Boyden, John S., 8-12-1971, Memorandum with Points and Authorities Supporting Allegations as the Date or Dates of Taking Pursuant to the Order of this Commission dated the 2nd day of June 1971. In Hopi Tribe, Navajo Tribe v. the U.S.A. RG 279, Records of the Indian Claims Commission, Box 1866, file 196. National Archives, Washington, D.C.

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BEFORE THE INDIAN CLAIMS COMMISSION

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

MEMORANDUM WITH POINTS AND AUTHORITIES SUPPORTING ALLEGATIONS AS TO THE DATE OR DATES OF TAKING PURSUANT TO THE ORDER OF THIS COMMISSION DATED THE 2ND DAY OF JUNE 1971

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BEFORE THE INDIAN CLAIMS COMMISSION

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

MEMORANDUM WITH POINTS AND AUTHORITIES SUPPORTING ALLEGATIONS AS TO THE DATE OR DATES OF TAKING PURSUANT TO THE ORDER OF THIS COMMISSION DATED THE 2ND DAY OF JUNE 1971

SCOPE OF DOCUMENTARY EVIDENCE, DIGEST AND MEMORANDUM

On April 28, 1971 this Commission granted the motion of petitioner, the Hopi Tribe, "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."

On June 2, 1971 the Commission further ordered:

> [T]hat the plaintiff in Docket No. 196, The Hopi Tribe, shall file on or before June 25, 1971, its documentary

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> evidence on the date or dates of taking, which is not already a part of the record of this case, including a digest of the new exhibits, and that there shall be filed by the plaintiff in Docket No. 196, The Hopi Tribe, along with its documentary evidence and digest a memorandum with points and authorities supporting its allegations as to the date or dates of taking . . .

By orders dated July 14, 1971 and July 21, 1971 an extension of time until August 9, 1971 within which said documents may be filed was granted.

In its order of April 28, 1971 the Commission further held that no new evidence had been presented by the plaintiff to support a re-examination or amendment of the findings other than those that specifically pertained to date(s) of taking.

The only finding of the Commission as to the area of aboriginal possession in its Interlocutory Order of June 29, 1970 was as follows:

> 2. As of December 16, 1882, the Hopi Tribe had Indian title to that tract of land described in the Commission's Finding of Fact 20. [23 Ind. Cl. Comm. 227, 312 (1970)]

In the Commission's said interlocutory order it also ordered, among other things:

> 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 within the 1882 Executive Order Reservation 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. (emphasis added) [23 Ind. Cl. Comm. 277, 313 (1970)]

Construing the foregoing orders as a composite directive, we conclude:

1. That we may submit new documentary evidence only on the date

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or dates of taking, which is not already a part of the record of the case.

2. Since the Commission has made no finding with respect to the aboriginal holdings of the Hopi Tribe prior to 1882, the petitioner may produce new evidence of dates of taking prior to 1882 to any territory claimed by the Hopi Tribe in its original petition, and refer to testimony and exhibits now in evidence where they are pertinent.

3. Since the Commission has fixed the area of Hopi aboriginal possession as of 1882, proof of taking outside the area, as found by the Commission, after 1882 may be introduced to perfect petitioner's record on appeal.

4. Since the interlocutory decree of June 29, 1970 provided that the case would proceed to determination of market value and "all other issues bearing upon the question of the defendant's liability to the Hopi Tribe," the claims of the Hopi Tribe for damages in an amount equal to the value of the use of the land, as set forth in Counts 5, 6, 7 and 8, under 25 U.S.C. §70a(1), (2) and possibly (5) of the Indian Claims Commission Act, together with evidence on Count 9 for an accounting, will be heard at a later date.

The scope of the evidence presented with this memorandum and the contents of this memorandum will, therefore, be limited in accordance with the orders of the Commission, omitting proof of damages under Counts 5, 6, 7 and 8. But evidence negating the premature findings of the Commission that the Hopi Indian title to all lands described in the Commission's Finding of Fact 20, but lying outside the boundaries of the 1882 Executive Order Reservation, was extinguished on that date will be included. Evidence negating the Commission's premature finding that the entire Hopi Indian title

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to some 1,868,364 acres of land within the 1882 Executive Order Reservation exclusive of land management district 6 was extinguished on June 2, 1937 will also be included.

With the limitations imposed upon petitioner by the previous orders of this Commission, as above outlined, this memorandum will cover specific areas within the Hopi alleged claim, presenting the contentions of the Hopi Tribe as to the date or dates of taking, together with points and authorities supporting its allegations.

DATES OF TAKING
OF SPECIFIC AREAS

AREA A: Land Management district 6, as defined on April 24, 1943, and as set out in paragraph numbered 1 in the Judgment of Healing v. Jones, Exhibit 78.

Petitioner makes no claim that this area has been taken by the defendant. The area now constitutes a Hopi Reservation [Healing v. Jones, Judgment, ¶ 1, Ex. 78, pp. 225-228, 210 F.Supp. 125 (1962), 373 U.S. 758 (aff'd)].

AREA B: 1882 Executive Order Reservation outside of District 6.

Petitioner contends that only an undivided one-half interest in the area of the 1882 Executive Order Reservation outside of district 6 was taken on June 2, 1937 (Healing v. Jones, supra, Ex. 78, p. 228). Petitioner's evidence with respect to deprivation of the use of the other one-half of this area is already partially in evidence, but additional evidence, together with the value of the surface use of the same will be presented when the Commission proceeds with "all other issues bearing upon the question of the defendant's liability to the Hopi Tribe."

REPRODUCED AT THE NATIONAL ARCHIVES

> Assuming that the Navajo were present at times in some of the recovery area, such presence therein is not inconsistent with the exclusive use and occupancy of such area by the Pueblo de Acoma. The recovery area was the ancestral home of the Pueblo de Acoma.
>
> Pueblo de Acoma v. United States, 18 Ind. Cl. Comm. 154, 236, 237 (1967).

CONCLUSION

Lest the true perspective of the issues be lost in the maze of specifics, let us remember that the three judge court in Healing v. Jones, with multitudinous exhibits and a solid month of trial, found that:

> 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 Luckachukas.
>
> Ex. 78, p. 109 (Hopi)

and that:

> From all historic evidence it appears that the Navajos entered what is now Arizona in the last half of the eighteenth century. Ex. 78, p. 111 (Hopi)

The true burden of this Commission is to determine how much of, and at what times, the Hopi territory was taken by the United States, by the Navajo Tribe under the military pressure of the United States, and as a result of the failure of the United States to protect the friendly Hopi Indians. The petitioner, the Hopi Tribe, submits the westward movement of the Navajo resulted in dates of taking in the areas as depicted in Appendix A, and as described in this memorandum, as follows:

AREA A: No claim that this area has been taken by the defendant.

AREA B: An undivided one-half interest in this area was taken on June 2, 1937 when the Navajo Tribe was settled on the Hopi Reservation.

AREA C: The average date of taking of this area was 1863.

AREA D: That the average date of taking of this area was 1864.

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AREA E: That the average date of taking of this area was 1878.

AREA F: That the average date of taking of this area was 1878.

AREA G: That the average date of taking of this area was 1890.

AREA H: This area was taken on February 28, 1893 and June 28, 1910, as described in Presidential Proclamations (Ex. DT 25 and Ex. DT 26), respectively.

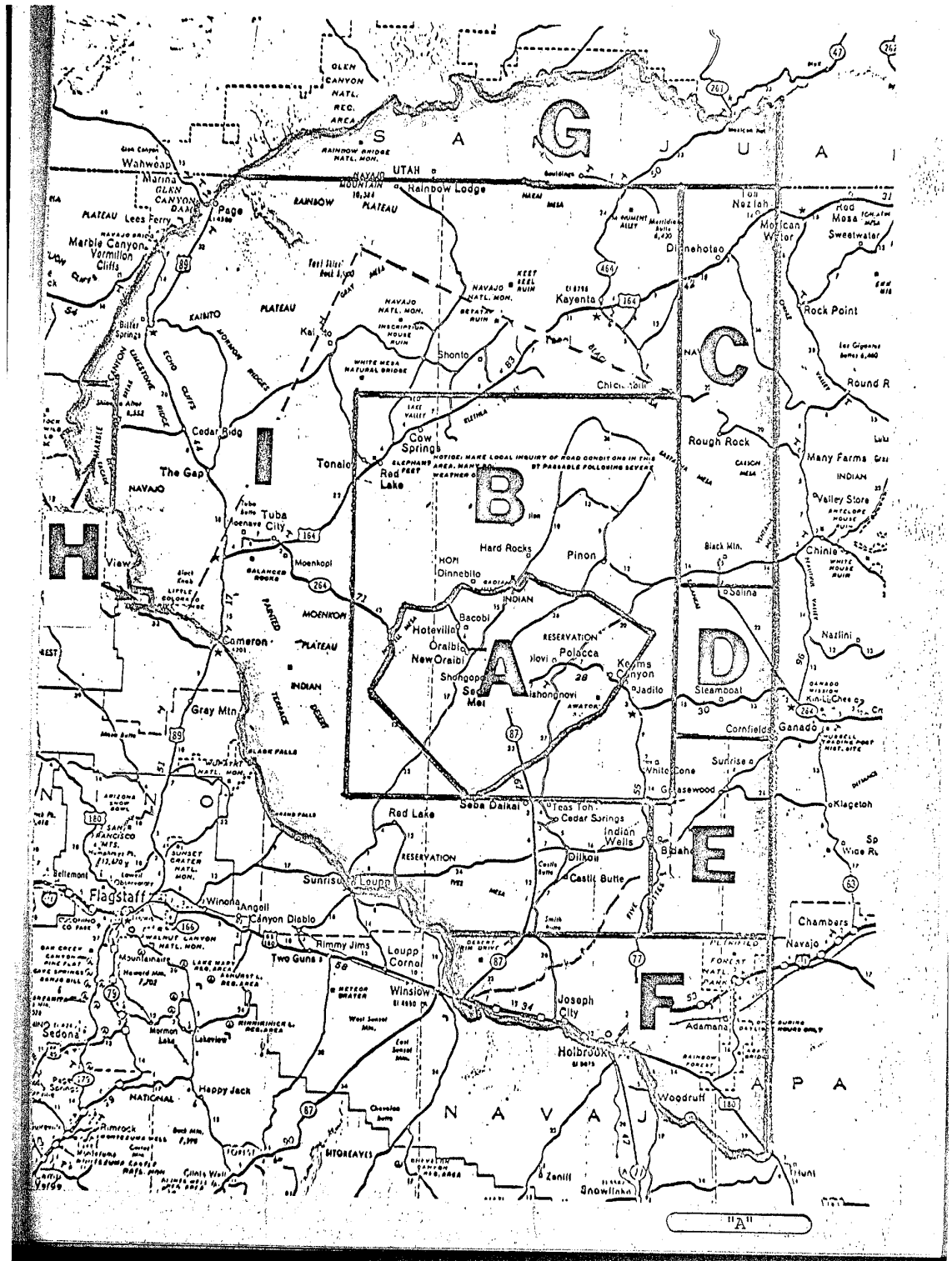
AREA I: This area was taken in 1934 with the exception of the checkerboard railroad sections South and West of the 1882 Executive Order Reservation which were taken prior thereto on the average date of 1891.

These calculations from historical documents find vindication and support in the Smithsonian Miscellaneous Collection, Vol. 100, Fig. 32, depicting "Navajo Limits at Different Dates" [Ex. 67 (Hopi), reproduced and attached to this memorandum as Appendix "B" for ready reference.]

Buoyed by the knowledge that its claim is substantiated by fact and equity the Hopi Tribe respectfully submits its case on dates of taking.

John S. Boyden

Stephen G. Boyden



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UTAH
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Red Lake
Tuba City
Moenkopi
Hard Rocks
Pinon
Dinnebito
Hotevilla
Bacobi
Oraibi
New Oraibi
Polacca
Keams Canyon
Jadito
Cameron
Gray Mtn
Seba Dalkai
Red Lake
Teas Toh
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Indian Wells
Dilkon
Castle Butte
Sunrise
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Flagstaff
Winona
Angell
Canyon Diablo
Rimmy Jims
Two Guns
Leupp Corner
Winslow
Joseph City
Holbrook
Sedona
Happy Jack
Rimrock
Woodruff
Adamana
Chambers
Navajo
Steamboat
Ganado
Cornfields
Sunrise
Klagetoh
Chinle
Rough Rock
Many Farms
Valley Store
Round R
Rock Point
Sweetwater
Red Mesa
Dinnehotso
Black Mtn.
Salina
Nazlini
Zeniff
Snowflake
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