

BEFORE THE INDIAN CLAIMS COMMISSION

THE PUEBLO OF LAGUNA, ET AL.)	Docket No. 227
)	
PUEBLO DE ACOMA)	Docket No. 266
)	
THE NAVAJO TRIBE OF INDIANS)	Docket No. 229
)	
Petitioners,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: February 28, 1967

Appearances:

Jay H. Hoag and O. R. McGuire,
Attorneys for Petitioners.

Walter A. Rochow, with whom was
Mr. Assistant Attorney General
Edwin L. Weisl, Jr., Attorneys
for the Defendant.

OPINION OF THE COMMISSION

Chief Commissioner Watkins rendered the decision for the Commission.

This is an action brought by the Pueblo of Laguna, petitioner in Docket No. 227, under the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049), for the taking of lands claimed to have been owned or occupied by petitioner, and for other damage caused to petitioner by the defendant, the United States. However, the petitioner in Docket No. 266, the Pueblo de Acoma, also claimed aboriginal title to part of the lands. Therefore, on January 18, 1955 the Commission ordered that Docket No. 227 be consolidated with Docket No. 266 insofar as the claims

in each overlap the other. Later, on February 3, 1961, the Commission ordered Docket Nos. 227 and 266 consolidated for purposes of trial with Docket No. 229, the Navajo Tribe of Indians, to the extent that the areas claimed in those dockets overlapped the area claimed in Docket No. 229.

In the interval between the orders of consolidation, trial of the Acoma and Laguna claims was concluded on September 19, 1957. Following the order of consolidation with the Navajo case, however, further testimony and documentary evidence was presented by the two pueblos in Docket No. 229. The result is that all testimony and documentary evidence in Docket No. 229 and Dockets 227 and 266, insofar as the same may relate in any way to the territory herein claimed by the Pueblo of Laguna, are now a part of the record to be considered in determining this petitioner's aboriginal claim.

During the course of the hearings in this case the claims of all three petitioners have been somewhat modified. Counsel for petitioner in Docket No. 227 stated during the hearing that the Lagunas were claiming "much less area than is alleged in our complaint" (Tr. 311). Counsel for petitioner in Docket No. 266 declared during the hearing that petitioners in Dockets 227 and 266 had agreed on the dividing line established by the Court decree of 1857 as the dividing line between their separate claims (Tr. 157). This cut off the eastern third of the Acoma claim (Tr. 157). The dividing line was described as "being a north and south line running from township 1 south, the dividing line between ranges 6 and 7 west, straight north to township 13 north, ranges 6 and 7 west." (Tr. 158) Counsel for petitioner in Docket No. 266 also said that

"after the proceeding, we are going to ask for permission to amend our complaint to show that stipulation." (Tr. 157) Subsequently a Memorandum Agreement was entered into signed by representatives of the Acomas and Lagunas and their respective attorneys on May 11, 1959, accepting the above dividing line as the common boundary between their two claims. (Acoma Ex. 54; Acoma Brief, pp. 113-117) Insofar as their respective claims are concerned, this agreement, in effect eliminated any overlap. Petitioner in Docket No. 229, the Navajo Tribe of Indians, whose claim completely overlapped the other two claims, submitted a map labelled "Appendix A" along with its proposed findings of fact, on which was outlined a large part of the overlap area conceded by them not to have been "Exclusively Used and Occupied by Navajos." Of course, any modifications in the original claims of these petitioners does not affect the right of the defendant to show that the overlaps, as originally claimed do in fact exist.

The present claim is based on aboriginal title. In order for an Indian tribe or group to establish aboriginal or Indian title and recover on such a claim, several elements must be present. First, aboriginal title or "Indian Title" is based among other things on exclusive use, occupancy and possession. Alcea Band of Tillamooks v. United States, 329 U.S. 40. However, "the rule of 'exclusive use and occupancy' must be reasonably applied. The term 'exclusive' is definable as excluding or having the power to exclude, limiting or limited to possession, control, or use by a single individual or organization, and as applied to use and occupancy of land by aboriginal Indians

involves considerations of the 'land using entity'." Confederated Tribes of the Umatilla Reservation v. United States, 8 Ind. Cl. Comm. 513, 552. Temporary occupancy by friends or raiding by enemies would not destroy the 'exclusive occupancy' required for Indian title. Lummi Tribe of Indians v. United States, 5 Ind. Cl. Comm. 543, 552, The Omaha Tribe of Nebraska et al., v. United States, 4 Ind. Cl. Comm. 627, 649-650. However, the tribe or group permitting such temporary occupancy by guests or friends must first have established Indian title through exclusive use and occupancy for the requisite time period. Confederated Tribes of the Umatilla Indian Reservation v. United States, 14 Ind. Cl. Comm. 104, 119.

Secondly, such exclusive use and occupancy must be from "time immemorial" or "for a long time". The Sac and Fox Tribe, et al., v. United States, 161 C. Cls. 189, 201, 202.

* * * The status of aboriginal ownership is not accorded to tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy "for a long time." * * * The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory. The Claims Commission Act, which seeks to repair damage caused by the United States conquest of Indian lands, should not be turned into an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before. (Ibid. 205, 206)

Thirdly, Indian title must be perfected in the entity before the sovereignty of the United States attached to the lands involved since aboriginal holdings cannot be increased after such sovereignty attaches. Iowa Tribe et al., v. United States, 6 Ind. Cl. Comm. 464, 501.

Fourthly, the Indian tribe must not have voluntarily abandoned the territory which they claim. However, any restriction in use because of

the raids of other Indian tribes is not an abandonment unless the territory is not reoccupied. The Omaha Tribe of Nebraska et al., v. United States, 4 Ind. Cl. Comm. 627, 649-650. The Caddo Tribe of Oklahoma et al., v. United States, 8 Ind. Cl. Comm. 354, 374. Neither does an Indian tribe or group relinquish Indian title by failing to resist white encroachment. The Seminole Indians of the State of Florida v. United States, 13 Ind. Cl. Comm. 326, 362-363; The Northern Paiute Nation and the Bands thereof, v. United States, 7 Ind. Cl. Comm. 381, 419.

Lastly, there must be a taking of said lands by the United States. Such a taking can be the result of the action or inaction of the United States executive and legislative departments over a period of time whereby a tribe or group of Indians are deprived of their right of use and occupancy of said lands. Shoshone Tribe of Indians of the Wind River Reservation in Wyoming v. United States, 299 U. S. 476, 495-496. It can also result from the Government acquiring, controlling and treating such Indian lands as public lands without the consent of the Indians whereby said Indians are deprived of their right of use and occupancy. The Northern Paiute Nation and the Bands thereof v. United States, 7 Ind. Cl. Comm. 322, 418-419, The Yakima Tribe of Indians v. United States, 2 Ind. Cl. Comm. 433, 459.

In this case we also have the question of the legal status of Spanish and Mexican land grants as they relate to aboriginal Indian title claims. The Commission has determined in past cases where this question was at issue, that valid Spanish and Mexican land grants were private property when the Treaty of Guadalupe Hidalgo was signed in

1848. Hence these lands never became part of the public domain of the United States and are immune from aboriginal Indian title claims. Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422, Pueblo de Isleta v. United States, 7 Ind. Cl. Comm. 619, affirmed by the Court of Claims, Pueblo de Zia et al., v. United States, 11 Ind. Cl. Comm. 131, 164-165. Therefore, petitioner's claim of aboriginal Indian title to any valid Spanish or Mexican land grants in the claimed area must be denied as a matter of law.

The history of the petitioning tribe's habitation in the claimed area is briefly as follows: After migrating from the Mesa Verde of southwestern Colorado toward the end of the 13th century during a period known as the Great Drought, the Laguna moved by stages to the San Jose River and about 1300 A.D. settled their headquarters at Puayana on the south side of Laguna Lake. In the 1400's they moved across the lake to Old Laguna and by the process of natural increase plus some immigration, Old Laguna increased in size and several subsidiary villages were developed. The Acomas were settled in the same general area west of the Lagunas.

With Old Laguna as the tribal center, the Lagunas spread to outlying farms and villages and gradually expanded their farming and herding areas and lambing sites. From the 16th century on they successively lived under the sovereignty of Spain, Mexico and the United States. During the Spanish and Mexican periods much of the claimed area was granted to both the Lagunas and non-Indians by the respective sovereigns. Numerous injustices were suffered by the Lagunas under these governments,

particularly from local officials. In 1848 the claimed area came under American sovereignty.

From the period just preceding American sovereignty over the claimed area, and for many years thereafter, the Lagunas suffered many encroachments by non-Indians on lands which they had used and occupied for many years. These encroachments were called to the attention of the United States government by United States officials working with the Indians there, but nothing was done at that time. However, during the next 75 years the Congress of the United States did pass Acts to establish the "Office of Surveyor-General of New Mexico", the "Court of Private Land Claims" and the "Pueblo Lands Board" in order to properly adjudicate the land rights of the pueblo Indians as well as other inhabitants of the area. In spite of these efforts, the Lagunas were effectively deprived of the use of some of their lands as a result of periods of inaction on the part of the United States. During this period there was some confusion as to the legal status of the pueblo Indians which encouraged those who were encroaching on their lands. Shortly after American sovereignty, the Indian Agent recommended that the pueblos be included under the wardship policy of the Non-Intercourse of 1834. After some delay Congress passed a law in 1851 applying the Non-Intercourse Act to the Indians of New Mexico. However, the territorial Courts of New Mexico interpreted the law differently and treated the pueblos as ordinary citizens entitled to no special protection from encroachment other than suing in the regular courts. The United States did nothing to clarify this apparent contradiction between United

States policy toward the pueblos and the decisions of the territorial courts. Finally in 1876, the United States Supreme Court upheld a decision of the New Mexico Territorial Supreme Court that the pueblos were not included under the 1834 Non-Intercourse Act. This action, of course, encouraged further encroachments since it was difficult for the Indians to sue in the courts because of their lack of funds and the problem they encountered in getting proper representation. Further encouragement to encroachments was given by long delays on the part of the United States in patenting Laguna lands.

For example, Congress confirmed certain tracts of land to the Lagunas in 1860 but it was 1884 before the patents were received. The Surveyor-General recommended in 1872 that the Laguna Pueblo Grant be confirmed. However, it was not until 1909 that a patent was finally issued. Without the physical evidence of ownership it was impossible for the Lagunas to prevent encroachments in the lands which they had purchased, let alone other lands which they had used from aboriginal times. Later on after the beginning of the 20th century, the United States did many things to help the Lagunas with their problems. These are things, however, that will be considered in detail in connection with the offset provisions of the Indian Claims Commission Act.

During the Spanish, Mexican and American periods, the Lagunas had other Indian groups on every side. The Acomas on the west, the Navajo on the north, the Isleta on the east and the Apache on the south. There is evidence that along the Acoma-Laguna border some of the area now claimed by the Lagunas was used by the Acomas for farming and herding,

although there were no Acoma villages there at the time American sovereignty began.

For many years prior to American sovereignty the Acomas and Lagunas disputed over part of the claimed area. These disputes continued until July 6, 1857, when the boundary line between Acoma and Laguna was established by judicial decree. The decree was declared and notarized April 22, 1858. The decree declared the dividing line between the two pueblos to be one "drawn north and south from the eastern or lower edge or side of the Canada de la Cruz, where the Gallo (San Jose) crosses the said Canada for the Pueblo of Acoma and its inhabitants." (Def. Ex. 41)

The territory to the east of this line where the Lagunas were concentrated was recognized as Laguna territory and the area west where the Acomas were concentrated was recognized as their territory. The precise location of the Canada de la Cruz was then the source of constant disagreement for many years. However, in the plats of an 1877 government survey by Sawyer and McElroy the junction of the Canada de la Cruz with the San Jose Valley was shown in the region of Seama, a mile or so east of the Acoma Pueblo Grant as confirmed and patented to that Pueblo by the United States. This geographic location was finally agreed upon by the two pueblos in 1877 as the true boundary described in the 1857 decree.

(Def. Ex. 47)

The Navajos occupied lands to the north of the Lagunas. The records indicate, as reflected in our findings, that from the middle of the 18th century until 1864 when they were taken to Bosque Redondo the Navajos moved in and out of parts of the claimed area. Sometimes small groups

would be raising crops at various places and be on friendly terms with the pueblos. At other times the Navajos would raid the pueblos causing them to move their herds closer to the home villages for protection. During the intermittent periods of peace the pueblos would again re-occupy the outlying areas as they had before. From time to time during this period military forces of the Spanish, Mexican and American governments would attempt to stop the raiding by carrying out campaigns against the Navajos and making peace treaties with them, and encouraged them to live a more settled existence. However, raids continued until the Navajos were taken to Bosque Redondo in 1864. The raids, at least in part, were a retaliation by the Navajos for members of their tribe who were taken and sold as slaves by both Indians and whites.

The Navajo who were in the claimed area were either raiding or dwelling there on a temporary basis at the invitation, sufferance or permission of either the Laguna or the United States authorities. The more permanent settlement of the Navajos in the main Canoncito area came after their return from Bosque Redondo in 1868.

There is no evidence that the Isleta were using any part of the claimed area during the period in question. There is much evidence about the Navajo. The Apaches did not dwell in any part of the claimed area but were content to limit their activities to raids from the south.

All of the parties involved, including the defendant, have given the Commission the benefit of the testimony of expert witnesses who, in most cases, also submitted written reports. This has been very helpful. Dr. Florence H. Ellis testified as an expert on behalf of

both the Acomas and Lagunas, who originally, had conflicting claims. However, since the overlap between the Acomas and Lagunas had been resolved by stipulation Dr. Ellis felt she could be an expert witness for both parties. She also appeared as an expert witness for the defendant in Docket 229 and testified concerning the same area. Dr. Ellis has submitted two written reports, "Anthropology of the Laguna Pueblo Land Claims," (Pet. Ex. 92 in Docket No. 227) and "Archeologic and Ethnologic Data pertaining to Acoma and Laguna Land Claims." (Acoma-Laguna Joint Ex. 527 in Docket No. 229) In so far as the Laguna claim is concerned, Dr. Ellis testified that the northern, western and southern boundaries of the area used and occupied by the Lagunas was approximately the same as that described in the petition. She did concede, however, that the largest territorial use by the Laguna was in the late 19th and early 20th centuries, some years after American sovereignty attached to the areas. (Tr. 296) She also conceded that from time to time the Lagunas permitted a few Acoma and Navajo temporary use of some of their land. Dr. Ellis testified that the line established by the Court decision of 1857 dividing the Acoma from the Laguna lands was not arbitrary but was based on actual occupancy. (Tr. 256; Pet. Ex. 92, p. 63) Her conclusions supporting the Laguna claim were based on archaeological, historical and ethnological materials. Respecting the Navajo use of the claimed area, Dr. Ellis said:

Before the time of Bosque Redondo, as far as we can make out by tradition and archaeology, there were very few Navajos in the Laguna territory * * *.

The Navajos who had been in the Laguna Territory previously to Bosque Redondo, who, as I said, were very few in number, were by all accounts friendly to the Lagunas, and I would say that at the utmost there seemed to have been four or five families at a time who would wander in and out. * * * (Tr. 290-291)

These relevant comments appear in her report, "Anthropology of the Laguna Land claims." (Pet. Ex. 92)

*** The presence of these eastern sites as well as of the grazing sites themselves, validates the contention of the Lagunas that the Navajos were not concentrated in the Canoncito area, as today. One old man who claims to be 100 (and looks it) says that in his youth there were over four Navajo families in the Canoncito area though. A few families came in to trade, were hired by the Lagunas or the Spanish-speaking people who were increasing in the area, who briefly lived here and then moved onward. * * * (Pet. Ex. 92, p. 77)

* * *

Until the period when the Navajos and Apaches were sent to Bosque Redondo in eastern New Mexico, where they remained between 1864 and 1868, the southern area of the present claim was used more sparcely than the northern, although people still today can give names of men who herded in the south and sometimes had to fight off Apaches. The land used officially was public domain, but considered by Laguna and nearby tribes to belong to Laguna through centuries of use. * * * (Pet. Ex. 92, p. 81)

* * * In general the Navajos concentrated to the north of Mt. Taylor, occasionally wandering in and out of the Laguna territory, (with Laguna permission), trading and doing a little farming and sometimes on their way to visit with the Alamo Navajos who lived just south of the Laguna border. (Pet. Ex. 92, p. 82)

* * *

All information points to the Canoncito group as such having come into existence after their tribe returned from Bosque Redondo when the Lagunas could no longer hold their old herding areas for themselves because the United States government had drawn reservation boundaries around them. * * * (Pet. Ex. 92, p. 84)

* * *

* * * Navajo sites should show some evidence of Navajo pottery sherds, but in our examination of the Canoncito area and Puerco we have found such to be almost non-existent, except where the late Navajo sites are distinguishable. (Pet. Ex. 92, p. 82)

* * *

We can summarize the herding areas used principally by the Lagunas in stating that certain areas were used especially by men from certain villages. In the north herding was carried on from the east side of Mt. Taylor to the Puerce, including all the area along the Salado now occupied by white ranchers. The Lagunas using this district often watered their stock at the base of Mesa Prieta. Sheep corrals are plentiful around Paguate itself; there are dipping vats, lambing pens and watering places. Herders took their flocks even farther north than the edges of the present claim, north of Cebolleta Grant, but they tried to skirt that grant as much as possible in going from east to west, detouring into it only to water their animals.

The herders went as far as 35 or 40 miles south of Laguna, though usually concentrating around Mesa del Oro on the southern boundary of the claim and what is now the Sais-Wilson Ranch, somewhat farther north. The Puerco was considered the eastern edge of their range lands and the Acoma-Laguna division line marked their western boundary. (Pet. Ex. 92, pp. 81, 82)

However, in her testimony during the trial in Docket 229 she said the Navajo boundary should be a little farther south than her earlier testimony had indicated so as to take in the northern tip of the Canoncito area. She drew a line on Def. Ex. E-100 in Docket 229 to illustrate where the division line was between the Acomas and Lagunas and the Navajo on the north. She said that aside from raids, trading and invitees, the

* * * Navajos lived as far south as Salado on occasion before 1848. They also lived occasionally slightly farther south in the Canada de Los Alamos Grant, and in the northeastern portion. (Tr. 6931)

In Acoma-Laguna Joint Exhibit 527 Dr. Ellis made the following comments affecting the present claim:

Laguna was not founded in 1698 or '88, as customarily stated in histories; the tribe was in its present location two centuries earlier after migrating from the north because of drought presumably caused by lack of attention to religion
* * *

* * *

* * * For a pueblo people, the Lagunas were unusually energetic, forceful, and aggressive, establishing far-reaching settlements, making herding a major industry, and sending punitive expeditions after Navajo raiders. Laguna's natural growth was greatly augmented by Rio Grande migrants especially eastern Keres, during the period of the Pueblo rebellion and reconquest. * * * (pp. 31-32)

* * *

* * * The Lagunas already had one main pueblo and some subsidiary villages, some of which were occupied only seasonally. Laguna had become so interested in sheep raising that they were using land from the Salado on the north to Pakwenema Mesa on the south and from Canada de la Cruz (at Siama) eastward to the Puerco. Farming was only equal to or perhaps even of secondary importance, a situation contrary to that in the other pueblos. When Navajo raids became increasingly dangerous, the herders temporarily retreated to the vicinity of their villages but within a few years at the most they spread widely again, even though such daring led to increasing loss of life to the herders. (p. 2)

* * *

Laguna early concentrated on sheep raising to a much greater extent than other pueblos; herding became more important than agriculture and large numbers of sheep moved over the area controlled by the tribe. * * * (p. 159)

* * *

Lagunas even sometimes herded north of Lee Evans ranch during the intermittent quiet periods even before Bosque Redondo--north of Piedra Lumbre and at Ojo Watera (vateya) to the east of the San Luis Valley * * *. (p. 184)

* * *

In 1762, the Bacas obtained a grazing permit to the area at the opening of Encinal Canyon. Although by law they were not to build a home there, they erected a large adobe hacienda next to the small Laguna ruin, and for years Lagunas chafed at this incursion. Lagunas were planting fields nearer to the present site of Encinal and living in dugouts during the farm season or running to and from Laguna to care for their fields. Division of the small water supply was a recurrent irritant. (p. 193)

* * *

* * * The Navajo missions dated in the mid-1700's. Cebolleta was founded in 1800, but Laguna had had a small village of its own there about fifty years earlier, as well as villages and herding sites on the Salado, in the wide valley west of Mesa

Gigante and north of Paguate Purchase area, at Paguate, at Chumpadero, and at Encinal, as well as in the more central area near Old Laguna. * * * (p. 137)

* * *

Between the time of the Spanish attempt at establishing a Navajo mission and village in the mid-1700's and the liberation of the Navajos from Bosque Redondo, no Navajos had lived around Encinal. (p. 147)

* * *

According to both the Acomas and the Lagunas, very few Navajos ever lived inside the territory of either pueblo or married their people, either before or after the Bosque Redondo incarceration of the Navajos. The period when the most Navajos were present in these pueblo lands was from a few months to perhaps two years after liberation of the Navajos in 1868, when many were very poor and hung around the pueblo villages for what food they might be given in recompense for aiding with various labors. (p. 140)

* * *

* * * A few (Navajo) camped for a while on the north side of Paguate and a few on the western edge of the mesa, but after a little while they drifted on. The occasional sherds of Navajo ware found in the debris of Laguna sites represents these trade and friendship contacts. (p. 33)

* * *

The site at Big Bead Mesa *** is in township 14 N. Range 4W., 30 miles southeast of Zia Pueblo and sixty miles northeast of Laguna. Kerr gives it as "the approximate southern limit of the old Dine (Navajo) country." * * * (p. 225)

* * *

Two areas of Navajo occupation before the Bosque Redondo round-up, Chuskaiya and Tsekaiya, are given by Lagunas. The former, of course, is the Chuska Mountain area but appears to include also, the Chaca or Chacra Mesa, just to the south of Chaco Canyon, and the Siete Lagunas or Seven Lakes District between Thoreau and the Chaco. A tree ring date indicates occupation of one forked stick (old style) hogan on Chacra Mesa in the 1600's. (p. 223)

* * *

* * * The Canada de los Alamos grant area is where we have the most evidence of pre-1800 occupation by Navajos although only a few hogan rings are to be found, and it is from this area that Navajos are said to have moved down into the main Canoncito area in the late 1800's and early 1900's. (p. 231)

* * *

Archaeology and tradition check the eastern Navajo distribution. Both Zias and the Lagunas place the eastern Navajos farther north than Canoncito in the pre-Bosque Redondo period. The Canoncito Navajos themselves have said (to Wm. McClellan their agent) that they formerly lived to the north and moved farther southward in the more recent period. * * * (p. 232)

* * *

The Acomas knew of hogans at Lobo Canyon on the west side of Mt. Taylor where the Navajos customarily stopped when coming south on raids. They also knew hogans to be at Ambrosio Lake, where they sometimes trailed the raiders in hope of retrieving their sheep. Ambrosio Lake is not far southwest of the fairly large lake known as Laguna Leon, which elderly Zias give as a major Navajo center in pre-Bosque Redondo days. (p. 202)

* * *

Thus we see Navajos who have served the U. S. Army as "scouts and guides" between 1862 and the time of their captivity (1864) being rewarded with land in the Canoncito, considered by the Lagunas to be theirs but classified by the United States as public domain. * * * (p. 237)

* * *

* * * In the Acoma-Laguna area there is no question but that Navajos on occasion came to trade and a friendly group even may have been permitted to farm for a season especially if drought chanced to have struck in the home territory of that group. * * * (p. 216)

* * *

* * * Everyone knew that when living on Laguna land these Navajos were trespassers but because the Lagunas were trying to be kind to the poverty stricken Navajos and because the Navajos worked for Lagunas much of the time, these Pueblo people never asked them to move. Neither did the Acomas. The Navajo settlements in these areas covered very little space, residence was changed frequently, and the few Navajos and these pueblos could be said to have lived in something of a symbiotic relationship to each other. * * * (p. 239)

* * *

* * * When Sandoval's band, after their cooperation with whites and the slave raids upon other Navajo bands, came to be considered a proper prey for other more western Navajo (presumably those of the Chacra Mesa) the United States Government gave them temporary refuge in Cebolleta territory as a protective measure (see Jenkins data). They were on land not considered to be their own, even as the Pueblo refugees were on land not their own when they moved in with the Navajos at the time of the Pueblo revolt. * * * (p. 189)

* *

* * *

* * * Indeed, many of their hogan sites are easily visible from the Canyon Seco road and sideroads. Some are within a half block of Laguna herding camps. The answer to the mystery soon began to appear: some Navajo families lived here and at Old San Jose (the next canyon west) and off Laguna lands while working for or waiting to work for Acomas, Lagunas, and Spanish or Mexican families. At San Jose and from there westward, a scattering of Navajos took up land or received government allotments of land after the Bosque Redondo period. Although this land is within

the Acoma claim, it was officially counted as public land by the United States Government and at that time, and hence open to settlement. * * * (p. 197)

* * *

Directly after the liberation from Bosque Redondo some Navajos camped near the Acoma area for a few months so that they might work for the Acomas in husking corn, gathering the harvest, or bringing in wood from a distance, so that they might get enough food to enable them to move on farther. None remained permanently, but some returned to work for the Acomas again later or to spend some weeks picking pinyons. Some asked permission for pinyon-picking and some did not, but the Acomas never drove them away. * * * (p. 201)

* * *

* * * The limits of tribal lands were recognized by other tribes, but in time of need the Pueblos characteristically gave the right of temporary use of farm lands to outsiders who came and made application. After the period of stress in their own home area has passed, such visitors usually returned to their original homes, but some chose to become members of the host tribe. This was permitted, though we may suppose that certain formalities of loyalty and participation in group activities were required, as today. (p. 269)

Regarding the stipulated boundary line between Acoma and Laguna she said:

That (the eastern line) was not drawn on the decision of the United States, but this was a real occupancy line of an earlier period as far as I could make out * * *.

* * * Now I would not say that these Indians never wandered across into the other person's fields a little. By fields I don't mean corn fields, I mean just territory. But the main occupancy definitely seems to be divided up and down the line which runs through the eastern edge of Punyana de la Cruz and they recognize Punyana de la Cruz as their own dividing line. (Tr. 256-257)

* * *

* * * I think Seama was about on the dividing line between Acoma and Laguna, and I would not swear to which tribe definitely occupied that site, but Punyestye certainly is over in the Laguna territory. It seems to be one of the two at least. * * * (Tr. 284)

Several exhibits were prepared by Dr. Ellis to indicate visually the different areas of land use and the types of use by the Lagunas. They are Laguna Exhibits 87, 88, and 89 and Joint Acoma-Laguna Exhibit 528(a).

The testimony of Dr. Myra Ellen Jenkins, expert historian testifying on behalf of the Laguna Pueblo, related primarily to the history of Laguna land use and claims under Spanish, Mexican and American sovereignty based on the historical documents. Dr. Jenkins' testimony and written reports supported the general territorial claims of the Lagunas (Pet. Ex. 94, p. 530), (Tr. 402). She testified that no other Indians occupied the claimed area except a few Navajo who were there with Laguna permission. (Tr. 373, 403) Dr. Jenkins did indicate, however, that during certain periods the Laguna were restricted in their use of parts of the claimed area because of Navajo and Apache raids or the fear of them. (Tr. 376) Dr. Jenkins also testified that because of the inaction of the United States and its inconsistent policy toward the Lagunas, they lost the use of much of their land for considerable periods of time as a result of non-Indian trespass on these lands. Her written report, "History of Laguna Pueblo Land Claims" (Pet. Ex. 94), traces in considerable detail the struggle of the Lagunas in trying to protect their lands from encroachment. Concerning the American period she said:

* * * In Indian Affairs, however, the United States was much more concerned with military campaigns against the belligerent Navajos and Apaches than in protecting the rights of the peaceful pueblos * * *.

The failure of the United States from the beginning of the occupation to define the status of the pueblos and to adopt a consistent policy of administration led to increased trespass upon Indian lands and confusion and inconsistency in the treatment of the pueblos. * * * (Pet. Ex. 94, pp. 92, 93)

As early as November 20, 1849, Indian Agent James S. Calhoun is reported as writing:

Various representations have been made to me by Pueblo Indians of Mexican and Spanish encroachments upon their lands

* * * There is no doubt that villages are built upon ground rightfully belonging to the Indian Pueblos--These grounds were seized by those who now occupy them, at a moment when resistance by the legitimate owners was impracticable and justice to the Indian is too often withheld. (Pet. Ex. 94, p. 96)

On August 31, 1853, Superintendent E. A. Graves reported to Governor Meriwether:

These Indians however complain that Mexicans are continually making encroachments upon their grants. I would with deference suggest that some steps be taken at an early day, for the purpose of ascertaining and defining the actual boundaries of their grants or pueblos in order that punishment might be inflicted upon those who trespass upon their rights; and also to define the boundaries between different pueblos or villages. (Def. Ex. 94, p. 101)

Dr. Jenkins also was the co-author of a study entitled "Record of Navajo Activities Affecting the Acoma-Laguna Area, 1746-1910." (Jt. Acoma-Laguna Ex. 530) One of the basic conclusions of this study is that the few Navajo who lived within the claimed area during the early American period were there temporarily or with the permission of the Lagunas or United States authorities. There is also much detail concerning Navajos raiding in the claimed area. Some pertinent comments from this study are as follows:

Navajo presence in the Acoma-Laguna region dates from the middle of the 18th century when the Navajos, fleeing from the Utes, permitted themselves to be settled at Encinal, under Fray Juan Sanz de Lezaun, and at Cebolleta under Fray Manuel Vermejo * * *.

Most of the Navajo left the missions and moved westward, but a few families remained temporarily in the region and moved in and out for the next 125 years, raising crops at times in the Cubero, Cebolleta, Juan Tafoya and Canada de Pedro Padilla areas, sometimes on friendly terms with the Acomas and Lagunas, and often raiding them. Larger, roving bands of Navajos returned periodically during the same period to plague the pueblos. (Pet. Ex. 530, pp. 1, 2)

Throughout the Spanish period to 1821, however, small bands of Navajo continued to move in and out of the region, sometimes cultivating small plots in the Cebolleta, Cubero, Pedro, Padilla Canada, on the Rio Puerco and in the Canyon of Juan Tafoya on the Agua Salada, northeast from Cebolleta. There is no historical evidence that even small bands utilized any area south of the San Jose River. * * * (Pet. Ex. 530, p. 35)

* * *

Reports of military and exploring expeditions in Navajo country between 1846 and 1850 mention no peaceful or settled Navajos in the area from the Puerco River on the east to beyond the Ojo del Gallo on the west, and from the north of Mount Taylor to a region some thirty miles south of the pueblos of Acoma and Laguna. One 1846 account speaks of a small temporary settlement west of the village of Cubero which had apparently been recently abandoned by a few Navajos. These reports do, however, frequently mention Navajo raiders in the above delimited region. (Pet. Ex. 530, p. 104)

* * *

* * * However, neither the map prepared by Simpson (Lt. J. H. Simpson, with troops who signed a treaty with the Navajo in Canon de Chelly on Sept. 9, 1849) and Kern, nor a sketch of the country prepared by Calhoun, October 15, 1849, show any Navajos east of Mount Taylor area or near the Ojo del Gallo. In fact, Simpson recommended that a military post be established at Cebolletita just south of Cebolleta, to guard the pueblos and settlers from Navajo war parties who swept down from the northwest * * *.

While Simpson saw no evidence of Navajos on his return from Canon de Chelly, he saw ample evidence of Acoma and Laguna cultivation * * *. (Pet. Ex. 530, p. 117)

In the latter part of this study documents are quoted to show that "the lands the Navajos claimed lay far to the west and north of lands used and claimed by Acoma and Laguna." (Pet. Ex. 530, p. 161) This was in connection with a discussion of the Navajos with the United States officials just prior to their return to their own country from Bosque Redondo. Barboncito, the Navajo spokesman, is quoted as saying that there was only one family called "the Saviettats" who might not want to return to their own country and that if they "remain with the Mexicans I cannot be held responsible for their conduct." "He thus indicated," said Dr. Jenkins,

"that only one family was involved in the Cebolleta-Cubero-Laguna-Acoma area." (Pet. Ex. 530, p. 161)

Mr. Alfred E. Dittert, Jr., an anthropologist, and Mr. Warde Alan Minge, a historian and anthropologist, testified as expert witnesses on behalf of the Pueblo of Acoma. Mr. Dittert's testimony supported the Acoma claim as modified by the division line upon which counsel for both the Acoma and Laguna agreed to stipulate. His testimony had little to do with the Laguna claim one way or another. Mr. Dittert did not submit a written report. Mr. Minge's testimony, as might be expected, also relates almost entirely to the Acoma claim. Mr. Minge submitted a written report, "Historical Treatise in Defense of the Pueblo of Acoma Land Claim" (Pet. Ex. 104) and a joint report in cooperation with Dr. Myra Ellen Jenkins entitled, "Record of Navajo Activities Affecting the Laguna-Acoma Claim." (Pet. Ex. 530) This latter report, as has already been mentioned, concludes that the Navajo were not occupying any of the area claimed by the Laguna Pueblo during the early American period except for a few families who were permitted in the area by the Lagunas or American authorities. In this report Mr. Minge observes:

* * * As a result of raids and small-pox, the Lagunas and Acomas drew closer to their home pueblos. This was a familiar pattern for many years. As the Navajo menace lessened, the pueblos would return to their former planting and herding sites; in time of attack, they would withdraw for protection. (Pet. Ex. 530, p. 10)

* * *

* * * From 1800 to the incarceration of the Navajo by the United States government at the Bosque Redondo reservation in 1863-64, relations between the government of New Mexico and the Navajo tribe were characterized by intermittent Navajo raids on the Spanish settlements and Indian pueblos, followed by punitive expeditions and treaties of peace. Then, brief and uneasy periods of comparative calm would follow, and a few Navajos would attempt to return to some of their old temporary sites in the

Acoma-Laguna area, often on friendly terms with the pueblos, but contrary to the treaty terms or agreements which they had previously accepted. Other raids, other expeditions, and other periods of relative quiet would follow with regularity. (Acoma-Laguna Joint Ex. 530, pp. 15-16)

And in his testimony in Docket 229 Mr. Minge said:

I believe that there were Navajos who moved in and out of the area. I certainly was not able -- and I looked very thoroughly -- I was not able to pin down any one point that I felt would have been occupied steadily by the Navajos, used in any way over any length of time, say a year, during the period. (Tr. 6993)

Dr. Robert Rands, an anthropologist, testified as an expert witness on behalf of the defendant. He also submitted a written report entitled

"Laguna Land Utilization: An Ethnohistorical Report." (Def. Ex. 90)

As is evident from the title of this report and his testimony (Tr. 568-

569) his conclusions are based on historical documents and informants'

testimony rather than personal archaeological investigation in the claimed

area. Dr. Rands does not dispute the idea that at some time during the

American period the Laguna may have been using the entire claimed area.

(Tr. 599) But he believed that the largest expansion of Laguna land

use was some years later than the time when American sovereignty first

attached to the claimed area in 1848. However, Dr. Rands' conclusions

in this respect are qualified somewhat by his own statements. For

example, in the introduction to his study he said:

* * * Late American and Ethnological Period (ca. 1870's - present) i.e., from roughly the time of the first American surveys of the Laguna and Acoma grants to the present time. Inasmuch, however, as the ethnological data depend upon informant's memories, and since these may in some cases go back to times well prior to 1870, it is apparent that no precise dates can be given for the beginning of this period. (Def. Ex. 90, pp. 1-2) (Emphasis supplied)

And referring to this same period later on in the same study, he remarked:

The time of this period cannot be defined in years, as certain of the ethnological data may refer to reasonably remote times, while other information goes back only a few generations. Likewise, the reliability of the information probably varies. (Def. Ex. 90, pp. 101-102) (Emphasis supplied)

It is his opinion, though, that the fear of Navajo and Apache raiding restricted the use which the Laguna made of the claimed area, and that at a later time, after 1868 when such raiding ceased and the Laguna flocks became more numerous, the Lagunas spread out to use the area which they now claim. (Tr. 598, 606-607) Dr. Rands testified that the Navajo were at least on the very borders of the claimed area over a considerable period of time and thus affected the land use by the Lagunas. (Tr. 586-587) Although the Apache never lived in the claimed area or took it away from the Laguna "they prevented, and very effectively prevented, the utilization of the area outlined." (Tr. 598) In his study he makes the following remarks:

The Laguna ascribe their failure to expand out from Old Laguna until the early part of the Ethnological Period as being due to danger from Navajo and Apache raiders. Although Paguate was evidently established earlier as a summer village, the great period of Laguna expansion seemingly dates from approximately the 1870's, when the major Laguna settlements known today were founded * * *. (Def. Ex. 90, pp. 102-103) (Emphasis supplied)

The following comments in his study have the Lagunas ranging rather widely in their economic activities.

The Laguna gathered wild plant foods on a fairly extensive scale especially prior to the building of the railroad in 1880. Much of the gathering was done at nearby places, but special trips were made to gather pinion nuts and juniper berries south of McCartys--within the present Acoma Grant--and even to the Zuni Mountains. Additional gathering was done on the slopes of Mount Taylor.

The Laguna hunted mostly to the southwest, outside the area of their claim. The Mogollon Mountains and, to a lesser degree

the North Plains are mentioned in connection with the hunting of deer and antelope. Additional hunting was done in the Zuni and San Mateo Mountains. (Def. Ex. 90, pp. 104-105)

* * *

The Lagunas claimed to have grazed their sheep as far as the Rio Puerco on the east, the White Springs (west of Marquez) on the north, the Putney Mesa (and even into the Zuni Mountains) on the west, and to Cebolla and Cerro del Oro on the south. Independently of one another, two informants have given a similar picture of the southern extent of sheep herding; note that Cebolla and Cerro del Oro, each specified as the southern boundary for their grazing, lie at very close to the same degree of latitude, in a straight west-east line. A third informant states, however, that the Laguna were grazing still farther south, at Red Lake (Map 14), as early as the period of Apache raids. (Def. Ex. 90, pp. 103-104) (Emphasis supplied)

With respect to other Indians in the claimed area, Dr. Rands did not believe the Lagunas exclusively used and occupied all the territory they claim. He testified that there was a group of Navajos at Cebolleta and Encinal but conceded that there were never large numbers of them at any time. (Tr. 586-587) His report indicates that the Navajos first came into the Canoncito area after their return from Fort Sumner in 1868, agreeable to what the Lagunas claim rather than at an earlier time as claimed by the Navajos. (Def. Ex. 90, p. 100) He testified that Acoma informants told him that they grazed animals east of the stipulated dividing line (Tr. 622) and in his report he said:

The grazing area claimed by the Lagunas and Acomas overlaps widely. Members of both pueblos claim the Rio Puerco on the east, while the Marquez-White Springs region to the north is virtually identical.* * * To summarize, on the east and north the areas claimed as grazing lands are virtually identical for the Acoma and Laguna, but the Acoma claim to have grazed farther or more intensively on the northwest, west, and south * * *.

Whatever the truth of the conflicting claims, considerable agreement exists between the area over which the Laguna purports to have grazed and the combined farming and/or grazing area claimed by the Acomas. (Def. Ex. 90, pp. 106-107)

He testified that there was a co-utilization of pinyon sources by various Indians in the area (Tr. 618) and on the subject of shrines he observed:

Several of the sacred points visited by the Lagunas served likewise as shrines for other Indians. The Salt Lake was a sacred place of the Acoma, Zuni, Navaho and Hopi. It lies outside the area claimed by the Laguna but other shrines, located within the Laguna claim were also used by non-Laguna peoples. Thus, the Correo Snake Pit was used by the Acoma as well as the Laguna; the shrine on Mount Taylor was visited by Acoma, northern pueblos, Zuni and Navaho. The number of shrines used exclusively by the Laguna is unknown, but they cannot have been numerous. * * * (Def. Ex. 90, pp. 104-105)

Petitioner in Docket No. 229, the Navajo Tribe of Indians, had an expert archaeologist, Mr. David Brugge, testify concerning Navajo occupation of the claimed area. Said petitioner also submitted proposed findings of fact in which it was concluded:

At the time of the American occupation of this territory in 1846 and at the time of the treaty of Guadalupe Hidalgo with Mexico February 2, 1848 (9 Stat. 922), the Navajo Tribe exclusively used and occupied all of the area of the Laguna claim, as it is purportedly shown on Acoma-Laguna Joint Exhibit 528-A, Laguna Site Map, excepting only a smaller area bounded on the north by Old San Jose, Cubero, Encinal, Cebolleta, the Canada de Pedro Padilla, on the east by Mesa Gigante and Correo, on the south by the upper limits of the area drained by the Arroyo Colorado, and on the west by the lands of Acoma Pueblo. (pp. 51-52)

As a visual aid to the Commission, a map labeled "Appendix 'A'" was included with these proposed findings. This map delineated the excepted area and located a large number of alleged Navajo sites around the perimeter of this area. These sites were so located based on the evidence recorded in Navajo Exhibits 710, 520-I, 520-J, and 520-L. This excepted area is considerably smaller than that claimed by the Lagunas, especially on the north and east. During the period between the hearings in the instant case and those of Docket 229, Mr. Brugge visited a number of the

sites listed in Dr. Ellis' reports (Pat. Ex. 92, Joint Ex. 527). His observations are evidenced in Navajo Ex. 710 and in his testimony before the Commission. (Tr. 9465, 9488) Counsel for the Navajo Tribe, in disagreeing with some of Dr. Ellis' conclusions, states that she "*** did not follow standard archaeological procedures in the identification of the ethnic affinity of the sites which she recorded ***" (Navajo Brief, p. 115) During the course of the hearing in Docket 229, wherein Dr. Ellis appeared as an expert witness for the United States, she conceded that the Navajo were using the northern tip of the Canoncito area in 1848. (Tr. 9410-9413) As to the other locations in the claimed area, Dr. Ellis believes that they were either not Navajo sites or they were Navajos who were there temporarily, by permission, or ones who arrived sometime after American sovereignty attached to the claimed area. Dr. Ellis said she had considered all the archaeological material put in by the Navajo Tribe, i.e., Navajo Exhibits 520-A through 520-W, in arriving at her conclusions.

The main issue involved in this case is the determination of the territory exclusively used and occupied by the Pueblo of Laguna in 1848 when American sovereignty attached to the claimed area. As is apparent from the findings of fact herein and this opinion thus far, historical documents and archaeological and ethnological evidence have been presented to the Commission in addition to the oral testimony of several expert witnesses, bearing on this particular issue. The experts have disagreed on the significance of much of this evidence. However, we recognize that where several tribes of Indians are involved in one area in a case such

as this, it is very difficult even for experts to use the type of evidence we have in these cases and come to a complete agreement as to where particular Indians were at a particular time. The evidence we have is not the type that admits of real precision on the questions of identification and time. Pottery sherds are very useful for both dating and identification purposes but with certain limitations. Mr. Brugge testified that pottery could only be used to date a site within a fifty year span. (Tr. 9480-9481) And on their use for identification, even when the experts agree that certain potsherds belong to a particular Indian tribe, many times there is the question of whether or not it naturally belonged to the site or whether it was obtained from the particular tribe by trading. And, of course, as the evidence shows, the experts can not always agree as to whether a particular potsherd belongs to the Laguna, Acoma or Navajo. (Tr. 9190) Tree ring dating or dendrochronology also has its limitations, at least as far as this case is concerned. Dr. Ellis testified that "dating these Navajo hogans is the worst problem I have seen come up in dating this southwestern archeology *** (by worst problem she means) the most difficult to obtain any secure dates. By dates I mean fairly good-sized periods, not necessarily the exact year." (Tr. 9317) She went on to say that she thought a good deal of the evidence, presumably that pertaining to dating, was speculative under the circumstances. (Tr. 9318)

In Acoma-Laguna Joint Exhibit 527 Dr. Ellis has described a large number of sites in the Laguna claimed area which she has identified as being Laguna sites. This identification is based, for the most part,

on the pottery sherds found there, although the site complex as a whole was also considered. However, Dr. Ellis' conclusions regarding the use of much of this area are in direct conflict with those of the Navajo experts. The Navajo petitioner in Docket No. 229 is critical of the way in which Dr. Ellis has used these potsherds to identify the above sites as Laguna sites. To a certain extent this criticism is justified. In chapter III of Acoma-Laguna Joint Exhibit 527, Dr. Ellis reported the potsherds found on each site. She listed and identified Laguna sherds as having been found on the large majority of these sites. However, she also reported and listed many other sherds as having been found at these sites but did not explain the meaning of their presence in terms of the identification of the site or the time when it was occupied. Presumably she felt that the sherds other than those which she positively identified as Laguna were either trade items or their presence was otherwise not inconsistent with her conclusions that the sites had been occupied by Laguna Indians. However, this was not explicit and it would have been better if the relation of these unidentified sherds to her conclusions had been explained. On the other hand, petitioner in Docket No. 229 has not shown that an explanation of these sherds would identify the sites as being Navajo rather than Laguna. Neither do the references in the Navajo Brief on this point (pp. 110-116) prove that the sites wherein Navajo as well as Laguna sherds appear should be identified as Navajo rather than Laguna sites.

Mr. Brugge, expert archaeologist for the Navajo, personally examined seven of the sites reported by Dr. Ellis. (Navajo Exhibit 710; Tr. 9465-9509) He agreed with Dr. Ellis that three of the seven were Laguna sites.

Of the remaining four, Mr. Brugge identified two as Navajo, one as Navajo and Laguna, and the other as having been occupied by a number of different Indian tribes at different times. Of the two sites identified as Navajo by Mr. Brugge, Dr. Ellis said one was Navajo and Laguna and the other, although Navajo, was a post-Fort Sumner site. The Fort Sumner period was from 1864 to 1868, so any date after this period could represent a Navajo intrusion into the claimed area after the 1848 sovereignty date. Their disagreement on the dating of this site was based on a difference in interpretation of the structures found on the site. The one site identified as Navajo and Laguna by Mr. Brugge was labeled Laguna by Dr. Ellis and the site described as being inhabited by several tribes at different times by Mr. Brugge was identified as Laguna by Dr. Ellis. Here we are dealing with the type of evidence concerning which even the experts can legitimately differ as to its significance and meaning. There is no dispute as to whether the pottery was found at a particular site or whether the described structures exist. The differences are in relation to what these items mean in terms of identifying the Indian tribe that used a particular site and the period of time when it was used by such tribe.

Much of the evidence concerning the claimed area presented by the Navajo petitioner in Navajo Exhibits 520-I and 520-J is in this same category. We have made a broad summary of this evidence in Finding 7 herein. As brought out in these summaries, many times when the site is identified as Navajo the date of habitation is uncertain, and when the date is certain the identity of the tribe using the site is not. The

identification and dating of these sites were made for the most part, by interpreting the meaning of the structural features of the site, that is, by considering the significance of such features as the size of the hogan, the distance of the ash dump from the hogan, existence or non-existence of game corrals, the type of hogan and other features which may be considered by the expert to be typical of a Navajo site at a particular period of time. However, as we have said above, the meaning of these structures as well as the time when they were used is a subject of dispute even among the experts. (Tr. 9565-9509) By the very nature of this evidence, the dating of a particular site in the above exhibits cannot be very precise. Most of them are dated pre-Fort Sumner or post-Fort Sumner, that is, before or after the 1864 to 1868 period. A pre-Fort Sumner date does not mean that the Navajo were occupying a particular site in 1848 when sovereignty attached to the claimed area. This is especially true in view of the fact that the Navajos were raiding in the claimed area during this early American period and the Pueblos were restricted somewhat in their use of the territory because of these raids.

In finding that the Pueblo of Laguna exclusively used and occupied the area described in Finding 37 herein, much of which is also claimed by the Navajo petitioner in Docket 229, we have recognized that the significance of much of the evidence is in dispute. However, it seems clear to us from the many different kinds of evidence which has been presented in this case that the Laguna Indians were in the general location of the claimed area for some time prior to the arrival of the Navajo, that Laguna use of this area was widespread, and that they did

not voluntarily abandon lands which they had used from early times, but on the contrary, whenever they were forced to restrict their land usage because of drought, disease, raids by other Indian tribes or other outside factors, they re-asserted control of these areas as soon as they could.

Assuming that the Navajo did occupy some of the recovery area in 1848 or prior thereto, such use is not inconsistent with the exclusive use and occupancy of such area by the Pueblo of Laguna if the Lagunas were there first, did not intend to give it up, and the Navajos are considered as temporary inhabitants or invited guests. We have viewed the obvious Navajo occupancy in some of the recovery area in that manner.

Claims such as these are not easy to determine with exactness and we recognize the difficulties involved as did the Court of Claims years ago when it said:

*** The problem of establishing such exclusive use and occupancy title by immemorial possession as of a date too remote to admit of testimony of living witnesses, and where no deeds or patents exist, is not a simple one. At best, the ultimate fact of beneficial ownership by exclusive possession and occupancy can only be inferred and found from many separate events and a variety of documentary material ***.
(Snake or Paiute Indians v. United States, 125 C. Cls. 241, 254.)

However, we also feel as the Court of Claims reasoned in Upper Chehalis Tribe, et al., v. United States, 140 C. Cls. 192, 195, that

***Absolute accuracy of location and extent of occupancy is not essential, and the record in this case is sufficient for the Commission to determine with reasonable accuracy the location and extent of the areas actually occupied by the tribes involved herein.

Undoubtedly there was some overlapping between the Acomas and Lagunas as to their use of certain areas east and west of the stipulated

dividing line. However, we believe that since they were both in the area very early and had litigated this point in 1857 when it was comparatively easy to determine the facts, the use area of each pueblo is fairly represented as being to the east and west of this dividing line. Any herding or farming over this dividing line by either party was considered permissive or temporary action and did not reflect a feeling of, or any attempt at ownership.

With this background in mind, we believe that the territory we have described in Finding 37 as having been exclusively used and occupied by the Pueblo of Laguna as of February 2, 1848, is reasonably accurate and reflects the correct interpretation of the evidence in this case.

In line with the previous decisions of this Commission, we have concluded that all valid Spanish and Mexican land grants located within the boundaries of the territory exclusively used and occupied by the Pueblo of Laguna were private property at the time American sovereignty attached to the area in 1848. Therefore, these grants are not compensable under the Indian Claims Commission Act and must be excluded from the territory described in Finding 37 herein to which the petitioner held Indian title in 1848. It is clear that the petitioner did not voluntarily abandon any of these lands but was effectively deprived of the use of them because of the inaction of the United States whereby they failed to prevent encroachments on these lands. The United States failed to protect these rights of petitioner even though requested to do so many times.

Petitioner has claimed that the Pueblo of Laguna was damaged by the loss of irrigation waters as a result of the enlargement by the defendant of the dam at Bluewater on the upper San Jose River in 1923. Assuming that there has been a loss of irrigation waters, it is not clear whether this was because of the enlargement of the dam, the same amount of water divided up between more people and thus making it seem like less, or merely less water for other reasons. At the time of the hearing Commissioner O'Marr commented:

I am only speaking for myself here, but I question very much whether you have shown any reduction in the water supply except this man's unsupported statements and a guess of one-fourth of that. That is not very reliable as far as I am concerned. (Tr. 533)

We have, therefore, denied recovery on this part of the claim.

Therefore, based on the findings of fact and legal conclusions heretofore set forth in this case, as well as the record as a whole, we conclude that as of February 2, 1848, the Pueblo of Laguna held Indian title to the lands described in Finding of Fact No. 37 herein, excluding those valid Spanish or Mexican land grants or parts thereof lying within said boundaries; that said petitioner did not voluntarily abandon any of the lands so held; that said petitioner lost the use of said lands because of the failure of defendant to protect said petitioner's rights therein and, therefore, that defendant is liable to said petitioner for the loss of said lands; and that under clause 4 of section 2 of the Indian Claims Commission Act said petitioner is entitled to recover from defendant the fair market value of these lands, the date or dates of these losses and the value thereof to be determined at a future hearing before this Commission. An order will be entered accordingly.

As this opinion, and the findings of fact upon which it is based, involve the three dockets discussed, they are applicable to all said dockets insofar as the respective claims of the Pueblo de Acoma, petitioner in Docket No. 266, and The Navajo Tribe of Indians, petitioner in Docket No. 229, overlap the area to which the Pueblo of Laguna, petitioner in Docket No. 227, held Indian title as determined by the Commission in Finding of Fact No. 37.

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner