

Indian Claims Commission, 7-9-1973, Opinion on Motion [by Plaintiff, of 8-28-1970].
Included as Appendix III in U.S. Court of Claims Order, on Appeal no. 13-74,
The Hopi Tribe v. the United States and the Navajo Tribe. Copy from Hopi Tribe
General Counsel's Office "Kennedy Files," Box 23.

A45

APPENDIX III

31 Ind. Cl. Comm. 16

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BEFORE THE
INDIAN CLAIMS COMMISSION

THE HOPI TRIBE, an Indian RE-
organization 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, SIPAU-
LAVI, 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.

Decided: July 9, 1973

Appearances:

John S. Boyden, Attorney for Plaintiff
in Docket No. 196; Wilkinson, Cragun

& Barker, and Stephen G. Boyden
were on the Brief.

Harold E. Mott, Attorney for
Plaintiff in Docket No. 229

William F. Smith, with whom was
Assistant Attorney General Shiro
Kashiwa, Attorneys for Defendant.

OPINION ON MOTION

Kuykendall, Chairman, delivered the opinion of
the Commission.

On June 29, 1970, this Commission issued findings of fact, an opinion, and an interlocutory order in these consolidated cases.¹ Among (31 Ind. Cl. Comm. 16, p. 17) other things, we determined that, as of December 16, 1882, the date on which President Arthur by Executive order established the Hopi Indian Reservation² the Hopi plaintiff held aboriginal title to a certain tract of land in Arizona. This tract was described in detail in the Commission's finding of fact 20, and included within its boundaries the 1882 Executive order reservation as well as additional land, to the north, west, and south of the reserved area.³ We also concluded that the United States extinguished Hopi aboriginal title to those lands lying outside of the 1882 reservation as of December 16, 1882,⁴ and that on June 2, 1937, the

¹23 Ind. Cl. Comm. 277.

²I Kappler 805.

³23 Ind. Cl. Comm. at 305.

⁴Id.

United States extinguished Hopi Indian title to an additional 1,868,364 acres of land within the 1882 reservation but lying outside the boundaries of what is designated as "land management district 6."⁵

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.⁶

Both the Navajo plaintiff in Docket No. 229, and the defendant filed responses in opposition to the Hopi motion.⁷ On April 28, 1971, the Commission issued an order wherein it acknowledged that the Hopi plaintiff had not been given adequate opportunity to present evidence on the date(s) of taking and that a rehearing

⁵23 Ind. Cl. Comm. at 309.

⁶Motion for Further Hearing on Dates of Taking, for Rehearing and for Amendment of Findings.

⁷Navajo Brief in opposition to Hopi motion was filed on October 12, 1970. Defendant's Response was filed on January 15, 1971.

would be granted with the reception of additional evidence limited solely to the question of date(s) of taking of the Hopi aboriginal lands.⁸ On June 2, 1971, the Commission ordered the Hopi plaintiff to file such additional evidence "on the date or dates of taking" not already part of the record along with a memorandum of points and authorities in support of its contentions.⁹

On May 22, 1972, this entire matter came on for rehearing before the Commission, at which time the Commission received the additional evidence relative to the alleged date(s) of taking. No additional evidence was offered or received in support of the Hopi's claims of aboriginal title. (31 Ind. Cl. Comm. 16, p. 19).

At the hearing on May 22, counsel for the Hopi plaintiff centered his argument around what earlier had been characterized as three fundamental, but erroneous, determinations made by the Commission in its 1970 decision. These three allegedly erroneous determinations are stated as follows in the Hopi supporting brief:¹⁰

1. The Commission erroneously held that the Executive Order of December 16, 1882, extinguished the Hopi Indian title to those lands described in Finding of Fact 20, which were outside the boundaries described in said executive order.

⁸Journal — Indian Claims Commission, p. 1414.

⁹Id. p. 1424.

¹⁰Pp. 4, 19, 23 — Brief in Support of Petitioner's Motion for Further Hearing on the Matter of Dates of Taking by the Defendant, etc. Sept. 16, 1970.

2. The Commission erroneously held that on June 2, 1937, when the grazing regulations were approved, being the beginning of the implied settlement of the Navajo Tribe on the Executive Order Reservation of December 16, 1882, as determined in the case of *Healing v. Jones*, 210 F. Supp. 125 (1962), *aff'd* 373 U.S. 758 (1963), Hopi Indian title to all land in said Executive Order Reservation lying outside "land management district 6" was extinguished.
3. The Commission erroneously held that the Hopi Tribe did not have Indian Title to its claimed lands lying outside the area described in Finding 20.

We shall deal with each of these contentions, although not in the same order as they are stated above.

Hopi Aboriginal Title

At the outset it should be noted that the plaintiff has produced no new or additional evidence in support of its claims of aboriginal title. (31 Ind. Cl. Comm. 16, p. 20). It merely has continued to contend that the Hopi Tribe as of 1848 held Indian title to all the land it has claimed in this consolidated case.

Nevertheless, the Commission has carefully reviewed those portions of this enormous record which relate to the extent of Hopi aboriginal land ownership from prehistoric times, through the periods of Spanish (1540-1823) and Mexican (1823-1846) sovereignty, and from the beginning of United States sovereignty in 1848, up to December 16, 1882, when President Arthur

created the Executive order reservation in Arizona, "... for the use and occupancy of the Moquis and such other Indians as the Secretary of Interior may see fit to settle thereon."¹¹ The Commission has reconsidered all the evidence offered by each and all of the parties and not just that offered by the Hopi plaintiff. Much of the evidence offered by the Navajo claimant in Docket No. 229, and the Hopi plaintiff in Docket No. 196, is similar in character. Both tribes relied upon archaeological and historical evidence as well as expert testimony in support of their competing claims. In addition, the Commission again examined and considered the available relevant evidence in the case of *Healing v. Jones, supra*, as well as those findings and conclusions of law reached in that decision insofar as they bear upon the aboriginal title issue in this proceeding.¹² (31 Ind. Cl. Comm. 16, p. 21).

Having completed this 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.

¹¹I Kappler 805.

¹²210 F. Supp. 125 (1962), *aff'd* 373 U.S. 758 (1963). The Hopi plaintiff has introduced as Hopi Exhibit 78 the slip opinion of the Court in *Healing v. Jones*, as well as the appendix to the opinion, being a chronological account of the Hopi-Navajo controversy, the court's findings of fact, conclusions of law, and final judgment. Any subsequent references in this opinion to portions of *Healing v. Jones* not published in the Federal Supplement will be cited to Hopi Exhibit 78.

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. 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.¹³ 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 of 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 (31 Ind. Cl. Comm. 16, p. 22) 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 appreci-

¹³ As the Court of Claims noted in *United States v. Seminole Indians*, 180 Ct. Cl. 375, 384 (1967), "Cultures that stake their survival upon a close union with the soil, as is the case with primitive food raising economies, would not demand the vast tracts of land required for a nomadic, hunting existence."

able 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.¹⁴ 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.¹⁵ (31 Ind. Cl. Comm. 16, p. 23).

It is the Commission's opinion that its 1970 decision is fully supported by the record, and represents a

¹⁴ Tr. 7405 — Dr. Eggan, Hopi expert witness "They abandoned them physically. They did not abandon spiritually and they continued to make use of them. They continued to visit them."

¹⁵ *Healing v. Jones, supra*, at 137 n. 8. "As revealed by extensive archaeological studies, there were over nine hundred old Indian sites, no longer in use, within what was to become the executive order area but outside of the lands where the Hopi villages and adjacent farm lands were located. Most of these were Navajo sites. . . ."

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.

The 1882 Executive Order Reservation

The Hopi plaintiff contends that the Commission was wrong in holding that its Indian title to those lands outside the 1882 reservation was extinguished by the December 16, 1882 Executive Order. The plaintiff argues *inter alia* that the December 16, 1882, Executive Order¹⁶ did not *per se* terminate Hopi aboriginal rights to the subject lands; that the United States did not remove or confine to the 1882 reservation those Hopi Indians living outside the reservation, particularly those living to the west in the Moencopi area; that the Hopi Tribe never relinquished its claim to all lands outside of the 1882 reservation; and that the defendant has continued to recognize and acknowledge Hopi aboriginal title to a large portion of the claimed area outside of the 1882 reservation. We now answer these contentions

¹⁶ We do not think that there is any doubt of the power of the President during this period, in absence of prior congressional approval, to withdraw lands from the public domain and reserve them for such public purposes, as military reserves, Indian reservations, etc. The underlying rationale is that the long continued practice of executive withdrawal without congressional interference raises the presumption of implied sanction or approval by the Congress. *United States v. Midwest Oil Company*, 236 U.S. 459 (1914). The validity of the establishment of the 1882 Executive Order reservation can be sustained on this basis. However, we think Congress explicitly recognized its validity in the passage of the Act of July 2, 1958, 72 Stat. 402, when it authorized a three judge court to adjudicate Indian trust and individual rights "... to the area set aside by the Executive Order of December 16, 1882 ...". See *Healing v. Jones*, *supra*.

as we did in our opinion of June 29, 1970. (31 Ind. Cl. Comm. 16, p. 24).

As we have previously stated, the Navajo harrasments of the Hopi village areas had occurred frequently over a period of several centuries prior to American sovereignty and had continued thereafter. By the 1870's these Navajo incursions coupled with the mounting pressure of new white settlements in the south and west, plus the expanding Hopi and Navajo populations, caused official attention to be focused on the need of protecting Hopi interests by reserving specific lands for their use. In short order several recommendations from the field were forwarded to the Commissioner of Indian Affairs calling for the establishment of a Hopi reservation, or a joint Hopi-Navajo reservation. No action was taken on these initial proposals.

On March 7, 1882, the Hopi Indian agent, J. H. Fleming, renewed an earlier request that a reservation be set aside for the Hopi Tribe, which would include the Hopi pueblos, the agency buildings at Keams Canyon and enough land for agricultural and grazing purposes. Later in that year Agent Fleming again wrote to the Commissioner of Indian Affairs advising that he had expelled a white intermeddler from the Hopi villages, and that the United States Army could not eject other trespassers unless the Hopi lands were given reservation status. In response to this plea, the Commissioner requested Fleming to describe the boundaries "... for a reservation that will include Moquis villages and agency and large enough to meet all needful pur-

poses and no larger."¹⁷ (31 Ind. Cl. Comm. 16, p. 25).

On December 4, 1882, Agent Fleming wrote to the Commissioner outlining the boundaries of the proposed reservation, and included the following observations:

The lands most desirable for the Moquis, & which were cultivated by them 8 or 10 years ago, have been taken up by the Mormons & others, so that such as is embraced in the prescribed boundaries, is only that which they have been cultivating within the past few years. The lands embraced within these boundaries are desert lands, much of it worthless even for grazing purposes. That which is fit for cultivation even by the Indian method, is found in small patches here & there at or near springs, & in the valleys which are overflowed by rains, & hold moisture during the summer sufficient to perfect the growth of their peculiar corn.

* * * *

In addition to the difficulties that have arisen from want of a reservation with which you are familiar, I may add that the Moquis are constantly annoyed by the encroachments of the Navajos, who frequently take possession of their springs, & even drive their flocks over the growing crops of the Moquis. Indeed their situation has been rendered most trying from this cause, & I have been able to limit the evils only by appealing to the Navajos through their chiefs maintaining the rights of the Moquis. With a reservation I can protect them in their rights & have hopes of advancing them in civilization. Being by nature a quiet and peaceable tribe, they have

¹⁷ *Healing v. Jones, supra, Hopi Ex. 78, p. 115.*

been too easily imposed upon, & have suffered many losses.¹⁸

Fleming's recommendations were finally approved by the Secretary of Interior and forwarded to President Arthur, who, on December 16, 1882, issued an Executive order establishing the reservation.¹⁹ (31 Ind. Cl. Comm. 16, p. 26).

At this time it was estimated that there were 1813 Hopis living in the seven permanent villages within the boundaries of the 1882 reservation. There is nothing in the record to indicate the number of Hopis then living outside the reservation.

It is clear that the Government expected that the 1882 Executive order would enable it to protect the Hopis from the Navajos and from white settlers and also provide the Hopis with enough land to sustain them. We now know that the Navajos did not cease their encroachments on the Hopis in 1882. It was intended that the Hopi reservation would be a permanent home for the Hopis. Responsible government officials believed that sufficient land had been set aside to accommodate present and future Hopi tribal needs and therefore the Hopis would confine their activities within the boundaries of the reservation. The record does

¹⁸ *Id.* pp. 116, 117.

¹⁹ On December 21, 1882, Agent Fleming received a telegram from the Commissioner of Indian Affairs advising "President issued order, dated sixteenth, setting apart land for Moquis recommended by you. Take steps at once to remove intruders." *Healing v. Jones, supra*, at 137.

not disclose any Hopi protest or objection at the time as to the size of the new reservation.

The Hopi situation in 1882 was not unlike that faced by the Hualpai Indians (Walapais) during this same period, to which problem the Supreme Court addressed itself in *United States v. Santa Fe Pacific Railroad Company*.²⁰ In the *Santa Fe* case, the Act of July 27, 1866, 14 Stat. 292, required the "voluntary cession" of the Walapais' ancestral lands before Indian title could be extinguished. Several abortive attempts by the Government to force the Walapais upon a new reservation had (31 Ind. Cl. Comm. 16, p. 27) failed to extinguish their Indian title. By 1881 the influx of new settlers and expanding cattle operations caused the Walapais to request that a reservation be set aside for them while sufficient land was still available.

On January 4, 1883, President Arthur signed an Executive order creating the Walapai Indian Reservation in Arizona.²¹ For a time only a few Walapais lived on the reservation. For years it remained unsurveyed and cattlemen used it for grazing. Despite this, the Court found that the Walapais had in fact accepted the reservation, and, in doing so, had relinquished any tribal claims to lands outside of the reservation. In the words of the Court:

... But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted

²⁰ 314 U.S. 339 (1941).

²¹ I Kappler 804.

to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by "voluntary cession" within the meaning of § 2 of the Act of July 27, 1866. The lands were fast being populated. The Walapais saw their old domain being preempted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be (31 Ind. Cl. Comm. 16, p. 28) fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seem to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others.²²

In light of the circumstances surrounding the crea-

²² 314 U.S. at 357-58, footnotes and citations omitted.

tion of the Hopi reservation, the actions taken with respect to Hopi presence on the reservation thereafter²³ point to Hopi acquiescence in and acceptance of their new reservation status. This implied Hopi acceptance coupled with the Government's manifest intent to confine future Hopi tribal activity within the boundaries of the 1882 reservation, terminated the Hopi's aboriginal title to lands outside of the reservation.

One further point deserves some comment. Plaintiff contends that the Commission erred when it stated at page 284 of its opinion:

As established the 1882 Reservation contains within its boundaries all of the Hopi permanent villages, the agency buildings at Keans Canyon, and what Agent Fleming considered to be sufficient land to meet the needs of the Hopi population which was then numbered about 1800. (31 Ind. Cl. Comm. 16, p. 29).

Plaintiff proceeds to state that:

The Commission is clearly mistaken in this regard since the Village of Moencopi was not only a permanent Hopi village, but had been in existence for as far back as possibly the year 1400.²⁴

Nevertheless, the Hopi plaintiff has stipulated that

²³ By 1888 the Hopis were protesting further encroachment of the Navajos "on their reservation". Similar complaints soon followed, and the resolution of this constant and nagging problem occupied the time and energies of numerous administrative officials in the years that followed. See *Healing v. Jones*, *supra*, Hopi Exhibit 78, p. 122, and following pages.

²⁴ P. 5 — Brief In Support of Petitioner's Motion for Further Hearings, etc.

the village of Moencopi had been abandoned as a *permanent* Hopi village sometime prior to 1800, and not reestablished until sometime after 1848.²⁵ In addition the plaintiff's principal witness, Dr. Eggan, agreed with the defendant that the Paiute Indians had run the Hopis out of Moencopi around 1830 or 1840, and that it was not until the 1870's that an unknown number of Hopis resettled at this site under the protection of the Mormons who had been living at nearby Tuba City.²⁶ In *Healing v. Jones, supra*, the court made the following observation with respect to Moencopi in discussing 1951 Hopi population figures:

Not included in this figure are the several hundred Hopis living a few miles west of the 1882 reservation at Moencopi. The forebears of these Hopi had left "Old Oraibi" in the reservation area, and moved to Moencopi in a 1906 "revolt".²⁷

The Commission now adheres to its decision on this point for the reasons stated above and in its 1970 opinion. (31 Ind. Cl. Comm. 16, p. 30).

*June 2, 1937—Hopi Indian Title Terminated for Lands
Within The 1882 Reservation*

The plaintiff has challenged the Commission's finding and conclusion that, on June 2, 1937, the Hopi In-

²⁵ Tr. 1562.

²⁶ Tr. 7412.

²⁷ *Healing v. Jones, supra*. at 169, n. 68.

dian title was extinguished to that land within the 1882 reservation situated outside the boundaries of an area officially designated as "land management district 6," or simply "district 6."

The establishment of district 6 within the 1882 reservation came about in the following manner. Under Section 6 of the Indian Reorganization Act of 1934, the Secretary of Interior was empowered to make rules and regulations for the administration of Indian reservations relative to forestry, grazing, soil erosion, and other purposes.²⁸ Thereafter, on November 6, 1935, the Secretary issued grazing regulations purportedly limited to the adjoining Navajo Reservation. These regulations established land management districts, several of which embraced not only the Navajo Reservation but also the 1882 reservation. As defined early in 1936, land management district 6 was situated entirely within the 1882 Reservation and was specifically designed to include that area exclusively occupied by the Hopis. No specific metes and bounds description was given for district 6 and it was not until 1943 that the final boundaries were approved.²⁹ On June 1, 1937, a comprehensive set of grazing regulations was made applicable to the Hopi and Navajo reservations. The net effect of these regulations was (31 Ind. Cl. Comm. 16, p. 31) to restrict practically all Hopi activities within the boundaries of district 6 and to make the remainder of the 1882 reservation available for the exclusive use of the Navajo Tribe.

²⁸ § 6, 48 Stat. 984, 986; *Healing v. Jones*, *supra*, at 163.

²⁹ *Healing v. Jones*, *supra*, Hopi Exhibit 78, p. 185.

Under these circumstances, the court in *Healing v. Jones*, concluded as a matter of law as follows:

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 11, 1882.³⁰

As we understand it, the plaintiff's contention is that, at least until 1962 when *Healing v. Jones* was decided, the Hopis still retained Indian title to all the land within the 1882 reservation. As a result of the *Healing v. Jones* decision, the plaintiff asserts that, since June 2, 1937, it has retained a one-half undivided interest in that part of the reservation outside of district 6.³¹ We understand the plaintiff to argue that this one-half interest is Indian title. In support of its view that Hopi aboriginal rights were not abrogated except to the extent as outlined above, the plaintiff has directed our attention to certain findings and conclusions that the court reached in *Healing v. Jones*, such as, (1) that at no time had the (31 Ind. Cl. Comm. 16, p. 32) Congress enacted legislation designed to terminate or have the effect of terminating Hopi rights of use and occupancy anywhere in the 1882 reservation,³² (2) that

³⁰ *Id.*, at 223.

³¹ Hopi Memorandum with Point and Authorities, etc. August 12, 1971, p. 4.

³² *Healing v. Jones*, *supra*, Hopi Exhibit 78, p. 220.

administrative efforts, through the imposition of restrictive grazing regulations and a permit system, to exclude the Hopis from that part of the 1882 reservation outside of land management district 6 were at all times illegal,³³ (3) that the failure of the Hopis to use a substantially larger part of the 1882 reservation was not a matter of free choice, hence there was no abandonment,³⁴ and, (4) that administrative officials repeatedly assured the Hopis that none of the aforementioned administrative regulations and practices were designed to affect whatever rights the Hopis then had in the entire 1882 reservation. Based upon these findings and conclusions the plaintiff has summarized its position in the form of a question —

Under the circumstances reiterated above, particularly including the finding of the court that the excluding of any Hopis upon any of the land within the Executive Order Reservation was at all times illegal, how can it be held that any valid administrative action had terminated the Hopi title prior to the time the court determined the Hopis had lost a one half interest?³⁵

It suffices to say that the court in *Healing v. Jones* was concerned with the question of the Hopi reservation rights that were acquired under the Executive Order of December 16, 1882. The court's findings and conclusions bear upon the nature and extent (31 Ind.

³³ *Id.* at 224.

³⁴ *Id.* at 221.

³⁵ Brief in Support of Petitioner's Motion, etc., Sept. 16, 1979, p. 22.

Cl. Comm. 16, p. 33) of the Hopi reservation rights.³⁶ The court was not concerned with the question of the aboriginal or Indian title of the Hopis to these lands. Hence, plaintiff's reliance upon these particular findings of the court in *Healing v. Jones*, as determinative of the issue of Indian title is misplaced.

The Hopi Indians have already demonstrated to the Commission's satisfaction that they held the Indian title³⁷ to the 1882 reservation at the time they acquired nonexclusive reservation rights in the same lands under the Executive Order of December 16, 1882. Since the reservation had been set aside for Hopis "... and such other Indians as the Secretary of Interior may see fit to settle thereon,"³⁸ (31 Ind. Cl. Comm. 16, p. 34) it was only a matter of time until the growing Navajo population and the multi-purpose use of the 1882 reserv-

³⁶ For example, the illegal or unlawful acts cited by the court in *Healing v. Jones* had reference to the fact that, following the passage of the Act of May 25, 1918 (40 Stat. 570), wherein it was provided that henceforth only the Congress could create new Indian reservations or make additions to existing reservations in Arizona and New Mexico, it was not possible administratively without the consent of the Hopi Indians to terminate Hopi reservation rights in the 1882 reservation or to award exclusive rights to the Navajos in any part of the reservation. There is no question as to the legality of the actions taken by the Secretary of Interior in impliedly settling either individual Navajos or the Navajo Tribe on the 1882 reservation pursuant to the authority conferred by the 1882 Executive order.

³⁷ With utmost consistency the Court of Claims has reiterated that aboriginal or Indian title rests on actual, exclusive and continuous use and occupancy for a long time prior to the loss of the property. *Lummi Tribe of Indians v. United States*, 181 Ct. Cl. 753 (1967); *United States v. Seminole Indians*, 180 Ct. Cl. 375 (1967), *Confederated Tribes of the Warm Springs Reservation v. United States*, 177 Ct. Cl. 184 (1966) and cases cited therein.

³⁸ I Kappler 805.

ation resulting from governmental policies would make Hopi exclusive use and occupancy of the same lands impossible.

In 1882, nearly 300 Navajo Indians were living on the reservation. Thereafter the Navajo population steadily increased, so that in 1900 there were 1826 and in 1911 approximately 2000 Navajos. By 1921 there were 2760 Navajos and 2236 Hopis living on the reservation. By 1930 there were 3319 Navajos, and by 1936, almost 4000 on the reservation. Throughout this entire period, and up until June 2, 1937, when the Secretary of Interior impliedly "settled" the Navajo Tribe on the reservation pursuant to his authority under the 1882 Executive order, the Government made no serious effort to remove the Navajos. On the contrary, we find acquiescence both explicit and *sub silentio*, by responsible administrative officials in the growing Navajo presence. The record herein fully supports the conclusion reached in *Healing v. Jones*:

The evidence is overwhelming that Navajo Indians used and occupied parts of the 1882 reservation in Indian fashion, as their continuing and permanent area of residence, from a long time prior to the creation of the reservation in 1882 to July 22, 1958, when any rights which any Indians acquired in the reservation became vested.³⁹

Indeed it could be argued that the Hopi Indian title to portions of the 1882 reservation actually terminated when the Navajo population exceeded that of the

³⁹ 210 F. Supp. at 144-45. The Act of July 22, 1958, 72 Stat. 402, confirmed reservation rights in the 1882 reservation.

Hopis. However, the Commission chose June 21, 1937, as the climactic date, since on that date the restrictive grazing regulations (31 Ind. Cl. Comm. 16, p. 35) as approved by the Secretary of Interior were put into effect, thus substantially confining future Hopi activity within the boundaries of land management district 6, and freeing the balance of the reservation for uninterrupted Navajo use and occupancy. In sum, the Commission finds nothing in plaintiff's additional evidence, or in its argument with respect to "dates of taking", that would cause the Commission to recede from its earlier position that Hopi Indian title to that part of the 1882 Reservation outside of land management district 6 was effectively terminated on June 2, 1937.

In its supporting brief the Hopi plaintiff referred to certain other claims remaining to be tried in this docket, namely "counts 5 through 8" which counts,

. . . are based upon the fact that the petitioner, the Hopi Tribe, retained the Indian title to the lands and that the United States deprived the Hopi Tribe of the use of these lands.⁴⁰

In further explanation of the above the plaintiff states,

The matter yet to be tried is whether the United States must pay the reasonable rental value of the land it allowed the Navajos to use during the period prior to the actual taking.⁴¹ (31 Ind. Cl. Comm. 16, p. 36).

⁴⁰ Hopi Brief in Support of Petitioner's Motion for Further Hearing, etc., p. 22.

⁴¹ Id.

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.

Conclusion

Accordingly, for the reasons stated in this opinion, the Commission has denied the Hopi plaintiff's motion to amend the Commission's findings previously entered herein with respect to the extent of plaintiff's aboriginal or Indian title to the claimed area, and the dates said Indian title was extinguished by the United States. This case as previously ordered shall proceed to a determination of the acreage of lands awarded herein, their value as of the respective dates of taking, and all other matters bearing upon the extent of defendant's liability to the Hopi plaintiff.

Jerome K. Kuykendall, Chairman

Concurring:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantly Blue, Commissioner

APPENDIX IV

33 Ind. Cl. Comm. 72

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BEFORE THE
INDIAN CLAIMS COMMISSION

THE HOPI Tribe, an Indian Reorgan-
ization 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,
HUNGOPAVI, OSRAIBI,
KYAKOTSMOV, BAKABI,
HOTEVILLA and MOENKOPI,

Plaintiff,

Docket No.
196

THE NAVAJO TRIBE
OF INDIANS,

Plaintiff,

Docket No.
229

v.

THE UNITED STATES
OF AMERICA,

Defendant.

ORDER DENYING HOPI PLAINTIFF'S MO-
TION FOR LEAVE OF COMMISSION TO
HEAR FURTHER ARGUMENT ON LIABIL-
ITY 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

On October 4, 1973, the Hopi plaintiff in Docket 196 filed the above-captioned motion wherein it requested that this Commission, prior to the valuation phase of these proceedings, hear argument on the question of the liability of the United States for the "rental value" of Hopi aboriginal title lands under Counts 5 through 8 of the original petition in Docket 196, that the Commission thereafter amend its findings and order previously entered herein on June 29, 1970, 23 Ind. Cl. Comm. 277, to reflect a final determination of this issue, and, for such other and further relief as may be appropriate. Oppositions to the Hopi motion were filed by the defendant on October 19, 1973, and the Navajo plaintiff in Docket 229 on October 29, 1973. On November 12, 1973, the Hopi plaintiff filed a further reply brief.

The Commission, having taken the matter under advisement, and now being fully advised in the premises, is of the opinion that the Hopi plaintiff's motion should be denied. Accordingly, this case should proceed, as expeditiously as possible, in the manner previously ordered by the Commission. Further argument and the disposition of the issue (33 Ind. Cl. Comm. 72, p. 73) of the "rental value" of the Hopi aboriginal title lands under Counts 5 through 8 of the original petition will be deferred to the value phase of this case.

A70

IT IS THEREFORE ORDERED, the Hopi plaintiff's motion be, and the same is hereby, denied.

Dated at Washington, D.C., this 23rd day of January 1974.

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

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APPENDIX V
IN THE
UNITED STATES COURT OF CLAIMS

App. No. 13-74

THE HOPI TRIBE,

Appellant,

v.

THE UNITED STATES

and

THE NAVAJO TRIBE,

Appellees.

Before SKELTON, *Judge*, Presiding, NICHOLS and BENNETT, *Judges*.

ORDER

This case comes before the court on the suggestion and motion of the appellant, Hopi Tribe, filed February 20, 1976, for rehearing *en banc* pursuant to Rules 7 (d) and 151 (b). Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the six active Judges of the court (Judge Kashiwa not participating) as to the suggestion for rehearing *en banc*, which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151 (b).

A72

IT IS ORDERED that the said appellant's motion for rehearing, filed February 20, 1976, be and the same is denied.

BY THE COURT

Byron Skelton
Judge, Presiding

A73

APPENDIX VI

26 U.S.C. section 70p Hearings

The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the Territory of Alaska.