

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 29, 1970

Appearances:

John S. Boyden, Attorney for Plaintiff in Docket No. 196; Wilkinson, Cragun & Barker, of Counsel; Don A. Stringham on the Brief.

Norman M. Littell, Attorney for Plaintiff in Docket No. 229; Joseph F. McPherson and Charles J. Alexander, of Counsel; Leland O. Graham, on Briefs; Harold E. Mott entered Appearance.

Walter A. Rochow and William H. Lundin, with whom were Assistant Attorneys General Edwin L. Weisl, Jr., and Ramsey Clark, Attorneys for Defendant.

OPINION ON TITLE

Chairman Kuykendall delivered the Opinion of the Commission.

This consolidated case involves the overlapping aboriginal title claims of the Hopi Tribe, the plaintiff in Docket No. 196, and the Navajo Tribe of Indians, the plaintiff in Docket No. 229, to a large tract of land in northeastern Arizona and southern Utah.

The Hopi plaintiff contends that, following the attachment of American sovereignty over the area in suit in 1848 by virtue of the Treaty of Guadalupe Hidalgo (9 Stat. 922), the United States thereafter by a series of Presidential executive orders, administrative actions, and the enactment of certain legislation, deprived the Hopi Tribe step by step of all its aboriginal lands without the payment of any compensation. Recovery is sought under Section (2)(4) of the Indian Claims Commission Act. On the other hand the Navajo plaintiff alleges that by virtue of the Navajo Treaty of July 1, 1868 (15 Stat. 667) the Navajo Tribe ceded to the United States its aboriginal rights to the Hopi-Navajo claimed area for an unconscionable consideration for which additional compensation is sought under Sec. 2(3) of the Act. The contested area in this law suit represents the totality of Hopi aboriginal land claims in Docket No. 196, which area is located within and consists of about one-third of a much larger area that is the subject matter of the claims asserted by the Navajo plaintiff in Docket No. 229.

The Hopi or "Moqui" Indians belong to the Pueblo culture, speak a Shoshonean dialect, and are one of the few American Indian tribes still residing in a major portion of their ancestral home. The Hopi origins are lost in antiquity, and their first recorded contact with the white man occurred in 1541, when a Spanish detachment stationed at

Zuni east of the Hopi Tribe was sent by Coronado to visit the province of Tusayan as the Hopi country was referred to. Upon their arrival the Spaniards found the Hopis gathered in permanent villages on three principal mesa tops. These Hopi mesas are situated in the center of the overlap area, and extend upward six hundred feet above the surrounding valleys and range lands. Throughout the period of Spanish rule over the southwestern part of the country, the Mexican period (1821-1848), and even after American sovereignty attached under the provisions of the 1848 Treaty of Guadalupe Hidalgo, the Hopi Indians have been pictured as a relatively inoffensive and timid people, living in six or seven permanent village sites on the Pueblo mesas in the heart of their country. Their agricultural subsistence was supplemented by cattle and sheep raising in the nearby valleys, with some hunting and food gathering in the outer or peripheral areas away from the village sites. While the Hopi were a religious tribe, they resisted to a marked degree the efforts of the Spanish missionaries to convert them to the tenets of Christianity. The focal point of Hopi worship was the eagle, considered the most sacred of birds and a sun symbol. The Hopis had numerous eagle shrines which they visited periodically. Many of these shrines were located at great distances from their village sites, some being located as far west as the San Francisco Mountains and as far south as Chevelon Creek southeast of Winslow, Arizona, both sites being well beyond the boundaries of the area in suit. Many of the outlying shrine areas were also visited by the Navajo, Zunis, Acomas

and other Pueblo and Apache groups. Many of the Hopi shrines had been abandoned some years prior to the time American sovereignty attached in 1848. ^{1/}

The United States officials had but little contact with Hopi Indians during the early years of American sovereignty over the New Mexico Territory. The Hopis, who numbered about 2,500 souls, were then living in seven villages; namely, Walpi, Sichomovi and Hano on the First Mesa; Mishovgnovi, Shungopovi and Shipaulovi on Second Mesa; and Oraibi on Third Mesa. What contact there was usually resulted from Hopi complaints of Navajo raiding, an activity which the Navajo had regularly pursued during both the Spanish and Mexican periods of sovereignty.

The Navajos first entered the southwestern part of the United States sometime between 1300 to 1500 A.D. They are a branch of the Athapaskan people who apparently migrated into the southwestern part of the United States from Canada. With the Apaches the Navajos make up one linguistic group who were first contacted by the Spanish south of the San Juan River early in the seventeenth century.

The Spanish had found the Navajos to be an aggressive people who shunned attachment to permanent village sites. They moved about a

^{1/} By 1848 the Hopi had abandoned the Navajo Mountain shrine on the northern boundary of the overlap area, and the San Francisco Mountain and Chevelon Creek shrines west and south of the claimed area.

great deal gathering food and hunting where the opportunity availed itself. During the Spanish era, the Navajos acquired horses and sheep. The horses provided them with even more mobility, and as the Navajo population increased their territorial demands likewise increased. It was inevitable that there would soon be conflict between the warlike Navajos, the neighboring Indian tribes and the Spanish authorities.

History has shown that Navajo territorial expansion was in a westerly direction. The Utes to the north and Apaches to the south contained Navajo tribal movement in those directions, while the Spanish and Pueblo Indian settlements to the east near the Rio Grande River proved to be a formidable barrier to any eastward Navajo expansion.

In 1848 the heart of the Navajo country lay east of the lands in suit being generally identified as that area in northwestern New Mexico and northeastern Arizona in the vicinity of the San Juan River and its tributary streams west of the Rio Grande, and including Blanco Canyon, Canyon de Chelly, and the Tunicha Mountains. By 1854 the Navajo Tribe numbered 8,000 to 10,000 Indians who could be found as far south and southwest in New Mexico and Arizona as the 35° parallel of north latitude just outside the overlap area.

For all intents and purposes the United States officials inherited the Navajo situation that had plagued the prior Spanish and Mexican authorities for years. There was constant turmoil and warfare between the Navajos, the New Mexican settlers and the neighboring tribes. It was a period when the Hopis to the west were beginning to feel the

mounting pressure from the Navajos. A treaty of peace concluded with the Navajo Tribe in 1849 had failed to stem Navajo raiding activity. In an attempt to check further Navajo encroachments Fort Defiance had been established in 1851 in Arizona at a point just west of the present New Mexico-Arizona boundary line.

In 1855 Governor David Merriwether sought by treaty to establish a Navajo reservation. The western boundary of the proposed new reservation was described as a line running north and south in Arizona, between the confluence of the San Juan River and the Rio de Chelly and the confluence of the Zuni River and the Little Colorado River. This western boundary, as drawn, is situated approximately 20 miles east of the nearest Hopi villages and within the eastern boundary of the lands in suit. As such it represents a compromise of what was believed to be the western limits of Navajo country as gleaned from earlier maps and other information then available. Due to an unfavorable Committee report the proposed 1855 Treaty was never ratified by the United States Senate.

Trouble with the Navajos continued through the 1850's and into the 1860's. In 1863 the military authorities conceived the idea of removing all Navajos and relocating them east of the Rio Grande River on the Pecos River at the Bosque Redondo in New Mexico. Colonel Kit Carson was placed in charge of field operations. By April of 1864 several thousand Navajo Indians had been rounded up and interned at Fort Sumner at Bosque Redondo. Thousands of other Navajos had managed to elude

Carson's troopers by scattering to the winds and moving into remote areas where they had never been seen before.

Faced with the enormous problem of caring for thousands of dissatisfied Navajos interned at Fort Sumner, the United States authorities decided that a permanent Navajo reservation should be established, one that would essentially embrace the limits of lands traditionally associated with the Navajo Tribe. On June 1, 1868, the United States entered into a treaty with the Navajos at Fort Sumner under the terms of which the Navajo Tribe was granted a sizeable reservation lying east of and adjacent to the lands in suit. In exchange for this new reservation the Navajo Tribe agreed to relinquish all occupancy rights to lands situated outside of the reservation except the limited right to hunt on unoccupied lands contiguous thereto. ^{2/} Within a short period those Navajo Indians interned at Fort Sumner were released and moved to the newly established reservation. Estimates of the overall Navajo population in 1868 place the figure at twelve to thirteen thousand Indians.

An 1878 Executive Order reestablished the western boundary of the 1868 Navajo Reservation further west at the 110° West Longitude, and an 1880 Executive Order added more land to the southwest part of the reservation. As enlarged the 1868 Navajo Reservation amounted to roughly eight million acres. Despite the vast size of this reservation

^{2/} 15 Stat. 667.

many Navajos ignored its boundaries and moved westward encroaching more and more upon lands considered to have belonged to Hopi Indians. The Indian agents in residence near the Hopi villages began to relay to their superiors in Washington an increasing number of Hopi complaints concerning Navajo encroachments on Hopi lands.

By 1876 it had been recommended that the Hopi Indians be given a reservation to protect them against Navajo trespasses and white intermeddlers. Nothing came of this or subsequent proposals until December 16, 1882, when President Arthur, acting upon the recommendations of Agent J. H. Fleming, issued an Executive Order setting up by metes and bounds a new Indian reservation of roughly 2-1/2 million acres for the immediate benefit of the Hopis ". . . and such other Indians as the Secretary of Interior may see fit to settle thereon." (I Kappler 805) This new Executive Order Reservation rests in the center of the overlap area and abuts the Navajo Reservation on the west, the common boundary line being the 110° of West Longitude. As established the 1882 Reservation contains within its boundaries all of the Hopi permanent villages, the agency buildings at Keams Canyon, and what Agent Fleming considered to be sufficient land to meet the needs of the Hopi population which then numbered about 1800 Indians. In addition to the Hopis, there were approximately 300 Navajo Indians living in the Executive Order Reservation as of 1882.

In the Commission's judgment the formal issuances of the December 16, 1882 Presidential Order effectively terminated and put to rest

all Hopi aboriginal title claims beyond the limits of the 1882 Hopi Executive Order Reservation.

The Commission concludes that the record herein does not support the large aboriginal land area contended for by the Hopi plaintiff. In awarding a much smaller area, we considered among other things the fact that the Hopi Indians were a relatively small tribe, probably never exceeding 2500 Indians prior to 1882, and that by nature the Hopis were inoffensive and somewhat timid Indians whose pueblo oriented culture and environment confined them to permanent village sites.

The Hopis grazed sheep and cattle in the valleys below the mesas and the Commission is of the opinion that its boundary lines include the land used for these purposes. ^{3/}

Finally the Commission does not agree with the Hopi plaintiff that the sporadic and intermittent visits of Hopi Indians to sacred shrines in the outer reaches of the overlap area substantiates Hopi aboriginal title to all those lands lying between the village sites and these distant shrine areas. First of all the record clearly documents a long time Hopi abandonment of many shrine areas as well as common usage by other tribes of other shrines. While admitting to actual physical abandonment of shrines, the Hopi plaintiff insists that Hopi Indian presence is unnecessary to sustain ownership

^{3/} We note in this connection that Hopi Indian agent J. H. Fleming in a letter to the Indian Commissioner Price on December 4, 1882, indicated that boundaries of the proposed new Hopi Reservation embraced sufficient land for their agricultural and grazing purposes. Healing v. Jones, 210 F. Supp. 125 (1962) Aff'd 373 U.S. 958, Hopi E. 78.

rights to their sacred places as long as spiritual attachment or rapport is sustained. However, even if we were to accept Hopi spiritual attachment as an indicia of aboriginal ownership, the Hopis in our judgment have failed to meet the evidentiary burden of showing continuous and exclusive use of their outlying and remote shrine area. The Confederated Tribes of the Warm Springs Reservation of Oregon v. United States, 177 Ct. Cl. 184 (1966), The Sac and Fox Tribe of Indians of Oklahoma, et al., v. United States, 161 Ct. Cl. 189, 315 F. 2d 896 (1963), cert. denied, 350 U.S. 848. In fact the archaeological evidence of record points to the presence of many abandoned Navajo sites throughout the perimeter of the subject tract although the actual use dates of many of these sites are strictly conjectural.

The Commission is of the opinion that as of December 16, 1882, when the Presidential Order was issued setting up the 1882 Executive Order Reservation, the Hopi Tribe held the Indian title only to those lands within the overlap area as described in the Commission's Finding No. 20. The Commission further concludes that the issuance of the December 16, 1882, Presidential Order setting up the Executive Order Reservation for the benefit of the Hopi Tribe, and for such Indians as the Secretary of Interior might see fit to settle thereon, had the effect of extinguishing, without the payment of any compensation, the Hopi Indian title to all those lands described in the Commission's

Finding No. 20 lying outside the boundaries of the 1882 Executive Order Reservation.

Following the issuance of the 1882 Presidential Order, certain events and happenings transpired which finally deprived the Hopi Tribe of a major part of its aboriginal title lands within the 1882 Executive Order Reservation. There has been placed in the record in this case a copy of the findings of fact, opinion, and conclusions of law, issued in the case of Healing v. Jones, 210 F. Supp. 125 (1962), Aff'd. 373 U.S. 758 (1963), a matter of which this Commission takes judicial notice. The Healing case was a special action brought by the Hopi Tribe against the Navajo Tribe and the United States before a special three judge court convened pursuant to the Act of July 22, 1958, 72 Stat. 402, for the purpose of resolving the competing Hopi and Navajo claims in and to the 1882 Executive Order Reservation. Where pertinent and material to the disposition of title issues in this case, and where consistent with the record and the law of the case, the Commission had adopted as its own, either in part or in total, directly or indirectly, certain findings of fact and conclusions of law rendered by the court in Healing v. Jones, supra.

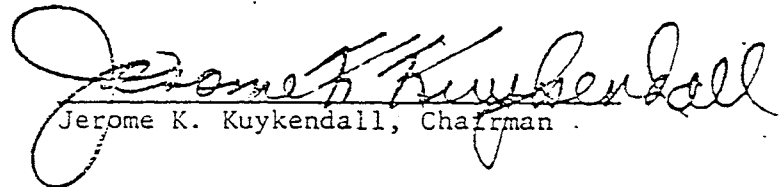
In the Healing case, the Court found, and the Commission concurs, that; (1) The Navajo population in the Executive Order Reservation increased steadily from 1882 from 300 Indians to 8,800 Indians by

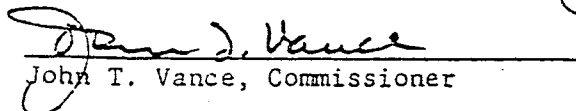
1953, and the Hopi population increased from about 1800 Indians to over 3,200 during the same period; (2) while Navajo Indians were allowed to move on to part of the Executive Order Reservation after 1882, it was not until June 2, 1937, that the Secretary of Interior by the issuance of certain grazing regulations impliedly settled the Navajo Tribe on a part of the Executive Order Reservation pursuant to the valid exercise of the authority conferred in the Secretary by the December 16, 1882 Presidential Order; (3) that Hopi non-use of a large part of the 1882 Reservation can be attributed to Hopi superstition and fear of the more warlike and aggressive Navajos and not to Hopi abandonment of the land; (4) that part of the Executive Order Reservation upon which the Navajo Tribe was officially settled was segregated from that part of the reservation where the Hopi villages and population were concentrated; and (5) that the limitation upon the Navajo tribal use area within the Executive Order Reservation was administratively fixed on April 24, 1943, by the Bureau of Indian Affairs when it circumscribed the boundaries around an area encompassing the Hopi villages, said area being designated as "land management district 6".

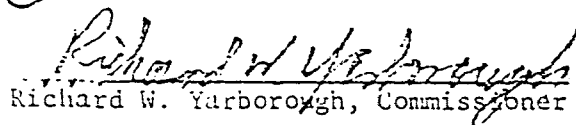
In the Commission's judgment, Hopi aboriginal title to the 1882 Executive Order Reservation lands, except for those lands within "land management district 6", was extinguished, without the payment of any compensation, by administrative action on June 2, 1937 when the Navajo Tribe was legally settled on the Hopi reservation.

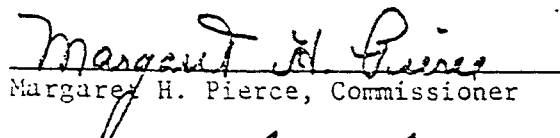
The case shall now proceed to a determination of the acreage and the December 16, 1882 fair market value of the lands awarded to the Hopi Tribe as set forth in the Commission's Finding 20 lying outside the 1882 Executive Order Reservation; to a determination of the June 2, 1937 fair market value of some 1,864,364 acres ^{4/} of Hopi aboriginal title lands within the 1882 Reservation but lying outside the boundaries of land management district 6, and, to a determination of all other issues bearing upon the defendant's liability to the Hopi Tribe.

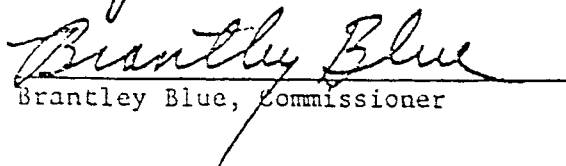
Concurring:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

^{4/} The 1882 Executive Order Reservation contained 2,499,558 acres, and "land management district 6" contained 631,194 acres, Comm. Finding 23.