Boyden, John S., 10-4-1973, Motion for leave of Commission to Hear Further Argument on Liability Phase of Counts 5 through 8, and to Amend Findings and Orders in relation Thereto to Make Final Deposition [sic] of Said Liability Phase of Said Counts; Memorandum in Support of Hopi Tribal Motion for leave of Commission etc. 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.

Nat Arch Box 1866 file 170 v.1.
Must in file is Oct 229

ORIGINAL
INDIAN CLAIMS COMMISSION

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FILED 71

OCT 4 1973 DEPUTY CLERK
INDIAN CLAIMS COMMISSION

BEFORE THE INDIAN CLAIMS COMMISSION

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

Norman E. Tinto

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INDIAN CLAIMS COMMISSION

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

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

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

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

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

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

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

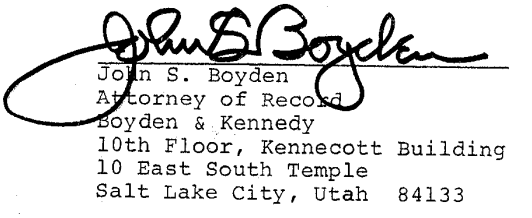
WHEREFORE, Petitioner prays:

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

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

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

DATED this 4th day of October, 1973.



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

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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), MISHOGNOVI, SIPAULAVI, SHUNGOPAVI, ORAIBI, KYAKOTSMOVI, BAKABI, HOTEVILLA and MOENKOPI,	)	Docket No. 196
Plaintiff,	)	
THE NAVAJO TRIBE OF INDIANS,	)	Docket No. 229
Plaintiff,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

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INDIAN CLAIMS COMMISSION

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

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

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

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

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

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

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

The same findings also held:

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

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

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

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

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

> 29. The defendant United States, by and through its officers, the Department of the Interior, the Bureau of Indian Affairs, employees and agents, since September 28, 1962, to the present time has vacillated, equivocated, delayed and denied the Hopi Tribe and its members any substantial possession or use of the surface of said Joint-Use Area. (Exs. 10, 31-35; Tr. Vol. I, pp. 83, 94, 100, 118, 133)
>
> 30. The defendant United States of America still continues to procrastinate, vacillate, and refuse to deliver to the Hopi Indians or to assist the Hopi Tribe in obtaining their one-half undivided interest in the surface of said Joint-Use Area outside of District 6, or the resources thereof, notwithstanding requests, supplications, and demands of the Hopi Tribe for

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> such use and possession. (Tr. Vol. I, pp. 83, 94, 127, 133; Exs. 35, 18, 19, 34) Exhibit A, attached hereto.

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

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

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

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

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

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

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

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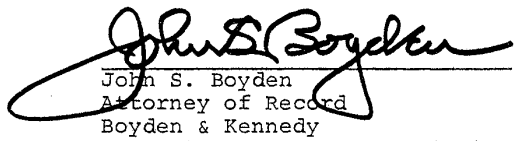
In any event, whatever the decision of the Commission may be in this regard, the determination of liability or lack of liability on the part of the Defendant should be made by amending the findings of the Commission for the purpose of preventing multiple appeals and expediting a decision that has already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

CONCLUSION

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

Respectfully submitted,



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