

MAR 21 1973

BEFORE THE INDIAN CLAIMS COMMISSION

HOPI TRIBE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Docket No. 196

MOTION FOR SUMMARY JUDGMENT AND FINAL DISMISSAL

The United States, by counsel, moves that the Commission enter an order granting a summary judgment that the United States has fully accounted to the plaintiff and to enter an order finally dismissing count 9 of plaintiff's Petition.

In support of above the Government shows:

1. Count 9 of plaintiff's Petition pleads a cause of action for a general accounting of plaintiff's funds.
2. The General Services Administration prepared an accounting report in this case. This report is dated March 14, 1966.

*196. P. Plaintiff motion April 3 to respond*

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3. On or about March 21, 1966, a copy of the report of March 14, 1966, was mailed to the attorney of record for the Hopi Tribe.

4. On or about October 11, 1972, a copy of the report of March 14, 1966, was mailed to the Commission.

5. Pursuant to the procedure established by the Commission in Sioux Tribe v. United States, 12 Ind.Cl.Comm. 541, 547 (1963), the plaintiff Hopi Tribe had ninety days within which to file exceptions to the Government's accounting report.

6. Over ninety days have elapsed since the receipt of the accounting report by the attorney of record for the plaintiff and since its filing with the Commission.

7. Plaintiff Hopi Tribe has failed to file any exceptions to the Government's accounting report.

WHEREFORE, the United States prays that the Commission enter a summary judgment that the United States has fully accounted to the plaintiff Hopi Tribe and finally dismissing count 9 of plaintiff's Petition.

Respectfully submitted,

KENT FRIZZELL  
Assistant Attorney General

DEAN K. DUNSMORE  
Attorney,  
Attorneys for Defendant

By \_\_\_\_\_  
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the \_\_\_\_\_ day of March 1973, one copy of the foregoing Motion for Summary Judgment and Final Dismissal was mailed to John S. Boyden, Esquire, 10th Floor Kennicott Building, 10 E. South Temple, Salt Lake City, Utah 84111.

Dean K. Dunsmore  
Attorney for Defendant



[T]hat defendant be required to make a full, just and complete accounting for all property or funds received or receivable and expended for and on behalf of petitioner, and for all interest paid or due to be paid on any and all funds of petitioner, and that judgment be entered for petitioner in the amount shown to be due under such an accounting  
.....

In response to count 9 and plaintiff's prayer for relief, the General Services Administration prepared the accounting requested by the plaintiff. <sup>2/</sup> On March 14, 1966, copies of this report were mailed to attorneys for the plaintiff. <sup>3/</sup> Subsequently, the Government learned that a copy of this report was not in the files of the Commission, and per request of the Department of Justice a copy of this report was mailed to the Commission on October 11, 1972. <sup>4/</sup>

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<sup>2/</sup> This report is dated March 14, 1973.

<sup>3/</sup> See Attachment A for copy of letter of transmittal.

<sup>4/</sup> See Attachment B for copy of letter of transmittal.

II. Summary Judgment. In Sioux Tribe v. United States, 12 Ind.Cl.Comm. 541 (1963), the Commission established the procedure for the disposition of accounting cases. The Commission held therein: <sup>5/</sup>

It is the opinion of this Commission that the desirable procedure to be followed in these accounting cases consists of the filing of the General Accounting Office report by defendant in pursuance of the petition along with such appropriate motion as defendant may see fit under the circumstances. Petitioner will then file in writing within ninety (90) days its specific exceptions, if any, along with its reasons therefor, to any item or items which it contends are in violation of a proper accounting and which should be disallowed. Defendant will file an answer within the usual time. The parties will then be at issue and may proceed to a hearing on the matter.

The plaintiff has failed to comply with these procedures. Almost seven years have lapsed since the plaintiff first received the Government's accounting report, and over ninety days have passed since the report was filed

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<sup>5/</sup> At 547.

with the Commission. Nor has the plaintiff Hopi Tribe moved for any extension of time in which to file exceptions or otherwise obtain a waiver of the procedure laid down in Sioux Tribe, supra, as is the proper procedure before the Commission. In the absence of such exceptions the conclusion is that the Hopi Tribe has no exceptions to the Government's accounting report, and the United States is entitled to a summary judgment.<sup>6/</sup>

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<sup>6/</sup> Sioux Tribe, supra, at 549: "[T]he defendant must be apprised of what item or items, if any, petitioners are aggrieved. If there are no such items then the matter is terminated and defendant should have a summary judgment."

III. Dismissal. The United States having fully accounted to the plaintiff Hopi Tribe, count 9 of plaintiff's Petition should be dismissed. This dismissal should be made final pursuant to the procedure discussed by the Court of Claims in Seminole Indians v. United States<sup>7/</sup> and certified to Congress upon the lapse of the time for filing an appeal.

Respectfully submitted,

KENT FRIZZELL  
Assistant Attorney General

DEAN K. DUNSMORE  
Attorney,  
Attorneys for Defendant

By \_\_\_\_\_  
Attorney

Attachments

\_\_\_\_\_  
<sup>7/</sup> Appeal No. 15-72 (January 18, 1973), slip opinion at  
<sub>3-4.</sub>

CERTIFICATE OF SERVICE

I hereby certify that on the            day of March 1973,  
one copy of the foregoing Memorandum of Points and Authorities  
in Support of Motion for Summary Judgment and Dismissal was  
mailed to John S. Boyden, Esquire, 10th Floor Kennicott  
Building, 10 E. South Temple, Salt Lake City, Utah 94111.

Dean K. Dunsmore  
Attorney for Defendant

Attachment A

REGION 3

FEDERAL RECORDS CENTER

Alexandria, Virginia 22314

MAR 21 1966

Wilkinson, Cragun, and Barker  
Attorneys at Law  
1616 H Street, N. W.

Attention: Mr. Donald C. Cornley

Gentlemen:

In accordance with your request of March 13, 1966, there is enclosed two copies of a report containing an accounting of trust funds, and statements of gratuity disbursements made by the United States for the benefit of the Hopi Tribe of Indians.

It is understood that one copy of the report will be retained by you and the other will be forwarded to Mr. John S. Boyden, Attorney of record for the Hopi Indians.

Sincerely yours,

JOHN B. NIX

John B. Nix  
Chief, Indian Tribal Claims Branch

DISPATCH

Enclosures 2

CC: 3

Official File-3821

NB:JEH:rcpr 3/21/66

90-2-20-421

21 OCT 3 1972

INDIAN TRIBAL CLAIMS DIV.

FEDERAL RECORDS CENTER

R  
D

Attachment B

RECEIVED

October 11, 1972

OCT 13 10 22 AM '72

DEPT. OF JUSTICE  
MAIL ROOM  
ORON

Indian Claims Commission  
6th Floor, Riddell Building  
1730 K Street, N. W.  
Washington, D.C. 20006

Gentlemen:

There is furnished for your information and records a copy of  
our report on Docket No. 196, of the Hopi Tribe of Indians,  
et al.

Sincerely,

DANIEL T. GOGGIN  
Acting Director  
General Archives Division

Indian Claims Section

OCT 16 1972

10:30 AM

cc:  
Mr. Dean Dunsmore

90-2-20-421

DEPARTMENT OF JUSTICE		R E C O R D
28	OCT 13 1972	
L.A.O. LANDS DIV.		
INDIAN CLAIMS SEC.		



3. Notwithstanding the reasons above cited, and pursuant to the request of the Commission, the petitioner is proceeding to respond to the accounting filed herein by the United States by filing Exceptions to the Government's accounting report.

4. Petitioner files herewith a Motion for additional time within which to file such Exceptions.

5. Although additional Exceptions may be required to fully state the position of the Hopi Tribe after the decisions of the Commission regarding dates of taking, a filing of Exceptions to said accounting within the time requested by your petitioner will in no way prejudice the position of the United States.

6. A Summary Judgment dismissing Count 9 of the Petition herein under the facts and circumstances above stated would be unfair and excessively harsh.

WHEREFORE, the Hopi Tribe prays that the Motion for Summary Judgment and Final Dismissal filed by the United States be dismissed.

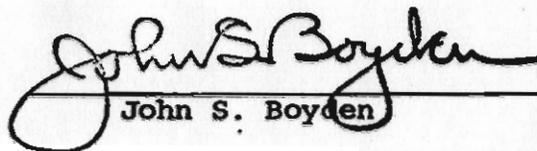
Respectfully submitted,

  
\_\_\_\_\_  
John S. Boyden  
Attorney of Record for Plaintiff  
Tenth Floor - Kennecott Building  
10 East South Temple  
Salt Lake City, Utah 84111

WILKINSON, CRAGUN & BARKER  
Frances L. Horn  
Of Counsel

CERTIFICATE OF SERVICE

I, John S. Boyden, certify that two copies of the foregoing Answer to Motion of United States was mailed, postage prepaid, this 2nd day of April, 1973, to Dean K. Dunsmore, Indian Claims Section, Land and Natural Resource Division, Department of Justice, Washington, D. C. 20050.

  
John S. Boyden

196 Motion return filed

APR 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), MISHONGNOVI,	)
SIPAULAVI, SHUNGOPAVI, ORAIBI, KYAKOTSMOVI,	)
BAKABI, HOTEVILLA and MOENKOPI,	)
	)
	)
Plaintiff,	)
	)
vs.	)
	)
THE UNITED STATES OF AMERICA,	)
	)
	)
Defendant.	)

Docket No. 196

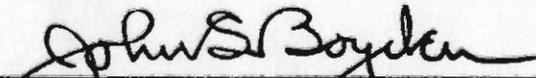
*Granted on  
4/30/73*

MOTION FOR TIME WITHIN WHICH  
TO FILE EXCEPTIONS

Now comes the Hopi Tribe, plaintiff in Docket No. 196, and moves Commission to set a date for the filing of exceptions to the accounting reports prepared by the General Services Administration, Volumes I and II, for the first day of June, 1973. For reason, plaintiff states, that its suit in a general accounting was filed as Count IX of its petition August 3, 1951, and that exceptions have heretofore been delayed pending Commission action on the first eight counts of the petition in the belief that litigation of the eight counts would disclose additional matters to be handled in the accounting claim. The Commission has, however, requested that exceptions be filed and, owing to the lateness of the date, plaintiff

agrees that active litigation of this claim should be begun. The June 1, 1973 date is requested to allow associate counsel, Wilkinson, Cragun & Barker, to prepare the exceptions. The attorneys who have undertaken to do so are on this date charged with filing two briefs in the Court of Claims in mid-April, 1973. The June 1 date will enable them to complete the exceptions.

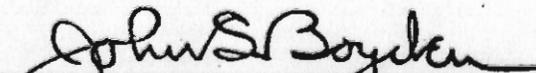
Respectfully submitted,

  
\_\_\_\_\_  
John S. Boyden  
Attorney of Record for Plaintiff  
Tenth Floor - Kennecott Building  
10 East South Temple  
Salt Lake City, Utah 84111

WILKINSON, CRAGUN & BARKER  
Frances L. Horn  
Of Counsel

CERTIFICATE OF SERVICE

I, John S. Boyden, certify that two copies of the foregoing Motion for Time Within Which to File Exceptions was mailed, postage prepaid, this 2nd day of April, 1973, to Dean K. Dunsmore, Indian Claims Section, Land and Natural Resource Division, Department of Justice, Washington, D. C. 20050.

  
\_\_\_\_\_  
John S. Boyden



late date will serve only to frustrate the clear intent of Congress in its enactment of the Act of March 30, 1972, Pub. L. No. 92-265, 86 Stat. 114, that the Indian Claims Commission complete its adjudication of all cases pending before it by April 10, 1977.<sup>1/</sup> The filing of exceptions by the plaintiff is but the second step in the slow process of framing the accounting issues and of achieving a determination of the extent of the Government's liability to account and the sufficiency of its accounting. To now permit the plaintiff Hopi Tribe, the party upon whom the seven-year delay is chargeable, to file exceptions to the Government's accounting report will prevent the complete adjudication of all Hopi claims before the Indian Claims Commission prior to April 10, 1977.

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<sup>1/</sup> H.R. Rep. No. 92-895, 92d Cong., 2d Sess. 4 (1972).

WHEREFORE, the United States prays that plaintiff's Motion for Time Within Which to File Exceptions be denied and the Government's Motion for Summary Judgment and Final Dismissal filed on March 21, 1973, be granted.

Respectfully submitted,

KENT FRIZZELL  
Assistant Attorney General

DEAN K. DUNSMORE  
Attorney,  
Attorneys for Defendant

By \_\_\_\_\_  
Dean K. Dunsmore

CERTIFICATE OF SERVICE

I hereby certify that on the        day of April 1973,  
one copy of the foregoing Response to Motion for Time Within  
Which to File Exceptions was mailed to John S. Boyden, Esquire,  
10th Floor Kennicott Building, 10 E. South Temple, Salt Lake  
City, Utah 84111.

Dean K. Dunsmore  
Attorney for Defendant

June 14, 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  
Count 9

v.

THE UNITED STATES OF AMERICA, )  
Defendant. )

EXCEPTIONS

John S. Doyden  
Attorney of Record for Plaintiff  
Tenth Floor-Kennecott Building  
10 East South Temple  
Salt Lake City, Utah 84111

WILKINSON, CRAGUN & BARKER  
Frances L. Horn  
Of Counsel

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an accounting report in two volumes covering disbursements from fiscal year 1872 through fiscal year 1951. Only Part One and a portion of Part Five of the report relate to the claim for an accounting; the bulk of the report was submitted as the basis for possible offsets against any claim which the plaintiff might establish against the defendant.

## II. Duty to Account

The courts have consistently held that the government has a fiduciary duty to its Indian wards when it assumes control over their funds and other properties. In Seminole Nation v. United States, 316 U.S. 286, 297 (1942), the Supreme Court declared that in its dealings with the Indians, the government should be judged by "the most exacting fiduciary standards." In Menominee Tribe v. United States, 101 Ct.Cl. 10, 19-20 (1944), the court considered it "settled doctrine that the United States as regards its dealings with the property of the Indians, is a trustee," whose conduct is to be tested "by the standards applicable to a trustee." In Iowa Tribe v. United States, 2 Ind.Cl.Comm. 167, 176 (1952), the Commission stated that:

"While many of the obligations of defendant would seem to be contractual rather than fiduciary, the fact is that in its dealings

with the tribe the defendant kept the only records of these transactions as a self-imposed duty to its illiterate and incompetent wards and thereby became accountable to them for the manner in which it discharged its treaty, other assumed and Congressionally imposed obligations...."

In Navajo Tribe v. United States, 176 Ct.Cl. 502, 364 F.2d 320 (1966), where the United States was "responsible for supervision of the affairs of the tribe, including, in particular, supervision of oil and gas leases on tribal property," the court held that in judging the conduct of the government in such a situation "the most exacting fiduciary standards" must be applied (id. at 507).<sup>2/</sup>

As trustee of the moneys and properties of the plaintiff tribes, defendant has a duty to account to plaintiff for its administration:

"The principle is firmly established that trustees, guardians, executors, or agents are bound to keep clear, distinct, and accurate accounts, and to render them whenever legally demanded." <sup>3/</sup>

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<sup>2/</sup> See also, Creek Nation v. United States, 16 Ind.Cl.Comm. 431, 465-469 (1965) (Government held to standard of fiduciary with respect to its stewardship of Indian tribal land which was conveyed to third parties); Oneida Tribe v. United States, 165 Ct.Cl. 487, 493 (1964) (Government held to be under a special relationship and special responsibility to safeguard Indian timber); Ottawa and Chippewa Indians v. United States, 42 Ct.Cl. 240, 246 (1907) (Government liable as a "trustee" with respect to its handling of government securities). See also, Mason v. United States, 198 Ct.Cl. 599, 461 F.2d 1364 (1972), rev'd other grounds, \_\_\_ U.S. \_\_\_ (June, 1973).

<sup>3/</sup> Richardson v. Van Auken, 5 App. D.C. 209, 215 (1895). See also, Bogert, Trusts and Trustees, § 961 (1962) (Cont'd)

The burden is upon the trustee to provide sufficient information to allow the beneficiary to determine whether his property has been adequately managed:

"[t]he onus is upon [the trustees] to show how the estate entrusted to them has been administered or applied, and how, and to what extent, they are entitled to acquittance. If full and accurate accounts have not been kept, all presumptions are adversely indulged, and all obscurities and doubts are to be taken most strongly against them." <sup>4/</sup>

In Sioux Tribe v. United States, 105 Ct.Cl. 725, 802 (1946), the Court of Claims stated that

"[t]he primary duty to so classify and report as to the nature and amount of disbursements rest[s] on defendant.... The defendant is the trustee; it kept and has all the records and evidence, and it has the burden of making a proper accounting."

This Commission has clarified the defendant's duty to account. It noted in Mescalero Apache Tribe, et al v. United States, 23 Ind.Cl.Comm. 181, 185 (1970) that:

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<sup>3/</sup> and In Re Pittsburgh Rys. Co., 117 F.2d 1007, aff'd 312 U.S. 168 (1941), where the court stated that

"[t]here is no more fundamental duty imposed on those who hold property for others than that of rendering an account of its management...."  
(Id. at 1008.)

<sup>4/</sup> Richardson v. Van Auken, 5 App. D.C. 209 at 215 (1895).

"The burden is on the United States to provide a report in such detail, from all available data, so that it may be readily ascertained whether plaintiffs' funds were properly managed. It is not up to plaintiffs to cull through raw data to arrive at this conclusion."

It is the plaintiff's contention that defendant's accounting report does not meet the requirements laid down by the court or this Commission.

### III. Exceptions

Plaintiff, the Hopi Tribe, takes exception to defendant's accounting in the following respects:

Exception No. 1. The accounting is incomplete on its face. Although completed March 14, 1966, it observes a cut-off date of June 30, 1951.

Authority. In Southern Ute Tribe v. United States, 17 Ind.Cl.Comm. 28 (1966), the Commission noted that its decision in Kiowa, Comanche and Apache Tribes v. United States, 5 Ind.Cl.Comm. 72 (1957), established the right of the defendant to present claims for gratuitous offsets beyond the cut-off date for filing cases before the Commission. The Commission then reasoned (p. 65):

"Since this is a matter wherein defendant will be under the necessity of accounting further for its handling of petitioner's money and the issues are not yet closed by decision of the Commission it is our opinion that defendant should bring its accounting up

to the date of the judgment herein. This would be equivalent to the right of defendant to assert offsets to the same date. Since our act is silent as to both questions it appears equitable that both parties be treated the same with respect to the offsets of defendant and the accounting due petitioner."

In Gila River Pima-Maricopa Indian Community v. United States, 135 Ct.Cl. 180 (1956), 157 Ct.Cl. 941 (1962), the United States Court of Claims reached the same conclusion for different reasons. The Gila River Pima-Maricopa Indians filed in the Indian Claims Commission a petition seeking, inter alia, an accounting. That petitioner filed identical claims in the Court of Claims. The petitions alleged continuing wrongs; the petition in the court was intended to cover damages that accrued subsequent to the passage of the Indian Claims Commission Act. On defendant's motion to the court for summary judgment on the pleadings, the court in 1956 held seven of the claims and the accounting in abeyance pending the Commission's action on the claims, noting, however (135 Ct.Cl. at 185):

"Section 2 of the Indian Claims Commission Act confers on that Commission exceedingly broad jurisdiction to hear and determine claims of Indian tribes, bands and identifiable groups, against the United States, notwithstanding any lapse of time or laches, where such claims arose prior to the date of the passage of that act on August 13, 1946. A claim arising prior to such date would not seem to be cut off where it is a continuing one." (Emphasis added.)

Thereafter, in 1962, without waiting for the Indian Claims Commission to act, the Court of Claims dismissed the Pima-Maricopa petition filed in that court on the ground that the jurisdiction of the Indian Claims Commission includes all injuries suffered by a petitioner as a result of a continuing wrong when "the allegedly wrongful acts of the defendant first accrued, if at all, prior to 1946."<sup>5/</sup>

Exception No. 2. The accounting shows on its face that funds are due plaintiff by reason of defendant's failure to credit interest to trust funds.

Authority. The defendant set up several accounts in the Federal Treasury, in which tribal funds were deposited, namely Indian Moneys, Proceeds of Labor, Hopi Agency, deposits made August 31, 1918 through June 28, 1951 in the amount of \$155,046.71, (GSA Report, pp. 228-234); Indian Moneys, Proceeds of Labor, Hopi Agency, Sheep Dipping, \$4,463.25 deposited 1939 through 1948 (GSA Report, p. 235); Indian Moneys, Proceeds of Labor, Hopi Agency Telephone, April 30, 1938 through March 14, 1951 in the amount of \$2,720.95 (GSA Report, pp. 235-236); Indian Moneys, Proceeds of Labor,

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<sup>5/</sup> See also, Fort Peck Indians v. United States, 28 Ind.Cl. Comm. 171, 174-175 (1972); Te-Moak Bands v. United States, 23 Ind.Cl. Comm. 70, 71-72 (1970); Mescalero Apache Tribe, et al. v. United States, 23 Ind.Cl. Comm. 181, 185-186 (1970).

Hopi Agency, Traders Regulation, December 31, 1937 through June 28, 1951 in the amount of \$5,158.51 (GSA Report, pp. 237-238); and Indian Moneys, Proceeds of Labor, Hopi School, deposits December 1, 1899 through June 28, 1951 in the amount of \$51,210.59 (GSA Report, pp. 238-244); Proceeds of Labor, Hopi Indians, Arizona, deposits August 30, 1919 through July 17, 1951 in the amount of \$376.76 (GSA Report, pp. 244-246). Defendant paid no interest on any of these funds. This failure to pay interest was contrary not only to the obligation which the defendant bore as trustee of these funds which it held on behalf of the plaintiff, but also it was contrary to the specific statutes adopted by the defendant governing tribal funds. By the Act of September 11, 1841, 5 Stat. 465, R.S. § 3659, 31 U.S.C. § 347(a), the defendant promised that Indian trust funds held by the United States and the annual interest accruing thereon should be invested in stocks of the United States, bearing interest at 5 percent.<sup>6/</sup> Since, however, most of the deposits of Hopi funds in the Federal Treasury occurred subsequent to 1918, it must be noted that the Act of May 25, 1918, 40 Stat. 561, 591, codified at 25 U.S.C. 162, authorized the Secretary of the

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<sup>6/</sup> The legislative history of this statute was discussed at length in Memorandum on Legislative History, Congressional Acts Pertaining to Indian Trust Funds in Connection With The Te-Moak Bands v. United States, Docket No. 22-G, et al., pp. 56-68. The Memorandum, filed June 1, 1971, is incorporated by reference as an appendix to these exceptions and is referred to herein as "Legislative History."

Interior to deposit in state banks tribal trust funds "on which the United States is not obligated by law to pay interest at higher rates than can be procured from the banks" or "if he deems it advisable and for the best interest of the Indians, [the Secretary] may invest the trust funds of any tribe ... in United States Government bonds." Tribal funds required for support of schools or pay of tribal officers was excepted from deposit or investment.<sup>7/</sup> In connection with the 1918 statute, it is notable that in 1926 the Controller General ruled that interest accruing on funds deposited in banks pursuant to the 1918 act "should become a part of the principal amount thereof."<sup>8/</sup>

By Act of February 12, 1929, 45 Stat. 1164, amended June 13, 1940, 46 Stat. 584, 25 U.S.C. 161(a)-(d), Congress provided for payment of interest on all money in excess of \$500 held by the United States in a trust fund account and carried on the books of the Treasury Department to the credit of an Indian tribe, if the payment of interest thereon was not otherwise authorized by law, requiring payment of simple interest at 4 percent.<sup>9/</sup>

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<sup>7/</sup> For discussion of this statute, see Legislative History, pp. 81-86.

<sup>8/</sup> H. Rept. 897, 69th Cong., 1st Sess., Legislative Report, App. B, No. 57.

<sup>9/</sup> See, Legislative History, pp. 89-93.

By Act of June 24, 1938, 52 Stat. 1037, 25 U.S.C. 162(a), the Congress repealed the 1918 statute and substituted therefor a statute giving the Secretary of the Interior greater latitude in dealing with tribal trust funds to make them as productive as possible. The 1918 act had limited the Secretary's authority to deposit the funds of a given tribe to state banks within the state where that tribe resided. The 1938 act extended the authority to all state banks (with proper safeguards to insure the deposits) and widened the choice of investments open to the Secretary to include any public debt obligation of the United States and any bonds, notes or other obligations which are unconditionally guaranteed as to both interest and principal by the United States.<sup>10/</sup> The Hopi funds, however, were totally unproductive.

The defendant should account to the plaintiff for the interest lost by the plaintiff by reason of the defendant's failure to take advantage of any of these options to make the Hopi funds productive.

In order that the amount of interest which should have been paid might properly be determined, defendant should be ordered to supplement its accounting report<sup>11/</sup> by supplying the following information:

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<sup>10/</sup> See Legislative History, pp. 94-96.

<sup>11/</sup> Fort Peck Indians v. United States, 28 Ind.Cl.Comm. 171, 184-185 (1972).

(1) As to revenues, the dates when funds were received and the dates when they were deposited to plaintiff's accounts in the Treasury; <sup>12/</sup>

(2) The dates when funds were removed from plaintiff's accounts to pay obligations, the precise nature of such obligations and the dates on which they were paid; <sup>13/</sup>

(3) The state of the accounts on an annual or other periodic basis so that the interest which should have been earned may be calculated.

Exception No. 3. Defendant's accounting for miscellaneous revenue (GSA Report, p. 9) is totally inadequate.

Authority. Except for sale of coal, for which defendant accounts by fiscal year, tons and unit price (GSA Report, pp. 11-13), defendant's accounting for revenue is completely inadequate. Even as to the coal sales, the information given is insufficient on which to make a determination of adequacy of consideration. The Report gives neither location of the mines nor grade of the coal disposed of in the sales nor any other information necessary or helpful to determine whether the sales were proper management of plaintiff's coal assets. As to the balance of the revenues

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<sup>12/</sup> Menominee Tribe v. United States, 107 Ct.Cl. 23, 32-33 (1946), followed by the Commission in Te-Moak Bands v. United States, 23 Ind.Cl.Comm. at 70-80; Mescalero Apache Tribe v. United States, 23 Ind.Cl.Comm. 181, 182-183 (1970).

<sup>13/</sup> Te-Moak Bands at 79.

some 33 years of revenues are listed in the most general of terms, and apparently do not include all tribal revenues. For example, the House Report 2503 (1952), Materials, Laws and Treaties Affecting Indians (p. 387), notes that the Hopis had a tribal ram distribution enterprise and a tribal livestock breeding enterprise which are not reflected in the Report. The defendant in no way accounts for rights-of-way through or on plaintiff's lands for railway, telegraph or telephone lines or for construction, operation or maintenance of such lines or offices, or construction, operation or maintenance of pipelines for conveyance of oil and gas, although notice was given to defendant by plaintiff of the need for such information in its petition, pages 7-8, reciting the statutes under which defendant has arrogated unto itself the right to grant such rights-of-way and other interests in plaintiff's land to third persons for plaintiff's benefit.

With respect to plaintiff's property other than money, defendant should be ordered to provide a supplemental accounting containing all relevant data including information relating to funds handled by field offices, from which plaintiff may ascertain whether its properties were properly managed by the defendant (Mescalero Apache v. United States, 23 Ind.Cl.Comm. 181 (1970)), including, but not limited to:

(1) As to plaintiff's lands available for leasing for the purpose of grazing or mining, a statement showing whether such leases were executed and, if so, the dates of the leases, the lessees, location of the lands, the nature of the minerals and the acreage and periods involved, and the income received from such leases;

(2) As to rights-of-way through or on plaintiff's lands for railway, telegraph, or telephone lines, or for the construction, operation or maintenance of such lines or offices, or for the construction, operation or maintenance of pipelines for the conveyance of oil and gas, a statement showing whether such rights-of-way were granted, and, if so, the dates of the grants, their purpose, the grantees, the acreage and term involved, the amount of compensation or tax assessed, if any, and the reason for not requiring compensation or tax where none was required (Fort Peck Indians, 28 Ind.Cl.Comm. at 186);

(3) As to plaintiff's lands, whether the defendant conveyed any of plaintiff's land to railroads operating on plaintiff's reservation for reservoirs, material, or ballast pits, or for the purpose of planting trees to protect its line;

(4) Dates and nature of all transactions which produced funds which were deposited in plaintiff's principal account;

(5) Whether the sums deposited in the account represent the entire proceeds derived from the transactions which produced them or net proceeds after deduction by the defendant of administrative or other charges or expenses;

(6) The amounts and character of and the authority for any charges made by the defendant.

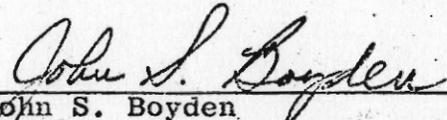
Exception No. 4. The accounting is deficient in its statement of disbursements.

Authority. The defendant should supply the meaning and content of the terms and categories used in the Report. (Fort Peck Indians v. United States, 28 Ind.Cl.Comm. at 191-192.) Although some categories such as "Agency buildings and repairs" (GSA Report, p. 6) seem clearly to be an agency expense which should not have been taken from tribal funds (Sioux Tribe v. United States, 105 Ct.Cl. 725, 780-785 (1946); Cherokee Nation v. United States, 102 Ct.Cl. 720, 766-768 (1945)), it is impossible to determine from the categories used in the Report whether ultimate benefit from the use of the funds was enjoyed by the tribe or the government or by some third person. Defendant should submit proof that plaintiff actually received the goods charged to their account. (Six Nations v. United States, 23 Ind.Cl.Comm. 376, 380 (1970); Te-Moak Bands, 23 Ind.Cl.Comm. at 81-82.)

Exception No. 5. The accounting contains insufficient description of the several funds set up in the Federal Treasury in the name of the plaintiff.

Authority. As noted, pages 7-8, supra, the defendant shows a number of different funds "Indian Moneys, Proceeds of Labor, Hopi Agency, Hopi School, Hopi Indians." Examination of income and expenditure from "Indian Moneys, Proceeds of Labor, Hopi Agency Telephone" (GSA Report, pp. 15, 35) indicates that although laborers and line men were paid from this fund and \$1,278.52 remained on hand, construction of telephone lines and expenses of the telephone system (GSA Report, pp. 6-7) apparently came from some other fund. It is impossible to determine from the present report whether funds were properly expended.

Respectfully submitted,



John S. Boyden  
Attorney of Record for Plaintiff  
Tenth Floor-Kennecott Building  
10 East South Temple  
Salt Lake City, Utah 84111

WILKINSON, CRAGUN & BARKER  
Frances L. Horn  
Of Counsel

CERTIFICATE OF SERVICE

Served this 13<sup>th</sup> day of July, 1973, by mailing one copy of the foregoing Exceptions, postage prepaid by United States first class mail, to Dean K. Dunsmore, Esquire, Indian Claims Section, Land and Natural Resources Division, United States Department of Justice, Washington, D. C. 20530.

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Frances L. Horn

JUL 13 1973

Before the  
INDIAN CLAIMS COMMISSION

**EXTRA COPY**

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, SHUNCOPAVI, ORAIBI, KYAKOTSMOVI, BAKABI, HOTEVILLA and MOENKOPI,

Docket No. 196  
Count IX

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

MOTION FOR ORDER TO DEFENDANT TO  
SUPPLEMENT ITS ACCOUNTING REPORT

Plaintiff, the Hopi Tribe of Indians, moves the Commission for an order requiring the defendant to render a full and complete accounting. Plaintiff has shown in the attached exceptions that the report prepared by General Services Administration and filed by defendant as its accounting, is inadequate to allow the plaintiff and this Commission to determine with any degree of accuracy whether plaintiff's funds and property were mismanaged by defendant, and, if so, to what extent.

As further discussed in the attached exceptions, the supplemental accounting should contain the following information:

(1) An up-to-date accounting so that plaintiff and the Commission may trace continuing wrongs, if any;

(2) Dates when funds were received as revenues, and dates when they were deposited to plaintiff's accounts in the Treasury;

(3) Dates when funds were removed from plaintiff's accounts to pay obligations, the precise nature of such obligations, and the dates on which they were paid;

(4) The state of the accounts on an annual or other periodic basis so that interest which should have been earned may be calculated;

(5) As to plaintiff's lands available for leasing for the purpose of grazing or mining, a statement showing whether such leases were executed, and, if so, the dates of the leases, the lessees, the location of the lands, the nature of the minerals, and the acreage and periods involved and the income received from such leases;

(6) As to rights-of-way through or on plaintiff's lands for railway, telegraph, or telephone lines, or for the construction, operation or maintenance of such lines or offices, or for the construction, operation or maintenance of pipelines for the conveyance of oil and gas, a statement showing whether such rights-of-way were granted, and, if so, the dates of the grants, their purpose, the grantees, the

the source of funds and the special rules, if any, relating to the disbursement of funds for each of them.

Respectfully submitted,

  
John S. Boyden,  
Attorney of Record for Plaintiff  
Tenth Floor-Kennecott Building  
10 East South Temple  
Salt Lake City, Utah 84111

WILKINSON, CRAGUN & BARKER  
Frances L. Horn  
Of Counsel

CERTIFICATE OF SERVICE

Served this 13th day of July, 1973, by mailing one copy of the foregoing Motion for Order to Defendant to Supplement Its Accounting Report, postage prepaid by United States first class mail, to Dean K. Dunsmore, Esquire, Indian Claims Section, Land and Natural Resources Division, United States Department of Justice, Washington, D. C. 20530.

  
Frances L. Horn

OCT 19 1973

BEFORE THE INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 UNITED STATES )

Docket No. 196

THE NAVAJO TRIBE, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 UNITED STATES )

Docket No. 229

109

GOVERNMENT'S BRIEF IN RESPONSE TO HOPI  
TRIBE'S MOTION FOR REHEARING

Statement

On June 29, 1970, the Indian Claims Commission rendered its opinion in this case as to the aboriginal title area of the plaintiff Hopi Tribe and the dates of extinguishment of this title. 1/ The Hopi Tribe filed a motion for rehearing of this decision and the Commission denied this motion on July 9, 1973. 2/

1/ Hopi Tribe v. United States, 23 Ind.Cl.Comm. 277.

2/ Hopi Tribe v. United States, 31 Ind.Cl.Comm. 16 (1973).

On October 4, 1973, the Hopi Tribe filed a 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 and a memorandum in support of said motion. This motion is apparently filed in conformance with Rule 33 (a) of the Commission as a second motion for rehearing. 3/

I. The Hopi Tribe Has Not Stated  
Grounds Upon Which A Rehearing  
May Be granted.

Rule 33(b) of the Indian Claims Commission provides that a motion for rehearing shall be founded on one or more of the following three grounds: error of fact, error of law and newly discovered evidence. 4/ For the Commission to be able to grant the present motion of the Hopi Tribe, the plaintiff must premise its request on at least one of the three above grounds. However, the Hopi's present motion is directed to the following language in the Commission's opinion of July 9, 1973: 5/

3/ 25 C.F.R. § 503.33(a): "After the Commission has announced its decision upon such motion [motion for rehearing] no other motion for rehearing shall be filed by the same party unless by leave of the Commission."

4/ 25 C.F.R. § 503.33(b), and Stillaguamish Tribe v. United States, 19 Ind.Cl.Comm. 531, 531-32 (1968).

5/ 31 Ind.Cl.Comm. at 35-36.

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

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

In further explanation of the above the plaintiff states,

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

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.

In regard to the above language the Hopi Tribe has requested a rehearing for the following reasons: 6/

6/ 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, at 2.

1. 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.

2. 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.

3. 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 process.

In short the Hopi Tribe has not requested this second rehearing on the basis of an alleged error of fact, alleged error of law, or newly discovered evidence. Plaintiff's motion is filed for no reason other than the convenience of the plaintiff on appeal. Such grounds of plaintiff's convenience are not proper grounds for a motion for rehearing under the rules of the Commission. The plaintiff's motion should therefore be denied. 7/

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7/ Plaintiff's motion for a second rehearing should also be denied for reason of untimeliness. Plaintiff's motion was filed on October 4, 1973, seeking a further rehearing from the Commission's opinion and order of July 9, 1973, denying plaintiff's first motion for rehearing. A motion for rehearing must be filed within thirty days of the filing of the Commission's conclusions. 25 C.F.R. § 503.33(a). Nor has the Hopi Tribe presented any issue which had not been considered by the Commission in the plaintiff's first motion for rehearing.

II. Counts 5 through 8 of the Hopi Tribe's Petition Should Be Dismissed.

[Since the Hopi Tribe has not presented grounds upon which a rehearing may be granted, the Commission should deny the Hopi's motion for leave to file this second rehearing without reaching the merits of plaintiff's argument. The Commission has already provided that the Hopi Tribe may submit further arguments as to liability in counts 5 through 8 in the valuation phase of this case. 8/ This procedure having been established by the Commission, there is no reason to depart therefrom.] 9/

The Hopi Tribe has contended that counts 5 through 8 of its petition have alleged a cause of action against the United States for rentals for Hopi lands utilized by the Navajo Tribe. When first presented this alleged claim was stated as follows: 10/

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8/ Hopi Tribe v. United States, 31 Ind.Cl.Comm. 16, 36 (1972).

9/ Cf., Saginaw Chippewa Indian Tribe v. United States, 31 Ind.Cl.Comm. 408, 408-09 (1973).

10/ 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, at 22.

[T]he United States must pay the reasonable rental value of the land it allowed the Navajos to use during the period prior to the actual taking.

The Hopi Tribe now appears to have abandoned this position, but instead claims as follows: 11/

[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.

Within the context of plaintiff's memorandum in support, the Hopi Tribe is now apparently claiming that the United States is liable to the Hopi Tribe for the fair rental value of the lands of the joint use area of the 1882 Executive Order Reservation which plaintiff alleges were illegally used by the Navajo Tribe. 12/ This illegal use is apparently alleged to have occurred since 1937. 13/

11/ 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, at 5. [Hereinafter referred to as Memorandum.]

12/ The joint use area of the 1882 Executive Order Reservation is that area to which it has been determined that the Hopi and Navajo Tribes hold an undivided one-half interest. Healing v. Jones, 210 F.Supp. 125, 191-92 (D. Ariz. 1962), aff'd, 373 U.S. 759 (1963) and Hopi Tribe v. United States, 23 Ind.Cl.Comm. 290, 310 (1970).

13/ Memorandum at 2-5. While the plaintiff does not so state this alleged illegal use is apparently to have commenced on June 2, 1937, at which time the Navajo and Hopi Tribes commenced to have a joint and undivided one-half interest in the lands of the 1882 Reservation outside of Land Management District 6. Hopi Tribe, supra, 23 Ind.Cl.Comm. at 311.

The Hopi Tribe attempts to assert that its alleged rental claim occurred prior to August 13, 1946. On the contrary, if the plaintiff does have such a cause of action it occurred subsequent to August 13, 1946, and is not within the jurisdiction of the Indian Claims Commission. 14/

Plaintiff predicates its allegation of jurisdiction on the finding in Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963), of an undivided one-half interest in the Hopi and Navajo Tribes to that area within the 1882 Executive Order Reservation but outside of Land Management District 6. Plaintiff contends that this interest dates back to 1937 and accrued at that time and then continued to date. 15/ The plaintiff, however, ignores the fact that the decision in Healing v. Jones, supra, was in the nature of a quiet title action pursuant to the Act of July 22, 1958. 16/ Until such title was determined the United States had no

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14/ 25 U.S.C. § 70a..

15/ The United States does not acquiesce in any contention by the plaintiff or the Commission that the latter has jurisdiction over wrongdoings which occurred prior to August 13, 1946, and continued thereafter. However, in this case even if such a jurisdiction existed it would not salvage the plaintiff's alleged claim, for each use, for which rental is claimed, constitutes a separate transaction from which jurisdiction is to be measured.

16/ Pub. L. No. 85-547, 72 Stat. 403. The decision in Hamilton v. MacDonald, Civil No. 579 Prescott (D. Ariz. filed September 7, 1972), which the Hopi Tribe appended to its Memorandum is likewise directed only to the time subsequent to the decision in Healing v. Jones, supra. This opinion is of no relevance to the Hopi's alleged claim before the Commission.

duty to the plaintiff to limit the use of the 1882 Reservation by the Navajo Tribe or by individual Navajo Indians, 17/

Plaintiff's reference to the district court's comments in Healing v. Jones, supra, to illegal or unlawful acts also fails to salvage plaintiff's alleged claim. The Commission has itself acknowledged that such comments refer only to the authority of the executive to establish Indian reservations. 18/

Further, plaintiff apparently predicates the jurisdiction of the Commission over the alleged rental claim upon the language of Section 2, Clause 5 of the Indian Claims Commission Act 19/ for the plaintiff states: 20/

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, . . .

17/ The Executive Order of December 16, 1882, 1 Kappler 805, specifically provided that the Secretary of the Interior could settle Indians other than Hopi Indians on the 1882 Reservation.

18/ Hopi Tribe, supra, 31 Ind.Cl.Comm. at 33.

19/ 25 U.S.C. § 70a.

20/ Memorandum at 4.

In order to constitute a cause of action under Section 2, Clause 5, the Court of Claims has held: 21/

There must be a showing that the United States undertook an obligation, a "special relationship", the obligation was to the Tribe, that the United States failed to meet its obligations, and that as a result the Tribe suffered damages.

By the Executive Order of December 16, 1882, supra, the United States did not undertake an obligation to prevent other Indians from using the lands of this reservation; but on the contrary, the United States specifically retained the right to settle other Indians thereon. In the absence of a duty to prevent the settlement of Navajo Indians on the 1882 Reservation, the United States may not be held liable under Section 2, Clause 5 of the Indian Claims Commission Act.

Plaintiff's memorandum in support of the present motion for a second rehearing is inconsistent and unclear. While the plaintiff seems to be seeking rental for the use by the Navajo Tribe of lands to which the court in Healing v. Jones, supra, quieted title to the Hopi Tribe as an undivided one-half interest, 22/

21/ Aleut Community of St. Paul Island v. United States, \_\_\_\_ Ct.Cl. \_\_\_\_\_, \_\_\_\_\_, 480 F.2d 831, 839 (1973).

22/ As such plaintiff's alleged claim is also nothing more than a suit by the Hopi Tribe against the Navajo Tribe. The Commission has jurisdiction only over "claims against the United States." 28 U.S.C. § 70a. Therefore, this alleged rental claim of the Hopi Tribe can be dismissed on this ground. However, should this be a valid claim against the United States, the benefit of the alleged use inured to the Navajo Tribe and should any rental award be awarded to the Hopi Tribe, this award should be deducted as an offset from any award ultimately received by the Navajo Tribe.

the Hopi Tribe also seems to be claiming rental value while still claiming aboriginal title to said lands from 1937 to date. 23/ The Commission has, however, held that the plaintiff's aboriginal title to the lands lying within the 1882 Reservation, but outside of Land Management District 6 was extinguished on June 2, 1937. 24/ Plaintiff certainly may not recover rental compensation based on aboriginal title for acts which occurred after the extinguishment of such title.

Lastly, the Hopi Tribe is premature in its concern that the retained Hopi interest in the 1882 Reservation lying outside of District 6 will be claimed as a gratuity and result "in a washed transaction." 25/ Gratuities and other offsets are claimed only after the amount of liability is determined. 26/ The interjection now of this question by the Hopi Tribe serves only to delay the ultimate disposition of a case which the Hopi Tribe has alleged

23/ Memorandum at 5: "Honestly and fair dealings require that when the Government unlawfully deprived the Hopi Tribe from the use of its own lands without extinguishing Indian title. . . ." [Emphasis added.]

24/ Hopi Tribe, supra, 23 Ind.Cl.Comm. at 288; 31 Ind.Cl.Comm. 35.

25/ Memorandum at 5.

26/ 25 C.F.R. § 503.12(a).



CERTIFICATE OF SERVICE

I hereby certify that on the            day of October 1973, one copy of the foregoing Government's Brief in Response to Hopi Tribe's Motion for Rehearing were mailed to John S. Boyden, Boyden & Kennedy, 10th Floor, Kennecott Building, 10 East South Temple, Salt Lake City, Utah 84133 and William C. Schaab, Rodney Dickason, Sloan, Akin & Robb, First National Bank Building - West, Albuquerque, New Mexico 87103.

Dean K. Dunsmore  
Attorney for Defendant

196

*Motion of Hopi for consideration  
of certain demands hereby  
submitted*

OCT 29 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,

Plaintiff,

Docket No. 196

THE NAVAJO TRIBE OF INDIANS,

Plaintiff,

Docket No. 229

-vs-

THE UNITED STATES OF AMERICA,

Defendant.

109

RESPONSE OF PLAINTIFF THE NAVAJO TRIBE OF INDIANS  
TO MOTION FILED ON OCTOBER 4, 1973  
BY PLAINTIFF THE HOPI TRIBE

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On June 29, 1970, more than 1,200 days ago, the Com-  
mission entered Findings of Fact, Conclusions of Law, its Opinion  
and an Interlocutory Decree in this case, all relating to the  
taking of the aboriginal lands of the Plaintiff Tribes. The Com-  
mission ruled on that date that this case could "now proceed to  
a determination of the acreage and the . . . fair market value"

of the lands awarded to the Plaintiff Tribe and "to a determination of all other issues bearing upon the defendant's liability". Yet the Navajo Plaintiff has since that time been unable to proceed to a determination of those issues because of motions filed on behalf of the Hopi Plaintiff.

On August 28, 1970 the Hopi Plaintiff filed, pursuant to Commission Rule 33, a 23-page Motion seeking further hearings, a rehearing and amendments of findings with respect to a wide range of issues. The Hopi Plaintiff pointed out in its 33-page Brief in support of its Motion (Brief, p. 22) that with respect to Counts 5 through 8 of its original petition there remained to be tried the question whether the Defendant must pay the Hopi Plaintiff the "reasonable rental value" of land allegedly used by members of the Navajo Plaintiff.

After the other parties filed responses to the Hopi Plaintiff's Motion and Brief, on April 28, 1971 the Commission granted a rehearing for the sole purpose of permitting the parties to present additional evidence relating to the date of taking the aboriginal lands of the Hopi Plaintiff. The Commission's April 28 Order had the effect of denying the Hopi Plaintiff's Motion insofar as it sought further hearings on any other issues, including the "reasonable rental value" issue.

On May 22, 1972 evidence relating to the date of taking

was presented and on July 9, 1973 the Commission denied the remaining portions of the Hopi Plaintiff's Motion. In its Opinion supporting its July 9 Order, the Commission stated that it was inclined to dismiss the "reasonable rental value" issue but decided to "withhold final action on the matter until the [Hopi] plaintiff has had further opportunity, if it so desires, to argue the matter at the value phase of these proceedings" (31 Ind. Cl. Comm. 36).

Nevertheless, on October 4, 1973, more than three years after the Hopi Plaintiff filed its Motion and Brief for further hearings and more than two years after the Commission ruled that it would not grant further hearings except on the date of taking, the Hopi Plaintiff filed yet another motion seeking leave of the Commission for another hearing on the "reasonable rental value" issue. The Hopi Plaintiff's October 4 Motion recognizes that the Commission is not required to consider the Motion because the Commission has already ruled on the Hopi Plaintiff's 1970 Motion for a rehearing and Sec. 33 of the Commission's rules provides that "[a]fter the Commission has announced its decision upon such motion [for a rehearing] no other motion for a rehearing shall be filed by the same party unless by leave of the Commission". The Navajo Plaintiff submits, for the reasons outlined below, that the Commission should deny the Hopi Plaintiff's Motion

for yet another hearing and instead proceed to a determination of the acreage, fair market value and other remaining issues pursuant to its June 29, 1970 Opinion.

A. The Hopi Plaintiff's Motion for Another Hearing was Not Timely Filed. Sec. 33 of the Commission's Rules requires that motions for rehearings must be filed within 30 days after the Commission files conclusions on its findings of fact. The Commission filed its first conclusions in this case on June 29, 1970, without approving the Hopi Plaintiff's "reasonable rental value" claim. The Navajo Plaintiff submits that the Hopi Plaintiff's time for filing a motion for another hearing on this claim started to run on that date and ended on July 29, 1970. Even if it should be determined that the Commission did not file its conclusions on the "reasonable rental value" claim on June 29, 1970, the Hopi Plaintiff has known with certainty since the entry of the Commission's April 28, 1971 Order limiting the purpose of the additional hearing requested by the Hopi Plaintiff that the Commission would not hear the "reasonable rental value" claim before the valuation phase of this claim, and it should have moved for another hearing on the claim not more than 30 days thereafter. The Commission's Opinion of July 9, 1973, discussing the "reasonable rental value" claim at some length and stating that it could be considered, if at all, in the valuation phase of this case

(31 Ind. Cl. Comm. 35-36) again made it clear to the Hopi Plaintiff that the claim would not be considered before the valuation phase. Nevertheless, the Hopi Plaintiff did not file its Motion for another hearing until almost three months after the Commission's Opinion was filed. Under these circumstances, the Hopi Plaintiff's Motion cannot be considered timely.

B. Permitting Piecemeal Consideration of the Claims of the Hopi Plaintiff Would Interfere With the Orderly Discharge of the Commission's Business. Sec. 33 of the Commission's Rules wisely seeks to prevent piecemeal consideration of Indian land claims cases by limiting to one the number of motions for more hearings which a claimant may file without leave of the Commission. Permitting cases to be tried piecemeal would disrupt the orderly discharge of the Commission's business by involving the Commission and its staff (and the parties as well) in unnecessary work and expense and would prevent the Commission from timely discharging its Congressional mandate. For such reasons, piecemeal consideration of cases resulting from additional hearings, such as the one now sought by the Hopi Plaintiff, should be allowed only in the most compelling circumstances. Such circumstances are not present here. The Hopi Plaintiff has twice before (in its original petition and in its August 28, 1970 Brief) placed the "reasonable rental value" question before the Commission. Its

third attempt to do so is not based upon alleged errors of law or fact or upon newly discovered evidence; nor will the Hopi Plaintiff's claim be lost if it is not heard separately. It can, as the Commission has indicated, be fully considered in connection with the valuation phase, and may be appealed thereafter to the Court of Claims.

C. The Commission Should Not Permit This Case to be Further Delayed. The Commission and the Navajo Plaintiff have ~~been prepared~~ to proceed with the valuation phase of this case for more than three years. The Hopi Plaintiff prevented them from proceeding by filing its Motion for more hearings, but it should not now be permitted to delay the resolution of this case with its second Motion for more hearings.

D. The Hopi Plaintiff's "Reasonable Rental Value" Claim Can Best Be Decided in the Valuation Phase of this Case. The Commission has consistently taken the position that the Hopi Plaintiff's "reasonable rental value" claim can best be considered in the valuation phase of these proceedings. The Navajo Plaintiff agrees. If the Hopi Plaintiff's claim is tenable at all, it presents valuation questions which should be considered with the other valuation questions and not in special proceedings.

#### CONCLUSION

For the reasons set forth above, the Navajo Plaintiff

respectfully requests that the Commission summarily deny the Hopi Plaintiff's Motion for another hearing on its "reasonable rental value" claim and that it direct the parties to proceed with the valuation phase of this case.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By *William C. Schaab*  
William C. Schaab, Attorney of Record  
for The Navajo Tribe of Indians  
Post Office Box 1888  
Albuquerque, New Mexico 87103

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 24 day of October, 1973 one copy of the foregoing Response of Plaintiff The Navajo Tribe of Indians to Motion filed on October 4, 1973 by Plaintiff The Hopi Tribe was mailed to Dean K. Dunsmore, Esq., U. S. Department of Justice, Indian Claims Section, Lands and Natural Resources Division, Safeway International Building Room 674, Washington, D. C. and to John S. Boyden, Esq., attorney of record for The Hopi Tribe, El Paso Natural Gas Building, Suite 604, 315 East Second South Street, Salt Lake City, Utah 84111.

*William C. Schaab*  
William C. Schaab