

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: March 31, 1967

Appearances:

Nicholas C. Dazzo, and Samuel L. Dazzo,
 Attorneys for Petitioners in Dkt. 266
 Jay H. Hoga, Attorney for Petitioners
 in Dkt. 227
 Norman M. Littell, and Marvin J. Sonosky,
 Attorneys for Petitioners in Dkt. 229

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 de Acoma, petitioner in Docket No. 266, 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. 227, the Pueblo of Laguna, 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 de Acoma, 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. Temporary visiting 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 visiting 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, 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:

The present day Acomas are descended from two groups of people. One group was located in the claimed area from early prehistoric times. The other group migrated from the Mesa Verde area about 1300 A.D. and merged with the aboriginal inhabitants. In early times the Acoma peoples occupied a broad area from the Rio Grande west to El Morro, north to Mt. Taylor and an unidentified distance south of the main Acoma Pueblo. This area has been referred to as the Acoma Province. Some time between 1200 and 1300 A.D. the nucleus of Acoma culture was established at the Penol or rock, and is now commonly referred to as Acoma Pueblo or Old Acoma. This pueblo has dominated the region culturally and politically from prehistoric times. During the 13th century the Province received an untold number of migrants and during the pueblo revolt and reconquest of 1680-1699, the Acoma Pueblo at the Penol received rebellious Indians as refugees. However, these Indians did not remain after the reconquest.

Prior to the arrival of Spanish explorers in 1540 A. D. a large number of Acoma villages existed in the Acoma Province. The western half of the Acoma Province contains a large number of ruins indicating the widespread use of the area by the Acoma peoples in early times.

The land around the Mesa del Oro in the south and the San Mateo in the north contain evidence of use by the Acomas prior to 1300 A. D. Pottery found in the eastern part of the Acoma Province shows early Acoma occupation in territory which later came to belong to other pueblo Indians. Archaeological finds indicate that no outside groups occupied the claimed area before the arrival of the Spanish.

At the time of the first Spanish Exploration in 1540, the Acoma peoples were occupying the valley along the San Jose River and carried on extensive irrigation along this river up through the 17th and 18th centuries. The main villages occupied at this time by the Acomas were the Pueblo of Acoma on the Penol, Kowina and Seama. During the 19th century they occupied the main villages of Kowina, McCartys, Acomita, Seama, Locomotive Rock, Spider Spring, Cebolla, Acoma and Questa. These villages did not include the subsidiary villages or rancherias occupied during the same respective periods. The Acomas lived part of the time in small farm villages, herding camps and rancherias but used the larger pueblos as their home area. These farming and herding sites are found throughout the area in suit.

They farmed a large area north of Grants and along the San Jose River, south of Grants around Ojo del Gallo and San Rafael, south somewhat further at Cerro Carnero, just west of the lava flow, and along the northern boundary line of the Acoma Grant following both sides of the San Jose River. They also farmed the Cebolleta Spring and Pilares areas starting just beyond the southwest corner of the Acoma Grant line, the Cebolleta

Mesa and Blue Meadow areas, and the Petoche region south between Acoma Pueblo and Broom Mountain.

Sheep herding appeared among the Acomas in the 17th century but was only nominal until a century later. Sheep camps, identified principally from small collections of potsherds at various sites, are found scattered throughout the claimed area and date back to the Spanish period of the 18th century. The extended raids of the Navajo and Apache restricted Acoma herding during the 18th century but beginning with the 19th century there was a marked increase in herding. The Acomas herded along the southern slopes of Mt. Taylor, around Laguna Monte and Laguna Ambrosio. This range extended from Cerro Azavache, Mesa Cuchillo and Laguna San Jose north to beyond the Acoma claim. The Acoma also herded north of the San Jose River and north and west of Bluewater. Their western herding area extended southward from the San Jose River along the Zuni Range following the eastern slopes of the continental divide. Summer grazing was south of the Acoma Pueblo Grant in such areas as Cebolleta, Cerro Veteado, Cerro Techado, Tres Lagunas and along Alamocito Creek to Cerro Mohino. They also herded from Seven Cedars to Red Lakes and on the slopes of the Sawtooth Mountains. They wintered their herds at Encierro in the lava beds, in the Petoche area, and near the Brush Mountains southeast of the lava beds.

The Acoma economy also included the gathering of wild plants such as juniper berries, acorns, wild cherries, pinyon nuts, yucca and Rocky Mountain bee weed. These wild plants and their products were gathered

in such places as the Sawtooth and Zuni Mountains, Mt. Taylor, Pie Town, north of Laguna Ambrosio and west of Tinaja.

Hunting areas that have been used by the Acomas in the late 1800's to modern times are located both within and without the claimed area. They hunted deer, antelope and wild goats from time to time at Mt. Taylor, Cebolleta Plateau, Putney Mesa, the Sawtooth, Datil, Tularosa and Mogollon Mountains, Zuni Salt Lake, the North Plains and the lava beds.

Conditions of unrest during early Spanish Colonial rule brought about the mingling of various Pueblo peoples, many of whom took refuge on the Penol of Acoma. This long established pattern of taking asylum at Acoma was intensified during the Second Pueblo Revolt. During the Pueblo Revolt 1680-1699, Acoma joined the rebellious Indians of New Mexico by allowing them to use the Penol as a refuge. The Acomas did not play a major role in the pueblo uprising that broke out in 1680 but in the subsequent revolt of June 1696, the Acomas were quite active and encouraged and incited other pueblos to insurrection. However, they submitted to the Spanish Crown on July 6, 1699 and continued to be vassals of Spain until the Independence of Mexico from Spain in 1821. During the Mexican period of 1821-1848 they lived under the sovereignty of Mexico but no material change was made respecting the rights which the Indians possessed under the Spanish Government.

During the Spanish and Mexican periods some of the claimed area was granted to both the Acomas and non-Indians by the respective sovereigns.

Numerous injustices were suffered by the Acomas under these governments, particularly from the 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 Acomas 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 Acomas 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 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 Act 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 Acoma lands.

For example, Congress confirmed the Acoma Pueblo Grant December 22, 1858, but it was November 19, 1877, before the patent was issued. Without the physical evidence of ownership it was impossible for the Acoma to prevent encroachments on their Pueblo Grant, let alone other lands which they had used from aboriginal times.

In this connection, although the United States finally issued a patent for the Pueblo of Acoma Grant, the Acomas disputed the correctness of the survey of these lands and claimed that they should have received a much larger area, claiming errors in the northern and western boundaries. Accordingly, the Secretary of the Interior directed the Surveyor General on April 1, 1884, to make another examination of these boundaries and to hear testimony respecting the boundaries claimed by the Acomas. Hearings were held in October 1884 and a decision rendered by the Surveyor General January 26, 1885, in which it was determined that there was no justification

for a new survey. An appeal was filed by the Pueblo with the Commissioner of the General Land Office on January 5, 1886. The Commissioner reviewed the evidence and affirmed the decision of the Surveyor General June 19, 1886.

In the present case before the Commission the Pueblo de Acoma renews its claim that the 1877 survey of the Pueblo of Acoma Grant was erroneous and should have included a much larger area. There is evidence before the Commission at this time to support petitioner's claim in this regard. (See Pet. Ex. MM-3) However, we have concluded in Finding of Fact 33 that a determination of this question is not necessary at this time. The reason for this conclusion is that since the Pueblo de Acoma held Indian title to the same lands that would have been included in the Pueblo of Acoma Grant in the event that the 1877 survey should be found to be erroneous, its recoverable compensation would be the same. There would be no difference between the fair market value of land held by virtue of Spanish Grant or Indian title.

During the Spanish, Mexican and American periods, the Acomas had other Indian groups on every side. The Zunis on the west, the Navajo on the north, the Laguna 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 Acomas was used by the Lagunas for farming and herding, although there were no Laguna 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 Acomas. 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 Acoma or the United States authorities. 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) Insofar as the Acoma claim is concerned, Dr. Ellis testified that the western and southern boundaries were about the same as those described in

the petition (Tr. 206-216). She conceded that the Navajo had settled to some extent in the northern part of the claimed area (Tr. 201), and that the Acomas permitted temporary use of their territory from time to time by the Lagunas and Navajos.

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 Acoma claim were based on archaeological, historical and ethnological materials. Respecting the Navajo use of the claimed area, Dr. Ellis said:

"...we have no historical reference of this thing happening, of large Navajo groups depopulating an area, converging on an area and holding it. Archaeological evidence of such a situation would have been settlements showing an old type of Navajo culture, and it does not exist. There are plenty of hogans known to be old Navajos elsewhere, but in Acoma area it is not that type of situation." (Tr. 188)

"In some of these northern sections the Navajos did some hunting and occasionally they came down on the raids to Acoma or the various Acoma villages and got off again, and they did some gathering of pinons on occasion, as they still do, at some of the foot hills which is the area around here, and I suspect probably more up in here, although I do not have evidence, but they were not a settled people; this was just on occasions, as we go off on hunting trips and fishing trips, and go back to where our homes are." (Tr. 213)

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:

"This survey indicates that the Acoma herding and hunting groups were well extended throughout the Acoma land claim periphery. In a site by site comparison to the Laguna area, the number of sites are about equal, but the number of Acoma sherds per site is smaller than that from comparable Laguna sites. Part of the difference in sherd count is a result of much less erosion within the Acoma area to uncover sherds. It is believed, also, that Acoma land usage was well extended but somewhat less heavy than Laguna, for Acoma ash dumps usually are much thinner." (p. 74)

"*** There seem to have been more raids on Laguna than on Acoma, probably because the Lagunas had more sheep. Moreover, it was easier for the Navajos to reach the Laguna herding areas, many of which were to the north and in terrain where broken mesas permitted the raiders to slip up unseen." (p. 90)

"It is possible that Navajos on occasion came from Chacra Mesa and Ambrosio Lake to raid around Gigante, as they did in the Zia and Jemez areas." (p. 91)

"These (Navajos) lived in the Chacra Mesa-Crown Point-San Mateo area; they also came to raid Acoma, often attacking from the north and then making a loop southward and back northward by way of El Morro Spring, the best watering place in the area." (pp. 280-281)

"Herding was carried on by Acomas at a distance from the Mesa before the mid-1800's. From then until the Bosque Redondo incarceration, the raids were so troublesome that the Acomas usually drove their flocks to the corrals at the base of the mesa every night ***." (p. 207)

"As indicated in accounts of raids remembered by Laguna and Acoma informants, the herders of these pueblos suffered such loss of herders as well as of sheep that the owners had to temporarily give up their earlier wide-spread herding areas and keep the flocks close to the pueblos. ***" (p. 183)

"*** To the south the herding area was said to extend 'as far as the eye could reach', the Alamacito Creek. ***" (p. 130)

"*** But, as in Laguna, pinyons were a major item of trade and source of income. The Acomas went to camp for a

week or several weeks on Black Mesa, the Brushey Mountains, Mt. Taylor, Bluewater area, or Cebolleta Mesa. *** (p. 158)

"Some Navajos are known by Acomas to have hidden out on their land, at a long distance from the pueblo, during the period when most of their people were at Bosque Redondo. *** (p. 154)

"The period when 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 poor and hung around the pueblo villages for what food they might be given in recompense for aiding with various labors. *** (p. 144)

"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. *** (p. 205)

*** 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. 220)

*** Acoma and Laguna both outlined their areas by a series of shrines periodically visited by their officers in the past. Those for Acoma extended from the north side of Mt. Taylor south to Alamocito Creek and west to El Morro, *** (p. 275)

" *** 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 Acomas. They are Acoma Exhibits 1 and 1-A, and Joint Acoma-Laguna Exhibit 528(b).

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 the claims under Spanish, Mexican and American sovereignty. However, in her written report, "History of Laguna Pueblo Land Claims" (Pet. Ex. 94) she makes the following comments that are pertinent to the Acoma claim.

*** 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 by Dr. Jenkins 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." (Joint Acoma-Laguna Ex. 530) One of the basic conclusions of this study is that the few Navajo who lived within the Acoma-Laguna claimed areas during the early American period were there temporarily or with the permission of the Acoma, Lagunas or United States authorities. There is also much detail concerning Navajo 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 Saviettas" 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 Gebolleta-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. Mr. Dittert did not submit a written report. 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 Acoma Pueblo during the early American period except for a few families who were permitted in the area by the Acomas 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)

* * * * *

*** During periods of raids, both on the pueblos and on the Spanish settlements along the Rio Grande, the pueblos would move their herds nearer the home villages; in times of peace they would again return to former herding and farming sites. *** (p. 36)

* * * * *

*** 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 "Acoma Land Utilization: An Ethnohistorical Report." (Def. Ex. 89) As is evident from the title of this report and his testimony (Tr. 568-569) his conclusions are based on historical documents and informant 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 Acoma may have been using the entire claimed area. But he believed that the largest expansion of Acoma land use was some years later than the time when American sovereignty first attached to the claimed area in 1848. (Tr. 598-599)

It is his opinion that the fear of Navajo and Apache raiding restricted the use which the Acoma made of the claimed area, and that at a later time, after 1868 when such raiding ceased and the Acoma flocks became more numerous, they 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 Acomas. (Tr. 586-587) Dr. Rands also testified that the Apache never lived in the claimed area or took it away from the Acoma but that "they prevented, and very effectively prevented, the utilization of the area outlined." (Tr. 598) In his study, Def. Ex. 89, Dr. Rands makes the following conclusions regarding the use of the claimed area during the early American period (1846-1860's):

"Data which specifically relate to Acoma itself are very limited during this period. The Penol and even the upper portions of the San Jose were rarely visited, and when they were the record is sometimes unclear whether Acomas or Lagunas were involved. Nevertheless, certain inferences of a highly probable nature can be drawn.

1. The Acoma raised great quantities of peaches, presumably in the valleys close to the Penol.

2. Acoma sheep, cattle and horses were numerous. How widely the sheep were herded is not known, but many flocks were encountered some distance from the Penol, along what seems to have been the Acoma Valley in the direction of Laguna.

3. The Acomas irrigated in the San Jose Valley, west of Laguna. How close their farms extended toward Old Laguna is not clear, but farming through this area seems to have been relatively uninterrupted, with no sizable block of land separating the Acomas and Lagunas. To the west, the Acoma farm-lands seem to have extended at least as far as Acomita and quite possibly McCartys.

4. Numerous cattle and sheep were herded in the San Jose Valley. Whether they belonged to the Acoma as well as Laguna is not specified. Sheep and goat corrals existed at Old Laguna and apparently at other settlements.

* * * * *

8. *** No other Acoma town than that on the Penol is mentioned. Nevertheless, the Acoma, and perhaps the Laguna as well, must have had additional farming settlements of some sort, along the San Jose, perhaps on a seasonal basis.

9. Economy emphasized the gathering of pinion and perhaps other wild plant products, to the extent that "a larger portion of the inhabitants" was said to be gone at one time from Old Laguna. Gathering may well have been equally important among the Acoma, but data are lacking.

10. Friendly Navaho (Sandoval's band) were living in the region about Cebolleta (presumably on the Chupadero Mesa). Other Navahos lived back of Cebolleta, either in the northern part of the San Mateo Mountains or still farther north, outside the area of the Acoma claim. *** (Def. Ex. 89, pp. 74-75)

In this same study Dr. Rands has made some principal conclusions regarding the Acoma use of the claimed area, during the late American and ethnological period. However, the period covered by these conclusions is qualified somewhat by his own statements. For example, in the introduction to this 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 Acoma and Laguna grants to the present time. Inasmuch, however, as the ethnological data depend upon informants' 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. (Emphasis supplied.)
(Def. Ex. 89, pp. 1-2)

And as a preface to the principal conclusions covering this same period 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. 89, p. 130) (Emphasis supplied.)

With the above noted qualifications, the principal conclusions of Dr. Rands regarding use of the claimed area during the late American and ethnological period are as follows:

1. For practical purposes, the pueblos of Isleta and Zuni may be ignored in connection with the Acoma and Laguna land claims. Information from Isleta and Laguna Indians makes it quite clear that the lands which their people utilized extensively did not overlap with the Acoma and Laguna claims. The exception to this statement deals with an apparent Isleta practice of obtaining selenite for windows from the identical source used by the Acoma and Laguna.

2. The farming, herding and gathering practices of the Zuni do, however, have a possible bearing on the Acoma claim. Of importance in this connection is information from Mr. Marion Lambson, a rancher and Forest Service employee, at the El Morro lookout--a man who has observed the region for many years from his tower and from riding over it. This information indicates that the Acoma and Zuni gathered wild plants to within approximately ten miles of one another, but no farther. The most westerly extent of Acoma gathering observed by Lambson, just beyond the present settlement of Tinaja, corresponds to within two or three miles of the outer boundary claimed by the Acoma.

3. At the beginning of the period the Acoma were largely living at Old Acoma. Only a few sheep herders seem to have been living at Acomita, which according to Gunn was "built" in 1870. By at least 1881, however, a dispersed settlement pattern was in existence along the San Jose in the region of Acomita (Bourke).

4. Sometime prior to the hearings in 1884--30 years before, according to an Acoma witness-Acomas were living in the San Jose Valley at the most westerly extent of the present Acoma grant. Acomas also lived a few miles downstream at McCartys. Apparently, however, they were not living as far west as the Ojo del Gallo.

5. Along the San Jose Valley to the east, Acomas had been living at Pueblito (Seama) sometime prior to the government surveys in 1877. According to a Laguna informant, the Acomas lived at Seama earlier than the Lagunas. But the Acoma "were on property that wasn't theirs." The Lagunas apparently forced the Acomas from Seama, which is now a Laguna village.

6. Early in the period, these settlements seem to have been farming villages only, uninhabited during the winter, when the people returned to Old Acoma. The bulk of the data indicates that this condition lasted until fairly recent times--as late, perhaps, as World War I (Parsons). The Acoma insist, however, that in past times Acomita served, along with Old Acoma, as a winter village. In the summer, people dispersed from both Acomita and Old Acoma to widely spread farming and herding locations.

7. According to the Acoma, during the summer the entire family would usually move out from Acomita or Old Acoma to some outlying area. (The distance might be short--sometimes, in the case of people from Acomita, to some other place within the San Jose Valley.) Farming, usually without irrigation, would be done in the summer location. Sheep would be herded in that general region by two of the men. In winter, the family would return to Acomita or Old Acoma. The sheep would be moved to winter pasture, a couple of the men staying with the sheep.

8. The area over which the Acoma claim to have farmed extended from the northeastern to almost the northwestern limits of their alleged "outer" or "grazing" area. On the west it extended to the lava flow (and across it at the Ojo del Gallo); on the southwest and southeast to the corners of the so-called "farming" area; and on the east to approximately the limits of this area. This was not an intensively farmed block of territory. Rather, dry farming was done by the sheep-herding families in scattered canon bottoms. Two areas of more intensive cultivation are claimed: (1) the valley and canons around Old Acoma, particularly Paradise Canon to the south. Many peaches were grown here (cf. corresponding data for the Early American period). (2) The San Jose Valley, from the Canada de la Cruz on the east upstream to above McCartys. Irrigation was practiced along the San Jose.

9. Growing crops and peach trees--bearing and dead--were noted for five or six miles south of the Acoma grant in 1884 (U.S. Deputy Surveyor White and Special Agent Patterson). The cultivated lands were apparently in the Paradise or Acoma Canons. Perhaps some farming extended almost as far as the "fifteen miles" travelled to the south by Solomon Bibo.

10. The Acoma say that they have herded throughout the area which they claim. The differing requirements imposed by summer and winter pasturage necessitated passing over sizeable stretches which were not grazed intensively as the herds moved from their summer to winter ranges.

11. According to Acoma claims, their former ranges for herding sheep have been successively taken over by outside groups, particularly the Laguna. First they lost their eastern pastures (the area of the various Laguna purchases), then those to the northeast (Mount Taylor to Sabinal). Because of the Laguna expansion the area northwest of Mount Taylor assumed increasing importance and, finally, the far west (the Zuni Mountains).

12. The Laguna insist, however, that the Acomas did not herd widely until very recent times. The Acomas' herds were small and their grazing lands confined to the environs of Old Acoma, according to Laguna informants. /Pullen in 1890 refers to the Acoma Valley, near Old Acoma, as the Acomas' stock range. Some years ago an Acoma Indian indicated that the Acoma were herding in the San Jose Valley ca. 1880 (?)./

13. Food gathering is claimed to have taken the Acoma outside the limits of their claim on the south (the Sawtooth Mountains and beyond Pie Town) and the north (beyond Laguna Ambrosio). The Acoma state that they gathered from the Zuni Mountains on the west to the flats along the Rio Puerco on the east. Lambson's observations show that the Acoma were gathering as far west as Tinaja, on their alleged outer boundary. Data are unsatisfactory as to what extent gathering was an accompaniment of their grazing and to what extent special expeditions were made for wild plant products. The economic significance of food gathering undoubtedly varied from year to year, according to the success of their cultivated crops.

14. Deer hunting was done far beyond the area claimed by the Acoma, in the Sawtooth, Datil, Tularosa and Mogollon Mountains, as well as toward the Zuni Salt Lake. Within the Acoma claim it was done on the Acoma Plateau and in the Zuni and San Mateo Mountains. Antelope were hunted on the

North Plains, wild goats in the lava beds. Hunting expeditions of two or three weeks duration used to be made, the meat being dried at camp and then transported home on burros.

15. Sacred points claimed by the Acoma tend to be clustered in the following fashion: (1) Shrines near Old Acoma. (2) Shrines along or close to the border of the "inner" or "farming" area. Except on the north, these consist mostly of springs. (3) Shrines scattered along or close to the outer boundary of the "grazing" area. These tend to be topographical features such as hills. A scattering of other shrines occurs, including sacred places that lie far outside the area of the Acoma claim (Eagle Peak, Zuni Salt Lake, Concha). It was the duty of the war captains to visit each of these shrines at least once a year, depositing prayer sticks. In addition, previous war captains or other religious leaders might visit them. Certain shrines would also be visited by hunters or salt gatherers. The Acoma claim approximately 50 shrines. It is impossible to substantiate most of these claims on the basis of previous ethnological investigations, although the reason for this may lie in the Acomas' traditional reluctance to divulge such information.

16. The Acoma obtained selenite (crystalline gypsum) for windows from Yeso, in the eastern portion of their claim.

17. However the Lagunas, Isletas, and Mexicans also obtained selenite from Yeso or an immediately adjacent location.

18. Several of the sacred points claimed by the Acoma served likewise as shrines for other Indians. The Salt Lake was a sacred place of the Laguna, Zuni, Navaho and Hopi. It lies outside the area claimed by the Acoma, but other shrines, located within their claim, were also used by non-Acoma peoples. Thus, the Correo Snake Pit was used by the Laguna as well as the Acoma; the shrine on Mount Taylor was visited by Laguna, northern Pueblos, Zuni and Navaho. The number of shrines used exclusively by the Acoma is unknown. There are, however, a number of locations, along the eastern boundary of the Acoma "farming area" and therefore close geographically to the Laguna, which appear to have been used as shrines exclusively the Acoma.

19. The pattern of hunting by the Laguna approximated that of the Acoma. Among both groups, the most important hunting grounds lay to the south, well outside the areas claimed by these pueblos. Among both, hunting of less importance was carried on in the Zuni and San Mateo Mountains. The Laguna and Navaho, like the Acoma, hunted antelope on the North Plains.

20. The gathering of wild plants seems not to have formed as important a part of the Laguna economy as it did of the Acoma. Even so, the Laguna may have gathered from certain areas which were utilized by the Acomas (south of McCartys and perhaps some of the same regions in the Zuni Mountains and Mount Taylor). The Navahos collected herbs along Oso Ridge, in the vicinity of Acoma plant-gatherers.

21. The grazing area claimed by the Acomas and Lagunas 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. However, the Acoma claim to have herded considerably farther to the northwest (Ceja Colorado) than do the Laguna, who appear to look upon the lava beds in the region of Ojo del Gallo, or Putney Mesa, as the effective termination of their herding activities in this direction. To the west the Laguna, like the Acoma, claim to have herded in the Zuni Mountains, although it appears that their utilization of this area was less extensive than that by the Acoma. On the south the Laguna claim to have herded as far as the Cebolla-Cerro del Oro region. This falls considerably short of the Acoma's alleged "grazing" boundary along the Alamocita Creek, but it is virtually identical to the latter's "inner" or "farming" boundary. To summarize, on the east and north the areas claimed as grazing land are virtually identical for the Acoma and Laguna, but the Acoma claim to have grazed farther on more intensively on the northwest, west, and south.

22. The area of the Lagunas' claim, then, corresponds on the east and north to the Acomas' "grazing" area but on the west and south is equivalent to the latter's "farming" area. Moreover, the Laguna claim closely corresponds to the boundaries of the Alcaaldia de la Laguna as set forth in the Miera y Pacheco map of 1779 (Map 1). The agreement in these cases is too close to be attributable to coincidence. Except for the regions to the north and east, the so-called "farming" area of the Acoma corresponds equally to the Miera y Pacheco boundaries. To the northeast the Acomas' alleged "farming" area abuts on the Laguna and Baltazar Baca grants. One might speculate, therefore, that the departure of the Acomas' "farming area" from the boundaries shown for the Alcaaldia de la Laguna is an implicit recognition of the fact that non-Acoma peoples were occupants or co-holders of the eastern and northern portions of the Alcaaldia.

23. Until the expansion of Laguna homesteaders shortly before World War I, the Acoma and Laguna apparently do not claim to have practiced dry farming on the same or closely adjacent sites. An exception to this statement may be the Acoma claim that they farmed "east of Pagate." (Def. Ex. 89, pp. 130-138-A)

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 Acoma claim, as it is purportedly shown on Acoma-Laguna Joint Exhibit 528-B, Acoma Site Map, excepting only a smaller area bounded on the north by Cubero and San Jose, on the northwest by the south side of Lobo Canyon, Grants, and Ojo del Gallo, on the west and south by the upper limits of the area drained by Acoma Creek, Arroyo Colorado, and minor drainages entering the San Jose River from the south between the northeast tip of the lava flow and Acoma Creek, and on the east by the lands of Laguna Pueblo. (Navajo Findings of Fact, p. 15)

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 many 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 Acomas, especially on the north and west. 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 (Pet. 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 in 1848 the Navajo and Laguna were using that Mt. Taylor area and the Navajos were in the San Mateo and Cebolleta mountain areas. (Tr. 9407-9411) As to the other locations in the claimed area, Dr. Ellis believes that they were either not Navajos' 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.

As is apparent from the findings of fact herein and this opinion thus far, a host of historical documents and much archaeological and ethnological evidence has been presented to the Commission in addition to the oral testimony of several expert witnesses, bearing on the issues of this case. 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 many 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 Acoma claimed area which she has identified as being Acoma 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 Acoma sites. To a certain extent this criticism is justified. In chapter VI of Acoma-Laguna Joint Exhibit 527, Dr. Ellis reported the potsherds found on each site. She listed and identified Acoma sherds as having been found on these sites. However, she also reported and listed some 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 Acoma were either trade items or their presence was otherwise not inconsistent with her conclusions that the sites had been occupied by Acoma 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 Acoma. Neither do the references in the Navajo Brief on this point (pp. 110-116) prove that the sites wherein Navajo as well as Acoma sherds appear should be identified as Navajo rather than Acoma sites.

Mr. Brugge, expert archaeologist for the Navajo, personally examined two sites in the Acoma claimed area reported by Dr. Ellis in Acoma-Laguna Joint Exhibit 527, sites A-23 and A-28 visually located on Acoma-Laguna Joint Exhibit 528(b). Site A-23 is located on the northern edge of the

Acoma claimed area and was not included in the area found to have been exclusively used and occupied by the Acomas. Dr. Ellis said the site was Acoma and Mr. Brugge found it to be Navajo. They disagreed on the identification of the utility ware found on the site. Site A-28 is located near the western edge of the claimed area near Tinaja and was included in the Acoma recovery area. Dr. Ellis identified the site as Acoma and Mr. Brugge said it showed occupation by several Indian tribes over a period of time. They disagreed on the significance of the archaeological remains found on the site. (Tr. 9468-9473) 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 6 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 reasonably certain the identity of the tribe using the site is not. The identification and dating of these sites was 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 nonexistence 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. 9465-9509) 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 necessarily mean that the Navajos had really established themselves at the particular site long enough to be considered more than visitors or temporary inhabitants. 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 Acoma exclusively used and occupied the area described in Finding 32 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 Acoma Indians were in the general location of the claimed area for centuries prior to the arrival of the Navajo, that Acoma 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 were present at times in some of the recovery area, such presence therein is not inconsistent with the exclusive use and occupancy of such area by the Pueblo de Acoma. The recovery area was the ancestral home of the Pueblo de Acoma.

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 at a time when it was comparatively easy to determine the facts, July 8, 1857, 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 32 as having been exclusively used and occupied by the Pueblo of Acoma and to which they held Indian title, 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 de Acoma 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 32 to which the petitioner held Indian title. 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 de Acoma 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 1927. 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. 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 the Pueblo de Acoma held Indian title to the lands described in Finding of Fact No. 32 excluding those valid Spanish or Mexican land grants or parts thereof lying within said boundaries; that petitioner did not voluntarily abandon any of the lands so held; that petitioner lost the use of said lands because of the failure of defendant to protect petitioner's rights therein and, therefore, that defendant is liable to petitioner for the loss of said lands; and that under clause 4 of section 2 of the Indian Claims Commission Act 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 of Laguna, petitioner in Docket No. 227, and The Navajo Tribe of Indians, petitioner in Docket No. 229, overlap the area to which the Pueblo de Acoma, petitioner in Docket

No. 266, held Indian title as determined by the Commission in Finding of Fact No. 32.

(Signed) Arthur V. Watkins
Arthur V. Watkins
Chief Commissioner

We concur:

(Signed) Wm. M. Holt
Wm. M. Holt
Associate Commissioner

(Signed) Harold Scott
T. Harold Scott
Associate Commissioner