignores simple justice. This is so particularly when the Defendant is now under order of the court to restore the one-half interest to the Hopi Indians. Can it under any stretch of the imagination be said that when the United States Government excluded the Hopi Indians from the land to which they retained Indian and legal title it was a complete taking and that when the court orders and accomplishes the return of those lands to the tribe, an offset may be claimed for the return of those lands leaving the Hopi with no compensation in a washed transaction? Honesty and fair dealings require that when the Government unlawfully deprived the Hopi Tribe from the use of its own lands without extinguishing Indian title, a fair rental value should be paid by the Government to the Hopi Tribe from the date of such unlawful use of Hopi lands to the date of the restoration of the lands to that Tribe.

In any event, whatever the decision of the Commission may be in this regard, the determination of liability or lack of liability on the part of the Defendant should be made by amending the findings of the Commission for the purpose of preventing multiple appeals and expediting a decision that has already been too long delayed.

CONCLUSION

It is respectfully submitted that the Commission should grant leave to the Petitioner to hear further argument on the liability phase of Counts 5 through 8 and thereafter amend its findings and orders in relation thereto to make final disposition of all questions of liability except the accounting phase to be presented at a later date.

Respectfully submitted,

John S. Boyden
Attorney of Record
Boyden & Kennedy
10th Floor, Kennecott Building
10 East South Temple
Salt Lake City, Utah 84133

Wilkinson, Cragun & Barker
Of Counsel

CERTIFICATE OF MAILING

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END

NOV 12 1973

BEFORE THE INDIAN CLAIMS COMMISSION

| | | |
|-------------------------------|---|----------------|
| THE HOPI TRIBE, |) | |
| |) | |
| |) | Plaintiff, |
| |) | |
| THE NAVAJO TRIBE OF INDIANS, |) | Docket No. 196 |
| |) | |
| |) | Plaintiff, |
| |) | |
| v. |) | Docket No. 229 |
| |) | |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| |) | Defendant. |

REPLY BRIEF OF THE HOPI TRIBE TO
OBJECTION OF THE UNITED STATES
AND THE NAVAJO TRIBE.

The United States in response to the Hopi Memorandum in Support of Hopi Motion for Leave of Commission to Hear Further Argument on Liability Phase of Counts 5 through 8 and to Amend Findings and Orders in Relation Thereto raises the technical ground that the Hopi Tribe has not complied with Rule 33(b) 25 CFR §503.33 in that no error of fact, error of law or newly discovered evidence has been shown. The Defendant quotes but ignores the fact that this commission has already granted permission to further argue the matter when it stated:

At the moment the commission is of a mind to discuss "Counts 5 through 8" of Plaintiffs' petition. However, we shall withhold final action on the matter until after the Plaintiff has had further opportunity, if it so desires, to argue the matter at the value phase of these proceedings. (Emphasis added.)

The real question presented is whether the argument must wait

until the value phase of these proceedings or be heard now in the interest of avoiding multiple appeals on the liability phase. If the argument is heard now on Counts 5 through 8, the decision of the Commission, one way or the other, would necessarily result in an amendment to its previous findings.

Plaintiff's motion is not predicated upon newly discovered evidence, but there is such evidence. The previous motion of the Hopi Tribe was filed on August 28, 1970. (1) On September 7, 1972, and since the filing of that motion, subsequent proceedings in the case of Hamilton vs. MacDonald (formerly Healing vs. Jones) has determined:

29. The Defendant United States, by and through its officers, the Department of the Interior, the Bureau of Indian Affairs, employees and agents, since September 28, 1962 to the present time has vacillated, equivocated, delayed and denied the Hopi Tribe and its members any substantial possession or use of the surface of said Joint Use Area.

30. The Defendant United States of America still continues to procrastinate, vacillate, and refuse to deliver to the Hopi Indians or to assist the Hopi Tribe in obtaining their one-half undivided interest in the surface of said Joint Use Area outside of District 6, or the resources thereof, notwithstanding requests, supplications, and demands of the Hopi Tribe for such use and possession. (2)

It will be remembered that the original case of

(1) Hopi Tribe vs. the United States, 31 Ind. Cl. Comm. 16 (1973).

(2) See Exhibit A attached to Hopi Memorandum filed with its present motion.

Healing v. Jones, 210 Fed. Supp 125 (Ariz, 1962), aff'd 373

U.S. 758 (1963) held that:

12. The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy, for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, has at all times been illegal.

On October 14, 1972 in the same proceedings, the Federal Court ordered and directed the United States:

to grant and permit the joint use and possession of the surface, including all resources, in and to all of the executive order reservation of December 16, 1882, lying outside of the boundaries of Land Management District Six as defined on April 24, 1943, to the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike. (3)

On October 31, 1972, a Writ of Assistance was issued directing the Navajo Tribe and the United States to comply with the Federal District Court's order (4).

This evidence bearing directly on the issues involved in the motion before the Court is newly discovered because it was not in existence before the Hopi Tribe filed its last motion on August 28, 1970, and it was filed with the present motion. No affidavit was filed with the motion because the Commission had previously indicated that the matter could be further argued.

(3) See Exhibit B Pg. 2, attached to Hopi Memorandum filed with the present motion.

(4) See Exhibit C attached to Hopi Memorandum filed with the present motion.

The United States further objects that the present motion was not timely filed. Again this argument refuses to take notice that the opportunity to reargue the causes stated has already been granted (5). The Hopi Tribe simply requests that the argument be advanced in the interest of time, economy and justice. 25 CFR §503.33(a) does not purport to cover this situation. Surely the government does not question the authority of the Commission to advance the hearing on motion of the Plaintiff or on its own motion if reason and justice requires such expediting of proceedings.

The United States further claims that the Hopi Tribe has abandoned one position on rental charges and now lays claim to only part of its former assertions (6). When this Commission denied the Hopi motion for enlargement of the aboriginal area, that became the law of the case, unless and until appealed. The practical considerations on rental charges were then considered in view of restrictions imposed by the decision of the commission. "Consistency, thou art a jewel." But in a lawsuit, the parties must learn to roll with the punches. The change in Hopi position was the result of trying to live within the guidelines imposed by the commission.

(5) Hopi Tribe vs. United States, 31 Ind. Cl. Comm. 16, 36.

(6) Government's brief in response to Hopi Tribe's motion for rehearing, pg. 5, 6.

The government also contends that until title to the Executive Order Reservation was determined in Healing vs. Jones, supra, the United States had no duty to the Plaintiff to limit the use of the 1882 Reservation by the Navajos (7). Perhaps the Defendant should also be more sensitive to the decision of this commission. All of the lands now the subject of the rental claim has been held to have been aboriginal Hopi lands as of 1882. (8) The Hopi claim was not based on the Executive Order. It was based on the aboriginal or Indian title. The Defendant took one-half of the Joint Use Area in the Executive Order Reservation and failed to protect the Hopi interest in the other one-half, even after confirmation of aboriginal title by its own Executive Order. All this occurred long prior to August 13, 1946. The litigation definitely determined that giving full credence to the Executive Order, aboriginal Hopi lands in question, as found by this commission, were taken by the government only as to an undivided one-half interest when the Navajo Tribe was settled in the Hopi Executive Order Reservation in 1937 (Healing vs. Jones, supra). The other one-half belonged to the Hopi Tribe and still belongs to it under more than one theory. The claim arose before August 13, 1946.

(7) Government's brief in response to Hopi Tribe's motion for hearing, pg. 7, 8.

(8) Hopi Tribe vs. United States, 23 Ind. Cl. Comm. 277, 306, (1970).

The Hopi contention does not run counter to Aleut Community of St. Paul Island vs. United States, 480 F2d 831, 839 (1973). Here the United States undertook a "special relationship" to protect the Hopi Indians from the aggression and depredations of the Navajo Tribe. That was one of the reasons given for the establishment of the Hopi Executive Order Reservation. (9) The United States had driven the Navajo Indians from New Mexico into the Hopi territory. (10)

(9) 16. The executive order reservation of December 16, 1882, was established for the following purposes: (1) to reserve for the Hopis sufficient living space as against advancing Mormon settlers and Navajos, (2) to minimize Navajo depredations against Hopis, (3) to provide a legal basis for curbing white intermeddlers who were disturbing the Hopis, and (4) to make available a reservation area in which Indians other than Hopis could, in the future, in the discretion of any Secretary of the Interior, be given rights of use and occupancy.

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

The moral and legal obligations thus assumed by the United States were not met, and the Hopi Tribe suffered the damage. The government's lack of action to protect the Hopi Indians by minimizing Navajo depredations and reserving for the Hopis sufficient land space against the advancing . . . Navajos was an unfair and dishonorable dealing with the Hopi Tribe by the United States after it had established the Hopi Executive Order Reservation specifically for those purposes.

If counsel for the defendant would read the findings of the court in Hamilton vs. McDonald, supra, the Hopi memorandum would seem neither "inconsistent" nor "unclear" for there the United States is ordered to do its duty and a writ of assistance against both the Navajo Tribe and the United States was issued. Whether an award against the United States for rental should be an offset against any judgment the Navajo Tribe might obtain is a matter between those parties. The Hopi Tribe takes no position in this regard.

The attempt of the government counsel to keep the Hopi offset question under his hat until the liability question is determined (11) does not prevent the Hopi Tribe from anticipating a situation that would leave its people striped and unpaid as a result of unfair and dishonorable dealings on the part of the United States.

(11) Navjo Memorandum, pgs. 10, 11.

The foregoing response to government objections sufficiently states the Hopi position as to timely filing of its motion as to avoid the necessity of reiteration in response to Navajo objections. However, we might add that the Hopi plaintiff did not learn of the Commission's disinclination to finish the liability phase of the case on counts 5 through 8 until the decision of the Commission on July 9, 1973.

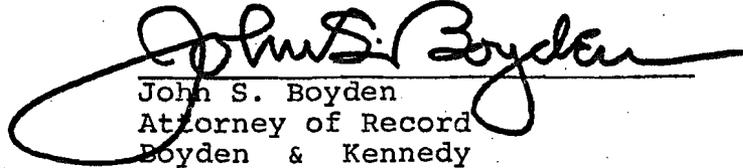
The desire to finish the liability phase before going into the damage question is predicated upon the desirability of preventing piecemeal considerations. We do not see that forcing more than one appeal by not concluding the liability phase in any way hastens the final results. In fact a favorable decision on the rental question would weight heavily in the consideration of the Hopi Tribe as to whether any appeal would be taken. An unfavorable decision on the same question would obviate the necessity of two appeals with all questions of liability finally determined in one appeal.

CONCLUSION

For the reasons stated the motion for leave of this court to advance the time for further arguments on the liability phase of Counts 5 through 8 should be granted and

a determination of the liability phase made by the Commission.

Respectfully submitted,

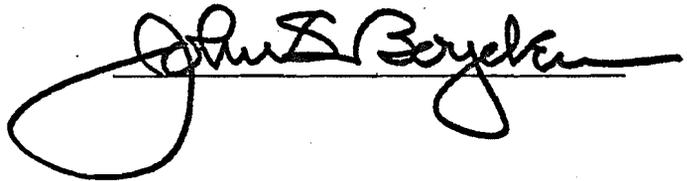
A handwritten signature in cursive script, reading "John S. Boyden". The signature is written in black ink and is positioned above a horizontal line that underlines the printed name below it.

John S. Boyden
Attorney of Record
Boyden & Kennedy
Tenth Floor, Kennecott Building
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Salt Lake City, Utah 84133

Wilkinson, Cragun & Barker
Of Counsel

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END