

Boyden, John S., 1976, Report to the Hopi Tribe...re: Proposed Settlement of Indian Claims Commission Docket No. 196. Copy courtesy of Col. Caleb H. Johnson. Also found in RG 279, Records of the Indian Claims Commission, Box 1865, file 3, Hopi Tribe 196, Original Papers. National Archives, Washington, D.C.

REPORT TO THE HOPI TRIBE CONSISTING OF HOPI INDIANS LIVING OFF AND ON THE HOPI RESERVATION, INCLUDING HOPI INDIANS OF THE VILLAGES OF FIRST MESA (CONSOLIDATED VILLAGES OF WALPI, SHITCHUMOVI AND TEWA), MISHONGNOVI, SIPAULAVI, SHUNGOPAVI, ORAIBI, KYAKOTSMOVI, BAKABI, HOTEVILLA AND UPPER AND LOWER MOENKOPI

Re: Proposed settlement of Indian Claims Commission Docket No. 196

THIS REPORT, is submitted by legal counsel to the Hopi Tribe to furnish background information concerning the claims of the Hopi Tribe pending before the Indian Claims Commission on behalf of the Hopi Tribe and its members, as specified in Docket No. 196, and to explain the proposed settlement of that case by the entry of a final judgment in the amount of FIVE MILLION DOLLARS (\$5,000,000.00) in favor of the Plaintiffs, the Hopi Tribe, as stated in said Docket 196, including Hopi Indians of the villages of First Mesa (Consolidated Villages of Walpi, Shitchumovi and Tewa), Mishongnovi, Sipaulavi, Shungopavi, Oraibi, Kyakotsmovi, Bakabi, Hotevilla and Upper and Lower Moenkopi.

This proposal will be presented to the members of the Hopi Tribe, as above named, for their consideration and approval. The meeting for this purpose is scheduled for October 30, 1976, commencing at 10 o'clock A.M., at the Hopi Day School in Oraibi,

CLAIMS CASE DISTINGUISHED
FROM LAND RECOVERY CASES

By Federal Statute, 25 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

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EXHIBIT "A"

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 cases 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.

A group of Hopi Indians from the Village of Shitchumovi filed a Petition before the Indian Claims Commission wherein they stated:

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, except 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.

Since no provision was made when the Indian Claims Commission was established for restoration of land, this claim was not pursued.

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.

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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 prosecuted.

PROPOSED SETTLEMENT

Counsel for the tribe and for the United States have negotiated a proposed settlement of Docket No. 196 by the entry of a final judgment in favor of the Hopi Tribe and all Hopi Indians represented in said suit in the amount of FIVE MILLION DOLLARS (\$5,000,000.00) in complete satisfaction of all rights, claims or demands which the Plaintiff, the Hopi Tribe, presented or could have presented to the Indian Claims Commission pursuant to the Act of August 13, 1946 (which is the Indian Claims Commission Act), and also finally settling all rights, claims, demands, payments on the claim and counterclaims, or offsets which the United States has or could have asserted against the Hopi Tribe under the provisions of the Indian Claims Commission Act from the beginning of time through June 30, 1951.

HISTORY OF THE CASE

The Hopi Tribe, as Plaintiff, in Docket No. 196, tried its case to a panel of three Commissioners of the Indian Claims Commission and the record was closed with respect to the issues of aboriginal title on May 22, 1963. The Commission had specifically ordered that such hearing be limited to the issue of title in an Order dated October 13, 1958. More than seven years after

the closing of the record, during which time certain additional exhibits were received and proposed findings submitted, the Commission entered its opinion on title. During the intervening seven years, all of the Commissioners and apparently most of the staff personnel who presided at or attended the hearing on the Hopi claim, had left the Commission and the opinion on title was issued by Commissioners, none of whom had heard the testimony presented.

Counsel for the Hopi Tribe were of the opinion that the findings were not correct and, despite the limitation of the hearing to the issues of title only, the Commissioners' opinion on title included findings and made a determination as to the dates of taking by the United States, both within and without the 1882 Hopi Executive Order Reservation.

Because counsel was dissatisfied with the decision, a motion was made that the Commission have further hearings on the dates of taking and also ask for rehearing and amendment of the findings particularly with respect to the extent of the aboriginal lands.

The Commission on June 2, 1971, granted the motion in part but limited the evidence to be presented to:

documentary evidence on the date or dates of taking which is not already a part of the record.

The Hopi Tribe presented additional exhibits but was never allowed to present oral testimony on the issues of dates of taking.

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Following the argument, the Commission on July 9, 1973, entered an opinion and order denying the Hopi Motion to amend the previous findings. A second Motion to amend the findings was denied by the Commission on January 23, 1974.

An appeal to the Court of Claims was made on the issues of the lack of substantial evidence to support the Commission's findings as to the extent of the Hopi aboriginal claim as well as the incorrect determination of dates of taking on less than all the evidence in the case. Indeed, the findings of the Indian Claims Commission on the extinguishing of Hopi Indian title, counsel felt was in direct conflict with the holding in Healing v. Jones. Plaintiff, the Hopi Tribe, submitted a lengthy and detailed brief to the Court of Claims, together with a substantial index of documents. A short, two-page order of the Court of Claims approving and affirming the decision and orders of the Indian Claims Commission failed to meaningfully address or even comment upon any of the issues that had been raised by the appeal and simply affirmed the decision of the Indian Claims Commission.

Thereafter, 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 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.

EFFECT OF 1934 RESERVATION LAWSUIT

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.

To protect the Hopi tribe in this regard, the proposed Stipulation between the Tribe and the United States provides:

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 of precedent in any other case or otherwise.

SUITS AUTHORIZED BY THE ACT OF DECEMBER 22, 1974
OTHER THAN FOR DETERMINATION OF TITLE TO LANDS

The Act of December 22, 1974, authorized suits against the Navajo Tribe and also authorized joining the United States in a suit for the adjudication of any claims the Hopi Tribe may have for damages to the lands to which title was quieted in the Hopi and Navajo Tribes by the suit of Healing v. Jones, known as the Joint Use Area. To be sure that these suits were not affected by the proposed settlement, it was agreed as follows:

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 (88 Stat. 1712), provided, however, that the United States does not hereby waive its right 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.

AMOUNT OF THE JUDGMENT

The sum of FIVE MILLION DOLLARS (\$5,000,000.00), as agreed between counsel for the parties to the suit in Docket No. 196, was arrived at after taking into consideration the acreage allowed by the 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, P.H.D., Geologist, were employed by the tribe for advice on coal values.

The Bureau of Land Management in June of 1974, 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 6, 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. 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 estimate of the value if we were to reach an agreement with the Attorney General's office.

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 fact 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 6, was taken in 1937. Greener, in his works on arid domain, estimated that lands, as of that time, was worth from \$1.00 to \$1.25 per acre. If we estimate the entire acreage outside of District 6 but within the Joint Use Area at \$1.00 an 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.

TIME ELEMENT

One of the factors considered by counsel in negotiating the proposed settlement is the substantial amount of time which would be saved by the settlement. The Hopi Tribe would receive their money much sooner by means of the settlement. By the time the valuation phase would be tried, proceedings in the Supreme Court of the United States concluded, offsets determined and any re-trial that might be required if a Petition for Writ of Certiorari were granted, we may be sure that a considerable length of time would be consumed, amounting to several years. Interest at its present level would, of course, be a substantial amount in favor of the Tribe if the settlement were accepted now rather than waiting for the money at a later date.

The time element would also involve additional costs and expenses in the further trial, particularly including the costs of expert testimony with regard to the valuations.

RECOMMENDATION

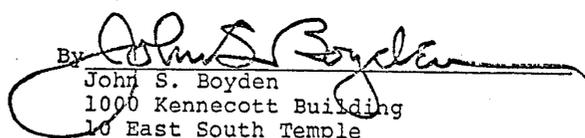
Counsel for the Hopi Tribe recommends that the proposed settlement be approved. In making this recommendation, we

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.

Respectfully submitted,

BOYDEN, KENNEDY, ROMNEY & HOWARD

By


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