

Boyden, John S., 5-18-1964, Petitioner's Requested Findings of Fact on Issues of Title and Liability and Accompanying Brief (Docket 196 before the ICC). John S. Boyden Collection, MSS 343, Box 1. L. Tom Perry Special Collections, Harold B. Lee Library, Brigham Young University, Provo, UT.

Boyd
[5-18-1964]

Before the
INDIAN CLAIMS COMMISSION

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

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Defendant.

DOCKET NO. 196

PETITIONER'S REQUESTED FINDINGS OF FACT
ON ISSUES OF TITLE AND LIABILITY
AND ACCOMPANYING BRIEF

No publication or reproduction (either photographic, photomechanical or digital) without written approval
Original in BYU Library Special Collections

INDEX
PROPOSED FINDINGS

<u>STATEMENT</u>	1
<u>TRIBAL ENTITY</u>	
Finding 1	2
<u>JURISDICTION</u>	
Finding 2	3
<u>ATTORNEY</u>	
Finding 3	4
<u>CLAIM OWNERSHIP</u>	
Finding 4	5
<u>CONGRESSIONAL ACTION</u>	
Finding 5	6
<u>PREHISTORIC PERIOD</u>	
Finding 6 600 A.D.	7
Finding 7 1275 A.D. Concentration of Moqui	9
<u>SPANISH PERIOD</u>	
Finding 8 General Francisco Vasquez Coronado	12
Finding 9 Antonio de Espejo	14
Finding 10 Onate	15
Finding 11 Franciscans 1629	16
Finding 12 Pueblo Revolt 1680	17
Finding 13 Don Diego de Vargas	18
Finding 14 Jesuit priests	19
Finding 15 Father Escalante and Father Garces	20
Finding 16 Spanish Period Summary	22

No publication or reproduction (either photographic
photomechanical or digital) without written approval
Original in BYU Library Special Collections

MEXICAN PERIOD

Finding 17 1823 to beginning of Mexican War 24
Finding 18 Mexican War 25

TREATY OF GUADALUPE-HIDALGO

Finding 19 26

ABORIGINAL LANDS

Finding 20 28

AMERICAN PERIOD

Finding 21 Colonel Alexander Doniphan 37
Finding 22 Navajo raiding and trading 1848-1851 39
Finding 23 Lt. L. Sitgreaves 41
Finding 24 Lt. A. W. Whipple 42
Finding 25 Governor David Merriwether line 44
Finding 26 E. F. Beale 47
Finding 27 Joseph C. Ives 48
Finding 28 1858-1860 Military pressure 50
Finding 29 Jacob Hamblin 51
Finding 30 1860-1861 Military pressure 52
Finding 31 Kit Carson 53
Finding 32 Post Fort Sumner 55

HOPI POPULATION

Finding 33 57

NAVAJO MIGRATION

Finding 34 59

HEALING v. JONES

Finding 35 Hopi Reservation 64
Finding 36 Hopi-Navajo joint use area 66

BRIEF

. 67

FINDING 20

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 Colorado⁷⁸ 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 1855⁷⁹ 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.⁸⁰

NOTE: Petitioner (Hopi Tribe) in paragraph 7 of its original claim, filed with the Commission, asserted Indian title to a larger tract of land than is now claimed. This requested Finding is in conformity with petitioner's proof at time of trial as substantially confirmed by proof of defendant's witnesses Schroeder, (Ex. S 807 Map), Ellis, (Ex. E 100 Map), and Reeve, (Ex. R 180 Map).

78 Ex. G 209, pg. 2. Little Colorado River is also referred to as Colorado-Chiquito.

79 Ex. G 108. The Merriwether line is depicted on a map in this Exhibit, being a sketch of the Navajo country by First Lieut. W.D. Whipple, 82nd U.S. Infantry.

Ex. 2 (Hopi) Map showing Merriwether line.

See also Finding 25, infra.

80 The Hopi Indians have traditionally constructed dwellings of a pueblo or apartment house type. In 1848, and for many years prior thereto, their daily activities upon which they relied for sustenance and protection extended many miles out from the mesas, constituting an actual use and occupancy of the lands

above described. This dominion at the time was exclusive and recognized as shown by the footnotes of other proposed findings herein. It will be noted that occasional trading or raiding by other tribes was done by venturing out of the confines of their own territory.

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

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

A. SHRINES, RUINS AND PETROGLYPHS:

Shrine areas were of particular significance because trips to the shrines were coupled with many related activities such as hunting, trapping eagles, gathering herbs, plants, berries, minerals and other items necessary to Hopi life.

Dr. Eggan testified, Tr. 7221: "I think they not only made multiple use, but they made a relatively intensive use of their territory both on their reservation and on the neighboring regions."

See Finding 7 and footnotes thereunder.

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

"In many respects this claim is conservative."

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

Ex. 69a (Hopi), Map of additional active Hopi eagle shrines and eagle shrine areas by clans or mesa; Ex. 69b (Hopi), Migration Legend Of The Snake And Flute Clans; Exs. 69c, 69d, 69e, 69f, 69g (Hopi), Photographs of petroglyphs and shrines; Ex. 69h (Hopi), Migration Shrines of Poley Clan; Exs. 69i, 69j, 69k (Hopi), Photographs of Poley Clan shrines. See also Ex. 55 (Hopi), pg. 6.

Ex. E 550, pg. 29; Also Ex. G 142, pg. 29. "This is an area bounded roughly by the Colorado-San Juan Rivers to the north, the present Arizona-New Mexico state line on the east, the Zuni and the Mogollon Rim to the south, and the San Francisco Peaks to the west. It is an area of shrines, sacred natural features, eagle trapping locations, and regions where salt is obtainable. It is necessary to realize, concerning this second claim, that actual use is not the important thing. What is important is that this area be recognized as a sacred area. Use is made of it by priests who visit the shrines to perform certain rites, to trap eagles, and to gather various herbs and minerals necessary to their rites. The Hopi does not think of this region as an area to be used for agriculture or for exploitation of the natural resources."

Tr. Eggan 7324, 7393, 7404-05, 7439; Tr. Ellis 7565, 7576, 7675, 9068; Tr. Pitrat 9641; Ex. E 503, pg. 18; Ex. 50 (Hopi), pgs. 1-10; Ex. E 124, pgs. 175, 177; Ex. E 571, pg. 638; Ex. E 513, pgs. 2,3. Willow Springs 6 miles east of Tuba City is an oft-visited Hopi shrine. Clan symbols have been carved into the stones there for generations. Ex. E 518, pgs. 4, 57; Ex. E 549, pg. 60; Ex. 678 (Navajo), pg. 9445; Ex. 15A (Navajo), pg. 7; Ex. S 635, pg. 25; Ex. E 532; Ex. E 533, pgs. 33-35; Ex. G 142, pg. 29; Ex. 691 (Navajo), pgs. 53-69; Ex. 41 (Hopi), pg. 11; Ex. E 561; Ex. E 564, pg. 18; Ex. E 51a, pg. 187; Ex. E 112, pg. 18; Ex. 50 (Hopi), pg. 5.

No publication or reproduction (either photographic, photomechanical or digital) without written approval
Original in BYU Library Special Collections

(a) WEST:

Ex. 68 (Hopi) Map; Ex. 69 (Hopi) Map;
Ex. 55 (Hopi), pg. 7; Ex. 15A (Navajo),
pg. 3; Ex. E 520, pg. 32, et seq.; Tr.
Schroeder 8081, 8105, 8624:

(b) SOUTH:

Tr. Eggan 7404-05. "They abandoned shrines
in the country around San Francisco Moun-
tains, the shrines down around Winslow and
their shrines over in the east. But still
they feel that those places belong to them."

Ex. 68 (Hopi) Map; Ex. 69 (Hopi) Map; Ex.
9 (Hopi), pgs. 5, 7; Ex. 50 (Hopi), pg. 4;
Ex. E 560, pg. 43; Ex. E 530, pg. 17; Ex.
E 517, pg. 22; Ex. E 540, pgs. 322, 331,
332; Ex. E 541, pgs. 190, 191; Ex. E 124,
pg. 177; Ex. E 555, pg. 27; Ex. G 9, pg.
23; Ex. G 1, pgs. 8, 9; Ex. G 10, pgs. 73,
75, 76; Ex. R 20, pg. 76; Ex. 648 (Navajo),
pg. 276.

(c) NORTH:

Ex. 50 (Hopi), pg. 3. "One of the oldest,
if not the most ancient of all the Walpi
clans, is the Snake, which formerly lived
at a place called Tokonabi, near Navaho
Mountain, far north of the Hopi mesas. In
their migration southward the members of
this clan were accompanied by others, among
whom was the Horn clan. They built houses
at intervals in their migration, the ruins
of which are pointed out, and which are
still known by name to the traditionists of
the clan. On the abandonment of a pueblo
several miles north of Walpi, the Horn
clans separated from the Snake and went to
a pueblo called Lenanobi, which, as its name
implies, was inhabited by Flute (Lena) clans.
After this consolidation these two clans
abandoned Lenanobi and joined the Snake set-
tlement at Walpi."

Ex. 68 (Hopi) Map; Ex. 69 (Hopi) Map; Ex.
69a (Hopi) Map; Ex. G 162, pg. 1; Ex. G 39,
pg. 11; Ex. G 61, pg. 346; Ex. G 89, pgs.
1, 2, 3; Tr. Pitrat 9637, et seq.; Ex. 656
(Navajo), pg. 28.

(d) EAST:

Ex. 68 (Hopi) Map; Ex. 69 (Hopi) Map;
Ex. 69a (Hopi) Map; Ex. 47 (Hopi), pg. 4;
Ex. E 51a, pg. 74, Canyon de Chelly former-
ly Hopi; Ex. 51b, pg. 378, Canyon de
Chelly formerly Hopi; Tr. Ellis 9390,
Canyon de Chelly formerly Hopi; Ex. E
531, pg. 664.

(e) EXECUTIVE ORDER:

Ex. 68 (Hopi) Map; Ex. 69a (Hopi) Map;
Ex. 50 (Hopi), pg. 4; Ex. 526, pg. 637;
Tr. Eggan 7171.

B. GRAZING AND AGRICULTURE:

Tr. Eggan 7319, 7326; Tr. Eggan 7429. ". . . they
herded cattle and sheep over much of this area, that
they had agricultural fields mainly in the heart of
this area."

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

Ex. 55 (Hopi), pgs. 5-8; Ex. 24 (Hopi), pg. 7; Ex.
25c (Hopi), pg. 3; Ex. 15 (Hopi), pg. 3.

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

Ex. 6 (Hopi), pg. 2.

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

Ex. G 42, pgs. 116, 129; Ives describes Moqui graz-
ing and agriculture in 1858.

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

No publication or reproduction (either photographic
photomechanical or digital) without written approval
Original in BYU Library Special Collections

Tr. Eggan 7393.

Ex. 28 (Hopi), pgs. 1, 2. Hopi peach orchards and gardens in 1834.

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

Ex. G 96, pg. 3; Ex. E 560, pg. 43; Ex. 564, pg. XXI, et seq.; Ex. 47 (Hopi), pgs. 4,5; Ex. 12 (Hopi), pg. 1, Coronado; Ex. E 510, pg. 46, Oñate; Ex. 8 (Hopi), pgs. 1-5, Espejo; Ex. 678 (Navajo), pg. 9444, Garces and Escalante.

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

Ex. G 117, pg. 368.

Ex. G 18, pg. 119. Cotton and tobacco; Ex. 55 (Hopi), pg. 2; Ex. 25c (Hopi), pg. 3. Beans, corn, etc.; Ex. E 51b, pg. 268; Ex. 42 (Hopi). Melons, pumpkin, etc.; Ex. 47 (Hopi), pgs. 2,3,4,6,7. Peaches, wheat, etc.; Ex. 655 (Navajo), pg. 129; Ex. E 509, pg. VIII; Ex. E 552, pg. 861; Tr. Ellis 7723, 7738.

C. TIMBER AND PLANTS:

Ex. 3 (Hopi); Ex. E 538, pg. 35, 36. "It is true that the Hopi extend their environment by long journeys for various substances. Every berry patch for many miles around is known and visited; a journey of 200 miles or so for salt from the Grand canyon, wild tobacco from the Little Colorado, sacred water from Clear creek, or pine boughs from San Francisco mountain, the home of the snow, is thought of little moment. To my knowledge, an Oraibi man made a continuous run of 160 miles as bearer of a note and answer. The knowledge of the resources of a vast territory possessed by the Hopi is remarkable, and the general familiarity with the names and uses of plants and animals is surprising. Even small children were able to supply (sic) the names, corroborated later by adults."

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

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

Ex. E 559, pg. 49. Timber, and various woods and plants for many purposes.

No publication or reproduction (either photographic
photomechanical or digital) without written approval
Original in BYU Library Special Collections

Tr. Eggan 7393, 7439; Ex. 48 (Hopi), pgs. 2, 3; Ex. E 571, pg. 638.

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

Ex. 539, pg. 137, 138. Many plants.

Ex. 15A (Navajo), pg. 7. Wood.

Ex. G 142, pg. 29. Plants.

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

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

D. HUNTING:

Tr. Eggan 7429. "I think there is clear evidence they hunted over much of this area. . ." Tr. Eggan 7393.

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

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

Ex. G 18, pg. 160, 161.

Tr. Ellis 9387. Espejo was fed venison and dried rabbit.

Ex. 41 (Hopi), pg. 18. Hopi possessed bear skins, wild cat and deer skins.

Tr. Ellis 9388. Hunting on visits to shrines.

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

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

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

Tr. Ellis 7563. Turtles in Clear Creek, Cottonwood Wash.

Ex. E 570, pg. 11. Badger, cougar, wolf, fox, coyote, etc.

Ex. 6 (Hopi), pg. 4. Lions, wildcats and otter.

E. TRADING AND TRAILS:

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

Ex. 41 (Hopi), pg. 18. Trading with Jacob Hamblin and Major Powell. Hopi had cow, black and cinammon bear, wildcat and deer skins.

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

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

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

Ex. E 518, pgs. 88, 89. Hopi pottery all over Arizona.

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

Ex. E 541, pg. 74; Ex. E 566, pgs. 278, 279; Ex. G 147, pgs. 39, 40, 41; Ex. 53 (Hopi); Ex. E 524; Ex. E 512, pg. 308; Euler Report on Havasupai; Ex. E 51b, pgs. 398, 437; Ex. 14 (Hopi), pg. 1; Ex. G 117, pg. 356; Ex. G 135, pg. 163; Ex. G 18, pgs. 105, 246; Ex. 22 (Hopi), pg. 2; Ex. 24 (Hopi), pg. 1; Ex. 12 (Hopi), pg. 1; Tr. Reeve 7899; Ex. E 523, pg. 6; Tr. Eggan 7349, 7393; Ex. E 570, pg. 12; Ex. E 520, pg. 36; Ex. E 532, pgs. 353, 356; Ex. G 88, pgs. 2, 3; Ex. G 57 (Map); Ex. G 61, pg. 345; Tr. Schroeder 8625; Ex. G 10, pgs. 73, 75, 76.

F. SALT, MINERALS AND MISCELLANEOUS:

Tr. Eggan 7439. "It is true that the Hopi extend their environment by long journeys for various substances. . . . a journey of two hundred miles or so for salt from the Grand Canyon. . . is thought of little moment."

Ex. E 538, pgs. 35, 36; Ex. 48 (Hopi), pg. 3.

Tr. Ellis 7564. Salt in Colorado River Area.

Tr. Ellis 9068. Salt mines.

Ex. E 555, pg. 22. Salt and pigments.

Ex. E 570, pg. 12. Salt and clay.

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

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

Ex. G 142, pg. 29. Salt.

Ex. E 562, pg. 9. Roots.

Ex. 6 (Hopi), pg. 3; Ex. E 520, pg. 36. Salt.

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

No publication or reproduction (either photographic
photomechanical or digital) without written approval
Original in BYU Library Special Collections

FINDING 36

The United States District Court in the case of Healing v. Jones,¹⁶⁸ on the 28th day of September, 1962, further held that the petitioner in Docket 196, The Hopi Indian Tribe, and the petitioner in Docket No. 229, The Navajo Indian Tribe, for the common use and benefit of their respective members, but subject to the trust title of the United States, have joint, undivided and equal rights and interests both as to the surface and sub-surface, including all resources, in and to all of the Executive Order Reservation of December 16, 1882,¹⁶⁹ lying outside of the boundaries of the Hopi Reservation as described in Finding 35 supra. Said court accordingly quieted title to said lands in the Hopi Indian Tribe and the Navajo Indian Tribe, share and share alike, subject to the trust title of the United States, as a reservation.¹⁷⁰ Although petitioner herein has now been adjudged a tenant in common of said property, petitioner is still deprived of the use of all of said lands, notwithstanding its aboriginal title.¹⁷¹

168 210 F. Supp. 125; 10 L. Ed. 2d 703.

169 1 Kappler 805, pg. 222, Conclusion of Law 7.

170 Ex. 78 (Hopi), pg. 228. The Navajo Indian Tribe was impliedly settled by the Secretary of the Interior upon the 1882 Executive Order Reservation. The settlement was pursuant to the Executive Order, but was upon the aboriginal land of the Hopi Indians.

171 Ex. 78 (Hopi), pg. 224, Conclusion of Law 12. The exclusion of the Hopi Indians from use and occupancy was at all times illegal even under the Executive Order of December 16, 1882. The Executive Order withdrew aboriginal lands of the Hopi. (See Finding 20 supra.)

BRIEF

The statement of the three judge court in the case of Healing v. Jones (210 F. Supp. 125; 10 L Ed. 2d 703) succinctly states a proposition fundamental in the proof of aboriginal title for the petitioner herein.

The court there stated:

The Hopis are a remnant of the western branch of the early house-building race which once occupied the southwestern table lands and canyons of New Mexico and Arizona. Before 1300 A.D., and perhaps as far back as 600 A.D., the ancestors of the Hopis occupied the area between Navajo Mountain and the Little Colorado River, and between the San Francisco Mountains and the Luckachukas.

No Indians in this country have a longer authenticated history than the Hopis. As early as 1541, a detachment of the Spanish Conqueror, Coronado, visited this region and found the Hopis living in mesa villages, cultivating adjacent fields, and tending their flocks and herds. In 1692 another Spanish officer, Don Diego De Vargas, visited the area where he met the Hopis and saw their villages. American trappers encountered the Hopis in 1834. In 1848, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, this area came under the jurisdiction of the United States.

(Ex. 78 (Hopi), pgs. 109-110)

The only difference between the testimony of witnesses for the defendant and for this petitioner, as to the territory exclusively held and occupied by the Hopi Indians at the time sovereignty of the United States attached on July 4, 1848, was with respect to the east boundary line of the Hopi country.

Dr. Eggan, testifying for the petitioner, was of the opinion that the Merriwether line divided the Hopi and Navajo country on July 4, 1848.
(Tr. Eggan 7416)

Hopi witnesses Pitrat and Pahona gave evidence of a traditional boundary east of and parallel to the Merriwether line running through a

point just west of Ganado, Arizona. (Tr. Pitrat 9644-45, 9678-80, 9693); Tr. Pahona 7476-77, 7482.)

Dr. Reeve, witness for the defendant, in drawing the line between these two tribes (Ex. R 180) irregularly extended the line in two westward protrusions. With respect to the lower protrusion, on cross-examination, Dr. Reeve admitted that he did not have a single document to substantiate his contention that the Navajo country extended further west to include Navajo corn fields. (Tr. Reeve 7905-06.) With respect to the upper protrusion, he admitted that his conclusion was based upon two army letters of very little value and further admitted he had never read the Pettit diary. (Tr. Reeve 7950-51) The petitioner, with substantial proof, showed that the Pettit journey in 1855 was far to the east of the point to which Dr. Reeve referred, (Ex. 70 (Hopi); Ex. 70a through 70i (Hopi); Ex. 71 (Hopi); Ex. 72 (Hopi); Tr. Pitrat 4648) and that Pettit came upon the Navajo Indian lodges at a point east of the Merriwether line, which point is now known as Whiskey Creek. (Ex. 72 (Hopi))

Dr. Ellis, another witness for the defendant, drew a line taking in only a minimal amount of territory west of the Merriwether line. (Ex. E 100) She based her testimony largely upon the visit of Ives some ten years after the Treaty of Guadalupe Hidalgo. (Tr. Ellis 9380-81.) She agreed that in view of the continual moving of the Navajo to the west it is probable they had made some progress in the previous ten years. (Tr. Ellis 9389 et seq.)

Another government witness, Mr. Schroeder (Ex. S 807) conceded territory to the Hopi without substantial difference from the testimony

of petitioner's expert witness, but gave the Navajo less territory on both ends of the Merriwether line. (Tr. Schroeder 8591 et seq.)

It is quite apparent that Dr. Reeve and Dr. Ellis did not fully consider that the rights of aboriginal title must have time to take root. (Sac and Fox Tribe of Indians of Oklahoma v. U.S., 315 F. 2d 896 at 905) Sparse accounts of the occasional presence of the Navajo before 1848 could not defeat the aboriginal title of the Hopi. (Sac and Fox case supra.)

Although Governor Merriwether was not possessed of all the facts with respect to the claims of the Indians, (Ex. 157 (Navajo) pg. 2) 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. (U.S. v Santa Fe Pacific R.R. Co. 314 U.S. 339 at 345)

The Navajo Indians could acquire no aboriginal title after the lands came under the jurisdiction of the United States in 1848. (Towa Tribe of Kansas v. United States, 6 Ind.Cl.Comm. 464, 502 (1958); Pueblo de Isleta v. United States, 7 Ind.Cl.Comm. 619, 622 (1959), aff'd 152 C.Clas. 866 (1961), cert.den., 368 U.S. 822 (1961); Osage Nation v. United States, 11 Ind.Cl.Comm. 733, 838 (1962).)

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, as shown on Ex. 2 (Hopi), culminating in the Act of June 14, 1934 (48 Stat. 960), 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 (Ex. 78 Hopi, p.223), 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 pressure of the United States Government in 1846 (Proposed Finding 21) and after 1848 (Proposed Finding 21, footnote 83; Proposed Findings 22 and 28), in an endeavor to protect the citizens of the United States, largely in the state of New Mexico. (Proposed Finding 28, footnote 123.) 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. (Buttz v. No.Pac. R.R., 119 U.S. 55 at 66; 30 L Ed. 330 at 335). After assisting the United States in its war upon the Navajo (Ex. 307 (Navajo); Ex. 303 (Navajo) pg. 2), the Hopi reliance upon the government for protection of Hopi property resulted in frustration and loss.

The Supreme Court of the United States held in the Santa Fe case (314 U.S. 339 at 345) that the policy of the government to respect the aboriginal possession of lands held by Indian tribes applies to lands

acquired under the terms of the Treaty of Guadalupe Hidalgo (9 Stat. 922). It is not denied that the Hopi right of occupancy was subject to the dominion and control of the government. (Buttz v. No. Pac. R.R. supra) (Johnson v. McIntosh, 8 Wheat 543 at 575, Bk. 5 L Ed. 681 at 689).

To abandon is to forsake or desert the territory. The circumstances of the instant case are clearly distinguishable from the cases holding that Indian title is extinguished when a tribe ceases to exclusively occupy an area of land. (Quapaw Tribe v. United States, 128 C.Cl.s.45,49; Osage Nation v. United States, 11 Ind.Cl.Comm. 733).

The government, charged with the solemn duty to deal fairly and honorably with petitioner and its property, (Act of Aug. 13, 1946, Sec. 2, 60 Stat.1049) 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.

The dominion of the government over Indian land was also recognized by the Supreme Court in an earlier case, (Beecher v. Wetherby et al, 5 Otto 517, 95 U.S. 517, Bk. 27 L Ed. 440) but the court employed some significant language:

"It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

Congress has answered the challenge with the Act of August 13, 1946, supra, under which redress may be had. (Jicarilla Apache, Kiowa, et al cases, Dockets No. 22A and No. 257).

We respectfully submit that the Hopi claim is conservative and meritorious under all of the evidence produced.

No publication or reproduction (either photographic or photomechanical or digital) without written approval. Original in BYU Library Special Collections

John S. Boyden
Attorney for Petitioner in Docket 196
315 East Second South
Salt Lake City, Utah