A History of Docket 196: the Hopi Claim Before the Indian Claims Commission.

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Executive Summary

Docket 196, the Hopi claim before the Indian Claims Commission (ICC), has a complex history. The main contexts concern:

- the origin, purpose, and operation of the Indian Claims Commission
- Hopi aboriginal lands, and U.S. actions affecting these, especially from 1930-1951
- the relationship of Docket 196 to the history of the Hopi Tribal Council
- how Docket 196 was drawn up, presented, and argued for under the ICC Act
- the Commission's Opinions and Findings of Fact on Hopi aboriginal lands
- the Hopi Tribe's appeals of ICC rulings to the Court of Claims & the Supreme Court
- changes affecting Docket 196 with Healing v Jones & the 1934 Reservation litigation

This report is based on the author's archival research in July-August 2008 at:

1) Arnold and Porter's Hopi archive, Denver, CO;
2) John S. Boyden Collection (MS# 823), J. Willard Marriott Library, University of Utah, Salt Lake City, UT;
3) John S. Boyden Collection (MSS 343), L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, UT;
4) Office of General Counsel, the Hopi Tribe, Kykotsmovi, AZ (especially, 'Kennedy files');
5) Office of the Tribal Chairman, the Hopi Tribe, Kykotsmovi, AZ;
6) Office of Cultural Preservation, the Hopi Tribe, Kykotsmovi, AZ;
7) Office of Government Services, the Hopi Tribe, Kykotsmovi, AZ;
8) Office of the Tribal Secretary, the Hopi Tribe, Kykotsmovi, AZ;
9) Branch of Tribal Operations, Hopi Indian Agency, Keam's Canyon, AZ;
10) Indian Claims Commission files (Record Group 279), the National Archives, Washington D.C.;
11) Department of the Interior Library, Washington, D.C.;
12) Library of Congress, Washington, D.C.

The author also relied upon documents in his own archives gathered from different sources over the last three decades, upon interviews on land matters with knowledgeable Hopis since 1980, upon published sources, and upon a web-based record of documentary sources by the Indian Law Resource Center (http://www.indianlaw.org/en/hopi_report).

The Indian Claims Commission was created by Congress in 1946, in effect as a branch of the Court of Claims. It was devoted to the resolution of all Native American claims against the United States. Before 1946, Native American claims could be brought before the Court of Claims, but in order to be heard, each one required a special jurisdictional act of Congress. It was

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a highly cumbersome process, and the Court was seriously backlogged by the late 1920's. Native claims were typically based on treaty (or executive order) violations; the Court of Claims did not hear claims for losses of aboriginal lands until 1946, the same year the ICC Act was passed into law. The Court of Claims was only authorized to award compensatory money judgments for U.S. actions held to have been in violation of treaties or other U.S. laws. The ICC was created to streamline the claims process, but in essence it operated in the same way as the Court of Claims. Although this was not clear to many tribal claimants, the ICC only ever had authority to award money judgments: it could not restore tribal lands. This limit of authority was explicit in its subsidiary role to the Court of Claims, which remained the Court of Appeal against ICC decisions.

The larger purpose of the ICC was to "finally dispose" of all Native claims against the United States. When the ICC Act was passed in 1946, the emerging mood in Congress was for termination of federal services and of tribal sovereignty. Some key players in the ICC legislation were associated with the termination movement. Notably, these included prominent Utah politicians, officials, and Claims attorneys, who were adherents of the Latter-Day Saints ideology promoting assimilation of Lamanites (Native Americans) into the Mormon mainstream. Ernest L. Wilkinson, a powerful Claims attorney for the Utes (and others) since the 1930's, was central here; he drew up the final version of the ICC Act. Senator Arthur V. Watkins (R., Utah) became the leading proponent of termination in Congress. A third figure was John S. Boyden, Democratic candidate for Governor of Utah in 1948, who became Wilkinson's law partner in 1950. All three worked on termination of tribes in Utah in the 1950's, intending that state as a model for termination of tribes nationwide. After Watkins failed to win reelection, in 1959 he was appointed to the three-member Indian Claims Commission. By the time Boyden presented Docket 196 for trial in 1961, Watkins was Chairman of the ICC.

Under the 1946 Act, the ICC was supposed to last ten years. All claims had to be brought within five years (by August 13, 1951), and Congress expected the ICC to resolve them by 1957 (ten years after its first meeting). The number of claims ballooned in the months prior to the 1951 deadline. Moreover, most claims were complex historically and legally, often involving 19th or even 18th century treaties. There was no way the three-member Commission could dispose of all the claims within its deadline. Eventually, after multiple renewals, the ICC was closed in 1978 (22 years after its initial expiry date). But Congress became increasingly frustrated with the slow rate of progress. Watkins' appointment as Commission Chair in 1960 was designed to speed up decisions. His main proposal to this end was for Compromise Settlements, between the tribal claimants and the United States, represented by the Justice Department. Many cases were resolved by settlements after that, and when the Commission adopted new procedural rules in 1968, Compromise Settlements became explicitly recommended.

By 1969, the Commission had been expanded to five members; under pressure, Watkins had resigned in 1967, and the other two sitting Commissioners were soon replaced also. By this point (and since 1960), termination was no longer a policy favored by Congress; opposition had been so great in Indian country that after several tribes were terminated with disastrous results, Congress and the Bureau shifted course. The Claims cases thus extended long after the time when their purpose had been conceived as a prerequisite for tribal termination.

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Under the ICC's operating procedure, tribal claimants had very little power: all decisions, including the framing of the claims as presented, went through white Claims attorneys. The Commission itself did not include a single Native voice for most of its life. Marginalization of Indians from a legal process which directly affected their lives produced growing resentment, culminating in the take-over of the B.I.A. in Washington in 1972, and the Wounded Knee siege of 1973 (the ICC was not the sole cause, but it was a major one). Many tribes believed that the ICC was a "Land Claims Commission" with authority to restore lands. Still in the mid-1970's some Hopis, both on the Tribal Council and in the Traditionalist group, continued to refer to the ICC as a Land Claims Commission. The problem was that the ICC did not permit tribes to claim land: just *money for land* deemed illegally "taken" by the Government in past actions. Only one recommendation by the ICC ever resulted in land restoration: Taos Pueblo's Blue Lake. In that instance, the Commission simply referred the case back to Congress (since land restoration was beyond its power), which had to pass a special authorizing Act. The ICC was very clear that the Taos case was "unique" and should not be interpreted as a precedent for any other tribal claims.

Hopis had been pressing their aboriginal land claim before various government officials since 1930. Hopitutskwa was depicted on maps and described in letters and petitions in various official settings. The government's responses in the 1930's and 1940's not only rejected that, but increasingly restricted Hopi land rights within a small area of the 1882 Reservation. Although Hopis voted to adopt the (I.R.A.) Tribal Constitution in December 1936, and formed a Tribal Council under its terms, immediately thereafter they were faced with Bureau policies confining Hopi movements to Grazing District Six (established in June 1937). While the Tribal Council attempted to preserve Hopi rights, by the early 1940's, especially with livestock reduction, there was a consensus that the Constitution had failed completely in this regard. Hopis involved with the first years of the Council became disillusioned and called for reversing approval of the Constitution. The Council ceased to function by 1943. In 1944, rather than expanding the Hopi land base beyond District Six, the Bureau began a policy of encouraging Hopis (and other Arizona Natives) to relocate to the Colorado River Reservation. This policy expanded through the late 1940's and became attached to the developing Navajo-Hopi Long Range Rehabilitation Act (1950). Both the Act and the relocation program were clearly associated with an eventual goal of Hopi termination. Although the Hopi were never actually slated for termination per se, these actions were clearly preparatory to that aim. "Final disposition" of Hopi claims against the government by the ICC would thus also be conducive to that aim.

John Boyden sought to become the Hopis' Claims attorney almost immediately following passage of the ICC Act. Encouraged by Ernest Wilkinson, in January 1947 he traveled to Windowrock and Keam's Canyon trying to interest both the Navajo and Hopi tribes in hiring him. By the fall of 1947, his focus rested only on Hopi. Without a Tribal Council, however, no-one who was recognized by the Department of Interior had the authority to sign a Claims contract. During this period, numerous energy companies were seeking leasing rights on 1882 Reservation lands. For them too, no Tribal Council meant no recognized Hopi authority to sign leases. At the same time, Hopis were facing desperate economic times from stock reduction and confinement to District Six. In 1948, the First Mesa chiefs petitioned the Commissioner of Indian Affairs to restore Hopi rights to the entire 1882 Reservation. His response was to encourage Hopis to relocate to the Colorado River Reservation or simply move off reservation and assimilate into the American mainstream. But the Commissioner also used the opportunity to

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argue forcefully that the Bureau required a representative Hopi tribal government, for three principal reasons: to amend the Tribal Constitution, to hire a Claims attorney who could present a tribal claim to the ICC, and to negotiate oil leases with energy companies. As a result, Agency Superintendent Crawford began a campaign to get Hopis, especially those employed by the Agency, to reinstitute the Tribal Council.

Many Hopis resisted, continuing to hold the Bureau responsible for stock reduction and District Six. A Traditionalist movement arose, and in 1949 its leaders wrote to President Truman rejecting the ICC and the Rehabilitation Act (then in the works). In January 1950, Superintendent Crawford convened representatives from all Hopi villages at Keam's Canyon to persuade them to reinstitute the Tribal Council. Several villages demurred, but several others—about half those recognized in the Tribal Constitution—did appoint delegates. The first new Council meetings were held in February and March, 1950. It appears Crawford used misleading tactics, however, and he could not convince his superiors that the reorganized Tribal Council was legitimate. Oliver La Farge (author of the Constitution) visited Hopi in June 1950, and voiced grave doubts about the Council, which was being sold to the people as the necessary vehicle through which lands could be restored by the "Land Claims Commission." Even the new Commissioner of Indian Affairs, Dillon S. Myer, an arch-terminationist, who visited Hopi in September 1950, likewise pronounced the Tribal Council unrepresentative.

Meanwhile, time was running out if an ICC claim was to be made before the August 1951 deadline. At the urging of Crawford, the Tribal Council moved to hire a Claims attorney. Although the record is silent on whether Boyden had maintained contacts with Hopi since late 1947, it seems likely that he had. After inviting him for a meeting in December 1950, the Council made a preliminary agreement to hire him as the Hopi Tribe's Claims counsel.

In February, 1951, Tribal Council representatives traveled to Salt Lake City to discuss this further. Contemporary reports indicate that, with Boyden's active encouragement, they also discussed plans for land restoration. Given the Hopis' long-term concerns about land, it seems unlikely they would only have been interested in filing a claim for monetary compensation for lands deemed lost. Boyden immediately began to discuss signing a separate contract to serve as the Hopi Tribe's General Counsel, in addition to an ICC Claims contract. He began to devise a strategy—even before the Claims contracts were signed—to reverse an Opinion by the Interior Department's Solicitor in 1946. That Opinion recognized Navajo interests in the 1882 Reservation outside District Six to the mineral estate underlying the land. Despite some attempts by Interior to do so, there had been no ratified ruling officially restricting the Hopi Reservation to District Six. But in recognizing Navajo rights inside the 1882 Reservation, this Solicitor's Opinion in effect closed off Hopi rights outside District Six, since Hopis were only permitted to graze their stock in District Six. It appears Boyden's strategy was twofold. First, the Council must hire him as their Claims attorney, and he would file the ICC claim for monetary compensation for aboriginal lands illegally taken by the Government in the 19th century. If the Council agreed to this, then they could work out a separate contract authorizing Boyden, as General Counsel, to pursue a reversal of the Solicitor's Opinion in order to reclaim Hopi land rights within the 1882 Reservation. The historical record is unequivocal that he was working both of these angles with the Council at the same time. Records of his discussions at Hopi

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indicate a frequent lack of distinction between Hopi rights under the ICC Act and rights to reclaim lands through some other, not-yet-established legal means.

Boyden met with most villages in May 1951, to persuade them to hire him as their Claims counsel. During the meetings, he explicitly mentioned the possibility of land restoration, and the extent to which he decoupled this from the ICC claim was sometimes clearer than others. He was very much aware that the Tribal Council remained unrecognized by the Bureau. To hedge his bets with the Commissioner of Indian Affairs—who had to approve his Claims contract before a claim could be filed—Boyden thus sought individual contracts with each village, as well as one with the Tribal Council. On the strength of village resolutions, certified by Superintendent Crawford, Hopi delegates traveled to Salt Lake City on July 12, 1951 (one month before the ICC deadline) to sign Claims contracts with Boyden. Although Bacavi's two delegates (its Tribal Council representatives) signed, the village had not yet passed a resolution. Without Bacavi, Boyden knew he could probably not persuade the Commissioner that a "majority" of Hopi villages supported him. At Boyden's urging, a village meeting was hastily arranged upon the delegates' return, and a resolution was passed after the fact. This gave Boyden the following "villages" listed in the Tribal Constitution: First Mesa, Sipaulovi, Kyakotsmovi, Bakabi, and Upper Moenkopi. Mishongnovi, Shungopavi, Oraibi, Hotevilla, and Lower Moenkopi refused to sign contracts or appoint representatives to the Tribal Council. Later on, in defending against protests, Boyden appears to have deliberately miscounted villages to support his argument that he had a majority. Yet in the terms specified by the Constitution, he had exactly fifty percent; or, 4.5 out of nine "villages."

The Commissioner approved his Claims contracts in Washington on July 27. One week later, on August 3rd, Boyden filed the Claims petition for the Hopi Tribe, assigned Docket number 196. There were different aspects to the claim: most importantly, it sought compensation for the loss of Hopi aboriginal lands since U.S. annexation of the Southwest under the Treaty of Guadalupe Hidalgo in 1848. As "Pueblo Indians," the Hopis' rights were protected under this Treaty. Boundaries of 1848 Hopi aboriginal lands described in the claim were: the San Juan River to its confluence with the Colorado River, the Colorado to its confluence with the Little Colorado River, the Little Colorado to its confluence with the Zuni River, the Zuni River up to its intersection with the Arizona-New Mexico state line, and the state line north (passing the Four Corners) up to the San Juan River. Even though Boyden was demonstrably aware of the Hopitutskwa claim actively presented to officials since 1930, the claim area in Docket 196 excluded all lands west and south of the Little Colorado River. Moreover, Docket 196's inclusion of lands up to the state line as aboriginal Hopi is puzzling; the northeastern part of this (say, from Canyon de Chelly north to the San Juan River) lay well beyond the boundary of Hopitutskwa claims as stated since 1930. The common denominator of the lands for which compensation was claimed in Docket 196—for all but the southernmost area below the 1934 Reservation line to the Little Colorado and Zuni Rivers—was that they all fell within existing Indian Reservations, Hopi or Navajo. Whatever lands it might end up compensating the Hopis for, the ICC was not asked to include much private land in its calculations. Nor was it asked even to consider the loss of valuable natural resources (especially timber, harvested since the 1880's) of the San Francisco Peaks area. In addition to the claim against lost aboriginal lands, Docket 196 also sought compensation for the rental value of lands in the 1882 Hopi Reservation which had, to all intents and purposes, been appropriated by the Government for the Navajos. In that

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regard, when *Healing v. Jones* was filed seven years later (in 1958), covering the same area of the 1882 Reservation, the two cases—*Healing* and Docket 196—would come to have a direct, mutual influence on each other.

Docket 196 was filed on behalf of the Hopi Tribal Council (as well as the individually named villages with which Boyden had separate contracts). As such, the claim petition listed all the villages mentioned in the Tribal Constitution, despite the fact that several villages had explicitly rejected the Tribal Council and refused to sign village contracts. That rejection caused the Department of the Interior to withhold recognition of the Tribal Council—at the time of the ICC filing, and indeed for another four years. Before the August 13, 1951 deadline, other villages weighed in on the question of an ICC claim. Hotevilla notified Washington it would refuse to file a claim to compensate for lands it had never ceded to the U.S. Through the Kikmongwi and all the *Wimmomngwit* (society chiefs), Shungopavi, as the "mother village," filed a claim (Docket 210) on behalf of all Hopis, seeking restoration of Hopitutskwa to Hopi authority, and rejecting the possibility of monetary compensation.

Less than one month after he filed Docket 196, Boyden returned to Hopi to arrange his General Counsel contracts. The ICC contracts were on a contingency basis: Boyden would only get paid for his work if and when the ICC made an award (of which he could claim up to ten percent). For the General contract, he also agreed to withhold most billing, under a plan agreed with the Tribal Council that once land rights in the 1882 Reservation were cleared up, the Tribe would stand to gain substantial revenues from minerals leases, and would be able to pay him out of those funds. Boyden entered discussions with energy companies for Hopi Reservation leases at least as early as 1952. For his General contract, Boyden again gained the formal assent of the Tribal Council and four (possibly 4.5—Upper Moenkopi remains unclear) of the nine villages listed in the Constitution. The B.I.A. Area Director refused to support this contract, however, as unrepresentative, and he opposed Bureau recognition of the Tribal Council on the same grounds—even though these were the identical grounds on which Boyden's Claims contract had been approved the previous July. When Boyden visited Washington in January 1952, he deferred seeking approval for his General contract, because of this opposition. He did, however, seek to have the Hopi Agency removed from the Windowrock Area Office (where his chief B.I.A. opponent was based) to Phoenix (the transfer did in fact occur, in 1954). Strong Hopi dissent to Boyden's work persisted, and was supported by a local newspaperman, Platt Cline, who urged Congressional attention. Boyden secured Interior approval of his General contract in May, 1952. In August, 1952, however, following up from Cline's continuing complaints, Interior launched an investigation of Boyden's Claims and General contracts, although it concluded, in December 1952, not to disturb the existing approvals for either. However, Interior remained explicit that these approvals did not constitute recognition of the Tribal Council as the legitimate representative of the Hopi people. In short, Boyden was able to move forward on his Claims and General contracts, even though the Department of the Interior did not recognize the entity with which he had his contracts as the official representative of the Hopi people. How or whether this process was lawful thus remains a serious question.

Throughout the 1950's Boyden and his co-counsel in Ernest Wilkinson's Washington law firm sought to delay hearings on Docket 196, with the idea that any new decision by Interior on the Solicitor's 1946 Opinion would directly impact the claim. If they succeeded in some

measure, the terms of any compensatory award in Docket 196 (with an ICC decision on Government liability for loss of Hopi lands inside the 1882 Reservation) would be different than if they could not get the Solicitor's Opinion reversed. At first, Boyden sought a direct reversal by the Secretary of the Interior. He broached this during the first visit ever by a Secretary of the Interior to Hopi in 1953, and, with explicit Secretarial permission, submitted a formal petition in April 1955. Eventually, the matter was transferred to Congress, where Boyden succeeded in lobbying through a jurisdictional Act authorizing the Hopi Tribe to sue the Navajo Tribe for its interest in the 1882 Reservation. Immediately the Act was passed, on August 1, 1958, Boyden filed the *Healing v. Jones* lawsuit, to be heard before a three-judge panel of the District Court in Prescott. Thereafter, he continued seeking delay of the ICC trial on Docket 196 pending the outcome of the *Healing* case.

In 1957, pressed by the ICC to hire an attorney, and by the Government to consolidate its case with Docket 196, Shungopavi formally withdrew its Docket 210 petition, reserving the right to re-present it in future if a Commission was created that could restore lands rather than just grant monetary compensation. Shortly thereafter, Boyden and the Navajos' attorney agreed to a Government motion to consolidate Docket 196 with Docket 229, the Navajo claim, for purposes of trial, since both involved overlapping areas. In fact, the Navajo claim area completely encompassed that claimed by the Hopi in Docket 196, and competed also with several other dockets, representing Southern Paiute, Havasupai, Apache, Laguna, and Acoma claims. The Southern Paiute claims also competed directly with the Hopi claim, and when Docket 229 and 196 finally came on for trial, the ICC explicitly took notice of Southern Paiute claims vis-à-vis the Hopi and Navajo claim areas.

Healing v. Jones was tried in September, 1960. During the month prior to trial, the Hopi Agency took testimony from numerous older Hopis on lands both within the 1882 Reservation (for both the Healing case and Docket 196) and outside it (for Docket 196). In addition to these interviews, Boyden also relied on historical research at the National Archives. He was advised by historian Lyman Tyler and anthropologist Fred Eggan. It appears to have been on Eggan's advice that, for Docket 196, Boyden shifted the eastern boundary of the claim—from the state line west to the "Meriwether Line" of 1855 (a straight line linking the Zuni River-Little Colorado confluence with the Chinle Creek-San Juan River confluence). The consolidated ICC trial on Dockets 229 and 196 was presented in Washington in September-October 1961. Eggan was the only expert witness for the Hopi, and Duke Pahona was the only Hopi witness. In addition Charles Pitrat of the Hopi Agency presented information gathered in interviews with older Hopis on traditional uses, as marked in two Map exhibits showing eagle shrines and other Hopi shrines throughout the claim area. Pitrat was called back to testify again in October 1962. Additional evidence and documentary exhibits were submitted through 1963. *Healing v. Jones* was decided in 1962, and affirmed by the Supreme Court in 1963. In awarding Hopis joint rights outside District Six, the *Healing* ruling basically reversed the Solicitor's Opinion of 1946, and established a half Hopi interest to all of the 1882 Reservation. In consequence, Boyden would later argue before the ICC that the Hopis had lost a half-interest (to the Navajos) in the 1882 Reservation, for which they should be compensated in Docket 196.

In 1970, nine years after the main Docket 196 trial, and two years after all the 1961-1963 Commissioners who had heard witnesses, evidence, and argument, had retired from the

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Commission, the ICC rendered its Opinions and Findings of Fact on Dockets 229 and 196. The ICC's Finding 20 on Docket 196 decreased the Hopi aboriginal area significantly—even more than the reduced area recognized by the defendant's chief expert witness (Florence Ellis) at the trial. Moreover, the ICC recognized the "date of taking" for Hopi aboriginal lands not as 1848, but rather 1882, with the Hopi Executive Order. In contrast, in Docket 229 the ICC *increased* the aboriginal area it recognized as Navajo over that described by the defendant's same expert. The entire area south of the Little Colorado River downstream to the confluence with the Dinnebito Wash was recognized as *exclusive* Navajo aboriginal land in 1868, the date assigned by the ICC as the government "taking date" for Navajo lands (i.e., by the Navajo Treaty of 1868).

Boyden's appeal of the ICC decision focused on two principal issues: the area recognized in Finding 20 as Hopi aboriginal land, and the ICC's assigned date of taking. Boyden argued that evidence on dates of taking had been ruled out of the trial by an ICC stipulation in 1958. The Commission agreed to hear further argument on dates of taking but denied the Hopi Tribe's appeal on the area of aboriginal lands. On this issue, the ICC ruled that Hopi aboriginal lands had been the same in 1882 as in 1848, and that U.S. military actions against the Navajos had produced no effect whatsoever in depriving Hopis of their aboriginal lands.

The appeal failed and so Boyden took another appeal directly to the Court of Claims in late 1974 just as Congress was moving to enact the 1974 Navajo-Hopi Land Settlement Act. That Act authorized the Hopi Tribe to sue the Navajos for their rights in the 1934 Reservation and established the basis for partitioning the 1882 Reservation. Boyden's argument in the Court of Claims petition argued particularly against the ICC's ruling that Hopi aboriginal lands were the same in 1882 as 1848 and had been unaffected by U.S. military actions against the Navajo. Boyden's argument is well substantiated by the documentary record, and the ICC's position on this matter, as well as its recognition of exclusive Navajo aboriginal lands south of the Little Colorado River is completely indefensible historically.

In January 1976, the Court of Claims dismissed the Hopi Tribe's appeal. Boyden filed notice of intent to appeal to the Supreme Court. In the meantime, negotiations had begun with the Justice Department to reach a Compromise Settlement. Boyden held meetings with the Hopi Tribal Council at least as early as August 4th, 1976, to discuss the terms of a Settlement virtually agreed to by the Justice Department. It appears the $5 million figure had already been substantially determined. Still proceeding on two fronts, however, on August 23rd, he filed the appeal to the Supreme Court. Two days later, on August 25th, Boyden presented a formal Settlement proposal to the Justice Department. On October 5th, the Justice Department responded favorably to the proposal, but with a requirement to amend one paragraph (Paragraph 2) of the Stipulation for Entry of Final Judgment, to the effect that the Settlement would finally dispose of all claims against the Government the Hopis had brought, or could have brought, to the ICC, and to bar them from ever again presenting such claims to the Government.

Three days later, on October 8th, Congress authorized a final extension of the Indian Claims Commission, until September 30, 1978. Congress insisted that the ICC must decide by December 31st, 1976, which cases it would be able to conclude by the 1978 deadline and which ones it could not. Those it could not were to be transferred directly to the Court of Claims. This

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placed substantial pressure on the ICC to produce definitive decisions within the window from October 8th to December 31st, 1976.

At this point, things began to move very rapidly on the Docket 196 Compromise Settlement. Boyden met with the Tribal Council on October 14th-15th. He presented the formal terms of the Settlement agreed with the Justice Department. The $5 million figure was calculated on the basis of acreages for lands recognized as aboriginal Hopi by the ICC in its 1970 decision—at 1882 values for lands outside the 1882 Reservation and 1937 values for lands inside the 1882 Reservation outside District Six—and on the estimated value of coal inside the 1882 Reservation. The only appraisals Boyden had obtained, however, were for the coal values; for land values, he relied on comparable ICC decisions in the Hualapai and Fort Sill cases. The total added up to $5 million, out of which he would seek ten percent in compensation. $5 million was clearly a somewhat arbitrary figure. The Tribal Council voted unanimously in favor of the proposal, and selected delegates to travel to Washington to testify at the ICC hearing on the Settlement. The minutes of the October 15th Council meeting suggest that the date for the hearing had already been preliminarily set for November 11th. Yet this Council meeting occurred two weeks prior to the public Hopi meeting and vote on the proposal. After October 15th, thorough efforts were made to inform the Hopi public of the proposal and of the public meeting and vote set for October 30th. Village (Mesa) meetings were also held on the subject in the week prior to October 30th. Debates between Council Chairman Abbott Sekaquaptewa and Traditionalist leaders opposing the Settlement were broadcast on KOAI TV in late October. Traditionalist leaders advised people against attending or voting at the public meeting of October 30th. The historical record is clear that publicity for the proposal and vote was entirely adequate. The time allowed to consider the terms and implications of the proposal was very brief, however; even those who favored the proposal complained about the short window for making up their minds.

Boyden and Tribal Council representatives presented the proposal at the public meeting in Kykotsmovi. The Settlement's Stipulation for Entry of Final Judgment comprised several paragraphs. In addition to Paragraph 2 cited above, Paragraph 5 indicated that neither party agreed "to any issue for purpose or precedent in any other case or otherwise." For the Hopi Tribe, among other things, this meant not agreeing to the ICC's view of Hopi aboriginal lands, and that no final decision would be considered as having been taken on that issue. Paragraph 4 indicated that, notwithstanding any other paragraphs to the contrary (i.e., especially Paragraph 2), the Settlement would not have any precedent effect on Hopi legal pursuit of their interests in the 1934 Reservation as authorized by the 1974 Land Settlement Act. Paragraphs 2, 4, and 5 thus contained obvious contradictions. On the one hand, the Settlement finally disposed of all claims that were or could have been brought before the ICC; the ICC Act was designed to hear and finally dispose of all claims against the United States for "aboriginal-title" or "reserved-title" lands taken illegally or too cheaply. On the other hand, according to Paragraph 4, the Settlement would not affect ongoing Hopi assertion of its land rights in the 1934 Reservation—which comprised the vast majority of the lands claimed for in Docket 196. And Paragraph 5 precluded the Settlement from serving as a precedent under any circumstances. Reconciling these positions—either to explain them to tribal members at the public meeting of October 30th, 1976, or at any time thereafter in arguing through the implications of the Settlement—has proven impossible, precisely because they are genuinely contradictory. Out of 251 votes cast at the public meeting, 229 were in favor, 29 opposed, and 2 ballots were spoiled.

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In keeping with the very fast pace since October 8th, on November 1st, Superintendent Alph Secakuku provided a detailed report to the Commissioner of Indian Affairs about the meeting and votes, and about publicity on the proposal. On November 4th, the ICC formally set the Settlement hearing for one week later, November 11th. On November 8th, the Commissioner of Indian Affairs approved the Settlement on the strength of Superintendent Secakuku's report. On November 9th, Traditionalist leaders mounted an extensive protest, telegraphing the Attorney General and announcing follow-up petitions and letters. A petition was prepared and circulated beginning in early November (many signatures bear dates in that period). On November 11th, the ICC hearing moved ahead, with testimony principally from Tribal Chairman Sekaquaptewa. The Justice Department attorneys presented the ICC with the November 9th telegram from Mina Lansa denouncing the Settlement, and indicating extensive Hopi disagreement with it. The ICC dismissed this opposition, and did not take up the Justice Department's suggestion to hold another hearing on Hopi opposition. With the ICC's new acceleration—after the case had been plodding along at a snail's pace for twenty-five years—three weeks later, on December 2nd, Final Judgment was issued approving the Compromise Settlement. A large dissenting petition arrived soon thereafter; dated December 1st, but only sent on December 8th after it had been notarized in Winslow, the petition contained 1,048 Hopi signatures. On December 7th, Boyden moved to withdraw the Hopi Tribe's appeal to the Supreme Court. At least as early as December 13th—more than two weeks before reporting its Final Judgment to Congress—the ICC received its copy of the petition against the Settlement, but took no action. On December 21st, the Supreme Court granted the Hopi Tribe's request to withdraw its appeal. On December 30th, the ICC reported to the Speaker of the House and the President of the Senate its Final Judgment on Docket 196—one day before the imposed deadline of December 31st for ICC to report on all cases it could or could not resolve by the time of its scheduled expiry in September 1978.

Dissent to the Settlement persisted. Called to respond to Congressional inquiries—some of which might have resulted in withholding of funds to pay the Settlement—the ICC Chairman and Chief Counsel laid out specific reasons for the Settlement's acceptance. Chairman Kuykendall chiefly sought to rebut the position that the $5 million involved a sale of Hopi lands. He stated that the Settlement "does not involve the sale or other disposition of any land or other Hopi property" because "no claim for the return of land was involved in the case." This rendering adhered to the Government's position that the lands for which compensation had been claimed had long ago been *ceded* to the United States. In that sense, as some legal scholars have argued, the Settlement—as all other awards by the ICC—in effect ratified old "sales" or transactions in which land had been transferred illegally or inequitably. Precisely as the ICC was set up according to the principles of the Court of Claims, its awards compensated for old legal or moral violations by the United States with a money judgment—to redress the old inequities and absolve the Government from ongoing liability for the claimant's losses (in this case, of lands). Many Hopi traditionalists did not accept that the aboriginal lands had ever been ceded, since their religious obligations specifically addressed the annual and seasonal need to renew the lands and life of Hopitutskwa. From this perspective, Hopi aboriginal lands were by definition inalienable. Therefore acceptance of the $5 million *did* represent a sale, since it involved accepting the Government's position that the lands had been ceded or alienated at some point in the past.

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The two positions rest on such different philosophical premises that they are ultimately irreconcilable. The government's view of land is only in terms of real estate, according to the terms of Western law. Hopi traditional views see the land and its resources as a living, breathing set of forms that require ritual and practical attention for their sustenance. While Hopis very clearly operate with property rights—to fields, houses, orchards, livestock, eagle-gathering areas, clan ruins, etc.—they have never applied this sense of exclusive ownership to the totality of their aboriginal lands. As collectively "owned," those lands, rather, represent the accumulated set of social and religious responsibilities brought into the Hopi community by the migrating clans and their associated religious societies. It is basically for this reason that many Hopis, whether aligned with Traditionalist views or not, have been uncomfortable accepting the $5 million Compromise Settlement.

However, insofar as Congress might ever be persuaded to open questions of Hopi aboriginal lands, there are clearly major obstacles. In the first place, while the Settlement explicitly agreed not to recognize a specific area as Hopi aboriginal lands, that agreement to disagree rested on the already stated viewpoints of the Hopi Tribe and the ICC in Docket 196 on the Hopi aboriginal land area. The Hopi Tribe's position in Docket 196, as most recently amended in 1961, was that aboriginal Hopi lands were almost entirely encompassed by the 1882 Hopi Reservation and the 1934 Reservation, with the exception of lands south of the 1934 Reservation boundary to the Little Colorado and Zuni Rivers. The ICC's "judicially established" Hopi aboriginal area, which continues to appear on maps published by the B.I.A., was significantly smaller than the Docket 196 claim, but fell within the boundaries stated in the Docket 196 petition. Similarly, the "judicially established" area of aboriginal Navajo lands as decided in 1970 by the ICC (in effect affirmed by the Court of Claims in 1981 when it pronounced final judgment on the Navajo award in Docket 229), also appears on B.I.A. maps, including the historically indefensible "boot" south of the Little Colorado River. (The maps themselves are not determinative, of course, but in serial reproduction by the B.I.A. they take on the appearance of representing the official Government view). The main point here is that the only area that the Hopi Tribe appears to have protected—in its insistence (i.e., in Paragraph 5 of the Stipulation for Entry of Final Judgment, cited above) that the Settlement would not agree to an area of aboriginal Hopi lands—was what it claimed in Docket 196, i.e., lands that mostly fell inside the 1882 and 1834 Reservations.

In conclusion, four issues in the history of Docket 196 continue to resonate. First, the claim area specified in 1951 and 1961 does not coincide very well with Hopi statements of their aboriginal claim since 1930, notably involving lands south and west of the Little Colorado River. Second, the ICC's Opinions and Findings in 1970 and subsequently contain several indefensible errors, notably the idea that Hopi aboriginal lands were the same in 1848 as 1882, and that U.S. military actions did not affect Navajo intrusion into exclusive Hopi areas. ICC assignment of lands south of the Little Colorado River to exclusive Navajo aboriginal use and occupancy is not supported by the documentary record. Third, there remains substantive doubt as to whether the Docket 196 petition as filed was lawful, even though the Commissioner of Indian Affairs approved Boyden's Claims contracts in July 1951. In that the petitioner is stated as representing all the Hopi villages identified in the Tribal Constitution, this ignores the explicit rejection by several large Hopi villages of attorney Boyden, of the 1951 Council, and of the Claim itself. The fact that the Tribal Council was not then recognized by the Secretary of the Interior as the

official representative for the Hopi villages seems to be in direct conflict with the Commissioner's approval of Boyden's contracts to file the claim on behalf of the Hopi Tribe. Fourth, the ICC's Final Judgment was highly accelerated and did not allow time for the presentation of Hopi dissent. In rejecting the Justice Department's advice to hold a hearing on Hopi dissent, the ICC rushed to judgment, evidently mindful of its fast-approaching decision deadline of December 31st, 1976.

In the present author's reading, from Congress' point of view, any residual Hopi rights (i.e., beyond those decided with the Docket 196 Settlement in 1976) in the lands of the 1882 and 1934 Reservations were finally adjudicated with the actions resulting from legislation of 1958 and 1974 (i.e., *Healing v. Jones*, and *Masayesva v. Zah v. James*). In short (still inferring Congress' point of view), the majority of Hopi aboriginal lands claimed for in Docket 196 have already also been litigated in United States courts. Those areas of Hopitutskwa that have never been litigated in federal courts and/or were never heard by the ICC are encompassed by the aboriginal area indicated in the Docket 210 petition (and in pre-ICC Hopi petitions to government officials since 1930). In the present author's understanding (which is that of an anthropologist, not an attorney), these are the only areas that might conceivably now be the subject of an aboriginal claim: i.e., south of the 1934 Reservation up to the Little Colorado and Zuni Rivers (as specified and not finally ruled upon in Docket 196), and south and west of the Little Colorado River to the Hopitutskwa boundary (as specified in the Docket 210 claim). In 1957 and 1963, Shungopavi reserved its right potentially to re-present the claim filed in Docket 210 at some future point, indicating that notwithstanding withdrawal, it had established a formal record of Hopi legal interest. Hypothetically, that may be a point from which to initiate any future claims to aboriginal lands. But in reaching a decision on this question, it may be worth considering that other measures than an appeal to Congress for restoration of aboriginal rights may best *protect* the lands of Hopitutskwa for future generations. Such measures might include use of some Settlement funds to purchase private lands, and compacts with federal agencies on Hopi co-management of public lands. Any claims for land restoration to Congress in the present appear to face the considerable obstacle not only of the 1976 Compromise Settlement ("final disposition"), but of the settled determinations of the *Healing* and *Masayesva* cases.

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Timeline of Key Events in the History of Docket 196, 1848-1981.

1848	2-28	Treaty of Guadalupe Hidalgo between the United States and Mexico transfers "New Mexico" to U.S. sovereignty. Treaty guarantees U.S. will continue to recognize the rights of Mexican citizens (Pueblo Indians, including Hopis, were officially Mexican citizens).
	7-4	Date claimed by the Hopi Tribe in Docket 196 as the operative moment when the U.S. assumed responsibility for protecting preexisting Indian title Hopi lands under the Treaty of Guadalupe Hidalgo.
1882	12-16	Hopi Executive Order Reservation established. Date claimed by Indian Claims Commission (hereinafter ICC) as primary "date of taking" of Hopi "Indian title" lands (i.e., those falling outside the 1882 Reservation); with Executive Order, Hopi land rights inside 1882 Reservation guaranteed by "reservation title" as well as "Indian title;" change is additive (not substitutive).
1934	6-14	(1934 Reservation) Act establishing Boundaries of Navajo Reservation.
	6-18	Indian Reorganization Act.
1936	12-14	Hopi Tribal Constitution, as drawn up by Oliver La Farge under the Indian Reorganization Act, is ratified.
1937	3-22	Commissioner Collier assures Hopi Tribal Council, after their inquiry (following first meeting), that their rights are fully protected under the Treaty of Guadalupe Hidalgo.
	6-2	District Six established as exclusive Hopi area. Date claimed by ICC as "date of taking" of Hopi "Indian title"/"recognized title" lands within the 1882 Reservation outside District Six.
1938	5-11	Act to permit leasing of lands within the Hopi Executive Order Reservation "for mining purposes, with approval of the Secretary, by authority of the Hopi Tribal Council and the duly authorized representatives of the Navajos having rights within the reservation"(Cohen 6-11-1946).
1941	2-12	Interior Department Solicitor declines to approve an order that would define District Six as the Hopi Reservation, with the remainder of the 1882 Reservation becoming part of the Navajo Reservation.
1942	1-8	Department of Interior takes position that no Navajos be recognized as permitted to move onto the 1882 Hopi Reservation since the date when the Hopi Tribal Constitution was ratified (12-14-1936).

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1943		Hopi Tribal Council no longer functioning as a result of District Six and stock reduction. Villages refuse to send delegates.
1946	6-11	Interior Solicitor's Opinion issued that Hopis and Navajos settled within the 1882 Reservation prior to 12-14-1936 have co-extensive rights in the natural resources, including mineral estate, of the 1882 Reservation. Opinion responds to the Commissioner of Indian Affairs' "request... prompted by inquiries he has received as to the procedure to be followed in offering the lands for mineral development under the act of May 11, 1938."
	8-13	Indian Claims Commission Act signed into law.
1947	1-15	John S. Boyden writes to Ernest Wilkinson (Washington) to inform him of his visits to the Navajo and Hopi Reservations to discuss representing the Navajo and Hopi Tribes them as Indian Claims counsel.
	9-9	E. Wilkinson advises Boyden to visit Hopi again to discuss the nature of the claim to be filed before ICC.
1948	March	Hopi Chiefs of First Mesa write to Superintendent Crawford requesting abolition of District Six, and restoration of entire 1882 Reservation to Hopi possession.
	4-30	Requests for oil leases to the Hopi Reservation are growing significantly.
	5-12	In response to the First Mesa chiefs, Acting Commissioner of Indian Affairs William Zimmerman (an architect of the Termination policy) suggests the only solution for Hopi problems is relocation to the Colorado River Reservation and entry into the American economic mainstream.
	6-21	Zimmerman calls for Superintendent to try to reestablish Hopi Tribal Council: a) to amend the Constitution, b) so that the Tribe can hire a lawyer to file an ICC claim, and c) to enable oil leases to be granted to energy companies.
1949	3-28	Traditionals send protest to President Truman over ICC and oil leases.
1950	1-27	Reservation-wide meeting at Keam's Canyon led by Superintendent Crawford to discuss reorganizing Hopi Tribal Council.
	2-9	First meeting of the reorganized Tribal Council.
	3-1	Second meeting of reorganized Tribal Council. Superintendent Crawford reports First Mesa, Sipaulavi, Mishongnovi, Kyakotsmovi, and Upper Moenkopi have selected delegates.
	3-2	Traditionals protest reorganized Tribal Council

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4-19 Navajo-Hopi Rehabilitation Act appropriates $88.5 million for development of services on Navajo and Hopi Reservations etc. Act envisioned by its crafters as eventually leading to Hopi and Navajo termination.

4-21 Acting Commissioner responds to Traditionals' protest indicating he is seeking further information about the circumstances of the Tribal Council's reconstitution.

7-5 After visit to Hopi, Oliver La Farge questions legitimacy of Tribal Council and urges that any attempts to reorganize it be completely separated from the need to file an ICC claim.

9-9, 9-10 Commissioner of Indian Affairs Dillon S. Myer visits the Hopi reservation and the Hopi villages.

10-20 Commissioner Myer concludes Hopi Tribal Council is not a representative body for the Hopi people.

12-16 After meeting with John Boyden at Polacca, Hopi Tribal Council passes resolution to hire him as its Claims attorney.

1951 2-5 Hopi Tribal Council representatives travel to Salt Lake City to discuss hiring of Boyden.

May Boyden holds meetings with Hopi villages re: filing a claim. Introduced by Agency Superintendent, Dow Carnal.

7-12 Boyden's Claims Contract signed by Hopi delegation in Salt Lake City, for Hopi Tribe, and for First Mesa, Sipaulavi, Kyakotsmovi, Bakabi, and Upper Moenkopi.

7-14 Meeting at Bakabi for village to ratify (apparently hitherto unauthorized) signing of Boyden Claims contract on 7-12.

7-27 Boyden's Claims contract approved by Acting Commissioner of Indian Affairs in Washington.

8-2 Docket 210 (Village of Shungopavi) sent to ICC; filed by ICC on 8-6-1951

8-3 Docket 196 filed with ICC in Washington by Boyden and Wilkinson.

9-1 Boyden's General Counsel contract signed with Hopi Tribe

9-2/9-4 Boyden meets with Hopi villages (First Mesa, Sipaulavi, Kyakotsmovi, Bakabi, and possibly Upper Moenkopi) to gain resolutions for his General contract.

11-24 Oscar L. Chapman, Secretary of Interior, visits Hopi Reservation with Boyden;

Navajo Tribal Chairman also present.

1952 1-7 (Windowrock) Area Director Harper recommends against approving Boyden's General contract, and against recognition of Tribal Council.

1-11 Boyden in Washington defers seeking approval for his General Contract on learning of Harper's opposition; initiates efforts to have Hopi Agency removed to Phoenix Area Directorate from Windowrock.

3-29 *Arizona Daily Sun* editor Platt Cline requests information from Boyden on Hopi claims. Cline begins campaign questioning Boyden's contracts and legitimacy of Tribal Council

5-29 Boyden's General Contract approved by Commissioner of Indian Affairs, but approval specifically does not mean recognition of Hopi Tribal Council.

6-25 Boyden informed of "comprehensive minerals survey of Navajo-Hopi reservation" under Navajo-Hopi Rehabilitation Act. Adds urgency to need to get Solicitor's 1946 Opinion reversed.

8-28 In response to letters by Platt Cline to the Senate et al, the Secretary of Interior begins formal inquiry into the validity of Boyden's Claims and General contracts on the grounds that the Tribal Council lacks authority to represent the Hopi Tribe.

9-17 Boyden produces a formal response to the Secretary's inquiry of 8-28-1952.

12-8 Boyden requests action from Interior on the question of his General contract.

12-12 Interior issues decision that Boyden's contracts are OK.

12-15 Boyden writes Interior Secretary Chapman to follow up from the latter's suggestion, in a meeting with Hopis on 11-24-1951, that the Solicitor's Opinion of 1946 re: Navajo rights in the Hopi Reservation should be reconsidered.

1953 1-6 Boyden's application for reconsideration of Solicitor's Opinion granted (Boyden 8-1-1955).

3-25 Cline publishes an article in the *Arizona Daily Sun* featuring views of traditional villages, and questioning the legitimacy of the Claims, of Boyden's contracts, and of the Tribal Council.

7-17 Acting Commissioner of Indian Affairs grants "provisional" recognition to the Tribal Council, until the tribe or the villages present an alternative proposal for a tribal organization. Recognition is based in part on the fact that the Council has contracts with Boyden.

11-3 Commissioner of Indian Affairs Glen Emmons holds meeting at Keam's Canyon with Hopis and Boyden. Boyden speaks on behalf of Hopi Tribal Council; speech avows readiness for termination once Hopi rights in 1882 Reservation are adjudicated.

12-21 *Arizona Daily Sun* publishes another article representing traditionalists' views and sharply critical of the Tribal Council as non-representative of the Hopi people.

12-31 Superintendent Carnal expresses approval of Area Director Harper's suggestion that there be a Hopi referendum on the Constitution and Bylaws (none occurs).

1954 7-2 Commissioner of Indian Affairs advises Senator T. Kuchel that government recognition of Hopi Tribal Council is only "for consultation on matters of overall welfare of the Hopi Tribe."

7-14 Shortly before this date, Hopi Agency is transferred from Windowrock Area to Phoenix Area Directorate.

8-7 Meeting of Boyden at Hotevilla with representatives from several villages (plus Tribal Council Chair and Superintendent). Boyden seeks renewal of his General contract. Most Hopis do not want to talk about that, but seriously question his Claims contract.

1955 1-11 Boyden suggests not pursuing Docket 196 until he can get Solicitor's Opinion of 1946 reversed.

2-2 Commissioner of Indian Affairs indicates lack of Tribal Council authority re: traffic ordinances; affirms ongoing Bureau withholding of full recognition.

2-24 Phoenix Area Director Haverland argues for full recognition of Tribal Council.

4-9 Boyden files Petition for Hopi Tribe to Secretary of Interior for Reconsideration of Solicitor's Opinion on Mineral Rights in the 1882 Reservation. No action taken pending Congressional consideration of legislation re: 1882 Reservation, in 1957 (enacted 7-22-1958).

7-15/7-30 Bureau team appointed by Commissioner of Indian Affairs conducts Hearings on Hopi Reservation re: Hopi grievances (notably re: Tribal Council)

12-1 Commissioner of Indian Affairs Emmons grants full recognition to Hopi Tribal Council, based on results of Hopi Hearings of 7-15/7-30. Indicates Council can only operate if all elected delegates (nine) from the supporting villages are present for all decisions. Otherwise no quorum. Total number of representatives authorized by Constitution from all villages is 17. Thus one village potentially holds swing vote to destabilize Council.

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1956	3-6	Large meeting at Hotevilla continues to seriously question legitimacy of Tribal Council.
	11-23	Government files motion before ICC to dismiss Docket 210.
	12-14	Assoc. ICC Commissioner O'Marr meets with Wadsworth Nuvangoitewa and other Shungopavi delegates re: Docket 210 in Santa Fe
1957	1-25	Government files motion to ICC to consolidate Dockets 196 and 210 with 229 (Navajo).
	2-8	Bacavi refuses to send a representative to the Tribal Council, eliminating quorum. Crucial time re: Boyden's efforts to get Congress to pass an act allowing Hopis to sue Navajos re: 1882 Reservation. Superintendent O'Harra strongarms Bacavi's Governor (who is also an Agency employee) to select a Council representative and restore quorum.
	5-4	Shungopavi withdraws Docket 210 "for the present" until a new Claims Commission is established that can restore lands.
	5-31	Docket 196 ordered consolidated with Docket 229 (Navajo claim) by ICC. Docket 210 is formally dismissed on same day.
1958	7-22	Public Law 85-547 enacted authorizing judicial settlement of conflicting Hopi and Navajo interests in 1882 Reservation > Healing v. Jones.
	8-1	Hopi Tribe sues Navajo Tribe in District Court re: 1882 Reservation rights (Healing v. Jones).
	10-13	ICC limits the scope of the initial hearing on the Docket 196 claim to the issue of title.
	10-15	Hopi Tribe files motion to take Dockets 196 and 229 trial off the ICC calendar until Healing v. Jones is decided.
1960	4-25	ICC orders consolidation, for trial purposes, of Dockets 196 and 229 (Navajo) with Dockets 91 (Havasupai), 30 (Fort Sill Apache), 48 (Chiricahua and Warm Springs Tribes of Apaches) and 22-D (San Carlos Apaches).
	9-26—10-22	Healing v. Jones trial, Prescott, AZ.
1961	6-16	Defendant (Government)'s Answer filed to Docket 196 petition.
	8-22	Last briefs filed in Healing v. Jones; case "taken under submission."

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	9-19/11-08	ICC trial in Washington on Dockets 229 and 196.
1962	6-14	Hopi Tribe's exhibits filed with ICC in Docket 196.
	9-28	Healing v. Jones decided by District Court. Announcement in San Francisco (site of Ninth Circuit Court of Appeals).
	10-15	Charles Pitrat presents further testimony on Exhibit 69 (Hopi shrines map) at ICC hearing in Washington.
1963	5-1	Shungopavi reasserts that it has established a record via Docket 210, and reserves a right to claim the lands described on the basis of that record at some future point.
	5-22	Record on the issue of Hopi aboriginal title in Docket 196 closed, by order of ICC.
	6-13	Supreme Court decision in Healing v. Jones; affirms Hopi rights in 1882 Reservation.
1964	5-18	Petitioner's Requested Findings of Fact on Issues of Title and Liability in Docket 196 filed; same day Navajo Tribe files Proposed Findings of Fact in Docket 229.
1966	3-14	General Services Administration issues two-volume accounting of Government expenditures for Hopi Indians, 1872-1951. 14 years since date of first request (1952).
1967-69		All ICC Commissioners retire 1967/1968. Three new Commissioners appointed 1968; Commission adopts new procedures; two additional Commissioner positions created 1969.
1968	3-4	Boyden notes recent request by Associate ICC Commissioner Scott to reach a Compromise Settlement on Docket 196. Boyden defers until ICC decision on title and liability.
1970	6-29	ICC Opinions on Title, Findings of Fact, and Interlocutory Orders on the issue of aboriginal title, Dockets 196 and 229. Interlocutory Order in 196 specifies that case should proceed to a new phase, to determine market value of lands recognized by ICC Docket 196 Finding of Fact 20 as Hopi aboriginal area: 1) value as of the year 1882, for all lands outside the 1882 Reservation boundaries; 2) value as of the year 1937, for all lands outside District Six within the 1882 Reservation.
	8-28	Boyden (Hopi Tribe) motion to ICC for further hearings on dates of taking, for

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Rehearing and amendment of findings; motion contends that the Hopi Tribe had not been permitted to present its complete evidence on date(s) of taking, that the Commission had failed to find that the Hopi Tribe had aboriginal possession to all of the lands claimed by said tribe as of July 4, 1848, and that the Commission's premature decision on date of taking was based on erroneous findings of fact and conclusions of law which distorted the nature and extent of Plaintiff's aboriginal holdings as of 1848 and thereafter.

10-12 Navajo Tribe files brief in opposition to Hopi Tribe motion of 8-28-1970.

1971 1-15 U.S. files a response to Hopi Tribe motion of 8-28-1970.

4-28 ICC Order grants Hopi Tribe motion "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." ICC notes that "no new evidence had been presented by the plaintiff [Hopi Tribe] to support a reexamination or amendment of the findings other than those that specifically pertained to date(s) of taking" (Boyden 8-12-1971).

6-2 ICC Order permits Hopi Tribe to file additional documentary evidence, a digest of exhibits and memorandum of points and authorities on dates of taking; but not oral testimony [Exhibits etc. subsequently filed].

8-12 In response to ICC Order of 6-2-1971, Boyden files Memorandum re: Dates of Taking.

1972 5-22 Rehearing on issue of dates of taking on Hopi aboriginal lands. Boyden orally argues matter before ICC, with attorneys representing Navajo Tribe and U.S.

1973 7-9 ICC renders opinion denying Hopi motion of 8-28-1970 to amend ICC findings of 6-29-1970; same day ICC enters Order denying Hopi Appellant's motion to amend Findings of Fact re: nature and extent of Hopi aboriginal title to lands and dates of taking thereof.

7-13 Boyden files "Exceptions" to Government GSA's accounting (1966) re: disbursements for Hopi Tribe 1872-1951.

10-4 Boyden files "Motion for leave of Commission to Hear Further Argument on Liability Phase of Counts 5 through 8, and to Amend Findings and Orders on relation Thereto to Make Final Disposition of the Liability Phase of Said Counts."

1974 1-23 ICC denies Boyden motion of 10-4-1973. ICC orders HT to "file a more definite statement regarding Count 9 (the accounting claim)."

2-19 Motion filed requesting clarification of ICC order of 1-23-1974. Motion denied.

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4-23 Hopi Tribe attorneys file with ICC and Court of Claims a Notice of Appeal from ICC findings and interlocutory order of 6-29-1970.

5-23 Appeal notice of 4-23 docketed in Court of Claims. Government moves to dismiss appeal as untimely.

9-13 Court of Claims denies government's motion to dismiss appeal of 4-23-1974. Case proceeds to decision in Court of Claims.

10-10 Boyden files motion for leave to respond to order of 1-23-1974 "out of time."

Nov (approx) Attorneys submit "lengthy brief and appendix" and a reply brief to Court of Claims re: ICC denial of Hopi Tribe appeal against ICC Opinion and Findings

12-22 Navajo and Hopi Land Settlement Act becomes law—providing for partition of JUA and for Hopi lawsuit to obtain its rights in the 1934 Act Reservation.

1975 3-13 ICC grants 10-10-1974 motion re: filing out of time (re: Count 9—the Accounting claim).

1976 1-9 Hopi Tribe Appeal against ICC's decisions on aboriginal title and dates of taking argued before Court of Claims.

1-30 Court of Claims issues order affirming ICC decisions and orders of 6-29-1970. Thereafter, Boyden files motion for rehearing en banc.

3-26 Court of Claims denies motion for rehearing Appeal en banc.

5-27 Attorneys file with U.S. Supreme Court motion for extension of time within which to file a petition for writ of certiorari. Purpose of motion "to enable Mr. Boyden to pursue settlement negotiations then in progress with the government" (Boyden 4-22-1977).

6-7 Supreme Court grants motion for extension of time. No settlement reached "during the period of the extension."

8-23 Boyden files Petition for a Writ of Certiorari with U.S. Supreme Court. Petition docketed as no. 76-263.

8-25 Boyden submits formal offer to settle, and Stipulation for Entry of Final Judgment, to Justice Department.

10-5 Dept. of Justice accepts Compromise Settlement, pending approval by the Hopi Tribe, Secretary of Interior, and the ICC.

10-8 Justice Department files motion for extension of time to reply to the Hopi petition

before the Supreme Court. Granted until 11-11-1976.

10-8 Final two-year extension granted by Congress to ICC. Establishes deadline for ICC final decisions on cases or transfer to Court of Claims, as 12-31-1976.

10-14/15 Boyden presents reasons for accepting Compromise settlement to Hopi Tribal Council in meeting that lasts 1½ days. Council votes unanimously (16 to 0) to accept Settlement. Tribal resolution in favor. Appoints delegates to testify at hearing in Washington.

10-16 Traditionalists (Kikmongwis Claude Kewanyama and Mina Lansa) issue letter calling for Hopis not to vote at the October 30th meeting.

10-21 KOAI TV debate between Chairman Abbott Sekaquaptewa, Rev. Caleb Johnson and Traditionalist leaders re: Settlement.

10-26/28 Village (Mesa) meetings held on Compromise Settlement at three Hopi Mesas and Moencopi. Also for Hopi community in Phoenix.

10-29 Continuation of KOAI TV debate.

10-30 Public meeting and vote to discuss Compromise Settlement, Oraibi Day School. 400-500 attend at peak, meeting lasts 7½ hrs. Vote is: 229 in favor, 21 against, 2 ballots spoiled. Lakon ceremony at Shungopavi same day, cited by Traditionalists as reason not to hold the meeting.

11-1 Hopi Superintendent Alph Secakuku files Memorandum to Secretary of Interior re: Proposed Settlement.

11-4 ICC sets date for hearing on Compromise Settlement one week hence.

11-8 Secretary of Interior & Commissioner of Indian Affairs approve the Settlement based on the 11-1 report by Superintendent Secakuku.

11-9 Traditionalist Leaders telegraph objection to Compromise Settlement to Dept. of Justice.

11-11 ICC Hearing on Compromise Settlement, presented as Joint Motion for Entry of Final Judgment, Stipulation for Entry of Final Judgment. Hopi delegates certified by Tribal Council testify at ICC hearing in Washington.

11-12 Supreme Court grants Government motion for extension of time to file reply to Hopi petition until 12-11-1976.

12-2 ICC Findings of Fact and Conclusions of Law on Compromise Settlement; ICC Final Judgment on Docket 196 entered.

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12-7 Boyden files motion to withdraw Hopi Tribe's Supreme Court petition.

12-8 Memorandum and Petition, dated 12-1-1976, signed by 1,048 Hopis from Mishongnovi, Lower Moencopi, Hotevilla, Old Oraibi, Oraibi, and Shungopavi rejecting the Settlement and the authority of the Tribal Council, sent to ICC and Attorney General.

12-13 Memorandum and Petition of 12-8 against the Settlement received by ICC.

12-21 Supreme Court grants Hopi Tribe's motion to withdraw its certiorari petition; dismisses petition, following ICC approval (12-2) of Settlement.

12-30 Final Judgment Proceedings Reported to President of the Senate and Speaker of the House. Copy of ICC Final Judgment certified to Dept of Treasury.

12-31 Congressional deadline for ICC to certify and transfer all cases it determined it could not finish by 9-30-1978.

1977 1-8 Boyden undergoes major surgery for prostate cancer.

1-17 House Speaker Tip O'Neill acknowledges receipt of 12-30-1976 letter from Chairman Kuykendall enclosing Final Judgment.

2-14 U.S. Representative Edward Roybal requests an answer from ICC Chairman Jerome Kuykendall to constituent protests about the Compromise Settlement. Other questions, from Rep. D. Clausen follow > questions to ICC by House Subcommittee on Interior Appropriations

3-14 Docket 196 case files formally closed by Justice Dept.

3-15 ICC Chief Counsel Webb responds to House Subcommittee on Interior Appropriations on legitimacy of Settlement in Docket 196.

3-17 ICC Chairman Kuykendall responds to Reps. Clausen and Roybal questions on legitimacy of the Settlement in Docket 196.

4-22 Plaintiff's Petition for Award of Attorneys' fees. Submitted by Boyden.

5-4 Congress passes Public Law 95-26 to appropriate funds to pay the $5 million Award.

7-27 ICC Order allowing Attorney's fees to Boyden et al for their work since 1950 on Docket 196, for $500,000 (maximum allowed of 10 percent of ICC award).

10-5 ICC Order allowing Attorney's expenses in Docket 196 ($20,000 for payment to

expert witness Fred Eggan).

1978	9-30	ICC terminated.
1979	4-30	Thomas Banyacya and Earl Pela visit White House, meet with Patrick Apodaca. Present grievances re: Hopi lands, waters, and Boyden's reported conflict of interest; provide copy of Indian Law Resource Center's Report to the Hopi Kikmongwis on Docket 196 for President Carter.
1981	9-30	Docket 229 (Navajo) resolved in Court of Claims; on September 18, 1981, Navajo Tribe awarded $14,800,000 for "settlement of all claims remaining in this docket" (Sisson 9-30-1981).

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A History of Docket 196: the Hopi Claim Before the Indian Claims Commission.

Peter M. Whiteley

> The road from the filing of a claim with the Commission to the final award of damages by Act of Congress is a long and difficult one for the average Indian claimant, involving lengthy and often highly technical hearings, the expenditure of substantial amounts of money, and careful and tedious investigative work. The process of recovery is one easily subject to long and frustrating delays, particularly if the claim involves land that is subject to other claims pending before the Commission.
>
> Indian Claims Commission (1968:11)

Preamble

To understand the history of Docket 196, and how it ended up in the Compromise Settlement of 1976, several elements are important:

- the origin, purpose, and operation of the Indian Claims Commission
- Hopi aboriginal lands, and United States actions affecting these, especially from 1930-1951
- the relationship of Docket 196 to the history of the Hopi Tribal Council
- how Docket 196 was drawn up, presented to the Commission, and argued for under the terms of the ICC Act
- the Commission's main Opinions and Findings of Fact on Hopi aboriginal lands
- the Hopi Tribe's successive appeals of Commission Findings to the Court of Claims and the Supreme Court
- the evolution of Docket 196 from 1951-1976 in relation to the Healing v Jones case and the 1934 Reservation litigation

Since the historical context of the Indian Claims Commission is a primary determining factor, I will address that first.

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Origin and Purpose of the Indian Claims Commission

Introduction

> The Indian Claims Commission is an independent agency established by Act of Congress on August 13, 1946 (Public Law 79-726). It is a judicial arm of Congress created for one special purpose: the hearing and determining of Indian claims against the United States which came into existence prior to the approval of the Claims Commission Act in 1946 (Indian Claims Commission 1968:1).

The Indian Claims Commission Act (60 U.S. Stat. 1049) of August 13, 1946 was designed in part to recognize Native American service in World War II (House Report 1466 to Accompany H.R. 4497, 12-20-1945). For the first time in history, it allowed tribes unimpeded access to a tribunal that might "right old wrongs," caused by past United States actions or inactions. These were not the only goals, however. The principal aim was to finally dispose of all Native American claims (of whatever type) against the government. Prior to 1946, all Native American claims against the United States had first to be presented before Congress, and then, with explicit Congressional action, transferred to the U.S. Court of Claims. Claims had grown steadily since the 1920's, and were seriously backlogged. The claims were often complex, factually and legally, the procedures for addressing them were cumbersome, and the results were typically inconclusive. In 1945, Secretary of the Interior Harold Ickes, speaking in favor of establishing the Indian Claims Commission, summarized the problems:

> The endless petitioning of the Congress for jurisdictional acts to authorize litigation in the Court of Claims; the frustration and disappointment over refusal by that court, on technical grounds of "lack of jurisdiction", to hear cases based on fraud, duress, mistake of fact, or other equities involving the validity of treaties or agreements; and the inevitable return of the claimants to the Congress for a broader jurisdictional act to permit consideration of the merits of the claim—these weaknesses of the present system which are so costly in time and material resources to the Government as well as to the claimants, would be eliminated by the establishment of the proposed Commission, because it would have power to consider the merits of all existing Indian tribal claims and

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> to render what would be, in effect, a final judgment, binding upon the parties (House Report 1466 to Accompany H.R. 4497, 12-20-1945:16).

The Act to create the Indian Claims Commission thus sought to streamline the claims process, and to put an end to all Native American claims against the United States government.

Congress heard testimony on bills to establish an Indian Claims *court* (i.e., which would try claims adversarially) in 1930, 1934, 1935 and then an Indian Claims *Commission* (which might adjudge claims non-adversarially) in 1935 (e.g., Senate Report 1002 to Accompany S. 2731, 5-13-1935), 1937, 1940, 1941, 1944, and 1945 (Vance 1969:327-28). The ICC Act's final form in 1946 drew specifically on these earlier discussions (Rosenthal 1990:54-109). As finally passed into law, the ICC Act must thus be seen not so much as a novel program at the close of World War II, but as the end result of a long-term legislative discussion.

The United States Court of Claims

The U.S. Court of Claims was established in 1855 to hear claims against the United States. As Harvey Rosenthal[1] puts it:

> Before 1855, no general statute allowed citizens to bring suit against the United States Government on *claims for a money judgment*. The only recourse was to petition Congress to redress any grievance by a private act. By the 1850s, though, this process had become a burden on Congress and was rife with delays and inequities. It is the constitutional function of Congress to examine and determine claims against the United States, but Congress can delegate this power, with limitations. It did so in 1855 when it created the Federal Court of Claims to "hear and determine all claims founded upon any law of Congress, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also claims which may be referred to said court by either house of Congress" (Rosenthal 1990:10, emphasis added, quoting from the 1855 Act [10 Stat. 612, February 24, 1855]).

[1] Rosenthal was the official historian for the Indian Claims Commission in its final years, principal author of the Commission's final report (Indian Claims Commission 1978), and subsequently author of the definitive history of the Commission (Rosenthal 1990).

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In essence, the Indian Claims Commission represented a parallel and subsidiary development—almost one century later—to the Court of Claims itself, and for similar reasons: Indian claims had become "a burden" on the Court and were "rife with delays and inequities." The Commission was created to separate Native American claims from claims by any other groups or individuals against the U.S. Government. During its life (1946-1978), the Commission functioned as a court of claims[2] for Native American tribal cases. In terms of procedure, the Commission remained under the superior authority of the Court of Claims: all appeals of Commission decisions were heard by the Court of Claims, and after the Commission was terminated in 1978, all remaining dockets were transferred to this federal Court.

This historical context—that the Indian Claims Commission had its founding in and drew its bearings from the United States Court of Claims—is very important. Any Native claims filed with Congress and the Court of Claims before 1946 were only ever conceived of *as compensable by monetary awards*. They were never contemplated as resulting in restoration of land. Yet once the ICC was created, more than a few tribes presented claims on the assumption that lands might be restored to them. For many people at Hopi, the ICC continued to be referred to as the "Land Claims Commission," with an inference that the Commission might restore lost lands, rather than simply pay money to compensate for the loss. Many other tribes became dissatisfied with the Commission because it lacked authority to restore lands.

Native American Cases in the Court of Claims

Shortly after the 1855 Act establishing the Court of Claims was passed, several Native American tribes filed suit against the United States. Before any of these claims could be decided,

[2] Indeed its practical decision to operate as a court, in which proceedings were adversarial, departed from its founding intent in this regard (Vance 1969; see also above).

however, a new Act was signed into law in 1863, outlawing Native access to the Court of Claims. This act was partly a response to the fact some 10,000 Native Americans were then fighting for the Confederacy against the United States in the Civil War (Rosenthal 1990:11).[3] In 1881, the Court of Claims was again opened to Native claimants, but with the proviso that Congress first had to pass a special jurisdictional Act for each and every claim. With this cumbersome procedure, many cases were long delayed, and even those that reached the Court resulted in few or low compensatory awards (Rosenthal 1990:16-17). After World War I (1914-18), there was an upsurge in Native claims. Congress passed the American Indian Citizenship Act in 1924, in part to recognize Native American service during the war. This recognition of Native rights under U.S. law and Congress's generally favorable disposition at the time:

> ... resulted in an explosion of claims to redress the old injustices. In the next three years almost as many cases were filed in the Court of Claims (37) as were presented in the forty-two years before citizenship (39).... But, 1924 was the swing year that initiated the torrent of Indian claims presentation and litigation.... 1924 saw 5 claims filed, 1925 had 7, 1926 reached 10, and in 1927 they rose to 15. In 1926 an Indian Tribal Claims Section of the General Accounting Office was organized, comprising eighty-two people, to work exclusively on compiling data for Indian claims cases (Rosenthal 1990:18-19).

The demands on the Court were thus growing exponentially. It was becoming clear that some other mechanism was needed. In contrast to most claims against the United States by private citizens or corporate groups, Native American claims were often exceptionally complicated, and required the presentation of extensive historical documentation and testimony. Many claims took years from initial filing until final disposition. For example, the Shoshones filed a claim in 1891 to protest the failure to protect their rights assigned by a treaty signed in 1868. Not until 1927—36 years after the initial filing—did Congress pass the necessary jurisdictional act authorizing the case to proceed to the Court of Claims; it took another eleven years (until 1938) for the Court to reach a decision.

[3] For the record, some 11,000 Native Americans fought for or otherwise aided the Union Army (Rosenthal 1990:12).

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As a general matter, the government was in practice not friendly to such claims and defended vigorously against them. Huge amounts of land were often involved, and compensation for treaties deemed by the Court to have failed to adequately protect Native interests potentially called for enormous monetary awards (especially if interest were to be added). Most claims were for lands deemed to have been ceded too cheaply or illegally, or for other indications of U.S. dereliction in regard to treaty provisions. All Native claims filed were on the basis of treaty violations, and after 1871, when the government ended the treaty-making process, for violations of Executive Orders that created reservations. Any award that might be made by the Court thus required the presence of a treaty or other law which had formally ratified the relationship between the United States and the Native society in question. If a treaty was judged to have been violated, for example, by a failure to secure lands it had explicitly guaranteed, then the tribe was legally eligible for a monetary award. Throughout the entire period, 1855-1946, when the Court of Claims and/or Congress (1863-81) was the accepted venue for the presentation of Native claims, no claims at all were allowed on the basis of "aboriginal title" or so-called "Indian title" to lands. However, in 1946, just prior to passage of the Indian Claims Commission Act, the Supreme Court affirmed a 1945 ruling by the Court of Claims which for the first time allowed compensation for lands under aboriginal title:

> With the *Alcea Band of Tillamooks* case the Court finally dealt with a principal block to Indian recovery and set a precedent to allow the new Commission to serve the Indian cause more adequately than the Court. This was the first case to award compensation for taking of land held under "Indian title." Previously compensation was awarded for lands held only under title "officially recognized" by treaty, agreement, or law. Some jurisdictional acts prior to this had authorized the Court of Claims to determine liability based upon aboriginal title but no awards were ever made (Rosenthal 1990:33).

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"Offsets"

As the defendant in cases before the Court of Claims, the United States fought hard to limit the monetary awards. A total of 219 Native claims were filed in the Court of Claims between 1881 and 1946: only 35 resulted in awards.[4] Beginning in 1920, the government successfully argued that "offsets" might be made by deducting "gratuities" (like annuity payments guaranteed by some treaties) and other "credits" it might claim against any final award. Calculating offsets became increasingly elaborate, and began to encompass many types of service, including: all salaries paid for Indian Agency employees since first establishment of the relevant Agency, costs of educating Indian children, construction and maintenance costs of Agency and school buildings, and others for which there might not even be any evidence on particular Reservations. The Tribal Claims Section of the General Accounting Office was installed in 1926 to search the record thoroughly to establish the largest possible amount of offsets against any particular award that the Court of Claims might make. In many instances, claims were eventually dismissed because the amount of offsets permitted exceeded the amount of an award made by the Court. In others, the awards were severely diminished by allowed offsets. In 1935, for example, the Blackfeet won a claim against the government, and were awarded more than $6 million by the Court. But the government claimed offsets of $5.5 million, reducing the final award to $622,000. Offsets allowed included "prorated expenses for education of Indian children at various institutes even though it was never shown that Blackfeet children ever attended the specified schools" (Rosenthal 1990:30).

This pattern became the norm, and the government devoted extensive research to compiling massive offsets:

[4] Total compensation awarded over the 66-year period was $77.3 million, an average per award of $2.2 million, but an average of ca. $350,000 per claim for all claims filed.

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> The process of claims accounting was lengthy and expensive.... The largest report, one of the Sioux petitions, resulted in a document of 4,385 pages in eight volumes derived from the analysis of 7,279 accounts and 600,000 vouchers. This job took seven years and cost over $177,000.... In sixteen cases decided by the Court involving claims totaling $346 million the Court allowed $13.6 million. Offsets were allowed amounting to $11 million leaving a net recovery of about $2.65 million (Rosenthal 1990:30).

Native claimants and their supporters found these practices "grossly unfair" and "a grave wrong doing on the part of the highest officials of the land" (Rosenthal 1990:31, quoting from Congressional hearings "To Create an Indian Claims Commission" in 1935).

When passed into law, the ICC Act included a provision for offsets, but recommended that these be applied "in good conscience" and more consistently than had been the case with the separate jurisdictional acts for prior Indian claims. Nevertheless, this provision in the ICC Act was designed to protect the government against the fear that huge awards might potentially be made: offsets would provide a mechanism for reducing them within the terms of the law. Congress would probably not have passed the Act without this provision. As one scholar put it, "it's as if the government was expressing a willingness to correct the error of its ways—providing the effort wasn't too costly" (J.R. White, quoted in Lurie 1978:103).

The Question of Interest on Indian Claims

Beyond offsets, two additional factors were the object of specific concern in Congress before passage of the ICC Act in 1946: 1) whether to allow interest on awards since the time when lands were adjudged to have first been "taken" by the government, and 2) attorney representation and fees. Prior to 1937, no interest was granted on any award to Native Americans in the Court of Claims, even though the "date of taking"—i.e., the moment when the federal government, especially through treaty, was held to have taken away Indian lands—was often many years before the judgment award was made. Land values were assessed as of the time of

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taking also: so if a treaty made in 1860 initiated the circumstances for a tribal claim brought forward in 1920, only 1860 land values were considered, and no accrued interest on those 1860 values was allowed. In 1937, and again the following year in 1938, the Court of Claims did permit interest to be calculated on two claims: one for the Klamath and the other for the Shoshone. The Supreme Court upheld both decisions. So:

> In 1940 the government struck back at the decisions of 1937 and 1938. A bill was introduced into the Senate to limit interest payments, if any, to four percent for six years from the date of injury. In testimony on the bill, Justice Department lawyers argued that without this law the $750 million in pending cases could balloon to $3 billion with 300-400 percent interest added over 60-80 years. The case was then put to Congress that any such recovery by the Indians was too large and would grow unless limits were set. Congress had to decide if it wanted to "allow the several Indian tribes to recover large sums of money, including both principal and interest," or to enact a defense against this huge potential expense (Rosenthal 1990:27-28).

Others disputed the Justice Department's assertions. Attorney Ernest L. Wilkinson, a prime mover in the passage of the Indian Claims Commission Act (and a mentor and close associate of John S. Boyden), had served as the lead attorney in the Shoshone case. In Senate hearings in 1940, he argued vigorously against this bill to limit interest payments, and the bill was eventually voted down. But the Justice Department's concerns had clearly lodged with the Court of Claims, and the question of interest was effectively "buried" (Rosenthal 1990:29). From 1940-1946, of three awards made by the Court, none were granted interest: "Of the five cases that claimed interest, all were dismissed" (Rosenthal 1990:29).

While the ICC Act itself was silent on the question of interest, this specific history in Court of Claims decisions from 1940-46 established an operating precedent for the Commission not to consider claims for interest on awards based on values at the assigned dates of taking:

> The Commission's measure of damages in most claims was the market value of the land at the time of the taking, without interest or adjustment for inflation. One 1860 dollar had the buying power of about fifteen 1980 dollars.... Moreover, one 1860 dollar, with interest, would have earned about sixty-four dollars by 1980, causing many tribes,

> generally without success, to demand the payment of interest on their claims judgments. Lastly, it is noteworthy that the market value of tribal lands at the time of nineteenth-century transactions often had to be guessed at or based on the federal resale rate of a dollar or two per acre, because prior to the treaty or taking in issue, no land in the area had been bought or sold privately. Consequently, *Commission awards frequently represented less than one percent of the real value of the damages suffered by the tribal claimants* (Barsh 1982:18, emphasis added).

Claims Attorneys

Attorney representation for tribal claimants was a matter of particular concern in Congress prior to the Act. It was feared there would be an upsurge of attorney interest in profiting from tribal claims, and there was considerable skepticism in general of the motives of "Indian lawyers":

> ...many in Congress only saw conspiracy at the root of the Indian claims.... Even Senator Burton K. Wheeler of Montana, himself regarded suspiciously by the conservatives.... said in hearings on the proposed Indian Reorganization Act of 1934 [the "Wheeler-Howard" bill] that it was a "well known fact here in this city it has been somewhat of a racket with some lawyers and people going out there chasing around the country and having solicited such business among various tribes."....
>
> Congressional debate on Indian legislation often raised the specter of the avaricious Indian attorney whose claims business was the biggest "racket in the country," usually with the motive and effect of obscuring merit with myth (Rosenthal 1990:24, quoting Congressional testimony in 1934 and 1937).

Rosenthal (1990:23-24) argues that this perception was unfair, and that in many instances attorneys working for tribal claimants fared poorly in terms of their own monetary compensation:

> In the face of the facts that the federal government was an unsympathetic foe and the process of even gaining a confrontation with it was lengthy and difficult, some few attorneys persisted. Only a leaven of idealism could raise them to the effort of maintaining these often frustrating litigations. A limited number of attorneys and firms, largely centered in Washington, DC, developed a specialized knowledge of Indian law and history, congressional connections, familiarity with the records of the Department of Interior and the General Accounting Office, and experience in the Court of Claims. These men were subject to the supervision and direction of the Commissioner of Indian Affairs and the Secretary of the Interior, and could make no contract, compromise, or settlement

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> without the Secretary's approval. Recoveries were contingent on success of the suit and usually determined by the Court or the jurisdictional acts not to exceed 10 per cent with a general maximum of $25,000. For a few it was a fruitful practice, for all a trying one (Rosenthal 1990:23).

Whether or not idealism was the motive, there was a major cultural divide in the prosecution of Indian claims, and attorneys exercised an unusually privileged position as intermediaries in this regard. The culture of United States law at this juncture was almost wholly Caucasian: Congress was white, Claims Court judges were white, and most attorneys were white. Although the strongly assimilationist policies of the Dawes Act period were being superseded—in Franklin D. Roosevelt's presidency, and under Commissioner of Indian Affairs John Collier—by a more enlightened vision for the Bureau of Indian Affairs, the approach of the federal government to its "Indian wards" remained highly paternalistic.[5] In most instances, tribes were at a considerable disadvantage in seeking legal recourse before U.S. courts: indeed redressing this inequity was a primary aim in establishment of the Indian Claims Commission itself. An earlier version of the bill called for one of the three appointed Commissioners to be a Native American—a recommendation that was not retained in the final form of the Act. This fundamental lack of direct involvement by Native Americans themselves in the claims process was a major factor in their rejection, at one stage or another, by a number of tribes. As Lurie puts it:

> Few tribal representatives were able to attend their claims hearings; fewer still were called upon to testify to promote a sense of direct tribal effort in forwarding their claims; and often lawyers and ethnohistorians uncovered causes for suit of which the tribes had been unaware (Lurie 1978:106).

[5] While he is perceived by many writers on the history of Indian-white relations as a heroic liberal, John Collier, the overarching figure in Indian affairs throughout this period, does not have a particularly favorable record as far as the Hopis are concerned. Via his agent Oliver La Farge, Collier is fundamentally associated with imposing the Indian Reorganization Act and the Hopi Tribal Constitution (authored by La Farge) on the Hopis, conditions that very quickly led to the practical reduction of the Hopi Reservation to Grazing District Six and a devastating program of livestock reduction to accommodate their shrunken land-base. Supposedly enlightened liberalism in Indian policy was still imposed with a heavy paternalistic hand, and with unfavorable results in the Hopi case at least.

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The Commission as a whole has been judged a failure by its historian, owing to this exclusion of Native people from the process:

> To have been a success the Commission would have had to involve the Indians directly in its formulation and operation. But, as always, it was a case where "primarily white bureaucrats attempted to deal with Indian issues without consulting those who both knew more about the problems and were to be bound by the resultant policies." Nevertheless, Indian resentment at this old ploy was temporarily suppressed by a guarded hopefulness about the potential of the new Commission of 1946. Their optimism quickly waned when it became obvious that the Commission would break little new ground and was really a government measure to enhance its own efficiency by disposing of the old claims and terminating the Indian tribes. Indian disillusionment smoldered through the 1950's and into the 1960's but was not acknowledged by the Commission, the B.I.A., or the news media (Rosenthal 1990:246).

Rosenthal discusses how the major Native protests of the 1970's (takeover of the Bureau of Indian Affairs building in Washington in 1972, and the siege at Wounded Knee in 1973) were directly associated with the failure of the Indian Claims Commission to address Native grievances against the government—the very reason for the Commission's existence:

> Indian frustration burst out in a dramatic fashion in late 1972. The B.I.A. headquarters building was seized and held for a week in November. Prominent among the twenty demands...was a call for a thorough review of Indian treaty commitments and violations, and a demand for the elimination of the system that had resulted in unending and expensive legal battles for Indian rights which produced indecisive results. Then came Wounded Knee. The seventy-one day siege in early 1973 was partially a result of an alleged century of treaty violations and the failure of the Commission to redress them (Rosenthal 1990:247).

In the words of Frank Fools Crow (Lakota), testifying in 1976 at Congressional hearings to amend the Indian Claims Commission Act:

> We know the underlying policy behind the Claims Commission Act and we are not fooled. The government intends to clear title to the land illegally taken, to clear their own conscience before they terminate us.... I wonder where the white man ever got the idea that these wrongs had to be settled in his courts by his rules (quoted in Barsh 1982:11).

Anglo attorneys working for tribes frequently exercised a great deal of power *over* as well as *on behalf of* their clients, who in most cases were far removed from the legal structures

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and practices of the Courts, in whose procedures they were not well versed. Thus the attorneys played an enormous role in framing the presentation of claims (for clients who in most respects could not speak for themselves before the Commission)—claims whose outcome directly determined attorney fees. After the demise of the ICC in 1978, Court of Claims Judge Philip Nichols wrote an opinion in 1981 that drew attention to the conflict of interest attaching to the work of Claims attorneys:

> "The attorney's interest, but not the tribe's is to effect a judicial sale, as it were, of tribal land at values of some historic past date, not of the present, to be set by the Commission, whether or not the Indians may in reality ever have had their title extinguished except by the ICC proceeding itself" (quoted in Newton 1992:850).

Congressional concerns about attorneys and fees were sufficient to be included as a section of the final version of the ICC Act:

> Sec. 15. Each such [claimant] tribe, band or other identifiable group of Indians may retain to represent its interests in the presentation of claims before the Commission an attorney or attorneys at law, of its own selection, whose practice before the Commission shall be regulated by its adopted procedure. The fees of such attorney or attorneys for all services rendered in prosecuting the claim in question, whether before the Commission or otherwise, shall, unless the amount of such fees is stipulated in the approved contract between the attorney or attorneys and the claimant, be fixed by the Commission at such amount as the Commission, in accordance with standards obtaining for prosecuting similar contingent claims in courts of law, finds to be adequate compensation for services rendered and results obtained, considering the contingent nature of the case, plus all reasonable expenses incurred in the prosecution of the claim; but the amount so fixed by the Commission, exclusive or reimbursements for actual expenses, shall not exceed 10 per centum of the amount recovered in any case (60 U.S. Stat. 1049).

Termination and the Terminationists

Before addressing the main sections of the ICC Act, one further element is important: the issue of termination. The goal of *ending* Indian claims was made explicit in the Act:

> Sec. 22.... The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

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> ...A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy (60 U.S. Stat. 1049).

In this respect, legislation to form the Commission belonged with emerging Congressional plans to reduce and/or terminate the federal relationship with Indian tribes (House Report 1466 to Accompany H.R. 4497, 12-20-1945:8). The pendulum in Indian policy had begun to swing back from the more liberal approach of the 1930's, notably the Indian Reorganization Act (1934), which had sought to give tribes a measure of self-determination. The new reasoning was that, once Indian claims against the government were disposed of, there would no longer be any need for a special federal relationship: reservations could be abolished, all vestiges of Native sovereignty eliminated, and the Bureau of Indian Affairs dissolved (e.g., Fixico 1986:21-44, Burt 2008). Plans for tribal termination were definitely concurrent with the Indian Claims Commission Act:

> Although termination would not become official federal policy until the early 1950s, Senate and House reports in 1943 and 1944 strongly criticized the reorganization policy and encouraged a return to assimilation of Indians.... Resolving any existing claims of Indian tribes was a necessary precursor to initiation of the new policy (Royster 2008:29).

As Philleo Nash, a special assistant in President Harry Truman's cabinet and later (1961-66) Commissioner of Indian Affairs, puts it:

> Termination began in 1947 when the Congress called on the acting commissioner of Indian affairs for a set of criteria that would mark the readiness of tribes to give up their status as Indians and enter the mainstream, no longer needing the protection of federal trusteeship. With criteria in hand, the Congress then demanded a list of tribes in an advanced state of readiness. The Interior Department was reluctantly forthcoming, and one by one bills terminating the trust and the special status of tribes and individuals as Indian were prepared and several were passed....
>
> The adoption of House Concurrent resolution 108 (67 U.S. Stat. B132) in 1953 made termination official congressional policy.... In practice, termination was an issue from the end of World War II to about 1960.... (Nash 1988:271).

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Ending Indian claims against the government and the termination of the federal relationship were thus:

> ...twin pillars of the policy of "bureau withdrawal" coveted by Congress. Proponents of the Commission's continuing existence stressed that its awards would help facilitate termination by ending old grievances and staking new beginnings (Rosenthal 1990:170).

The Indian Claims Commission was given ten years to resolve all claims. To be heard by the Commission, all claims had to be filed within five years—by August 13, 1951. Several hundred claims were filed, however, and it soon became clear that the three-member Commission could not possibly adjudicate them all by 1957 (ten years from the time of its first meeting). A series of extensions were passed, eventually lengthening the Commission's life by two more decades (32 years in all). Several tribes were terminated by Congress in the 1950's, but after much Native opposition, the termination policy was abandoned by 1960. Accordingly, as the Indian Claims Commission persisted (beyond 1957) while termination was being phased out, the relevance of termination per se to the business of the Commission declined. However, the appointment of a leading terminationist Arthur V. Watkins (see below) to the Commission in 1959, and his advancement to Chair in 1960 (he served until 1967), shows the ongoing centrality of this ideology within the framework of the Commission. It remains important to understand the Indian Claims Commission Act as intended to set the terms for ending or greatly reducing the government's responsibilities towards Native Americans.

It is by no means insignificant—especially for Hopi interests—that leading proponents of termination in Washington included Senator Arthur V. Watkins of Utah and Ernest L. Wilkinson, the Claims attorney who played a major role in getting the Indian Claims Commission bill passed into law (Rosenthal 1990:82-91; House Report 1466 to Accompany H.R. 4497, 12-20-1945; *New York Times* 9-4-1985; Metcalf 2002:55). Watkins became the leading voice for

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termination in Congress during his tenure as a Republican member of the Senate from 1947-1959. As chairman of the Senate Subcommittee on Indian Affairs, Watkins had a major role in shaping Indian policy:

> Sen. Arthur V. Watkins of Utah...became the chief Congressional architect of the new federal policy [termination]. A devout conservative and Latter-Day Saint, Watkins relished the opportunity to participate in the overhaul of Indian policy.... O. Hatfield Chilson, an Eisenhower official, noted in an interview that Watkins was "the only one I know of who insisted on being on the Indian Affairs Committee" (Cowger 1999:106).

Both Watkins and Wilkinson were Utah natives, alumni of Brigham Young University, devout members of the Church of Latter Day Saints, and strong adherents to the Church's views (for Wilkinson, see *Time* 5-20-1957, Metcalf 2002:49-73; for Watkins especially, see Metcalf 2002:21-48). In Indian affairs, those views included the idea that Indians were Lamanites, who should be actively converted and absorbed within the greater Mormon community.[6]

> [According to O.H. Chilson, quoted above, there was]... an important connection between Watkins' inordinate interest in Indian affairs and his Latter-Day Saint background. Latter-Day Saints believe that Lamanites (Indians) and Nephites (non-Indians) both share a royal heritage. Although a chosen people, Lamanites have suffered injustice and persecution, according to Latter-Day Saints because of their unrighteous past. The Lamanites, however, will one day "blossom like a rose," when they accept full assimilation into the mainstream society and convert to the true faith (Cowger 1999:106-07).

Several other prominent Utah federal officials and politicians, including H. Rex Lee, Associate Commissioner of Indian Affairs (who, as Acting Commissioner of Indian Affairs, provided John Boyden with his draft Claims contract to present to the Hopi in 1951), were involved in the termination process. It is no coincidence that the first tribe for whom termination legislation was passed, the Uintah and Ouray Utes, were in Utah:

> Utah also became the battleground where adversaries fought the first termination campaigns. In 1954, Congress considered general legislation to terminate all the small reservations in Utah, home state of Watkins. The Utah senator was particularly interested

[6] This mission affected Hopis in a number of ways, including extensive fostering of Hopi children in Utah Mormon families in the 1960's and 1970's (e.g., C. Wilkinson 2005:257-61).

> in terminating the Southern Utes as a showcase to launch his new legislation (Cowger 1999:107).

The Utes were represented by Ernest Wilkinson and his younger associate, John S. Boyden, formerly Assistant U.S. Attorney for the District of Utah. Others in the first group of tribes to be presented for termination were from Utah, and had previously been, or were still being, represented by Wilkinson and Boyden. Boyden began to work with Wilkinson as co-counsel for the Utes in 1946 (O. Boyden 1986:166-67; E. Wilkinson 1-18-1947). Wilkinson was also attorney for the Klamath of Oregon and the Menominee of Wisconsin, the first two tribes to be formally terminated (Wilkinson 6-11-1945; Rosenthal 1990:106; Burt 2008:24). With Senator Watkins, John Boyden worked to terminate a small band of Paiutes in southwestern Utah: the aim was to demonstrate how termination might serve as a model nationwide (Metcalf 2002:101-23). Watkins led the movement in Congress to adopt House Concurrent Resolution No. 108 in 1953, which made termination into official government policy:

> Watkins became known as "the Father of Termination" because of his passion for the idea. Other main players in this movement included Ernest L. Wilkinson, one of the best Indian claims attorneys in the country, and John S. Boyden, legal counsel for the Northern Utes of the Uintah and Ouray Indian Reservation in Utah, and for the Hopi Indians of Northern Arizona. Wilkinson was a mentor admired by Boyden....
>
> What most of the terminationists had in common was their religious background; they were members of the Church of Jesus Christ of Latter-day Saints, with attitudes colored by their belief in the Book of Mormon. These Mormon leaders felt that their superior insights into the origins of American Indian groups, whom they considered scattered branches of the house of Israel, were derived from Mormon scripture (Brigham Young High School 2008).

Like Watkins and Wilkinson, Boyden was also a Utah native and devout member of the Church of Latter Day Saints (e.g., O. Boyden 1986:115-26). Boyden clearly belonged to this religious and ideological movement in Indian affairs. And it may not be without interest that when Boyden finally presented Docket 196 for trial before the Indian Claims Commission in

1961, the Chief Commissioner presiding over the case, now no longer a Utah Senator, was Arthur V. Watkins.

In sum, several background features to the establishment of the Indian Claims Commission had determining effects on its decisions, including those directly affecting the outcome of Docket 196:

1) modeled on the precedents and practices of the U.S. Court of Claims, the Commission was only able to award monetary compensation for lands judged to have been taken illegally or too cheaply; it could not restore land;
2) the decisions of the Commission were envisioned as bringing all Indian claims against the government, of whatever nature, to a final end;
3) the government protected itself against the possibility of (what it feared might be) excessive awards by allowing deduction of offsets for "services rendered" to the tribes;
4) awards were to be based on 19th century land values and did not allow the addition of interest;
5) white "Indian claims" attorneys had a disproportionate importance in the presentation and determination of claims; direct Native involvement was very limited, especially until the later years of the Commission in the 1970's;
6) the desire for finality of claims was closely linked to Termination of federal status for Indians. Some of Termination's leading proponents were also directly involved in the Commission or its cases: these prominently included a close-knit group of Utah politicians, whose active Mormon beliefs influenced their engagement with American Indian affairs.

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Public Law 726: The Indian Claims Commission Act

The Indian Claims Commission Act's formal jurisdiction specified a series of permissible types of claim:

> Sec. 2 The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:
>
> (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;
>
> (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit;
>
> (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity;
>
> (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and
>
> (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity (60 U.S. Stat. 1049).

The Commission, initially comprising one chief Commissioner and two others (increased to five in all in 1969), was given some latitude as to how it would operate. As noted, Congressional discussion in the early 1930s had been framed in terms of the establishment of an Indian Claims *Court*. Beginning in 1935, that was no longer the preferred option and the language changed to an Indian Claims *Commission*. As John T. Vance, chairman of the Indian Claims Commission, put it in 1969, "From 1935 until the enactment of the Indian Claims Commission in 1946 the word *court* was never mentioned again in any proposed bill" (Vance 1969:331). As opposed to a court, a commission did not need to hear claims adversarially, but

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rather could collect evidence itself and reach a decision it felt was in the best interests of the claimants. This format was clearly the preference in the Indian Claims Commission Act itself. While it *allowed* claimants to hire attorneys in order to present their claims, it did not mandate this, and indeed in its provisions to establish an Investigation Division suggested that all necessary evidence might be researched and presented within the Commission itself:

> Sec. 13…(b) The Commission shall establish an Investigation Division to investigate all claims referred to it by the Commission for the purpose of discovering the facts relating thereto. The Division shall make a complete and thorough search for all evidence affecting each claim, utilizing all documents and records in the possession of the Court of Claims and the several Government departments, and shall submit such evidence to the Commission. The Division shall make available to the Indians concerned and to any interested Federal agency any data in its possession relating to the rights and claims of any Indian (60 U.S. Stat. 1049).

The Commission was given wide powers to collect documents from "any of the Departments of the Government it may deem necessary, and shall have the use of all records, hearings, and reports made by the committees of each House of Congress…" (60 U.S. Stat. 1049).

In practice, however, the Commission failed to set up any effective Investigation Division, thus requiring claimants to present cases and the Justice Department to defend against them (Vance 1969; Newton 1992:772-73). This failure was criticized by both scholars and advocates, notably including Chief Commissioner Vance (1969).[7] The role of tribal attorneys, who prosecuted the claims on an adversarial basis, thus shaped the presentation of claims and influenced the nature of awards:

> In effect, the Commission required the litigants to undertake and pay for much of the work intended for the Investigation Division and sought no major appropriation from Congress to make it an effective source of knowledge to illuminate their deliberations (Lurie 1978:100).

[7] See also Newton 1992:772, n. 102.

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As noted above, while the Act only allowed awards of money rather than land restoration, this was unclear to many people, and the existence of the Commission effectively *prevented* tribes from even potentially bringing claims for land in other legal contexts:

> ...federal courts held that the jurisdiction of the Commission to hear claims was exclusive, meaning that Indian tribes had to bring their historic claims before the Commission, and could not use the federal courts to seek other remedies. Thus, when the Oglala Sioux Tribe sued for their ownership of the Black Hills on the ground that the land had been taken unconstitutionally, the federal court dismissed the claim, holding that the tribe's only avenue of redress for its historic claim was the Indian Claims Commission. The result for the tribes that wanted their land returned was devastating. Their only avenue of redress was the Indian Claims Commission, but the Commission could only award money damages; it could not order return of the land (Royster 2008:31).

In only a single instance did a recommendation from the Indian Claims Commission ever result in the restoration of land: Taos Pueblo's Blue Lake. But in that instance, the case had to be referred back to Congress, which, only at the strong urging of President Nixon, passed special legislation in 1969 to restore 48,000 acres the Pueblo. However, that case was considered "unique" by the Commission, which did not intend for it to be used as a precedent for other claims (Rosenthal (1990:228). While some other tribes did seek similar judgments after the Taos case, all those claims failed (Rosenthal 1990:228).

In keeping with the procedures of the Court of Claims, the ICC Act also specified that offsets should be allowed against any awards:

> In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under Section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. sec. 250), as amended; the Commission may also enquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant.... (60 U.S. Stat. 1049).

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The Act also specified who might present a claim. The statement is particularly germane for the Hopi claim:

> Sec. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission (60 U.S. Stat. 1049).

At the time the Act was passed, there was no functioning Hopi Tribal Council. Another section of the ICC Act stipulated that tribal leaders, who might bring forth a claim, should be notified of the Act as soon as possible:

> Sec. 13 (a) As soon as practicable the Commission shall send a written explanation of the provisions of this Act to the recognized head of each Indian tribe and band, and to any other identifiable groups of American Indians existing as distinct entities, residing within the territorial limits of the United States and Alaska, and to the superintendents of all Indian agencies, who shall promulgate the same, and shall request that a detailed statement of all claims be sent to the Commission.... (60 U.S. Stat. 1049).

It is presumed that the Commission indeed sent notification of the Act to the Hopi Agency Superintendent, but it is not evident that any notice was sent to any Hopi individual or group serving as the "recognized head of each Indian tribe and band." Technically, the only Hopi entity the federal government recognized in the leadership role at Hopi was the Tribal Council, but this had not been functioning for several years prior to the Act. From letters of protest in 1949 and thereafter, as well as the filing of Dockets 196 and 210, it is clear that the Hopi leaders were extensively informed, however.

The Act stipulated that the Indian Claims Commission would complete all its work within ten years, or five years after the deadline it established for the filing of claims:

> Sec. 23. The existence of the Commission shall terminate at the end of ten years after the first meeting of the Commission or at such earlier time after the expiration of the five-

> year period of limitation set forth [above]...as the Commission shall have made its final report to Congress on all claims filed with it (60 U.S. Stat. 1049).

Ten years proved wholly inadequate. Before the 1951 deadline, 370 petitions were filed; they were eventually divided into 617 different dockets (Indian Claims Commission 1978). Many claims were presented in the last few months before the deadline. The Commission had to be extended several times: in 1956, 1961, 1967, 1972, and for the last time in 1976 for two more years. The Commission's total life-span was 32 years—more than three times as long as specified by the statute. By the late 1950's, Congress was exasperated with the pace of Claims resolutions. Only 64 dockets had been completed within the decade established by the Act. Of these, the Commission had dismissed 54 claims outright, and awarded compensation on only ten, with awards totaling almost 10 million dollars (Rosenthal 1990:266). While Congress agreed to extensions, it became increasingly frustrated:

> ...with each extension came a growing impatience in Congress with the Commission's slow progress and a resolve to speed the claims process. In 1960, Arthur V. Watkins, an outspoken terminationist, became Chief Commissioner. He greatly increased the efficiency and output of the claims settlements but was still found wanting by an exasperated Congress. The extension act of 1967 removed the incumbent Commissioners, increased their number from three to five, and tightened the procedures. The intent of Congress in the strong wording of the act was to bring a quick end to a task that had already taken double the time allotted it by the original act (Rosenthal 1990:175-76).

Compromise Settlements

One of Chief Commissioner Watkins' measures to increase the pace was to encourage Compromise Settlements. Watkins saw that matters would be speeded by getting the attorneys for the claimants and the Justice Department to agree on settlements, eliminating the need for final determination by the Commission:

> With Watkins on the Commission, as member and as Chief, its pace quickened in 1960. In addition to his tightening of the trial schedule, he established a definitive program for "compromise settlement," that is, settlement "out of court." There were issues or whole

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> claims that were best decided without the long expensive need for a trial. Watkins intended to facilitate this process whenever possible or when mutual agreement seemed likely (Rosenthal 1990:180).

However, prior to 1960, Compromise Settlements had only involved the attorneys, and not the tribes themselves. Tribal claimants were often very dissatisfied when agreements were reached that they essentially had no part in. Watkins worked to change that, but his motivation owed as much to his persistent terminationist aims as to anything else. If tribal representatives, as well as their attorneys, signed off on Compromise Settlements, Watkins believed, the "finality" of the claims would be secure. Otherwise, there was a risk the tribes would seek to file claims anew, on the grounds that their interests had not been properly represented.

Watkins succeeded in getting the Commission to adopt this procedure over the objection of some of the attorneys:

> ...Watkins felt that the signatures of Indian representatives must accompany those of the contract attorney [for the tribe] and the assistant attorney general [for the government]. Until this decision the tribes did not participate in the final approval. The Commission was firm and established [a rule]... to obviate future recriminations in cases of compromise by bringing in the Indian voice more into the process of final settlement (Rosenthal 1990:180).

The number of cases settled by Compromise increased rapidly after this: fifty percent of cases in 1959-60 and sixty percent from 1961-65 were settled by compromise (Rosenthal 1990:193). The Justice Department was also moved to encourage resolution by Compromise Settlement. But many cases still involved "extensive adjudicative work" (Rosenthal 1990:194) before a Compromise Settlement was negotiated.

Although the Docket 196 Compromise Settlement occurred a decade after this period, clearly Watkins' actions on the Commission provided the precedent. While it is not known whether Watkins and Boyden had discussions on a Compromise in Docket 196 before, during, or after the trial in 1961, both the context and their personal history make it very likely this was the

case. After Watkins stepped down from the Commission on October 1, 1967, Boyden was urged by Associate Commissioner Scott to negotiate a Compromise Settlement on Docket 196 (Boyden 3-4-1968). While certainly interested, Boyden responded that this could not be arranged until the Commission made a decision on the government's liability, following the presentation of the case at trial of 1961, and the submission of further evidence up to 1963. Settlements remained the emphasis after Watkins' departure from the Commission in 1967, and were encouraged by new formal procedures adopted by the reorganized Commission in 1968:

> It is the belief of the Commission that these procedural reforms will encourage the parties to settle or compromise their claims without the necessity of full-scale adjudicative proceedings which are time-consuming and may be quite expensive for the litigants (Indian Claims Commission 1968:17).

By this point, Docket 196 had already been through the major portion of adjudicative proceedings (i.e., "Phase One"—see below), so it is not evident what the Hopi Tribe would have had to gain at this stage by negotiation. When Boyden finally negotiated the Compromise Settlement in 1976, it followed the established pattern put into place for resolving ICC claims by Chief Commissioner Watkins in the early 1960s, and as affirmed by the procedural reforms of 1968.

Practical Operation of the Indian Claims Commission

While many cases were complex, there was a general pattern, focusing on unfair compensation for lands "ceded" to the United States in the years since the founding of the Republic:

> The typical case that marked up the bulk of the Commission's work is one that embodies a claim for additional compensation for lands taken by the United States by treaty or statute and in some instances without the benefit of either. The majority of these land claims fall into the category of "treaty takings." In these situations the Indians receive some compensation from the Government for the cession of their lands. This

> compensation may have taken the form of money, goods, services, or any combination of the three. The gist of the Indian complaint is the alleged gross inadequacy of the consideration paid when compared with the fair market value of the ceded lands at the time they were taken from the Indians. If the Commission ultimately determines that such a disparity between the price paid and actual value does exist, then the United States becomes liable to the Indian claimants for the difference, though this determination is subject to appeal to the United States Court of Claims (Indian Claims Commission 1968:3-4).

In an annual report submitted 22 years after its establishment, the Commission, having first noted the "staggering size and complexity" of its task, provided an extended description of its regular procedures. This description is perhaps the most straightforward statement on record of how the Commission operated—of how its mandate under the Indian Claims Commission Act was actually put into practice. Most of this description applies directly to the presentation of Docket 196, and is therefore worth quoting in its entirety. The Commission identified three separate phases of trial for a typical case, "each of which requires a full hearing and decision." Docket 196 was only ever tried on the first phase, and never proceeded to the expected second and third phases, but the Commission's description of these latter two phases is directly relevant to an understanding of how the Compromise Settlement of 1976 was reached. The Commission described Phase One as follows:

(1) Title Phase

> Before obtaining compensation, the Indian claimants must show that the tribe has a compensable interest in the subject matter of the claim. The burden thus rests upon the claimants to prove their title to the lands claimed by them. Such proof may indicate aboriginal or "Indian title" or may involve recognized or "reservation title."
>
> Aboriginal or "Indian title" is that form of title that is based upon proof of actual, exclusive, and continuous tribal use and occupancy for a long period of time of the lands claimed up to the date of the alleged seizure by or cession to the United States. Aboriginal title is strictly a possessory right, the determination of which is always a question of fact [as opposed to a question of law]. Actual use and occupancy of a given area to the exclusion of other tribes must be shown. Constructive possession of the land will not suffice.

In proving aboriginal title, a tribe must first satisfy the Commission by a preponderance of the evidence that as of the date of the cession to the United States, it had actually used and occupied in "Indian fashion" a specific area of land to the exclusion of other tribes. It thus follows that common usage of a specific area by competing tribes destroys the element of exclusiveness and prevents recovery based on aboriginal title.

Needless to say, the evidence in support of aboriginal claims does not lend itself to the use of eye witnesses. The ultimate fact of aboriginal ownership is usually inferred from all the evidence, and ordinarily requires a great deal of proof. This being the case, the Commission during the course of a hearing on this issue will receive in evidence an abundance of documentary material dealing primarily with historical facts. The best sources of such materials are in the reports of early explorations, maps of explorers, military reports, contemporaneous reports and letters of knowledgeable Government officials and representatives writing from the areas in question, the annual reports of the Secretary of War and the Secretary of the Interior, Senate and House documents, contemporary newspaper articles and reports, and any official Government correspondence bearing upon the tribe or area in question.[8] The works of deceased historians, anthropologists and ethnologists have also frequently been received in evidence. Since many facts needed to support an aboriginal claim are not recorded in history, the Commission frequently hears the direct testimony of expert witnesses in the fields of history, anthropology, and ethnology as well. Only where the claimants, by the use of such evidence, can prove use and control of a particular area by their ancestors, can a claim based upon a theory of aboriginal ownership be sustained.

Not all claims before the Commission involve aboriginal title issues, however. Where an Indian tribe has a compensable interest in lands by virtue of recognized title, sometimes referred to as "reservation" or "treaty title," then such issue becomes strictly a question of law [as opposed to fact].[9] Recognized title is always in the form of a grant that comes about solely through Congressional action. Contrasted with the permissive type of occupancy found in the concept of aboriginal title, recognized title does not depend upon exclusive use and occupancy for its vitality. It is based, rather, on an act in which Congress specifically granted to a tribe permanent legal rights of occupancy in a sufficiently defined area.

Since determination of recognized title is a question of law, the Commission considers the Congressional acts alleged to constitute such recognition. Sometimes this can be a difficult task if the treaty or statute is vague or ambiguous. If this be the case, resort is made to the supporting legislative history of background for an insight into the Congressional will.

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[8] Strikingly absent from this list are the oral histories of the peoples themselves, and their own reports of continuing usage of traditional areas—usages (for example, in the case of Hopi) granted by right of inheritance traceable back through several generations of continuous use (to before the time of U.S. annexation).

[9] Thus the Hopi claim in Docket 196 involved interests based on both "Indian title"—which encompassed all lands of the aboriginal claim, both inside and outside the 1882 and 1934 Reservations—and also "reservation title" to lands falling within those two Reservations, as established in 1882 and 1934, respectively.

> A determination by the Commission that an Indian tribe has either aboriginal or recognized title to the area under consideration does not of itself, however, adjudicate the question of the liability of the United States to the tribal claimant. This judgment usually comes in at a later phase of the proceedings (Indian Claims Commission 1968:4-7)

A major part of the Hopi Tribe's appeal of the Commission's 1970 decision on Docket 196 would be that, instead of sticking to the trial mandate of Phase One, the Commission's Opinion and Findings directly impacted on questions of land value and dates of taking—issues that were supposed to be reserved for Phase Two—without ever having heard any evidence or argument presented on such issues (see below).

As the Commission's procedures developed in practice, at the Title Phase the concept of "exclusive use and occupancy" for determining a tribe's aboriginal lands became increasingly important. As the Commission emphasized (above), "Actual use and occupancy of a given area to the exclusion of other tribes must be shown," and "common usage of a specific area by competing tribes destroys the element of exclusiveness and prevents recovery based on aboriginal title." With cases moving forward, the Commission began to apply a routine standard in this regard:

> The concepts of use and occupancy frequently became matters at issue until a kind of formula evolved out of the commission's decisions. The Commission chose to honor tribal claims where any kind of aboriginal title to exclusive use and occupancy was shown, if only ritualistic or seasonal, but to disallow compensation for intertribally shared lands although an important portion of several tribes' sustenance might have come from such areas (Lurie 1978:99)

Competition over "exclusive use and occupancy" thus became a major part of many cases. As the ICC's historian noted:

> To qualify for occupancy, land use must have been consistent, either continual or seasonal, and the use must have been of vital importance to the economy of the people constituting the group.
>
> The qualifying term, "exclusive," added immeasurably to the problems....[of deciding claims] Not thinking of land *per se* in terms of ownership but of the resources on it, tribes

> claimed use of the land but allowed others access also. Exclusivity was exclusively a white man's concept (Indian Claims Commission 1978:9-10).

Where there were competing claims, the Commission had to make a decision about which tribe to recognize in the particular areas. Where historical evidence was not absolutely dispositive in this regard, the Commission often ended by splitting the difference. This standard became especially significant to the Commission's decisions in Docket 196, since the Navajo Tribe's claim (Docket 229) encompassed the entire area (and much beyond) claimed by the Hopi Tribe.

The Commission's 1968 description of its standard operating procedures next took up Phase Two of a typical case:

(2) Valuation Phase

> This term refers generally to the proceedings and decisions which determine the dollar value of the property rights which were ceded by or taken from the Indian petitioners. In most instances the valuation phase will lead to a determination of any liability of the defendant, and in any event it is this phase which fixes the extent of the defendant's liability.
>
> Value is determined as of the date of taking, which might be the date of Congressional ratification of a treaty with the Indian tribe or the date the tribe was removed from its ancestral homelands if no treaty was involved. Without regard to the nature of the title involved (i.e., whether aboriginal title or recognized title), the measure of value used by the Commission is the "fair market value." Although aboriginal title is a mere possessory right of use and occupancy, it is nevertheless as valuable as a fee simple title. Thus, like recognized title, it includes all the natural resources of the land involved, including vegetation, timber, mineral resources and the like.
>
> In arriving at "fair market value" the Commission must use the standards set in previous decisions of the Court of Claims. These standards require the Commission to consider all of the factors which might be given weight in bargaining between a willing seller and a willing buyer. It must consider what knowledge would have been possessed by a prospective well-informed buyer and well-informed seller as of the evaluation date. The problem is thus to consider all of the various elements which would have been weighed by the hypothetical well-informed buyer and seller as of the valuation date had there been a market for the lands in question. In so doing the Commission must weigh many factors, including the acreage of the tract, its location, topography, climate, availability of water, nature of the soil and the value of timber or other natural resources, the existence of transportation facilities, the size of existing population in the area and population movements, and the sales and value of surrounding lands. In addition the Commission

considers expert testimony and determines the value of the ceded land in accordance with the highest and best possible use of the land at the time of taking.

Having completed its findings which fairly reflect all the factors pertaining to value, the Commission enters its ultimate finding or conclusion of value which is stated in a total dollar amount for the entire tract. Usually this figure is then expressed alternatively in its overall average per acre figure.

In determining the amount of consideration paid under a treaty or agreement, the Government usually presents a detailed report prepared by the General Services Administration listing every appropriation and disbursement, by fiscal years, made in satisfaction of the terms of the treaty of cession for the lands involved in the claim. This total consideration figure is then compared to the fair market value of the tract as previously determined by the Commission. If an unconscionable consideration was paid, the Indians are found to be entitled to recover the disparity (Indian Claims Commission 1968:7-9).

While Phase Two was never reached in Docket 196, over 14 years (1952-1966), under request by the Justice Department, the General Services Administration compiled a two-volume listing of purported payments made to the Hopi Tribe, in the form of a large variety of services (see below). So although, the Hopi Tribe did not have an opportunity to present evidence and testimony in a Phase Two, the government's accounting and the Commission's general principles for establishing "fair market value" were undoubtedly part of the Washington negotiations that culminated in August 1976—including Boyden and the Wilkinson firm with Justice Department attorneys—which established the terms for the Compromise Settlement.

Phase Three of a typical ICC case considered offsets calculated against "fair market value." These would be directly informed by the General Services Administration accounting described under Phase Two:

(3) Gratuitous Offset Phase

The concluding phase of an Indian case requires a determination of the allowable gratuitous offsets which may be credited to the defendant. Under the rules of the Commission the defendant is entitled to amend its answer within sixty days after a determination of its liability to set forth any claimed offsets. The various items claimed by the Government are presented in a detailed GSA report which is usually accompanied

> by certain representative vouchers in various categories involved. To be allowable each item of claimed offset must have been a gratuitous expenditure made to or for the claimants without any obligation on the part of the Government to make it, and without obligation on the part of the Indians to repay it. The expenditure must have been for the benefit of the entire tribe, and must not come within any of the excepted categories under Section 2 of the Indian Claims Commission Act (i.e., removal expenses, agency or other administrative expenses, education or health expenses, highway improvement expenses, etc.).[10] Finally, the nature of the claim and the whole course of dealing between the claimants and the United States must, in good conscience warrant the offset.
>
> After Commission determination of the allowable offsets in total dollar terms, that figure is subtracted from the amount of the defendant's liability decided upon by the Commission in the valuation phase of the case. This remainder is then reported to the Congress as the total extent of the Government's liability to the Indian claimants. It is the responsibility of the Congress to appropriate the money thus determined by the Commission and to direct how it will be distributed among various members of the tribe.
>
> In some cases, at the conclusion of the litigation, the Commission must determine the amount of compensation due the attorneys for the petitioners. Under the terms of the Indian Claims Commission Act, the Commission is required to make such a determination of attorneys' fees in all cases where the amount of compensation was not stipulated in the contract of employment between the attorneys and the claimants approved by the Department of the Interior (Indian Claims Commission 1968:10-11).

Again, Phase Three was not reached in Docket 196, but Boyden's report on the Compromise Settlement to the Tribal Council on October 14-15, 1976, shows that offsets projected from the GSA's general accounting were directly a part of negotiations with the Justice Department. The Commission's standards in a typical case would thus have been determinative for the Hopi Compromise Settlement in this regard also.

These passages thus encapsulate the guiding principles in the Indian Claims Commission's approach to specific claims. Those principles guided the key decisions in Docket 196, even though only Phase One was ever concluded before the Commission.

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[10] This represented an improvement, then, over the pre-1946 Court of Claims standards. Boyden would file a series of "Exceptions" to the government's claimed expenditures under the GSA accounting in July 1973 (see below).

Background to the Hopi Claim

The Hopi Land Situation and the Traditional Claim in the Years Prior to 1951[11]

Anthropologists and government officials had recorded larger Hopi land claims than the immediate area of the villages since the 1880's. While there were some differences among the traditions of the villages of the three Mesas, there was overall agreement that Hopitutskwa, Hopi aboriginal land, encompassed a broad area including Navajo Mountain, the San Francisco Peaks, Bill Williams Mountain, the Mogollon Rim, Woodruff Butte, Lupton, Lolomai Point, and Navajo National Monument (Map 1).

[11] Early accounts of traditional Hopi land claims are described more fully in my report for the Hopi Tribe in the 1934 Reservation case, *Hopitutskwa: an Historical and Cultural Interpretation of the Hopi Traditional Land Claim* (Whiteley 1989). Here I will just reiterate some key points in the discussion of direct relevance to Docket 196.

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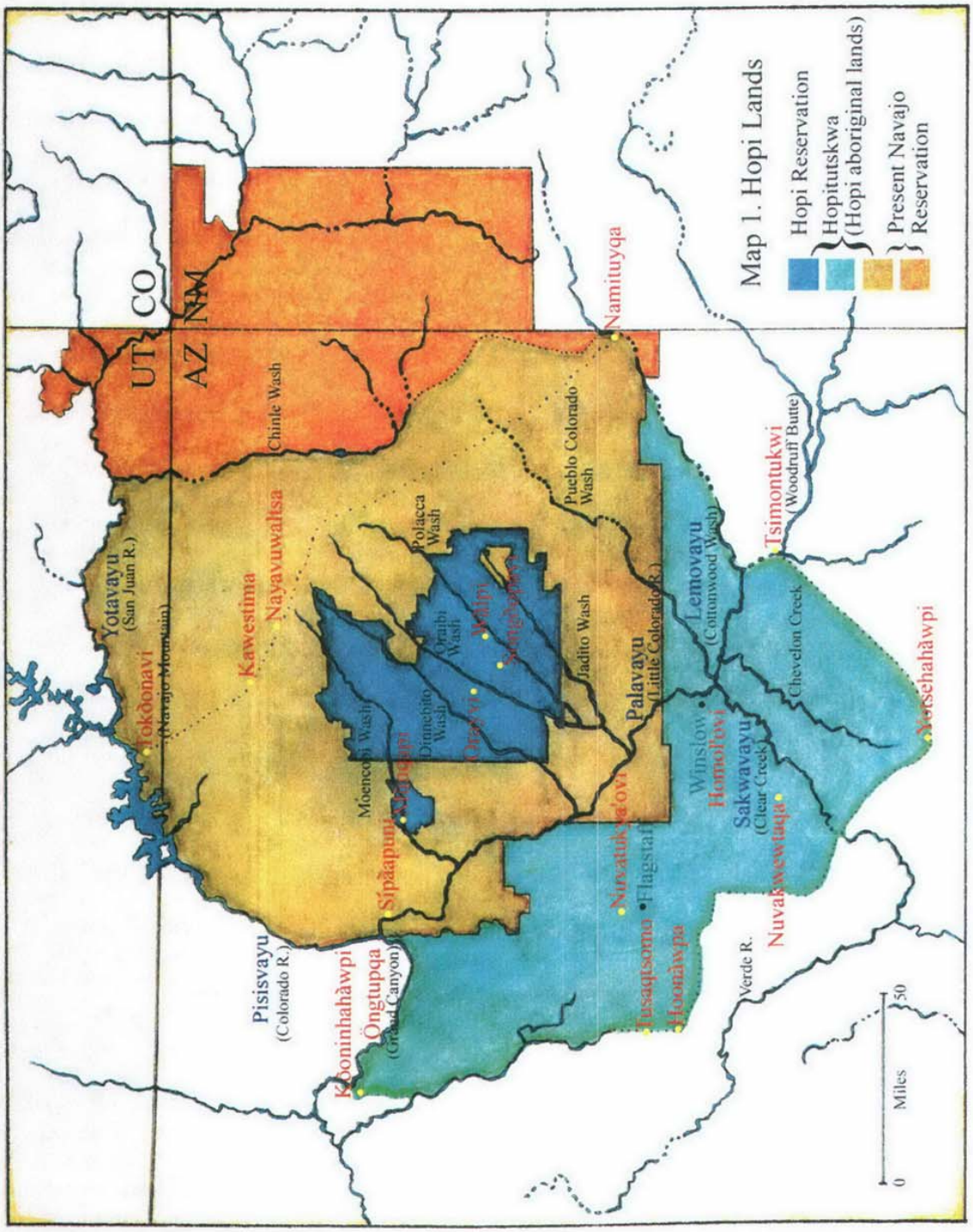


Map 1. Hopitutskwa, Hopi aboriginal land, in relation to modern reservation boundaries.

Hopi protests to government officials about Navajo encroachment began in the 19th century shortly after the Treaty of Guadalupe Hidalgo. Records of traditional Hopi land claims were compiled by anthropologists and others beginning in the late 19th century. In the 1920's, a series of Hopi letters and petitions protested the government's failure to protect Hopi lands, especially against Navajo encroachment. The first detailed Hopi statement of the traditional land claim appears in a petition (with an accompanying hand-drawn map by Fred Kabotie and others—see Map 2) signed by many individuals, including traditional leaders, from all three Second Mesa villages, to the Commissioner of Indian Affairs in 1930. This was submitted in the context of Congressional discussions of a bill to establish a Hopi-Navajo boundary. The bill (which eventually became the Act establishing the 1934 Reservation) sought to establish one definite boundary between Hopis and Navajos within the 1882 Reservation, and another boundary between Hopis and Navajos residing on the Western Navajo Reservation. Hopis were being asked in 1930 to accept 500,000 acres within the 1882 Reservation (even less than what was to become District Six) and 32,000 acres (i.e., for Moencopi) within the Western Navajo Reservation as their exclusive area. Hopis from all three Mesas unanimously rejected these proposals, which were indeed excluded from the final version of the Act of June 14, 1934. The Act simply expanded and consolidated reservation lands surrounding the 1882 Reservation, leaving for a later date the question of boundaries between Hopis and Navajos.

The 1930 Second Mesa petition stated:

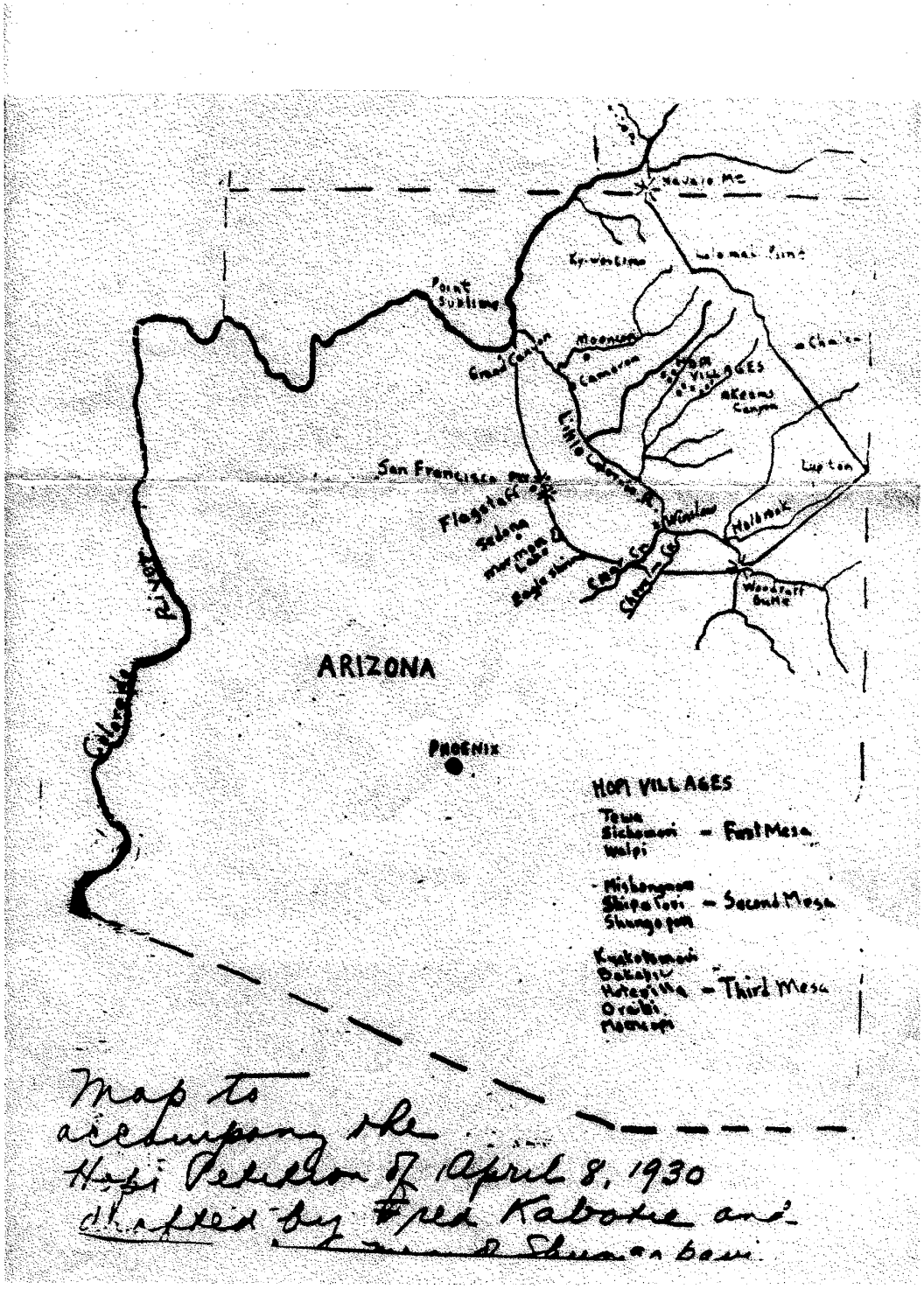
> After an extended discussion and consideration on the matter we feel That our old tribal land claim concerning about our old boundary lines and the area of land within the said boundaries should and ought by right in the light of justice, liberty and the Supreme Being, be taken into consideration for us at Washington that we desire and want our land return to us, because we love our home-land and never want to be moved out of this place. For centuries the Hopi shrines at the distance points...which boardered [sic] the Hopi people from every direction, marked and designated the Hopis' tribal land boundary lines. Before the other peoples came the Hopis' essential needs at away places were all

obtainable. For examples: Wild game and fowls was plentiful, timber for building purposes could be gotten from either Sun Set Mts. in the west and up from north of here, salt and etc.

But, intrusion of the Navajos, then, coupled with the lack of justice and better understanding on the part of our white-brothers; not the spirit of friendship and brotherhood which we and our grandfathers have always felt to-ward our white-brothers account for the fact that our boundary lines has never been acknowledged or recognized by the United States Government.

As a result our land had been greatly diminished or reduced in size to what is now called our reservation. Much to our deep regret and the frightful loss of our land we love, that confiscated area of land had officially been set aside as a Navajo reservation and a public land....

Wherefore; we the people, the majority of the Hopiland signing the said petition are earnestly and sincerely ask that our land we love so well be returned to us for the benefit of our future generations (Komalentewa et al 4-9-1930).



Map 2. Hopi aboriginal land as claimed in 1930 (drawing by Fred Kabotie and others)

Another petition for the restoration of traditional lands was submitted to the Senate Subcommittee on Indian Affairs in 1931 (Sakhongva et al 5-18-1931). Senate Hearings on the Navajo-Hopi boundary bill were held in 1932; the record includes "minutes of meetings conducted by representatives of the Indian Bureau with the Hopi Indians at the various Hopi villages" in November 1932. Hopis consistently rejected government proposals for a smaller area than their traditional claim:

> Secakamama: We won't try to settle on this present boundary. What we want is our own domain - the outside line - the old reservation [sic] from San Francisco Peaks and around....
>
> Veits: Being the descendants of the Chimopovi people here and being considering the tribal land claims I will point it out through from here north to the Colorado River and down along the river through that Marble Canyon and down away distant from that bridge at Lee's Ferry, down along a line and at a certain place coming up from the Canyon and on the southwest from there along the San Francisco Peaks, recognized as being an old shrine of the Hopis in considering that as a boundary, the original line, but a little farther down, and along from there south through them blue ridges up to the last point and southwest from Winslow and then from there eastward along the highest point, along there and up to this Woodruff Butte along there a little ways ahead up there at a certain point turning north and a little above Ganado along the pine ridges coming down along there and intersecting with the...Canyon de Chelly, and along there coming up pointing north straight up to the Navajo Mountain and down into that river. That is the tribal land claim of the first people here....
>
> This is all that I have to say. The people here are only interested in that. But the belief of the first people here, as he [probably meaning Maasaw] marked out the original line, and inside of that we are told that he [meaning the Hopi] was to depend on you [i.e. the white man] to protect this land for him - that inside of this land that whoever does those things wrong and mean should be moved out of that place....We believe that by not allowing the Navajos into the reservation here or into this land here (Boundary Hearings, Navajo-Hopi Indian Reservation, 1932:43,51).

Again in 1933, Hopis from Second Mesa pressed their case, reciting the boundaries as shown on Kabotie's map (Lomaheftewa et al 2-27-1933). The following year, in response to proposals to establish an IRA tribal government, Viets Lomaheftewa reiterated this claim, in a petition with many signatures from Shungopavi and Mishongnovi:

> By our tradition we ask you again to return to the Hopis the Land according to the original boundries which has been possessed by the Hopis and marked by the fours sacred shrines, we Hopis made this Country our home we built our Cities here, we farm the land and put the water to be beneficial uses for the Hopis and we also used the balanced of the land for LiveStock-grazing purposes. Therefore we are asking you to return our Old Domain back to us Hopis We are not asking for anything that does not belong to us by all the rules of equity.
>
> So we will now point out again where the Hopi Indian claim as their said boundary line supposed to be;
>
> Starting from north called Do-go-na-vie [Toko'navi] by the Hopis in the cliff of Colorado River follow the river down to the Salt Canyon [the Grand Canyon], from there along west side of Flagstaff through Blue Ridge to Mt. called Pe-heg-ha from there to Woodruff Butt there turning eastward covering Petrified Forest to Mission Spring from there back to Do-go-na-vie, this is the original boundary line for the Hopis which has been told from generation to generation, therefore we can never forget what our ancestors have told us (Lomahaftewa 3-8-1934).

Shortly thereafter, villagers from Kykotsmovi, Moencopi and Shungopavi petitioned Commissioner John Collier to abolish the 1882 Reservation and restore prior legal rights as enshrined by the Treaty of Guadalupe Hidalgo.

> By the stroke of a pen the land that belonged to us under the treaty of Guadalupe Hidalgo of 1848, was given and made a dumping ground for all roving bands of Indians that the Secretary of the Interior may see fit to dump there, and who have done us great damage....
>
> ... this land was, and is, our community property under and by virtue of the treaty of 1848, that we were at that time, and for hundreds of years prior, a separate and distinct nation.... (Fredericks et al 3-14-1934).

Both the traditional claim and the Treaty of Guadalupe Hidalgo are directly significant to the claim filed as Docket 196 some 17 years later. Hopi rights under the treaty were the basis for the Docket 196 claim. After adoption of the Hopi Constitution in December 1936, one of the first actions of the Tribal Council was to request clarification from Commissioner of Indian Affairs Collier about the Treaty of Guadalupe Hidalgo. The Commissioner assured the Council that Hopi rights were protected under the treaty:

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> The Hopi Indians were brought under the supervision of the United States Government through the Treaty of Guadalupe Hidalgo between the United States and Mexico, dated February 2, 1848, and reported in 9 Stat. 922. This treaty transferred to the United States the territory in which the Hopi Indians were situated and operated to transfer the Hopi Indians form the guardianship of the Mexican Government to the guardianship of the United States Government. This transfer of guardianship has been repeatedly recognized by the Supreme Court in cases involving the Pueblo Indians, whose status is similar to that of the Hopi Indians (Collier 3-22-1937).

In 1937, anthropologist Oliver La Farge, author of the Hopi Tribal Constitution, also spoke directly to the issue of the traditional land claim:

> ...[Hopi tradition] is absolutely controlling for seventy-five per cent of the Hopi tribe, for which they would be willing to lay down their lives, and for the remainder, Christians and all, it is emotionally dominant....
>
> The claim to...about half the state of Arizona, is not understood as meaning exclusive habitation. It relates to the fact that Hopi ceremonies are held not only for the Hopis but to maintain the welfare of the whole world, and also to the location of shrines of importance and the eagle hunting territories at places far removed from the villages. It is essentially a spiritual overlordship, plus a demand for access to and protection of the shrines and a restoration of ancient hunting privileges (La Farge 1937:26-28).

In a 1938 meeting with John Collier, Tribal Chairman Peter Nuvamsa again presented the 1930 petition. Other Hopi leaders at the meeting also commented, including Kuwannömtiwa, chief of Bacavi:

> The belief of the Hopi people was that this boundary situation should be discussed by the recognized chiefs of the different villages....Mr. Collier, I want to make this statement to you. You have had your say that the tribe and the Navajos and the Government should negotiate. That fact was put into the [Tribal] constitution. This is not the heart of these people [the Hopis]. They think that the gods that they hold in their arms are sacred and are the means of their life and they think they have the say of where the boundary line should be (Collier 7-14-1938:21-23).

A few days after Collier's visit, several traditional leaders issued their own statement, through spokesman Dan Katchongva:

> We cannot recognize any division of the lands we claim not traditionally. We must have all our land according to tradition and to the stone maps.[12] It must follow our traditional boundary and divide none of the land inside it....It was arranged by Masawa, that the

[12] The stone tablets held by the Hotevilla and Orayvi chiefs (see Whiteley 1989).

> Hopi should lay claim to their land by this stone, maintain their land and benefit by it in future years....It is the tradition of the Hopi that with the presentation of this stone to claim the Hopi land, and the return of the Hopi's rightful country, that no future harm or detriment should come to them or to their land (Kotchungva et al n.d.).

This document was thumbprinted by the Kikmongwis of Hotevilla (Pongyayawma), Shipaulovi (Humihongva), Shungopavi (Sikyayamtiwa), and by other village leaders.

Shortly after these meetings, anthropologist Gordon MacGregor was sent by Commissioner Collier to investigate Hopi traditional claims further. MacGregor reported:

> In 1930 and again in 1933, the Second Mesa villages have presented maps outlining their conception of the Hopi country and asking for recognition of it....It includes the distant mountain peaks they can see from their villages and the farthest shrines, except those in Grand Canyon to the west. The line also includes all but one or two ruins in central Arizona from which the Hopi clans believe they have migrated. This claim is the true Hopi country, and one which Second Mesa would like to have the Government formally recognize as the Hopi, rather than Navajo country....
>
> Sipaulovi village has given the section of the geographic Hopi area which they consider theirs. On the west the area commences with a shrine on Sunset Mountain, Navaqueawataka [Nuvakwewtaqa, Chavez Pass] -- a butte just southeast of Sunset Mountain, along the upperside of Clear Creek, where the Sipaulovi eagle cliffs are located to Woodruff Butte, Chimontequi [Tsimontukwi]. There is no exact line, but these points mark the southern extremity of the area which this village considers its own territory.
>
> Mishongnovi village claimed no shrine except at Salt Lake, south of Zuni Reservation in New Mexico.... A definite western line of the village territory was said to run from the village southwest to Montezuma's chair, a butte within the reservation [actually Montezuma's Chair lies beyond the southern 1882 reservation boundary], to the ruins near Winslow [Homol'ovi], thence to Sunset Mountain area. On the east, the line ran to White Cone Peak, in the southeastern corner of the Hopi Reservation to Greasewood Springs and then southeast to Salt Lake in New Mexico. Their eagle territory is the same as that of Sipaulovi, along the upper edge of Clear Creek [research for the 1934 Reservation case showed MacGregor's statement here was clearly inadequate]....
>
> The First Mesa claim begins with White Cone Peak in the southeastern corner of their present reservation, runs northeast through Steamboat Canyon to the east edge of Salakai [i.e., Balakai] Mesa, thence north along the eastern and northern edge of Black Mesa passing through a shrine at Chilchinbito Spring and Point, along the mesa edge forming Marsh Pass eastern escarpment, thence to Wildcat Peak just south of the Northwest corner of the present reservation, thence southwest to Tuba Butte, thus incorporating Moencopi village, thence southeast along the Moencopi Plateau to Montezuma's Chair, a

peak just south of the central point of the south line of the present reservation, and thence east to White Cone peak....

The First Mesa or Walpi people made an agreement with the Navajo sometime about 1850 establishing a boundary line. The Navajo were to cross it only on condition of good behavior. As a sign of good faith the Navajo are said to have presented a feather shrine or symbol, which First Mesa still preserves. A pile of rock some distance west of Ganado and on the old road once marked this line. First Mesa, of course, would like to see this line form the eastern limit of the reservation (MacGregor 8-6-1938).

In April 1939, Tribal Council delegates traveled to Washington to meet with Commissioner Collier. Again they presented the traditional claim, as specified since 1930, and their resolve was entirely undiminished:

Peter Nuvamsa (Tribal Chairman): ...this area shown on the map is the original area that the Hopis in the past have revived year after year in exercising their ceremonies which involve their traditions....Every year we hold an annual ceremonial which takes in our claim which is outlined by the outside circle.

John Collier: You mean the area bounded by Rainbow Bridge and Colorado River on the south and east (sic), below Winslow and almost to Gallup on the west and north (sic).

Peter Nuvamsa: That is the sacred area. We have taken into consideration how we might live after the settlement of this area, how we may obtain our timber, salt, and game in this area. Inside this area is a shrine to be of main purpose to the Hopi people....If the Government would recognize this area for the Hopi people and set up regulations as to how it should be governed, then it would be up to the Government to protect us....

Byron Adams (First Mesa): This large area which the Hopis are claiming, if it is not recognized by the Government, it will be destroying the Hopi's religion because the most sacred and serious ceremony of the Hopis is the rehearsal of the settlement and of their claim in connection with the reservation [see below]. If it is true that this outlying boundary is not Hopi, what are these religious ceremonies going to mean? (Conference on Hopi Extension Area 4-24-1939).

Later in 1939, during an investigation into reservation boundaries by C.E. Rachford, several leading elders spoke, including Kotka of Walpi. He described a historical meeting between Hopi and Government representatives:

Then the Hopi replied and pointed out the boundary of his reservation, beginning near Ganado and along the line that Maho described [previous pages]; thence on the eastern side along Black Mountain by Lujani [Lohali] up to a place called Navajo Mountain;

> thence into the Grand Canyon; thence out of the Grand Canyon towards Flagstaff, and from there as far as his eyes could see coming up to Holbrook from the south....It seems very unfortunate that no records have been kept or been found regarding our claims. We have nothing that we can point to in the way of documents. Because of these many promises we look to you now representing great authority from Washington, to consider our claims and take action which would come near to what we had claims before the aggressors [i.e. Navajos] appeared on the scene (Meeting at Polacca 12-4-1939:10-11).

The area described was the same as that presented to the Indian Claims Commission as the aboriginal claim in Docket 210 in 1951 (see below).

Hopi acceptance of the 1934 Indian Reorganization Act (which led to establishment of the Tribal Council) appears to have hinged on the understanding that this entailed specific rights to pursue the land claim. Peter Nuvamsa enunciated this view of the I.R.A.:

> We had been led to believe that by acceptance of the Reorganization Act that we could be heard and our claims considered. Now we honestly and sincerely believe that our claims are just but if we cannot get any protection under the Reorganization Act, it seems that the Hopi Tribe will be better off by doing away with it and coming back to his former life (Conference on Hopi Extension Area 4-24-1939).

Similarly, in his 1937 notes to the Tribal Constitution, Oliver La Farge emphasized that Hopis should not be:

> ...asked to accept wording [regarding a boundary] which would appear to abandon the ceremonial claim. As previously stated this matter [Hopi acceptance of the Tribal Constitution] will be greatly facilitated if ceremonial requirements are met by action to establish Hopi rights in their outlying shrines....
>
> The older villages also have wider claims extending far beyond the clan holdings. After a good deal of discussion the Hopis were finally led to agree that these claims...should be adjudicated by the tribal council under its power to supervise the use of unoccupied land beyond the clan and village holdings (La Farge 1937:33,35).

As anthropologist Edward Kennard pointed out:

> The expression, "beyond the clan and village holdings," meant to the majority of the Hopi, lands beyond the San Francisco Peaks to the west, Navajo Mountain to the north, the Buttes South of Holbrook, and an indefinite point to the east somewhere east of Ganado (Kennard 1939).

When Grazing District Six was created in 1937, shortly after adoption of the Tribal Constitution, Hopis felt betrayed. The betrayal was magnified greatly by the stock reduction program of the early 1940's. Dissatisfaction with District Six and stock reduction was intense. John Collier and others repeatedly assured the Hopi that District Six was for grazing purposes only and would not diminish their interest in the 1882 Reservation. But after he left office in 1945, the Interior Department's Solicitor issued an Opinion that interest in the area outside District Six was joint between Hopis and resident Navajos. In a note to John Boyden some years later, anthropologist Fred Eggan expressed his surprise to learn of the Solicitor's Opinion, but reported his private understanding that Commissioner Collier and his successor William Brophy had indeed intended to restrict the Hopi Reservation to District Six:

> I am somewhat astounded at Felix Cohen rendering such an opinion. My impression at the time was that Mr. Collier and Mr. Brophy were preparing to set up a reservation composed of district six, only, with the rest to go to the Navaho. I have heard that such an order was prepared but not put into effect because of the "political repercussions" which would follow. I also know that tremendous pressures were being put on the Indian Bureau with regard to oil leases for the Hopi reservation....
>
> I think Mr. Collier was so anxious to "solve" the Navaho problems that he paid little attention to other groups in the Southwest (Eggan 4-28-1955).

Hopi Termination and Relocation

The historical record is unequivocal that the Bureau of Indian Affairs expected the Hopi to be included within the general provisions of the termination program. In January 1948, "the Hopi Chiefs of First Mesa" (Nayatewa et al 1-8-1948) wrote to Superintendent Crawford requesting abolition of District Six, and full restoration of the 1882 Executive Order reservation to the Hopi. While noting their "desperate land problem," Acting Commissioner Zimmerman (5-12-1948) did nothing to answer their specific concerns. His proposal was rather to expand a

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program that had been in place since 1944 to relieve Hopi land pressures, by relocating as many Hopis as possible to the Colorado River Reservation:

> The problem of the Hopi Indians has been of deep concern to the Indian Office for many years. It is still one of the pressing problems confronting this service. At the base of this problem lies the ugly fact that the land base available for the support of the Hopis and the Navajos is far too small to enable these Indian tribes to make even a bare subsistence livelihood.
>
> The Hopis would like to have the use of the two and a half million acres of the "Moqui" Reservation. We sympathize with their desire and wish it were possible to help them obtain this land. This would involve at the least removal of all of the Navajos from the "Moqui" Reservation. What should we do with the displaced Navajos? There are several thousand of them. The Navajo Reservation proper is already overcrowded. The Hopi problem cannot be solved without simultaneously solving the problem of the Navajos. A partial solution of the problem of both tribes lies in the provision of additional irrigated land on a very large scale. A beginning has been made so far as the Hopis are concerned by providing irrigated land on the Colorado River Reservation and fifteen Hopi families have already moved to very productive irrigated land on the Colorado River Reservation. We hope eventually to have enough of this Colorado River irrigated land for several hundred Hopi and Navajo families (Zimmerman 3-8-1948).

Zimmerman—one of the architects of the termination policy (Fixico 1986:21-44)—offered further conclusions on the Hopi situation two months later:

> The economic plight of the Hopi is as bad as that of the Navajo. For this reason they are included, proportionately, in the 10-Year Rehabilitation Program. They, like the Navajo, must seek employment outside the reservation. They must, through education, acquire the skills that will make them able to compete, in every respect, with the white man. It will be necessary for large numbers of them to settle on the rich lands of the Colorado River reservation. They, like the Navajo, must intensify their efforts to improve their agriculture and their livestock, and through good conservation practices, their grazing lands (Zimmerman 5-12-1948).

In this light, it becomes clear that the Rehabilitation program was designed to lead eventually to termination (cf. Metcalf 2002:41-42). Senator Arthur Watkins, the leading Congressional force behind termination, had been involved since 1947 with the Navajo-Hopi Long-Range Rehabilitation program, and its association for him with the larger goal of termination was clear at the time (Metcalf 2002:42). Between 1945 and 1951, when the

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relocation program was active, only about 115 Hopis, out of a total population of around 4,000, elected to relocate to the Colorado River Reservation. Of these, about forty eventually returned to the Hopi Reservation. The scheme ended up having no impact at all in solving Hopi land problems (McIntire 1968:234-36).

Dillon S. Myer, a leading proponent of termination (Burt 2008:22), became Commissioner of Indian Affairs in 1950.[13] In September 1950, four months into his tenure, Myer made an official visit to the Hopi Reservation, including all the Hopi villages (General Schedule for the Commissioner's Visit to the Hopi 9-9/9-10-1950). It is not known whether he discussed termination during that visit, but it would seem likely. In 1953, Assistant Interior Secretary Orme Lewis raised the issue for Southwestern tribal groups assembled for the Intertribal Ceremonial at Gallup. Hopi Agency policeman Sam Shing (of Upper Moenkopi) reported Lewis' words back to Hopi:[14]

> I then read and explained an address by Orme Lewis, Assistant Secretary of the Department of the Interior...[on] August 13, 1953.
>
> "Federal responsibility for administering the affairs of individual Indian Tribes should be terminated as rapidly as the circumstances of each tribe will permit. This should be accomplished by arrangements with the proper public bodies of the political subdivisions for assuming responsibility for the services customarily enjoyed by Non-Indians—residents of such political subdivisions and by distribution of tribal assets to the tribes as a unit or by division of tribal assets among individual members, whichever may appear to be the better plan in each case. In addition, responsibility for trust properties should be transferred to the Indians themselves, either as groups or individuals as soon as feasible" (Shing 11-17-1953, quoting a letter of Orme Lewis).

So far as is known, the Hopis were never actively slated for termination, but that was the evident goal of Senator Watkins', Commissioner Zimmerman's, Commissioner Myer's, and Assistant

[13] Myer had been in charge of the Japanese Internment Camps—on the Colorado River Indian Reservation—during World War II. My research has not addressed this issue, but there is a striking coincidence among Myer's role on the Colorado River Reservation, the relocation of Hopis to that reservation (beginning in 1944-45) under the incipient Navajo-Hopi Long-Range Rehabilitation program, and that program's known association with termination.

[14] Shing's report was so controversial, that he had to fight off several calls by Hopi leaders at First Mesa for his dismissal from employment at the Hopi Agency (Shing 11-17-1953).

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Secretary Lewis' policy prescriptions. The policy's general provisions clearly included Southwestern tribes, and had the policy continued, Hopi would undoubtedly at some point have been scheduled for termination.

John Boyden's key role in termination of tribes in Utah—with fellow Utah Mormons and terminationists, Arthur Watkins and Ernest Wilkinson—may also be pertinent here (Metcalf 2002).[15] Boyden's work over the next three decades to secure Hopi land interests in the 1882 and 1934 Reservations cannot be taken as an indication that he supported long-term Hopi tribal sovereignty. In a meeting at Keam's Canyon between Commissioner of Indian Affair Glen Emmons and Hopi representatives in November 1953, Boyden was requested to make a statement on behalf of Hopi interests. His concluding remarks stated:

> We want to be self-sustaining. The Hopi possesses a proud and enviable reputation for long hours of work and the development of skills comparing favorably with all classes on and off the reservations. If our people had adequate facilities and resources they would not be a problem to the Federal Government—they would be a sustaining component of our American population. We are not shying from responsibility. We simply plead for a voice in the shaping of policy affecting our future. We are not unfriendly to our neighbors, the Navajos, we only ask for justice in the defining of rights and privileges of grave interest to us both. In our humble opinion, *the greatest determining factor in a fair termination of government supervision* is the willingness with which the Government of the United States discharges its assumed responsibility of defining and protecting our rights under law (Boyden 11-3-1953:7, emphasis added).

All told, the arrival of the Indian Claims Commission legislation thus came at a highly unpropitious moment for the Hopis. Not only had Hopi efforts to get their aboriginal land recognized been ignored, but their rights to the 1882 Reservation had been completely undermined by District Six. The Tribal Council had collapsed over the imposition of District Six

[15] Metcalf (2002:196) notes the ambiguity between views stated in later years in Boyden's biography with his evident favoring of termination in his actions. Metcalf (2002:56) draws the same conclusion about Ernest Wilkinson: that he was publicly in favor of Native rights, but privately supported termination, to speed assimilation into the mainstream, and had actively promoted the Indian Claims Commission Act as a means to this end.

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and stock reduction (over which some Hopi "progressives" had gone to jail rather than consent willingly). Hopi families were being told that if they did not have enough land they should just relocate to the Colorado River Reservation. Behind that was the evident aim of eventually terminating the Hopi tribe's federal trust relationship. And now the Government, via the Indian Claims Commission Act, came asking Hopis to sell their birthright—lands purportedly "ceded"—for a mess of potage. At the very same time (1946)—and illegally, as Boyden was to prove in the Healing v. Jones case—the government had in effect only just appropriated many of those "ceded" Hopi lands in the 1882 Reservation, by carving out District Six and establishing Navajo rights to the remainder through the Interior Department Solicitor's Opinion.

It is hardly surprising that the ICC, and the type of claims it would allow, were seen in many Hopi quarters as adding insult to injury.

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Organizing a Hopi Claim

The Hopi Tribal Council

The Tribal Council, organized in 1936 under the Indian Reorganization Act of 1934, had ceased to function by 1943, as a direct result of Hopi dissatisfaction with its inability to protect Hopi land interests—notably in the de facto reduction of the Hopi Reservation to District Six—and of the stock reduction program of the early 1940's. There was a widespread interpretation by Hopis that the Government deceitfully used the Indian Reorganization Act of 1934, and the resultant Hopi Tribal Constitution, to promote these restrictive and destructive measures. D'Arcy McNickle, a Flathead anthropologist working for the Bureau of Indian Affairs, summarized the reasons for the Council's demise, and continuing Hopi skepticism of the Council when efforts were made to reorganize it in 1950:

> Unfortunately, the question of setting up a land management district and of reducing livestock to the carrying capacity of the land confronted the Hopi people with desperate political questions before the Tribal Council had fully established itself in the confidence of the people. It was assumed by many that the written constitution and the Council created under the constitution were somewhat responsible for bringing about an apparent reduction of Hopi territory and of livestock. The Council foundered on that problem and no Hopi leader in the traditional line has been willing to support the [reconstituted] Council (McNickle 2-21-1952).

The historical record is clear that there was a direct interdependence between reorganization of the Hopi Tribal Council and the filing of Docket 196 (cf. Clemmer 1978:62-67). Oil and minerals company interests in the Hopi Reservation also played a major role. As early as 1942, interests in obtaining oil and gas leases on the reservation were expressed to the Commissioner of Indian Affairs (Chambers and Lynch 1985:3). In 1944, a party of geologists showed up to drill exploratory wells on the Reservation for Standard Oil (Ladd 2-15-1944). In 1947, more interest in obtaining mineral leases was expressed, and Hopis were in generally

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poverty-stricken circumstances, especially owing to stock reduction. Some evidently favored negotiating minerals leases. But there was no representative Tribal government to negotiate these:

> The prejudice and opposition to a tribal council are still very strong. As you know, we have had no council for several years and there is strong opposition to the selection of one.
>
> Since the need of the funds by the Hopis is so urgent and the opposition to a tribal council so strong, even though the majority seem to favor leasing, it is wondered if we could provide a solution[16] (Ladd 7-9-1947).

Later the same year, McNickle, as Assistant to the Commissioner of Indian Affairs, wrote the new Hopi Superintendent, to report the Bureau's opinion that the Tribal Council could not be made to work under the present Constitution:

> The difficulty of operating under the existing Hopi Constitution has up to this point baffled everyone and by now we are all convinced that the existing procedures cannot be made to work (McNickle 11-5-1947).

The impediment to negotiating mineral leases gained in significance as more and more companies sought to explore on Hopi Reservation lands. Superintendent Crawford wrote to Acting Commissioner of Indian Affairs William Zimmerman[17] for advice:

> The letters we are no receiving from the oil companies are demanding quicker action and are becoming harder to satisfy with our answers. It is almost impossible to answer satisfactorily the questions from the oil companies without considerable embarrassment to all concerned. The need for additional supplies of petroleum is becoming more crucial each day; on the other hand, both the Hopis and the Navajos need the thousands and thousands of dollars they are now losing because they are unable to lease their lands (Crawford 4-30-1948).

In reply, Zimmerman pressed the need upon Hopi Agency Superintendent to re-organize the Hopi Tribal Council:

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[16] Superintendent Ladd proposed a special Act of Congress authorizing the Secretary of Interior to sell mineral leases on the Hopi Reservation.

[17] See Zimmerman's remarks above on terminationist solutions for Hopi.

> In accordance with the provisions of the Hopi Constitution, a tribal council is the only mechanism for a legal expression of the will of the Hopi people. A tribal council elected pursuant to this Constitution would legally be endowed with all of the authorities contained therein. But, one of the reasons for the strong opposition of the Hopis, today, to a tribal council is the broad authorities granted the council by the Constitution which they approved on December 19, 1936.
>
> I do not believe, however, that a tribal council elected for the primary purpose of considering certain well known and pressing problems would break faith with the Hopi people by considering other matters affecting their interest and welfare. There are several major problems which need attention at once in the interest of the Hopi people but which can be acted upon only by a tribal council in accordance with the Constitution. Without a council the Hopi people are thus deprived of the means of securing that assistance which is needed to carry out the wishes of the people. All the while the problems become more difficult so that the impasse which has now developed may result in a loss or neglect of very valuable tribal assets and opportunities.
>
> Three necessary major actions, which can only be taken through a tribal council, are:
>
> 1. Amendments to the Constitution.
>
> 2. *The selection of a lawyer or lawyers to prepare and present the Hopi claims to the Indian Claims Commission.*
>
> 3. The authority to lease land for oil development purposes (Zimmerman 6-21-1948, emphasis added).

Zimmerman thus located the major reasons for the Bureau's need to have a Hopi Tribal Council reconstituted. That the impetus came from the Commissioner of Indian Affairs, not from the Hopis themselves, is very significant in this regard. And the linkage between the Commissioner's perception of the need for a Tribal Council and pursuit of Hopi claims under the ICC Act is especially noteworthy. Zimmerman went on:

> The appointment of a tribal attorney is particularly important. Time is running out. Three years remain during which the Hopis must prepare and present their claims, under the provisions of the Indian Claims Commission Act of August 13, 1946. Indian claims are generally very involved and require intensive study and research before presentation. It is therefore of paramount importance that the Hopis act to recommend a tribal attorney for the approval of the Secretary of the Interior. The only way this can be done is through a tribal council elected pursuant to the provisions of the Hopi Constitution (Zimmerman 6-21-1948).

Zimmerman elaborated on the mineral rights issue, and directed Superintendent Crawford's attention specifically to the Interior Solicitor's Opinion of 1946 and mineral rights in the 1882 Reservation—a subject that was to be strenuously addressed by John Boyden over the next ten years.

Crawford evidently disseminated these recommendations among the Hopi villages. As one result, a petition signed by numerous traditional leaders from Shungopavi, Hotevilla, and Mishongnovi was sent to President Truman in March 1949. Crawford identified the motive for the petition as opposition to re-organization of a Tribal Council (Crawford 4-7-1949). Among other things, the petition stated:

1. From the Land Claims Commission in Washington, D.C. a letter requesting us to file in our claim to land we believed we are entitled to before the five-year limit beginning August 13, 1946 is expires. We were told that after this five-year limit is expired we can not file any claim....

   This land is a sacred home of the Hopi people and all the Indian Race in this land. It was given to the Hopi people the task to guard this land. Not by force of arms, not by killing, not by confiscating or properties of others but by humble prayers, by obedience to our traditional and religious instructions and by being faithful to our Great Spirit Masau'u. We are still a sovereign nation. Our flag still flies throughout our land (the flag of our ancient ruins). We have never abandon our sovereignty to any foreign power or nation....

   The boundaries of our Empire were established permanently and was written upon Stone Tablets which are still with us.... These Stone Tablets... will prove to the whole world that this land is truly belongs to the Hopi people....

   This is our sacred soil.

   Today we are being asked to file our land claims in the Land Claims Commission in Washington, D.C. We, as hereditary Chieftains of the Hopi Tribe can not and will not file any claims according to the provisions set up by Land Claims Commission because we have never been consulted in regard to setting up of these provisions. Besides we have already laid claim to this whole western hemisphere long before Columbus' great, great grandmother was born. We will not ask you, a white man, who came to us recently for a piece of land that is already ours. We think that white people should be thinking about asking for a permit to built their homes upon our land.

> Neither will we lease any part of land for oil development at this time. This land is not for leasing or for sale. It is our sacred soil (Talaheftewa et al 3-28-1949).

In forwarding this petition to the Commissioner of Indian Affairs, Superintendent Crawford's comments indicate that he had been actively trying to reestablish the Tribal Council, since Zimmerman's letter of June 21, 1948, though with limited success. Oraibi chief Tawakwaptiwa refused to meet with him at all, and in line with the chief, Lower Moenkopi likewise demurred. At Mishongnovi, Crawford reported mixed signals about supporting a council. The other villages represented different positions:

> The Villages of Hotevilla and Shungopavi have never indicated any approval of a new council, and this petition is a direct result of their opposition to it. I have carefully explained the provision of the Claims Commission Act and furnished their leaders with additional copies....
>
> Sipaulavi, a direct descendant from Shungopavi, however, has refused to have anything to do with this petition. Previously, they had selected their councilman, David Talawiftema, and they wish to present a reasonable claim for the consideration of the Indian Claims Commission – to lease their land for oil and formulate and support a progressive program.
>
> Bacabi has been without a Kikmongwi for over a year. A committee was appointed by themselves to guide their activities until a Kikmongwi is selected. They wish to support a progressive program and are interested in leasing their lands for oil exploratory purposes. This village is also suffering from lack of recognized leadership.
>
> The upper district of Moencopi selected a councilman at their "election" last November. However, their organization was challenged by Hopis of the village and upon complete investigation, we found that the organization was not formed in conformity with the Hopi Constitution. They now wish to organize in conformity with the Hopi Constitution.
>
> The First Mesa villages have held many meetings. I met with them first and thoroughly discussed our problems with them. The leaders met together further and decided to support a council. The leaders then met with the entire population of all the First Mesa villages and received complete approval to support a program. This, by the way, is completely breaking traditional form for the Kikmongwi and his leaders have the traditional power to make decisions for the people (Crawford 4-7-1949).

So at this point in April 1949, Superintendent Crawford could only report one village with a selected Tribal Council representative. While several other villages supported a "progressive

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program," none had yet established representatives recognized under the terms of the Hopi Constitution.

In January 1950, Crawford convened a meeting of all the villages at Keam's Canyon to try to get the Council restarted. From the meeting minutes (Crawford 2-3-1950), it appears representatives from all villages were present (including Shungopavi, Hotevilla, Mishongnovi, and Lower Moenkopi).[18] After this, a "Council" did meet on February 9th and March 1st. The February 9th meeting included "newly elected delegates" from: Upper Moenkopi, Kyakotsmovi, Sipaulavi, Mishongnovi, and First Mesa; Lower Moenkopi, Hotevilla, Bakabi, Old Oraibi,and Shungopavi[19] did not send delegates (Hopi Tribal Council 2-9-1950). At the March 1st meeting Crawford showed the members a pile of requests from oil companies seeking drilling rights (Chambers and Lynch 1985:10). Three weeks later, Crawford wrote to 20 oil companies, announcing that he had successfully reorganized the Hopi Tribal Council preparatory to the signing of leases. Clearly this commercial pressure was intense, and a major reason for the reinstitution of the council:

> There has been a volume of correspondence, telephone calls, and individual conferences relative to the Hopi people leasing their land for oil development purposes. I have tried to keep you currently informed for time to time as to the progress of the reorganization of the Tribal Council. Meetings for the reorganization of the Tribal Council were held on January 27, February 9, and March 1, 1950. The results of these meetings have been to again formally organize, with ten of the authorized seventeen members certified to the Council. The organization is now awaiting official approval of the Commissioner, Bureau of Indian Affairs, before considering the many and varied problems of the Hopi people (Crawford 3-21-1950).

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[18] I am unable to identify a representative from Old Oraibi per se, although Heber Dann (from Lower Moenkopi) may have been serving in this regard.

[19] In conformity to records of the period, I mostly follow the spellings for village names as officially recognized at that time. In some cases, these are not the same as current spellings in official discourse (for example, Bakabi=Bacavi, Kyakotsmovi=Kykotsmovi), or in the Hopi Dictionary orthography adopted by the Hopi Tribe (Bakabi=Paaqavi, Kyakotsmovi=Kiqötsmovi, Moenkopi=Mùnqapi, etc.).

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In response to these efforts to reorganize the Tribal Council, traditional leaders again voiced protests:

> The Hopi Tribal Council is being reactivated today but to us religious leaders it is not legal; it does not have the sanction of the traditional head-men. And it is composed of mostly young and educated men who know little or nothing about the Hopi traditions. Most of the men supporting it are Indian Service employees, men who have abandoned the traditional path and are after only money, position and self-glory. They do not represent the Hopi people.
>
> These major issues must be settled by the highest traditional leaders of the Hopi people and the proper leaders in Washington. It is time we get together peacefully and seriously to settle these matters now (Hermequaftewa et al 3-2-1950).

Dan Katchongva pursued further the question of whether the reconstituted Tribal Council was legal, or recognized by the Bureau of Indian Affairs, in a meeting with Acting Commissioner of Indian Affairs John H. Provinse. In response, and evidently made nervous by all the protest, Commissioner Provinse specifically denied that the Tribal Council was recognized by the Bureau:

> There are then several questions to be answered before a final decision is made as to the legality of the reactivation of the Hopi Tribal Council. Among these questions are whether the meeting of January 27 was called under the terms of the Hopi Constitution or was called by the Hopi people in an effort to resume activity under the Hopi Constitution, whether delegates have been duly elected from the villages, and whether sufficient delegates have been elected to constitute a quorum.
>
> Since our information on these and other points is not complete, I have written for further information. Upon receipt of all the facts this Office will then make a final decision (Provinse 4-21-1950).

In summer 1950, Oliver La Farge, author of the Hopi Tribal Constitution, spent a week on the reservation as the guest of Superintendent Crawford. Shortly thereafter La Farge wrote to him that Hopis had not been effectively informed that the ICC could only award monetary compensation, and not land. La Farge also criticized the use of the ICC Act as a reason for attempting to reconstitute the Hopi Tribal Council:

Now that I have had time to think over the various conversations I had during my brief stay among the Hopis, and to go over my notes, I find it clear that a great many Hopis are under the impression that he Indian Claims Commission might award them land. I find this also strongly implied in certain passages of the minutes of the Tribal Council, which I reread at leisure at Window Rock.

I notice that there is a great deal of reference to this Commission as the "Land Claims Commission." The prevalence of the term is, of course, a deception in itself.

As you know, even if the Hopis had a valid claim, the Claims Commission can only award cash damages in compensation for a failure or wrong action on the part of the United States Government. Acceptance of such an award by the Hopis would have something the effect of giving a quit-claim to present occupants of the land, which of course would be a violation of their tradition and might require them to abandon their ceremonies.

As you and I agreed when we discussed this matter the Hopis believe that they have two possible claims. The first of these is the ancient, traditional land claim, which varies from village to village, and is essentially a ceremonial matter. I do not believe that the Claims Commission or any court would entertain that claim for a moment, since it is based upon aboriginal occupancy which was abandoned centuries before the establishment of American sovereignty.... It is inconceivable that the loss of this land could be the cause of a claim against the United States Government. If there is any ground for a law suit at all, it is a suit between Indian tribes concerning possessory rights and not a matter for a Claims Commission. Even so, I think it has no substance in our law, and believe you will agree.

The other possible claim [to the whole of the 1882 Reservation, on the basis that the government had illegally settled Navajos there] is equally tenuous....

More important -- if by any chance the claim were upheld, the greater part of it would result in an award of damages, and once again in *accepting this award the Hopis would be relinquishing their claim to the land as such*, with the results I have already stated.

I feel that *it is extremely dangerous to allow the idea of the "Land Claims Commission" to continue as a reason for maintaining the Tribal Council.* In the end, this idea will result in a violent disillusionment which will completely discredit all those who have been active in reviving the Council, and may well make it impossible for an effective tribal council to be organized again for at least a generation....

I urge you most strongly to see to it that every village is fully informed immediately as to the true nature of the Indian Claims Commission, *and is relieved completely of the idea that any possible recovery of land is a reason for maintaining the Tribal Council.* I feel so strongly about this that I am myself writing to this effect to certain Hopi leaders of my acquaintance (La Farge 7-5-1950, emphasis added).

La Farge was incorrect on the purported "abandonment" of areas in the "ancient claim," and he was to prove incorrect too on the possibility of an intertribal lawsuit for loss of Hopi lands. He was correct, however, that the "Land Claims Commission" was a deceptive and misleading term, but despite his urging, efforts to alter the usage were unavailing. It was still the term employed by Hopi Traditionalists in 1976 to protest the Compromise Settlement (see below).

In May, 1950, Dillon S. Myer was appointed Commissioner of Indian Affairs (see above). Shortly after La Farge's visit, Myer visited Hopi himself in September, 1950. He concluded the Tribal Council was an unrepresentative body. Myer discussed alternative schemes of organization (based on mesa groups of villages) with Area Director Allan Harper in October 1950. On the Council, he opined:

> Assuming that the present Council will not win the support of the people as a whole, but still assuming that the present Constitution can be made to function, then you should explore what can be done to bring about a representative and acceptable Council. It has been suggested that careful work with the traditional villages, particularly Shungopavi, might in time gain acceptance for the Council....
>
> Decisions in these matters should not be hurried, and the Hopis themselves should not have the impression that we expect prompt answers. On the other hand, the problem ought to be worked at persistently, and you and Superintendent Crawford should give to it all the time you possibly can (Myer 10-20-1950).

The ICC Act's Section 10 (above) specified that "wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians." Clearly the Secretary of the Interior did not recognize the 1951 "Tribal Council" as having that exclusive privilege. The Shungopavi *Wimmomngwit* (traditional chiefs) were permitted to file a separate claim (Docket 210), that was still being treated by the Indian Claims Commission as a justiciable claim until it was withdrawn by the claimants in 1957. And while it was presented by

the leaders of Shungopavi village, Docket 210 was intended to represent the interests of all Hopis.

John Boyden understood that without a Tribal Council, he would not be able to present a viable Hopi "tribal" claim, or obtain a Claims contract that would be recognized as legitimate by the Secretary of Interior and Commissioner of Indian Affairs. In sum, without the oil lease interests—which the Bureau was anxious to approve—and the urgency to file a claim with the Indian Claims Commission, the Tribal Council of the early 1950's would probably not have reorganized. By the same token, without some entity that might potentially be recognized as the Hopi Tribal Council, the filing that became Docket 196 would probably not have been a viable claim.

The Attorneys

The Hopi claim was closely tied to prominent Utah Mormon attorneys and politicians involved with Indian claims litigation and legislation, who were simultaneously leaders in the terminationist movement. Boyden worked directly with Ernest Wilkinson's law firm to represent the Hopi claim (while Wilkinson himself also soon became President of Brigham Young University). In 1949, Boyden was admitted as an attorney to the U.S. Court of Claims, "on motion first made by Ernest L. Wilkinson" (O. Boyden 1986:36). Shortly thereafter, Boyden and Wilkinson announced "the formation of partnership for the general practice of law under the firm name of Boyden and Wilkinson" in Salt Lake City (O. Boyden 1986:36). By 1951, Wilkinson's Washington firm was listed as "Wilkinson, Boyden, and Cragun" (G. Wilkinson 5-23-1951). Ernest Wilkinson remained cross-listed in Boyden's Salt Lake City firm for several years (as Boyden, Wilkinson, Tibbals, Staten, and Croft) (Hopi Tribe 1955).

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John Boyden,[20] born in Coalville, Utah, in 1906, received his LLB from the University of Utah in 1929. In 1933 he was appointed Assistant U.S. Attorney for the District of Utah, and was assigned all Indian cases; he served in this role until 1946. As he later pointed out:

> While serving as Assistant U.S. Attorney working on Indian affairs, he developed a close working relationship with reservation superintendents and other Bureau of Indian Affairs personnel with the jurisdiction of that office (Boyden 4-22-1977: Appendix A-1).

Boyden's role as Assistant U.S. Attorney and his interest in Democratic politics took him to Washington on occasion. He was admitted to practice before the Supreme Court in 1934, and soon became acquainted with leading Washington players in Indian affairs (O. Boyden 1986:27). His relationship with Ernest Wilkinson probably began during the 1930's. Wilkinson's Ute case was before the Court of Claims throughout this period. On behalf of Ute land interests, Boyden filed a U.S. trespass action in 1942 (Hanson v. U.S. 153 F 2d 162 (10th Cir. 1946). In 1942, Boyden was assigned to prosecute Navajo grazing cases in southern Utah. The same year, he was appointed by the Department of the Interior to survey law and order conditions on the Navajo Reservation; Boyden prepared a code of Indian Tribal Offenses in association with the Navajo Tribal Council. In 1946, Boyden was proposed by the B.I.A. as a "legal adviser" to superintendents of Indian Reservations, but no funds were forthcoming, so the same year, he accepted a position as General Counsel for the Ute Indian Tribe.

Boyden's autobiographical statement mentions two other occasions on which he was approached by representatives for the Secretary of the Interior with "reference to appointment to high governmental positions which he declined to accept, preferring instead to remain in private practice" (Boyden 4-22-1977: Appendix A-3-4). He served as Claims attorney for the Southern Paiute and the Goshute-Shoshone, as well as the Hopi. For the Goshute-Shoshone, his partner as

[20] Information on John Boyden is mostly drawn from his autobiographical statement submitted to the Indian Claims Commission as Appendix A to his petition for award of attorney's fees (Boyden 4-22-1977); additional data is taken from his published biography (O. Boyden 1986).

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Claims attorney was Ernest L. Wilkinson (Boyden 8-8-1947). Boyden was active in Democratic politics: he ran for Governor of Utah in 1948 and again in 1956 (O. Boyden 1986:53), and was nominated also in 1963, but declined to run on that occasion in part because of his commitment to "bringing the Hopi matter to a complete and successful conclusion" (Boyden 12-3-1963).

Eight attorneys in Wilkinson's Washington firm worked as co-counsel to the Hopi Tribe "in its claims against the United States since 1951" (Boyden 4-22-1977: Appendix B, affidavit of Glen A. Wilkinson). Heading the list of "members of the Firm more actively associated with the case" was Ernest Wilkinson (Boyden 4-22-1977), who, as a prominent Indian Claims attorney, had drafted the final form of the ICC Act with Felix Cohen (Metcalf 2002:55). Wilkinson's Washington firm (listed in 1977 as Wilkinson, Cragun, and Barker) conducted basic research in primary and secondary sources:

> ...to determine Hopi history, aboriginal boundaries and the nature of the claims to be asserted. Firm personnel drafted a petition embodying those claims. It assisted in the perfection of that draft through in-house conferences, all in close cooperation with John S. Boyden, Attorney of Record (Boyden 4-22-1977: Appendix B, affidavit of Glen A. Wilkinson:2).

The Wilkinson firm was involved in all phases of the case, including the Compromise Settlement negotiations (Boyden 4-22-1977: Appendix B, affidavit of Glen A. Wilkinson:3). At one stage, Boyden at least nominally agreed that "the partners here in Washington...will take over primary responsibility for the Hopi claims case" (Madsden 6-13-1953). While Boyden came to be regarded as too independent by the Washington partners, and was effectively ousted from the firm in 1955 (Metcalf 2002:264, n.36), he remained close friends and colleagues with Ernest Wilkinson until the end of his life (O. Boyden 1986:218).

Boyden's interest in the possibility of representing the Hopi began shortly after passage of the ICC Act. He had visited the Hopi Reservation for the first time in 1938 (O. Boyden

1986:30). In January, 1947, he traveled to the Navajo Reservation to see if, based on his work for them in 1942, the Navajos would hire him as their Claims counsel.[21] Leaving Windowrock, he headed for Hopi, informing Ernest Wilkinson of the trip shortly thereafter:

> As I returned from Window Rock, Arizona, I crossed through the Navajo reservation for the purpose of contacting the Hopis. I spent the greater portion of a day with one of the tribal leaders, visiting the various villages and seeing matters of interest, including a buffalo dance. This gave me a splendid opportunity to talk with him concerning a claims contract. These Indians appear to desire a return of their executive order reservation which has now been encroached upon by the Navajos. It is entirely possible that a conflict of interests will prevent representation of both the Navajos and the Hopis.
>
> I also conferred with Mr. Burton A. Ladd, Superintendent of the Hopis, and explained my interest in Indian matters. Mr. Ladd was very cooperative and stated that he expected to see me again when I returned to that country.... It...appears there is a great tendency among the Hopis to quarrel among themselves. One group claims to own all the land in the United States, from coast to coast, and are dogmatic about it to the extent that they might not be party to a suit based on solid legal principles. A second group is more conservative, limiting their claim to only a substantial portion of the United States bounded by the Grand Canyon on one side. A third group is more practical and will probably be satisfied to base a claim upon the executive order reservation[22] (Boyden 1-15-1947).

Wilkinson replied that he would provide a contract form for "representing the Indians" shortly, and that if "there is a conflict between the Hopis and the Navajos we had better forget the latter" (E. Wilkinson 1-18-1947), which suggests that the attorneys' preferred interest, even at this stage, was Hopi.

From a letter later that year, it appears Boyden had followed up the question with Hopi Superintendent Ladd in spring 1947. But he remained actively in pursuit of a contract with the

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[21] In keeping with the prominence of Latter-Day Saints in the Indian policies of the 1940's and 1950's, it is noteworthy that Boyden took along Spencer W. Kimball on his trip to the Navajo Reservation. Kimball, future President of the Church of Jesus Christ of Latter-Day Saints, was at that time one of the "Quorum of the Twelve Apostles," the Church's principal governing body. From Boyden's discussion (Boyden 4-8-1955), it does not appear Kimball accompanied him to the Hopi Reservation.

[22] Notwithstanding his flippant tone, this shows that Boyden was aware from the very first of serious factional differences among Hopis about how to protect their land interests. In line with conclusions below about his limiting of a Hopi claim to reservation boundaries, his apparent favoring here of limiting an ICC Hopi claim to the 1882 Reservation is noteworthy.

Navajo too. No decision was forthcoming, so in August Boyden wrote to Ladd, to inquire whether or not the Hopis had already employed Claims counsel:

> You will remember I talked with you last spring with respect to claims of the Hopi Indians.... I write this letter in explanation for not having talked with you on subsequent trips to the Navajo Reservation.
>
> As you probably know, some of the Navajo Indians were contemplating employing me as their counsel. If this had been done there would have been a conflict of interest in representing the Navajos and Hopis. I, therefore, refrained from further talking with you until the Navajo matter was settled. A short time ago factional differences in the Navajo Tribe resulted in the employment of Norman Littell of Washington, D.C., thus eliminating any possibility of representation by me.
>
> I hope this explanation is completely understandable and if in the future I may be of any assistance to you or the Hopi people, do not hesitate to communicate with me.
>
> I am now engaged in considerable Indian work, being General Counsel for the Ute Indians and the Claims Counsel with Mr. Ernest Wilkinson for the Goshute-Shoshone Indians....(Boyden 8-8-1947).

In response, Superintendent Ladd wrote:

> I have discussed your letter of August 8, 1947, with several of the Hopis but we are having difficulty in obtaining united action.
>
> The people with whom I have discussed your letter seem very favorable to you and to some sort of a percentage proposition.
>
> I will keep you advised and if I am able to get tribal representation your letter will be discussed (Ladd 9-5-1947).

Boyden responded enthusiastically, suggesting the terms of a contract, on a contingency basis, "If the Hopis indicate any further interest in the matter" (Boyden 9-9-1947a). The same day, Boyden wrote to Ernest Wilkinson offering a formal association in representing the Hopis:

> I have just received a communication from the Superintendent of the Hopi reservation. They are giving consideration to employing me as Claims Counsel. I have talked to you about this matter once before and if you are interested in associating with me, I would be pleased to hear your views on the matter (Boyden 9-9-1947b).

After this sequence of letters, no others have so far been located suggesting a resolution to the question of Boyden representing Hopi, until late 1950. The fact that he was actively pursuing the Hopi contract this early on is, however, noteworthy. And his indication in May 1951 (below) that he had already visited Hopi "quite a few times" may suggest there were further trips and discussions over the three years from September, 1947 to December, 1950.

The (unrecognized) Hopi Tribal Council discussed hiring a Claims attorney at its November 28, 1950 meeting (Chambers and Lynch 1985:14). Less than three weeks later, after he had met with them at Polacca on December 16, 1950, the "Governing Body of the Hopi Tribe" passed a resolution to hire John Boyden in this capacity (Governing Body of the Hopi Tribe 12-16-1950). Boyden recounted his view of the history of his involvement with Hopi during meetings with the villages in May 1951. At a meeting to try to persuade Lower Moencopi to support his Claims contract, Boyden first characterized the purpose of the ICC Act "so that any Indian tribes having grievances might file a claim against the Government" (Meeting Held at Lower Moencopi, 5-11-1951:3). Boyden was introduced by Superintendent Dow Carnal, who emphasized the need to organize a claim in short order because of the fast approaching deadline:

> For some time, four or five years, there has been some talk about placing a claim before the Indian Claims Commission in Washington. That five-year period set aside to file a claim is about up. Time is short and if anything is to be done it better be done pretty quick. A large number of Hopi people felt that if they should file a claim they should hire an attorney to file the claim and fight it through the court. Some of the people learned of an attorney in Salt Lake City that had a fine reputation as an attorney and had a very fine record in working with other Indian tribes. Now, Mr. Boyden came over to Keams Canyon Tuesday of this week and we have been meeting with all the villages along down the line and he thought he would like to meet with the individual villages to talk with the people to see what they thought about and see if they had any questions for him (Meeting Held at Lower Moencopi, 5-11-1951:1).

Boyden then outlined how he had come to be involved with Hopi interests:

> I have been interested in the Hopi people for a long time, and have been down here quite a few times. The first time I ever talked about the Hopi claim, I do not remember the

> name of the Indian, but it was when Superintendent Ladd was here, and several Indians were interested in studying their claim to see if they had a good claim against the Government. Mr. Ladd wrote me a letter in 1947 and told me that he had not been able to get all the villages together so nothing more was done about it until last year when I got a telegram from Sam Shing as a member of a committee asking me if I would be interested in representing the Hopi people. I said I would be, if proper arrangement could be worked out, so I came down here to talk to them over at Polacca on December 16 last year [1950]. At the meeting I said that I did not know whether the Hopis had any grievance with the Government, and before I would want to say that I would represent them I would like to find out for sure if anything had been done to wrong them, or if anything had been taken away from them. So I would know about the Hopi history I then went home to my office and started to work; that is what I did and I had help to look up old maps, documents, and papers that were written at the time this country became a part of the United States at the time of the Guadelupe-Hidalgo Treaty, and I got all those papers together and brought them with me. I then convinced myself that there were wrongs that had been committed against the Hopi people and I thought they should be represented by counsel and their claims properly presented to the Indian Claims Commission. This is some of the work I did, and it is all about the Hopi people, so then I decided to prepare a contract. I felt that the success of presenting that claim might largely depend upon cooperation of all Hopi people. So with that in mind I came down here with the contract to explain it to the Hopi people and see if we could agree upon an attorney contract for presentation of the claim for you (Meeting Held at Lower Moencopi, 5-11-1951:3-4).

Land vs. Money

It should be noted that in the passage above, Boyden used the term "grievance" against the government, rather than explicitly "land loss" or "land claim." As the meeting he talked about how he would only get paid if he achieved a "recovery" for the Hopi people. At no point did he indicate that recovery would be in money alone, and the impression was definitely left that land return was a possibility. At one point Boyden presented a map:

> This is bigger than the [1882] Executive Order [Reservation]. This is the little Colorado running down here and this is Fort Defiance over here. This [Fort Defiance] was made in 1851. Of course, I would claim the most that I could claim and could prove in court. Now, all you people here have a right to look to your Chief for leadership to protect you in your claim.[23] All I have to do is warn you that this has to be filed by August and that I want to help you (Meeting Held at Lower Moencopi, 5-11-1951:7).

[23] Sahmetewa, replying for Lower Moencopi, had indicated several times that they were looking to the Oraibi chief, who had records of their landholdings, to protect their interests—thus deferring the possibility of cooperation with Boyden.

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The map (which Boyden showed at several village meetings) was of New Mexico Territory, drawn by John Parke and Richard Kern for the Army Corps of Topographical Engineers, and published in 1851 (Parke 1851). The map was the most reliable composite map of New Mexico Territory of the period. The Hopi ("Moquis") are not depicted within any boundaries but they are shown occupying the area west and south of the Mesa de la Vaca (Black Mesa), with no other Indians marked between them and the Little Colorado River. Navajos are depicted in the area of the Canyon de Chelly and the Tunicha Mountains.

At the Lower Moencopi meeting, the discussion appears to have focused on land itself rather than monetary compensation for the land:

> Sahmetewa: ... if they would make an effort and they would file a suit to accomplish the biggest area which had already been determined and set aside for them. That is supposed to have been set apart for them for a long time.
>
> Mr. Boyden: Under the law we are not going to be able to claim any land before this became United States territory in 1848. We must prove what territory the United States has taken. You cannot claim anything before that time because it did not belong to the United States. The land before that belonged to Mexico.
>
> Sahmetewa: Well, he just repeated what he said before [the interpreter Bennett Cooka, speaking].
>
> Melvin: We will have to rely on the decision of the old Chief and we will follow him (Meeting Held at Lower Moencopi, 5-11-1951:8).

At other village meetings to discuss his Claims contract in May 1951, Boyden presented the possibility of getting lands returned. For example, at Shipaulovi, in answer to a question about how he would be paid for his work, Boyden stated:

> You see I would recover my share only when you get something that you do not have now. If I recover a big sum I would only take what they allowed me—not more than ten per cent—I do not get anything until I get something for you. If I get a lot of land[24] they

[24] Although Boyden was being fairly explicit in explaining the terms of the Contract, this is an instance of ambiguity in his assertions to a Hopi audience. What he evidently means here is, "If I get *a compensatory award for* a lot of land...".

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> would determine my fee according to the work done and the value of the land. *If you have additional land besides—there is a chance you might be able to recover some—if that happened and I got additional land, and under it there was oil, you would have funds to do that* [pay me]. But the claims against the government are essentially for recovery of money from the government for having taken something away from you (Meeting with the Members of Shipaulovi Village 5-9-1951:9-10, emphasis added).

The conflation of land with money was magnified by Boyden's pursuit of land return in the 1882 Reservation under the General Contract (see below), signed very shortly after the filing of Docket 196. At the same time as he was discussing the Claims contract in these May 1951 village meetings, Boyden was also talking with Hopis and Superintendent Carnal about a General contract. The two were evidently not separate issues for many Hopis. For example, in 1955, Sam Shing, who had been centrally involved in helping Boyden file the Docket 196 claim and remained an active part of the Tribal Council, defended the Claims contract with Boyden in a public hearing at Moencopi before Assistant Commissioner of Indian Affairs, Thomas M. Reid:

> The contract, I believe, is the best in the land. The contract is on a contingent basis. If he works for us and never recovers anything, we won't pay anything. He is the loser, because we don't pay anything, but if he does recover anything *in the way of land, money or whatever it might be*, then it was up to the Indian Office to determine how much we pay (Hopi Hearings 1955:314, emphasis added).

Overall, Boyden had been fairly, but not consistently, clear with the Tribe that Docket 196 could not result in return of land. Yet if someone as centrally involved with him as Sam Shing could continue, four years on, to lump Boyden's Claims case work with his General contract work, it is evident that the distinction of land v. money awards would not have been apparent for many Hopis. Boyden's linkage of monetary compensation and land emerges in his discussion of his claims contract at Hotevilla in May 1951 (which Hotevilla refused to agree to):

> Simon Scott: I would like to ask this question. Which claim does the tribal council propose to file in? Is it for money to sue the government for money or for land? Which one is it that the council had in mind in hiring a lawyer?

> Mr. Boyden: I do not know what the tribal council had in mind but the law is clear. Congress only provided for cash damages in the Indian Claims Commission but in bringing that suit for money you have to prove a legal taking of the land which may be filed after determining which land was legally taken away. It may very well open up the subject as to ownership of land as well as any that has been taken away from you or wrongs that have been done.....
>
> ...the suit you might bring against the government will have nothing to do in taking away land. If there is any land that has been taken away from you you will be paid for that, but there will be no taking of land. You will only be paid for wrongs that have been done....
>
> Dan Katchongva: ...We are not going on with this hiring anyone to fight this land out for us. We are not going to ask a white man for money – it may be money and maybe a lot of things that money would do for you but we do not want that, so I want you to know that I am not going to sign anything. I will not say anything more....
>
> James P[ongyayaoma]: That is my position as a leader of the village. We are standing firm on our tradition. We know how to work things out. This is our land. We live here. I am not going to ask for anything. I am still looking forward to that day when they tell us whose land this is, who it belongs to and who made that mistake, so I will not sign my name.
>
> Mr. Boyden: Of course, I knew that, but I have fulfilled my promise to come and explain the contact to you. I have offered to help you and I would have helped you if you had wanted me to do so. But since you do not, it has been nice to be here and I hope we will be friends (Meeting Held at Hotevilla Village 5-11-1951).

If Boyden's presentation of how a case before the Indian Claims Commission might simultaneously lead to other ways of reclaiming Hopi lands was not clear to his Hopi audience, the confusion extended to at least one of their Agency Superintendents as well. In December 1953, Superintendent Dow Carnal, wrote to Allan Harper, Area Director at Windowrock, taking mild issue with Boyden's presentation of Hopi interests to Commissioner Emmons one month earlier:

> It is true that the land question has not been settled by the Government nor has there been too much negotiation toward settlement between the two tribes [i.e., Hopi and Navajo] or agencies as such, but a number of steps have been taken since 1936 which have been helpful and protective for the Hopi people.... As far as settling the dispute over the land, I feel that this will have to be done by the Courts. *Since the Hopi people have a claim filed before the Indian Claims Commission, it may be that it can be settled this way.* It will be

> almost impossible for you and me to get the Hopis and Navajos to agree to any type of compromise (Carnal 12-31-1953, emphasis added).

At least in appearance, Carnal appears to conflate the role of the Indian Claims Commission and a court with jurisdiction to decide the long-running Hopi-Navajo land dispute.

Boyden's Claims Contracts

To file a Claim under the law, Boyden first needed to obtain a valid contract to represent the tribe. That contract had to be formally approved by the Commissioner of Indian Affairs, before he could proceed. Boyden's own account indicates he was first invited by Hopis to work on the Claims case in late 1950. In response, he came to the Reservation for a meeting in December 1950. Then in February 1951, Tribal Council representatives traveled to Salt Lake City to discuss hiring him:

> Hopi Indian Envoys seek land damages: Three members of the Hopi Indian Tribal Council with headquarters in Oraibi Ariz., were in Salt Lake City Monday taking preliminary steps to recover 1,600,000 of land which they claim is rightfully theirs.
>
> Homer Homewytewa, chairman of the council, Samuel Shing, council secretary, and Andrew Seechoma, council member talked with John S. Boyden relative to hiring Mr. Boyden in its dealings with the federal government in Washington, DC. Mr. Boyden's appointment as legal counsel must have the final okeh of the commissioner of Indian affairs. Reason for the questionable title was due to the failure of Congress to ratify the executive order of 1888 [sic] which set aside 2,000,000 acres as a Hopi reservation, Mr. Shing explained. As a result the Hopis are only occupying one fifth of the reservation as originally set up. Navaho Indians occupy the rest (*Deseret News* 2-6-1951).

Notwithstanding the limits of the Indian Claims Commission's mandate, this report attests that the primary Hopi interest in hiring Boyden was to try to regain lands in the 1882 Reservation. This in part explains why three months later, during Boyden's discussions with Hopi villages, which were intended to focus on the Claims contract, the issue of land restoration was front and center. Boyden knew that he could not pursue that issue with the ICC, and thus sought a separate

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General Counsel contract with the Hopis as well as a Claims contract.[25] In short, the joint discussion of a monetary award (for the Claims case) and land restoration (under some other, as yet undetermined, legal provision) was present from the very beginning of Boyden's association with Hopis. Unless he promised to work to regain lands in the 1882 Reservation, it appears that the Hopis were not so interested in hiring him for a Claims case.

Boyden's initial Claims contract with the Hopi Tribe, for ten years, was dated July 12, 1951: it was approved by the Acting Commissioner of Indian Affairs on July 27, 1951. Over one week in May 1951, Boyden sought approvals from all the villages. Since the legitimacy of the Tribal Council remained in question, he wanted to obtain signed contracts with each individual village as well as one with the Tribal Council. At a meeting on May 8th, 1951, with First Mesa Consolidated Villages, Irving Pabanale asked him whether it was necessary to gain the consent of every village for the Claim to proceed:

> Mr. Boyden: There is a possibility, as a matter of fact more than a possibility, that this contract could become valid without all villages signing it. I have talked to Mr. McNickle of the Tribal Relations Division of the Indian Office and I am inclined to believe that we could go ahead without each individual village to do it, but I would rather not do that unless we could not get all villages. We are trying to work the thing so that everyone will share in the benefits of everything that we do. If that is the situation I think there is a fair chance the villages will go along with us if the matter is properly present [sic] to each village. It is probable that we can get this done without having them all but I say let's get them all if possible so that we can all work together (Meeting of Consolidated Villages of Walpi, Shitchumovi and Tewa 5-8-1951:7).

Boyden's aim would soon prove overly optimistic. At the same meeting, First Mesa voted in support of Boyden's Claims contract, with 36 in favor and eight not voting (Meeting of Consolidated Villages of Walpi, Shitchumovi and Tewa 5-8-1951:12). This was by far the largest number of votes obtained at any village in favor of the Claims contract. At the Shipaulovi meeting, of thirteen village members present, nine voted in favor, and four did not vote (Meeting

[25] Or rather, "Claims contracts" (plural)—see below.

with the Members of Shipaulovi Village 5-9-1951). Mishongnovi's meeting was held on May 10th, and while some expressed support, neither the village chief, nor his spokesman, Starlie Lomayaktewa, were present; their absence meant disapproval, so no vote was taken (Mishongnovi Village meeting 5-10-1951). Mishongnovi's earlier support of the reorganized Tribal Council (in February 1950) had evidently shifted. A meeting at Kykotsmovi on May 9th was inconclusive; at the follow-up on May 15th, about thirty village members were present: 21 voted in favor, with one opposed (Kyakotsmovi Village Meeting 5-15-1951). At Upper Moenkopi's meeting on May 11th, twelve members were present: all voted in favor (Meeting with Upper Moenkopi Village 5-11-1951). No approvals were obtained at meetings held at Lower Moenkopi and Hotevilla the same day (May 11th) (Meeting Held at Lower Moencopi, 5-11-1951; Meeting Held at Hotevilla Village, 5-11-1951). It is not evident from the record seen by the present author that meetings were even held at Oraibi, Shungopavi, or Bacavi during this period. Boyden did prepare contracts for Mishongnovi, Hotevilla, and Oraibi, typed up with the same language as for the other individual villages, but these remained unsigned and unapproved. It appears that no draft contracts at all were prepared for Lower Moenkopi or Shungopavi.[26]

In the end he was only able to persuade the Consolidated Villages of First Mesa, Sipaulavi, Kyakotsmovi, and Upper Moenkopi to approve his contract by the time of its date on July 12, 1951:

> THIS AGREEMENT made and entered into this 12th day of July, 1951, by and between the Consolidated Villages of Walpi, Shitchumovi, and Tewa of First Mesa, the Villages of Sipaulavi, /Bakabi [inserted], Kyakotsmovi and Upper Moenkopi, all in the State of Arizona, each, at a General Council or meeting and in accordance with law and Federal regulations, having selected tribal delegates to execute this contract, and the Hopi Tribe,

[26] Box 40 folder 6 of the Boyden Collection at the University of Utah Library contains copies of the contracts. "Upper" was handwritten onto a contract just typed up as "Moenkopi." By the absence of even a draft contract for Shungopavi, it may be that Boyden knew before he arrived for these meetings on the reservation in May 1951, that Shungopavi would not support his bid to become its Claims attorney.

organized pursuant to the Indian Reorganization Act of June 18, 1934, (48 Stat. 984; 25 U.S.C.A. 461-479), whose members are principally engaged in stock raising and farming, hereinafter referred to as "The Hopi Tribes",[27] and JOHN S. BOYDEN, attorney at law…. (Attorney's Contract 7-12-1951).

A party representing the villages agreeable to the contracts traveled to Salt Lake City to sign on July 12 (see Figure 1).

John S. Boyden, Salt Lake City, Utah.
Fig. 1. Delegation of Hopis meeting in the courtroom of Salt Lake City District Judge for the purpose of signing their first attorney's contract, July 12, 1951. They are: (seated left to right), Homer Homewytewa, Kyakotsmovi; Homer Cooyama, Kyakotsmovi; Roger Honahni, Upper Moenkopi; Lewis Numkena, Upper Moenkopi; John S. Boyden, Salt Lake City attorney retained by the Hopis; Judge A.H. Ellett, Salt Lake City District Judge; Ned Nayatewa, Sichomovi; Andrew Seechoma, Walpi; Hale Secakuku, Shipaulovi; David Talawiftema, Shipaulovi; Julius Toopkema, Bacabi; Howard Talayumptewa, Bacabi; (standing left to right), Samuel Shing, Moenkopi; Dewey Healing, First Mesa (Tewa); Dean Tevaya, Sichomovi; James S. Beck, Bureau of Indian Affairs employee; Logan Koopee, Sichomovi. Photographer unknown.

Figure 1. Hopi Delegates with John Boyden and others, at signing of Boyden's Claims Contracts, Salt Lake City, July 12, 1951 (Clemmer 1979).

[27] Boyden's added 's' here is not a typographic error: it appears on several other documents of the period. Perhaps he was hedging his bets: if there was no single "Hopi Tribe" yet recognized by the Bureau, his representation of "The Hopi Tribes" might serve to circumvent questions about the legitimacy of his contract.

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Although the signatories for Bacavi were present, and did sign, the village did not yet have a resolution. The word "Bakabi" was clearly inserted onto the collective contract with "The Hopi Tribes" after the fact. Evidently, Bacavi held a meeting on June 13th, but neither Boyden nor Superintendent Carnal had been present, and no minutes were taken (Boyden 7-13-1951). There was clearly ongoing disagreement within the village about whether or not to support the Claim and the Claims contract:

> It is true that the village of Bacabi finally certified a council delegate who in turn voted for the resolution at the council meeting, but the village as yet has not made up its mind as to whether they will sign or not. As you know, the leadership in this village is not too stable as yet, and perhaps this is the reason that they have not decided about signing the resolution (Carnal 6-20-1951).

Returning the signed contracts to Superintendent Carnal on July 13th, Boyden informed him that:

> Since they [the Bakabi delegates] were here and *since it does add strength to our position* I had these two delegates appear before the Judge [A.H. Ellet, District Court Judge in Salt Lake City] and sign the contract.... A meeting should be called [at Bakabi] to pass [a]...resolution [in favor of the attorney contract]. The minutes of the meeting should be taken as before in order to complete the contract (Boyden 7-13-1951, emphasis added).

A Bacavi village meeting was called immediately upon the delegates' return, on July 14th, 1951. It was led by Superintendent Carnal:

> Superintendent Carnal: The purpose of this meeting is to discuss further the hiring of an attorney to represent the Hopi Tribe and the Bakabi Village in filing any claims they may have before the Indian Claims Commission. In a previous meeting, Howard Talayumptewa and Julius Toopkema were selected to sign the resolution for the hiring of John S. Boyden as attorney to represent the village. If there is any further discussion or questions anyone would like to ask, you may feel free to do so at this time.
>
> Julius Toopkema: There are some people present who have not been here at our previous discussions and who may not understand thoroughly what has been discussed before. If these people have questions, they should ask them at this time.
>
> Wilson Talashoma: Do you want a decision tonight?

> Superintendent Carnal: Yes. It seems that if the decision is to be made, it should be done immediately. We have to send the contract to Washington for the Commissioner's approval. This action is necessary before the attorney can file any claim should this contract be approved by the Area Office and the Commissioner (Meeting of Bakabi Village 7-14-1951).

Superintendent Carnal wrote to Boyden after the meeting reporting a positive result, but his remarks make clear that there had previously been dissent in the village about supporting the Claim and the resolution to hire Boyden as attorney:

> A large number of the residents of this village were present and a very interesting meeting developed. It seems that the trip Julius and Howard made created a considerable amount of interest among the people and they approved the resolution and confirmed the action of Julius and Howard in signing the contract for the village.
>
> You might be interested to know that the group which had been opposing any progress in the village for some time were all present at the meeting and took an active part. This seems to be a very encouraging sign and it looks as if the Bakabi people are finally getting back together (Carnal 7-16-1951a).

Seventeen people appeared for the meeting, and did vote to approve retroactively the village's contract at that time. But at least insofar as the Claims contracts were dated on July 12th, there were only certified approvals by four villages—and even these are in question (see below).

The pressure to get Claims contracts signed before the fast-approaching deadline is clear in Carnal's remarks at the Bacavi meeting. It is also noteworthy that even though the Claims petition as filed on August 3rd, 1951, shows *all* the villages as represented by the Tribal Council, Boyden's contract with "The Hopi Tribes" only lists those villages which had actually approved the contract. Moreover, in his letter to Carnal of July 13th, Boyden enclosed "revisions" to drafts of the village meetings minutes (First Mesa, Sipaulovi, and Kyakotsmovi) in which the approval of his contract had occurred:

> I found there were many variations from what actually took place because of inaccuracies in the recording of the minutes. To the best of my ability I revised those minutes and am returning them herewith. You will note that all three have a certificate to be signed by you as to the correctness of the minutes. In each case, I am enclosing five copies, one for

the Village itself, one for you as Superintendent, one for the Area Director, and one for the Commissioner of Indian Affairs, and one extra copy to use as you see fit (Boyden 7-13-1951).

By July 13th, Boyden still did not have a draft for the minutes of the "Upper Moenkopi group" and requested that it be mailed to him "at once." There may be no reason to assume any impropriety on his part in "revising" the minutes of the meetings with First Mesa, Shipaulovi, and Kykotsmovi, to make them conform to the needs of a legal contract. But it is of some interest that the Attorney whose contract was being negotiated:

1) was altering key documents for three villages (and presumably four, once a draft was sent to him from Upper Moencopi) that were needed to validate his contract;

2) did not even have a draft of the minutes for the only other village (Upper Moencopi) that had held a certified meeting, at the time the contract was signed (and attested by a District Judge);

3) was missing altogether minutes for a certified village meeting for a fifth village (Bacavi), since that meeting had not yet occurred by the time the contract was signed.

In short, all five of the Hopi village resolutions which Boyden used in support of his Claims contract are clouded by doubts about the propriety of formal certification.

Time was getting short if the Claims petition was going to beat the August 13 deadline. First, Boyden's Claims contract had to be approved by the Commissioner of Indian Affairs. He made arrangements to be in Washington four days after his July 13 letter to Carnal:

> As you know, the time is now exceedingly short and although I have the first rough draft of the Hopi petition, before the same can be filed my contracts must be approved by the Commissioner of Indian Affairs. Therefore, I suggest that immediately upon receipt of these documents you do the following:
>
> a) call the Bakabi meeting and have the resolution on page 12 of all five copies of the contract properly executed by the Secretary of the meeting and by yourself as Superintendent.

b) Transmit all five copies to the Area Office for further transmission to the Commissioner of Indian Affairs.

In view of the shortness of time I believe you should mail the contracts and the three sets of Minutes [First Mesa, Sipaulovi, and Kyakotsmovi] with an explanation that the other two sets of Minutes will follow shortly.

c) If it is at all possible, I hope these contracts can be delivered immediately to Mr. Harper [in Windowrock] with the request that they be immediately transmitted by airmail to the Commissioner of Indian Affairs. I probably will be in Washington by next Tuesday, July 17th. My trip there will be very short, but if the contracts could arrive in Washington by the 17th or 18th, I will confer with the Commissioner to see if the approval can be had without delay.

This letter, I am sure, must sound very "high pressured", but I believe we both understand each other, and I am sure we both understand the exigencies requiring such prompt action (Boyden 7-13-1951).

Boyden emphasized that before a Hopi Claim petition could be submitted to the Indian Claims Commission, it also had to be printed. He could not get it printed until the Commissioner of Indian Affairs approved his contract, however, since, "The petition itself must refer to the date of my contract with the Indians" (Boyden 7-13-1951). Carnal forwarded the signed contracts and minutes (still lacking Bakabi and Upper Moenkopi) to the Area Director on July 16, recommending that the contracts be approved (Carnal 7-16-1951b).

In 1977, petitioning the ICC for award of attorney's fees, Boyden presented his own perspective on the history of the Claim, and his negotiations with the Hopis:

> Following the passage of the Indian Claims Commission Act, Mr. Boyden was contacted by the Hopi Tribe to investigate the filing of a claim for the Hopi people against the United States. The Hopi Tribe consists of a confederation of self-governing villages organized under a Constitution and Bylaws pursuant to 25 U.S.C. §476. A considerable degree of autonomy is retained by the Hopi villages, making it advisable to hold separate village meetings rather than merely dealing with a central tribal government....
>
> Following Mr. Boyden's preliminary investigation of the potential for a Hopi claim, separate village meetings were held with Mr. Boyden to determine the tribal consensus on the filing of such a claim. As a result of these meetings, four of the seven villages determined to enter into a claims contract between the Hopi Tribe for itself and as the

> representative of its individual villages and Mr. Boyden. The Hopi Tribal Council thereafter passed a resolution authorizing the contract. Mr. Boyden, having obtained the consent of a majority of the villages and a majority of the population, was willing to proceed (Boyden 4-22-1977:7).

These statements raise several questions. If the Hopi Tribal Council was not in 1951 (or until 1955) deemed to be representative of the Hopi Tribe's "individual villages," the legitimacy of the Claim itself—at least insofar as it purported to represent the interests of all the Hopi villages—may be in doubt. Boyden's assertion that he had consent of a "majority of the villages" is peculiar: it is not clear what "four" of "seven" refers to. It is true that by July 12, 1951, he had gotten village approvals at four villages: First Mesa Consolidated, Sipaulavi, Kyakotsmovi, and Upper Moenkopi. But if these were the four, the total number should have been ten. With Bakabi's belated approval, Boyden had contracts with five. The Claim petition itself and subsequent filing documents list the villages as:

- First Mesa (Consolidated Villages of Walpi, Shitchumovi and Tewa)
- Mishongnovi
- Sipaulavi
- Shungopavi
- Oraibi
- Kyakotsmovi
- Bakabi
- Hotevilla
- Upper Moenkopi
- Lower Moenkopi

Moreover, the assertion that his contracts represented the majority of the Hopi population may be defensible, but is not beyond doubt. Those villages that refused to sign contracts with him included the largest population centers on Second and Third Mesas proper in 1950: i.e., Shungopavi, Mishongnovi, and Hotevilla. Hopi population figures for 1950 compiled by the Hopi Agency are:

First Mesa	866
Shipolovi	116

Mishongnovi	227
Shongopovi	321
Oraibi [Kyakotsmovi]	292
Old Oraibi	130
Hotevilla	427
Bakabi	147
Keams Canyon	102
Upper Moenkopi	192
Lower Moenkopi	208

(spellings as in Dozier 1954:289)

Out of the total number of Hopis and Hopi-Tewas living on the Reservation (the counts did not include off-reservation residents), 1613 were represented in those villages which had signed contracts, 1313 in those villages which had not (the 102 at Keam's Canyon, representing families working at the Agency, are excluded from these totals). On this scale, Boyden did have a majority, although it is not clear how many people in both sets of villages may have supported a position out of line with those of their respective village leaderships.

In 1961, after Boyden's first ten-year Claims contract expired, two-year contract renewals were granted through the end of the Claim by the Tribal Council (but not with the individual villages, or "Tribes," that had signed his first group of Claims contracts).[28]

Expansion of the Attorney's Role in the Claims Case to Hopi Land Interests in General

In his letter to Carnal of July 13, 1951, Boyden referred to a note Carnal had sent him, "that the Hopis desired to enter into a general contract;" Boyden added, "and I further discussed the matter with the delegation here" (Boyden 7-13-1951). Thus we see again that at the same time as the Claims contracts were being signed on July 12, 1951 in Salt Lake City, discussion of

[28] Dates of renewal appear somewhat eccentric from Boyden's listing (Boyden 4-22-1977:5), although there may be no reason to question them. The last renewal of the Claims contract was for five years, covering the period July 27, 1977 to April 30, 1982. That contract (with Boyden's firm, Boyden himself being deceased by 1980), was approved by the Tribal Council and the Bureau Area Director in August, 1980, indicating expectations of continuing work on questions arising from the Claim (Streitz 8-25-1980)

a contract to seek land return was taking place. Boyden indicated to Carnal he would shortly prepare such a contract. He had been interested in negotiating a General contract at least as early as May 1951. The matter acquired additional urgency when Boyden learned that Felix Cohen, author of the Solicitor's Opinion of 1946 on rights in the 1882 Reservation (and compiler of the canonical *Handbook of Federal Indian Law*), had announced his intention to seek a General Counsel contract with the Hopis (though he was not interested in serving as their Claims attorney).[29] Cohen had evidently spent some time at Hopi. Glen Wilkinson (Ernest's younger brother, and a member of the Wilkinson law firm) wrote to Boyden regarding Cohen's interest. Boyden replied:

> I called the superintendent of the Hopi Reservation, Dow Carnal, and discussed the situation with him. He said that at this late date he thought the entry of another attorney in the matter would only confuse the issues. Half of the villages have passed resolutions hiring me as claims counsel, *but it has been the understanding of them all that I would also represent them as general attorney. You can readily understand that the difference between the claims and the general contract on the Hopi Reservation is not clearly marked as in other cases. By this I mean that a complete investigation may result in a claim for return of the land rather than a suit against the government, involving both work as a general attorney and as a claims attorney.*
>
> At the present I am awaiting action by the general committee,[30] which has already passed a resolution giving me an option to accept their claims contract if I so desire. I accept the option and therefore their action should be merely a formality. Mr. McNickle [of the B.I.A.] has told me that under the circumstances of the approval by their general business committee the Indian Department would recognize the committee for the purpose of employing claims counsel. Since the status of the committee is in a rather uncertain condition, I felt it was not wise to include the general contract at the same time. *I know the general contract will be a very difficult one from the standpoint of keeping the support of all interested factions, but it is almost a necessity for me to take it while representing them as claims counsel.* I believe it would therefore be wise to discourage

[29] Cohen had evidently been nominated as one of three possible attorneys (Boyden, and a second Washington lawyer were the other two) for the Hopis to consider hiring for their ICC claim. It is probable that the Tribal Council discussed these three names at its meeting of November 28, 1950, if not before. As a practicing Latter-Day Saint, Sam Shing's prominence in the selection process may have tipped the balance for Boyden, although as we have seen, Boyden had been actively pursuing the Hopi contract since 1947.

[30] Boyden's choice of terms here and in the following sentence is interesting: at this juncture, he appears not to have regarded this "general business committee" as actually constituting a valid "Tribal Council."

Felix from attempting to negotiate a contract unless for some reason I am not ultimately selected (Boyden 5-25-1951, emphasis added).

In sum, Boyden was discussing a General contract with Hopis at the very same time as the Claims contract. If the Hopis wanted Boyden to try to get some land back, they would first have to approve his contract for the Claims case. After that, "If I have sufficient time and opportunity, it is my intention to discuss such an unusual [General] contract with the Commissioner of Indian Affairs while I am in Washington" (Boyden 7-13-1951).

Immediately following his filing of the Claims case, which became docketed as No. 196, Boyden drew up a General Contract with the Hopi Tribal Council, specifically to pursue other Hopi interests in land. According to his own report Boyden secured a General Contract with the Hopi Tribe on September 1, 1951 (Boyden 9-17-1952:2). In his first semi-annual report under this General contract, Boyden indicates his work began on a trip to the Hopi Reservation on August 31st, 1951 (Boyden 2-29-1952). Apparently he spent several days meeting with individual villages and the Tribal Council seeking to get this new contract approved. However, notwithstanding statements he made later implying approval by a majority of Hopi villages, it appears he may have only met with First Mesa, Shipaulovi, Kykotsmovi, and Bacavi, between September 2 and September 4, 1951.[31] In the village meetings, he made the pitch that this General contract would enable him to seek oil leases, and that way he could be paid for his work for the Tribe[32] (since he could only be paid on a contingency basis on the Claims contract, which might take years to produce a result—in fact many more years than he imagined at the time):

[31] First Mesa Meeting 9-2-1951; General Meeting at Sipaulavi 9-3-1951; Kyakotsmovi Village Meeting 9-4-1951; Meeting in Kiva at Bakabi 9-4-1951. I have not located meeting minutes for Upper Moenkopi.

[32] A matter of some ongoing controversy among Hopis, Boyden was eventually paid $1 million for his work on *Healing v. Jones*. The Supreme Court decision on the case in 1963 enabled the Tribe to gain $3 million in energy leases (of which, by the Tribal Council's decision, Boyden received one third).

> The claims contract was to press the claims, and the only authority under that was for that purpose. Several people have talked to me about more things to be done to protect your lands and resources. The Navajos are leasing up to the old Executive Order Reservation line. You need help in protecting your rights. I know you don't have money. If I am successful in leasing your land for oil and so forth, I will get paid as well as you. I worked out a contract and have a copy here with me in which you agree to employ for three years, and which has tentatively been approved by the Commissioner (General Meeting at Sipaulavi 9-3-1951).

Resolutions at the village meetings supported his hiring on the General contract. He evidently sent this contract to the Commissioner shortly thereafter in "draft form"; the contract was "submitted in final form, fully executed on December 3, 1951" (Sigler 5-23-1952). Boyden's General contract took significantly longer to approve, and Boyden made repeated efforts to prevent others from blocking it. In early January 1952, Boyden went to Washington, intending to try to have his General Contract approved. He met with the Commissioner of Indian Affairs, and "explained...the necessity for proceeding with the Villages and the Hopi Tribal Council" (Boyden 1-11-1952). However, he deferred seeking the Commissioner's necessary approval of his General contract, because of opposition by the B.I.A. Area Office Director. At this time, the Hopi Agency remained under the purview of the Navajo Area Office at Windowrock. Area Office Director Harper opposed certification of Boyden's contract until the Tribal Council had been recognized, and he did not support such recognition. Harper had written to the Commissioner of Indian Affairs shortly before Boyden's meeting in Washington:

> I recommend that this contract be disapproved.
>
> Reference is made to the signatures of Roger Honahni and Andrew Seechoma, purporting to approve the contract on behalf of "The Hopi Tribe, organized pursuant to the Indian Reorganization Act of June 18, 1934." The Tribal Council, represented by Messrs. Honahni and Seechoma, has not been approved by the Bureau, and as you know, I have strongly recommended that the said Council be not so approved. It has been my understanding that the Bureau has accepted the policy, recommended by Superintendent Carnal and me, that the said Council shall not be recognized to speak on behalf of the Hopi Tribe. Approval of the proposed contract would effect recognition of the Tribal Council by indirection, thus reversing the basic Hopi policy which has been worked out

> in the field with the Bureau's consent and approval. I am not prepared to recommend reversal at this time (Harper 1-7-1952).

Harper mentioned having had several discussions with Boyden, in which the latter had projected that:

> ...approval of the contract would constitute the first step in a sequence, under which recognition of the Tribal Council would be brought about, contrary to the administrative policy of this Area Office. After approval, he proposes to recommend transfer of Tribal funds to the control of the Council and to proceed to negotiate oil leases under authority of the Council. These subsequent actions, it would appear, are to be proposed in order to create Tribal funds with which to pay Mr. Boyden compensation in accordance with Section 4 of the proposed General Counsel contract.
>
> I believe that if the proposed contract is approved, there will be a rebirth of bitterness and extreme controversy among the Hopi villages, thus destroying any prospect of developing a representative body in accordance with the policy and procedure on which we have had to devote so much time, resulting from the inept and non-comprehending policy and actions of the previous Superintendent, Mr. James Crawford. I do not believe our administrative policy should be changed to accommodate Mr. Boyden (Harper 1-7-1952).

In part owing to this conflict with Harper, Boyden, during the meeting with the Commissioner on January 11, moved to have the Hopi Agency transferred from Windowrock to the Phoenix Area Office:

> Pursuant to my understanding with the members of the Tribal Council I strongly urged the Commissioner of Indian Affairs and the members of this staff to transfer the Hopi business from the Window rock Area office to the Phoenix Area Office. I was informed that our request will be given early and serious consideration (Boyden 1-11-1952).

Boyden's General contract was finally approved by the Commissioner of Indian Affairs on May 29, 1952 (Sigler 5-29-1952, Wolfsohn 12-12-1952), although protests against its legitimacy continued, and the Department of the Interior refrained from formally recognizing the legitimacy of the Tribal Council. As the B.I.A.'s Chief Counsel emphasized in his letter approving the contract, "the approval of the contract need not be understood as a commitment on the part of the Department to recognizing the Tribal Council" (Sigler 5-29-1952). The General contract was for three years, and when time came for renewal in 1954, Boyden faced continuing

hurdles. In a long meeting at Hotevilla, for example, that included Superintendent Pensoneau, Tribal Council representatives, and delegates from Shungopavi, his contracts were insistently challenged (Hotevilla Meeting 8-7-1954).

Boyden was already aware of the Opinion issued by the Department of Interior's Solicitor (Felix Cohen, the same man who in May 1951 sought to represent the Hopis as their General Counsel) on June 11, 1946, limiting exclusive Hopi interests in subsurface oil and minerals within the 1882 Reservation to District Six. That Opinion stated that Navajos who had "settled in good faith prior to the date of ratification of the Hopi constitution [12-14-1936] have coextensive rights with respect to the natural resources of the reservation, including the mineral estate" (Cohen 6-11-1946). With a General Contract, Boyden's first aim was to try to get this Opinion reversed: otherwise, he reasoned, there was no chance of securing any land or minerals rights for Hopis (within the 1882 Reservation) outside District Six. From the very start, Boyden was keenly aware that any determination he could obtain on this question would directly affect the Docket 196 claim. This is seen, for example, in Boyden's reaction in 1953 to an attempt by his partners in the Wilkinson law firm in Washington to gain more control over the Hopi Claims case. He resisted this move somewhat, especially because the Claims case and his efforts to reverse the Solicitor's Opinion had now become interdependent:

> While the primary responsibility for the Hopi claims will probably be assumed by the Washington office [of Boyden and Wilkinson's firm], it is my intention to keep very closely in touch with this case. As you know, the claim may depend largely upon what happens in the Solicitor's Opinion question that is now being raised. *If we have some of our land returned to us, we naturally will not receive compensation from the Government for that land. The Hopi very much prefer to have all the land they can obtain. Therefore we will have considerable difficulty in distinguishing between the work done upon the claims contract and the general contract....*
>
> Incidentally, I don't believe we should crowd the trying of the Hopi [I.C.C.] case, because we certainly want the other matter disposed of first (Boyden 6-18-1953).

From this, it is abundantly clear that separation between the Claims case—for monetary compensation—and pursuit of land return under Boyden's General Contract was not even distinct for the attorneys directly involved.

In a meeting later that year between the Tribal Council and Glen Emmons, Commissioner of Indian Affairs, at Keam's Canyon, speaking on behalf of the Hopi Tribe, Boyden emphasized the question of Hopi interests in the whole 1882 Reservation:

> ...we do not feel that the Government has discharged its obligation in taking proper steps to commence negotiations for the settlement of this land problem.
>
> The opinion of the Solicitor, with which we sharply disagree, granting the Navajos on the Hopi Reservation a per capita interest in the minerals underlying the Hopi reservation is perhaps consistent with the previous recognition of grazing rights for the Navajo, but it does not require that these Navajos relinquish claim to the rights of their own reservation before they accept claims upon the Hopi reservation. This is a situation unique in our handling of the Indians for the Code of Federal Regulations and the courts have expressly prohibited other Indians from sharing in the benefits of two reservations (Boyden 11-3-1953).

In April 1955, Boyden formally submitted a lengthy brief petitioning the Secretary of the Interior to reconsider the Solicitor's Opinion (Hopi Tribe 1955). In effect, it was this petition that evolved into the legislation (Public Law 85-547, July 22, 1958) authorizing the Hopi Tribe to sue the Navajo Tribe for their interest in the 1882 Reservation. After this point, separation between the interests involved in the Docket 196 claim and the question of Hopi land rights in the 1882 Reservation would become somewhat more distinct. But in the early 1950's, at the time Docket 196 was filed and indeed for as long as it remained unclear to what extent Hopis retained legal rights in lands of the 1882 Reservation, distinguishing land rights vs. monetary compensation was virtually impossible—notwithstanding that the Indian Claims Commission Act itself only allowed for a money award. Still in mid-1957, Boyden did not know whether the Hopi Tribe would be able to secure the necessary legislation to litigate for Hopi interests in the 1882

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Reservation, and he regarded it as crucial that the Docket 196 claim should be postponed until Congress made a decision on the legislation:

> ...I draw your attention to the fact that we are desperately trying to arrive at legislation for settlement of a Navajo-Hopi boundary dispute. At the present moment there is considerable doubt as to the passage. Under no circumstance do I deem it advisable for us to try the Hopi case [Docket 196] prior to our settlement with the Navajos. Perhaps this matter should be expressed to the Indian Claims Commission at this time (Boyden 4-29-1957).

Boyden's intertwined approach—attempting to secure Hopi land rights within reservation boundaries (first the 1882 Reservation, and later the 1934 Reservation), while pursuing the Claims case to gain compensation for lands deemed irretrievably lost—guided his path over the next three decades. For example, questioned at a Special Meeting of the Tribal Council in 1955 about progress on the Claims case, Boyden emphasized the interrelationship between arguing for land restoration in the 1882 Reservation and Docket 196:

> Julius Toopkema: I want to ask Mr. Boyden for the sake of information. What do you know about our claim that we have in Washington? Do you know any more about where we are now?
>
> Mr. Boyden: As you know, the only authority the Indian Claims Commission has is to give us money for the wrongs they have done us. They can't give us land. All of the Hopi people want as much land as they can get. If I can get Congress to establish all this land for us then the damage from the Government will be less. For that reason I am not pushing that claim [Docket 196] until we can get this Solicitor's opinion reversed. I am not pushing the other claim, and when they [the government] asked for more time, I have consented all along because we first want to get all the land we can get. It is just standing there at present. It was filed in time, but I don't want to go to trial on that until we get all the land we can get, and then what we can't get, we will try to get money for it.
>
> Ned Nayatewa: When the Secretary said this Executive Order Reservation is set aside for the Hopis, naturally we feel it is for the Hopis, but the Navajos are in there, but every resource that comes along like coal and so forth, the Navajos seem to be getting it all.
>
> Mr. Boyden: That is what this will settle altogether. As it is now the Navajos would get the biggest part of it, but if we get this reversed then the Hopis will get it all.
>
> Ned Nayatewa: Any resources developed in this Executive Order Reservation?

Mr. Boyden: That is what I am fighting about (Hopi Tribal Council 1-11-1955).

The Court's decision in *Healing v. Jones* was, of course, to recognize "Joint Use," and in the 1974 Land Settlement Act Congress sought to divide the 1882 Reservation between Hopis and Navajos. But this approach by Boyden in the 1950's to seek sole Hopi control over the entire 1882 Reservation ("if we get this reversed, then the Hopis will get it all") should be borne in mind. In sum, keeping the question of land rights in the 1882 Reservation and the Claims case separate was impossible. As Boyden noted, both to his co-counsel in Washington and to the Hopi Tribal Council, the Claims case for lands lost under government negligence could not be effectively decided until it was clear which lands legally remained under Hopi control. Arguing before the Indian Claims Commission for a compensable award for Docket 196 was not feasible while the question of rights in the 1882 Reservation remained unresolved.

However, there is no denying also the influence over Boyden played by the continuing interest of the energy companies in obtaining mineral leases to reservation lands. Steve Boyden, John's son, recalled this as a primary motive for his father to get the 1946 Solicitor's Opinion reversed:

> In 1956, energy companies had developed considerable interest in the oil, gas, and minerals underlying the Hopi Reservation and had approached both the Hopi and Navajo tribes about obtaining exploration permits. Steve recalls:
>
> > Dad sensed that this was the opportunity the Hopis were looking for to bring their land claims into the courts. The Navajo Tribe was anxious to lease the subsurface of the Hopi Reservation, claiming interest in it by virtue of their surface occupancy. The Hopis stoutly maintained that the Navajos had no interest in the Hopi reservation and were not entitled to share in any of the minerals or oil and gas. Dad was successful in obtaining the assistance of the Bureau of Indian Affairs whose trust responsibility it was to oversee tribal leasing. The BIA took the position that the Navajos could not unilaterally lease mineral interests in the Hopi reservation to third parties. Furthermore the BIA acknowledged that the respective interests of the two tribes had never been determined (O. Boyden 1986:177).

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As is well known today, there are reports that, at the same time as he was working for the Hopis, Boyden was simultaneously working with energy companies to help them gain access to minerals leases in the Hopi Reservation (e.g., Indian Law Resource Center 1979, Chambers and Lynch 1985, C. Wilkinson 1996). Boyden's semi-annual reports of his work on the General contract with the Tribal Council show that he was in consultation with several oil companies at least as early as 1952 (Boyden 8-31-1952). Whether or not he was working for them directly is another matter, and the record is not transparent. However, what might be said here at least is that Boyden was very much aware of the commercial potential for the development of minerals on the Hopi Reservation, and he, like many Hopis, felt that this was in the best interests of the Hopi Tribe. He was also aware that Congress would look favorably on a legislative measure that would aid the energy companies in gaining this access, as well as resolve the Hopi-Navajo land dispute. After the *Healing* case was decided in 1962, a press release noted:

> At stake in the case was the right to what is believed to be some of Arizona's richest, Atom-Age treasures of oil, gas, coal and other minerals. Development of these potentials has been blocked for years by conflict between the Hopi and Navajo Tribes over the ownership of these lands. At the outset of the case it was described as being possibly "one of the nation's most important Federal Court actions, in many decades" (O. Boyden 1986:187).

In many ways, Boyden's approach to Hopi land issues was an ambitious strategy, and certainly not without success. In essence, he confronted head-on the government's premise that the Indian Claims Commission would dispose of all claims against it, which was based on the assumption that the government's asserted takings were irreversible and unchallengeable. He did not succeed in getting back all of the 1882 Reservation for Hopi, but in regaining control of approximately half, Boyden succeeded far more than most had predicted (like Oliver La Farge in 1950 [above]). And he did succeed in overturning the Department of the Interior's aim in the 1930's-1950's to restrict Hopis to District Six. But Boyden's joint strategy—land return within

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the reservation, and money compensation for what could not be returned, both within the reservation and outside it—prevents keeping the Claims case conceptually or historically distinct from the legislative and Court actions resulting in *Healing v. Jones* and the 1974 Navajo-Hopi Land Settlement Act.

The legal complexities may have made this situation inevitable. In 1954, for example, following his meeting with Boyden and the Tribal Council at Keam's Canyon in November 1953, Commissioner of Indian Affairs Glen Emmons produced a memorandum for the Assistant Secretary of Interior on the "Hopi boundary." He concluded with a "Suggested Solution of the Problem:"

> (a) Legislation to authorize a fair division of the 1882 Reservation between the Hopis and the Navajos with coextensive rights. The Hopis will oppose such legislation because they claim the entire reservation. If the division results in a grossly inadequate resource base for one group, the legislation may need to give to that group relocation opportunities or occupancy rights (for a consideration) in the lands lost by them.
>
> (b) Litigation by the Hopis in a new action before the Court of Claims under existing jurisdictional acts if they feel that the congressional division of the reservation infringes their rights. Their claim of exclusive rights should be adjudicated in the pending Indian Claims Commission case. If the claim is denied, the proposed congressional partitionment should create no new liability of the United States. If the claim is sustained, the form of the judgment will determine whether the proposed congressional partitionment would create a new liability (Commissioner of Indian Affairs 4-9-1954).

In light of the subsequent history of *Healing v. Jones* and the 1974 Act, this 1954 memorandum appears frankly prophetic. But more important, it shows the Commissioner of Indian Affairs' view that, in regard to the Hopi, the Indian Claims Commission was not capable of fulfilling its mandate under the ICC Act to finally dispose of all grievances against the United States.

Filing the Claims

Docket 196

As presented on August 3, 1951, the filing that came to be termed Indian Claims Commission Docket No. 196 contained nine "counts," each subdivided into subsidiary paragraphs numbering 36 all told. Many of these involve legal technicalities, but the most substantive paragraphs referring specifically to the lands alleged to have been taken by the United States at various junctures since the Treaty of Guadalupe Hidalgo 1848, asserted the following:

Petition.

The Hopi Tribe respectfully represents: Count 1

1. Petitioner, The Hopi Tribe, is a corporation organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 934), as amended by the Act of June 15, 1935 (49. Stat. 378), the majority of the members of which reside on the Hopi Reservation in Arizona. Petitioner is a tribal organization recognized by the Secretary of the Interior of the United States as having authority to represent such tribe. Prior to their being placed on the reservation they no w occupy, its members, by permission of the tribe, used and occupied from time immemorial the lands described in paragraph 7 hereof....

5. At all times mentioned in this petition, defendant was guardian and trustee of the properties and affairs of petitioner and as such guardian and trustee was subject to a high degree of fiduciary obligation and required to deal honorably and fairly with the petitioner and its property....

7. On July 4, 1848 and prior thereto from time immemorial, petitioner owned or continually held occupied and possessed a large tract of land described generally as follows, to wit: Beginning at the juncture of the Colorado and Little Colorado Rivers; thence in a southeasterly direction along the said Little Colorado River to its juncture with the Zuni River; thence in a northeasterly direction along the said Zuni River to a point where the same now intersects the state line between the States of Arizona and New Mexico; thence in a northerly direction along said state line until said state line intersects the San Juan River; thence along the San Juan River in a general westerly direction to its juncture with the Colorado River; and thence in a southwesterly direction along the said Colorado River to the point of beginning.

8. On July 4, 1848, when the defendant obtained sovereignty over the area owned or occupied by the petitioner, the members of the petitioner tribe were an agricultural and

pastoral people who from time immemorial had lived in permanent dwellings and raised their crops and pastured their flocks on the surrounding land. Members of petitioner tribe were, at that time, ignorant of and without knowledge as to the nature of legal land titles under United States law and relied upon and had confidence in the honesty and authority of the United States and its agents upon whom they relied for protection for their property.

9. After July 4, 1848, defendant took control of the aforesaid area held, occupied and possessed by petitioner, and converted the said lands to the use of the defendant without payment of just compensation or of any compensation agreed to by them.

10. As a result of the conduct of defendant in converting petitioner's land to its own use as aforesaid, petitioner was damaged in an amount equal to the value thereof.

Counts 2 through 8 presented other aspects of why the petitioner should be compensated for the loss of the use of the lands described in 7 above. Count 9 was the "accounting claim" that referred to Hopi interests in:

[Count 9, paragraph] 32. ...the proceeds of property of petitioner or of rents or other income therefrom [which] have been payable to or collected by defendant....

34. ... interest on any and all sums of petitioner's money in the hands of defendant which it retained for its own uses and purposes, whether by way of interest or principal....

36.Upon information and belief, petitioner alleges that defendant from time to time has collected or received or, in the exercise of its fiduciary duties ought to have collected or received, various property, including money, for or on behalf of petitioner, or defendant itself has become liable to pay moneys for or on behalf of petitioner. Defendant has failed to account for its management, handling and disposition of the said moneys and properties. As a result, petitioner has been damaged by having been deprived of the amount of money or value of other property, together with interest thereon, which may be shown to be owing to petitioner upon a proper accounting in accordance with the fiduciary duties and the liabilities herein set forth.

In concluding, the petition summarized the totality of its interests in presenting the claim as follows:

Wherefore, petitioner prays that it be awarded judgment against the defendant after the allowance of all just credits and offsets for (1) an amount which will provide just compensation for the lands taken from the petitioner by the defendant; or (2) an amount which will provide just compensation to the petitioner for the damages caused by the defendant's failure to deal fairly and honorably with petitioner in the taking of the petitioner's lands; or (3) an amount which will provide just compensation for the lands

> taken from the petitioner by the defendant in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; or (4) an amount which will provide just compensation to the said petitioner for the damages caused by the defendant's failure to deal fairly and honorably with the petitioner in the taking of the petitioner's lands in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; or (5) an amount which will provide just compensation for the use of said lands to the date hereof; or (6) an amount which will provide just compensation to the petitioner for the damages caused by the defendant's failure to deal fairly and honorably with the petitioner in depriving petitioner of the use of said lands to the date hereof; or (7) an amount which will provide just compensation to the petitioner for damages caused by the defendant's seizing and depriving the petitioner of the use of said lands in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; or (8) an amount which will provide just compensation to the petitioner for the damages caused by the defendant's failure to deal fairly and honorably with the petitioner in the seizing and depriving of the use of said lands in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; and (9) that 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; and (10) for such other relief as to the Commission may seem fair and equitable (The Hopi Tribe 8-3-1934).

The description in paragraph 7 of the lands claimed as aboriginal Hopi country appears to have relied in no small part on the Parke-Kern map of 1851, as the representation which was closest in time to the Treaty of Guadalupe Hidalgo. But it remains unclear why Boyden was not prepared to file for the whole area described in a series of petitions from Second Mesa villages since 1930. Hopi presentations to government officials since that time variously referred to the "Old Domain," the "outside line," "the old reservation [sic] boundary," the "old tribal land claim," and "our old boundary lines and the area of land within the said boundaries." Within the large area excluded from the Docket 196 claim, to the south and west lie the San Francisco Peaks, one of the most sacred Hopi sites, referred to as a "boundary shrine" in some Hopi documents, and all lands south of the Little Colorado River, including Sakwavayu, Clear/Chevelon Creek, another major sacred area, and several well-known eagle-gathering areas. In its separate petition (Docket 210) filed before the Indian Claims Commission in 1951,

Shungopavi included all these areas, enclosing a very similar map (Map 3) to that drafted by Fred Kabotie in 1930.

Boyden was certainly aware of this claim before he filed the Docket 196 petition; in addition to the numerous records on file it was presented to him at Shipaulovi (a village that consistently supported Boyden) in May 1951. Kikmongwi Frank Masaquaptewa, raised the issue specifically:

> Frank Masaquaptewa: Now, I think I want to speak a little before we take further consideration of the contract. ...our elder, my uncle, have left with me...that the area which is designated would be exclusively for the Hopis was already set aside. Back in their days this was done in the general council and I believe all Hopis know about it and this was done before there was a white civilization among us although the white man was here and supposedly knew about it because some of the various villages were represented and gathered and met and agreed on a certain area and I have been presenting this time and again to different sources, but now I want to present it to Mr. Boyden for his opinion as to what he might think about it. This area, as I understand, as agreed upon by our white brother and maybe Hopi people is an area that lies commencing from Navajo Mountain bounded on the north by the Grand Canyon and then south from that place across the country where there is a small mountain area [Tusaqtsomo, Bill Williams Mountain] and east right over to the San Francisco Peaks, making a line toward Clear Creek [Sakwavayu], of course that takes in the Winslow area; from Clear Creek going east by Holbrook to a peak. A peak that is in the northeast nearest to Holbrook [Tsimontukwi, Woodruff Butte] and from there again northwest of Ganado up to the point that we call Red Hills [Palatsmo, in the Chinle Valley] and then it follows that contour from there north until it hits the Salina point and from there it follows the way of the formation of the cliffs [i.e., the eastern escarpment of Black Mesa] and the rugged area north until it again goes over the mountains and makes its direction toward Navajo Mountain again. Now this was laid down to us by these people that made this agreement, some of those people were my uncles and it was put to us that whenever the time comes that the white man would come to talk about our land—about the claim—that all we had to do was designate to him the area that was set apart for us because there is supposed to be a document of the agreement in the records and white man will know it because he knows where the records are.

He detailed other aspects of this well-known tradition, notably that Hopis should not seek to exclude Navajos and whites who had come in, or this would produce trouble, but that:

> ...it was made known that if the time comes let us give these people [Navajos and whites within the area he has described] the same privileges [to live here as are enjoyed by Hopis] because after it is defined and recovered it would mean that they would have to be

> administered under the same setup as we are, and the Navajos would have to be subject to Hopi administration, then when that time comes it would be their own privilege as to who wished to remain but they would have to be subject to the Hopi reorganization and at their own free will if they wished to go back to their people which would eventually clear themselves out and this would hold down the trouble.... If they decided to remain then they would have to decide whether from that time on they will have to pay to our people in order that they may have the right to stay in this area.... I would forever cease to think about this if it is possible for him [Boyden] to make our claims on this basis and if he can then I would be overjoyed. Since this area has been set aside by the general council I feel we can consider it. I know that a majority of the Hopis have a knowledge of it (Meeting with the Members of Shipaulovi Village 5-9-1951:3-4).

Boyden's response was to indicate the need for written documents to substantiate any Hopi claim:

> We have to have documents, and old maps, to prove what land you occupied since it came to the possession of the United States. You must have possessed that land exclusively of other Indians. We cannot claim land we occupied as Hopis before the time the United States took this land over from Mexico. The Indian Claims Commission Act provides that we can sue the government or obtain money for wrongs they have done to the Hopi people by taking land. If we recover certain land we cannot be paid for it. I know that you want the land that has been taken from you—I will never forget that (Meeting with the Members of Shipaulovi Village 5-9-1951:6).

The exclusion of a large sector of traditional Hopi claims from Docket 196 is puzzling—especially when compared with the petition's original inclusion of Canyon de Chelly and all the 1868 Navajo Treaty Reservation in Arizona—areas which lie outside the aboriginal claim from the 1930's, Frank Masaquaptewa's delineated area, and Shungopavi's Docket 210 petition of 1951. What is immediately noticeable about the area claimed in Docket 196 is that the vast majority of these lands lay on existing Indian reservations; the only significant area that did not lies between the southern boundary of the 1934 Reservation and the Little Colorado and Zuni Rivers. It thus appears that, to all intents and purposes, Boyden was only prepared to file a claim for the Hopi Tribe against the government that did not much involve private landholdings or even public lands (Bureau of Land Management, Forest Service, National Park Service) that lay outside existing Indian Reservation boundaries. In pronouncing on this area in 1970, the Indian

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Claims Commission recognized aboriginal title for "exclusive use and occupancy" south of the Little Colorado River up to the Mogollon Rim, from the Flagstaff area on east, to the Navajo Tribe (see Map 6 below). Yet the historical record makes it very doubtful that any Navajos were in this area, even on a temporary basis, at the time of the Treaty of Guadalupe Hidalgo (see Whiteley 2007b). Hopis, by contrast, have a series of religious and other usage sites within this area, that they continue to visit into the present. All of these were found by the ICC to have been "abandoned centuries earlier." The ethnographic record from the late 19th century forward completely falsifies that argument. The failure to recognize this area as part of Hopi aboriginal territory in the Indian Claims Commission's "Indian land areas judicially established" must be charged directly to the fact that it was not claimed for the Hopi Tribe in Docket 196.

The Response of the Traditional Villages; Docket 210

The traditional villages did not remain silent on the question of filing claims, even though they opposed the Tribal Council as a means of presenting these. On August 8, 1951, Dan Katchongva, for Hotevilla, wrote to the Commission indicating a refusal to file a claim:

> By this Act you required all Indian tribes to file a claim for land that has been taken away from them by the Government of the United States without just compensation.
>
> Again, without our knowledge, consent nor approval you have passed this Claims Act. In spite of our repeated requests, yes, demands, for a full hearings on these vital issues time has come to a close as far as that Act is concern. To the Hopi this is not the end but the beginning of the bigger problems....
>
> By this act the Government of the United States has admitted legally that it did robbed, stole, taken away and took possession illegally the land that rightfully belongs to the Indian. It simply means that the culprit has been caught and after admitting the wrongs decided to settle the matter in his own way, according to his own rules and at his own court. It means he is willing to compensate with the stolen goods....
>
> The Hopi Sovereign Nation has long ago made solemn covenant with his white brother to never abandon the sacred trust and duty which were placed upon him. Stone Tablets and

> emblems were made and given to each Hopi leader. These represent all people and all land in this continent. A death penalty is placed on anyone who violate this fundamental principle. For this fact the Hopi people in Hotevilla, a branch of Oraibi, following the traditional path of the Oraibi people, will not file any claim for land or money with the Government of the United States....Other Indian tribes or other Hopi villages may file in a claim but we who know these truths will not sell our homes, our land, our religion and our way of life for money (Katchongva 8-8-1951).

Katchongva proceeded to question the legitimacy of the Tribal Council, of Attorney Boyden, and the Claims contracts. Throughout the 1950's and 1960's, other protests were lodged by the traditional leaders from Hotevilla, sometimes mentioning the Claims case specifically (e.g., Clemmer 1978:83-86; see also Indian Law Resource Center 1979).

On August 2, 1951, Shungopavi, the mother village, submitted its own petition to the Indian Claims Commission. The intention of the petitioners was not only on behalf of Shungopavi but for all the Hopi people. All of the recognized Shungopavi *Wimmomngwit* (religious society chiefs), signed the petition. This is the same group that had been prominent in rejecting attempts to have the new the Tribal Council recognized, even though, the village's vote in 1936 had been strongly in favor of adopting the Tribal Constitution, and indeed one of the Council's first Chairmen was Peter Nuvamsa, Sr., of the Shungopavi Bear clan. Since the Council had failed to protect or restore Hopi land rights, Nuvamsa had been one of the first, in 1939, to recommend disbanding it in favor of a return to the preexisting system of village government (see above). By the 1950's, Nuvamsa and other leaders in Shungopavi were firmly opposed to the Council. Although his name does not appear on the Docket 210 petition, former Chairman Nuvamsa was directly involved in filing it (Nuvamsa 7-18-1951); he appeared at hearings on the claim in 1956 (Indian Claims Commission 12-14-1956); and continued to represent the claim in 1963 (Nuvangoitewa et al 5-1-1963). Nuvamsa had played a direct role in

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presenting the same claim to the Commissioner of Indian Affairs, in his capacity as Tribal Chairman in 1938 and 1939 (above).

Docket 210 was not interested in monetary compensation, but only in the restoration of Hopi rights to the entirety of the traditional claim. It was prepared by Viets Lomaheftewa, with the assistance of John Connelly of the Second Mesa Day School, and attested by Hopi Superintendent Dow Carnal. The language of the petition is now famous in the history of Hopi representations of their land interests:

> We, the Hopis, continuous dwellers on the mesas, at this place which is called Shungopovi and which is well understood by other villages as being their mother village, because it was here that the Bear Clan, the first inhabitants of this land, established their homes, now meet our traditional obligations and present to you, the Indian Claims Commission, the traditional claim of the Hopi Indian People.
>
> Always vital to us is the subject of our land. In times far back before your history we were taught truthful and peaceful living, which remains with us in the traditional life way of the Hopi people. We could not remain here in selfish tenant. In our traditional life we are strong against selfishness and tyranny, and are to be governed in our traditional way so we might have prosperity, happiness, honor and peace, not only for ourselves, but for all people including our white brothers.
>
> Many times we have talked with officials of the Unites States Government on the matter of our land. In April of 1939 we presented a map of our land to the Commissioner of Indian Affairs but have not received acknowledgment of our claim. W have given much work and thought to come to some understanding of what you call law and legal rights. We have tried to see where the law of the United States Government and the law of the Spanish Government, the first white people to come among us, joined. In this effort we have failed to find where you gave us any legal way or rights or title to the land which was ours from times long before you came among us.
>
> Thus realizing that inasmuch as you have not given us legal entrance to the problem we must humbly and with deepest thought and sincerity present our claim to the Hopi land (Tusqua) as it is fixed by our traditional life, and which we must use in our traditional way in carrying out our traditional practices and regulations.
>
> In the beginning, according to our faith, the people were segregated in groups or bands. Moving in the direction of the sunrise, people established themselves in many different places along the journey. But time after time and year after year they persisted in moving on until the first group arrived and settled in the place called Shungopovi. These first people were the Hon-wungwa or Bear Clan. Many people were advanced along their

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journey and may were waiting to learn that their leader had made his permanent home. Those who were waiting left their homes to journey to this place and the ruins of these homes remain today to mark their places.

Time after time the clans or bands of people arrived in the vicinity of Shungopovi and appeared before their leader with the emblems of the authority to remain here. Those they delivered faithfully under oath to their leader. Upon acceptance they were assigned lands for their use. And the assignment of land was determined by the wise and honest judgment of the leader, who was governed by the needs of his people and yet in whose sight all human beings were brothers and sisters. Today, as in the beginning, it is the duty of our leader to govern the land and to determine its boundaries and the rightful use for the continuous needs of the Hopi people.

THE LAND AND ITS PURPOSE

The Hopi Tusqua (land) is our love and will always be, and it is the land upon which our leader fixes and tells the dates for our religious life. Our land, our religion, and our life are one, and our leader, with humbleness, understanding and determination, performs his duty to us by keeping them as one and thus insuring prosperity and security for the people.

1. It is from the land that each true Hopi gathers the rocks, the plants, the different woods, roots, and his life, and each in the authority of his rightful obligation brings to our ceremonies proof of our ties to this land. Our footprints mark well the trails to these sacred places where each year we go in performance of our duties.

2. It is upon this land that we have hunted and were assured of right to game such as deer, elk, antelope, buffalo, rabbit, turkey. It is here that we captured the eagle, the hawk, and such birds whose feathers belong to our ceremonies.

3. It is upon this land that we made trails to our salt supply.

4. It is over this land that many people have come seeking places for settlement, and finding Shungopovi established, asked our leader for permission to settle in this area. All the clan groups named their contributions to our welfare and upon acceptance by our leader were given designated lands for their livelihood and for their eagle hunting, according to the directions from which they came.

5. It is from this land that we obtained the timbers and stone for our houses and kivas.

6. It is here on this land that we are bringing up our younger generation and through preserving the ceremonies are teaching them proper human behavior and strength of character to make them true citizens among all people.

7. It is upon this land that we wish to live in peace and harmony with our friends and with our neighbors.

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We realize that within the area of the Hopi land claim there are towns and villages of other people. It is not our intention to bring disturbance to the people of these places, for our way requires us to conduct our lives in friendship and peace, without anger, without greed, without wickedness of any kind among ourselves or in our association with any people; and in turn to have guaranteed that there will be no disturbance to us in the carrying out of our traditional life.

Although we are small in numbers, scarce in money and without wide knowledge of your ways and your laws, with humble hearts but strong determination we state the traditional claims of the Hopi people, who are joined as one on this question of land through their commitments to our leader and his assignment of land for their use in fulfilling their obligations and maintaining their life. Our authority to present the claim is in the traditional organization of the Hopi people. By custom long established and observed it is known to all true Hopi that authority and responsibility for the security of the land belongs to their leader, and all individuals, groups, clans, villages, in return for the land assigned to them for use are obligated to support this authority. And none, whether through self-will, ignorance, or through any other means, are free to take authority over the land into their hands. We are aware that through ignorance of our ways certain Hoipi individuals, groups and villages have been encouraged in directions in opposition to the traditional government of the Hopi people, and that they may take it upon themselves to act in respect to this land claim of the Hopi people. It is our responsibility to point out this situation, not in anger, not in ill-will, but only to have it clear that we alone are authorized by the traditions of the Hopi people to represent the people on this matter of the Hopi Tusqua (land).

In the accompanying map we have described that area which is by long tradition, use and occupancy, the land of the Hopi. At the present time and for some years we have been forced from these boundaries inward and it has been only with difficult effort and strong faith in our way of life that we have managed to survive. Our petition to you is for full restoration of the land to us and the freedom to govern its use. We cannot, by our tradition, accept coins or money for this land, but must persist in our prayers and words for repossession of the land itself, to preserve the Hopi life.

Our claim—based upon our occupation and use in the conduct of our traditional life under the traditional order of the Hopi people joined as one through long established custom, and through agreements whereby all clans are pledged to their traditional leader and in turn are supported by their leader—is for our rights to the full use of our resources, our ceremonial shrines and hunting areas.

Through many dark hours we have come to this time and have lived through the times of anger, confusion, ignorance, fear and misunderstanding, supported by the strength of our traditional life, and it is our confidence that you in the spirit of justice and honor will recognize this traditional claim of the Hopi people, that we may live together in peace with one another.

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Boundary Marks of Hopi Tusqua (Land)

1. Sak wai vai yu (Chevelon Cliffs)[33]

2. Honapa (west of Sedona)[34]

3. Tusak choma (Bill Williams Mountain)[35]

4. & 5. Po ta ve taka (Point Sublime, Grand Canyon, to junction of Colorado River and Escalante River)
Palungoihoya[36]

6. Tukuk navi (Navajo Mountain)[37]

7. & 8. Ky westima (east of Keet Seel and Betatakin)[38]

9. Nei ya vu walah (Loloma Point)[39]

10. Nah mee to ka (Lupton - mouth of canyon)[40]

11. Tsi mun tu qui (Woodruff Butte)[41]

---

[33] Sakwavayu ('blue river') generally refers to Clear Creek and Chevelon Creek; the spot marked #1 on the accompanying map is at the head of Chevelon Creek.

[34] Hòonawpa ('bear spring'), south of Bill Williams Mountain.

[35] Tusaqtsomo ('grass mound'), Bill Williams Mountain.

[36] Potavetaqa ('migration spiral petroglyph place'), at the head of Kòoninhahawpi ('descent trail to the Havasupai') on the south rim of the Grand Canyon; Palöngawhoya ('Little War Twin') is the name of a particular rock formation at the confluence of the Escalante and Colorado Rivers.

[37] Toko'navi ('dark on top place'), Navajo Mountain in general, and a particular village ruin in the area.

[38] Kawestima (untranslated), encompassing old villages in the Tsegi Canyon area in Navajo National Monument.

[39] Nayavuwalsa ('clay gaps'), a point on the north rim of Black Mesa, to the northwest of Lolomai Point.

[40] Namituyqa ('bluffs facing each other'), the mouth of a canyon near Lupton on the Arizona-New Mexico border.

[41] Tsimontukwi ('jimson weed butte'), Woodruff Butte.

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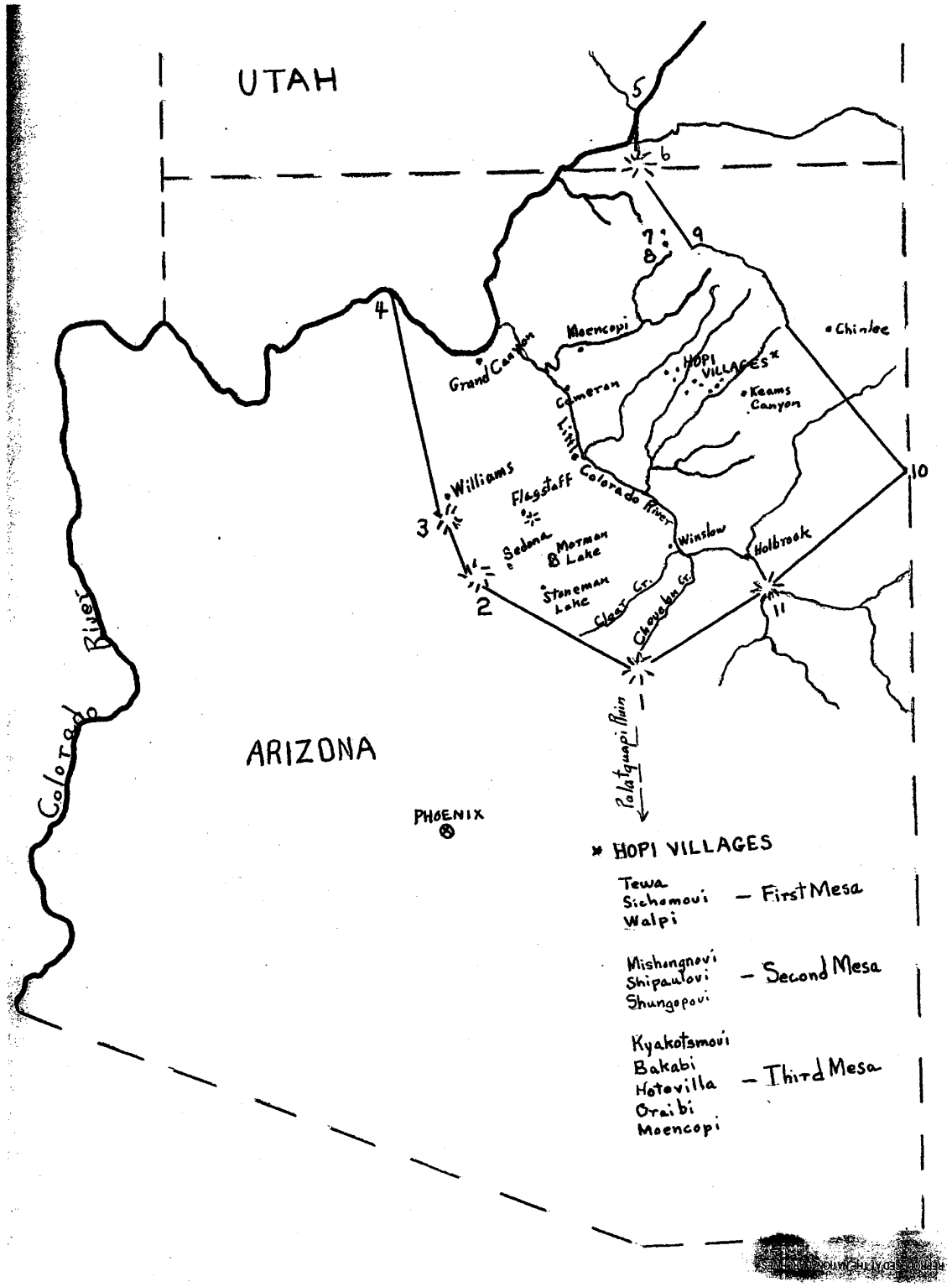

Map 3. Hopi aboriginal claim filed with the Docket 210 Petition

[Signed]

Clark Talahaftewa (Thumbprint)	Kikmongwi Bear Clan	Sakwa len mongwi (Blue Flute Society)
Dick McLean Quamavama (Signed Dick McLean Quamavama)	Katcin mongwi Katcina-Parrot Clan	Dow mongwi (Singers Society)
Franklin Coochyestewa (Thumbprint)	Sun Clan	Kwan mongwi (One Horn Society)
Viets Lomahaftewa (Signed Viets Lomahaftewa)	Water Clan	Al mongwi (Two Horn Society)
Ralph Selina (Signed Ralph Selina)	Corn Clan	Wuwucim mongwi (Wuwucim Society)
Otis Polelonema (Signed Oits Polelonema)	Snow Clan	Mas len mongwi (Grey Flute Society)
Louis Tewanima (Thumbprint)	Rope Clan	Tchuf mongwi (Antelope Society)
Wadsworth Nuvangoitewa (Thumbprint)	Sunforehead Clan	Chu mongwi (Snake Society)
Andrew Hermequaftewa (Thumbprint)	Bluebird Clan	Advisor

... Witness Dow Carnal, Superintendent, Hopi Indian Agency

Witness John Connelly, Teacher, Shungopovi Day School

(Docket 210 Petition 8-1-1951)

Ongoing Dissent

Ever since Boyden's first visits to Hopi, there was disagreement among the Hopi villages as to whether to proceed on the claim, or whether Hopi land interests should be pursued through the U.S. justice system. After Dockets 196 and 210 had been filed, some Hopi groups continued to press for the traditional land claim. On balance, while Boyden was certainly an active player

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in Hopi political discourse, the record show that conflict among Hopis on these issues was a matter of genuine disagreements. Discussions at several meetings from 1951-1955—especially Hotevilla—indicate that dissent was not the result of lack of understanding of the intent of the Indian Claims Commission Act, but disagreement with its premises.

There was strong and continuing support for Boyden and his pursuit of the claim, as well as his work under the general contract, by traditional leaders and their spokesmen at First Mesa. A meeting held at Hotevilla in 1953 convened leaders, both "traditional" and "progressive," from several villages to discuss the questions raised by Docket 196. This was one of the rare occasions on which leaders of opposing factions gathered together to speak their minds to each other. Unfortunately, only rough handwritten notes of the minutes of that meeting appear to survive. It was held on March 18, 1953, beginning in mid-morning. The following leaders and spokesmen were present:

> Hotevilla: Dan Katchongva, "chief"; Thomas Banyacya, interpreter;
> John Boyden, attorney, Karl Johnson, interpreter;
> "Polacca group": Ned [Nayatewa, Kikmongwi of Walpi], "etc."
> "Kykotsmovi group": Roger Q [Quochetewa], Sam Jenkins, "etc."
> Moencopi: Roger Honani
> Superintendent Carnal
> Mishongnovi: Starlie [Lomayaktewa]
> Shungopavi: Andrew Hermequaftewa, Dick M. [MacLean Quamavehema]
> (Hotevilla meeting 3-18-1953)

Both those in favor and those opposed to the Claim argued vigorously for their positions, within their respective understandings of Hopi tradition. In response to a question from David Monongye of Hotevilla about First Mesa traditional views of the land question, Ned Nayatewa acknowledged differences with the traditions of other villages on Second and Third Mesas. First Mesa tradition, he noted, "is to work with white brother, as land is being taken from us. I wrote to Mr. Boyden myself, asking his help....He is not here to take but to protect." At this, Dan

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Katchongva complained, cited an "Oraibi tradition" that First Mesa would be first to be "yes village, cry for something." Andrew Hermequaftewa and Dick MacLean indicated that Shungopavi tradition could not support fighting for the land in court or before the Claims Commission. On the question of who held genuine authority among those at the meeting to speak as a traditional leader, Roger Honahni of Upper Moenkopi pointed out (in defending him against Dan Katchongva's attack) that Ned Nayatewa of Walpi (First Mesa) was in fact the only ordained Kikmongwi present. And thus the argument went, without resolution, but with spirited defenses of how the positions of each opposing group were in keeping with their respective Hopi traditions.

With continuing controversy over recognition of the Tribal Council, Commissioner of Indian Affairs Emmons appointed a team headed by his Assistant Thomas Reid to hold extensive meetings at the Hopi villages from July 15-30, 1955. Running to more than 300 pages, the resultant "Hopi Hearings" is the fullest document of the period on record, representing the views of different villages and factions. It includes several references to the traditional claim. At Shungopavi, Viets Lomaheftewa, a signatory to the Docket 210 petition and active in presenting the claim continuously since 1930, stated:

> We Hopis have always been wanting something, asking for it. We have always been wanting to get the land back which rightfully belongs to us, and I have drawn up and brought this map with me [same map as in Docket 210]. A copy of it is on file in Washington.... This is what we Hopis ant. We want to have this land given back to us for our people, and that is the desire of my people and my leaders so that for once this is given back to us we will be using it for our children and for raising many things so that we will not have to lose this land.... We, the Hopi leaders, are not the ones approving many of these new policies. It is this younger group that have approved them and hired this John S. Boyden to work on this land problem for the Hopi people. I did not approve of him and this village refused him as being the one to work on this land for the Hopis and he got peeved about it and I later learned that he was only working get this District 6 and that he is planning to sell the rest of the land for money (Hopi Hearings 1955:93).

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The differences did not go away in the 1960's or 1970's. In 1974, Traditionalist leaders rejected partitionment of the 1882 Executive Order Reservation then under consideration in Congress and reiterated the traditional claim:

> We will not accept these solutions to the Hopi land problem.... We have never entered into a treaty with the United States Government and thus we have full rights to our whole Traditional land area.....
>
> We shall continue to press for recognition of our Hopi Traditional land area which is beyond the 1882 Executive Order Hopi reservation. We propose that Congress grant us a simple form of recognition. We will not disturb the tranquility of those people who now live there, nor create any disturbance. In fact, it is our desire that they live there in peace and harmony with all people and with our mother earth. We only ask that this land area be recognized as being the Traditional Land Area of the Hopi People. Such a simple Act of Congress will enable us to freely visit our sacred religious shrines within the Hopi Traditional land area. We will be able to freely visit our Eagle Hunting Grounds and pray in the sacred mountains of Flagstaff, Arizona. We will be able to freely visit the salt mines within the area....
>
> In conclusion, it is our unanimous opinion, made in council, that we, the Hopi Traditional Chiefs and religious leaders, will be making a very bad mistake if we accept these two bills now proposed in Congress. Instead, we propose...that Congress grant a simple recognition of the Hopi Traditional Land Area and grant a much greater land area to the Moencopi Hopi people in agreement with us, the leaders of the Hopi people. These proposals seem reasonable to us, a people who have lived within this Country for generations and generations and possibly before the time of Christ (Johnson 1-19-1974).

While differences among Hopi viewpoints have occasionally been rancorous, it should be acknowledged that each party was acting for what it felt represented the best interests of the Hopi people. Within the context and under the pressure of the U.S. Government's impositions of political and legal control, they simply disagreed on methods. And neither were any of the factional alignments set in stone. Over the years, some allegiances shifted. Karl Johnson, a presence on the Tribal Council in the early 1950's and Chairman in 1956, allied himself with the Traditionalist group in the mid-1960's. Viets Lomaheftewa and Peter Nuvamsa, long-term advocates of Shungopavi's position, both gave testimony in 1960 during the combined research

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by the Hopi Agency for *Healing v. Jones* and Docket 196, and both testified for the Hopi Tribe at Congressional hearings on the 1974 Land Settlement Act.

Clearly there were differences about method among the traditional villages too. While Shungopavi continued to re-assert its Docket 210 claim into 1957, Hotevilla's leadership was opposed to making any claims. As Dan Katchongva put it in 1956:

> Many of these things have been put upon us without explanation, such as this Indian Reorganization Act which was passed without our knowledge. After that things began to come upon us so fast that many of us do not fully understand them, so without our consent this thing was put upon us. Following that we were told that we must put in a land claim for the land that we once had for our use. We were told other Indian people filed their claims and received a lot of money for it, but those things we know from our teaching are intended and designed to take our land and resources away from us by the white man and to destroy our ancient form of government and our religion and our way of very life; therefore as Hopis still following this life pattern, we will never file in any claim for this land to anyone. It is already ours, and we are occupying it, yet because of this new policy of the government they have cut up our land into many area districts and given us a very small area. We were told by our forefathers that whenever we make or file in the claim in this manner we will only receive just a small area. Knowing this, we have never turned away from it and never filed in a claim but when this council group started, without the traditional leaders' consent, they started to work on this program that comes from the government (Meeting at Hotevilla 3-6-1956:7).

These arguments from a half-century ago remain current in Hopi viewpoints on the Tribal Council's value and legitimacy to speak for the Hopi as a whole, and on whether to accept the $5 million Claims Settlement.[42] The arguments are not likely to be settled any time soon. But it is important to point out here that the same questions asked today have accompanied Docket 196 from the beginning: there were both vigorous Hopi proponents of the Claim, and vigorous Hopi opponents. While Boyden very much wanted to represent the Hopis as a whole, and sought to persuade all the villages to let him do so, the historical record is clear that the Claim as filed was in accord with the strong feelings of a significant number of Hopis, but was strongly opposed by

[42] At ca. $43 million, the Settlement fund has now grown to almost ten times its value in 1977 when first appropriated by Congress.

an equally significant number. And though Boyden may have manipulated Hopi sentiments from time to time, neither these conflicts, nor the Claim itself, were manufactured by the attorney.

Questions on the Claims and the Council: a Newspaperman's Efforts and Boyden's Response

In effect, the Docket 210 petition challenged Docket 196 and the authority of those who presented it. This was certainly Platt Cline's interpretation:

> Cline further stated to the commissioner [of Indian Affairs] that the traditional villages had signed a claim asking for land and not for money. He stated that they knew that such a claim could not be granted and expected the court to disallow it; and further that it was intended only as a petition to represent the views of the Hopi traditional people with respect to their lands. He stated that they were against the filing of any petition as I had done for money, upon the ground that it may be an acquiescence of the government's taking of the lands if they asked pay for the lands taken (Boyden 8-28-1952).

Docket 210 also challenged the premises of the Indian Claims Commission, since its call for land restoration was cast consciously against the idea of accepting "coins or money" for land, and its language commented specifically on the absence of legal recourse in existing U.S. law.

Platt Cline, lifelong Flagstaff resident and editor of the *Arizona Daily Sun*, had ongoing friendships with some Hopis, especially Dan Katchongva at Hotevilla (Cline, personal communication to Whiteley, 1983). In March 1952, Cline wrote to Boyden, concerning both Hopi Claims (Dockets 196 and 210), and questioning the representative status of the Tribal Council:

> Could you clarify this matter for me, advising me just what the situation is now, what claim has been filed, and provide me with a copy of it; just how the Hopis have agreed to pay for legal services in this regard; and whether or not the so-called tribal council has acted for and on behalf of the tribe in this matter (Cline 3-29-1952).

Boyden replied, that:

> Two Hopi claims have been filed, one by me on behalf of the Tribe as a whole and the individual villages of First Mesa (Consolidated Villages of Walpi, Shitchumovi, and Tewa), Mishongnovi, Sipaulavi, Shungopavi, Oraibi, Kyakotsmovi, Bakabi, Hotevilla

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> and Moenkopi. Another claim was filed by some of the Indians themselves from the Second Mesa....
>
> I have contracts signed by all of the Villages named in my Petition and by the Tribal Council authorizing me to prosecute the claim and providing that any payment for legal services will be determined by the Commissioner of Indian Affairs, if it is settled out of Court, or by the Court itself, if the case is tried.... My authority is not based upon the contract with the Tribal Council alone, but is based upon approval by a majority of the Hopi people, both as to population and number of Villages in addition to the action of the Tribal Council (Boyden 4-14-1952).

Whether intentionally misleading or not, Boyden's assertion that he had contracts with "all of the Villages named in my Petition" was false. Cline followed up:

> I assume you are aware that the Commissioner has not yet recognized the Hopi Tribal Council. I have a letter from the Commissioner, dated April 8, 1952, stating that "we have not as yet formally recognized the Tribal Council."
>
> So of course the Council cannot act on behalf of the Hopi people.
>
> After receiving your letter [of April 14th], I made a trip out to the Hopi country and consulted with a large number of my friends out there. I have made two additional trips out there since, again consulting with my friends, with many leaders, and other Hopis. I believe you are mistaken in stating that you have the approval of a majority of the Hopi people on your contract. It may be that you have at First Mesa, but the leaders at Shungopovi and Hotevilla assure me that they have not entered into a contract with you, and I believe there is some doubt about some of the other villages.
>
> Certainly I have no quarrel with you at all, but as a friend of the Hopi people, and one who has some knowledge of their problems and their business, I feel obligated to advise you of these facts.... (Cline 5-11-1952).

Cline proceeded to ask for a copy of Boyden's contract:

> Certainly a valid contract would be fundamental in preparing to pursue a claim on behalf of the Hopi people.
>
> I am sure you realize that the Hopis do not actually constitute a tribe, and that each village is independent and autonomous (Cline 5-11-1952).

In reply, Boyden proposed meeting at Keam's Canyon the following week, and acknowledged that his previous letter had been misleading:

> ...in that it stated I had a written contract signed by all of the Villages named in the Petition.... I do not wish to imply that I have a contract with Mishongnovi, Shungopavi, Hotevilla, Oraibi, or Lower Moencopi. All of the other villages were signers to the contract....My statement should have been: I have a contract signed by all of the Villages named in the Contract, not in the Petition (Boyden 6-14-1952).

But he defended his position in any event, and emphasized that:

> Under the Indian Claims Commission Act I do have authority to represent all of the Villages, both by law and by approval of the Contract by the Commissioner of Indian Affairs....
>
> I see from your letter that there are some of the facts with which you are not acquainted. The question as to my authority to represent all of the Hopi Villages is rather well settled, and I will be happy to explain that situation to you.
>
> Since your last letter, the Commissioner of Indian Affairs has on May 29, 1952, approved my general contract for and on behalf of the Hopi people. I will bring both of my contracts with me so that you may peruse them to your own satisfaction (Boyden 6-14-1952).

Boyden and Cline in fact met at Tuba City on June 22, 1952. Boyden reported "a rather favorable and amicable interview:"

> I took considerable pains to go over the program involving reconsideration of the Solicitor's opinion, agreement with the Navajos on a practical basis, to be followed by the creation of a Hopi reservation by legislative enactment.... I told him he could get a copy of my contract with the Indians from the Superintendent at Keams Canyon....
>
> Concluding the conversation he stated that he had been very happy to meet me and to clear up many of the misunderstandings, and assure me that my views coincided with his, and that under the circumstances he felt that I was doing the right thing for the Hopi people (Boyden 6-22-1952).

Boyden's view of their meeting contrasted sharply with Cline's continuing actions. Cline wrote to the Commissioner of Indian Affairs and U.S. Senators, protesting that the Tribal Council was not the legitimate representative of the Hopi people, and questioning Boyden's Claims and General contracts. On August 28th, the Secretary of the Interior queried the validity of Boyden's Claims and General contracts "on the ground that the so-called Hopi Tribal Council had no authority to act for the tribe," and requested his response (Boyden 9-17-1952). In reply,

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Boyden laid out the same reasoning he had presented to Cline. The "present tribal council," he said, was in conformity with the Hopi Tribal Constitution, and the Secretary had never withdrawn approval for that constitution. But whether or not this proved persuasive, Boyden also used the argument that he had contracts with a majority of individual villages:

> I have not heretofore cared to raise the legal question herein presented as to the authority of the tribal council for diplomatic and political reasons. It was my candid opinion that if I could work with the whole tribe, much more could be accomplished. Therefore, in an abundance of caution I attended meetings called by the Superintendent in each of the thirteen Hopi villages. The meetings were legally called and fairly conducted under the supervision off the superintendent. Seven of the thirteen villages individually endorsed the general contract and became parties to it (Boyden 9-17-1952).

Again, Boyden's observed tendency to lax counting of Hopi villages, and to elide the Claims and General Contracts, is evident here. Which were the "13" villages, in "each" of which he "attended meetings"? As we have seen above, he did hold village meetings in May, 1951, to discuss the Claims contract: at First Mesa, Sipaulovi, Mishongnovi, Kyakotsmovi, Hotevilla, Upper Moenkopi, and Lower Moenkopi. It is not evident from the record examined that he held meetings at this stage with Oraibi, Shungopavi, or Bakabi. And his meetings on the General Counsel contract in early September, 1951, appear to have only been held at First Mesa, Sipaulovi, Kyakotsmovi, and Bakabi.[43]

The Tribal Constitution recognized nine "villages," as follows:

> The Hopi Tribe is a union of self-governing villages sharing common interests and working for the common welfare of all. It consists of the following recognized villages:
>
> First Mesa (consolidated villages of Walpi, Shitchumovi and Tewa)
> Mishongnovi
> Sipaulavi
> Shungopavi
> Oraibi
> Kyakotsmovi

[43] Again, it may be that the record of a meeting at Upper Moenkopi is simply missing from the record. Or it is possible that since Roger Honahni (along with Andrew Seechoma of First Mesa) signed the General Contract for the Tribal Council, Boyden treated this as also representing Upper Moenkopi's approval.

Bakabi
Hotevilla
Moenkopi
(Constitution and By-Laws of the Hopi Tribe 1936: Article III—Organization).

Additionally, the Constitution recognized that Moenkopi village was divided into Lower and Upper Districts, and specified that each should choose its own Council representative, according to its own separate standards (Constitution and By-Laws of the Hopi Tribe, 1936: Article IV—The Tribal Council, Section 5). Thus according to different counting methods, the Constitution might be variously read to recognize: nine villages (with First Mesa counted as one, and Moenkopi counted as one); ten villages (First Mesa as one, Moenkopi as two); eleven villages (First Mesa as three, Moenkopi as one); or twelve villages (First Mesa as three, Moenkopi as two). Under none of these scenarios were there 13 villages. And Boyden never appears to have held separate meetings with the three villages of First Mesa: they were consistently treated as a single entity.

As noted, Boyden had five separate Claims contracts with individual villages (First Mesa, Sipaulavi, Kyakotsmovi, Upper Moenkopi, and Bakabi) as well as one with the (unrecognized) Tribal Council. According to the list in Article III of the Constitution, he thus had approvals from 4 villages and one Moenkopi district: 4.5 out of nine, or exactly fifty percent. With Moenkopi counted as two villages, he could claim five villages out of ten. If he counted First Mesa as three villages, this went against the listing in the Constitution, and contradicted the fact that he had met with them as a single entity. So his "majority of the villages" is doubtful on these grounds.

However, in the passage quoted from Boyden's letter to the Secretary of Interior on September 17, 1952, he was in fact discussing his General contract, rather than his Claims contract (the subject in earlier paragraphs of the letter):

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> Under date of September 1, 1951, I entered into a general counsel contract with the Hopi tribe organized pursuant to the Indian Reorganization Act of June 18, 1934, and with the villages named therein, to wit: Consolidated Villages of Walpi, Shitchumovi, and Tewa of the First Mesa, Sipaulavi, Bakabi, Kyakotsmovi, and Upper Moenkopi, all in the State of Arizona (Boyden 9-17-1952:2).

Again, his language in this listing is ambiguous to say the least. If "therein" refers to the tribe as recognized under the Indian Reorganization Act, he has omitted five villages listed (or implied, in the case of Lower Moenkopi) in the Tribal Constitution. "Therein" must therefore refer to "the general counsel contract"—though the ambiguity may be deliberate. The present author has not located separate contracts with the "seven" (or rather, 4.5) "villages" for Boyden's General contract. I believe there may in fact have been only one such contract, which named the Hopi Tribal Council and the villages from which he had obtained positive resolutions in the September meetings on the General contract: namely (according to the listing in the Tribal Constitution), First Mesa, Sipaulavi, Kyakotsmovi, Bakabi, and Upper Moenkopi. That would explain the singular 'contract' in the correspondence around this issue, and the Bureau's willingness to emphasize the 'seven villages' on the contract:

> There is enclosed the original of an attorney contract between the organized Hopi Tribe and *seven separate Hopi Villages* and John S. Boyden for general counsel services (Dwight 6-9-1952, emphasis added).

That "The Consolidated Villages of First Mesa" could be recognized separately as three villages for this purpose was not in conformity with the Tribal Constitution. If my inference is correct, then Boyden's listing of the villages he purported to represent is inadequate, since the Tribal Constitution should entail that any contract signed with a (recognized) Tribal Council would also cover Mishongnovi, Shungopavi, Oraibi, Hotevilla, and Lower Moenkopi. Either Boyden had a legitimate Tribal Council-approved General contract—thus representing all the villages, at least formally under the Constitution—or he had individual contracts with 4.5

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villages. But is not apparent how he could claim to have both. And that contradiction persisted in the B.I.A. Chief Counsel Sigler's approval of the General contract on May 29, 1952 (above), which explicitly did not imply recognition of the Tribal Council. The same contradiction thus echoes back upon the Claims contract. If the Tribal Council was not recognized by the Department of the Interior as the legitimate representative of the Hopi tribe, how was Boyden's Claims contract with the Tribal Council legitimate? As he stated (above) in his letter of July 13, 1951, to Superintendent Carnal, he had to have an approved contract signed by the Commissioner of Indian Affairs in order to file the claim before the ICC. So the question remains as to whether or not the Secretary of the Interior acted lawfully in recognizing either Boyden's Claims or his General Counsel contracts with the Hopi Tribal Council, if the Department and the Commissioner of Indian Affairs did not recognize the Tribal Council as the legally constituted representative of the Hopi people under the Tribal Constitution. If these questions are sound, it might be that Boyden's only legitimate contracts—both Claims and General Counsel—were with the 4.5 out of nine individual villages. It is not apparent to the present author how his 1951 Tribal Council contracts could be valid if the 1951 Tribal Council was not valid. And if that argument holds water, the Docket 196 claim as filed for all the villages named in the Petition (i.e., all those listed in the Tribal Constitution) may not have been lawful.

I conclude that, in his letter to the Secretary of the Interior on September 17, 1952, while it is possible Mr. Boyden was himself confused about numbers, it is more likely that he sought to confound his readers in the Department of the Interior (few of whom would have been familiar with Hopi Constitutional niceties), by using inconsistent standards for counting Hopi villages. In counting a majority of the Hopi *people* as having supported him, Boyden argued for:

> The assumption that under a democratic form of government where elections are duly held, the members of all villages are bound by the action taken at such meetings.

> Therefore, the villages approving of the contract and their entire population must be assumed to have approved that contract. Conversely, the villages failing to take action or taking action against the approval the contract, and their entire population, must be assumed to disapprove the contract. It is my contention that my contract has the approval of the Hopi Tribal Council, a majority of the Hopi people, both as to population and number of villages (Boyden 9-17-1952:3)

Boyden ended with the request that the Interior Secretary re-approve his General contract:

> ...some Hopi tribal members, aided, abetted and even provoked by non-Indian people, have an avowed purpose of minority obstruction to any collective action assumed on behalf of the Hopi people. I am convinced that there are many problems that cannot be solved by the Hopi villages on an individual basis. My present endeavors under the general contract, looking forward to restoring Hopi rights not recognized by the Department, effecting an amicable settlement with the Navajo Tribe as to territorial boundaries, and ultimately establishing by legislation a Hopi reservation which has never gone beyond the status of an Executive Order, have met with the approval of both the progressive and traditional Hopi people (Boyden 9-17-1952).

Responding to Cline's concerns, the Interior Department supposedly conducted an investigation, but by December had not reached a conclusion. Prodded by Boyden's "request for action" on December 8th (Boyden 2-10-1953), the Department replied that it "has found no sufficient basis for disturbing the action of the Commissioner and Acting Commissioner in approving the contracts" (Wolfsohn 12-12-1952). For now at least, Boyden was in the clear.

Cline, however, would not go away, and continued to press for the interests of the traditional villages. In March, 1953, the *Sun* ran the following article:

> Hotevilla – Traditional leaders and family heads of this Hopi Indian village 120 miles northeast of Flagstaff, in a letter to the Secretary of the Interior Douglas McKay, protested that they have never had a proper chance to express their views on Indian Bureau plans and policies.
>
> "We speak not only for the people of Hotevilla, but for all other Hopi Villages," the letter said. "Especially do we speak for the traditionally established villages who have to this day never been given opportunity to explain our stand on many matters vital to us."

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This letter was signed by more than 120 residents of the little Indian village.[44]

"The general feeling at a recent large meeting [of] representatives of most of the Hopi villages is that most of the confusion, misunderstandings, divisions and uneasiness among our people are direct result of the work of the so-called Hopi Tribal Council," the letter says.

"The majority of the traditionally established villages have never recognized or accepted this council to be representatives of the Hopi tribe because of our own religious beliefs and traditions which we are still following."

"Our recognized traditional headmen have never given this so-called Hopi Tribal Council authority to speak for them for they know they are only working for the Indian Bureau because most of them are on government jobs. It is known fact that the Superintendent at Keams Canyon Agency is doing all he can to keep this so-called Hopi Tribal Council going by appointing who is to be a governor at certain village without the consent of the people.".....

"One of the most serious troubles they [the Tribal Council] brought upon us when they hire a lawyer from Salt Lake City, without our knowledge or consent. Before we know anything about it John S. Boyden, an attorney, whom they have hired, came upon our villages with written contracts expecting us to sign it overnight. Some signed with the strong pressure from the Hopi government employees and others. The people had no chance to study the contracts freely."

"When Boyden came to each village with his contracts the following villages rejected him and refused to sign his contracts: Lower Moencopi, Hotevilla, Oraibi, Shungopavy and Mishongnovi. Other villages that signed the contracts did not have much chance to study it and because of the great pressure a few people got together signed them.

Promises of gas and oil developments, the land that he will get for the Hopi people and later on the money he will get for the tribe are great inducement for the younger people and they fall for it and signed his contracts" (*Arizona Daily Sun* 3-25-1953).

Legitimizing the Tribal Council

In July 1953, the Commissioner offered *provisional* recognition of the Tribal Council pending the tribe's or villages' proposal of an alternative system:

[44] Although only from one village, the signatures thus exceeded in number the total of all votes taken in individual village meetings from May-July, 1951, in favor of Boyden's Claims contract (see above). That vote total was 95, distributed as follows: First Mesa 36; Shipaulovi 9; Kykotsmovi 21; Upper Moenkopi 12; Bacavi 17.

> We will recognize the Hopi Council as the governing body of the tribe as a whole until such time as that body is modified or changed through the wishes of a majority of the Hopi people from the different villages (Greenwood 7-17-1953).

Acting Commissioner Greenwood in effect confirmed Boyden's prediction to Area Director Harper (reported in Harper 1-7-1952) that Tribal Council recognition would flow from the Bureau's approval of his contracts: "[T]he Hopi Tribal Council has been recognized to a certain degree as evidenced by the approval of this office of attorney contracts with John S. Boyden" (Greenwood 7-17-1953).

In practice, however, lack of support among the villages continued to make it doubtful that the Council was a legitimate representative entity. In December, 1953, Platt Cline published another article in the *Arizona Daily Sun*, questioning the Tribal Council and the pursuit of oil leases:

> During the past two or three years the SUN has repeatedly called attention to the fact that the Indian Bureau was condoning an intolerable and illegal situation on the Hopi Reservation.
>
> We refer to the Indian Bureau-dominated and manipulated, so-called Hopi "tribal council."
>
> Members of this group, most of whom were stooges for the Agency superintendent at Keams Canyon, were on federal payrolls in various capacities. This, as the SUN has revealed, is in clear violation of the federal Hatch act which forbids political activity by federal employes.
>
> When Commissioner Emmons was in Arizona a few months ago, the SUN again called attention to this situation. Copies of the SUN editorial were sent to Emmons and various members of Congress.
>
> The Bureau, no doubt much against its desires, was forced to notify its stooges in the Hopi country that those on the federal payroll no longer could serve on the bureau's "tribal council."
>
> Now the so-called council is casting about seeking some tame, non-federally employed Indians to do the dirty work by serving as "elected" members for that body.

> What's back of all this? Many things, including the avowed policy of the Bureau to disrupt and destroy the REAL Hopi government, the traditional leaders and their organizations. And also, and certainly not least, the fact that somebody wants oil leases in the Hopi country—and the traditional, the REAL Hopi leaders, say no, which of course, should be their privilege.
>
> Dealings of the Bureau with most Indian tribes is a long story of mistreatment, betrayal, unfulfilled promises and general abuse. The Hopis have suffered more than most Indian groups.... (*Arizona Daily Sun* 12-21-1953).

Modern readers do not need to accept Cline's inflated rhetoric to recognize that his representation of events on the reservation had some basis in truth.

In late 1953, Superintendent Carnal, following a suggestion by Windowrock Area Director Allan Harper, expressed approval for a referendum to try to resolve the Tribal Council issue:

> I have no objection to a referendum being conducted on the Hopi Constitution and By Laws. Since there has been so much dissension among the people about the Council which operates under this document, it would be a way of determining what their real feeling is in regard to the document. If the majority of the people still wanted it to stand as is, we would feel more free to try to strengthen the Council and try to get more villages to accept the idea and certify delegates to serve with the rest of the villages now operating under it (Carnal 12-31-1953).

No referendum occurred, however.

In 1954, Commissioner of Indian Affairs Emmons again indicated a partial recognition of the Tribal Council for "consultation on matters of overall welfare of the Hopi Tribe" (Haverland 2-24-1955, quoting a letter from the Commissioner to Senator Thomas Kuchel of 7-2-1954). In 1955, however, the Commissioner "returned copies of a traffic ordinance that had been submitted by the Hopi Tribal Council for approval under its constitution." He advised Area Director Haverland that "the Hopi Tribal Council is not recognized by the Bureau for purposes such as the enactment of a traffic and motor vehicle code" (Haverland 2-24-1955, quoting letter from the Commissioner to Superintendent Pensoneau of 2-2-1955). Haverland challenged this

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non-recognition as failing to comply with the Hopi Tribe's Constitution and Bylaws. He further pointed out:

> Superintendent Pensoneau has been operating on the basis of the material contained in the July 17, 1953 letter [i.e., by Acting Commissioner Greenwood: see above] to the Window Rock Area Office. He has been working with the Hopi Tribal Council on this basis with the understanding that he should do so until the traditional groups come up with recommendations for a reorganization or change in the present constitutional government that will be supported by a majority of the villages and members of the Hopi Tribe. He has been carefully informing the traditionalists of all council actions in order that the views of this group may be considered.... The present tribal council, members of which took office December 1, 1954, is made up of nine members representing seven Hopi villages:
>
> Villages represented on the Hopi Tribal Council
>
> First Mesa (Tewa, Sichomovi, Walpi).....4 members
> Second Mesa (Shipaulovi Village).....1 member
> Third Mesa (Kyakotsmovi, Bacabi, Upper Moencopi).....4 members
>
> Villages not represented on the Hopi Tribal Council
>
> Second Mesa (Mishongnovi, Shungopovi)..... entitled 4 members
> Third Mesa (Hotevilla, Oraibi, Lower Moencopi)..... entitled 4 members
>
> The council not only represents a majority in the number of villages and in the number of eligible delegates, but also represents a majority of the tribal population as shown by the following tabulation.... [same 1950 figures as quoted above]
>
> It is our impression that the traditional groups are not inclined either to participate in the present government of the tribe or to suggest organizational and constitutional changes therein. This condition means that the Bureau will probably be faced for some time in the future with the necessity of having to work through these tribal representatives who are selected in accordance with the tribal constitution. It is our feeling that it is only through this group that a revision of the tribe's organizational setup can be accomplished. We also believe that to require the Superintendent to change his position at this time will materially delay, if not destroy, the progress that is being made toward reorganization (Haverland 2-24-1955).

Phoenix Area Director Haverland's method of counting a majority of Hopi villages thus followed Boyden's, even though this departed from the listing in the Tribal Constitution.

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Shortly thereafter, in April 1955, Boyden sent Oliver La Farge a copy of his Petition to the Secretary of the Interior for reconsideration of the Solicitor's Opinion on the 1882 Reservation. On La Farge's behalf, a reply was sent by William Zimmerman, Jr., now retired from the Bureau and a member of La Farge's Association on American Indian Affairs:

> Oliver's general reaction to your letter was that...there may be a difference of opinion between you two because he is in doubt as to the legal status of the Hopi Council. He agrees fully with you that the situation is most complicated and must be handled carefully (Zimmerman 4-13-1955).

In short, opinions questioning the legitimacy of the reconstituted Tribal Council were widely shared, and included the author of the Tribal Constitution.

The Department of the Interior's official position through 1955—four years after Docket 196 had been filed—still did not fully recognize the Hopi Tribal Council as the legal representative of all the Hopi people. On December 1, 1955, in a letter to Area Director Haverland, Commissioner Emmons finally granted full recognition to the Tribal Council:

> On the basis of information supplied by you, contained in our files here, and developed by the special committee which held meetings with the Hopi people this past summer, I have concluded that the election which the Hopi Tribe accepted the provisions of the Indian Reorganization Act was regularly held, that the constitution and bylaws were duly adopted and approved by the Secretary of the Interior, and that no valid reason exists to withhold full recognition of the Hopi Tribal Council duly elected pursuant to the tribal constitution so long as the council conducts its business in accordance with the constitution and bylaws. The facts are that seven of the Hopi villages, which are entitled to nine representatives on the tribal council, are observing and abiding by the provisions of the tribal constitution and are selecting representatives to the council, while the five remaining villages, which are entitled to eight members on the council, are not observing the constitution and are not selecting representatives to the tribal council. *The constitution provides that a majority, or nine members, of the council shall constitute a quorum and, therefore, the seven villages which select the nine members have a duly constituted tribal council under the constitution for the purpose of conducting business when all nine members are present.*
>
> ... [T]he limited recognition heretofore given that council [i.e., in July 1953] is hereby enlarged to the full recognition to which any duly constituted tribal governing body is entitled.

> Since the full membership of the council as now constituted is a bare quorum as prescribed by the constitution as a prerequisite for conducting tribal business, *it will be necessary that all nine members be present at any meeting where business is conducted in order that any action taken may be the official action of the tribal governing body* (Emmons 12-1-1955a, emphasis added).

Emmons was correct that the Council had a bare majority of delegates. However, in granting a majority to the villages represented (seven out of twelve), like Boyden since 1951, he did not count the villages as listed in the Constitution: according to that listing, there were still only 4.5 out of nine villages represented.

Emmons informed Senator Barry Goldwater the same day about the decision. He emphasized Hopi rights to reorganize under some other arrangement, and that the Bureau was respectful of the independence of the villages. Apparently, Andrew Hermequaftewa of Shungopavi had proposed holding a referendum to abolish the Tribal Constitution and revoke the vote of 1936 agreeing to the Indian Reorganization Act. In a classic piece of bureaucratic double-speak, Emmons suggested that this was the right of the Hopis, but that it would not disestablish the Tribal Council:

> Recognition of the Hopi Tribal Council in no way precludes the Hopi Tribe from holding a referendum election on the question of whether the tribe wants to remain under the provisions of the Indian Reorganization Act. However, such an election would be only an expression of the views of tribal members and would not accomplish the purpose of removing the tribe from the provisions of the act. The Indian Reorganization Act itself provides no means whereby a tribe, once having voted to accept the act, may vote to revoke that acceptance and, consequently, only amendatory legislation by Congress could accomplish that purpose (Emmons 12-1-1955b).

The quorum issue was crucial: one village could provide the swing vote on whether the Council was legitimate. If Emmons was correct that the Council in 1955 comprised a majority of Hopi villages and delegates, that was no longer true in 1957 when Bacavi refused to send its delegate (O'Harra 2-8-1957). Superintendent O'Harra quickly applied coercive pressure on the Village Governor (an Agency employee) and Bacavi amended its position: the Agency had

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decided it could not operate without a duly constituted Tribal Council. This had been Dan Katchongva's point in 1956:

> This seems to be the practice of these leaders from Washington, using the Indians and telling lies and getting their promotions into higher positions, leaving us with many troubles, and everything has been done in order to get our land and our resources. I want to repeat and remind you and tell you council members that this is what is happening today. Council members tell us they are working for the Hopi people; yet we know this council organization is for the benefit of the Indian Bureau or government, and its aim is to destroy our life and to get control of our land and resources, and they are using this tribal council to reach that aim. There are other villa leaders who are not accepting this policy of the government, and they have never recognized the council as the representative of the Hopi people (Meeting Held at Hotevilla 3-6-1956:10).

The Tribal Council has struggled with questions of representation and establishing a quorum ever since. Until the present time, efforts to change the Tribal Constitution toward a reorganization have not succeeded. The "traditional" villages have often argued that they have a pre-existing system of organization that does not need modification to conform to the needs of the U.S. Government. Withdrawals by villages of their representatives from the Council have occurred repeatedly over the years, especially from First Mesa and Mishongnovi. Each time, the Council loses its quorum and much of its ability to function. In the present, Hotevilla, Oraibi, Lower Moencopi, Shungopavi, and intermittently Mishongnovi—comprising large segments of the on-Reservation population—still refuse to send representatives to the Tribal Council. Recent efforts (2008) by Bacavi to withdraw its representatives would, if successful, mean (as a half-century earlier) that the Council no longer had a quorum.

In short, serious questions remain about the legitimacy of the Docket 196 filing as representing the Hopi Tribe (in its recognized status under the Indian Reorganization Act). The record is clear that there were major disagreements within Hopi society and within the

Department of Interior—about the legitimacy of the Tribal Council, about Attorney Boyden's contracts, and about the nature of the claim.

Relationship of Docket 196 to Healing v. Jones and 1934 Act Reservation Cases

> We have always anticipated that we would endeavor to obtain all the land that it is possible to obtain for the Hopis prior to pressing our claim for money damages (Boyden 1-7-1957b)

Looking back in 1977 on his work on Docket 196 over the previous twenty-six years, John Boyden remarked:

> The services of the attorneys have involved not only the investigation, preparation, and successful settlement of the plaintiff's claims herein, but participation in the legislative process and related litigation to protect the integrity of the Hopi claim (Boyden 4-22-1977:10).

Despite the formal separation of his Claims and General contracts, and the Hopi Tribe's statutorily separate interests pursued under each, in Boyden's mind the Docket 196 Claim and his pursuit of land restoration were inextricably linked:

> The issues in the Healing case were obviously related to the claim of petitioner [the Hopi Tribe] before the [Indian Claims] Commission and Mr. Boyden sought to have trial herein postponed until after determination of the issues in Healing between the Hopi and the Navajo Tribes (Boyden 4-22-1977:13-14).

In 1952, one of the first tasks Boyden pursued under his General contract was to get the Hopi Agency removed from the Navajo Area Office (e.g., Boyden 1-11-1952). He argued that many Hopis felt Windowrock had discriminated against Hopis, and favored Navajos living on the 1882 Reservation. This was in all probability true, but Boyden's conflict with Area Director Harper over recognition of his contracts and of the Tribal Council was another major factor. Boyden succeeded in his aim: by mid-1954, the Hopi Agency was transferred to the Phoenix Area Office (Hopi Tribal Council 7-14-1954). During this same period, in July 1954, Boyden was already preparing for litigation on land issues between Hopi and Navajo. Although he referred to this under the term "claims," the envisioned litigation was under his General Contract. Arguing for renewal of the three-year General Contract, Boyden included a section for litigation:

> The old contract did not include litigation. This time I have included litigation. It looks as if we might possibly present our claims to the court between the Navajo and Hopi. If you had any law suits, I would be your attorney for that too (Hopi Tribal Council 7-14-1954:7).

In January 1955, Boyden suggested not pursuing the Docket 196 case until he could get the Solicitor's 1946 Opinion reversed and then move to establish rights throughout the 1882 Reservation (Hopi Tribal Council 1-11-1955). Boyden informed the ICC in May 1957 of the pending legislation to authorize the Hopis to sue the Navajos to determine rights in the 1882 Reservation. He sought a delay on the Commission's hearing of Docket 196:

> This is to advise you that we prefer not to have our case tried until after the termination of the controversy between the Navajo and Hopi Tribes concerning their boundaries. Any territory we are able to recover against the Navajo Tribe obviously should not be a part of our claim against the government (Boyden 5-23-1957).

Following passage of Public Law 85-547 (which authorized the Hopi Tribe to sue the Navajo Tribe to determine their respective rights in the 1882 Executive Order reservation), Boyden explained to his Washington co-counsel in the Claims Case, John W. Cragun, how this would affect Docket 196:

> As I explained to you before, I desire to settle the Navaho-Hopi boundary dispute before pressing our [ICC] claim against the government. That is the only way we can determine how much land will ultimately be given to us. Of course, we cannot press our claim for damages against the government if the land is returned to us.

Boyden added that he had just filed suit (Healing v. Jones) in U.S. District Court in Arizona:[45]

> I wish you would explain these circumstances to [Indian Claims] Commissioner O'Marr and state we have no objection to the matter being taken off the trial calendar until the present controversy is determined (Boyden 8-5-1958).

The ICC trial on Dockets 196 and 229 was first set for May 18, 1959. But on October 15, 1958, Boyden and Cragun filed a motion for indefinite delay, until the Healing v. Jones[46] case was decided, since this would have a determinative effect on aspects of the ICC cases:

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[45] Healing v. Jones was filed on August 1, 1958.

> Actually, there are compelling reasons why the issue of title should not be set for trial by this Commission prior to the time a federal court recently invested with jurisdiction over a substantial part of the claim shall have determined a case recently filed between the parties petitioner [i.e., Hopi and Navajo]....
>
> The lands in suit in the U.S. District Court, Arizona, are claimed by both petitions pending before this Commission. Any judgment of that court would be res judicata and binding on both the Navajo and Hopi in the proceedings here....
>
> In its most recent pronouncement, Congress manifestly has contemplated that the issue of title to the Executive-order reservation would be determined by a three-judge District Court with appeal of right to the Supreme Court of the United States, rather than by this Commission under the earlier jurisdiction (Hopi Tribe et al 10-15-1958).

At this point, the Hopi Tribe began to face direct opposition from the Navajo Tribe's Claims and General attorney, Norman Littell, who wanted Healing v. Jones and the Claims cases to proceed in tandem. Littell opposed Boyden's efforts to remove Docket 196 from the Indian Claims Commission's trial calendar. Shortly thereafter, Boyden expressed his frustration:

> Frankly, I am disturbed because Littell knows full well we are unable to prosecute a claims case and the District Court case at the same time....
>
> 1. ...both the Navahos and the Hopis are claiming compensation for the lands involved in the District Court case. Certainly if we are able to establish that the reservation was created for the Hopis alone, we have no claim against the government for taking it away from us. The determination of this matter in the District Court would determine this question before the Claims Commission.
>
> 2. Should the District Court determine that the executive order reservation is the exclusive reservation of the Hopis, we may then pursue our cause of action for just compensation for the use of the lands as set forth in our petition No. 196. *This situation was discussed at the time we filed the petition.* This adjudication of the District Court would also be a substantial portion of our burden of proof in proving the unlawful use of part of the Hopi lands by the government.
>
> 3. Should it be determined in the District Court that the Hopis must share the executive order reservation with Navahos that have been settled thereon by the Secretary, then we would proceed against the government in the claims case, claiming aboriginal title and an unlawful settling of Navahos upon the reservation. Therefore, the determination on this subject in the District Court would determine an issue involved in the claims cases (Boyden 11-12-1958, emphasis added).

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[46] Healing v. Jones was first known as Sekiestewa v. Jones (Willard Sakiestewa was Tribal Chairman at the time of original filing).

Boyden and Cragun's motion to delay the ICC trial was granted by the Commission.

At least as early as 1966, i.e., four years before the Commission's Opinion and Findings of Fact on Docket 196, Boyden formally inquired of Robert Bennett, the Commissioner of Indian Affairs, about Hopi interests in the 1934 Reservation (Boyden 6-11-1966). The Commissioner obtained an opinion from the Associate Solicitor for Indian Affairs:

> It is beyond question that Hopi Indians resided in the area defined by the Act at the time of its passage. The history of the Act discloses beyond quibble that Congress recognized this fact and included the "other Indians"[47] provision for the express purpose of protecting Hopi rights.
>
> While it is clear that the Hopi have an interest in the area described in the 1934 Act, it is not possible for us to define the nature or extent of that interest (Allan 7-1-1966).

It is evident from this inquiry by Boyden, from Solicitor Allan's response, and indeed from Commissioner Bennett's imposition of the Bennett Freeze the same year (1966), that, in addition to the *Healing* case, the disposition of Hopi v. Navajo land rights in the 1934 Act Reservation would also have a determinative effect on the question of compensable rights in Docket 196. The 1974 Act, passed on December 22, was:

> To provide for final settlement of the conflicting rights and interests of the Hopi and Navajo Tribes to and in lands lying within the joint use area of the reservation established by the Executive Order of December, 1882, and lands lying within the reservation created by the Act of June 14, 1934, and for other purposes (quoted in O. Boyden:191-92).

The vast majority of lands in the Hopi Tribe's 1951 petition in Docket 196 (and as amended in 1961, with the eastern line moved to the Meriwether Line) fell within the bounds of the 1934 Act Reservation. The District Court's 1962 decision in *Healing* (affirmed by the Supreme Court in 1963) stipulated that Hopis held a fifty percent interest in those lands within the 1882 Reservation outside District Six. When it finally emerged (in 1970), the Commission's Opinion

[47] I.e., "other Indians already settled thereon," the phrase from the 1934 Act.

(below), distinguishing Hopi rights *within* the 1882 Reservation (outside District Six) from those *outside* the 1882 Reservation, depended directly on the *Healing* decision.

Boyden's inquiry of 1966 came eight years before the Land Settlement Act authorized the Hopi Tribe to sue the Navajo Nation in District Court for its rights in the 1934 Act Reservation. But it was obvious (at least to Boyden) that, until a legally binding decision (by Congress or the Courts) was made concerning the extent of Hopi land and resource rights in the 1934 Reservation, the ICC would face a similar problem to that resolved by the *Healing* court for the 1882 Reservation. The same issues, as to both the extent of U.S. liability and the valuation of lands "taken," existed for the 1934 Reservation as for the 1882 Reservation until the *Healing* decision was handed down. Had the same logic been followed, a final decision on Docket 196, regarding compensation for takings by the government from lands held by the Hopi under aboriginal and reserved title, should have waited until the 1934 Reservation case was decided too. Since the extent of Hopi rights in the 1934 Reservation was not determined until the District and Appeals Courts' decision of the 1990s (or even 2007, with the signing of the Intergovernmental Compact), it is not evident how the ICC could have properly assigned a value to lands not yet (in 1970, 1974, or 1976) recognized by the government as having been ceded by the Hopi Tribe.

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Further Developments in the Hopi Claims

Dismissal of Docket 210

The government moved to dismiss Docket 210 on November 23, 1956. The Commission (represented by Associate Commissioner Louis J. O'Marr) held a hearing at the Federal Court House in Santa Fe on December 14, 1956 "at which hearing there was present Wadsworth Nuvangoitewa,[48] one of the signers of the petition in the above-entitled cause, and four other members of the group known as the Shungopovi Village, and Richard Schifter, Attorney, and Charles E. Minton, Executive Secretary of the New Mexico Association on Indian Affairs, Inc., all of whom appeared for said claimant," as well as an attorney for the government as defendant (Order Postponing Action on Motion to Dismiss 12-21-1956). At the hearing, Peter Nuvamsa was asked to present his views on Docket 196, which, Claims Commissioner O'Marr noted, was intended to represent the interests of all the Hopi villages. Nuvamsa replied:

> My village is Shungopovi which they don't abide by this counsel [i.e., Council] which if I understand it right you are referring to, so-called Hopi Tribal Council. That does not include the other mesa village of Moenkopi nor Hotevilla Village (Indian Claims Commission 12-14-1956:4).[49]

Questioned further, Nuvamsa indicated Washington was attempting to impose the Tribal Council on all the Hopi villages, and that Shungopavi and the other villages wished to retain their independent village organizations: "We have our own Hopi Establishment" (Indian Claims

[48] Those appearing in Santa Fe for the hearing were: Peter Nuvamsa, Sr., Viets Lomaheftewa, Wadsworth Nuvangoitewa, Homer Cooyama, and Preston Keevama (who was living at San Juan Pueblo at the time) (Indian Claims Commission 2-21-1957). It is not clear what role Homer Cooyama, of Kykotsmovi, played in this hearing. He had signed the Claims contract on behalf of Kyakotsmovi with Boyden in July 1951. He may have been sympathetic to the Shungopavi claim, or simply present to report back to his village and the Tribal Council on the results of the hearing, or both.

[49] The hearing transcript is somewhat unclear here. 'Counsel' may simply be a typographic error for 'council.' However, the question immediately preceding Nuvamsa's response referred to Attorney John Boyden as well as to the Tribal Council. The transcription of Nuvamsa's listing of villages "not included" in the Council probably confused Moenkopi for both Mishongnovi and Moenkopi, and inferentially specified Lower Moenkopi in particular.

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Commission 12-14-1956:5). But he acknowledged that the Department refused to recognize the traditional organization.

Shortly thereafter, Claims Commissioner O'Marr again urged the Shungopovi group to hire an attorney (O'Marr 12-21-1956), even though the ICC Act explicitly did not require this, and numerous Dockets remained before the Commission where Indian claimants were not represented by an attorney (Indian Claims Commission 1968:21-22). Informed of this meeting in Santa Fe, Hopi Superintendent H.E. O'Harra declined to support O'Marr's recommendation that Shungopavi hire an attorney:

> Neither this office nor the Hopi Tribal Council had any prior notice that the Claims Commission was holding a hearing on the matter, although it was common knowledge that representatives of the Shungopavi Village and others were in Santa Fe on the above dates (O'Harra 12-31-1956)

O'Harra also forwarded a copy of this letter to Boyden, whose reply is indicative of his own approach to restoration of some lands under another legal umbrella:

> Since the Shungopovi group do not want a money judgment but are demanding return of the land, I do not see how any attorney can successfully prosecute their claim before the Indian Claims Commission. The Commission does not have jurisdiction to entertain a suit of the type they purport to prosecute.
>
> As attorney for the Hopi people, you know that I am attempting to obtain as much land as possible under the circumstances in the proceeding already instituted to reverse the solicitor's opinion with respect to ownership of the mineral rights. The legislative proposals growing out of the proceedings may well result in additional land being given to the Hopis and certainly should prevent further aggression against the Hopis if we are successful in our endeavors. I had hoped to delay the claims action until the outcome of the other proceeding is determined. In this way, we will accept money judgment for only that which we cannot have returned to the Indians.
>
> It is my opinion that the claim of the Shungopovi group in Docket 210 adds nothing to the claim we have filed on behalf of all the Hopi people in Docket No. 196 (Boyden 1-7-1957).

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On February 6, 1957, Wadsworth Nuvangoitewa wrote to Commissioner O'Marr, apparently indicating a desire to have Docket 210 and 196 conjoined, and presented together. As O'Marr reported to Area Director Haverland:

> The Tribal Council of the Villages which filed claims in Dockets 196 and 210 are discussing an arrangement by which the claimant in 196 will represent the two villages (O'Marr 2-14-1957a).

Unfortunately, Nuvangoitewa's letter of February 6 was not located; O'Marr was evidently confused about the "villages" in question, and it may be that his letter to Haverland did not accurately communicate Nuvangoitewa's position on the matter. From a letter the same day responding directly to Nuvangoitewa, it appears the latter had requested clarification on consolidating the cases; O'Marr began that, after reading Nuvangoitewa's letter of February 6, "it seems necessary to explain the effect of consolidating the two Hopi claims, Dockets 196 and 210, with the Navajo claim, Docket 229" (O'Marr 2-14-1957b).

Three weeks later, the Commissioner of Indian Affairs directed Area Director Haverland to recommend that Shungopavi hire an attorney (Greenwood 3-8-1957)—even suggesting that they hire Boyden, since the claims overlapped with Docket 196. Agency Superintendent O'Harra passed on the recommendation, but with information that in effect discouraged them from doing so. He emphasized:

1. The Hopi Tribe, through its Tribal Council, has employed Mr. John S. Boyden as the Claims Attorney.
2. The contract has been approved by the Bureau.
3. Mr. Boyden represents all the Hopi Tribe in presenting their land claim before the Indian Claims Commission.
4. *The Village is not authorized to act for the Tribe in hiring an attorney to represent the Hopi Land Claim.*

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5. The Indian Claims Commission cannot restore land but can award money damages only.

Irrespective of the foregoing, Bureau representatives stand ready to confer with village representatives and any attorney or attorneys the village may desire (O'Harra 3-19-1957, emphasis added).

With Shungopavi thus precluded from representing the "Hopi Land Claim," when the government filed a motion to conjoin Docket 196 with the Navajo Tribe's claim (Docket 229) and with Docket 210, Boyden did not oppose it: "it is entirely proper that these three cases should be consolidated as they are all in conflict as to territory claimed" (Boyden 4-29-1957). Less than a week later, Wadsworth Nuvangoitewa wrote to Commissioner O'Marr requesting withdrawal "for the present" of the petition in Docket 210:

We, in Docket No. 210, request herein to withdraw our land claim from its consideration by the Indian Claims Commission for the present time due to the following reasons:

1. We have tried our best to find a attorney to represent us in docket No. 210, in the time alloted to us for that purpose however we find the time limit too short.

2. Our intention in presenting this claim is for us to receive the land and not payment for damages inflicted to the Hopi Indians by the United States which resulted when our land was taken away.

3. We have been correctly informed that this Indian Claims Commission has no authority to restore the land claimed in docket No. 210 back to us therefore we will withdraw our claim from your Commission and if possible, resubmit it again to a Indian Claims Commission which will have the authority to restore land back to the Indians if such be created by the Congress of the United States of America.

However, we request that you keep our claim in docket no. 210 in your records as your record and as our record. Thank you for your consideration and the help that you have given us thus far (Nuvangoitewa 5-4-1957).

Following Nuvangoitewa's letter, the Commission entered an order dismissing Docket 210 on May 31, 1957 (Indian Claims Commission n.d.b). The Commission reported the proceedings in Docket 210 to Congress on November 27, 1963. But the claim to the land was by no means over in the minds of the Shungopavi leaders. In May 1963, the petitioners again wrote

to Commissioner O'Marr, reasserting that they had established a record of their land claim via Docket 210, and reserving the right to claim the lands described on the basis of that record at some future point:

> At our conference with you at Santa Fe, New Mexico in the month of December, 1956, relative to our petition Re: Hopi Village of Shungopavi V. United States, Docket No. 210, we were given until June 1, 1957 to employ an attorney to represent us.
>
> It was our understanding that to fail to employ an attorney to represent us at the time of hearing, our Claim will be dismissed.[50] Because we did not have the money to hire an attorney to handle our Land Claim, it must have been dismissed according to the Indian Claims Commission dictum.
>
> *However, we, at least, do invoke of your service that our Shungopavi Land Claim be filed on a permanent record. And since the intention of the Indian Claims Commission is definitely different, and against the desires of the Hopi people who prefer the restoration of the land, rather than accepting the money payments for their land, we could not agree. This is against our ancient doctrine of land rights.*
>
> Nevertheless, we, as a Hopi people have had for time immemorial and for generations to come, do desire to abide by our religious belief and a traditional form of government, which in turn, rooted to our land we love, and the foundamental principle of life. With this fundamental concept we shall look forward to the time when justice will evolve for our mutual understanding and benefit (Nuvangoitewa et al 5-1-1963, emphasis added).

Consolidation of Docket 196 with Docket 229 (Navajo Tribe v. United States)

In Docket 229, filed on July 11, 1950, the Navajo Tribe claimed that an area of approximately 40 million acres of aboriginal lands was unfairly ceded to the U.S. by the 1868 Navajo Treaty (when the original Navajo Reservation [3.5 million acres] was established). The Navajo claim completely encompassed the Hopi area that would come to be described in Docket 196. Docket 229 competed with several other claims too, including: Southern Paiute (Dockets 88 and 330), Havasupai (Docket 91), Fort Sill Apache (Docket 30), Chiricahua and Warm Springs

[50] As noted, while there was a recommendation in the ICC Act that claimants employ attorneys on their behalf, this was not a requirement. Owing to the overlapping claims in Dockets 210, 196, and 229, it may have been disadvantageous not to have an attorney, but Shungopavi was not required by the statute to employ one.

Tribes of Apaches (Docket 48), San Carlos Apache (Docket 22-D), Pueblo of Laguna (Docket 227), and Pueblo of Acoma (Docket 266). In addition to seeking to have Docket 196 consolidated with Docket 229 (U.S. Attorney General's Office, 1-25-1957)—in which it was successful—the government had tried, but failed, to consolidate trial of the Hopi claim with Southern Paiute Nation claims (Dockets 88 and 330) (Boyden 1-7-1957b). However, the Commission ruled that, "with respect to the area south and east of the Colorado River in the states of Utah and Arizona," all testimony and evidence presented in Dockets 88 and 330 (Southern Paiute Nation et al v. United States) would be "considered as part of the record in Dockets 196 and 229," and that the "defendant and petitioners in Dockets 229 and 196 be permitted to examine all witnesses testifying in Dockets 229 and 196 with respect to the pertinent exhibits and testimony filed in Dockets 88 and 330" (Indian Claims Commission 5-31-1960). When Dockets 229 and 196 came to trial in 1961, the records of the other competing Claims dockets were included, but only the Southern Paiute claims were held to be pertinent to the Hopi case

This competition with other tribes for "exclusive use and occupancy" significantly impacted on the Hopi Tribe's ability to prove its aboriginal claim. In its reasoning that the Hopi Dockets be included with the Navajo, the government relied on principles of exclusive use and occupancy discussed above. Recognizing a plausible area of exclusive Navajo use and occupancy entailed adjusting the size of adjacent tribes' recognized areas: in some cases, it may have been the case that in order to recognize a substantial Navajo area (in 1946 as now, the Navajo comprised the most populous tribe in North America), other tribal areas may have been decreased. For example, the northwestern part of the Hopi claim area was awarded to the Southern Paiute. Even if the Hopi Tribe disagreed with that decision, the historical and

ethnographic record at least recognizes Paiutes in that area since the 19th century if not before. In contrast, the area awarded the Navajo west of the Meriwether line and south of the Little Colorado River is historically and ethnographically implausible—notwithstanding the ICC ruling. Had Docket 196 included that area (as indeed Docket 210 did), it is hard to imagine how the Navajo claim would have prevailed against the Hopi, particularly if the Commission had properly allowed the date of taking as 1848, rather than 1882. There is no credible evidence in support of "exclusive Navajo use and occupancy" of that area in 1848, or indeed for any time after that point (see Whiteley 2007b).

Healing v. Jones

The interweaving of interests in *Healing v. Jones* and Docket 196 was underscored by their near co-occurrence in time. As noted, Boyden had repeatedly sought to delay the Docket 196 trial until after *Healing* was decided. He did succeed in obtaining postponement until after the *Healing* trial, which ran from September 26 through October 21, 1960 (Brugge 1994:67-92, O. Boyden 1986:179-93). But the District Court did not reach a decision until September 1962 (the decision was affirmed on appeal by the Supreme Court in June 1963). Meanwhile, Docket 196 was scheduled to come to trial in Washington in September 1961.

At the *Healing* trial in Prescott, press reports emphasized the minerals interests:

> Geophysical surveys by major oil and uranium companies have indicated that the disputed land caps one of the last great storehouses of natural resources in the United States.
>
> These companies are now awaiting the outcome of the trial, ready to give the victor millions of dollars for the privilege of looking for the hidden minerals.
>
> The tribe who holds the land stands to gain millions more through leases, bonuses, and royalties (*Arizona Daily Star* 10-16-1960).

The *Star* reported that the Navajo Tribal Council had rented five planes to fly in many Navajo witnesses. In contrast, the Hopis hauled their witnesses in a pickup truck. Both tribes "camped in the hills outside of Prescott." The Hopis had a single tent in a public campground off the Wickenberg Highway. The contrast in demonstrative power between the two tribes was evident to the press. But when the decision came down, most reports, including that by Platt Cline's newspaper, indicated a victory for the Hopi: "Hopi Indians Win Northern Arizona Boundary Settlement" and "Hopis Given Navajo Land in Decision" (*Arizona Daily Sun* 9-28-1962).

After appeals by both sides, on motion of the Hopi Tribe, the Supreme Court affirmed the District Court's decision on June 3, 1963. The *Healing* decision had become law. With the legal authority now established, the Hopi Tribe was able to enter a series of lease agreements with energy companies, which paid ca. $3 million in fees; of this figure, the Tribe agreed to grant Boyden $1 million for his work on the *Healing* case.

As Boyden had predicted, the rulings in the *Healing* case had a precedent effect on the ICC's decisions in Docket 196. In particular, the recognition of undivided Joint Use supported the Hopi "rental" claim for the 1882 Reservation outside District Six.

Trial Presentation of Docket 196

Ethnographic research for the *Healing* case occurred at the same time as for the Claims case. Especially just prior to the Healing trial, in September 1960, the Hopi Agency (probably Charles Pitrat) conducted multiple interviews with Hopis on secular and religious usages throughout the 1882 Reservation and throughout the total Docket 196 claim area (Hopi Indian Agency 9-1960). While the *Healing* trial in Prescott featured a number of Hopi witnesses (Brugge 1994:82-84), the Docket 196 trial relied on three witnesses for Hopi: Fred Eggan,

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Charles Pitrat, and Duke Pahona (the sole Hopi witness; some Hopi testimony recorded by the Hopi Agency was presented through Pitrat). Boyden had been pleased with what he felt were devastating cross-examinations of Navajo expert witnesses Lee Correll and George Hammond (an historian) in the *Healing* case (e.g., Boyden 10-3-1960). In consequence, the Navajo attorneys and Boyden agreed not to have their respective historians testify in the Claims trial.

Most evidentiary material to address the Docket 196 claim appears to have been gathered by Boyden in 1960-1961 (Boyden 1960-1963). For the historical and published ethnographic records, he was aided most by Drs. Fred Eggan, the anthropologist at the University of Chicago, and Lyman Tyler, an historian at the University of Utah. Boyden had been in discussions with Eggan since March 1952 at least (Boyden 8-31-1952). In 1960, Boyden met with other scholars also, including Harold Colton and Edward B. Danson (former Director and Director, respectively, of the Museum of Northern Arizona), and Alfred F. Whiting (Prof. of Anthropology, Dartmouth College). Colton and Danson evidently concluded not to participate further. [51] Eggan provided a good deal of information to Boyden via correspondence. Neither Eggan nor Tyler was asked to prepare a written report, however. Eggan's information for Boyden at this stage was based mostly on the published ethnographic and archaeological record; his own experience at Hopi as an ethnographer (which did play into his trial testimony) apparently had not included inquiries into continuing land and resource use at a distance from the villages. Eggan was the Hopi Tribe's only expert witness at the Docket 196 trial, and he clearly played a role in persuading Boyden to limit the claim area (e.g., Eggan 3-29-1960). For example, in March 1961, as Boyden was beginning to prepare for trial, Eggan wrote:

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[51] The purported authorship of a report by Colton report on Hopi ethnobotany for the case was later questioned by Katherine Bartlett (3-31-1975), his long-time assistant. Boyden also corresponded and/or had telephone conversations with Emil Haury (Prof. of archaeology, University of Arizona), Robert Euler (Prof of Anthropology, Prescott College), and Clyde Kluckhohn (Professor of Anthropology, Harvard University). None of these evidently provided much information or assistance (Boyden 1960-1963).

> I will be glad to testify in the case. If I testify as an "expert witness," however, I don't want to get in the position that Dr. Hammond did. Hence while I am willing to go a bit further than your present Little Colorado River line in the south, I would prefer to defend a line running from Holbrook northeast to the vicinity of Steamboat Canyon and on to Canyon del Chelly. In the north, I am worried about going much beyond Kayenta. Do you have some old Hopis who ever traveled as far as the San Juan or Navaho Mountain – or whose fathers did? The west – to the junction of the Colorado and Little Colorado, seems reasonably OK though the Paiute came into part of the area at a time I don't remember (Eggan 3-27-1961).

Eggan appears uncertain in his ethnohistoric knowledge here, and his description of a Hopi area he believed could be defended was very conservative. Since Eggan was his only testifying expert, it seems to have been on Eggan's advice (notably, Eggan 3-29-1960) that Boyden shifted the eastern line of the Hopi claim area from the Arizona-New Mexico and Utah-Colorado state line to the Meriwether Line of 1855 (a straight line from the confluence of the San Juan River with Chinle Creek due south to the confluence of the Little Colorado River with the Zuni River—see Map 4). This line marked the western limit of a proposed Navajo Reservation created by the Treaty of Laguna Negra in 1855.

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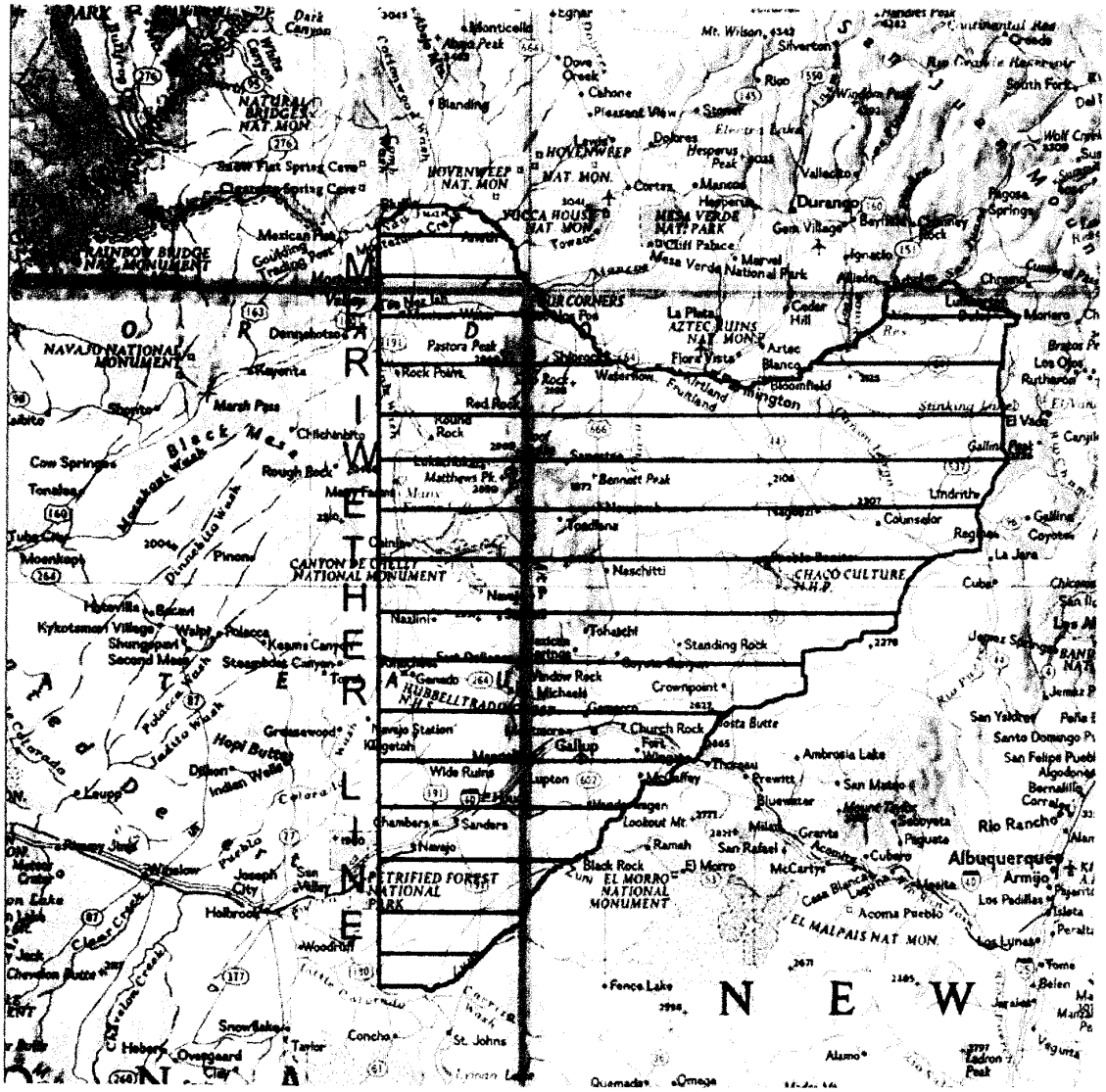
NATURAL BRIDGES NAT. MON.
RAINBOW BRIDGE NAT. MONUMENT
NAVAJO NATIONAL MONUMENT
HOVENWEEP NAT. MON.
YUCCA HOUSE NAT. MON.
MESA VERDE NAT. PARK
Mesa Verde National Park
FOUR CORNERS
AZTEC RUINS NAT. MON.
CANYON DE CHELLY NATIONAL MONUMENT
CHACO CULTURE N.H.P.
HUBBELL TRADING POST
PETRIFIED FOREST NATIONAL PARK
EL MORRO NATIONAL MONUMENT
EL MALPAIS NAT. MON.
Durango
Farmington
Gallup
Albuquerque
Rio Rancho
Santa Fe
Flagstaff
Winslow
Holbrook
Chinle
Kayenta
Tuba City
Moenkopi
Shiprock
Bluff
Monticello
Blanding
Cortez
Dolores
Rico
Silverton
Ignacio
Bloomfield
Aztec
Cuba
Grants
Acoma Pueblo
Los Lunas
Belen
Tome
Jemez Springs
Ojo Caliente
Taos
Espanola
Santa Fe
Pecos
Las Vegas
Raton
Springer
Clayton
Tucumcari
Quemado
Alamo
Omega
Concho
St. Johns
Snowflake
Taylor
Overgaard
Heber
Woodruff
Sanders
Chambers
Navajo
Wide Ruins
Lupton
Thoreau
Crownpoint
Tohatchi
Standing Rock
Window Rock
Ganado
Chinle
Naschitti
Lindrith
Counselor
Cuba
Jemez Springs
Bernalillo
Corrales
Los Padillas
Isleta
Peralta
Los Lunas
Belen
Tome
Jarales
Veguita
Alamo
Quemado
Omega
Fence Lake
Black Rock
Ramah
Lookout Mt.
Thoreau
Pueblo Colorado Wash
Black Mesa
Moenkopi Wash
Dinnebito Wash
Jeddito Wash
Hopi Buttes
Chevelon Creek
Clear Creek
Little Colorado River
Rio Puerco
Rio Grande
Rio Chama
Rio Jemez

were used entirely or in part by the Navajo Tribe, various Paiute bands, the Zuni Tribe, various Western Apache Tribes, the Capote Utes, and the Weeminuchi Utes (Clark 6-16-1961: paragraphs 8-11). The defendant also invoked the *Healing v. Jones* proceedings, and argued that any lands returned to the Hopis by that court action would "far exceed the value of any lands to which the Hopi Indians may have had aboriginal Indian title as of July 4, 1848, or any subsequent date" (Clark 6-16-1961: paragraph 24). And lastly, the defendant contested that if any sum should be found owing to the Hopis, they were not entitled to any interest on it (Clark 6-16-1961: paragraph 26). This last defense was in keeping with the standard that had prevailed in the Court of Claims since 1940, and which had been taken over by the Indian Claims Commission.

Trial hearings before the ICC began on September 18 and extended through September 27. The Navajo case (Docket 229) was presented first, with testimony notably by Lee Correll and David Brugge (Boyden 1960-1963). From September 28 to October 10, Boyden worked on exhibits and prepared for the trial on Docket 196. He spent the next several days in Chicago preparing Eggan to testify. They returned to Washington on October 14. The trial resumed on October 16 and continued through November 8. Eggan testified on October 16-17, Pitrat and Pahona on October 18 (Boyden 1960-1963; Navajo Tribe of Indians et al v. United States of America, 10-1961). With the exclusion from trial testimony of the historical experts (George P. Hammond for the Navajo and Lyman Tyler for the Hopi), documentary evidence was submitted separately. As sole expert witness for the Hopi (as he had also been in the *Healing* trial), Fred Eggan discussed many aspects of Hopi land use and history based on his own work with Hopis since 1932, and on a reading of the ethnographic and archaeological record.[52] Charles Pitrat of

[52] For some pages of the Eggan, Pitrat, and Pahona testimony, see Navajo Tribe of Indians et al v. United States of America, 10-1961.

the Hopi Agency's Land Operations branch presented two maps (Exhibits 68 and 69: Hopi Tribe 1961a, 1961b), showing Hopi eagle shrines and other shrines, respectively, and testified on the evidence he had used (principally conversations and field trips with older Hopis) to compile them. Duke Pahona from Walpi testified on the boundary established by the Walpi chiefs with the Navajos, west of Ganado, marked by two skulls. The agreement was sealed with the presentation of a *tiiponi* (sacred bundle) given to the Walpi Snake chief by Navajo leaders to guarantee that agreement. Pahona had brought the *tiiponi* with him and showed it to the Commissioners.

The chief expert witness for the defendant was Prof. Florence Ellis, an anthropologist and ethnohistorian at the University of New Mexico. She prepared an extensive report on Hopi history and land use (published as Ellis 1974a). Even though she testified for the defendant, Ellis' report and testimony were very helpful to the Hopi cause: she agreed with Eggan's testimony on the presence of Hopis throughout much of the claim area. Ellis' report has continued to be useful for other Hopi interests: it served as an exhibit in the 1934 Reservation case to support widespread historic Hopi use of the areas encompassed by the 1934 Reservation. At the trial, Ellis drew a line indicating her sense of the Hopi aboriginal area in 1848. To the north and west, it went considerably farther (to the San Juan and Colorado Rivers) than the ICC's subsequent (1970) finding on the Hopi aboriginal area. To the east, it partly hewed to the Meriwether line and then followed the northeast escarpment of Black Mesa, and thence north to the San Juan River. Since the Hopi petition of 1951 described the southern limit as the Little Colorado River, Ellis did not go south of that line.

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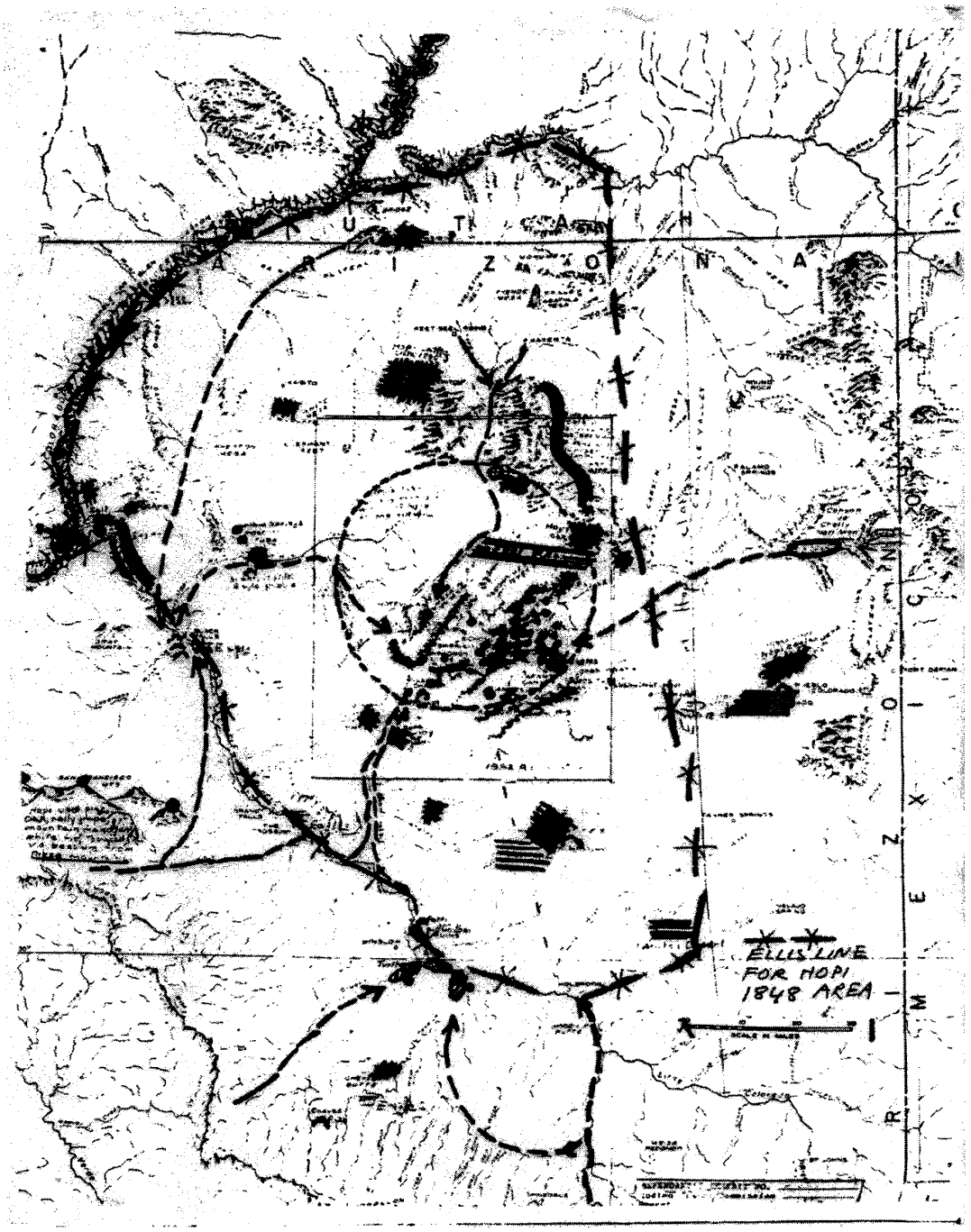

Map 5. Prof. Florence Hawley Ellis' indication of Hopi Aboriginal Area in 1848, from a Defendant's Exhibit at the 1961 ICC trial on Docket 196

Ellis and Prof. Frank Reeve, an historian at the University of New Mexico, also both testified as Government witnesses against the Navajo in Docket 229. In this regard, their testimony was even more helpful (Ellis 1974b; Reeve 1974): Ellis's testimony in particular undermined witnesses for the Navajo who argued for the long-term presence of Navajos throughout Hopi areas on the basis of tree-ring dates on purported Navajo sites. Even so, while voicing doubt about the validity of the tree-ring data, in defending its Findings against appeals by the Hopi Tribe in the early 1970's, the Commission, primarily on the basis of this "evidence," suggested that by 1882 Navajos had long lived around the Hopi villages (see below).

After the trial, Boyden had continuing discussions with Tyler and Pitrat, about preparation of exhibits. Most of the Hopi Tribe's exhibits were submitted on June 14th, 1962 (Boyden 1960-1963). On cross-examination Pitrat had been questioned on the shrine map (Exhibit 69: Hopi Tribe 1961b), specifically in terms of whether or not he had visited some of the sites depicted. Accordingly, further field trips were conducted (evidently in 1962), and he wrote up accounts of clan migrations and the Hopi-Navajo boundary marker (with photographs of sites). These were submitted as Exhibits 69B-69O.[53] The Navajo Tribe sought further cross-examination on these exhibits. Pitrat was thus called to testify again in Washington on October 15, 1962 (Pitrat 10-15-1962). Another ICC hearing occurred in Washington on May 12-13, 1963, in which Boyden cross-examined witnesses for the Navajo on exhibits (Boyden 1960-1963). Exhibits (principally historical documents) continued to be prepared through May 22, 1963, at which time the ICC ordered the record closed. Based on the testimony and evidence filed before the Commission, Boyden filed the Hopi Tribe's Requested Findings of Fact on Issues of Title and Liability on May 18, 1964; the Navajo Tribe filed its Proposed Findings of Fact on Docket 229 the same day (Indian Claims Commission n.d.a; Boyden 5-18-1964).

[53] For Exhibits 69B-69O, see Pitrat n.d.

The Hopi Tribe's Findings encompassed 36 points over 71 pages (Boyden 5-18-1964). The majority concerned historical and ethnographic indications of Hopi use and occupancy throughout the prehistoric, Spanish, Mexican, and American periods. On aboriginal lands (Finding 20), the Findings indicated the adjusted eastern boundary from that described in paragraph 7 of the 1951 petition:

> On July 4, 1848, and prior thereto from time immemorial, petitioner owned or continually held, occupied and possessed a large tract of land described generally as follows, to wit:
>
> > Beginning at the juncture of the Colorado and Little Colorado Rivers; thence in a southeasterly direction along the Little Colorado River to a point at the mouth or entrance of the Zuni River into said Little Colorado River; thence in a northerly direction along the boundary line of the Navajo country as fixed by the Merriwether Treaty of 1855 to a point where said Merriwether line intersects the San Juan River; thence along the San Juan in a generally westerly direction to its juncture with the Colorado River; thence in a southwesterly direction along said Colorado River to point of beginning (Boyden 5-18-1964:28).

The Findings concluded with a summary brief, which concentrated on issues of Hopi and Navajo competition over certain areas resulting from Government actions and inactions (taking particular account of the decisions of the *Healing* case):

> Although Governor Merriwether was not possessed of all the facts with respect to the claims of the Indians..., his delineation of the western boundary of the Navajo claim, we submit, is as nearly correct as can be determined from the facts at this time.
>
> The Hopi use and occupancy from time immemorial was exclusive over a definable territory....
>
> The Navajo Indians could acquire no aboriginal title after the lands came under the jurisdiction of the United States in 1848....
>
> The only question is whether the aboriginal title of the Hopi Indians was lost before the taking by the government. While the present phase of this case, by order of the Commission (October 13, 1958), was limited to the question of aboriginal title, successive executive orders for the Navajo...culminating in the Act of June 14, 1934..., and the settling of Navajo Indians upon the Hopi executive order reservation of 1882 supra, by the United States Government, as determined by the three-judge court [Healing v. Jones]..., were the acts that deprived the Hopi Tribe of its title.

To this day the Hopi Indians have struggled to preserve their aboriginal title. There is no abandonment for the evidence is clear that the Navajo were driven into the area through the military of the United States Government in 1946…and after 1848…, in an endeavor to protect the citizens of the United States, largely in the state of New Mexico…. When the Navajo stayed in Hopi territory the government recognized the aggression by successive executive orders to sanction the Navajo action. The executive orders were ultimately confirmed by the Act of June 14, 1934, supra.

Depriving the Hopi Tribe of its territory was accomplished while the fee to both the Navajo and Hopi real property was held by the United States Government as the guardian of their property….

The government, charged with the solemn duty to deal fairly and honorably with petitioner and its property…cannot allow one of its wards to impose upon another, sanction and ratify the imposition, and then claim Indian title is not exclusive because of acts which that government has aided and abetted….

We respectfully submit that the Hopi claim is conservative and meritorious under all of the evidence produced (Boyden 5-18-1964:69-71).

The Commission's Decision and the Hopi Tribe's Responses

The Commission's Opinions, Findings of Fact, and Interlocutory Orders, June 29, 1970

Seven years after the evidentiary record had been closed, the Commission finally reached a decision, issuing an Opinion, Findings of Fact, and Interlocutory Order on June 29, 1970. From the Commission's files at the National Archives, it appears the long delay owed to a series of motions regarding Docket 229 (the Navajo case). Boyden confirmed this view in a letter to Hopi Tribal Council Chairman Jean Fredericks in 1968:

> On February 22, I conferred with Commissioner Scott of the Indian Claims Commission concerning the possibility of arriving at a decision in the Hopi claims case within the near future. Mr. Scott said that the Commission had been reluctant to move on this case since it was directly connected with the Navajo claim, and the Navajo Tribe was proceeding without claims counsel.[54] He suggested that the Commission was urging claimants to make settlements with the government whenever possible. I explained to him that a settlement of a case where the liability had not even been determined was very difficult. I felt that if liability on the part of the government could be first determined, the amount of the payment could be more easily compromised. He agreed but offered no suggestion for immediate action. I am making a re-check of the status of the claims case with the hope that I may uncover some possible action to be taken that would expedite the matter. You will be informed as to my findings at a later date (Boyden 3-4-1968).

When Docket 196 was finally decided in 1970, none of the Commissioners who had heard the presentation of the case in 1961, and none of their key staff remained on the Commission (as Boyden emphasized in a series of appeals). The Commissioners who decided the case thus had had no direct access to the presentation of evidence and argument.

The Commission issued its Opinions, Findings of Fact, and Interlocutory Orders on both Docket 229 and Docket 196 the same day. Since the dockets were consolidated, this was intentional; the determinations in one directly affected the other. Docket 229 was presented first. In its decision, the Commission recognized aboriginal Navajo lands in areas north and south of

[54] Under pressure from the Secretary of the Interior, Norman Littell resigned as Claims counsel for the Navajo Tribe in 1967 (Brugge 1994:147)

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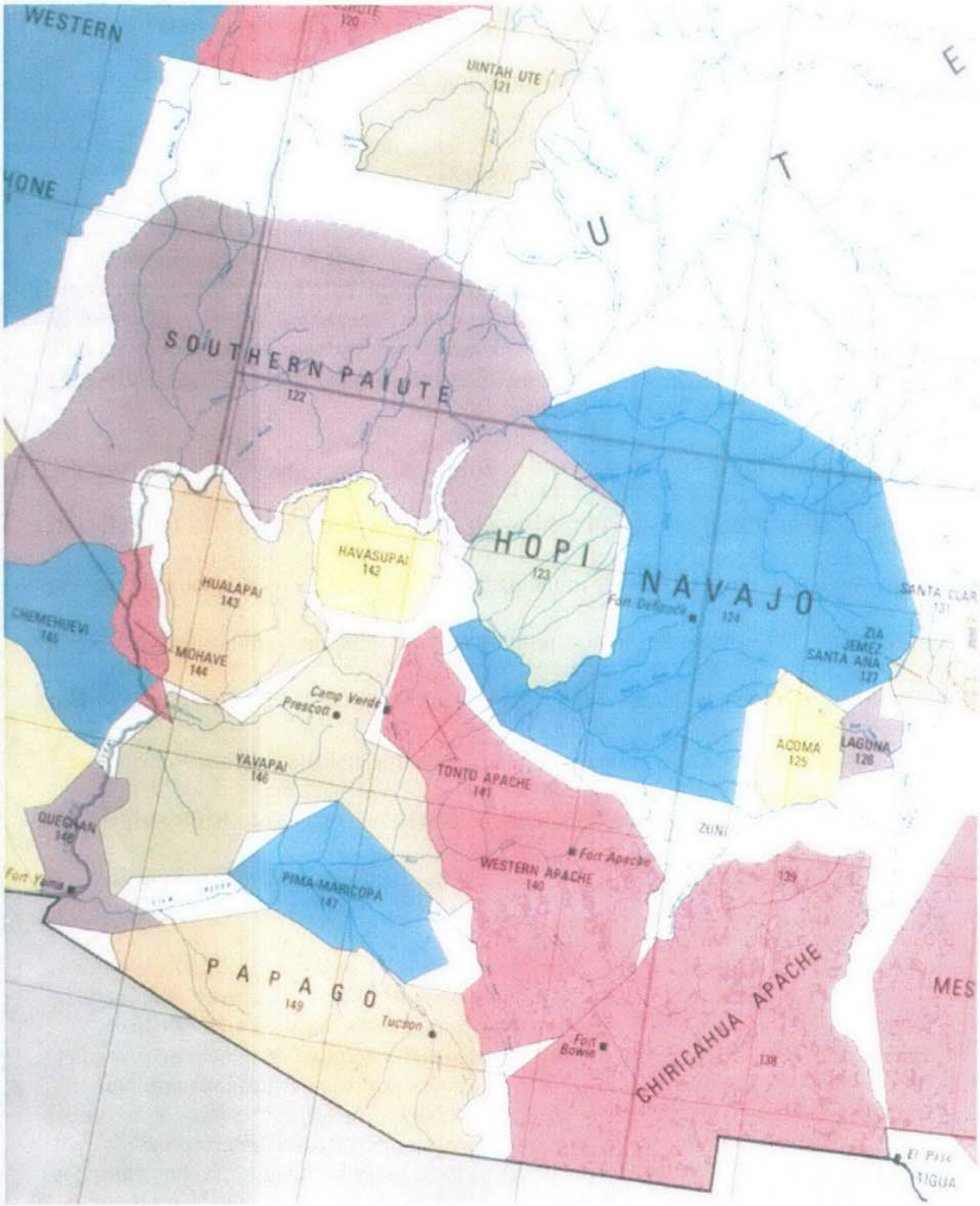
the 1882 Hopi Reservation. The western limit of aboriginal Navajo lands was described as follows, beginning with the southwestern "boot" of the area (see Map 6):

> [from Quemado, New Mexico]; thence westerly to the highest point of Mesa Redondo in Arizona; thence westerly to Snowflake, Arizona; thence westerly to Chevelon Butte; thence northwesterly to Sunset Crater; thence northeasterly to the point where Dinnebeto Wash enters the Little Colorado River; thence southeasterly up the Little Colorado River to Cottonwood Wash; thence northeasterly up Cottonwood Wash and Pueblo Colorado Wash to Greasewood Trading Post; thence northerly to Yale Point; thence northwesterly to the northeast corner of the 1882 Executive Order Reservation; thence northwesterly on a line through Navajo Mountain to the Colorado River; thence northwesterly [sic] up the Colorado River to the place of beginning [the Colorado-San Juan confluence] (Indian Claims Commission 6-29-1970b:Finding 17, p. 272).

In recognizing these southwestern and northwestern areas as Navajo aboriginal lands, the Commission relied on military reports of the Navajo round-up period (1863-64). It justified this by proximity in time to the claimed date of taking, i.e., 1868. But in so doing, the Opinion and Findings failed to acknowledge substantive military surveys of the western limits of Navajo country from Fort Defiance in the late 1850's (and establishment of the Fort itself in 1851 had a major impact on pushing Navajos farther west than the Chinle and Black Creek Valleys; see Whiteley 2007b). Contradictorily, the Commission did acknowledge those 1850's military effects in its Findings on Docket 196 (below). But on the southwestern area recognized as Navajo, the Commission concluded:

> ...we have concluded that the Navajos held aboriginal title in accordance with the boundaries we have set for them in the western part of the claimed area. We have included in this part of the Navajo aboriginal territory some of the places occasionally visited by the Hopis for religious or other purposes. The record also indicates the appearance of some members of other Indian tribes in the Navajo territory from time to time for visiting, trading, or raiding. Others occasionally crossed over the Navajo country. Such sporadic and infrequent use of these lands by Indians of other tribes does not invalidate the Navajo aboriginal title to these areas (Indian Claims Commission 6-29-1970a:253).



Map 6. Hopi, Navajo, and Surrounding Aboriginal Areas Judicially Established by the Indian Claims Commission. Map from the Indian Claims Commission's Final Report (Indian Claims Commission 1978).

In Docket 196, the Commission's Findings of Fact similarly included a specific description of the area it recognized as Hopi aboriginal lands (see Maps 6, 7, and 9):

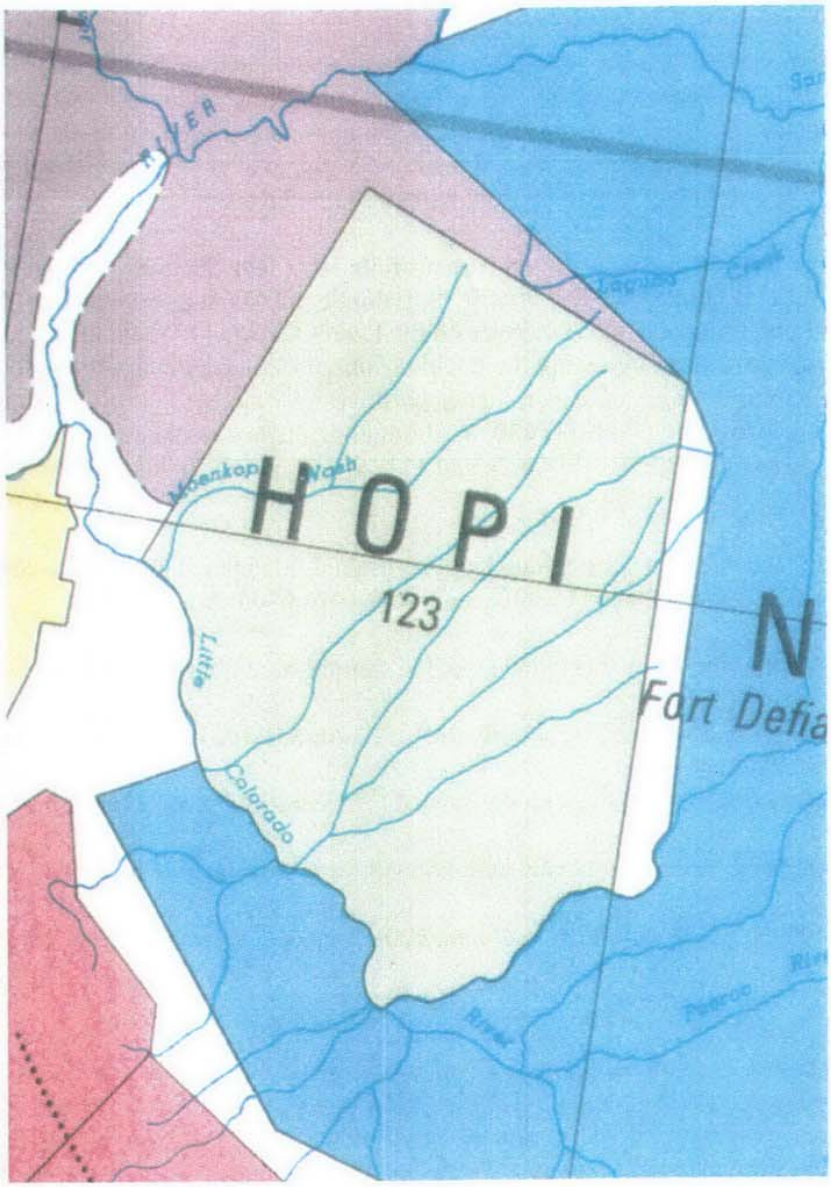
> 20. Based upon the preceding findings of fact [1-19] and all the evidence of record, the Commission finds that the issuance of the Presidential order on December 16, 1882, establishing the Hopi Executive Order Reservation effectively terminated and extinguished, without payment of any compensation to the Hopi Tribe, its aboriginal title claims to all lands situated outside of said reservation. As of December 16, 1882, the Hopi Tribe had Indian title to the following described tract of land.
>
> > Beginning at the northwest corner of the 1882 Hopi Executive Order Reservation, 110° W. Longitude and 36° 30′ N. Latitude, thence due south on the 110 W. Longitude to its intersection with the Pueblo Colorado Wash, thence southwesterly following the Pueblo Colorado Wash and the Cottonwood Wash to the Little Colorado River, thence northwesterly along the Little Colorado River to its intersection with 111° 30′ W. Longitude, thence northeasterly on a line to the intersection of Navajo Creek and 111° W. Longitude, thence southeasterly to the place of beginning.
>
> The evidence does not substantiate Hopi aboriginal title claims to the balance of the overlap area (Indian Claims Commission 6-29-1970d:305-06).

In diminishing the Hopi aboriginal area, the Commission did not even recognize the *defendant*'s expert witness positions, notably that of Florence Ellis, who allowed a significantly larger area than the one the Commission designated. The contrast between the Commission's decisions on Hopi and Navajo aboriginal land boundaries is striking. In Docket 229, the government held that the Meriwether Line marked the western Navajo limit of aboriginal title lands. But the Commission found:

> We think, however, that defendant's conclusions as to the territorial extent of the Navajo Tribe's aboriginal title at the time of the 1868 Treaty of cession are too restrictive. The pressure of population growth,[55] the earlier military and other campaigns of the Spanish and Mexicans against the Navajos, and the ecological and environmental features of the claimed area, when considered with the nature and pattern of Navajo use and occupancy of the territory, calls for a much larger aboriginal area to be awarded the Navajo plaintiff

[55] Total Navajo population in 1868 was about 12,000. In 1848, it was probably about 10,000. Reliable estimates of Hopi population from 1846-1861 vary from 2,450 in 1846; 10,950 in 1850; 6,720 in 1851, prior to a major smallpox outbreak; 2,000–2,500 in 1856; and 2,500 in 1861 (Whiteley 2008:182). The smallpox epidemic in 1852-53 decimated Hopi population but not Navajo, owing to differences in residence patterns.

than that which the defendant would allow (Indian Claims Commission 6-29-1970a:249-250).



Map 7. Detail from Map 6 Showing Area of "Exclusive Hopi Use and Occupancy" Recognized by the Indian Claims Commission

So, while in the Navajo docket, the Commission decided to recognize aboriginal title to a "*much larger aboriginal area*" than proposed by the defendant United States, in the Hopi docket it

recognized *a much smaller* area than that recognized by the defendant United States' chief expert witness.

In its Opinion on Docket 196, the Commission issued a broad justification for restricting the area of Hopi aboriginal lands:

> The focal point of Hopi worship was the eagle, considered the most sacred of birds and a sun symbol. The Hopis had numerous eagle shrines which they visited periodically. Many of these shrines were located at great distances from their village sites, some being located a far west as the San Francisco Mountains and as far south as Chevelon Creek southeast of Winslow Arizona, *both sites being well beyond the boundaries of the area in suit....* Many of the Hopi shrines had been abandoned some years prior to the time American sovereignty attached in 1848.
>
> By 1848, the Hopi had abandoned the Navajo Mountain shrine on the northern boundary of the overlap area, and the San Francisco Mountain and Chevelon Creek shrines west and south of the claimed area (Indian Claims Commission 6-29-1970c:279-80, emphasis added).

Aside from its simplistic rendering of Hopi religious perspectives, this sense of "abandonment" is not supported by historical or ethnographic evidence. Under cross-examination at the trial, Fred Eggan did concede to the defendant's suggestion of some form of abandonment, and that was the statement the Commission relied upon in this regard. "Some years prior" to 1848 suggests a historical vagueness in line with the Commission's frequently vague sense of the region's geography (see below). Florence Ellis, testifying for the defendant, did not acknowledge Hopi abandonment of areas north to Navajo Mountain; since the Docket 196 claim did not include the San Francisco Mountains or Chevelon Creek, there was no reason for the government to defend against a claim to these areas.

The Commission held that the first "taking" of Hopi aboriginal lands was in 1882, with the Executive Order establishing the Moqui Reservation:

> In the Commission's judgment the formal issuance of the December 16, 1882 Presidential Order effectively terminated and put to rest all Hopi aboriginal title claims beyond the limits of the 1882 Executive Order Reservation.

> The Commission concludes that the record herein does not support the large aboriginal land area contended for by the Hopi plaintiff. In awarding a much smaller area, we considered among other things the fact that the Hopi Indians were a relatively small tribe, probably never exceeding 2500 Indians prior to 1882, and that by nature the Hopis were inoffensive and somewhat timid Indians who pueblo oriented culture and environment confined them to permanent village sites.
>
> The Hopis grazed sheep and cattle in the valleys below the mesas and the Commission is of the opinion that its boundary lines include the lands used for these purposes.
>
> Finally the Commission does not agree with the Hopi plaintiff that the sporadic and intermittent visits of Hopi Indians to sacred shrines in the outer reaches of the overlap area substantiates Hopi aboriginal title to all those lands lying between the village sites and these distant shrine areas. First of all the record clearly documents a long time Hopi abandonment of many shrine areas as well as common usage by other tribes of other shrines. While admitting to actual physical abandonment of shrines, the Hopi plaintiff insists that Hopi Indian presence is unnecessary to sustain ownership rights to their sacred places as long as spiritual attachment or rapport is sustained. However, even if were to accept Hopi spiritual attachment as an indicia of aboriginal ownership, the Hopis in our judgment have failed to meet the evidentiary burden of showing continuous and exclusive use of their outlying and remote shrine area (Indian Claims Commission 6-29-1970c:284-86).

The Commission thus found that the 1882 Executive Order had extinguished Hopi aboriginal title to all Hopi aboriginal land (i.e., the area specified in Finding 20) outside the 1882 Reservation boundaries (see Maps 9 and 10, below). At that point in 1882, Hopis retained aboriginal title to the 1882 Reservation, and also acquired "reserved title" as a result of the Executive Order. Those lands lying outside the 1882 Reservation but still within Finding 20's Hopi aboriginal area had, the Commission ruled, been taken "without the payment of any compensation" (Indian Claims Commission 6-29-1970c:286). Hopis retained aboriginal title and reserved title to all lands within the 1882 reservation, the Commission went on, until 1937 (with the creation of District Six). At that point, Hopi aboriginal title to the 1882 Reservation beyond District Six, "was extinguished, without payment of any compensation, by administrative action on June 2, 1937 when the Navajo Tribe was legally settled on the Hopi reservation" (Indian

Claims Commission 6-29-1970c:288). According to the *Healing* decision, which the Commission explicitly accepted, the Hopis were entitled to a one-half interest (with resident Navajos getting the other half) in this area outside District Six, on the basis of their "reserved title" granted by the 1882 Executive Order.

Many statements in the Commission's Opinion and Findings on Docket 196 are at best questionable, at worst flat wrong. To take one example, in seeking to dismiss that eagle shrines supported Hopi aboriginal claims, since they had been "physically abandoned...long before the United States acquired sovereignty over the southwest portion of our country," the Commission noted, "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" (Indian Claims Commission 6-29-1970d:295). The statement that Oraibi lies "further north" of the Hopi mesas is baffling; the apparent location of the Jeddito Valley, either "further north " of the Hopi mesas, or "further north" of Oraibi is even more incongruous. During the appeals process (below), the Commission located the Hopi in "east-central Arizona." Perhaps these are small errors easily explained, but adding them all up suggests that the Commission had a very weak understanding of the basic geography it was ruling upon. That the Commission had trouble mastering the ethnography and history may be more understandable, but mastery of the geographic environment was quite straightforward with the multiple maps presented as exhibits in the case (or with a decent 1970 road map). And these erroneous statements occurred not in the heat of trial cross-examination, but as part of the sober, considered judgment of the Commission that had supposedly been percolating for seven years after closure of the case record. Such errors are the more troubling when the Commission's own findings on Navajo presence in 1846-48 ("to

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the east [of Hopi] and at Canyon de Chelly," Finding 12, Indian Claims Commission 6-29-1970d:298) contradict its depiction of the limits of the Hopi aboriginal area in Finding 20.

In its Interlocutory Order, the Commission announced that Docket 196 should proceed to the next phase of trial to determine acreages and values:

> It is ordered that this case shall proceed to a determination of the acreage and December 16, 1882 fair market value of the lands described in the Commission's Finding of Fact 20 lying outside of the boundaries of the 1882 Executive Order Reservation, the June 2, 1937 fair market value of the 1,868,364 acres lying outside the boundaries of "land management district 6," and all other issues bearing upon the question of the defendant's liability to the Hopi Tribe (23 Ind. Cl. Comm. 277, 313 (1970), [copy from Boyden 8-12-1971]).

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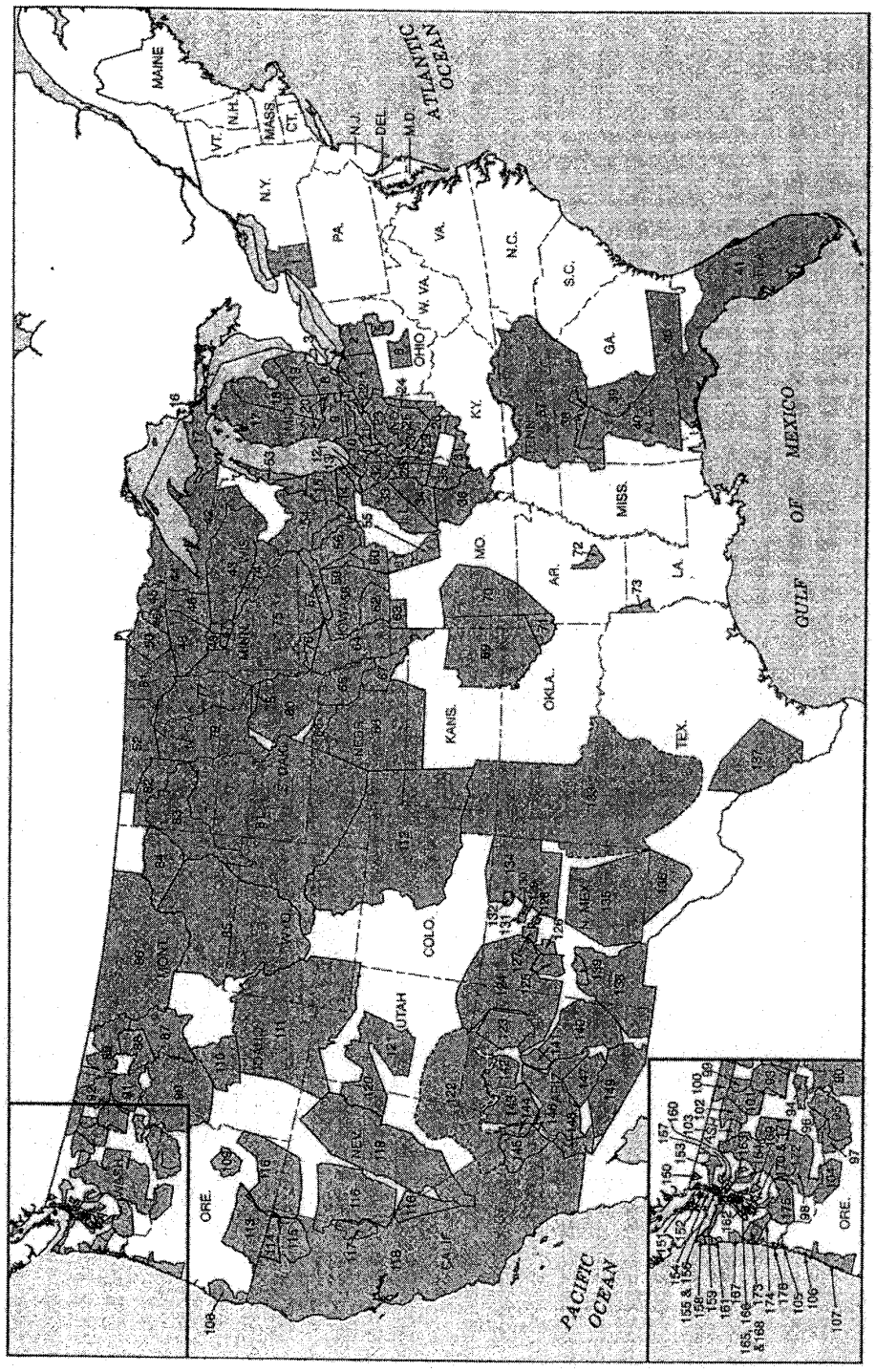

Map 8. All Aboriginal Land Areas in the United States "Judicially Established" by the Indian Claims Commission (Royster 2008).

Fig. 1. Judicially established Indian land areas. This map portrays the results of cases before the U.S. Indian Claims Commission or the U.S. Court of Claims in which a tribe proved its original tribal occupancy. Each tract so established is enclosed with a solid black line; a dashed line indicates that the case was settled before an exact area was defined (U.S.G.S. 1978; BIA Geographic Data Service Center 1998). 1, Seneca, 4,105,733 acres; 2, Delaware, Wyandot, Potawatomi, Ottawa, Chippewa, 2,747,040 acres; 3, Ottawa, 709,112 acres; 4, Delaware, Ottawa, Shawnee, Wyandot, 4,491,153 acres; 5, Delaware, 1,163,291 acres; 6, Shawnee, 1,865,020 acres; 7, Potawatomi, Ottawa, Chippewa, 591,088 acres; 8, Potawatomi, 1,948, 248 acres; 9, Potawatomi, 3,040,056 acres; 10, Potawatomi, 3,011,057 acres; 11, Potawatomi, 522,086 acres; 12, Potawatomi, 751,249 acres; 13, Potawatomi, 15,982 acres; 14, Potawatomi, 2,016,814 acres; 15, Potawatomi, 3,825,122 acres; 16, Sault Ste. Marie band of Chippewa, 153,327 acres; 17, Ottawa and Chippewa, 13,648,993 acres; 18, Saginaw Chippewa, 7,462,264 acres; 19, Saginaw Chippewa, 3,300992 acres; 20, Grand River band of Ottawa, 1,192,372 acres; 21, Miami Potawatomi, 1,458,480 acres; 22, Miami Potawatomi, 782,240 acres; 23, Miami, 3,027,970 acres; 24, Miami of Eel River, 754,483 acres; Miami and Delaware, 3,954,616 acres; Miami and Wea, 3,062,488 acres; 27, Potawatomi and Wea, 626,937 acres; 28, Potawatomi, Wea, and Kickapoo, 480,509 acres; 29, Wea and Kickapoo, 561,066 acres; 30, Wea, 1,388,223 acres; 31, Delaware and Piankashaw, 2,086,626 acres; 32, Potawatomi and Kickapoo, 1,873,666 acres; 33, Kickapoo, 7,512,818 acres; 34, Kaskaskia and Kickapoo, 3,501,058 acres; 35, Piankashaw, 2,547,363 acres; 36, Kaskaskia, 6,388,729 acres; 37, Cherokee, 32,319,178 acres; 38, Creek, 1,317,662 acres; 39, Creek, 5,216,015 acres; 40, Creek, 21,086,793 acres; 41, Seminole, 31,337,339 acres; 42, Chippewa bands of Lake Superior and the Mississippi, 10,311, 704 acres; 43, Chippewa bands of Lake Superior and the Mississippi, 13,518,869 acres; 44, Lake Superior band of Chippewa, 5,995,545 acres; 45, Bois Forte band of Chippewa, 2,092,998 acres; 46, Mississippi bands of Chippewa, 4,787,742 acres; 47, Chippewa bands of lake Superior and the Mississippi, 1,117,146 acres; 48, Pillager and Lake Winnibigoshish bands of Chippewa, 5,864,476 acres; 49, Pillager band of Chippewa, 739,948 acres; 50, Red Lake band of Chippewa, 3,792,183 acres; 51, Red Lake and Pembina bands of Chippewa, 6,750,779 acres; 52, Pembina band of Chippewa, 7,961,081 acres; 53, Potawatomi, 1,396,981 acres; 54, Winnebago, 7,966,739 acres; 55, Sac and Fox, 3,775,317 acres; 56, Sac and Fox, 3,672,138 acres, 57, Sac and Fox, 2,244,824 acres; 58, Sac and Fox, 8,853,573 acres; 59, Sac and Fox, 1,047,189 acres; 60, Iowa Sac and Fox, 1,139,816 acres; 62, Iowa, 3,253,921 acres; 63, Iowa, 1,456,728 acres; 64, Otoe and Missouria, Iowa, Omaha, Sac and Fox, 10,145,180 acres; 65, Omaha, 5,064,236 acres; 66, Ponca, 2,511,045 acres; 67, Otoe and Missouria, 3,058,491 acres; 68, Pawnee, 22,511,288 acres; 69, Osage, 17,772,035 acres; 70, Osage, 11,971,616 acres; 72, Quapaw, 1,031,438 acres; 73, Caddo, 732,892 acres; 74, Mdewakanton band of Santee Sioux, 3,996,735 acres; 75, Eastern or Mississippi Sioux, 27,480,227 acres; 76, Yankton Sioux, 1,775,242 acres; 77, Sisseton and Wahpeton Santee Sioux, 9,864,311 acres; 78, Sisseton Santee Sioux, 555,834 acres; 79, Teton and Yanktonai Sioux, 14,084,930 acres; 80, Yanktonai?, 11,346,542 acres; 81, Teton Sioux, 59,124,725 acres; 82, Three Affiliated Tribes of Ft. Berthold, 4,413,348 acres; 83, Arikara, Mandan, Hidatsa, 12,410,550 acres; 84, Assiniboine, 6,396,643 acres; 85, Crow, 37,249,088 acres; 86, Blackfeet and Gros Ventre, 30,528,124 acres; 87, Flathead, 6,340,063 acres; 88, Upper Pend d'Oreille, 3,020,687 acres; 89, Kootenai, 5,294,818 acres; 90, Nez Perce, 13,191,293 acres; 91, Coeur d'Alene, 3,084,509 acres; 92, Kalispel, 2,420,830 acres; 93, Spokane, 2,235,197 acres; 94, Palouse, 697,999 acres; 95, Cayuse, 2,435,330 acres; Walla Walla, 370,892 acres; 97, Umatilla, 1,001,321 acres; 98, Yakima, 8,690,303 acres; 99, Colville, 464,475 acres; 100, Lakes, 1,121,349 acres; 101, Sanpoil and Nespelem, 1,433,878 acres; 102, Okanagan, 1,016,006 acres; 103, Methow, 402,768 acres; 104, Warm Springs Sahaptins, 1,499,497 acres; 105, Clatsop, 31,189 acres; 106, Tillamook, 239,890 acres; 107, Alsea, 1,152,956 acres; 108, Coquille, Chetco, and Tututni, 1,678,134 acres; 109, "Snake," 1,709,804 acres; 110, Lemhi Northern Shoshone, 5,117,140 acres; 111, "Shoshone," 38,3555,050 acres; 112, Northern Cheyenne and Northern Arapaho, 50,917, 918 acres; Klamath, 6,358,532 acres; 114, Modoc, 1,811,259 acres; 115, Achumawi, 3,100,269 acres; 116, Northern Paiute, 26,135,301 acres; 117, Washoe, 1,703,649 acres; 118, California Indians, 82,851,671 acres; 119, Western Shoshone, 24,614,438 acres; 120, Gosiute, 6,005,636 acres; 121, Uintah Ute, 6,139,435 acres; 122, Southern Paiute, 24,098,363 acres; 123, Hopi, 4,716,295 acres; 124, Navajo, 20,915,963 acres; 125, Acoma Pueblo, 1,748,453 acres; 126, Laguna Pueblo, 707,303 acres; 127, Zia, Jemez, and Santa Ana Pueblos, 553,591 acres; 128, Santo Domingo Pueblo, 215,064 acres; 129, San Ildefonso Pueblo, 117,717 acres; 130, Nambe Pueblo, 66,501 acres; 131, Santa Clara Pueblo, 82,128 acres; 132, Taos Pueblo, 360,297 acres; 133, Kiowa, Comanche, and Apache, 64,523,170 acres; 134, Jicarilla Apache, 14,223,269 acres; 135, Mescalero Apache, 19,178,399 acres; 136, Mescalero Apache, 6,2442,732 acres; 137, Lipan Apache, 12,587,702 acres; 138, Chiricahua Apache, 14,634,476 acres; 139, Chiricahua Apache, 893,445 acres; 140, Western Apache, 9,664,689 acres; 141, Tonto Apache, 1,220,663 acres; 142, Havasupai, 2,443,392 acres; 143, Walapai, 5,183,048 acres; 144, Mohave, 1,052,118 acres; 145, Chemehuevi, 3,799,018 acres; 146, Yavapai, 9,246,951 acres; 147, Pima and Maricopa, 3,814,191 acres; 148, Quechan, 2,185,185 acres; 149, Papago, 9,113,041 acres; 150, Nooksack Salish, 80,128 acres; 151, Lummi Salish, 90,194 acres; 152, Samish Salish, 7,959 acres; 153, Upper Skagit, 445,959 acres; 154, Swinomish Salish, 26,554 acres; 155, Lower Skagit, 57,357 acres; 156, Kikiallus Salish, 8,448 acres; 157, Stillaguamish Salish, 58,334 acres; 158, Makah, 120,254 acres; 159, S'Klallam (Clallam Salish), 454,261 acres; 160, Snohomish Salish, 152,712 acres; 161, Quileute, 110,699 acres; 162, Skokomish Salish, 358,916 acres; 163, Skykomish Salish, 125,573 acres; 164, Snoqualmie Salish, 223,313 acres; 165, Suquamish Salish, 89,348 acres; 166, Duwamish Salish, 50,486 acres; 167, Quinault, 271,279 acres; 168, Squaxin Salish, 19,512 acres; 169, Muckleshoot Salish, 104,298 acres; 170, Puyallup Salish, 56,874 acres; 171, Steilacoom Salish, 10,969 acres; 172, Nisqually Salish, 156,096 acres; 173, Lower Chehalis, 509,416 acres; 174, Upper Chehalis, 321,576 acres; 175, Cowlitz, 1,696,980 acres; 176, Chinook, 46,456 acres.

Map 8 legend (Royster 2008)

Dates of Taking

The Docket 196 filing specified that Hopi aboriginal lands had been "taken" by the government with the Treaty of Guadalupe Hidalgo in 1848. Although the first phase of the ICC trial was solely concerned with establishing land *title* (aboriginal and/or reserved) for Hopis, Navajos, and Paiutes in the overall area, the Commission's 1970 Opinion and Findings also pronounced on *dates of taking*. Rather than in 1848, the Commission opined, Hopi aboriginal-title lands had been taken first in 1882, and then again for a second time in 1937. Boyden quickly moved, on August 28, 1970, for a rehearing both on the Findings of Fact regarding dimensions of the aboriginal area, and on dates of taking, since no evidence had been presented on behalf of the Hopi in the latter regard. As rendered by the Commission, Boyden's motion for rehearing was as follows:

> On August 28, 1970 the Hopi plaintiff filed a motion for further hearings which was supported by an assertion that it had not been afforded an opportunity to present its complete evidence as to the date or dates of taking of its aboriginal lands; that the Commission had failed to find, as requested by the plaintiff, that the Hopi Tribe held aboriginal title to all the land claimed by said tribe as of February 2, 1848, the date the United States obtained sovereignty over the subject lands pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922; (31 Ind. Cl. Comm. 16, p 18) and, that the Commission's premature decision was based on erroneous findings of fact and conclusions of law which distorted the nature and extent of plaintiff's aboriginal holdings as of 1848 and thereafter (Indian Claims Commission 7-9-1973:A47).

The Commission granted a rehearing on dates of taking, but denied the motion to rehear on Finding of Fact 20, in which they had delimited the area of exclusive Hopi use and occupancy.

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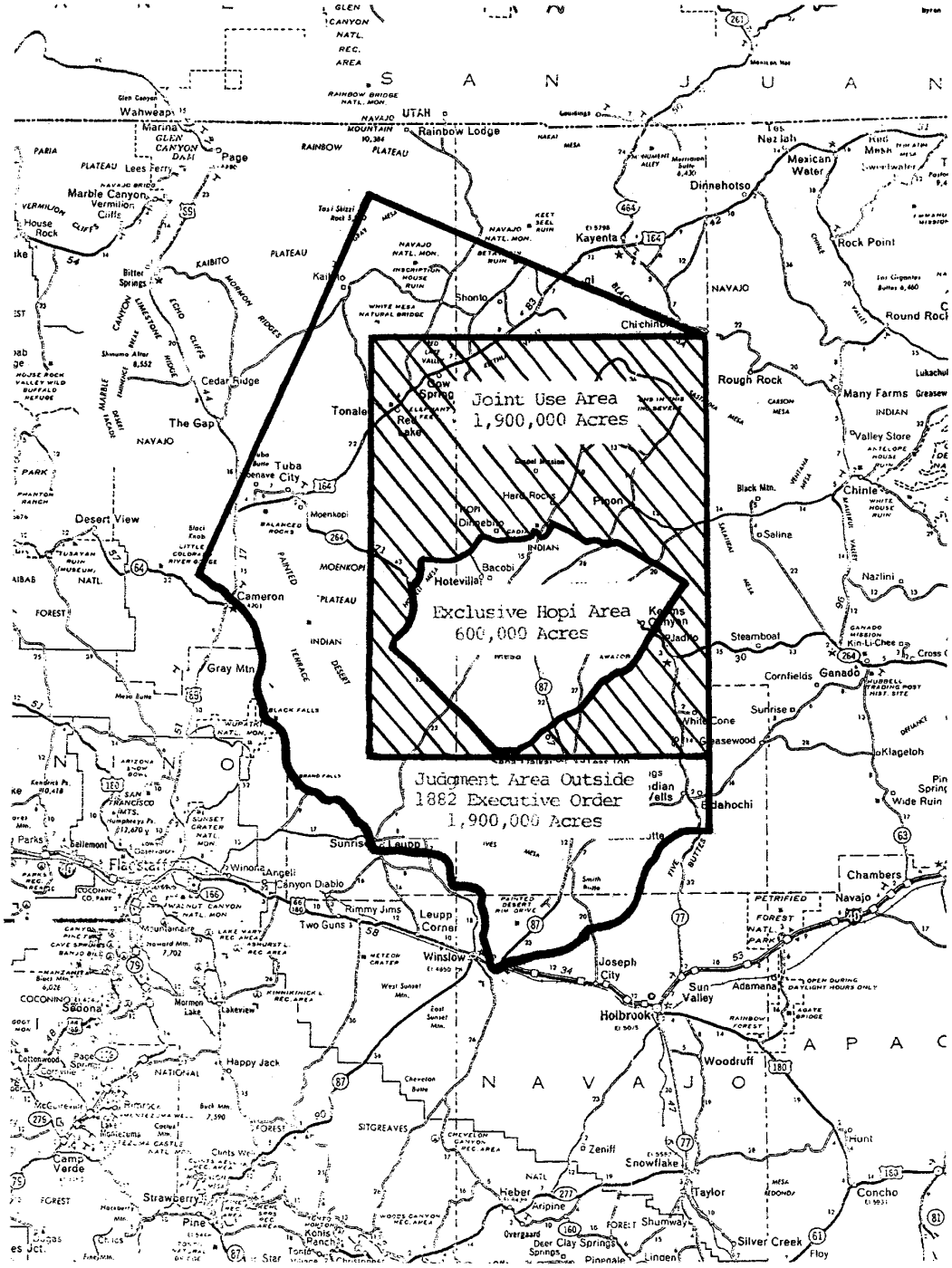
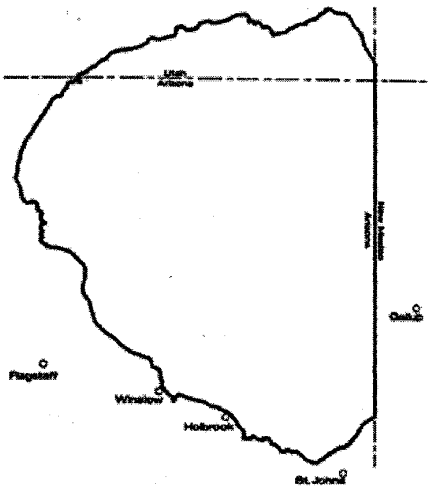


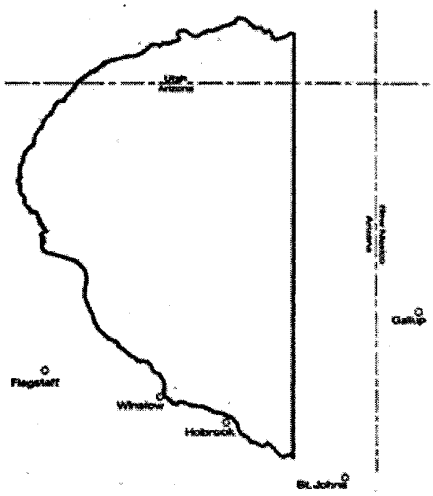
Map 9. Acreages for sectors of "Judicially Established" Hopi aboriginal lands outside and inside 1882 Reservation (Docket 196 n.d.)

The rehearing on dates of taking occurred on May 22, 1972. Boyden was only permitted to proceed by oral argument. He did not succeed in convincing the Commission to change its Opinion. On July 9, 1973, the ICC reaffirmed its 1970 Opinion and Findings of Fact, with several significant statements:

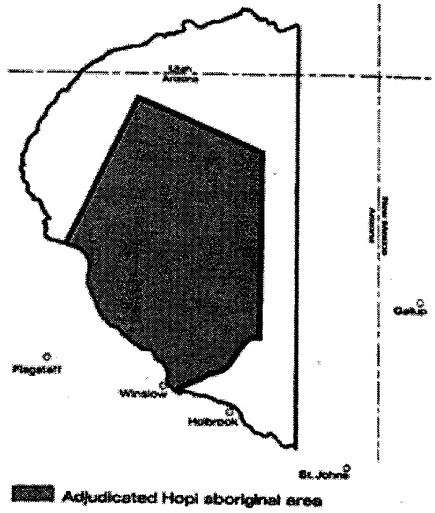
> Having completed...[a] reexamination of the record, the Commission concludes (1) that the Commission's 1970 decision delineating the extent of Hopi aboriginal land ownership in 1882 is fully supported by the record; and (in response to plaintiff's request for our opinion), we also find (2) that *the extent of Hopi aboriginal land ownership in 1882 is substantially the same as it was in 1848.*
>
> The record clearly shows that for a long time prior to the establishment of the 1882 Executive Order reservation, and also for a long time prior to the 1848 date of American sovereignty, the Hopi Indians pursued a static, nonnomadic, nonexpansionist, agricultural mode of life. They lived, as they do today, in their ancient pueblos high atop three mesas in east central Arizona [sic]. From these protected sites, the Hopi Indians descended to the valleys below to cultivate neighboring fields for grain and fruit and to pasture small flocks of sheep. They also gathered wood and wild plants and, as the occasion demanded, hunted for game. Their most productive land lay to the west and extended a short distance outside the boundary of the 1882 reservation in the Moencopi area.
>
> Horses played a minor part in the Hopi life style so that the distance from their villages at which they carried on their activities depended on how far they could safely travel by foot. Thus, when danger...arose, the Hopis would quickly return to their village sites where they were comparatively safe. The repeated harassment of and attacks upon the Hopi Indians, which occurred in the Spanish period and continued until the final cessation of hostilities, invariably occurred at or near the Hopi villages. Furthermore, *the United States Army's field operations against the Navajo in the 1860's did not in any appreciable way diminish or deprive the Hopi Indians of the lands they were actually using at the time.*
>
> Plaintiff argues that the existence of Hopi eagle shrines throughout the area, which it claims to have owned aboriginally, together with evidence that the Hopis visited these shrines at intervals for religious purposes and had a strong spiritual attachment to these holy places support a finding of Hopi aboriginal ownership. However, *it is clear that those eagle shrines in the peripheral areas claimed by the Hopi plaintiff as traditionally belonging to the Hopi Tribe had been abandoned for centuries*. Archaeological discoveries merely show that at some time in the distant past the Hopis had lived in the outlying regions of the claimed area and used these sites for religious purposes. They also confirm the fact that other Indian tribes in addition to the Hopis made use of eagle shrines throughout the claimed area. Furthermore, many ancient Navajo dwelling sites have been uncovered within the confines of the 1882 Executive Order reservation in the very heart of Hopi country (Indian Claims Commission 7-9-1973:A50-A52, emphases added).



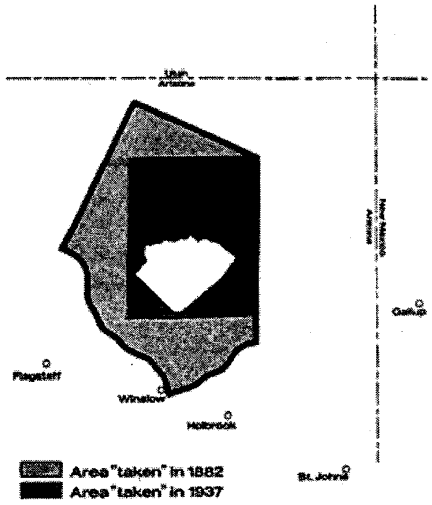
Original Area Claimed in Docket 196



Claim Area as Amended, 1961



Aboriginal Area Identified by ICC, 1970



"Takings" Identified by ICC, 1970

Map 10. Shrinking Hopi Aboriginal Lands.

Boyden could barely contain his annoyance at the Commission's apparent ignorance of basic ethnographic and historic facts. In the first place, of course, the Hopis do not live in east-central Arizona, and their most productive land does not lie "to the west" (of what? east-central Arizona?). The Hopi economy, while centered on agriculture, depended extensively on foraging (hunting and gathering), frequently at great distances from the villages, and Hopis had large herds of livestock (sheep, cattle, and horses) from the 17th century forward. Hopis had major horse herds, as noted by the Dominguez-Escalante expedition of the 1770's (see also below).

Perhaps most astonishing of the Commission's errors was the assertion that Hopi aboriginal lands were the same in 1882 as 1848 and that the actions of the U.S. Army against the Navajo in the 1860s (why no mention of the 1850's?) had no effect on depriving Hopis of their aboriginal lands by driving Navajos in upon them. The Commission's view here seems to contradict its own Finding in the Opinion of June 29, 1970, that:

> In an effort to check further Navajo raiding, Fort Defiance was established in 1851 in Arizona at a point just west of the present Arizona-New Mexico boundary line. The military operations emanating from Fort Defiance had a two-fold effect. *The Navajo began to range further south, west, and northwest*, and the military authorities were brought into closer contact with the Hopi Indians (Indian Claims Commission 6-29-1970d:299, Finding 13, emphasis added).

If Navajos "began to range further south, west and northwest" only at this juncture, how does that substantiate the Commission's claim that Navajos had by 1868 acquired "rooted" aboriginal title to those areas? And how does it square with the idea that U.S. military actions against the Navajo had no effect on depriving Hopis of their aboriginal lands as of 1848, or that those lands were the same in 1848 as 1882? Again in its Finding 14 on Docket 196 in 1970, the Commission directly referenced 1858 as the beginning of Navajo movement into areas it awarded to the Navajo Tribe as aboriginal title lands in Docket 229 (Indian Claims Commission 6-29-1970d:300).

The idea that eagle shrines had been "abandoned for centuries" is also, of course, sheer nonsense, as the ethnographic record—including that available to the Commission—amply demonstrates. Yet on the basis of these seriously flawed "findings," the Commission concluded:

> It is the Commission's opinion that its 1970 decision is fully supported by the record, and represents a reasonable estimate of the amount of land the plaintiff Hopi tribe had actually and continuously used and occupied to the exclusion of others for a long time prior to the establishment of the 1882 reservation (Indian Claims Commission 7-9-1973:A52-A53).

Boyden thus took the Hopi Tribe's appeal to the Court of Claims (below).

The *Healing* case's rulings had complicated the Commission's Opinion and Findings on Docket 196. In its 1970 decision, the Commission explicitly took "judicial notice" of the *Healing* court's findings. But, as Boyden pointed out, although the ICC Act prohibited the Commission from hearing claims against the government as a result of its actions after 1946, *Healing* Court rulings found that the government had been in continuous violation of the law from 1937-1972 in preventing Hopi access to the 1882 Reservation outside District Six (Boyden 10-4-1973, citing U.S. District Court for the District of Arizona 9-7-1972). This was another item to be included in the appeal.

Offsets

In keeping with Section 2 of the I.C.C. Act, the General Services Administration was requested by the U.S. Attorney General on September 29, 1952, to prepare an accounting of "gratuity payments" "in response to the allegations of Petition No. 196 of the Hopi Tribe of Indians" (General Services Administration 3-14-1966). The accounting report, 258 pages, took fourteen years to produce, based on records in the U.S. General Accounting Office "and other

sources." Delays in completion of the report were cited in repeated motions filed by the government in the 1950's to postpone hearings on Docket 196.

The GSA report referred explicitly to the primary terms of Docket 196:

> The petitioner alleges that by the Treaty of Guadalupe Hidalgo, proclaimed July 4, 1848, the defendant obtained sovereignty over lands owned and occupied by petitioner from time immemorial, and converted the lands to the use of the defendant without the payment of just compensation or of any compensation agreed to by them....
>
> Although petitioner's claims arise principally from the treaty of Guadalupe Hidalgo, dated July 4, 1848, the first disbursement of record for these Indians was in the fiscal year 1870 (General Services Administration 3-14-1966:1).

It compiled all data from 1870-1951, on disbursements 1) "for the benefit of the Hopi Indians," 2) "for the benefit of the Hopi Indians and said Indians jointly with other Indians," and 3) for "merchandise...delivered to or...services...rendered at the various agencies having jurisdiction over the Hopi Tribe of Indians" (General Services Administration 3-14-1966:2). Category 1 covered disbursements at the Hopi Agency and the Hopi School, Categories 2 and 3 included disbursements made at the Navajo Agency, and the Western Navajo Agency. All told, the figures submitted were as follows:

Category 1:	$ 244,630.43
Category 2:	$ 613,734.72
Category 3:	$ 677,429.42
Total:	$1,535,794.57

Under Category 1, the largest single expenditure was $97,102.82 for "Coal mine operation and maintenance," presumably for the principal benefit of the Hopi Agency, the Keam's Canyon Boarding School, and the Day schools. Education came in next at $42,771.37. Fourth on the list was $23,936.15 for "expenses of dipping sheep." Expenses included purchase and maintenance of motor vehicles, pay of burro drivers, carpenters, laborers, truck drivers,

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repairs to telephone lines," etc., etc., etc. (General Services Administration 3-14-1966:6-7). Needless to say, most of these goods and services were not requested by the Hopis, many were not desired by them, and most were directly for the benefit of the B.I.A. Agency. In this regard, the government's statement of offsets to be deducted from any award in Docket 196 was identical to those presented to the Court of Claims in cases prior to passage of the Indian Claims Commission Act. Although offsets were explicit in the I.C.C. Act, it remains a serious question whether they were legally or morally permissible. Nancy O. Lurie's history of the Indian Claims Commission notes:

> The major justification for offsets is that if Indians had received proper compensation for their lands initially they would not have needed subsequent gratuities. Offsets are therefore part of the price paid for the land. However, offsets often turn out to be the price of things that Indian people neither wanted nor would have purchased if given a choice. Also, had tribes not been forced to relinquish the lands and resources which had supported them, they would not have required government gratuities to survive.
>
> As a general point of law, a defendant may not plead against a judgment a gratuity given a plaintiff. Monroe Price [a legal historian] notes the questionable legality of Indian claims offsets in observing that "a person defending against a tort claim of rape cannot offset the award by the value of the incidental pleasure his victim enjoyed as a result of the attack" (Lurie 1978:103).

These statements certainly hold true for the accounting of offsets in Docket 196.

In 1973, with specific regard to Count 9 (the "accounting" claim) of the Docket 196 claim, Boyden filed a series of "Exceptions" to the GSA report, parts of which, he maintained, were "totally inadequate" (Boyden 7-13-1973). In March, 1975, the Government filed a motion to establish time for responding to the Hopi Tribe's Exceptions (Indian Claims Commission n.d.a). Further motions by Plaintiff and Defendant on these matters ended with an Order by the Court of Claims to stay all ICC proceedings pertaining to Count 9 until the Court had reached a decision on the Hopi appeal of the ICC decision of June 29, 1970 (Indian Claims Commission n.d.a). The Commission thus took no further action on the Government's 1966 statement of

accounting or the Hopi Tribe's Exceptions. As noted above, no Phase Two or Phase Three was ever heard in Docket 196. Boyden affirmed this in his Settlement proposal to the Hopi Tribe in October 1976 (see below): the "accounting claim, pressed by the Tribe, and the claimed offsets by the United States have never been heard by the Commission" (Boyden 1976:5-6). The accounting statement remained a key part of the record, however: the Government used it in negotiations for the Compromise Settlement, and Boyden invoked it specifically in his Settlement proposal to the Hopi Tribe as representing offsets the Government would claim against any adjudicated award by the Commission (should the Tribe not accept the Settlement).

Appeal to the Court of Claims

Having failed to persuade the Indian Claims Commission to amend its findings on Hopi aboriginal title lands or on dates of taking, the Hopi Tribe filed an appeal in the Court of Claims in late 1974. In an extensive brief and appendix, the attorneys laid out the grounds for appeal, which were primarily factual. The brief emphasized three key points. First:

> The Commission erred in limiting the Hopi Aboriginal Claim to the lands described in Finding of Fact 20… 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…. The Commission Erroneously Failed to Properly Consider the Extent of Aboriginal Boundaries (Hopi Tribe 1974:i).

The year 1848 was a crucial element of the Hopi Tribe's argument in Docket 196. Yet the Commission reasoned improbably that the Hopis' exclusive aboriginal area was the same in 1882 as 1848, thus ignoring a great deal of evidence about Navajo movements into Hopi aboriginal areas as a direct result of United States military actions since 1848. Moreover, in assigning dates of taking, the Commission in 1970 failed to abide by its own pre-trial order of 1958 to limit the issues at the First Phase trial to questions of aboriginal title. As we have seen,

the Hopi Tribe had already appealed these issues to the ICC to no avail: the Commission had refused to amend its findings. So the Court of Claims appeal re-emphasized that:

> ...the Commission's judgment was rendered before the Hopi Tribe had been given an opportunity to present its evidence on the dates of taking. In its opinion on the Hopi motion for a further hearing [motion of 8-28-1970], the Commission very conveniently, but without factual substance, attempted to palliate its error with a further conclusion:
>
> > That the extent of the Hopi aboriginal land ownership in 1882 is substantially the same as it was in 1848.... (Hopi Tribe 1974:11).

As noted, the Tribal attorneys could scarcely conceal their impatience with this ICC statement, which betrayed a fundamental failure to master the historical evidence presented at trial and subsequently:

> No one can conscientiously read the record in this case without concluding that Hopi possession diminished in direct proportion to Navajo expansion into Hopi territory (Hopi Tribe 1974:11-12).

The Court of Claims brief reiterated the history of the 1855 Treaty of Laguna Negra and its establishment of the Meriwether Line as the western Navajo limit. Though unratified by Congress, the Laguna Negra treaty was regarded by all parties as the fairest treaty made with the Navajos, and an accurate representation of their effective territorial boundaries (see Whiteley 2007b). The brief cited Fred Eggan's 1961 testimony that the Meriwether Line represented an actual land boundary between Hopis and Navajos in 1848 and for years prior to that, and "his opinion in this regard was substantially confirmed by the Defendants' witnesses" (Hopi Tribe 1974:12). The brief also cited Duke Pahona's testimony (backed by historical reports) on the line (just east of the Meriwether Line) agreed to between Hopi and Navajo, marked by two skulls and sealed with a *tiiponi*, given by Navajo chiefs to the Snake clan chief of Walpi. Mr. Pahona had presented the *tiiponi* at the trial in 1961—but, as Boyden stressed, none of the Commissioners who made the decision in 1970 had seen or heard any of the witnesses.

Reiterating the presentation of historical evidence from the trial, and relying too on the Government's own historical documents in this regard, the Hopi Tribe's brief outlined several expeditions against the Navajo from 1846-1850; then:

> Between 1850 and 1860, large numbers of Navajos, pursued by the United States military forces, entered what was then Hopi territory, being forced into areas they had not previously occupied.... Government witness Dr. Ellis stated that some of the Navajos took heed of the repeated warnings of reprisals from the United States and in about 1860 began a push westward into the peripheral areas never before occupied.... Many other exhibits and the testimony of witnesses substantiating the facts upon which we rely are in evidence in this case as above set out (Hopi Tribe 1974:14-15).

Summarizing, the brief noted:

> When the Commission determined aboriginal possession of the Hopi people as of 1882, it slighted the series of events to which we have made reference and the responsibility of the United States in the shrinking of Hopi country prior to that date (Hopi Tribe 1974:16).

The present author only disagrees with the brief's position insofar as the Docket 196 petition it sought to defend did not go far enough in its assertion of exclusive Hopi aboriginal territory in 1848. If the Meriwether line was a genuine reflection of the western limit of Navajo occupancy in 1848—which I believe it was—the same historical facts and sources laid out by the brief also extend to lands west, south, and southwest of the southern point of the Meriwether line, i.e., including a large area of Hopi shrines, serially visited ruins, and eagle-gathering sites south of the Little Colorado River as far as the Mogollon Rim. Again, the ICC's placement of the area south of the Little Colorado River, extending west and northwest to the confluence with Dinnebito Wash, within "exclusive" Navajo lands (Map 6) is wholly indefensible historically, for 1848 or long after that: this was Hopi territory. Similarly, the present author disagrees with the brief's concession that areas around the San Francisco Peaks and Navajo Mountain had been "abandoned" (Hopi Tribe 1974:22): based upon my reading of the historical record and

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discussions with Hopi elders over the last three decades, I cannot support that position.[56] The brief also contested the Commission's finding that the Hopis had little use of draft animals, and depended on walking to their fields, and to herd sheep, etc. The brief's citation of clear evidence from the 18th and 19th century indicated the Hopis had large horse herds (see also below).

The brief contested the ICC's western boundary-line of Hopi aboriginal land as, "neither a natural boundary nor is it supported by the evidence in the case" (Hopi Tribe 1974:26).

The second key point in the brief's argument was:

> The Commission Erred in Determining that the Executive Order of December 16, 1882, Extinguished the Hopi Indian Title to All Lands Which were Outside the Boundaries Described in Said Executive Order (Hopi Tribe 1974:29).

It went on to explain:

> The basing of findings upon obvious errors of fact and conclusions of conjecture does violence to the substantiality of the evidence upon which the Commission's opinion is predicated. In view of the fact that there was no effort made to confine the Hopi Tribe to within the boundaries of the 1882 Executive Order Reservation nor any substantial effort made to prevent the Navajo Tribe from moving into the reservation, it strains the tests for extinguishment of Indian aboriginal title as already laid down by the courts (Hopi Tribe 1974:48).

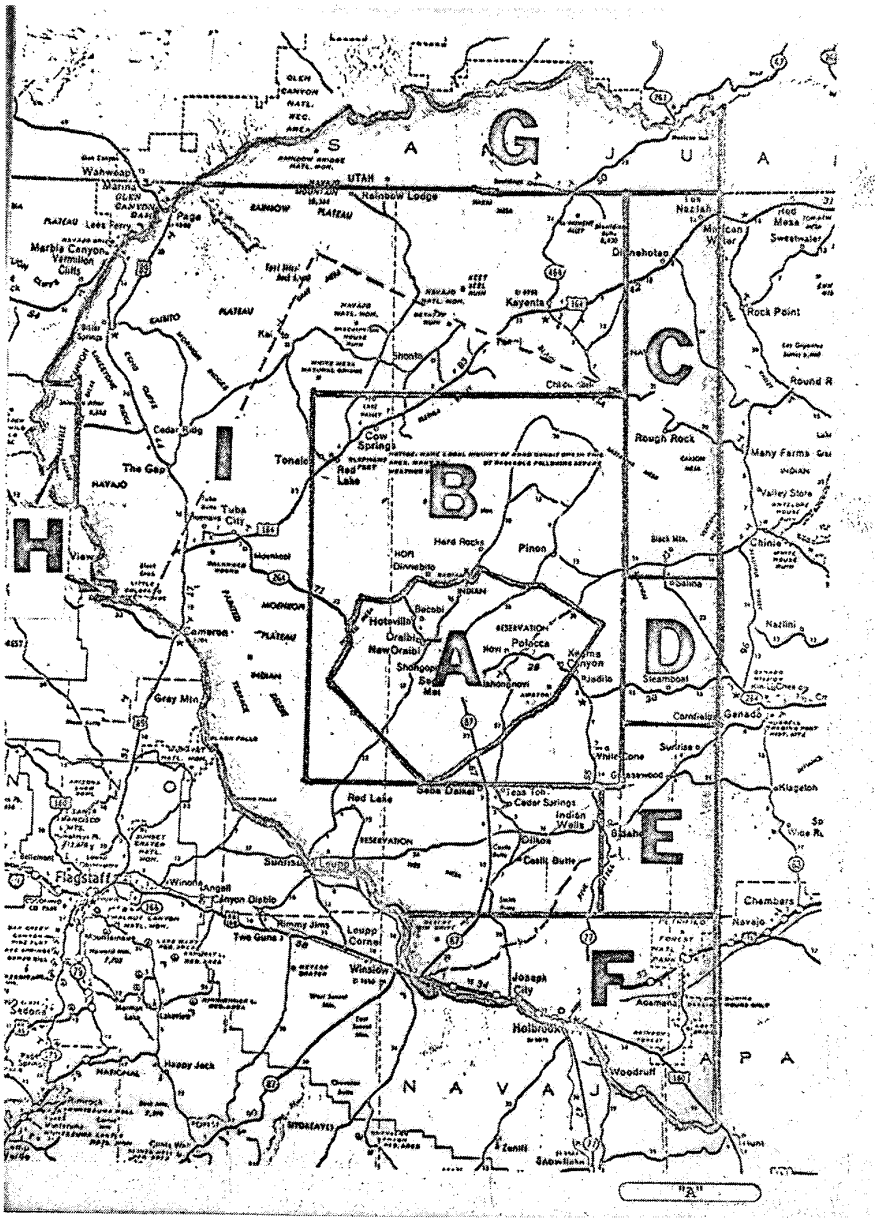
The argument stressed the contradiction between the Commission's finding here and the long-term presence of Hopi settlements at Moenkopi, and drew the Court's attention to the 1974 Land Settlement Act, at that moment almost finally approved by the Senate, which recognized extensive Hopi interests throughout the 1934 Act Reservation:

> The Hopi Tribe contends that the entire area designated as Area I [the 1934 Act reservation: see Map 11] was possessed aboriginally in 1848 by the Hopi Indian Tribe,

[56] Among other things these areas of Hopi aboriginal lands included the timber resources of the San Francisco Mountains, massively harvested by the lumber industry in Flagstaff from the late 19th century forward. As the Commission noted (Indian Claims Commission 1968:8), as a legal matter aboriginal title covered "all the natural resources of the land involved, including vegetation, timber, mineral resources and the like." Moreover in 1882, the date the Commission imputed as the date of taking for aboriginal Hopi lands outside the 1882 Reservation, the Atcheson, Topeka, and Santa Fe Railroad was already built through Flagstaff, enhancing enormously the market value of timber and other resources in that area. If a Hopi claim to this area had been presented to the Commission and/or to the Court of Claims and found favor, the compensation for these timber and timber-revenue losses might have massively enhanced a Hopi award.

thereby securing Indian title to the area; that by the enactment of the 1934 legislation a Navajo one-half interest was imposed upon that area, but reserving and continuing the other one-half interest for the Hopi Tribe (Hopi Tribe 1974:61).

The Claim Area was divided into nine separate areas, each argued by Boyden to have been "taken" at a different date. Area I comprised the majority of the 1934 Reservation (see Map 11).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Chinle
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Chambers
Joseph City
Leupp
Indian Wells
Cedar Springs
Rainbow Lodge
Dinnebito
Sunrise
Woodruff
Navajo
Tonalea
Cameron
Grey Mtn
Canyon Diablo
Two Guns
Happy Jack
Zuni
Sanders
Gallup
Nazlini
Klagetoh
Round R
Rock Point
Sweetwater
Nazlah
Dilnehotso
Chilchinbeto
Shonto
Kaibito
Lees Ferry
Marble Canyon
Vermilion Cliffs
Wahweap
Bitter Springs
Cedar Ridge
The Gap
Moenkopi
Bacobi
Shungopavi
Second Mesa
Sand Dune
Tuba Trading Post
Cedar Springs
Oljato
Castle Butte
Leupp Corner
Rimmy Jim
Sunrise
Navajo
Tsaile
Ganado
Cornfields
Steamboat
Pinedale
Sawmill
Chinle
Round Rock
Valley Store
Black Mts.
Nazlini
Klagetoh
Sanders
Zuni
Gallup
Sawmill
Tsaile
Navajo
Chambers
Adamana
Holbrook
Joseph City
Winslow
Leupp
Sunrise
Flagstaff
Winona
Happy Jack
Woodruff
Zuni
Sanders

This argument was very important for the final terms of the Compromise Settlement. Boyden here was arguing that, for any lands lying in the 1934 Act Reservation that were determined to have been taken from aboriginal Hopi possession, the compensable Hopi interest should be calculated on the same basis (except for differences in dates of taking) as for those lands lying outside District Six within the 1882 Reservation. His position here was entirely consistent with that which had prevailed in Healing v. Jones, as affirmed by the 1974 Act:

> We employ the reasoning in Healing v. Jones...in which each tribe was adjudged to have an undivided one-half interest when the Navajo Tribe was settled in the Hopi 1882 Executive Order Reservation....
>
> Therefore, in 1934 an undivided one-half interest in Area I was taken from the Hopi Tribe and given to the Navajo Tribe with the exception of the checkerboard sections south and west of the 1882 Executive Order Reservation which were taken prior to that by the railroad....The petitioner asserts that the average date of taking in the railroad lands was 1891.
>
> The Hopi aboriginal title and subsequently its reservation title after the 1934 Act has never been extinguished as to the balance of Area I (Hopi Tribe 1974:61-62).

Trial and final disposition of the 1934 Act case was still years away at this juncture. Yet the logic of Boyden's position here appears indefeasible. In short, if the value of compensation for lands taken, and their "rental," was a key principle for the 1882 Reservation in negotiating the Compromise Settlement, the same standard should apply, under the terms of the 1974 Act, for the 1934 Act Reservation. Yet when the Compromise Settlement was reached in 1976, there was no way to determine which lands in the 1934 Act Reservation had in fact been "taken" by the government from Hopi possession, because that issue was still up for adjudication. Absent that determination, it may be that the acreages for which the Settlement of 1976 was designed to

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compensate[57]—most of which lay in the 1934 Reservation—were significantly undervalued, especially if their date of taking should in fact have been 1934 rather than 1882.

The third key point of this appeal to the Court of Claims was:

> The Commission Erred in Determining That on June 2, 1937, Hopi Indian Title to All Lands in the Executive Order Reservation of December 16, 1882, Lying Outside "Land Management District 6" was Extinguished (Hopi Tribe 1974:63).

The brief argued that this was finding was contradictory to the salient decisions in Healing v. Jones.

The concluding argument of the brief did not mince words:

> We do not request a mere reweighing of the evidence. The facts here brought to the attention of this Court were by the Commission first overlooked then distorted into consistency with its original opinion. Hopi aboriginal title should be determined as of 1848 and the dates of taking of both aboriginal and reservation title fixed in accordance with the facts (Hopi Tribe 1974:70).

In the present author's opinion, the historical facts presented in the brief are solid, and as pointed out above, the ICC's defense of its Findings of Fact is blatantly wrong on well-established historical and ethnographic grounds. However, on January 30th, 1976, the Court of Claims issued a two-page opinion dismissing the Hopi appeal, and affirming the Indian Claims Commission's Opinion and Findings in its 1970 decision. Boyden petitioned for a rehearing "en banc" (with a full panel of judges present), but that petition too was denied, on March 26th, 1976. So, while evidently proceeding with attempts to arrange a Compromise Settlement with the Department of Justice, Boyden also moved to appeal the case to the Supreme Court.

[57] Notwithstanding subsequent assertions that the Settlement was *not* based on acreages, Boyden's report to the Tribal Council on October 14-15, 1976, indicates that it was.

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Supreme Court Petition

After all appeals before the Indian Claims Commission and the U.S. Court of Claims had been denied, the Tribal attorneys filed a motion on May 27th, 1976, with the Supreme Court for extension of time within which to file a petition for writ of certiorari (i.e., for the Appeal to be heard by the Supreme Court). The stated purpose of the motion was "to enable Mr. Boyden to pursue settlement negotiations then in progress with the government" (Boyden 4-22-1977). On June 7th, the Supreme Court granted the extension. No settlement was reached, however, "during the period of the extension." So, on August 23rd, 1976, Boyden filed a petition for a Writ of Certiorari with the Supreme Court. The petition was docketed as no. 76-263.

Although settlement negotiations with the Justice Department were ongoing, the petition provides an important window into continuing points of argument on the Docket 196 claim. Since the Supreme Court petition was withdrawn on December 7 (and accordingly dismissed on December 21), following the ICC's Final Judgment on the Compromise Settlement, these points of argument—which primarily concerned the same issues presented to the Court of Claims—were never finally adjudicated. The Supreme Court petition again argued (even more forcefully) that the ICC's Findings were at variance with the Findings in *Healing v. Jones*, despite the fact that the ICC had explicitly accepted the findings in the *Healing* case. The petition further argued that the Hopi Tribe had been denied due process in the ICC and Court of Claims decisions to disallow presentation of oral evidence on dates of taking. The petition's arguments were summarized in three key questions:

1. Whether the holding of the Indian Claims Commission, as affirmed by the Court of Claims, determining the extent and dates of extinguishment of Hopi aboriginal title is in error as a result of its conflict with the decision and holding of Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), affirmed by this Court at 373 U.S. 758 (1963).

2. Whether the Petitioner has been denied due process of law by the Indian Claims Commission in that:

    a. The decision on dates of taking was made without allowing the Hopi Tribe to present oral testimony and otherwise fully develop its case; and

    b. The decision on aboriginal claims was rendered by a panel of Commissioners who did not hear the evidence in the case.

3. Whether the decision of the Indian Claims Commission limiting Hopi aboriginal claims is supported by substantial evidence (Hopi Tribe v. the United States and the Navajo Tribe 8-23-1976:3-4).

The petition re-emphasized that the ICC decision in June 1970 was made by Commissioners who had not heard the testimony, witnesses, or oral arguments at the 1961 trial:

> During those seven years [from May 22 1963, when the aboriginal title phase of Docket 196 was closed], all of the Commissioners who heard the Hopi case had left the Commission. The Opinion on Title and accompanying Findings of Fact and Conclusions of Law and Interlocutory Order (23 Ind. Cl. Com... 277; Appendix II) were issued by a panel of Commissioners, none of whom had attended the hearing or heard the testimony presented (Hopi Tribe v. the United States and the Navajo Tribe 8-23-1976:6).

This lack of direct familiarity, the petition argued, had a direct impact on the Commission's opinion on dates of taking, since no evidence had been presented on that issue at the Title Phase trial. Secondly:

> To further illustrate the failure of the Commission to familiarize itself with the extensive record inherited from a previous panel, Petitioner demonstrated to the Court of Claims that the Commission based its decision regarding the extent of Hopi aboriginal possession, not upon natural boundaries, but, upon the false assumption that "Horses played a minor part in the Hopi life style so that the distance from their villages at which they carried on their activities depended on how far they could safely travel by foot" (31 Ind. Cl. Comm. at 21; Appendix III) (Hopi Tribe v. the United States and the Navajo Tribe 8-23-1976:15).

The argument then referred to documents from the 1770's and subsequently showing extensive Hopi use of horses and burros. One of my reports for the Hopi Tribe's water interests in the Little Colorado River Basin (Whiteley 2007a) discusses the evidence for Hopi horses in some detail. I can thus confirm independently the Tribe's contention in the Supreme Court

petition that Hopis were extensively using horses long prior to any date of taking of aboriginal lands by the United States.

The Supreme Court petition evinced the attorneys' frustration with the Court of Claims' peremptory dismissal, and charged that the Court of Claims had failed in its statutory charge to properly review the decisions of the ICC:

> Petitioner's position before the Court of Claims was presented in a brief and separate appendix in excess of 70 and 88 pages respectively. Detailed briefs were also submitted by the government and the Navajo appellees. The record before the Court of Claims was very lengthy. The Court of Claims order from this record and presentation of the parties, consumes barely two (2) pages....
>
> ...[The] order makes no reference to any of the issues on appeal raised by the Hopi Tribe or the other parties, makes no reference to any of the evidence, arguments, or to the record, and provides no discussion or reasoning in support of its conclusion that the orders of the Commission should be approved and affirmed (Hopi Tribe v. the United States and the Navajo Tribe 8-23-1976:13;18).

In sum, as well as the "critical discrepancy" between the Commission's decision and the *Healing* decision, the petition charged the Indian Claims Commission with "serious procedural irregularities" which were further "ignored by the Court of Claims" (Hopi Tribe v. the United States and the Navajo Tribe 8-23-1976:15)

The Supreme Court never had an opportunity to rule on the petition. Whether or not Supreme Court action, if any, would have resulted in a different disposition of the Hopi claim cannot be known, but the questions at issue were never legally resolved. This fact was clearly articulated in a letter from Boyden to Robert T. Coulter, attorney for Hopi Traditionalist leaders who challenged the Compromise Settlement, in January 1978, concerning the effects of accepting the Settlement monies on the status of Hopi aboriginal land:

> The case was appealed from the Indian Claims Commission to the Supreme Court and stricken from the calendar when the case was settled. Therefore, no final determination was had concerning the aboriginal possession of the Hopi people (Boyden 1-19-1978).

Thus the interpretation of Hopi aboriginal lands as "judicially established" by the Commission's 1970 Finding 20 was never in fact finally adjudicated. However, the depiction of Hopi lands on the map of Indian Land Areas Judicially Established (Maps 6 and 7; U.S. Geological Survey 1978) continues to represent an image of the aboriginal Hopi area, as established by the ICC—based on the idea that Hopis did not use horses, and had long since abandoned their eagle shrines. On the question of horses and eagles, it may not be insignificant that the first ever portrait of a Hopi man, Sikyawaytiwa,[58] by an Anglo-American, Edward Kern, was made at Canyon de Chelly in 1849 (one year after the Treaty of Guadalupe Hidalgo); he had ridden over from the Hopi Mesas to meet Col. Washington's party as it negotiated a treaty with the Navajos. The portrait shows him wearing a distinctive Euro-American *riding hat*, decorated with eagle feathers.

[58] I infer this was his name; it was rendered by Kern "Che-ki-wat-te-wa (Yellow Wolf)."

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Figure 2. Edward Kern's portrait of Sikyawaytiwa at Canyon de Chelly, 1849. Ewell Sale Stewart Library, Academy of Natural Sciences of Philadelphia.

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The Compromise Settlement on Docket 196

The Settlement Proposal

It is not clear exactly when Settlement negotiations began between the Attorneys for the Hopi Tribe and those for the Government. In 1973, Wilkinson, Cragun, and Barker "took on principal responsibility for Prosecution of Cause 9 of the Petition, the suit for a general accounting" (Boyden 4-22-1977: Appendix B, affidavit of Glen A. Wilkinson:4). This was by agreement with Boyden in 1973, and must have been in play after the Exceptions to the GSA's accounting report had been filed by Boyden on July 13, 1973. Glen Wilkinson indicates that shortly thereafter, "at this stage of the proceedings, settlement negotiations began" Boyden 4-22-1977: Appendix B, affidavit of Glen A. Wilkinson:4). The context of his statement suggests this may have been at some point in 1975.

Boyden met with the Tribal Council[59] in early August, 1976. After presentations on other litigation questions, the Council went into Executive Session:

> This portion of the meeting was not recorded due to the sensitive nature of the item to be discussed. Mr. Boyden presented a proposal on the land claims settlement which was under negotiations with the Government and could not be made public at this time. All spectators at the meeting were excused for this portion (Hopi Tribal Council 8-4-1976).

The Tribal Council was in Executive Session for 2.3 hours.[60] We may presume Boyden's proposal in this context was similar to the formal proposal he sent to the Justice Department

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[59] Copies of all minutes of Tribal Council meetings from August-November 1976 were generously provided by the Hopi Tribal Secretary's Office. For several meetings, no minutes were kept; recordings of those are present in Tribal records, but they have never been translated and transcribed (M. Felter personal communication 9-4-2008).

[60] On September 1st, at the Tribal Council's regular meeting, it again went into Executive Session to hear a report from Boyden:

> ...on the land claims case. Because of the negotiating status of the case, minutes were not taken. The record for this portion will show the status of this case was reported on by the General Counsel (Hopi Tribal Council 9-1-1976).

three weeks later (on August 25). At a Tribal Council meeting on October 15 (below), he referenced a Council resolution from the August 4 meeting to propose that the Justice Department consider an additional $500,000, which proposal had been declined. The implication is clear that the $5 million had been discussed at the August 4 meeting, and was even before that meeting acceptable in principle to the Justice Department.

On August 25th, 1976, two days after the Supreme Court petition was filed, Boyden sent a formal offer to settle the claims in Docket 196 (with attached Stipulation for Entry of Final Judgment) to the Justice Department (Taft 10-5-1976). The timing of this letter seems incongruous with the Supreme Court petition of August 23, unless, as suggested below, the latter was aimed at providing leverage in the settlement negotiations. In his presentation to the Hopi Tribal Council on October 14 and 15, Boyden voiced a fear that if the Supreme Court were to decide on the question of Hopi aboriginal lands, this might have an adverse effect on the pursuit of Hopi interests in the 1934 Reservation litigation. It is hard to judge the merits of that stated fear. In any event, in August 1976, Boyden was proceeding on two fronts at the same time. Some six weeks later, the Department of Justice sent a notice of agreement to the proposed settlement, provided it was agreed to by the Hopi Tribe, the Secretary of the Interior, and the Indian Claims Commission (Taft 10-5-1976).

Another critical factor was the life of the Indian Claims Commission. Congress had indicated in 1972 that the Commission should tie up all its business as rapidly as possible. As the deadline for the Commission approached in 1976, hearings were held in Congress about granting one final extension. Glen Wilkinson of the Wilkinson firm argued that the ICC should be allowed to finish all of the claims (Rosenthal 1990:233). But Congress was adamant. On October 8th, 1976, it granted a final extension to the ICC until September 30, 1978. However, Congress

stipulated that the ICC must decide by December 31st, 1976, which cases it would not be able to conclude by 9-30-1978, and transfer these to the Court of Claims (Rosenthal 1990:234). In short, the Compromise Settlement on Docket 196 was now on a fast track: if the ICC could not render its Final Judgment before December 31st, the case would simply have to be transferred to the Court of Claims.

Boyden submitted a formal statement regarding the proposed Settlement to the Hopi Tribal Council one week later, in a meeting over two days on October 14, and 15, 1976. Before Boyden's presentation began, Chairman Abbott Sekaquaptewa introduced the question:

> The Chairman gave a brief preview of the special report that was to be presented by Mr. Boyden regarding the proposed settlement on land claims case. He stated that the Government had agreed to the terms which the Hopi Tribal [sic] had asked for, but he didn't know if Mr. Boyden had received a letter from the Attorney General of the United States for acceptance of the negotiated settlement. The Tribal Council will need to discuss the proposed settlement to either accept or reject it. A general meeting of the Hopi people will then be held and a vote will be taken by them. A tentative date for the meeting is scheduled for October 30, 1976, to begin at 10:30 a.m. at the Hopi Day School Gym in Oraibi. He reminded Council that this matter had been discussed in executive session at a prior meeting and at that time, Council had authorized Mr. Boyden to go ahead and make a proposed settlement on this case to the Indian Claims Commission (Hopi Tribal Council 10-14-1976:2).

Chairman Sekaquaptewa then emphasized a key issue in the Settlement:

> One main thing is that the Tribe needs to make sure that by this settlement, it does not hurt us in future land cases whereby the Tribe would be suing for land. He explained that this was the main reason why an out of court settlement was more desirable. In this negotiation the Tribe is asking for $5,000,000 and under the condition that it not affect the 1934 Boundary Bill suit. He stated that the Government had cordially agreed to this stipulation and that they had been notified by telephone of this (Hopi Tribal Council 10-14-1976:2-3).

This issue was repeated several times during the course of Boyden's presentation to the Council. Vice-Chairman Alvin Dashee and Chairman Sekaquaptewa also interjected remarks underscoring this fact:

> Mr. Dashee pointed out that this situation is unique in that we could file for a money judgment against the government for this area and still file a suit against the government for the same area for the recovery of the land.
>
> Mr. Sekaquaptewa also stated that Congress had the power to hear suits on top of the Indian Claims Commission Act, which they have allowed the Hopi tribe to do in the 1882 Executive Order Reservation suit and the 1934 Boundary Bill suit (Hopi Tribal Council 10-14-1976:7).

The following day, Boyden continued with the presentation. He emphasized the distinction between Docket 196, on the one hand, and Healing v. Jones, and the 1934 Act Reservation case:

> By Federal Statute, U.S.C §70 et seq., claims of Indian tribes, including the Hopi claims, as set out in Docket No. 196, were authorized to obtain a money judgment against the United States. This statute did not authorize actions for recovery of land.
>
> The settlement hereby proposed pertains only to the money judgment authorized by said statute and does not include the case of Healing v. Jones, whereby the Hopi Tribe recovered one-half of the so-called Joint Use Area of the 1882 Executive Order Reservation, nor does the settlement include the action commenced by the Hopi Tribe pursuant to the Act of December 22, 1974, 88 Stat. 1712, to provide for the final settlement of the conflicting rights and interests of the Hopi and Navajo Tribes lying within the Reservation created by the Act of June 14, 1934, (48 Stat. 960), commonly known as the Western Navajo Reservation....
>
> As general counsel for the Hopi Tribe, we have, at the direction of the Tribe, made every effort to recover all land possible. This is the basis for the action of Healing v. Jones and the action now pending regarding the 1934 Reservation.
>
> The action now to be settled pertains only to the money judgment against the United States.
>
> The partition suit in the Healing v. Jones case will be actively pursued and the 1934 Reservation suit for recovery of land will also be vigorously pursued (Boyden 1976:1-3).

Boyden then recited a summary history of the case, including the Commission's decision of June 29, 1970, the Tribe's appeals of this decision to the ICC, the Court of Claims, and finally to the Supreme Court:

> Thereafter [i.e., after March 26, 1976, when the Court of Claims denied the Hopi Tribe's motion for a rehearing en banc], a Petition for Writ of Certiorari to the Supreme Court of

> the United States was filed. The Navajo Tribe answered the Petition. Negotiations were then ensuing between the Hopi Tribe and the United States. The Solicitor General has asked for additional time to reply[61] until November 11, 1976. Although the accounting claim, pressed by the Tribe, and the claimed offsets by the United States have never been heard by the Commission, *a careful examination of the claims of both parties revealed that any claim the tribe might press when offsets are allowed, will not be of a very substantial nature* (Boyden 1976:5-6, emphasis added).

This is the most direct statement found of Boyden's argument for accepting the $5 million: that if the Tribe were to wait for a direct award from the ICC, he doubted that the amount would be "of a very substantial nature," *after offsets were allowed.* Boyden presented land value estimates from other Commission decisions and an appraisal of the coal estate in the 1882 Reservation in support, but for the most part it appears he was asking the Council to trust his judgment on this matter. Given his experience and his knowledge of ICC matters, that may have been perfectly reasonable, but after 25 years of (intermittent) work on the claim, Boyden's exact reasons for concluding that any potential claim award would not be very substantial are none too clear. We must thus ask: was the Supreme Court petition a serious appeal, or was it a bargaining chip to persuade the Government to settle? Yet if not a serious appeal, this would run counter to the reasoned and forceful presentation of the appeals to the ICC and the Court of Claims over the previous six years. Was Boyden throwing in the towel on Docket 196, because of the Tribe's result in *Healing* and the promise of Hopi land rights in the 1934 Reservation with the 1974 Land Settlement Act? But then why—if he felt the Tribe's chances in Docket 196 had been weakened by the 1974 Act—would he have filed such a forceful appeal to the Court of Claims in late 1974 (which alluded directly to the impending 1974 Act)?

In his argument to the Tribal Council, Boyden did make a direct link between the Supreme Court petition and the Tribe's chances in a lawsuit over the 1934 Reservation. This may

[61] Even though the syntax is confusing, the reference here is to the Petition before the Supreme Court, not to the Settlement negotiations.

have been a legitimate legal concern, but it may also have been a rhetorical tactic to raise the Council's fears if they refused to accept the Settlement:

> If the Petition for a Writ of Certiorari were to be denied by the Supreme Court, there is considerable danger that the findings of the Commission, with respect to aboriginal possession, might become a material issue for the Navajo Tribe in the trial of the case to obtain additional land for the Hopi people. It, therefore, seems desirable to settle the case before the possibility of any such decision becoming final (Boyden 1976:6).

Boyden then emphasized one feature of the proposed Stipulation on the Settlement:

> The final judgment entered pursuant to this Stipulation shall be by way of compromise and settlement and shall not be construed as an admission by either party as to any issue for purpose or precedent in any other case or otherwise (Boyden 1976:6).

By his own statement, Boyden had in mind here only the impending 1934 Reservation lawsuit. But the stipulation and his later remarks (quoted above), that "no final determination was had concerning the aboriginal possession of the Hopi people" (Boyden 1-19-1978) may conceivably offer some encouragement for the further pursuit of Hopi aboriginal land rights. Whether that potential is realistic legislatively and politically is, of course, another matter.

Boyden's presentation to the Council proceeded to give a dollar rationale for how the $5 million figure was calculated. It:

> ...was arrived at after taking into consideration *the acreage allowed by Indian Claims Commission and an informed estimate of the value of the lands and coal reserves* as of the dates of taking. Two specialists, Mr. Roy P. Full, Mining Geologist and Mr. DeForrest Smouse, Ph.D., Geologist, we employed by the tribe for advice on coal values.
>
> The Bureau of Land Management in June of 1975, prepared a map determining the acreage involved in Docket No. 196 wherein they found that the area of the 1882 Executive Order Reservation, outside of District Six, known as the Joint Use Area, contained 1,868,364 acres. They also determined that the area of aboriginal title, as found by the Indian Claims Commission, outside of the Hopi Reservation, amounted to 2,191,304 acres.[62] While we did not agree as to the acreage found in the aboriginal area outside of the Hopi Reservation, *we were required to use that acreage in arriving at some*

[62] Map 9 (above) shows somewhat different acreages, especially for the area outside the 1882 Reservation, where there is a discrepancy of almost 300,000 acres. Since Map 9 is undated, it may have been constructed before the BLM survey of 1974 referred to below, which established the acreages Boyden is citing here.

estimate of the value if we were to reach an agreement with the Attorney General's office (Boyden 1976:7, emphases added).

Boyden specified the dollar per acre estimates: sixty cents per acre was proposed for 1882 land values outside the 1882 Reservation boundaries, and $1.00 per acre for 1937 values in the Joint Use Area:

> The Indian Claims Commission held that the 2,191,304 acres outside of the 1882 Executive Order Reservation was taken in 1882. Using a figure of $.60 per acre for this area, which would not be an unreasonable figure at that period of time, particularly in view of the Hualapai and Ft. Sill cases, which were finally determined at a figure of $.63 and $.65 per acre, the value would amount to $1,314,782.40.
>
> The Indian Claims Commission further found that the area inside of the 1882 Executive Order Reservation, exclusive of District Six, was taken in 1937. Greener, in his works on arid domain, estimated that lands, as of that time, was worth $1.00 to $1.25 per acre. If we estimate the entire acreage outside District 6 but within the Joint Use Area at $1.00 per acre, it would amount to $1,868,364.00 or a total of $3,183,146.40 for all land taken according to the theory of the Indian Claims Commission. It will be observed, however, that we have obtained one-half of that acreage known as the Joint Use Area by our judgment in Healing v. Jones and, according to our theory, we would, therefore, be receiving $2.00 per acre as of 1937 for the one-half interest that the Navajos obtained under the same lawsuit. If we add another $1,816,853.60 for coal, as of 1937 when there was a very limited market and very limited transportation, we would arrive at the settlement figure of $5,000,000.00, considering that any claims that we would have under an accounting would be balanced by any claims the government might have as offsets under the terms of the Indian Claims Commission Act.
>
> Our negotiations with the United States are not based upon the figures as above-given for your information but were only figures that were considered by us in arriving at the FIVE MILLION DOLLAR (5,000,000.00) conclusion. The government probably used a different method entirely (Boyden 1976:8-9).

This document makes clear that the only actual appraisal Boyden commissioned was for coal values within the 1882 Reservation outside District Six (referred to by the Department of Justice as "the Hopi Tribe's 1937 award area"). In terms of market values in 1937, the appraisers estimated "a minimum value of $2,170,000 for the recoverable coal on the property" (Smouse 7-15-1976). For land values on the acreage of aboriginal lands outside the 1882 Reservation in 1882, and outside District Six in 1937, Boyden had not sought independent appraisals. Instead he

relied on prior ICC decisions (Hualapai and Fort Sill) for 1882 values, and general rates in published sources for 1937 values. Boyden evidently relied on these figures in talks with the Department of Justice. On coal values, the Justice Department countered with the view that, owing to difficulties of access to the Black Mesa coal seams in 1937, "the coal reserves of the Black Mesa would not be a significant factor in any 1937 valuation of the Hopi Tribe's award area" (Dunsmore 6-23-1976). The Tribal attorneys also based their calculation on the Tribe's loss of half the 1882 Reservation outside District Six under the Land Settlement Act (see passage below quoting Boyden 1-19-1978).

Boyden also sought to persuade the Council that accepting the settlement would save much time, and eliminate any further costs (of expert testimony on valuation) if more proceedings occurred. In sum, he recommended:

> Counsel for the Hopi Tribe recommends that the proposed settlement be approved. In making this recommendation, we have weighed the possibility of an adverse decision by the Supreme Court with respect to our Petition for a Writ of Certiorari which would unquestionably involve the aboriginal lands findings of the Indian Claims Commission in our 1934 Reservation suit for recovery of land. We know that the Hopi Indians are much more concerned about preserving whatever interest they have in the 1934 Reservation and having that land returned to them than they are in any money judgment for any sum. We have carefully weighed the possible amount of a prospective judgment and consider that FIVE MILLION DOLLARS (5,000,000.00) is a reasonable amount considering all the facts and circumstances (Boyden 1976:9-10).

The overall reasoning may be sound, certainly for the time in question: the outcome of the 1934 Reservation case was still two decades away. But the impression is hard to escape that Boyden was rushing to Settlement, and by no means all of his stated reasons would prove to be valid. Some key reasons appear questionable: for example, his fear that the Supreme Court might affirm the ICC decision on Hopi aboriginal lands, adversely affecting Hopi chances of land return in the 1934 Reservation. It is perhaps conceivable that, in 1976, the 1934 Reservation lawsuit could be projected with a much more favorable outcome than finally proved to be true,

and would include land restorations to Hopi in areas falling outside those "judicially established" by the ICC as the aboriginal Hopi area. But at least with the benefit of hindsight, that scenario seems extremely doubtful. The Moenkopi award area in the 1934 case was well inside the exterior dimensions of the Hopi aboriginal area recognized by the ICC. It seems very unlikely that the Supreme Court would have *decreased* the ICC Hopi area, and if it had only affirmed this area, that might actually have *improved* Hopi chances for land rights in the 1934 Reservation. In other words, a Supreme Court affirmation might have strengthened Boyden's argument for a one-half Hopi interest in that sector of the 1934 Reservation which the ICC had recognized as having been exclusively Hopi in the year 1882.

There are thus two possibilities: 1) Boyden was simply wrong in projecting, in 1976, that a Supreme Court ruling on Hopi aboriginal lands would present a problem for the adjudication of Hopi rights in the 1934 Reservation, suggesting that he did not have a realistic grasp on the dimensions of a possible Hopi land award by the federal courts in the 1934 litigation; or 2) that he probably did realize that a land award in the 1934 Reservation litigation would likely not exceed the bounds of the ICC judicially-established Hopi aboriginal area (of course, it would prove to be far smaller than that). If the latter is true, we must conclude that he knowingly used a highly unlikely scenario to persuade the Tribe to accept the terms of the Settlement on Docket 196. In this regard, he may also have been responding to the fast-approaching deadline (12-31-1976) for the ICC to determine which cases it would be able to dispose of by the end of its term.

The Tribal Council meeting minutes from October 14 and 15 largely correspond to the argument presented in Boyden's formal report. But they add some perspective that helps clarify certain points. Boyden:

> ...stated that the Government was going to pay the Tribe for the entire acreage as approved by the Indian Claims Commission regardless of the fact that ½ of the Joint Use

> Area had been awarded to the Hopi Tribe in the case of Healing v. Jones. Also, the full amount was given for the coal at the time of taking in 1937 (Hopi Tribal Council 10-15-1976:4-5).

This statement conforms with Vice-Chairman Dashee's interpretation (above). It also confirms the idea that, notwithstanding later statements to the contrary, the Settlement *was* addressed to a specific acreage. Boyden also emphasized to the Council that in accepting the Settlement award the Tribe specifically would not agree to the ICC's definition of its aboriginal land area:

> It was contended by Mr. Boyden that the Hopi Tribe would not settle, on the aboriginal land as made by the Claims Commission. By that, he meant the Hopi claims in area goes beyond the aboriginal land as made by the Commission. They would state that the Hopi Tribe does not agree with this boundary (Hopi Tribal Council 10-15-1976:4-5).

However, it must be remembered that the only lands under consideration in this regard—again with the exception of the triangle south of the 1934 Reservation to the Little Colorado and Zuni River confluence—were those inside the 1934 Reservation, for which litigation was already in the works. No move was ever made by Boyden after 1961 to alter (i.e., expand) the dimensions of Docket 196's aboriginal claim area. Thus by not agreeing to the ICC's judicially established boundary, all the Tribe was doing here was to reserve its interest in aboriginal lands *as claimed in Docket 196*. Boyden's and the Council's concern that the Settlement should not have a precedent effect on other lawsuits clearly referred to the impending 1934 Reservation litigation. It did not apply to other aboriginal lands claimed by Traditional leaders, as presented in Docket 210, for example.

At the Tribal Council meeting of October 15, Boyden also presented the Stipulation for Entry of Final Judgment: "each section of this document was read and explained by Mr. Boyden and then translated by Mr. Samuel Shing, Interpreter" (Hopi Tribal Council 10-15-1976:7). During discussion, several Councilmen spoke: all were in favor of the Settlement. A vote was taken on the Settlement, with 16 in favor, 0 opposed, and 0 abstaining (Hopi Tribal Council 10-

15-1976:8). Accordingly, a Tribal Resolution was cast approving the Settlement. Motions were also made and voted upon to select those who would sign off on the Stipulation for Entry of Final Judgment, and for delegates to go to Washington "for the claims hearing." The Council approved the motion nominating Sam Shing, Roger Honahni, Abbott Sekaquaptewa, and Logan Koopee "to go to Washington to testify on any hearing on Settlement" (Hopi Tribal Council 10-15-1976:11). This may have been simply prudent preparation, but it does seem somewhat premature, in view of the fact that the meeting and vote on the Settlement by the Hopi people was still two weeks away. At least in appearance, the Council was treating the Settlement as a fait accompli.

Finally, at the Council meeting Chairman Sekaquaptewa indicated he had already discussed a televised debate on the Settlement with Caleb Johnson:

> Mr. Sekaquaptewa made a recommendation that this proposal be covered by television over Station KOAI in Flagstaff in a debate manner with Reverend Caleb Johnson and whomever he may choose to appear with him. This will be in the manner of questions and answers. He stated that this opportunity should be given to the "traditionalists" so that it can never be said that they never had been denied the opportunity to state their position on their proposal. He has contacted Reverend Johnson who is agreeable to this debate (Hopi Tribal Council 10-15-1976:9).

The Council passed a motion authorizing Chairman Sekaquaptewa to appear in the TV debate.

Immediately upon announcement of the Tribal Council's vote to accept the Compromise Settlement and of the meeting scheduled for October 30, 1976, Traditionalist leaders protested to Superintendent Alph Secakuku:

> Mormon lawyer, John S. Boyden from Salt Lake City, Utah who does not represent the Hopi Kikmongwis or Traditional Pueblos has finally opened and revealed his true evil habits and character in representing the so-called Hopi Tribal Council, Bureau of Indian Affairs, Indian Land Claim Commission and the Government of the United States by presenting to the Hopi Sovereign Nation this week the so-called Proposed Settlement of Indian Claims Commission Docket No. 196 in which John S. Boyden offered to the Hopi people $5,000,000.00 for lands that has been stolen not only from the Hopi Sovereign

> Nation but all First People who first discovered and occupied all lands which whitemen call America....
>
> It is unthinkable and downright treason for any Hopi or Native First People to sell their sacred homeland for a few pieces of white man's money. Being a Hopi and in a position to protect and maintain Hopiland you should know that to accept this bait is absolutely contrary to all of our Spiritual and Religious Instructions and warnings which all Initiated Hopi Religious Society Leaders have taught us (Kewanyama and Lansa 10-16-1976).

The letter was presented to Superintendent Secakuku by Second Mesa One Horn and Two-Society chiefs and Thomas Banyacya, who invited him to attend a meeting that same day at Shungopavi's Two-Horn kiva. It also protested the date of the public hearing on the Compromise Settlement as coinciding with a Lakon society ceremony at Shungopavi. It appears from this letter that a copy of Boyden's formal proposal to the Council had been supplied to the Traditionalist leaders.

Village (or rather, Mesa) meetings were held on the Compromise Settlement during the week prior to the main meeting at Oraibi Day School on October 30. The Kykotsmovi newspaper carried an account, with its opinion:

> Well, the preliminaries are underway—Tuesday night the Hopi Tribal Council Chairman held his pow wow for the Third Mesa residents at the community center in Kyakotsmovi. Vice Chairman Alvin Dashee and BIA Superintendent Alph Secakuku held forth at Polacca at the same time.
>
> These meetings are preliminaries to the big one scheduled to come off this coming Saturday, October 30. Wednesday night, the chairman will be in Phoenix to meet with Hopis down there who requested the meeting. Thursday night, meetings are scheduled in Moenkopi and Second Mesa. As predicted, the various forces are drawn along factional lines with the middle group consisting of mostly young people struggling to gain a foothold on one side or the other.
>
> The issue, as many have said, is very complex, and one complaint which we consider is legitimate is that we need more time to understand the issue before we can take intelligent action on it. There is only a small chance that we may gain the needed extra time as we have been informed, but there is a far greater risk if we don't obtain the exrtra time.

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> Also predictably, many of the people, particularly the "so-called traditionalists" are saying they will never consent to selling our Mother (our land) for any amount of money. But then that is the general feeling among all the people.
>
> However, the big problem is that unless we accept the negotiated cash settlement, we may greatly lessen our chances to recover any of the aboriginal land.
>
> And that is what the meetings are all about—to explain to the Hopi people why accepting the $5,000,000 would enable us to pursue the recovery of our ancient land (*Qua' Töqti* 10-28-1976).

This reflected the same perspective Boyden had presented to the Council, with the implicit threat that if people did not accept the Settlement quickly, Hopi land rights were at risk. As noted, it is not evident, at least in hindsight, that this risk was really present.

Meeting and Vote on the Compromise Settlement, October 30, 1976

The meeting at Oraibi Day School lasted approximately 7½ hours. Chairman Abbott Sekaquaptewa later estimated that at the peak, approximately 500 people were in attendance, noting that some Hopis had traveled from throughout the Four Corners states to attend (Indian Claims Commission 11-11-1976a:12). He acknowledged that some religious leaders at Shungopavi did not attend because of the Lakon ceremony that day. But he reported that Shungopavi's Kikmongwi Claude Kewanyama in fact did appear, "and objected to the meeting being held" (Indian Claims Commission 11-11-1976a:39).

Vice-Chairman Alvin Dashee presided over the meeting, and Sekaquaptewa served as interpreter. Boyden himself presented the terms of the Settlement at the meeting, as described in Boyden's questioning of Chairman Sekaquaptewa at the ICC hearing on November 11th in Washington:

> Q [by Boyden] Now, going back to the meeting that was held on the 30th, of the general Tribal meeting, at that time, was there ample time spent in examination and questions and answers, both to you as Chairman and to me as Plaintiffs' Counsel?

A [by Sekaquaptewa] Yes.

Q And that is a part of the 7-½ hours of which you are speaking?

A Yes, that's right.

Q And at the conclusion of that, were independent statements of opinion made by both sides, before the voting took place?

A That is correct.

Q And the vote – do you remember the tally of the vote?

A Yes. It was such a long meeting that quite a number of people had left. The tally was, when it was finally voted upon, 229 in favor and 21 opposed, and there were three spoiled ballots[63] (Indian Claims Commission 11-11-1976a:15).

According to the official tallies, 252 votes were cast, distributed as follows:

1st Mesa:	103
2nd Mesa:	47
Third Mesa:	63
Moenkopi:	39

Total 252 ballots cast total, 229 in favor, 2 spoiled, 21 against (Ballot Tallies 10-30-1976).

On November 1, Superintendent Secakuku forwarded his account of events leading up to the meeting and resultant vote to the Secretary of Interior. His report laid out all the venues in which announcements of the meeting had been placed, and gave an account of the proceedings at the meeting (Secakuku 11-1-1976). Copies of Boyden's report to the Tribal Council on October 14-15 were distributed to all those present at the meeting. Secakuku's report carefully documented how information was disseminated both before and during the meeting. Even before receipt of Secakuku's report, the ICC moved on November 4th to set the date for hearing on the Settlement in Washington: it was scheduled for just one week later, November 11th (Indian Claims Commission 11-4-1976). However, at Boyden's presentation to the Tribal Council on

[63] Only two spoiled ballots were recorded in the official tally (Ballot Tallies 10-30-1976).

October 15 (and from the Tribal Council's decision at that meeting to select witnesses for the hearing), November 11 was mentioned as the deadline for the Government's reply to the Hopi petition before the Supreme Court.[64] In view of the pressure Boyden applied, regarding fear of an unfavorable Supreme Court ruling on the petition, this may suggest that a November 11th hearing on the Settlement had already been preliminarily scheduled with the ICC—even before the Tribal Council meeting of October 14-15. It seems that in response to the Congressional deadline of December 31st, the ICC was anxious to bring Docket 196 to a rapid conclusion. There is thus an appearance that, as well as the Tribal Council, Boyden and the ICC itself were in effect treating the Compromise Settlement as a done deal more than two weeks before the Tribal meeting on the question.[65]

On November 8, acting upon receipt of Superintendent Secakuku's report, the Commissioner of Indian Affairs' office and Secretary of Interior approved the Compromise Settlement (Krenzke 11-8-1976). The following day, November 9, Traditionalist leaders telegraphed the Attorney General's office in Washington:

> On behalf of all the Hopi Traditional Kikmongwis, Religious Society Mongwis and all the Hopi people who follow the old traditional Hopi way we solemnly express our disapproval of the proposed settlement between the Hopi Tribe and the United States of America in Docket Number 196. We do not accept the authority of the Hopi Tribal Council to represent the Hopi people. We have never signed or authorized the contract of Mr. John S. Boyden nor have we ever authorized him or the Hopi Tribal Council to enter into any land settlement. We have not authorized the 5 or more Hopi individuals who will appear before you on this proposed settlement. We solemnly declare now that whatever they agree to will not be binding on all of us and the Hopi people whom we represent. Our respective villages have exercised their own sovereignty since the beginning of our time. We have never given up sovereignty by treaty nor have we lost it by war or otherwise. We have always exercised the right of sovereign civil government over our

[64] On October 8, the Justice Department had filed for an extension of time to reply to the Hopi petition; the Supreme Court granted an extension until November 11. But when that extension expired, on 11-12-1976 the Court simply granted another extension, until 12-11-1976. The November 11 "deadline" was clearly not final, at least from the Justice Department's or the Supreme Court's perspective.

[65] This interpretation may be excessive, but I believe it is warranted by the available evidence.

> village and clan lands through our religious organizations. The publicity given for only one week and the hearing held regarding the proposed settlement was clearly inadequate to inform all the Hopi people or to allow them to express their opinions. In addition all the religious leaders and many of the Hopi people were deeply involved in a religious ceremony which conflicted with the date of the hearing and prevented their appearance. Claude Kewanyama Kikmongwi of Shungopavi so stated to the Chairman of the Tribal Council but this was ignored. We therefore submit that the vote of some 250 Hopis out of a tribe of 8,000 members taken at the hearing is not truly representative of the opinions of the majority of the Hopi people. Our religious traditions and prophesies prohibit the Hopi people from giving up any claim to our ancestral lands for mere monetary consideration and letters and petitions from hundreds of Hopi people who oppose the proposed settlement and in support of this message will follow shortly (Lansa 11-9-1976)

This petition was presented by the Justice Department to the ICC at the hearing on November 11th. At that hearing, Chairman Sekaquaptewa testified that the public meeting date was set before Shungopavi had announced their Lakon ceremony, and that the Tribal Council had unsuccessfully attempted to find out when that would be scheduled, to try to avoid a conflict (Indian Claims Commission 11-11-1976a:42-43).

The ICC Hearing and Final Judgment on the Compromise Settlement

Eight Hopis traveled to Washington to attend the hearings. The formal delegates selected by the Tribal Council were: Abbott Sekaquaptewa, as Tribal Chairman, Logan Koopee and Dewey Healing[66] of First Mesa, Samuel Shingoitewa (Shing) and Roger Honahni of Upper Moenkopi (who had signed Boyden's original Claims contract for the Tribal Council). Additionally present were George Nasafotie (Shungopavi), listed as a traditionalist (but distinct from the "dissident traditionalists") and observer of the hearings, and Nathan Begay (Hotevilla), as Tribal Operations Specialist at the Agency (Indian Claims Commission 11-11-1976a43-45). Alph Secakuku, as Superintendent of the Hopi Agency, appeared in the hearings as a witness for the Government. Sekaquaptewa gave the principal testimony for the Hopi Tribe. The other

[66] Dewey Healing had evidently been added to the four selected at the October 15 Tribal Council meeting.

witnesses spoke briefly, affirming Sekaquaptewa's testimony. Sekaquaptewa was questioned by Boyden on the extent of publicity given to the Compromise Settlement and the public meeting at Oraibi Day School of October 30th to vote on the question. The witness reiterated the information included in Superintendent Secakuku's report, which listed all the newspaper, TV, and radio outlets, and the public postings of the meeting on 23 prominent noticeboards throughout the reservation. He also testified about the village (Mesa) meetings held during the week prior to October 30th. As the report quoted above from *Qua' Töqti* noted, Sekaquaptewa had conducted the meetings personally at Upper Moenkopi and Kykotsmovi, and there were two meetings at the First Mesa Consolidated Villages, and at Second Mesa (Indian Claims Commission 11-11-1976a:18). At the Mesa meetings, Sekaquapewa testified, the same information presented by Boyden to the Tribal Council on October 14 and 15, was presented, including the rationale for the $5 million figure (Indian Claims Commission 11-11-1976a:23).

Further, the witness briefly described the two television debates on KOAI TV (Flagstaff) broadcast on October 21 and 29. In addition to Chairman Sekaquaptewa and Rev. Johnson, he listed others present for the debates (for the Traditionalist group) as: Thomas Banyacya (as spokesman), Mina Lansa (as Kikmongwi of Old Oraibi), Otis Polelonema (as spokesman for the Chief of Shungopavi—Polelonema was one of the signatories on the Docket 210 petition),[67] Guy Kolchaftewa, David Monongye (Hotevilla), and Harold Koruh[68] (Indian Claims Commission 11-11-1976a:11).

[67] I infer that the hearing transcript listing of "Otis Presilima" refers to Otis Polelonema; to my knowledge, there was no other Hopi named "Otis" of the older generation from Shungopavi during this period.

[68] Again two identifications here are my own inferences: the transcript lists "Guy Footseptewa" and "Harold Caroo." Guy Kolchaftewa of Mishongnovi was active with the Traditionalist group at this point. Harold Koruh was from Shungopavi .

Boyden's questioning next took up dissent to the Settlement. He noted that the Government would present to the Commission Mina Lansa's petition (Lansa 11-9-1976), and alluded to a statement published in the Hopi Tribal newspaper, signed by Mina Lansa and others prior to the October 30 meeting, in which the Traditionalist leaders indicated that, "there must be no voting on the proposed settlement at this time or in the future" (Indian Claims Commission 11-11-1976a:17). Boyden also took notice of a letter by Larry Anderson protesting the settlement on behalf of the Traditionalist leaders.[69]

Appearing for the defendant (the U.S. Government), the Justice Department's first act at the hearings was to present Ms. Lansa's telegram, which they had received the previous day. On cross-examination, Attorney Dunsmore then questioned witness Sekaquaptewa about this, evidently seeking to establish that it should not persuade the Commission to reject the Compromise Settlement. Although in this regard, the Government seems to have also been concerned to demonstrate that, in presenting and discussing the telegram, it was properly exercising its trust responsibility for the interests of the Hopi people as a whole.[70] While the Commissioners did take the matter up, the hearing transcript suggests some hostility to treating the protest seriously:

> Commissioner Vance: Has this individual [Mina Lansa] made any attempt to appear before the Indian Claims Commission?
>
> Mr. Dunsmore: I have no idea, Your Honor, whether she did or didn't.
>
> I will note that the last paragraph of this telegram says that letters and petitions from hundreds of Hopi people who oppose the proposed settlement and in support of this message will follow shortly. That ends the quote.

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[69] Larry Anderson, a Navajo, was speaking for the American Indian Movement; at that time or somewhat thereafter he was married to a Hopi woman.

[70] Here we might see an echo of the Interior Department's 1950's refusal to exclude the traditional Hopi villages from dialog, and corresponding refusal until 1955 to acknowledge the legitimacy of the Tribal Council.

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Well, it is my intention that if we receive any documents of that nature, we will forward them to the Commission, copies of them, and Mr. Boyden, so that you may be apprised of whatever we receive on this matter....

Commissioner Vance: Is it your position that the Commission should consider this as evidentiary matter before us, in determining whether or not this...proposed settlement should be approved?

Mr. Dunsmore: I think they should be aware of this when you are reaching your decision as to whether to approve the settlement.

If need be – I would hope we would their testimony [sic] – if need be – if the Commission would determine it needs the testimony of some of these people, I do not know, but we felt – the Government felt that it should not – could not present this document to the Commission [sic].[71] That's what we are doing.

Whatever full disclosure we can have available on this settlement—

Commissioner Vance: Is this the only document that you have which purports to oppose this settlement?

Mr. Dunsmore: The only document that I know of that has been received by the Department of Justice in opposition to the settlement....

Commissioner Vance: So this is just for information. You don't suggest that the Commission can give serious consideration to –

Mr. Dunsmore: I'm not suggesting that they give serious consideration. It is for your information. I did not feel that it was in the interest of the government that we keep this document in our office.

Commissioner Vance: It arrives in a rather dramatic fashion, then. One might infer from this that this Ms. Lansa claims to represent 7,750 unrepresented Hopi – members of the Hopi Indian Tribe.

You don't suggest that this is a fact?

Mr. Dunsmore: I have no basis to believe that she represents that group of Hopi Indians. As I say, I'm just presenting the document for what it says....

And, as I say, I intend to – should we get some letters and petitions, to also provide them to the Commission.

I feel it is not our position to confine this material of this nature to our files....

[71] The transcript represents Attorney Dunsmore saying the opposite of what he evidently meant here.

> Commissioner Blue: No definite cut-off date on anything?
>
> Mr. Dunsmore: I would assume that once a final judgment is entered and recorded, I will quit sending you material related to it. I think that we have a clear cut-off date (Indian Claims Commission 11-11-1976a: 26-29).

It thus appears the Commission did expect to receive additional material protesting the Settlement. A large petition with 1,048 names, dated December 1st, 1976, was forwarded by attorney Dunsmore to the ICC on December 17 (see below).[72] The Commission, however, knew it was under the Congressional gun, and may have decided that if a Final Judgment could not be made on Docket 196 under the terms of the Compromise Settlement, it would simply have to be transferred out of its jurisdiction to the Court of Claims. Not waiting for the petition, the Commission pronounced its Final Judgment on December 2nd.

Later in the hearing, Boyden re-emphasized that Mina Lansa and others had been opposed to the public meeting of October 30 or to any vote on the Settlement proposal. At that point Commissioner Vance voiced the most direct indication of the Commission's dismissal of the protest:

> Commissioner Vance: Well, perhaps my line of questioning implied that I approved of this sort of evidentiary material, and that the Commission should give consideration to that. That is not my position, Mr. Boyden, and I would not want the record to show that that is anything that—that this sort of evidentiary material is anything the Commission should give any consideration to.
>
> This is the time for hearing the question of whether or not the settlement should be approved. And I think that clearly, the Chairman, Mr. Sekaquaptewa, has ably represented the tribe for years, as have you, and I have no doubts at all that the matter was done in a perfectly proper way.
>
> I think this sort of thing causes the Commission and the whole process of the settlement of Indian claims a great deal of difficulty.
>
> I think the Government has acted in a very mature way in settling this case and, of course, we are grateful to have all of the matters that pertain to it, but this really came in from left field – and it's nothing but a red herring.

[72] The Commission received its own copy of the petition directly on December 13.

> If she is intelligent enough to debate these matters on television, before the members of the Tribe, she certainly knows the place to oppose this hearing. This is simply propaganda (Indian Claims Commission 11-11-1976a:41-42).

It is difficult to accept this statement as without prejudice against hearing opposing viewpoints. By this stage of the hearing, the Government attorney had in effect proposed that the ICC should hold a hearing to listen to opponents of the settlement. Yet Commissioner Vance wished to quash all possibility of that, and evidently saw the ICC's best interest as to dispose of the case as expeditiously as possible. Had the petition with 1,048 names been lodged with the Commission by this point, there may have been more difficulty in dismissing the opposition. But the ICC was evidently moving rapidly toward approval of the Settlement and Final Judgment in order to beat the Congressional deadline of December 31, 1976. It thus appears to have ignored the announcement of impending petitions from a Hopi majority against the settlement. The Government attorneys had stated their intention to forward these to the Commission, and suggested that they should be considered. So a question may remain on whether the ICC adequately discharged its responsibility to the Hopi people, by failing to allow time to consider extensive opposition. There is a definite appearance that the ICC moved precipitously in the final phase of its considerations on Docket 196.

Another factor in the apparently accelerated approval of the Compromise may have been the looming 1934 Reservation lawsuit. As argued above, if Boyden had pursued the same course for the 1934 Reservation as he had for the 1882 Reservation, and awaited a decision on the Government's liability for loss of aboriginal/reserved title lands in the 1934 Reservation, Docket 196 may have ended up simply being transferred to the Court of Claims when the ICC expired in 1978 (this is what occurred with the Navajo Docket, 229). Whether or not the outcomes of the 1934 Reservation lawsuit or Docket 196 would have proved any different in that eventuality is a

moot point. But this suggests another reason for Boyden's, and indeed the ICC's own, interest in the Compromise Settlement: without the Settlement, any decision on acreages and land values throughout much of the area deemed by the ICC in 1970 to be Hopi aboriginal land might be delayed until after resolution of the 1934 Reservation case—which could easily be predicted not to happen until long after the scheduled demise of the ICC. But on this count at least, it is not evident why awards in Dockets 196 and 229 should not have been decided at the same time, since they continued to refer to overlapping areas of land. If nothing else, the Docket 196 Settlement cleared the way for the Court of Claims to make an adjudicated award on Docket 229 in 1981. That may have been in the Navajos' best interest, and may or may not have been in the Hopis' best interest. Whether or not it was wise, as Boyden argued, to have the ICC dockets cleared up before the 1934 Reservation lawsuit was developed, is a legal question, however.

There may have been additional reasons why Boyden was moving so quickly at this juncture. While this is speculative, it is possible that, in addition to his concern about the ICC deadline and the 1934 Reservation litigation, he was aware that his own time was short, and wished to bring the claim, which he had been working on for 26 tears, to a conclusion. This was Boyden's case: he knew it inside and out, he knew the Hopis, and he knew the Reservation conditions. In a sense, Docket 196 was his cause, the beginning of his relationship with the Hopi, and the origin of his obtaining the legislation for Healing v. Jones and the 1974 Land Settlement Act. Boyden was probably the only man alive who understood all of the intricate relationships among those pieces of legislation and litigation, in which he had been a primary author. Notwithstanding the evident work of Wilkinson's firm on Docket 196, the Washington attorneys were socially remote from the Hopi Tribe: in reality, Boyden was the only one, working for the

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most part independently, who was capable of communicating the interests of his Tribal clients. At least it may be reasonably inferred that this was his position on the matter.

In early January 1977, Boyden was admitted to hospital to undergo major surgery for prostate cancer. Shortly thereafter, he largely withdrew from professional activities (O. Boyden 1986:217-18). While his biography suggests he was unaware of the severity of his condition prior to January, 1977, the proximity in time to the ICC's Final Judgment and the dismissal of the Supreme Court petition is undeniable. Boyden regained his health somewhat, but never practiced very actively again (O. Boyden 1986:219). He died on July 17, 1980.

Final Judgment was entered on the Settlement on December 2, 1976. The Stipulation for Entry of Final Judgment included the following:

2. Entry of final judgment in said amount [$5 million] shall finally dispose of all rights claims, or demands which the Plaintiff presented or could have presented to the Indian Claims Commission pursuant to the Act of August 13, 1946..., and the Plaintiff shall be barred thereby from asserting any such rights, claims, or demands against the United States in any future actions.

3. Entry of final judgment in the aforesaid amount shall finally dispose of all rights, claims, demands, payments on the claim, counterclaims, or offsets which the United States has or could have asserted against the Plaintiff under the provisions of Section 2 of the Indian Claims Commission Act....

4. Notwithstanding anything in this Stipulation to the contrary, this settlement shall not affect any right or cause of action the Hopi Tribe may have under and by virtue of the Act of December 22, 1974..., provided, however, that the United States does not hereby waive its rights to contend that the Hopi Tribe has no right or cause of action against the United States, under and by virtue of said Act of December 22, 1974.

5. The final judgment entered pursuant to this Stipulation shall be by way of compromise and settlement and shall not be construed as an admission by either party as to any issue for purpose or precedent in any other case or otherwise.

6. The final judgment of the Indian Claims Commission pursuant to this Stipulation shall constitute a final determination by the Commission of the above captioned case, and shall become final on the day it is entered, all parties waiving any and all rights to appeal from

> or otherwise seek review of such final judgment (Indian Claims Commission 11-11-1976b).

Paragraph 2 had been specifically modified at the insistence of the Justice Department (Indian Claims Commission 12-2-1976:209). That paragraph may thus be of particular significance with regard to government's view of the "final disposition" of Hopi claims against the government, in keeping with the intentions of the ICC Act of 1946.

On December 7th, Boyden filed a motion to withdraw the Hopi petition before the Supreme Court. The Court granted the motion, dismissing the petition on December 21st, 1976.

The Traditionalists' Dissenting Petition

> Problems with federal administration and tribal governments have created schisms in Indian communities and, for many tribes, arguments about disposition of claims awards have added to internal political dissent (Lurie 1978:105).

Shortly after entry of the ICC's Final Judgment, a petition was sent to the Secretary of the Interior, the Assistant Attorney General, and the Indian Claims Commission, which stamped it as received on December 13th (Hopi Sovereign Nation 12-1-1976). The petition was dated December 1st, 1976, though most of its signatures were recorded in early November; but it was only sent after several copies had been notarized in Winslow on December 8th. The petition reiterated the same points as Mina Lansa's telegram of November 9th, elaborating on them in part:

> The undersigned residents of the Hopi Nation do hereby state that they have been advised of the proposed settlement between the Hopi Tribe and the Indian Claims Commission in the amount of $5,000,000.00, and our signature hereon is our certification that we fully oppose the settlement in lieu of our claim for our ancestral lands, and we request the Commission and the BIA to reject the proposed settlement as contrary to the desire of the Hopi people (Hopi Sovereign Nation 12-1-1976).

As proof of its claim that the vote by 251 Hopis on the Compromise Settlement did not represent the majority, the petition included signatures (with addresses) of 1,048 Hopis opposing, as follows: Mishongnovi 248, Hotevilla 8, Lower Moencopi 360, Old Oraibi 106, Shungopavi 346 (Hopi Sovereign Nation 12-1-1976). The number of signatories would undoubtedly have been larger if Hotevilla, the largest village on Third Mesa proper, had opened the petition village-wide: instead it chose to sign via its eight traditional leaders, who added specific comments:

> With our conscious clear of the past, to protect the structure upon which Hotevilla Village stands, and for the purpose Hotevilla is settled in spite of disgrace and suferings thereby will not be bound by the proposed settlement nor others if in future developed. Upon these basis we signed our names on behave of our village Hotevilla and people and our agreement to above statements [the main petition language]. We the religious leaders of Hotevilla Village[73] (Hopi Sovereign Nation 12-1-1976).

In a 1968 survey of Hopi population characteristics by the BIA's Phoenix Area Office, total on-reservation population was listed at 3,966.[74] Of this total, 53.7% was aged 19 and under (Bureau of Indian Affairs1969: Detailed Age Groups by Village of Residence and Sex, Hopi Indian Reservation). It is probable that age-group percentages were comparable in 1976. In a village-by-village breakdown for 1976 (Arizona Dept. of Transportation 1977, citing the Hopi Tribe as its source), total estimated Hopi village population was 6,447. If, conservatively, we allow 50% of these to be under eighteen years of age, that would place the total of Hopi adults at approximately 3,220. By this calculation, and if, for the sake of argument, we accept that all those who signed the petition in November 1976 were over voting age, approximately 32.5% of

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[73] Signatories: David Monongye, William Pahongva, Paul Sewemaenewa, Jack Pongyayesva, Lewis Naha, Amos Howesa, Dan Evehema, Kursgouva.

[74] That total may be too low; another total of "Hopi Tribe Members Living on Reservation" for 1968 was 4,907 (Arizona Dept of Transportation 1977). But the age distribution percentages that follow are significant nonetheless.

Hopi adults signed the petition. That is a larger percentage than had voted on the Tribal Constitution in 1936.[75]

The principal leaders who signed the petition were Claude Kewanyama (Kikmongwi, Shungopavi), Mina Lansa (as Kikmongwi, Old Oraibi), Guy Kolchaftewa (One Horn Society Chief, Mishongnovi, signed on his behalf by Douglas Coochwytewa), David Monongye (as Religious Leader, Hotevilla), Eli Selestewa (Religious Leader, Lower Moencopi, signed on his behalf by Nicholas Quomahu), Byron Tyma (Shungopavi), and Charles Lomakema (Shungopavi). Ned Nayatewa, Kikmongwi of Walpi, was listed among the leaders, but there was no signature; Nayatewa had been directly involved in supporting the Claims contract in 1951, and the absence of his signature here may (or may not) reflect his lack of support for the petition. The petition explained that voting and signing was anathema to Hopi custom, indicating that the small turnout for the October 30th vote reflected a boycott on the part of most Hopis, not lack of interest. But the issue was so serious that the signers of the petition indicated they now felt it necessary to depart from this custom of non-participation as their expression of opposition.

Notwithstanding advance warning of the petition, the five-member Commission voted unanimously to approve the Compromise Settlement. In submitting to the Senate, on December 30th, its "report to the Congress of its final determination under …[the Indian Claims Commission] Act in respect to the above-named Indian claim case in its Docket 196," the Commission noted:

> The plaintiff in this action sought to recover on claims founded on, inter alia, allegations that the United States deprived the Hopi Tribe of its aboriginal lands without payment of compensation, and claim for the amount shown to be sue under a complete accounting for all funds and other property of the Hopi Tribe that had been in the hands of the defendant. On December 2, 1976, in consonance with a compromise settlement agreement between the parties, the Commission entered a final award in the sum of $5,000,000.00, which

[75] Total vote in 1936 was 755: 651 in favor, 104 opposed, amounting to just over 30% of the adult Hopi population.

> award has finally disposed of all claims against the United States in the subject case (Kuykendall 12-30-1976).

ICC Chairman Kuykendall's notices to the House and Senate had thus beaten by one day Congress' deadline for the ICC to determine whether or not it would be able to decide its remaining dockets by the scheduled end-date of September 30, 1978.

Speaker Tip O'Neill acknowledged the House's receipt of the Commission's final judgment report on January 17, 1977. The Justice Department announced that the Docket 196 case was formally closed on March 14, 1977, sending its case files to the National Archives with the note, "This judgment was entered by way of a compromise settlement and no appeals were taken from this final judgment" (Dunsmore 3-14-1977). The Commission thus remained entirely unswayed by the petition of more than one thousand Hopis it had received on December 13, 1976, or by letters of protest by non-Hopi supporters to several members of Congress prior to mid-March, 1977 (see below).

Aftermath

Since 1976

After the Indian Claims Commission was closed down in 1978, Docket 229, the Navajo claim, which had been conjoined with Docket 196 since 1957, still remained to be resolved. Transferred to the Court of Claims (as noted, like all dockets the ICC had determined by 12-31-1976 that it could not resolve by 1978), an award was finally made in 1981 (Sisson 9-30-1981):

> On September 18, 1981, the U.S. Court of Claims approved a settlement award of $14.8 million on behalf of the Navajo Nation in Docket 229. The award was compensation for 17.2 million acres of land that was ceded to the United States under a treaty of 1868. On October 23, 1981, funds were appropriated for the judgment award (Office of the Inspector General 9-22-1997).

The award was thus based on recognition of aboriginal lands outside the Navajo Treaty Reservation of 1868: 17.2 million acres were thus recognized by the Court as "exclusively used and occupied" by the Navajo Tribe as aboriginal lands outside the boundaries of the 1868 Reservation. As pointed out above, the area included a continuous tract of land south of the Little Colorado River. It is extremely doubtful that this area should be considered exclusive aboriginal Navajo land: historical and ethnographic records agree with Hopi petitions since 1930 that this was part of the traditional Hopi area. The Navajo award also involved lands west of the Meriwether Line, especially in the area south of the Pueblo Colorado Wash, and north and west of the 1882 Hopi Reservation's northeast corner (see Map 6). Moreover, large sectors of the Hopi-Navajo overlap-area recognized by the ICC (and affirmed by the Court of Claims) as Navajo aboriginal lands lay within extension to the Navajo Reservation added since 1868. So, while retaining the greater part of these lands in practice, the Navajos also received a major compensatory award (almost 3.5 times higher than the Docket 196 award) for lands deemed to

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have been taken from Navajo aboriginal-title possession, but not reserved-title possession, in 1868. While it is true that the Hopi Compromise Settlement may also be construed as granting ICC compensation for some lands in the 1934 Reservation eventually awarded to the Hopi Tribe, the vast majority of 1934 Reservation lands, including a large part of those lands "judicially established" as aboriginally Hopi by the ICC, was awarded to the Navajo. On top of that, the Navajos received an ICC award for their land "losses" much higher than the Hopi award.

Discussions among Hopis about the $5 million Settlement remained highly sensitive after 1976 and still do today. While the Hopi Tribal Council was involved at least since August 1976 (and probably earlier) in approving the Compromise Settlement, the short window between the main Council meeting on October 14-15, 1976, in which the Settlement was first made public, and the scheduled vote (two weeks later) did not allow most tribal members much time to weigh the implications. In this regard, Hopi responses to the announced Settlement, and subsequent wariness to use any of the $5 million, reflect similar patterns of exclusion from the decision-making process that occurred among other tribes:

> Consequently, tribal revolts sprang up. In the same manner that the Hopi never accepted the premise of the Commission in 1946 [regarding acceptance of a monetary award for lands deemed to have been taken—the statement appears to refer to the Docket 210 petition], so others rejected it thirty years later, even after receiving sizeable awards. The Suquamish, Puyallup, and Stillaquamish, refused their judgments on the grounds that *their* claims were never adjudicated, only those pushed upon them by their attorneys and the Commission. At a tribal council, the Northern Paiutes voted to reject their judgment, claiming misrepresentation and declaring preference for land rather than money. The Oneida Indians of New York filed two strong land claims for nearly six million acres of that state. And the Oglala Sioux rejected their share of the $122.5 million settlement on eight Sioux tribes from the Black Hills of South Dakota. When their suit to block payment was lost on appeal, they turned to the United Nations in a futile attempt to make their claim a human rights issue. Other claims were pressed at the state level (Rosenthal 1990:250).

Although, the Tribe was deemed by the ICC to have accepted the Compromise Settlement, and the judgment funds were appropriated, out of which Boyden was paid his ten

percent ($500,000), the Tribal Council's efforts to secure agreement on disposition of the funds have so far remained in a state of suspended animation. Distribution of the funds must be approved by Congress. In 1998 the Tribal Council appointed a Task Team to develop a distribution plan. The team held extensive meetings over several years and did produce a draft bill on August 29, 2003. But disagreements about whether to use the funds at all have continued, on the presumption that any use would represent an acceptance of the cession of Hopi aboriginal lands, and thus amount to having sold those lands.

Understanding what the $5 million was actually *for* has remained unclear to many Hopi people. Since it was the product of an out-of-court *settlement*, rather than of a direct ruling (for specified causes) by the Indian Claims Commission or the Court of Claims, its exact basis remains somewhat murky. Perhaps the nub of the problem in this regard concerns the evident contradiction between Paragraphs 2 and 5 in the language of the ICC's Stipulation for Final Judgment:

> [Paragraph 2] Entry of final judgment in said amount [$5 million] shall finally dispose of all rights, claims, or demands which the Plaintiff presented or could have presented to the Indian Claims Commission pursuant to the Act of August 13, 1946..., and the Plaintiff shall be barred thereby from asserting any such rights, claims, or demands against the United States in any future actions....
>
> [Paragraph 5] The final judgment entered pursuant to this Stipulation shall be by way of compromise and settlement and shall not be construed as an admission by either party as to any issue for purpose or precedent in any other case or otherwise (Indian Claims Commission 12-2-1976).

In light of the language of the ICC Act, these two paragraphs are plainly contradictory. Did the Settlement "settle" all Hopi claims against the United States or did it not? This is obviously a legal matter, but the answer is not apparent from the terms of the Settlement themselves.

Questioned by Congressmen on the intent and effect of the Settlement, both ICC Chairman, Jerome Kuykendall, and the Commission's Chief Counsel, Harry Webb, provided an

official response, in mid-March, 1977, at the same time the Justice Department was formally closing the Docket 196 case. They responded to questions by House Representatives Don H. Clausen and Edward R. Roybal (e.g., Roybal 2-14-1977). Clausen and Roybal had received several letters protesting the settlement on the grounds that it involved a sale of Hopi lands, and was not authorized by the traditional leadership (e.g., Sims 1-26-1977, Nelson 2-7-1977, Pringle n.d.). To Representative Clausen, Kuykendall responded:

> The principal message in each of these letters appears to be that the settlement of the subject case, under which the Hopi plaintiff is to recover the sum of $5,000,000.00 involved the giving up or the sale of Hopi tribal land. Mr. Nelson's letter also attributes immoral and illegal action to the Hopi Tribal Council in this matter since (to quote from part of his letter) "the Hopi tribal council has no right to give up lands which belong to their people." Contrary to the import of this correspondence, the settlement of Docket 196 does not involve the giving up of Hopi lands, or the sale, disposition, leasing or encumbering of any tribal lands or other property. *The settlement can have no effect on the Hopi Tribe's existing interest in land or the uses to which its land is put. The Hopi Tribe did not forego claims for land in the settlement of Docket 196—no claim for the return of land was involved in the case.* The settlement agreement expressly provides that it shall not affect any right or cause of action the Hopi Tribe may have under and by virtue of the Act of December 22, 1974 (88 Stat. 1712) (Kuykendall 3-17-1977, emphasis added).

This language would seem to buttress continuing Hopi interests in pursuit of legal redress to restore aboriginal lands, and is in conformity with Paragraph 5 above. Kuykendall's argument is silent, however, on whether the award effectually ratified a past "sale" or "disposition" of lands *formerly* held by the Hopi tribe, but now no longer deemed held. However, that was the clear intent of Paragraph 2 of the Stipulation on Final Judgment—the Paragraph that the Justice Department had insisted be modified in conformity with the statutory aims of the ICC Act. Kuykendall's explanation of the history of the case (below) followed these statements in his letter to Clausen, and there he does seem to suggest that the Docket 196 claim was for lands determined to have been "ceded" to the defendant in the last half of the 19th and first half of the 20th centuries.

Kuykendall's history of the case is instructive as representing the formal perspective of the Commission:

> The Hopi petition in Docket No. 196 asserted against the United States what can briefly be described as claims for amounts providing just compensation for: (1) lands or the Hopi tribe's interest in lands taken from it by the defendant in the last half of the 19th and the first half of the 20th centuries that the tribe had owned under Indian title (a possessory interest based on exclusive use and occupancy over a long period of time), (2) what constituted a claim for the rental use value of some of its land to the date of the filing of its petition that the defendant, the United States, allegedly permitted the Navajos to use and occupy, and (3) the amount shown to be due to the tribe under a complete accounting for all of its properties and funds that had been managed on its behalf by the defendant.
>
> Because the claim of the Navajo Tribe for additional compensation for its aboriginal lands ceded to the United States overlapped the claim of the Hopi Tribe. Docket No. 196 was combined with Docket No. 229 of the Navajo Tribe for purposes of trial on the issue of aboriginal possession or Indian title and related issues. After trial the Commission entered its decision on these issues on June 29, 1970. The decision included, inter alia, a determination of the boundaries of the land to which the Hopi Tribe had aboriginal title in 1882, and the dates when the Hopi aboriginal title was extinguished as to portions of this land.
>
> After denial of two Hopi motions for rehearing and amendment of the Commission's land title decision, the Hopi Tribe took an appeal from that decision to the United States Court of Claims. On January 30, 1976, the Court of Claims handed down its order approving and affirming the determinations and order of the Indian Claims Commission. Hopi requests for rehearing and rehearing en banc were denied by the Court of Claims on March 26, 1976. Thereafter the Hopi Tribe petitioned the Supreme Court for a writ of certiorari to the Court of Claims. While this petition was pending before the Supreme Court, the parties in Docket No. 196 reached agreement upon a compromise settlement of the Hopi claims in this case for the sum of $5,000,000.00....
>
> To reiterate what is stated above, the settlement of the subject case does not involve the sale or other disposition of any land or other Hopi property (Kuykendall 3-17-1977).

Kuykendall's wording was identical to that included in a letter by the Commission's Chief Counsel, Harry E. Webb, Jr., to Byron Nielson, a Staff Assistant to the House Appropriations Subcommittee on Interior, on March 15, 1977. Webb's letter was in response to a telephone inquiry, presumably concerning whether Congress should appropriate the $5 million

funds to support the settlement.[76] In addition to the history, which is almost entirely verbatim in Webb's letter to the House Subcommittee in charge of appropriating the $5 million for payment, Webb noted:

> The Commission recognizes the difficulties that some members of the Hopi Tribe have with the compromise settlement and was aware of this at the time of the hearing before it on the settlement proposal. As I think will be clear in the enclosed findings of fact [on the Settlement], the Commission's action in approving the settlement proposal and entering the final award of $5,000,000.00 was in pursuance of its duty to render justice to all parties involved as well as ultimate justice on the merits of the Hopi claims in Docket No. 196 (Webb 3-15-1977).

That last sentence may take the prize for "most obscure bureaucratic pronouncement" on the case and the reason for its settlement. However, Webb's acknowledgment that the Commission was aware of Hopi dissent even in rendering its decision is noteworthy.

The Commission's Final Report included an alphabetical listing of all cases through September 1, 1978, along with decisions and dispositions. There the $5 million is recorded as "for settlement of claims for compensation for land, rent, & for a general accounting" (Indian Claims Commission 1978:49). However, in the Commission's original Index to Opinions, Findings of Fact, and Orders at the National Archives, which listed the major Commission decisions in Docket 196 (and which appears to be the original file from which the published remarks just quoted were taken), by the typed term "Final Award" on 12-2-1976 appears the handwritten statement, "5,000,000.00 for land" (Indian Claims Commission n.d.c.:72). While this may not perhaps count as the official view of the Commission, it certainly captures a prevalent perception of what the $5 million was actually intended to compensate for, and is in obvious conflict with statements that the payment was not for land.

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[76] Congressional failure to appropriate funds, in the face of public controversy regarding government decisions on Indian matters, had certainly occurred in the history of Indian legislation. A more famous instance concerned the Treaty of Buffalo Creek in 1838 to relocate the "New York Indians" to Indian Territory. Congress never appropriated more than a tiny fraction of the funds specified by the Treaty, thus undercutting the legislative intent after the fact.

Dissenting views continued to be communicated to United States Congressmen. In response to an inquiry from Senator Gary Hart, the Acting Director of the Bureau of Indian Affairs replied with the same description provided by Kuykendall (above):

> Actually the settlement in Docket No. 196 does not involve the sale or giving up of Hopi land, or the disposition, leasing or encumbering of any tribal lands or other property. The settlement can have no effect on the Hopi Tribe's existing interest in land or the uses to which its land can be put. The Hopi Tribe did not forego claims for land in the settlement of Docket No. 196—no claim for the return of land was involved in the case (Geary 11-10-1977).

Acting Director Geary gave assurances that the views of Hopi Traditionalists would be "fully presented to Congress," when a plan for distribution of the judgment funds was completed. That plan, however, has never been finalized.

Confusion persisted among Hopis about the purpose of the $5 million award. At a public meeting at the Second Mesa Day School on March 11, 1980, Superintendent Alph Secakuku and Chairman Abbott Sekaquaptewa presented a discussion on the subject. The main question broached, in accepting the $5 million, was, "Did the Hopi people sell their land?" The answer was "No!" (*Hopi Tribal News* 1980). The interpretation offered was that the payment was like a fine for wrongful actions by the U.S. government: "They paid the Hopi Tribe for their wrongful use or misuse of Hopi aboriginal lands, based on their trust responsibility" (*Hopi Tribal News* 1980). But that "wrongful use or misuse" was evidently conceived by the Government and the Commission to mean an irreversible "taking" of those lands. The $5 million award was specified by the *Hopi Tribal News* in the identical language given by ICC Chairman Kuykendall in his three-part listing on March 17, 1977 (above). The article emphasized that "the amount was not in payment for a specified acreage of land or area, but a sum decided upon, by the Commission, out of court, based on the fair value of the land in the year 1882" (*Hopi Tribal News* 1980). Of course, with such a complex history, the article's summary account left a good deal out. The

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amount was not in fact *decided* upon by the Commission, but by the Hopi Tribe's lawyers in negotiation with the Department of Justice lawyers: the Commission accepted the proposed settlement that had been negotiated. While the award indeed spoke to the three claims listed in the article (as by Kuykendall—land, rental, and accounting), so much had changed since the 1951 filing, especially in terms of the Healing v. Jones rulings and the 1974 Land Settlement Act, that the award can hardly be considered simply as compensation for the wrongs identified in the claims as originally filed.

Moreover, since the Commission accepted the Compromise Settlement on the basis of its own Title Phase Opinion and Findings of Fact in 1970, there is a clear sense, as pointed out above, that the amount *was* addressed to a specific acreage—2,191,304 acres of "aboriginal title" area outside the 1882 Reservation, a figure determined by a 1974 Bureau of Land Management survey of the ICC "judicially established" area of Hopi aboriginal lands. In his presentation of the Settlement to the Tribal Council, Boyden noted that "we were required to use that acreage in arriving at some estimate of the values if we were to reach an agreement with the Attorney General's office" (Boyden 1976:7), even though the Tribe had never formally agreed to that acreage. The Commission's final report includes the map prepared by U.S.G.S. (1978), with its representation of the "judicially established" area of exclusive Hopi aboriginal use and occupancy (see Maps 6-8). It was for the government's failure to protect that whole area, its negligence in permitting a series of "takings" from it, that the award was designed to compensate. In effect, by 1976, from the ICC's point of view, compensation was designed to address: 1) the taking of lands in the 1882 Reservation (i.e., the half interest given to Navajos outside District Six), 2) an inferred (because not yet judicially determined) taking of Hopi rights in lands in the 1934 Act Reservation, and 3) the taking of the small triangle of lands formed by

the south boundary of the 1934 Act Reservation with the Little Colorado River and the Pueblo Colorado/Cottonwood Wash.

So while it is true that the $5 million was not for a sale of any lands in 1976 (or 1951, when the Claim was filed, or 1970, when the ICC issued its Title decision), the ICC's Final Judgment rested upon an interpretation that the lands in question—at least as held by aboriginal title—had in effect been sold without payment in 1882 and 1937. The $5 million was thus a long-overdue payment for transactions that were supposed to have occurred many years earlier. So while the "fine" metaphor may be appropriate, in paying that fine the Government expected to be fully and finally discharged of all liability for the past "crime" it had committed—of non-payment for its "takings." Just as with all claims prior to 1946 presented before the U.S. Court of Claims, there was no ICC provision for *reversing the transactions*, i.e., restoring the land to its original owners. The transactions were deemed settled matters of fact: it is simply that they were now being determined (94 years and 39 years later, respectively) to have been inequitable. And in keeping with the only powers it held—to award a money judgment—the Indian Claims Commission granted the Settlement simply to compensate for those inequities.

"Final Disposition"

> This land is a sacred home of the Hopi people and all the Indian Race in this land.... We are still a sovereign nation. Our flag still flies throughout our land (the flag of our ancient ruins). We have never abandon our sovereignty to any foreign power or nation....
>
> ....This land is not for leasing or for sale. It is our sacred soil (Talaheftewa et al 3-28-1949).
>
> The purpose of the Claims Commission is to provide an opportunity for the Hopi and other Indian tribes to tell the court their story as to what lands they may have once occupied and used which were taken from them without their consent and without payment (Nichols 5-16-1949).

In this 1949 exchange between Hopi traditional leaders and Commissioner of Indian Affairs John R. Nichols lies the crux of competing interpretations of Docket 196 and the effects of the Compromise Settlement.

The meeting of March 1980 covered by the *Hopi Tribal News* included discussion of "possible future uses of the money by the people," but no specific plans were forthcoming. In April 1981, another meeting at the Second Mesa Day School was convened to address these questions with both Traditional leaders and Tribal Council members present. On this occasion attorneys for both groups also attended: John Kennedy, a member of the Boyden law firm, for the Tribal Council, and Robert T. Coulter, of the Indian Law Resource Center, for the Traditionalists.[77] Chairman Sekaquaptewa indicated that the award, as a "final judgment," discharged the duty of the Indian Claims Commission and the Court of Claims. As a finite judicial entity, the life of the Commission had come to an end. He therefore emphasized that, although the ICC claim was over, this did not necessarily mean the end of all Hopi recourse to the U.S. Government for their aboriginal lands, since the ICC was only one now-defunct U.S. judicial forum, and thus the Settlement may not represent a final discharging of governmental responsibility in this regard. Attorney Coulter responded that acceptance of money in ICC cases in fact did "quit-claim any further claim upon the land." After Thomas Banyacya translated, Chairman Sekaquaptewa commented on the translation, noting that if the Hopis accepted the award, "they would have *almost* no chance of claiming the land again," but in that "almost" he held out the possibility of some future claim for the land. Attorney Kennedy then spoke in support of Chairman Sekaquaptewa's interpretation. Coulter again responded with the unequivocal view that "it is simply untrue that the Hopis could take the $5 million and continue

[77] Whiteley was in attendance at this meeting on April 28, 1981. The account that follows is based on the notes he took at that meeting.

to claim their aboriginal area." He proceeded to cite other cases of Indian tribes which had accepted their awards from the Commission, including his own Potawotami Tribe, which accepted money for their land and now maintained a Reservation of only ¼ of an acre.

Kennedy denied this, responding that there remained a possibility of acquiring land, but he emphasized that this would be aside from the lands held to have been compensated by the $5 million. In that, he seemed to acknowledge that the $5 million addressed a specific acreage, even though the formal terms of the Compromise Settlement did not specify lands compensated for per se, and explicitly did not constrain Hopis from acquiring an award of lands in the 1934 Act Reservation.

In short, there remained differing interpretations of whether or not the Compromise Settlement closed out all legal or legislative avenues to asserting an interest before some United States tribunal for the recognition or restoration of some Hopi aboriginal lands. The ICC Act and its specific intent seem unambiguous in this regard, however. Paragraph 2 of the Final Judgment on the Compromise Settlement was obviously drawn up in conformity to the ICC statute, i.e., that the Settlement finally disposed of all claims that the Hopi Tribe did bring or *could have brought* under the ICC Act, and was disbarred from asserting any such claims in any further actions against the U.S. This would seem to say that, since the ICC was set up specifically to hear and dispose of *all* land claims based on aboriginal title (as well as others), with the Settlement the Hopis had had their "day in court" and could not revisit aboriginal land claims judicially ever again. Any change to the finality of the ICC's decision in the Hopi case would obviously require Congressional action. And any such action would appear to require some undoing of the provisions of the ICC Act. These provisions were also the basis for the settled

disposition of several hundred other Native American claims against the government decided during its lifetime by the ICC.

The Hopis are by no means alone in their dissatisfaction with the results of the ICC:

> This issue of land versus money payment, dealt with only once by the Commission in the *Taos* case, appears never to have been totally understood or accepted by the Indians. Many Indians see the situation as does Vine Deloria, Jr., that is, the Commission did not liquidate Indian rights or even Indian title but simply "updated the legal parity" of the land purchases as of the date the United States made them. Rather than finally settling the Indian claims, says Deloria, the Commission worked "merely to clear out the underbrush and allow the claims created by the forced political and economic dependency during the last century to emerge" (Rosenthal 1990:250).

However, Rosenthal does not include Deloria's additional stated opinion that, in practice, "in accepting an award, the claimant Indians sign off forever any residual rights they might have to the land involved, an agreement they may regret" (Lurie 1978:110). The terms of the ICC Act and its accompanying Congressional reports, as discussed in the first section of this report, suggest strongly that the Commission's decisions would close out the possibility of tribes taking up anew the question of lands for which the ICC awarded compensation. But the legal effect remains unclear, in part because of the Commission's failure politically to accomplish its appointed task. The Commission and its decisions are regarded in general as having failed to conclude the question of Native land rights. As the Commission's historian summarized:

> The tribes, now as always, acutely feel the need to preserve their land. At the important American Indian Chicago Conference in June 1961, 460 Indians of ninety tribes convened. In their Declaration of Indian Purpose they said:
>
> > In our day each remaining acre is a promise that we will still be here tomorrow. Were we paid a thousand times the market value of our lost holdings, still the payment would not suffice. Money never mothered the Indian people, as the land has mothered them, nor have any people become more closely attached to the land, religiously and traditionally.
>
> This peaceful rejection of the white attitude that all things have their price became a militant counterattack in the following decade when no relief from encroachment on Indian lands and rights was forthcoming.

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> The Commission might have firmly and creatively met these issues but it did not. In the *Taos* case of 1965 it brushed close to the Indian heart and found that "religion permeated the Pueblo's way of life," but it held it as an isolated example (Rosenthal 1990:254-55).

Rosenthal indicates Congress mostly viewed the Commission as having "a generally dismal record" and as having largely failed of its purpose:

> Little if any time was saved for Congress in its handling of these claims. The Commission as an element of the termination policy was as effective in that area as that policy itself [i.e., completely ineffective]. Indian Bureau costs were not reduced by any award of the Commission. The Indians, from their viewpoint, benefited very little from the often small and quickly squandered per capita awards. And if anything, many of these cases were less final than before (Rosenthal 1990:255).

Quoting from an interview with Justice Department attorney A. Donald Mileur in 1974,[78] Rosenthal indicates that it was "a widely held opinion in government that the Act of 1946 was a mistake, the Indians were not helped financially by it and its function has been a "legal farce" " (Rosenthal 1990:262, n. 35). Notwithstanding this general judgment of the ICC's failings, that is still a long way from a practical Congressional opening for the Hopi Tribe to pursue meaningful legal recourse for its aboriginal land claims.

Repeatedly, the Commission itself, Boyden, and representatives of the Tribal Council have indicated that the Settlement did not involve a sale of land. But, as noted, in that assertion, the underlying reference is "in the present." It requires accepting the Government's proposition that Hopi aboriginal lands had in fact *been* alienated to the United States long ago, principally in 1882. This was the fundamental premise of the Indian Claims Commission: that the lands for which tribal claims were filed had long ago been ceded. The ICC Act thus required claimants in effect to recognize the fact that the lands for which claims were made had been ceded or alienated. Accepting a compensatory award means recognizing that the cession had indeed taken

[78] Mileur was one of the three principal Justice Department attorneys involved in the Hopi Compromise Settlement; his signature appears for the government on the Stipulation for Entry of Final Judgment.

place. Because traditional Hopi religion is directly bound up with the land, however, there is a strong sense that Hopi land is fundamentally inalienable: it could not have been voluntarily ceded to the United States as real property under any past circumstances, because this would contradict the very basis of Hopi religion. The fact that Euro-Americans had colonized parts of the landscape, built towns, railroads etc., was no indication that Hopis had ever ceded their religiously undergirded rights to this land. From this point of view, the land had never been alienated, because Hopitutskwa is by definition inalienable, an eternal privilege vouchsafed by Maasaw and, so long as Hopis adhere to their religious duties, renewed annually in the cycle of ceremonies. The contradiction between these two perspectives is thus profound and perhaps irresolvable.

As already shown, there are differing legal and political opinions on whether acceptance of the Compromise Settlement closed out all possibilities for Hopi claims to aboriginal lands. Shortly after the Settlement, Traditionalist leaders asked the Indian Law Resource Center in Washington to look into the matter. The Center's *Report to the Hopi Kikmongwis on Docket 196* was the result.[79] Prior to the release of that report, Attorney Robert T. Coulter wrote to Thomas Banyacya in July 1977:

> You have asked that I explain the effect in accepting the payment which is to be made by the United States for the claim made in the Indian Claims Commission.
>
> Accepting the money for the claim will have the same legal effect as selling the rights to the land. This is so, because accepting the money will mean that the Hopi people will no longer have any right to the land for which the claim was made. According to present United States law, payment and acceptance of an award made by the Indian Claims Commission is a complete bar to any other legal action to recover the land for which the claim was made....

[79] On April 30, 1979, Thomas Banyacya and Earl Pela visited the White House to present the Traditionalists' grievances over land and water issues, and to raise the question of Boyden's alleged conflict of interest as detailed in the Center's report. They met with Patrick Apodaca, and gave him a copy of the report to present to President Carter.

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> The five million dollar award settles and puts an end to any claim to the land itself. This award is not simply compensation for past wrongs....
>
> ...Accepting the award will settle and put an end to all the claims in the [Docket 196] petition, including any further claim to the land itself....
>
> However, until the Hopi people actually accept that money, we can still fight to keep the Hopi rights to the land itself.
>
> I hope this will help people to understand the danger of accepting the award (Coulter 7-14-1977).

A copy of this letter was forwarded to John Boyden some months later. In an in-house response to Robert W. Barker of the Washington law firm (now Wilkinson, Cragun, and Barker), Boyden took issue with several of Coulter's arguments. He pointed out the following:

> You will notice that Mr. Coulter advises that until the Hopi people actually accept the claims case money, "<u>we can still fight to keep the Hopi rights to the land itself</u>." Obviously he is ignorant of the fact that the Hopi lands within the executive order reservation have been fully adjudicated and affirmed by the Supreme Court of the United States. The Hopi tribe has all of District 6 and an undivided one half interest in the remainder of that reservation. The partition of the joint-use area is now in the process of being completed, the District Court having made its judgment and the Ninth Circuit of Appeals having heard the argument on appeal. No decision has yet been received from the Appellate Court. ...[I]n arriving at a settlement we determined compensation upon the basis of the loss of the entire joint-use area, although it was carefully stipulated that that no decision was reached concerning the areas involved.
>
> It is also apparent that Mr. Coulter does not know that the claim of the Hopi to an interest in lands outside the Executive Order Reservation of 1882 is based upon a 1934 act[80] which occurred long after the adjudication by the Indian Claims Commission concerning the aboriginal possession of the Hopi in 1882. The case was appealed from the Indian Claims Commission to the Supreme Court and stricken from the calendar when the case was settled. Therefore, no final determination was had concerning the aboriginal possession of the Hopi people (Boyden 1-19-1978).

As is evident from ICC Chairman Kuykendall's rendering (above), however, Boyden's statement "no final determination was had concerning the aboriginal possession of the Hopi people" may or may not have some bearing on continuing Hopi aboriginal rights. Boyden

[80] This may be a misprint for "1974 Act." In any event, Boyden's reference here seems to be to the 1974 Act authorizing the Hopis to sue the Navajos for their rights in the 1934 Act reservation.

insisted in the language on the Compromise Settlement that it should not serve as a precedent for any other proceeding on the question of Hopi land rights. For example, in questioning Chairman Sekaquaptewa at the Commission hearings on November 11, 1976, Boyden posed the following series of questions about the settlement:

> Q Now under the terms of that stipulation [the Compromise Settlement], in the "Whereas" clause, it is stated that the Hopis made claim to a larger tract of land than was granted to them; does it not?
>
> A That's right, sir.
>
> Q And the Government denied – in the "Whereas" clause – denied all the allegations, in particular.
>
> A That's true.
>
> Q But both sides felt it desirable to settle for the sum of $5 million all of the claims set forth in the stipulation, that were presented or could have been presented up to the year – pursuant to the Act of August 13, 1946?
>
> A Yes, that's correct, sir.
>
> Q And the Government settled all of its judgment offsets that it claimed or could have claimed up to the end of their accounting in 1951 – the exact date is also given in this stipulation.
>
> A It is. I believe it is April 30th of that year, 1951.
>
> Q And in accordance with that stipulation, it was agreed by both sides that judgment may be entered accordingly but that final judgment entered in this could not be used in any other proceeding, as to any of the facts that were claimed by either side.
>
> A That's right. They would not set a precedent for any other case (Indian Claims Commission 11-11-1976a:21).

On cross-examination, the same issue came up again. Chairman Sekaquaptewa answered questions from Justice Department attorney Dunsmore:

> Q Do you understand that this proposed settlement will finally dispose of all of the claims of the Hopi Tribe, before the Indian Claims Commission?
>
> A Yes – pursuant to the Indian Claims Commission Act.

> Q Do you believe that when the members of the Hopi Tribe voted to accept this settlement that they also understood that this would dispose of all claims of the Hopi Tribe before the Indian Claims Commission?
>
> A Yes – that's right (Indian Claims Commission 11-11-1976a:36).

In accepting the Settlement as disposing of all claims before the Indian Claims Commission, it appears that the Hopi Tribe thus in essence agreed:

1) that all its aboriginal lands—as specified by itself (the plaintiff) in Docket 196's statement of claim (most recently amended at the trial in 1961)—had been ceded to the federal government;
2) that it did not possess an aboriginal land claim to areas outside the boundaries of the area claimed in the Docket 196 filing.

Official statements that the Settlement did not establish any precedent—legal or factual—for any other Hopi claims are almost always succeeded by a reference to the 1934 Reservation case then being pursued under the 1974 Land Settlement Act. At least in intent, it appears that the two points—1) that the Settlement would establish no precedent, and 2) that the Settlement would establish no precedent for the 1934 case proceedings—were distinct in the minds of those presenting them. Yet other statements, that all the Hopi claims (principally for lands deemed to have been already "taken" by the Government) presented in Docket 196, were satisfied by the Settlement, and the notation in Claims Commission files that the $5 million settlement was "for land," would seem to contradict this. Boyden's view in general appears to be that all Hopi land interests had been (for the 1882 Reservation) or were being (for the 1934 Act Reservation) finally determined by the Navajo-Hopi Land Settlement Act. As emphasized above, with the exception of a relatively small area between the southern boundary of the 1934 Act Reservation and the Little Colorado and Zuni Rivers, Boyden only acknowledged possible Hopi aboriginal

claims to lands that lay within the boundaries of the 1934 Act and 1882 Executive Order Reservations. Since any areas south, southwest, and west of the Little Colorado River were never submitted as part of Docket 196, these were not even adjudicated upon by the Indian Claims Commission; thus, in Boyden's appeals to the Commission, to the Court of Claims, and to the Supreme Court, against the 1970 ICC decision on Hopi aboriginal title lands, these areas were not even an issue.

With passage of the 1974 Act, Boyden secured for the Hopi Tribe the right to sue the Navajo Nation for their interest in the 1934 Act Reservation. After *Healing*, and through this 1974 measure, the vast majority of lands claimed as compensable in Docket 196 were now within reach of direct litigation. The original terms for arguing Hopi interests in the lands for which the Docket 196 claim was submitted had changed dramatically since 1951, with decisions by Congress (1958, 1974) and the Courts (1962, 1963, and pending in the 1934 Reservation litigation) affecting the 1882 and 1934 Reservations. In a sense, the Commission had outlived its usefulness in Boyden's perspective on Hopi interests. After 1974, the ICC was no longer such an important forum for adjudicating Hopi interests in land, either with regard to the determination of a compensatory award to discharge the Government's debts for past wrongs, or for determining Government liability for takings of aboriginal areas. Compared to the gains of land in the *Healing* case and the promise offered by a 1934 Reservation lawsuit, Docket 196 was not as important as it once had been. However else his work for the Hopi over the previous three decades may be evaluated—and there are many reasons to question some motives, methods, and judgments—much of the credit for this change is due to John Boyden himself.

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Conclusions

In conclusion, as Hopis continue to consider the $5 million Settlement (now grown with interest to more than $43 million), several facts and issues in the history of Docket 196 are worth emphasizing. In particular:

1) The claim area specified in the filing, and amended during the 1961 trial, only included land on Indian Reservations in Arizona and Utah, with the exception of a relatively small parcel south of the 1934 Reservation to the Little Colorado and Zuni Rivers. The total claim area does not coincide with explicit Hopi representations of their aboriginal claim area presented repeatedly to government officials, especially since 1930, and as specifically presented to the ICC in Shungopavi's Docket 210 claim. Lands west and south of the Little Colorado River, including Nuvatukya'ovi (the San Francisco Peaks), Sakwavayu (Chevelon Creek), Söönapi/Ötöpsikvi (Canyon Diablo), Nuvakwewtaqa (Chavez Pass/Anderson Mesa), Pihikha (Blue Ridge), and numerous other important Hopi sites were not even considered in the Docket 196 filing as within Hopi aboriginal lands. The ICC's assignment of much of that area as Navajo aboriginal land, in Docket 229, does not square with the historical record.

2) The ICC's Opinions and Findings of Fact on Hopi and Navajo aboriginal lands are filled with historical and ethnographic errors. Perhaps most egregious was the position taken by the Commission, on appeal, to "palliate" (in Boyden's words) its 1970 assertion that the first significant taking of Hopi aboriginal land occurred in 1882. The Commission's notion that Hopi aboriginal lands were the same in 1882 and 1848 is simply implausible. The Hopi Tribe's appeals to this end before the Indian Claims Commission, the Court of

Claims, and the Supreme Court are entirely convincing. The idea that U.S. military actions had no effect on driving Navajos in upon Hopi aboriginal areas after 1848—especially in the 1850's after establishment of Fort Defiance, and in the 1860's with the Navajo round-up—is not credible from any reasoned historical perspective.

3) There are substantive doubts about whether the Claim as filed on August 3, 1951, lawfully represented the will of the Hopi Tribe, as a recognized entity under the Indian Reorganization Act. The Tribal Council of 1951 was not recognized by the Secretary of the Interior, and its reinstitution owed more to pressures applied by the Bureau and its Agency officials than to Hopi initiatives. It is not clear how Boyden's Claims contract with the Tribal Council could have been lawfully approved by the Commissioner of Indian Affairs at the time the Claim was filed, if the Commissioner (and the Secretary of the Interior) did not then, or for another four years, recognize the Hopi Tribal Council. Hopi skepticism of the Tribal Council was real and persisting, primarily because it was seen as a vehicle for the Bureau of Indian Affairs to impose its policies, rather than to serve Hopi interests as these were conceived by Hopis. Bureau pressure to reconstitute the Council was applied especially because of the impending deadline for filing a claim before the Indian Claims Commission, and of the increasing expressions by powerful energy interests in obtaining leases on the Hopi Reservation. Although Boyden's main Claims contract was signed with the Hopi Tribal Council as recognized under the Indian Reorganization Act, and the petition accordingly listed all those villages that appear in the Tribal Constitution, it is manifestly the case that Boyden did not have the support of a major proportion—perhaps the majority—of the Hopi people. While Docket 196

purported to represent the interests of Shungopavi, Mishongnovi, Oraibi, Hotevilla, and Lower Moencopi, as well as the villages which had resolved to support Boyden on the claim, the historical evidence is convincing that the villages named were not merely indifferent, but strongly opposed to the claim.

4) Public dissemination of information about the terms of the Settlement was clearly adequate, at least within the operative time constraints. A series of facts (e.g., the television debates, newspaper postings, on-reservation notices, and Mesa-wide meetings) support Superintendent Secakuku's report to the Secretary of Interior on November 1, 1976, to this effect. Any claims in the present that Hopis did not know about the large public meeting at Kykotsmovi on October 30 should not be given credence. But the argument that insufficient time was allowed for the Hopi people to weigh the implications of the Settlement proposal has some validity. The Claims case was extremely complex and had changed in significance since 1951. The fact that the Final Stipulation statement on the Settlement contains two contradictory paragraphs (Paragraphs 2 and 5) illustrates that proper explanation of the Settlement was in some respects impossible. The public meeting and vote on the Settlement appear to have been entirely legitimate as such. It does appear that, in the interests of political and practical expediency, Boyden and the Tribal Council sought to rush the vote, however. The ICC was evidently concerned about its fast-approaching Congressional deadline of December 31st, 1976 for decision-making (assigned on October 8, 1976—very soon before the Compromise Settlement proposal to the Council). The fact that hearings on Final Judgment in Washington may even have been scheduled before the Hopi vote suggests

that the issues were not given sufficient time for a thorough airing. It is clear that many people who did not attend the public meeting of October 30th, following directives by traditional leaders, intended their absence to represent a negative position on the Settlement. The subsequent protest against the Settlement was extensive. The sheer number of names on the December 1, 1976 petition against the Settlement indicates the magnitude of Hopi popular opposition. And notwithstanding the ICC's foreknowledge of substantial opposition, it ignored the advice of government attorneys who recommended another hearing specifically to consider Hopi opposition. In the shadow of its deadline, the Commission moved precipitously to Final Judgment on the Claim.

Whether any of these historical factors, substantive and important as they may be, would have a real effect upon the Hopi people's ability currently to seek a) reversal by some means of the Indian Claims' Commission's Final Judgment on the Compromise Settlement thirty years after the fact, or b) actual return of aboriginal lands via Congressional action—are legal, political, and practical questions. The historical record of U.S. government policies and practices regarding Native American aboriginal rights to land does not offer much encouragement in this regard. Hopi claims to lands that fall within the 1882 and 1934 Reservations have already been adjudicated by the federal courts in line with the Act of 1974. Any current claim that somehow derived from Docket 196 could only apply to those lands falling in the area west of the Meriwether Line and south of the 1934 Reservation line as far as the Little Colorado and Zuni Rivers. Hopi interest in claiming other aboriginal lands—like those specified in Docket 210—would have to be on some other basis entirely than in reference to the Docket 196 claim presented to the Indian Claims Commission.

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As Hopis assess the merits of any action on the Settlement fund, it may be worth considering which course will best protect the Tribe's aboriginal lands—with or without an attempt to pass legislation for the restoration of land to Hopi possession. It may be predicted that non-Native population in northern Arizona will continue to grow, and that additional migrations into this area will occur. These will be accompanied by ongoing economic development that will expand non-renewable exploitation of natural resources, sometimes in very harmful ways (Woodruff Butte comes to mind). Obviously, the costs and benefits of all strategies regarding Hopi lands must be carefully weighed. In the long run, efforts to reacquire privately-held lands by purchase—in part utilizing some proportion of the Settlement funds, perhaps—may be more effective in preserving those lands and their resources for future Hopi generations than relying on Congressional action. In most regards, given the history recounted above, it appears doubtful to the present author that meaningful Congressional action would be forthcoming to restore possession of Hopi aboriginal lands. Congress may, however, be an appropriate venue to seek agreements enabling Hopis to jointly manage federal lands (i.e., Forest Service, Park Service, Bureau of Land Management) that fall within Hopitutskwa, potentially allowing for its better protection.

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