

Editor's note: 80 I.D. 441; Errata noted in 80 I.D. p. IV to correct inserted in text at p. 105, line 5; Appealed -- aff'd, Civ. No. C-308-73 (D.Utah Jan. 4, 1979).

NAVAJO TRIBE OF INDIANS

v.

STATE OF UTAH

IBLA 70-87

Decided June 29, 1973

Appeal from decision of Director, Bureau of Land Management, dismissing a protest against issuance of confirmatory patent to the State of Utah for two sections of land.

Affirmed as modified.

Patents of Public Lands: Generally -- School Lands: Generally -- Secretary of the Interior -- State Grants

Where the Secretary of the Interior is required by the Act of June 21, 1934, upon application by a state, to issue a patent to the state for school lands and to show the date title vested and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any, he (and his delegates) may determine questions of law as well as fact, including a determination as to whether title passed under the school land grant.

Act of July 16, 1894 (Utah Enabling Act) -- School Lands: Grants of Land --

State Grants

Title to school sections granted to the State of Utah by section 6 of the Utah Enabling Act, 28 Stat. 109, vests in the State on the date of Statehood (January 4, 1896), or upon completion and acceptance of the survey of the sections if the lands were not then surveyed.

Administrative Practice -- Administrative Procedure: Generally -- Indian Lands: Generally -- Rules of Practice: Evidence -- School Lands: Generally

Although the Board of Land Appeals takes official notice of the findings and conclusions in an interlocutory order of the Indian Claims Commission on the claim of the Navajo Tribe of Indians against the United States, the Board's decision on a protest by the Tribe against issuance of a confirmatory patent to the State of Utah for school land sections now included within the boundaries of the Tribe's reservation is based solely upon the evidence in the hearing in the Department on this protest and upon its own application of the law to the facts in this case.

Indian Allotments on Public Domain: Generally -- Indian Lands: Generally

The Indian Homestead and General Allotment Acts manifested a general governmental policy prior to and for some time after 1900 to replace the Indian reservation and communal tribal system, to encourage individual Indians to own their own small farm lands, and to open surplus reservation lands to disposition under the public land laws.

Grazing and Grazing Lands -- Taylor Grazing Act: Generally

Prior to the Taylor Grazing Act of June 28, 1934, generally open, unreserved public lands could be grazed upon without federal governmental interference or regulation, but subject to certain state laws.

Indian Allotments on Public Domain: Generally -- Public Lands: Generally --

Settlements
on Public
Lands --
Taylor
Grazing Act:
Generally

From the latter part of the 19th century to the Taylor Grazing Act of June 28, 1934, there was a general policy of the federal government to permit acquisition of title to open, unreserved public lands by individuals settling upon the land, including

Indians, but vested rights were obtained to the lands only upon compliance with a specific act of Congress, and only for the maximum acreage allowable under that law.

Administrative Procedure: Hearings -- Rules of Practice: Evidence

Exhibits and oral testimony in an administrative hearing are not fungibles where evidentiary value is ascribed on a quantum basis. Instead, they are products having different probative values dependent upon factors such as relevance, competency and credibility.

Indian Lands: Aboriginal Title -- Indian Lands: Tribal Lands

The Treaty of 1868 between the Navajo Tribe of Indians and the United States whereby the Tribe relinquished its claim to land outside the boundaries of a reservation provided thereby, extinguished the aboriginal occupancy rights of the Tribe and its members to any land outside that reservation.

Indian Allotments on Public Domain: Settlement

Under section 4 of the General Allotment of 1887, no improvements or other acts of settlement are required for allotments

for minor children of a qualified adult allottee who has maintained settlement on his own allotment.

Indian Tribes: Generally -- Rules of Practice: Appeals: Standing to Appeal --Rules of Practice: Private Contests -- Rules of Practice: Protests -- School Lands: Generally

The Navajo Tribe of Indians has standing within the Department of the Interior to contest or protest against the issuance of a confirmatory patent to the State of Utah for school sections within the exterior boundary of the reservation for the Tribe.

Indians: Generally -- Statutory Construction: Generally

There is a well-established rule of statutory construction to favor Indians in case of doubt as to the meaning of words in treaties or legislation in their behalf; however, the rule is not inflexible in its application and must give way where such action is warranted by other rules of construction and the circumstances of the case.

Act of July 16, 1894 (Utah Enabling Act) -- Indian Lands: Generally -- School Lands: Generally -- School Lands: Particular States -- State Grants -- Statutory Construction: Generally

To determine whether any Indian occupancy by Navajos outside their recognized reservation boundaries was recognized by

the Utah Enabling Act of 1894 so as to prevent the operation of the grant of lands for school purposes to the State, the intent of Congress must be ascertained by reading the provisions of the grant and the disclaimer of lands "owned or held by any Indian or Indian tribes" together, by considering the usual meaning of the words, by determining the overall purpose of the Act, and by considering the provisions in accordance with the historical milieu and public policy of that time, as well any court interpretations of other statutes.

Statutory Construction: Generally -- Words and Phrases

The word "held" as used in statutes in relation to land often means "owned", but as there is no fixed primary or technical meaning, its meaning must be determined by the context in which it is used to ascertain the legislative intent.

Act of May 17, 1884 (Alaska Organic Act) -- Act of July 16, 1894 (Utah Enabling Act) -- Alaska: Indian and Native Affairs -- Indians: Generally -- Statutory Construction: Generally

Historical differences between the situation in Alaska and the other states afford reasons for different interpretations of

legislation pertaining to Alaska natives and legislation pertaining to Indians in the other states. Therefore section 8 of the Act of May 17, 1884, regarding the occupancy of Alaska natives and others upon public land, is not in pari materia with the disclaimer provision in section 3 of the Utah Enabling Act of 1894, as to lands "owned or held by any Indian or Indian Tribes."

Indian Lands: Aboriginal Title

The standard used to determine the extent of an Indian tribe's aboriginal occupancy is whether the tribe occupied a defined area to the exclusion of other tribes.

Indian Lands: Aboriginal Title -- School Lands: Grants of Land -- State Grants -- Withdrawals and Reservations: Effect of

Where Indian aboriginal rights are terminated by abandonment or relinquishment by a treaty with the United States, a state may take a grant of lands unencumbered by any occupancy claims in the Indians, and where the state's title was vested, subsequent action by Congress setting the lands apart as a reservation for the Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the state's title cannot vest until the reservation is extinguished.

Indian Allotments of Public Domain: Generally -- Settlements on Public Lands -- School Lands: Generally

Although the school land grant to the State of Utah was subject to existing inchoate settlement claims, including any by individual Indians outside their reservation, if the claims were not perfected, the State's title to the lands vested.

Homesteads (Ordinary): Generally -- Indian Allotments on Public Domain: Generally -- Settlements on Public Lands -- Statutory Construction: Generally

The Indian Homestead Acts and section 4 of the General Allotment Act are settlement acts within the framework of other settlement laws pertaining to the public lands, and the practice, rules and decisions regarding white settlers on the public lands have been applied to them with certain reasonable modifications taking into account Indian habits, character, and disposition.

Indian Lands: Generally -- Indian Lands: Tribal Lands -- School Lands: Generally -- School Lands: Particular States

The Acts of March 1, 1933, adding "vacant, unreserved, and undisposed of" public lands to the Navajo reservation, and

of September 2, 1958, declaring lands within the exterior boundaries of the Navajo reservation in trust for the Navajo Tribe, "subject to valid existing rights", did not affect the existing title of the State of Utah in school sections which had vested in the State in 1900 when surveys were approved including the sections.

Act of July 16, 1894 (Utah Enabling Act) -- Indian Lands: Generally -- School Lands: Generally -- School Lands: Particular States -- Statutory Construction: Generally

By the Utah Enabling Act of 1894, Congress did not intend the grant of school lands to the State of Utah, effective upon survey in 1900, to be held in abeyance as to unreserved public lands which may have been within a wide, undefined perimeter of use by a proportionately few Navajo families outside their reservation grazing flocks of sheep with transitory encampments in an area also used by non-Indians for grazing purposes and wandered over by Indians from other tribes.

Federal Employees and Officers: Authority to Bind Government -- Indian Lands: Generally -- School Lands: Generally

Where lands were not withdrawn for Indians, any express or implied consent by Indian Office officials to Navajos grazing sheep on public lands outside their reservation boundaries where no claim to the land was made under section 4 of

the General Allotment Act and the lands were recognized by such officials and other government officials as public lands, rather than Indian lands, could not create Indian tribal occupancy rights to such lands superior to the Congressional grant to the State of Utah for school lands, and the State took an unencumbered fee simple title to such sections.

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OPINION BY MRS. THOMPSON

The appeal in this case is the culmination of extensive proceedings within this Department arising from an application filed by the State of Utah (hereafter referred to as the "State") on June 10, 1958, for a confirmatory patent to two school sections lying within the exterior boundaries of the extension of the Navajo Reservation added by the Act of March 1, 1933, 47 Stat. 1418 (hereafter called the Aneth or the 1933 extension). The Navajo Tribe of Indians (hereafter referred to as the "Tribe") protested against the issuance of the

patent to the State. Its protest was dismissed by the Salt Lake Land Office, and that dismissal was affirmed by the Acting Director, Bureau of Land Management, on September 23, 1960. The Bureau's dismissal was set aside by decision of the Solicitor, 72 I.D. 361 (1965), who remanded the case for a hearing on the Tribe's protest. The hearing was presided over by Administrative Law Judge John R. Rampton, Jr. 1/ and sessions were held in Cortez and Fort Morgan, Colorado, and Monticello and Salt Lake City, Utah. 2/ A recommended decision by Judge Rampton was adopted with only minor changes by decision of the Director, Bureau of Land Management, dated August 15, 1969, which dismissed the Tribe's protest and ordered issuance of the confirmatory patents to the State for the two sections in question. The Tribe has appealed from this decision.

Pursuant to a motion of the Tribe and order of this Board, oral argument by counsel of the Tribe and the State 3/ was heard by this panel on April 21, 1972.

The State's application for patent was made under the Act of June 21, 1934, 43 U.S.C. § 871a (1970), which directs the Secretary

1/ The title of the hearing officer has been changed from "Hearing Examiner" to "Administrative Law Judge" pursuant to order of the Secretary of the Interior, 38 F.R. 10939 (May 3, 1973).

2/ At the hearing the Tribe was represented by Norman L. Littel, Esq., Washington, D.C., then General Counsel of the Tribe, and John H. Schuelke, Esq. The State of Utah was represented by Phil L. Hansen, Esq., then Attorney General for the State of Utah (on the briefs only), Gerald R. Miller, Esq., and F. S. Prince, Esq., Special Counsel.

3/ The oral argument in behalf of the Tribe was made by John H. Schuelke, Esq., and Bruce E. Babbitt, Esq., and in behalf of the State by Gerald R. Miller, Esq.

of the Interior, upon application by a state, to issue patents to numbered school sections in place showing "the date when title vested in the State and the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any."

Where this Department has a statutory duty to issue a patent or other evidence of title to a claimant, including a state, there is authority to determine questions of law as well as fact incident to performance of that duty. West v. Standard Oil Co., 278 U.S. 200, 220 (1928). This includes a determination as to whether title passed under the grant to a state. Margaret Scharf, 57 I.D. 348 (1941). The Act of June 24, 1934, is not a new grant of title to a state. The issuance of the patent authorized by the Act is simply evidence of title which has already vested. Id.

The two sections in question are section 16, T. 40 S., R. 24 E., S.B.M., Utah (hereafter referred to as the Montezuma Creek section), and section 16, T. 40 S., R. 26 E., S.B.M., Utah (hereafter referred to as the McElmo Creek section). They are both in a remote desert area of southeastern Utah in San Juan County, north of the San Juan River. Official survey plats including these sections were accepted on May 1, 1900 (State Exhibits (Exs.) 23, 25; Navajo Tribe (Nav.) Ex. 61-0). The sections are numbered school sections granted to the State by section 6 of the Utah Enabling Act of July 16, 1894, 28 Stat.

109. Title to school sections would vest in the State upon the date of Statehood (January 4, 1896), or upon completion and acceptance of the survey of the sections if the lands were not then surveyed. 43 CFR 2623.1; State of Utah, v. Braffet, 49 L.D. 212 (1922). Thus, presumptively, title to the sections vested in the State on May 1, 1900, when the surveys were approved. 4/

The basic position of the Tribe is that title could not vest in the State on May 1, 1900, or thereafter, because the sections

4/ We note that the Supreme Court held that the Utah school grant did not include lands which were known to be mineral in character when they were surveyed. United States v. Sweet, 245 U.S. 563 (1918). However, by the Act of January 25, 1927, as amended, 43 U.S.C. § 870 (1970), Congress extended the school grants of numbered sections in place to include such sections which were mineral in character unless indemnity or lieu land had been previously selected in lieu of the sections, and excepted sections subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled. This Act and the Act of June 21, 1934, are thoroughly discussed in Margaret Scharf, which points out that until the contrary is clearly shown, there is a very strong presumption that land granted to a state for school purposes was of the character contemplated by the grant, insofar as its then known mineral or nonmineral character was concerned. 57 I.D. 348, 356-57.

In this case there has been no assertion and no evidence which would clearly establish that the land in question here was known to be mineral in character in 1900 when the surveys were approved so as to effectuate any change in the date title presumptively passed to the State of Utah. There was testimony by a witness of the State, Neil F. Stull, that in the 1920's the lands in the area were not even considered as having prospective value for oil. As an employee of the Department of the Interior in the 1920's he investigated Indian allotments in the area to determine if the lands in the applications were mineral or nonmineral in character (Tr. 1122-30).

The fieldnotes of the 1900 survey of the two townships stated there were no indications of mineral within the township except "a vein of coal underlays the mesa along the N. bdy" of T. 40 S., R. 26 E. (State Exs. 23 and 25).

were occupied by individual Navajo Indians or by the Tribe in a tribal capacity and this occupancy had the legal effect of precluding the grant of these two sections to the State. Throughout these proceedings the Tribe has offered various legal theories to support this basic thrust. These will be discussed further, infra.

The Solicitor ordered the hearing to receive "all the facts pertaining to occupancy which may be relevant." In reviewing the lengthy evidentiary record, we note that the Judge admitted most of the evidence offered by both parties at the hearing. 5/

Summary of Type of Evidence

The type of evidence submitted at the hearing is detailed in the Director's decision as follows:

[T]he Tribe presented testimony from numerous elderly Navajo Indians. These people, unlettered, unable to speak the English language and requiring interpreters, testified that they had lived on or near the school lands in question or that they had known of Navajo friends and relatives, now dead, who had lived on or near the sections involved. In support of the general proposition that, since before the beginning of recorded history, the Navajo people have resided and lived in the area known as the Aneth extension of the Navajo Reservation north of the San

5/ The hearing record is voluminous consisting of a transcript of 2230 pages covering testimony of some 64 witnesses, with approximately 750 numbered exhibits containing thousands of separate documents.

Juan River, the Navajo Tribe introduced voluminous exhibits which fall into five main categories, as follows:

1. Ancient documents from the National Archives, including maps dated from 1716, diaries and reports of early explorers, military reports, reports of Indian agents to the Commissioner of Indian Affairs, Indian allotment papers and homestead papers.
2. Technical data such as survey plats, population surveys, aerial photos, and genealogy studies and charts.
3. Published reports and analyses by historians, ethnologists, and anthropologists.
4. Archaeological reports, site photos and descriptive sheets.
5. Portions of the transcript in the case of Bill Hatahley et al. v. United States of America, in the United States District Court for the District of Utah, Civil No. C-36-53 (Nav. Ex.'s 59-59A), and in the proceedings before the Indian Claims Commission, Navajo Tribe of Indians et al., Petitioners v. U.S.A., Defendant, Docket No. 229.

Foundation testimony for the archaeological reports was given by two anthropologists employed by the Navajo Tribe and by a member of the Navajo Tribe who has participated in the preparation of the site reports. Foundation testimony for the hospital records and the census reports was given by members of the Navajo Tribe and by officers of the Bureau of Indian Affairs.

In rebuttal, the State of Utah called as witnesses elderly members of the Ute Tribe of Indians who, like the elderly Navajos, were unable to speak English and required interpreters. These people and their ancestors had also lived and roamed throughout the Aneth extension area. Testimony was also given by elderly white men who had run stock in the area involved, by traders to the Indians, and by a retired employee of the Department of the Interior, a geologist who had examined the Indian allotments in Townships 39 and 40 South, San Juan County, Utah.

For a specific rebuttal of the methods used by the Navajo Tribe archaeologist in examining the numerous sites reported as Navajo and the reliability of the archaeological site reports, the State called as a witness an assistant research professor in anthropology at the University of Utah who, using material furnished to him by the Navajo Tribe, resurveyed many of the sites written up in the Navajo reports.

Summary of Director's Findings and Conclusions

The Director's decision discusses in some length evidence concerning the general background and history of the Navajo people and their occupancy in the southwestern United States; general Navajo occupancy of the area added to the Navajo reservation by the 1933 extension; occupancy by individual Navajos with respect to each of the sections in question which lie within that extension; and other general historical information of that area. The decision then discusses the contentions of the Tribe in support of its protest against the patent to the State relating the law concerning the protection of Indian rights generally; individual Indian occupancy rights; aboriginal tribal rights of possession; the effect of the 1868 Treaty of the Tribe with the United States, 15 Stat. 667; the effect of the Utah Enabling Act; and the standing of the Tribe to protest the State's application.

Essentially, the Director found that there was no occupancy by individual Navajos upon the disputed sections until after May 1, 1900, that the area of occupancy judged with respect to the mode of

life of the Navajo was vague and indeterminate, and that there was not exclusive occupancy by the Navajos nor was dominion over the area asserted by them. Further, it found there was not sufficient tribal occupation of the area to establish tribal possession. In any event, it held that tribal claims to the land were barred by virtue of the 1868 Treaty of the Tribe with the United States. It held the Tribe did not have standing to protest the State's application, as any occupancy by individual Indians in 1900 sufficient to bar the State's grant would also be protected and prevent the Tribe's claim to the land under the Aneth extension Act of March 1, 1933, adding "vacant, unreserved, and undisposed of public lands," and the Act of September 2, 1958, 72 Stat. 1686, declaring lands within the exterior boundaries of the reservation subject to "valid existing rights" to be in trust for the Tribe.

Significant Geographical Features

The evidence in this case is related to certain geographical features. In 1900, the most significant date in this case, the northern boundary of the Navajo reservation in Utah and in New Mexico, was the San Juan River. That boundary was established by Executive Order of May 17, 1884. The San Juan River from its headwaters in southern Colorado runs through a portion of northeast New Mexico, then cuts across a small portion of Colorado near the Four Corners area of Utah-Arizona-Colorado-New Mexico. It then

flows in double hairpin turns northwesterly then southwesterly then northwesterly and then southwesterly again until it reaches its mouth in the Colorado River in southern Utah. In addition to the San Juan River the two main drainage courses within the 1933 extension are the McElmo and Montezuma Creeks which flow through the easterly and westerly portion of the 1933 extension area, respectively, southerly to their mouths in the San Juan River. ^{6/} Portions of those creeks flow through the subject sections which are identified by reference to them. North and west of the Montezuma section is an area called McCracken Mesa, mentioned as a favorite grazing range of the Navajos. This was added to the reservation by the Act of September 2, 1958 (72 Stat. 1686). Outside the reservation, in townships west of the 1933 extension and flowing from the north are Recapture Creek (its mouth in the San Juan River is in T. 22 E., R. 40 S.), and Cottonwood Creek (its mouth is in T. 21 E., R. 40 S.). Near the mouth of Cottonwood Creek at the San Juan River is the Mormon settlement of Bluff founded in 1880 (Tr. 1779). Four townships north and one township east of Bluff is the town of Blanding first settled in 1905 (Tr. 1781). Three townships north and one township east of Blanding is the town of Monticello. West of Monticello is a mountain range

^{6/} The use of the word "flow" is to describe the bed of these creeks or washes. In this dry desert climate during dry spells often no water would actually flow through these creeks, while during spring runoffs and unusually heavy rains the torrents of water would cause some changes in the stream-flow configuration and flooding.

called the Abajo or Blue Mountains. In the southern part of that range and southwest of Blanding is a mountain called Bears Ears. Other significant water courses include Mancos Creek with its mouth in the San Juan in New Mexico very near the Four Corners. The rest of the creek is within the State of Colorado, most of it within the southern Ute Reservation. Chinle Creek or Wash meanders from northern Arizona to the San Juan River in Utah a township west of Bluff.

The Tribe and the State in this appeal have referred to findings and conclusions by the Indian Claims Commission in a proceeding brought by the Tribe against the United States (Docket No. 229) under the Indian Claims Commission Act, 25 U.S.C. § 70 et seq. (1970). By its Interlocutory Order of June 29, 1970 (23 Ind. Cl. Comm. 244), the Commission found that on July 25, 1868, the Navajo Tribe held aboriginal title to a large tract of land which includes lands in Utah beginning at the intersection of the Colorado and San Juan Rivers "thence on a line northeasterly to Bears Ears; thence easterly to Blanding, Utah, thence southeasterly to Cortez, Colorado * * *," except for certain lands in Spanish or Mexican grants (Finding 17, 23 Ind. Cl. Comm. 272). The Commission also concluded as a matter of law that as of July 25, 1868, the effective date of the Navajo Treaty of July 1, 1868 (15 Stat. 667), the Tribe ceded its aboriginal title lands to the United States under the 1868 Treaty, except for the area specifically reserved to the

Tribe under Article 2 of the Treaty. The Tribe points out that the sections involved here are within the area found by the Commission to be aboriginal lands of the Tribe, whereas the State points to the Commission's conclusion that the Tribe ceded its aboriginal title to such lands by the 1868 Treaty.

For informational purposes, we have taken official notice of these findings and conclusions of the Commission and of its order for further proceedings to determine the acreage of the lands ceded by the Tribe, its fair market value as of July 25, 1868, and other matters relative to the determination of the extent of the liability of the United States to the Tribe. We note that the Commission's order is not a final order and is, therefore, not a final determination of the issues involved in that proceeding and will not become so until a final order is issued and any possible court appeals are concluded.

In addition to the fact the Commission's ruling is not a final determination, the State was not a party in that proceeding and, therefore, no factual findings in that case could bind the State. Our findings and conclusions in this controversy between the Tribe and the State rest solely upon our review of the evidence presented at the hearing in this case and such additional specific evidentiary matters as may be noted in this decision of which official notice has been taken, and upon our own understanding and application of the law to the facts shown.

Summary of Legal Theories

A brief review of the legal theories presented by the Tribe is necessary to set the discussion of the facts in proper perspective. The case went to hearing on the issues as they were formulated and briefly outlined in the Solicitor's decision at 72 I.D. 361 (1965) and as discussed by the Director in his decision. Essentially the Tribe contended as follows: Protection occupancy rights in individual Indians, as well as Indian Tribes, is a matter of federal governmental policy and recognized in the Supreme Court decision, Cramer v. United States, 261 U.S. 219 (1923). Occupancy by individual Indians would be sufficient to prevent the grant of school sections to a State, citing Schumacher v. State of Washington, 33 L.D. 454 (1905). These occupancy rights by individual Indians were independent of and in addition to any rights of a Tribe to lands within reservations established for the Tribe. The policy of protecting occupancy rights of individual Indians is reflected in the Utah Enabling Act where in paragraph 2 of section 3 of that Act (28 Stat. 107), the State disclaimed any claim to lands "owned or held by any Indian or Indian Tribes." The Tribe pointed out that the Supreme Court in Cramer, supra, referred to this disclaimer provision to support its position that the occupancy of individual Indians in that case prior to a grant to a railroad caused such lands to be within the provision in the grant excepting

lands "reserved * * * or otherwise disposed of." The Tribe contended that by applying that holding here the school sections were excepted from Utah's grant by the provision in section 6 of the Enabling Act (28 Stat. 109) relating to lands "otherwise disposed of", as they were lands occupied by Navajo Indians prior to the school grant.

The Tribe further contended that in considering the occupancy by the individual Indians the standard is to view the Indian possession and use with reference to the habits and modes of life of the particular Indian involved. The Navajos principally grazed livestock, conducted small farming operations, and hunted and gathered other foods from wild sources for their livelihood. Therefore, the control of land by a Navajo was by the protection and care of his livestock comparable to the way a livestock man controls an area to protect his grazing even though he may not actually live on each acre.

The Tribe's original position was that such individual occupancy and control were translated into a tribal right by virtue of the inclusion of these sections in the area added to the reservation by the 1933 extension and by virtue of section 1(d) of the Act of September 2, 1958 (72 Stat. 1686, 1687), which provided that "all public lands of the United States within said exterior

boundaries of said reservation are hereby declared to be held in trust for the benefit of the Navajo Tribe of Indians."

The State, in response, contended that the type of occupancy by the Navajos was not the type protected in the Cramer and Schumacher decisions, supra, but if it were, it pointed out that the 1933 extension added only "vacant, unreserved, and undisposed of public lands" (47 Stat. 1418). Also, the 1958 Act provided that the declaration of trust for the Navajo Tribe was "subject to valid existing rights." (72 Stat. 1687). It contended, therefore, that any occupancy of the school sections sufficient to preclude the grant to the State would also create rights in the individuals under the provisions sufficient to except the lands from those Acts. Thus, it argued, only such individual Indians, not the Tribe, would have standing to challenge the State's title.

The Director agreed with the State on the issue of standing, concluding that only individuals who allegedly occupied the sections in 1900 or their descendants might have standing to protest. Specifically he stated that the Tribe was not bringing the action to protect any individual Indian occupant's own home from any oppressor, but instead was asserting such occupancy "for its own purposes as a means of defeating the State's title and thereby gaining valuable assets for the Tribe."

The Tribe originally also implied that there was tribal aboriginal occupancy of the area but did not emphasize this point. In the present appeal, the Tribe in its first brief repeats its contentions concerning individual occupancy as precluding the vesting of the State's grant. In a supplemental brief and again in its reply to the State's brief in answer to that brief, the Tribe emphasizes an additional position to that expressed previously. The Tribe now contends that regardless of the effect of its Treaty of 1868, the Tribe has rights to these lands not based on its tribal aboriginal occupancy of the area but by virtue of the disclaimer in the Utah Enabling Act of any lands "owned or held by any Indian or Indian Tribes." In effect, it interprets this Act as preventing the grant to the State of lands "held" by tribal occupancy. As to the test of occupancy necessary to establish lands "held" by the Tribe, it suggests the standard be the area which was "essential to the livelihood" of the Indians as judged by the natural environment and lifestyle of the individual Indian or Indian tribe in question, with limitations as to whether the use and occupation is sufficiently intensive and continuous. It derives this suggested standard from its interpretation of cases primarily dealing with the Alaskan natives.

The State contends essentially that the Utah Enabling Act created no rights in the Tribe as to lands in Utah because tribal rights had been extinguished, but that assuming, arguendo, such rights

existed, the evidence found by the trial examiner would not support the Tribe's claim under the tests laid down in cases cited by the Tribe.

Issues

This brief skeletal framework of the most basic contentions of the Tribe and State points to the most significant issues in this case, namely:

1. What was the effect of the 1868 Treaty of the Tribe with respect to tribal and individual Indian rights to the lands in question?
2. Were rights to these lands preserved or created in individual Indians or the Navajo Tribe by the Utah Enabling Act?
3. What was the effect of the 1933 and 1958 Acts upon the status of the sections?
4. Does the Navajo Tribe have standing to challenge the State's patent application?
5. If occupancy by Indians could prevent the State's title from vesting, what standard governs the adequacy of the occupancy?
6. Does the evidence in this case establish there was sufficient occupancy by individual Indians or the Navajo Tribe under the proper standard to preclude the grant to the State?

These essential issues will be discussed, infra, not necessarily separately or in the above order, as their resolution requires a consideration of the statutes involved and the facts concerning Navajo occupancy generally in the context of the historical setting

as well as it can be adduced from the record. This entails a consideration of facts concerning other peoples in the area, the Mormon settlers and other whites (primarily stockmen, a few traders, missionaries and miners), and other Indian groups, especially the Utes and Paiutes, (or as also spelled, Piutes). Inseparably intertwined with these facts as to the history of the people in the area, is a consideration of the manifested governmental policy, as the Tribe's contentions in large part rest upon the effect of the Utah Enabling Act and upon the federal government policy to protect occupancy of Indians. See the discussion regarding statutory construction, infra.

Summary of General Indian and Related Public Land Law

The dates of the pertinent statutes, court and administrative decisions, and governmental administrative actions toward the Navajos, are important in relation to the historical milieu out of which they arose. Although a history of the Government's policies toward Indians generally would be of encyclopedic breadth and beyond the scope of this decision, highlights of some of the general policies shall be briefly noted as they are part of this milieu. It must suffice to state that prior to the creation of this nation, the European nations claimed title to the lands now in these United States by right of "discovery" under basic principles of international law, but subject to occupancy rights of the aboriginal inhabitants, the Indians.

See U.S. DEPT' OF THE INTERIOR, FEDERAL INDIAN LAW 18 (1958). This served as the foundation for this Government's recognition of Indians' rights of occupancy. One of the landmark cases, Mitchel v. United States, 11 U.S. (9 Pet.) 539, 559 (1835), discussing the aboriginal occupancy rights of Indian tribes and the policies by the English sovereign which were carried over by this nation, indicated the nature of those rights:

* * * friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots.

Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the Crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

The Supreme Court in Mitchel set forth the standard for recognizing tribal aboriginal rights and the conditions which would cause nonrecognition:

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its conclusive enjoyment in their own way and for their own purposes were as much respected,

until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Id.

This recognition of a communal or tribal aboriginal occupancy right led to various provisions in treaties and statutes for individual Indian rights in tribal property. See U.S. DEPT OF THE INTERIOR, FEDERAL INDIAN LAW, Ch. IX, Pts. B, C (1958). In addition to specific provisions for rights in recognized tribal lands, general legislation in the 1870's and 1880's permitted individual Indians to acquire property rights outside Indian reservations.

By the Act of March 3, 1875, 43 U.S.C. § 189 (1970), an Indian who abandoned his tribal relations was permitted to make a homestead under the homestead laws, which was to be inalienable for five years. By the Indian Homestead Act of July 4, 1884, 43 U.S.C. § 190 (1970), any Indian who was located on public lands at that date or thereafter "under the direction of the Secretary of the Interior, or otherwise," could locate homesteads on public lands to the same extent as citizens of the United States, but would receive trust patents - to prevent alienation of the property as a means of protecting his interests. By section 4 of the General Allotment Act of February 8, 1887, 25 U.S.C. §§ 334 and 336 (1970), allotments to individual Indians who settled on public lands outside of reservations, or for whose tribe no reservation had been

made, and their children, could be made to the extent of 40 acres of irrigable land, or 80 acres of nonirrigable agricultural land, or 160 acres of nonirrigable grazing land to any one Indian. Section 1 of that Act, 25 U.S.C. § 331 (1970), provided for allotments of reservation lands to individual Indians. These Acts have been recognized as manifesting the overall Governmental policy that prevailed at that time, and for some time after 1900, to replace the reservation and communal tribal system, to end Indians' nomadic lifestyle, to encourage individual Indians to integrate into the cultural structure of the rest of the nation by owning a parcel of land to farm and to take their place as independent, qualified members of the body politic, and to open surplus reservation lands for disposal under the public land laws. See e.g., FEDERAL INDIAN LAW, Ch. IX, Pt. C, supra; F. S. COHEN, U.S. DEPT OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN LAW, Chs. 2, 11 (1941); Squire v. Capoeman, 351 U.S. 1 (1956); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969).

This policy to transform the communal Indian property system into a pattern of small individually-owned farms was during the time the unreserved federal public lands could be settled upon and title acquired by individuals under laws such as the preemption acts and the homestead laws, usually for a maximum of 160 acres (see, e.g., 43 U.S.C. § 161 (1970)). Certain improvements, acts of occupancy,

application and proofs were required before a vested right could be recognized in the settlers. Desert lands could be reclaimed and title acquired under the Act of March 3, 1877, 19 Stat. 377, for 640 acres; however, by the Act of August 30, 1890, 26 Stat. 371, 391, 43 U.S.C. § 212 (1970), the aggregate quantity which any person could acquire under all the agricultural land laws, including the Desert Land Act, as amended, 43 U.S.C. § 321 (1970), was limited to 320 acres.

The Desert Land Act and, to a greater degree, later acts required a classification of the land by the Government as to the character contemplated by the Acts prior to allowance of entries. Thus, in 1909, the Enlarged Homestead Act, 43 U.S.C. § 218 (1970), was passed authorizing 320-acre homesteads on nonirrigable, nonmineral land for dry-farming, in Utah and certain other western states. In 1916, the Stock Raising Homestead Act, 43 U.S.C. §§ 291-301 (1970), authorized 640-acre homesteads for land that was "chiefly valuable for grazing and raising forage crops".

It was not, however, until the Taylor Grazing Act of June 28, 1934, 43 U.S.C. § 315 (1970), that the unreserved federal public lands were regulated by the federal government for grazing purposes. Prior to that time, generally open, unreserved public lands could be grazed upon without federal interference or regulation. This

historical practice of a free and open range is illustrated in a Supreme Court case arising from the then Territory of Utah. Buford v. Houtz, 133 U.S. 320 (1890). Operators of a cattle ranch whose private lands intermingled with federal public lands sought to enjoin sheep grazers from trespassing upon their unfenced private lands while grazing upon the public lands. The Court described the right to the public lands as follows:

We are of opinion that there is an implied license growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use. Id. at 326

* * * * *

Everybody used the open unenclosed country, which produced nutritious grasses, as a public common on which their horses, cattle, hogs and sheep could run and graze. Id. at 327-28.

The Court pointed out that unless an owner of land complied with the "fence" law of the various states and territories, and an animal "breached" the enclosure and inflicted injury, the owner of the animal was not liable to the landowner, and could permit his animals to run at large without responsibility for their getting upon the lands of his neighbors. Id. The Court also indicated that the Territory of Utah had such a fence statute. See also

Omaechevarrio v. Idaho, 246 U.S. 343 (1918), recognizing certain regulation by states in exercise of their police power to avoid conflicts over the range. The Court held a state statute did not conflict with the Act of February 25, 1885, 43 U.S.C. §§ 1061-1066 (1970). The 1885 Act forbade enclosures of public land by a person, party, association, or corporation who had no claim or color of title in good faith, or a claim made in good faith under the general laws of the United States with a view to entry. It also prohibited anyone from preventing or obstructing a settlement made under the public land laws.

This summary discussion of some of the general laws illustrates that during much of the time period in question here, especially from the time of the 1868 Treaty until the Taylor Grazing Act in 1934, there was a general policy of the federal government to encourage settlement upon the unreserved public lands and acquisition of title by individuals, including Indians. However, there were limitations as to the acreage which could be acquired by any individual under the laws and compliance with the laws was necessary before a right would vest to the lands. See cases cited, infra. At the same time, the public lands were considered an open range which could be grazed upon without regulation by the government. Inevitably, as is well known, conflicts over the use of this public land developed between settlers and stockmen, between cattle ranchers and sheep grazers,

between the Indians and non-Indians, and also between different Indian tribes. The evidence in this case tends to show aspects of all of these conflicts.

The Evidence Generally

We now turn from these general considerations to the more specific circumstances of this case.

In its first brief presented in connection with this appeal, the Tribe contends that the Director completely ignored or refused to consider the hundreds of exhibits admitted at the hearing and the testimony of some fifty persons. It contends such evidence definitely establishes that the extension area and other areas north of the San Juan River in Utah were under Navajo Indian control, and that Navajo Indians lived in that area and also on the particular sections in question. It submitted a 205 page "Summary of Evidence," which the State points out is not directed to any specific error on the part of the Director, and which it characterizes as "an historical diatribe" presumably prepared by one of the Tribe's witnesses, David M. Brugge, employed by the Tribe as an archaeologist. It is apparent that this "Summary of Evidence" is based primarily on documentary materials reproduced by the Tribe as Navajo Exhibits Nos. 100 to 633 and to a much lesser extent upon the

oral testimony of Navajo witnesses and other evidence presented by the Tribe.

We find no merit to the Tribe's contention that in making the decision below, the exhibits and testimony were not considered. The Director generally summarized the types of evidence presented. In discussing the facts he referred to some exhibits and to some of the testimony. Omissions of reference to particular exhibits or testimony in this case do not signify a failure to consider them.

Exhibits and oral testimony in an administrative hearing are not fungibles where evidentiary value is ascribed on a quantum basis. Instead, they are products having different probative values dependent upon factors such as relevance, competency, and credibility.

The difficulty in constructing a history of the area based upon the archival exhibits submitted by the Tribe was pointed out by the State's witness, Dr. C. Gregory Crampton, a professor of history at the University of Utah. He stated that only a partial history of general movement into the general area could be made and he did not recall documents that pinpoint any Indian activity to the contested sections (Tr. 2199-2201). We find, from reviewing the exhibits presented, at most only a vague and general picture primarily of United States governmental activities and policies relating to the Navajos.

The archival materials generally show increasing discontent by the Navajos with their reservation boundaries as the increase in their population, as well as of their herds of sheep, goats, and horses (and infrequently some cattle as well), created problems for them. Recommendations to increase the reservation boundaries reflect the need for additional grazing lands to support the major base of their economy, sheep grazing, and to remove sources of conflict with whites who objected to Indians leaving their reservation to graze their stock. Many of the complaints by whites made to military and Indian Office officials concerning Navajos outside the reservation relate to their grazing on public lands also grazed upon by white stockmen. Other complaints relate to alleged depredations from murder, to petty theft, to ranging their stock through farm lands of the whites.

Although many of the exhibits refer to movement of the Navajos north of the San Juan River, only a few of these exhibits may be specifically related to the area north of the river in Utah. Much of the material referring to Navajos north of the San Juan appears to pertain to the more populous area in New Mexico, especially prior to 1900. Thus, this material is not relevant to the situation in Utah, except to show a pattern of expansion by Navajos from areas where they were confined following the 1868 Treaty, and to show federal administrative policies toward them.

Many of the documents are incomplete by themselves as they refer to other documents or to enclosures which are not a part of this record. While much that is stated in the Tribe's summary of evidence reflects matters shown by the exhibits there is also reference to some exhibits which were withdrawn and are not a part of the record, and many inferences stated in the summary are simply not supported by the exhibits and other evidence in the record.

Pre-1868 Indian Occupancy of the Area

The first time period of significance in this case concerns the period prior to the 1868 Treaty with the Tribe, when a permanent reservation for the Navajo people was created. For our purposes, this reservation may generally be described as rectangular in shape, with a northern boundary on the line between what is now the states of Utah and Colorado and Arizona and New Mexico in the Four Corners area. The western boundary was a parallel of longitude about 109 degrees 30' west, provided it embraced the outlet of "Canon-de-Chilly" (15 Stat. 668). The northern boundary remained unchanged until the Executive Order of May 17, 1884, established it as the San Juan River. As indicated, the San Juan River was the northern boundary in Utah in 1900, the most crucial date in this case.

Information concerning the peoples who have inhabited the general Four Corners area begins with the prehistoric Anasazis. They are of interest in this case because of their ruins and artifacts. Around 1300 A.D., the Anasazis (ancestors of some of the Pueblo Indians) left the area and ancestors of the present-day Utes and Paiutes moved into the area. The Navajos, an Athapascan linguistic group, moved from the north into the southwestern part of the United States sometime around 1200 to 1500 A.D. Historical information concerning the Navajos in the southwestern states begins in the 17th century A.D. where mention is made of them at the headwaters of the San Juan River in Colorado (Tr. 2179).

Until 1848, the southwestern area with which we are concerned was Spanish and then Mexican territory. Copies of some ancient maps and documents of Spanish and Mexican derivation were presented as exhibits. An historical expert, witness for the State, praised the historical accuracy of the Miera Map of 1778 of the Dominques-Escalante expedition (State Ex. 39) as showing the Navajos south of the Rio de Navajos, identified as the San Juan River (Tr. 2190-94), and the Utes located north of the river. He indicated that another map (Nav. Ex. 100) could not be accepted as accurate without more source data to support it (Tr. 2193-96). Another map, the Urretuia Map of 1769 (Nav. Ex. 105), had no supporting explanatory foundation support and is susceptible to some interpretation, but it has the word "Navajo" written below the river and "Provincia de" above

the river. The witness identified the Chuska Mountain area of Arizona and New Mexico as the heartland region of the Navajos (Tr. 2179).

The United States acquired the Mexican territory in 1848 by the Treaty of Guadalupe Hidalgo, 9 Stat. 922. The Director summarized some of the events following that acquisition, which led to the 1868 Navajo Treaty:

* * * difficulties arose between the Navajo and the white settlers and resulted in several military operations which consummated in the Kit Carson campaign of the 1860's (Tr. 2179). It was Carson's objective to remove the Navajos from the area. This he partly accomplished in 1864 when perhaps half of the Navajos were marched to Fort Sumner in New Mexico and were there confined. Some of the Navajos escaped this fate and moved into hiding in remote areas such as the canyon country near Navajo Mountain. The Fort Sumner confinement and military campaigns very probably account for much of the initial movement of the Navajos north toward the San Juan River (Tr. 2180).

Most of the archival material dealing with the Four Corners area and Navajo "country" after the United States acquired it is found in military reports and in reports of Indian Agents and the Indian Office. The Gunnison map of 1855 (Nav Ex. 125) shows the Navajos as north of the San Juan River. The word "Navajo" is written between the 110 degrees 30' to 109 degrees 30', parallels of longitude, which area is west of the Aneth area. Other material prior to 1868 could only inferentially, at best, place the Navajos in the Aneth area, and does not

show exclusive occupancy by the Navajos. For example, a letter of May 1, 1851, from the New Mexico Agent Calhoun (Nav Ex. 116), states that the Navajos have or are removing from "Chinle" to the Rio San Juan and pitching their lodges on both sides of the river, and indicating that on the north side of the river, they must mix with the Utahs (Utes). Navajo Ex. 127, a War Department report of November 23, 1858, states that the Utahs killed 10 Navajos on the San Juan north of Carrissa Mountain.

In other reports it is not evident that the area north of the San Juan River pertained to the area in New Mexico and Colorado or Utah. For example, a report of May 7, 1852 (Nav. Ex. 120), indicated that the Navajos were moving north to the San Juan because they were afraid of Apaches. Likewise, a report of July 21, 1853 (Nav. Ex. 121), stated that Navajo criminals had gone north of the San Juan where there were many disaffected Utahs. Further reports of "thieves" or "bad" Navajos being north of the San Juan are found in Nav. Ex. 130. That some Navajos from the San Juan area surrendered to the military to go to Fort Sumner following Kit Carson's campaign is reflected in Nav. Exs. 134 and 135.

There was evidence that some Navajos may have hidden in the southeastern part of Utah and southwestern part of Colorado during Kit Carson's campaign and never went to Fort Sumner. There is insufficient evidence in the entire record, including the testimony of witnesses and archaeological site reports, however, to

establish specific occupancy by such Indians and their descendants on these particular sections of land at that time and prior to 1900.

The Director found generally that the facts did not establish sufficient tribal possession of the area to establish occupancy of the area in question. He concluded that prior to the 1920's the area was a "no man's land" used and shared by white stockmen and traders, a few bands of renegade Utes fleeing from confinement of their Colorado reservation, and some Navajo families seeking pasturage for their livestock. However, in addition to this finding, he ruled, in effect, that if there had been aboriginal occupancy by the Tribe prior to 1868, the Tribe relinquished all right to occupy the territory outside the reservation by the 1868 Treaty.

Effect of 1868 Navajo Treaty

The Tribe makes no argument concerning the effect of the 1868 Treaty upon its aboriginal tribal rights. It had previously alleged that it did not matter whether the occupancy was considered as being in the individual Indians or as tribal occupancy. The Tribe's most recent theory repudiates any significance to the Treaty because it asserts other tribal rights derived from the Utah Enabling Act and governmental policy apart from its aboriginal rights.

Nevertheless, the effect of the Utah Enabling Act and of governmental policy must be considered in relation to the Treaty. The

Director's decision quotes from portions of the Treaty. We need only reemphasize that by Article IX of the Treaty, the Tribe, through its representatives, expressly relinquished all right to occupy any territory outside of the designated reservation area, except for retaining the right to hunt on any unoccupied lands contiguous to their reservation (15 Stat. 669, 670). By Article XIII, the Tribal representatives agreed to make the "reservation their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs." The Tribal representatives also agreed to do all they could to induce Indians away from the reservation, "leading a nomadic life, or engaged in war," to abandon such life and settle permanently in a reservation. It was agreed that if any Indian left the reservation to settle elsewhere he would forfeit all rights, privileges and annuities conferred by the terms of the treaty (15 Stat. 671).

The creation of the reservation following a military campaign and enforced confinement of the Tribe at Fort Sumner was in furtherance of the governmental policy at that time to keep the Navajos from engaging in depredations against non-Indians and other Indian groups. Non-Indians were not thereafter to be allowed within the established reservation boundaries without authorization from government officials (Art. II, 15 Stat. 668). By this segregation it was hoped that peace between the Indians and non-Indians could be

maintained. The latter were increasingly moving into the southwestern part of the country following its acquisition from Mexico. For a discussion of the exclusive governmental rights retained by the Navajo Tribe over the lands within the Treaty reservation see Arizona ex rel. Merrill v. Turtle, 413 F. 2d 683 (9th Cir. 1969), cert. den. 396 U.S. 1003 (1970), and cases cited therein.

It has long been established that Indian tribal aboriginal occupancy rights are extinguished by cession to the United States. Mitchel v. United States, *supra*. The extinguishment of tribal aboriginal rights to lands outside of established reservations has been recognized in more recent times. United States v. Santa Fe Pacific Ry. Co., 314 U.S. 339 (1941). A special three-judge Federal District Court of Arizona in a controversy between the Hopi and Navajo Indians as to lands within an executive order reservation created December 16, 1882, for the Hopi "and such other Indians as the Secretary of the Interior may see fit to settle thereon," specifically discussed the Navajo Treaty of 1868. The court indicated that the Navajos had no rights to lands outside the original reservation except insofar as the Government released them from their agreement when provision was made for them to occupy other lands by an executive order or other administrative order or by a statute. Healing v. Jones, 210 F. Supp. 125, 140 (1962), aff'd, per curiam, Jones v. Healing, 373 U.S. 758 (1963). The Supreme Court of Utah in Young v. Felornia, 121 Utah 646, 244 P.2d 862 (1952), cert. denied, 344 U.S. 886 (1952), also held that the 1868

Treaty bound the entire Navajo tribe and divested each member of aboriginal interests to lands outside the reservation. ^{7/}

^{7/} The action was brought by holders of grazing permits for public lands issued by the Bureau of Land Management, and also of grazing leases from the State of Utah as to school section lands to remove certain Indians from lands in San Juan County, Utah. The Utah Court upheld a summary judgment for the plaintiff although the Indians claimed exclusive grazing and possessory rights based upon their continuous use and occupancy of the land from time immemorial and their allegations that they were a separate band distinct from the Navajo Indians who signed the Treaty. The Court found from their admissions that they were Navajos whose ancestors were connected with the Treaty Indians.

A similar action was brought by the United States to remove the Indians from the land. The United States Court of Appeals for the 10th Circuit overturned a District Court's dismissal of the suit on the ground factual questions had been raised by the Indians' claimed occupancy rights and their claims that they were a separate band of Indians not part of the Navajo Tribe and had no treaty obligations. United States v. Hosteen Tse-Kesi, 191 F.2d 518 (10th Cir. 1951). It ruled that if the Indians were found to be willful and continuous trespassers they should be enjoined and remanded the case for trial. The action was later dismissed by the District Court on June 27, 1953, however, as being moot since the Indians had moved to the reservation.

These two cases are noted by the Supreme Court in Hatahley v. United States, 351 U.S. 173, 175 (1956), which the Tribe has cited as showing a recognition of the long-time occupancy of Navajo Indians in San Juan County. (Portions of the transcript in the Hatahley case were admitted as evidence in the present case, as Nav. Ex. 59). The Indians in these three cases were occupying the McCracken Mesa area which was later added to the Navajo Reservation by the 1958 act in an exchange for reservation lands in Arizona to be used by the United States in connection with the Glen Canyon Dam. The Supreme Court stated at 174 that Indians had lived "from time immemorial in stone and timber hogans on public land in San Juan County". The question presented before the Court was not one of title to the land, but whether the Indians could recover under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq. (1970) for the wrongful destruction of their horses by government employees. The Court held that the individual Indians were entitled to damages since the employees had not given them the requisite notice prescribed by the regulations issued pursuant to the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315 (1970), before destroying the horses. The Court also held that the District Court could not enjoin the United States or its agents from interfering with the Indians. The case, therefore, does not stand as precedent for a

If there was any doubt that Healing v. Jones, *supra*, differed in any respect from the view expressed by the Utah Supreme Court in Young v. Felornia, as to the effect of the 1868 Treaty upon the aboriginal rights of Navajo Indians, that doubt has been removed by a subsequent decision, United States v. Kabinto, 456 F.2d 1087 (9th Cir. 1972), *cert. denied*, 409 U.S. 842 (1972). In Kabinto, the United States sought to eject 16 Navajo Indians within a portion of the Hopi reservation which the Court in Healing ruled belonged exclusively to the Hopi Tribe. The Navajos claimed the Healing decision did not bind them for a number of reasons, including an assertion that they had aboriginal occupancy rights to the land based upon occupancy which arose prior to the 1882 Executive Order establishing the Hopi Reservation. Kabinto held, however, that Healing was res judicata of the question of the extinguishment of their aboriginal claims. The court quoted, at 1090, from an unreported conclusion of law in Healing whereby the special court determined:

Neither the Navajo Indian Tribe nor any individual Navajo Indians, whether or not living in the [Hopi] reservation area in 1882, gained any immediate rights of use and occupancy therein by reason of the issuance of the

fn. 7 (cont.)

recognition of occupancy rights in those Indians superior to the United States' grazing lessees, but, rather, that the Indians' right to have proper notice given before the destruction of their horses was equated with the same right in white men who graze without authorization on public range lands licensed to others.

Executive Order of December 16, 1882, or by reason of any other fact or circumstance, save and except by the exercise, after December 16, 1882, of the authority reserved in the Secretary of the Interior, under the Executive Order of December 16, 1882, to settle other Indians in that reservation.

The Kabinto decision emphasized the power of the United States to extinguish Indian title - the aboriginal right of occupancy. From the quotation above it concluded that Healing had considered the aboriginal claims of the Navajos and decided adversely to them. With reference to a contention that Healing had not discussed Cramer v. United States, which the Tribe relies on in this case, the Court stated at 1090:

* * * In Cramer, the Supreme Court held that Indians who settle upon the public domain and establish residency thereby acquire rights of possession. Cramer, as was United States v. Santa Fe Pacific R. Co., *supra*, was an action brought by the United States to protect Indian title against third parties who also claimed interests from the United States. The question was not the power of the government to extinguish aboriginal Indian title, but whether that power was exercised. Healing determined that it had been.

Therefore, it is clear that by the Navajo Treaty of 1868 the aboriginal occupancy rights of the Navajo Tribe and its members to any land outside the 1868 reservation were extinguished. See also Dubuque & S.C. R.R. v. Des Moines Valley R.R., 109 U.S. 329 (1883). The above quotation illuminates one of the essential differences between the instant case and Cramer and United States v.

Santa Fe Pacific Ry. Co., namely, the fact that in those two cases the rights of the Indians (an individual in Cramer, and the Walapai Tribe in Santa Fe) against third parties (railroad companies or their vendees in both cases), arose because the United States had not extinguished the aboriginal rights. In Cramer a further reason was involved, namely, occupation rights based upon improvements and enclosure of land, similar to settlement claims of non-Indians, as will be discussed further, infra. In Santa Fe the grant to the third party was only of lands which had been voluntarily ceded by the Indians, so there was a further question of voluntariness. Here, however, there are no such differences and the Navajo aboriginal occupancy rights or title had been extinguished by the 1868 Treaty. The rights of the third party, the State, therefore, and the rights of the Tribe are in an entirely different posture.

Archival Evidence of Post-1868 Indian Occupancy of Aneth Area

Before considering the Tribe's contention that the Utah Enabling Act, in effect, created or recognized a further tribal right of occupancy in lands outside the reservation, let us review the manifested facts of Indian occupancy and the manifested governmental actions toward the Navajos that are established by the record. We shall emphasize especially material which is not expressly discussed in the Director's decision. As the Solicitor stated in remanding this case for the hearing, "the resolution of legal principles in areas

which have not been clearly staked out is better done with full knowledge of the facts involved." 72 I.D. 361, 366.

There is little in the archival material presented by the Tribe concerning the decade following the 1868 Treaty. Of some interest is a report dated 1876 of an archaeological expedition by Jackson, entitled "A Notice of the Ancient Ruins in Arizona and Utah Lying About the Rio San Juan" (Nav. Ex. 137). He reported finding a skeleton which he identified as probably being a Navajo by the type of cloth uncovered with the remains. He stated that the Navajos had occupied the country "within the remembrance of the older persons" and were driven beyond the San Juan by the onslaughts of aggressive Utes.

Much of the archival material which can be related to the Aneth area for the years 1879 through 1885 pertains to a settler named H. L. Mitchell, who located a homestead at the mouth of the McElmo Canyon at the San Juan River, and also ran a store and trading post. Reports by military and Indian Office investigators of his alleged troubles with the Navajos bringing their sheep across the river and bothering the non-Indians living at McElmo blamed the troubles upon Mitchell. They indicated he would encourage the Navajos to go off the reservation by giving them "passes" and then complain that the troops were needed so he could sell supplies to the Army (Nav. Exs.

186, 226, 235). ^{8/} By letter of October 14, 1882 (Nav. Ex. 163), the Indian Agent Eastman, told Mitchell not to give the Navajos permits to go off the reservation, but to let them know they must not trespass on settlers' rights.

In a letter of October 31, 1882 (Nav. Ex. 164), Agent Eastman reported to the Commissioner of the Indian Office that Navajos said whites - not Mormons - told them to cross the San Juan River into Utah, but the Agent had ordered them to back to the reservation. At

^{8/} Mitchell first complained in 1879 that 75 whites living at McElmo had been threatened by Navajos who brought 20,000 sheep through their homesteads (Nav. Ex. 144). He also complained at that time in behalf of himself and 50 other "gentiles" that the Indians were friendly with the Mormons but not them, and the Governor of Utah had refused him arms to protect his settlement (Nav. Ex. 145). Military officials investigating the charges were skeptical and seemed to find him getting along well with the Navajos (Tr. 172). They also reported that he stirred up the Indians (Nav. Ex. 178). In 1880, however, his son and another white were killed by Utes or Paiutes (Nav. Exs. 149-53). On December 10, 1883, Infantry Captain Ketchum reported on his expedition in Utah to Bluff, the Montezuma area, and Mitchell's ranch (Nav. Ex. 189). He stated that Mormons were abandoning their ranches close to Mitchell and he had taken care of the incident with the Indians and Mitchell. He ordered the Navajos north of the San Juan to cross the river to their reservation.

In 1884 an incident occurred at Mitchell's ranch in which he killed one Navajo and wounded two others. The next day after Mitchell and his family had fled, Utes and Navajos sacked his place and stole everything (Nav. Ex. 199). They also plundered stores belonging to two other whites (Nav. Ex. 200). Later military reports were to the effect that the incident at Mitchells was not significant, the Navajos were no longer around, and the Utes had returned to their area (Nav. Exs. 205, 206). A subsequent report implicated some Paiutes in the Mitchell affair, part of a group of about 40 Paiute "renegades" who lived in the vicinity of the Blue Mountains, and head waters of Montezuma Creek and Cottonwood Wash (Nav. Ex. 207). Another official stated the Paiutes were less to blame, but that they join the Navajo "in devilry" (Nav. Ex. 208).

that time, Eastman gave some passes to a number of Navajo headmen to hunt off the reservation (Nav. Ex. 165).

In an earlier letter of September 27, 1881 (Nav. Ex. 155), Agent Eastman reported that Navajos living north and west of the reservation had offered to help 40 "penitent" Paiutes in Utah, as they "used to be friends" and had intermarried with their people, but if the Utes returned to their bad life of "thieving and murdering" the Navajos said they would "hang them." A new Agent, Bowman, in December 1884, in response to complaints by settlers from McElmo about the Navajos, stated that the Navajos had a right to go off the reservation to hunt, but were subject to the same laws as the whites. He stated he would attempt to get the Indian police to try to restrain the Indians against making threats of violence (Nav. Exs. 222-24).

By February 23, 1885, Agent Bowman reported on his meetings with settlers and Navajos by the San Juan and stated that all but one problem was resolved, a conflict between a settler who had valuable improvements on the land and an Indian who had none and lived there but part time. He also stated that the whites said only Mitchell caused trouble and made complaints. He indicated that the Navajos were not on the public lands there, but 15 families and their flocks were on the Ute Mountain reservation (Nav. Ex. 227). During the period of 1885 through 1888, a

few other complaints were made by residents of Bluff and McElmo concerning the Indians off the reservation. 9/

Complaints from Utah citizens in 1889 and 1890 concerned Indians in the Blue and LaSal mountains which are north of the area in question here. These complaints involved Utes and Paiutes as well as Navajos. 10/

9/ In November 1885, 21 settlers at Bluff requested that the Navajos be kept south of the San Juan River as they were crossing in great numbers with their stock and crowding off the settlers' stock and eating their grass (Nav. Ex. 239).

In 1887, a trader, Amasa M. Barton, was murdered at Rincon eight miles below Bluff on the San Juan River. Indians later came back and robbed the store. Mormons at Bluff requested a small detachment of troops to capture the murderer and robbers (Nav. Ex. 247).

In 1888, 19 petitioners from McElmo complained about Navajos being off the reservation and stealing. The Agent in his letter of December 15, 1888, reported that the Navajos crossed the river chiefly to trade. He suggested a trading post south of the river would keep them there (Nav. 249). Indian Agent Patterson responded that he would send his Navajo police to the area to keep the Navajos on the reservation. He didn't want them to cross the river (Nav. Ex. 251).

10/ In the fall of 1889 the Governor of Utah reported that bands of Navajos and Utes were in the Blue Mountains hunting and alarming the citizens (Nav. Ex. 254). The Commissioner asked the Agent to have the chiefs and headmen return the Navajos to the reservation. The Indian Agent at the Southern Ute and Jicarilla Agency indicated the Ute Chiefs denied any trouble (Nav. Ex. 255). The Acting Commissioner of the Indian Office in a letter of November 7, 1889 (Nav. Ex. 257), to the Secretary of the Interior stated that 75 to 100 Navajos were reported off the reservation in Utah and that he recommended that the Secretary of War have the military return them. In a letter of December 11, 1889 (Nav. Ex. 258), he also ordered the Indian Agent to remove Navajos found within the Ute Agency and to avoid troubles with the whites. The military report of the investigation into the Blue Mountains in 1889 (Nav. Ex. 259), stated the cowboys complained that the Indians ran their cattle out of the mountains and made them wild. It also stated that the Navajos and Utes were hostile with one another. The Navajos would kill deer for the hides only while the Utes would use the meat. The report suggested possible danger to non-Indians, as well, if the two groups fought each other. Except for a "renegade" band of Paiutes, the other Indians returned to their reservations. Trouble also occurred between whites and Indians in San Juan County, New Mexico, resulting

In 1893 trouble between the non-Indians and Navajos along the San Juan occurred in an incident at River View, Utah, but primarily involved the Indians in New Mexico, including the murder of a non-Indian there (Nav. Exs. 269-89). The new Indian Agent Plummer requested permanent military troops at Fruitland, New Mexico, as the Indians were increasingly stealing cattle and sheep outside the reservation. He requested military patrols to arrest Navajos north of the San Juan without passes, and advised that the Navajos' activities off the reservation should be confined to legitimate trading, because they had driven their sheep through others' pastures, killed

fn. 10 (cont.)

in a cowboy killing a Navajo. To avoid further trouble the Agent reported he would get 25 Navajo families who were off the reservation to return (Nav. Ex. 260). On March 4, 1890 (Nav. Ex. 262), Agent Vandever reported to the Commissioner that he would enforce the Commissioner's order to return the Indians to the reservation except for those individual Indians off the reservation who had settled upon government land with the intention of complying with the land laws.

In 1890, petitions by citizens of Grand County and San Juan County, Utah, complained that roving bands of Utes and Paiutes and some Navajos were stealing their stock, produce from their farms, killing game for hides alone, and causing the settlers to be in fear. This was in the area of the Blue and LaSal Mountains (Nav. Ex. 263). Vandever reported that he had sent his police to get the Indians to come in (Nav. Ex. 264). The Indians told them they had been living on claims from 12 to 21 years and intended to remain there. He declared he was powerless to do anything and they remained on their settlements. A rough draft of a reply to Vandever's report stated it was the policy not to force any Indian who had taken up his residence, separate and apart from his tribe to live on a reservation, that any Indian who had "made valuable improvements upon any particular tract and desires to continue in occupation thereof and obtain title thereto should be encouraged to do so and assisted, but that bands of Indians who merely roamed around with their flocks of sheep and goats should be placed on the reservation" (Attach. to Nav. Ex. 264).

cattle, and brought liquor back to the reservation (Nav. Ex. 289). In June 1893 he also instructed a "Farmer", employed by the Indian Agency to help the Indians, to try to keep the Indians on the reservation and to have them trade only with traders on their side of the river (Nav. Ex. 286).

In November 1893 Plummer received complaints from settlers at River View, Utah, (close to the Colorado border on the San Juan River) that the Navajos were north of the river depleting the range and killing game (Nav. Ex. 296). He ordered the farmer at Fruitland, New Mexico, to go to Utah and arrest any Indians found outside the reservation without passes and impound their stock. He indicated that he had given a few passes to Navajos to hunt in the Ute and Blue Mountains (Id. and Nav. Ex. 298). He also recommended Bluff as the best place for interested lady missionaries to teach the Indians, as it was located across the river from the reservation and was visited by many Indians throughout the year (Nav. Ex. 297). In the spring of 1894 Plummer oversaw the placing of a teacher for the Indians at Bluff (Nav. Exs. 310, 311).

That year in response to other complaints from citizens of Utah concerning the Navajos, Plummer sent the "Additional Farmer" from Fruitland, New Mexico, to Bluff to tell the Navajos to stay on their

side of the river except when trading, and if they were arrested, he could not and would not help them (Nav. Ex. 314).

In the 1890's there was agitation by settlers and others in Colorado to remove the Utes from their reservation in southwestern Colorado and to place them in a reservation in San Juan County, Utah. This proposed new Ute reservation would include land within the 1884 Executive Order addition to the Navajo reservation as well as public lands. Plummer in a letter of March 13, 1894, to the Commissioner (Nav. Ex. 309) strongly protested against the proposal. He pointed out it would give the most isolated portion of the Navajo Reservation to the Utes, that the greater part of liquor traffic with the Navajos was carried out from shelter afforded by the present Ute reservation, and that the opportunity for lawlessness of all kinds would be increased by giving them an almost impregnable asylum. 11/

11/ He stated that in San Juan County, Utah, 8 Utes had "foiled" about 180 white men, soldiers and volunteers. He indicated that the Navajos living in that section of the reservation so far from the agency headquarters and separated by almost impassable rocky country were the least controlled and the area had proved an asylum for outlaws from all parts of the Tribe. To give these people San Juan County would be a further outlet where whiskey could be obtained. He believed the proposed Ute reservation in San Juan County, Utah, was not in the best interests of the Navajos, the Utes, the Government and settlers adjoining the reservations (Nav. Ex. 309).

An Eastern establishment, the Indian Rights Association, published a report in 1892 (State Ex. 40), also objecting to the proposal following a tour by its committee of the area. The area is described as a "no-man's land", but no Navajo settlements in the area are mentioned.

Citizens of San Juan County, Utah, also objected to the proposal and stated that the Utes were acting insolently and threatening the whites to leave. They suggested people were deceiving the Utes into believing they would be given San Juan County, Utah, as a reservation, and large annuities (Nav. Ex. 313). The Ute Indian Agent responded by letter of July 3, 1894 (Nav. Ex. 312), that the Utes went upon the public domain in Utah for forage because of encroachments on their reservation.

The Governor of Utah complained to the Secretary of the Interior that 300 to 500 Indians from the Southern Ute Reservation and 200 to 300 Navajos were in combination to oppose the whites in San Juan County, Utah, and requested troops to prevent conflict and bloodshed (Nav. Ex. 317). The Rocky Mountain News reported that landseekers in Colorado were trying to "kick" the Utes into Utah with the encouragement and aid of Ute Agent Day (Nav. Ex. 325). The Durango Democrat and Durango Herald (Nav. Exs. 321, 323) defended the rights of the Indians to graze in the Blue Mountains, indicating that whites had used the forage on the Ute reservation. Ute

Agent Day supported the Utah proposal and reported to the Commissioner that reports were exaggerated, that the Governor of Utah was wrong, and that the cowboys were the hostile element (Nav. Ex. 327, 328). The Governor of Utah, however, complained to the Secretary of the Interior that Agent Day was causing the trouble by telling the Utes to go out on the public land in Utah (Nav. Ex. 320).

Agent Day further reported to the Commissioner on December 14, 1894, that there were no people between Bluff and Monticello, only a few cattle companies and a few Utes who had used the winter range (Nav. Ex. 334). He continued his urgings that the Utah area be made the proposed reservation for the Utes as it was held by a few cattle men and renegade whites "worse than Indians," and that only 117 votes were cast in the last election in San Juan County (Nav. Ex. 339). In a military report, dated December 13, 1894, of the situation, Lieutenant Colonel Lawton stated that trouble between the Indians and non-Indians resulted because it was the first time the Indians had come into the Utah area in such large numbers saying they would stay there. He reported that a band of Weeminuchee Utes under Ignacio were returning to the reservation, but a group of about 95 Utes and about 80 Paiutes under Benoow, who had never resided on the Ute Agency, would not move and it would take troops to move them to the reservation and keep them there (Nav. Ex. 341).

In December of 1894, new acting Navajo Agent Williams reported to the Commissioner that the Navajos were in an impoverished condition due to drouths, and had undoubtedly killed non-Indians' cattle and sheep north of the San Juan to keep from starving (Nav. Ex. 329). He stated that a number were off the reservation with their flocks of sheep "trespassing on the impoverished ranges of Utah" and he would order them back on the reservation "although it would be like condemning them and the sheep to death." Id. In January 1895 Williams reported to the Commissioner that 400 to 500 Navajos were destitute and were killing sheep and ponies of others on the reservation and he had received complaints from three places outside the reservation of such killings, that all of the trading posts on the San Juan but one were closed and the one, Noland at River View, Utah (see Nav. Ex. 347), had no trade because the Indians had nothing to sell. He requested food and supplies (Nav. Ex. 344). They were issued (Nav. Exs. 346, 348, 349). A claim by Noland for stock allegedly lost to the Navajos was made (Nav. Ex. 350).

In May 1896 Ute Agent Day reported to the Commissioner that Ignacio requested troops to remove Navajos from the west end of the Southern Ute reservation; they had promised to go early in the spring but now refused and claimed the land as theirs; they were menacing the Utes and monopolizing the pasture and waterholes with their vast herds (Nav. Ex. 351). In August 1896 Navajo Agent Williams reported

that as soon as the Navajos' crops within the Ute Reservation were harvested they would leave (Nav. Ex. 352).

On August 22, 1897, a resident of Holyoke (McElmo), San Juan County, Utah, complained that Navajos' sheep ate her crops and the Navajos threatened her if she attempted to drive the sheep off (Nav. Ex. 355).

Some of the history reflected in the documents for the next two decades concerns Howard R. Antes, who located a small mission at Aneth on the north side of the San Juan River in Utah. He used this as a school, teaching up to 15 Navajo children. He later apparently also operated a trading post.

On November 14, 1898, he complained to the Secretary of the Interior concerning a Fred Adams of Bluff, who claiming to be a county official taxed Navajos for grazing their sheep on the Government land north of the San Juan River. Antes stated that the land was worthless and only inhabited by several traders and two men who had a few acres in cultivation and desired to use the land for grazing themselves. He requested that Indians, or at least the Navajos, be allowed to leave their reservation temporarily to get subsistence for their flocks and that they be exempt from taxation (Nav. Ex. 358). By letter of December 2, 1898 (Nav. Ex. 359),

the Commissioner reported to the Secretary of Interior that for several years "a few of the Navajos and a number of Southern Utes as well, have been finding subsistence for their flocks in San Juan County, and this with the tacit consent of the office." He stated that as wards of the Government they should be permitted to graze their stock on public lands and that the county should have no right to impose any grazing license tax upon them. He recommended that Antes be advised to inform the Indians that they should pay no taxes on their flocks to anyone, so long as they are kept upon the unoccupied lands of the United States. He also advised that Antes should lay all the facts relative to Adams' conduct before the prosecuting attorney in San Juan County with a request that he take action. He then stated:

It is not deemed wise to officially notify the Indians of the Navajo Reservation that they are at liberty to leave their reservation when they please to occupy lands outside and they should not be encouraged to do so. A system of irrigation on this reservation is now in course of construction, and when completed, the Indians will have no reason for going outside for grazing or for agricultural land. Id.

The record does not contain the Secretary's response, but Antes in a letter of February 2, 1899, to the Commissioner (Nav. Ex. 361), stated that the Commissioner's letter to the Secretary was forwarded to him with the Secretary's concurrence "that the Navajo Indians could graze their flocks off of their reservation without being

obliged to pay taxes to white men who do not occupy it." He requested that supplies be sent to the destitute Indians. On December 14, 1898, Navajo Agent G. W. Hayzlett reported of complaints from people in Utah of Navajo depredations (Nav. Ex. 360). He also stated that he had written some of the parties that in his opinion the Indians had the same right to occupy and graze on the public lands that the whites had subject, however, to the same laws of the State or territory, as the whites, and that he would ask the Department for advice. He also stated the Navajos were selling their sheep to traders and others but he directed his police to arrest any who did so. He also wrote to Antes on November 2, 1899, to advise the Indians not to sell their stock as once they did, they would have nothing (Nav. Ex. 362). Antes took it upon himself to issue "passes" or "permits" to the Navajos to go on the public lands.

In January 1900 Kate Perkins, Clerk of San Juan County, Utah, complained to the Commissioner that the County derived its revenue from taxing stock, that the range was in bad condition due to drouth and stocked to its utmost capacity, and that the Indians refused to remove their stock across the river because of permits issued by Antes. She asked what authority he had to issue them and enclosed a copy of the "permit" from Antes (Nav. Ex. 365). The Governor of Utah also asked the Secretary of the Interior as to Antes' authority to issue permits. The record does not reflect the Secretary's reply, but it does reflect a letter of January 22, 1900, by the Commissioner to the

Secretary (Nav. Ex. 366 and encls.), which avoids an answer to that specific question, misstated the facts concerning the "permit", and refers to his letter to Hayzlett of March 3, 1899, advising him that:

* * * many persons living in Utah just across the northern boundary line of the Navajo Reservation had complained about the Navajo Indians entering San Juan County with their herds, for the purpose of grazing the same, upon a permit issued to the Navajo Indians by a proper County official of the said County; that in reply he had advised the complainants that in his opinion the Indians had the same right to occupy and graze on the public lands as had the whites provided they comply with the laws governing the whites and he requested that he be instructed in the premises.

In reply, the office, under date of March 3, 1899, advised

him as follows:

In reply you are advised concerning the first subject that this office is of the opinion that Navajo Indians who comply with all the laws of the State of Utah and pay for and obtain a license to own, raise, or pasture their livestock within the lands of the said State, would have just as good a right to do so as have the whites. While you are expected to restrain and prevent so far as practicable Indians under your charge from going off the reservation for such purposes, yet it is very much doubted that you have a legal right to prevent them by force from peaceably leaving the reservation for this purpose. There would seem to be no remedy for this state of affairs except that of using moral suasion and your personal influence over them. Of course, they should be warned that when they leave the limits of their reservation and enter territory within the jurisdiction of Utah they are subject to all its laws and also to arrest and

punishment by the proper state authorities in case they violate any of such laws. If, therefore, the Indians while off the reservation and in Utah commit depredations on the stock of settlers and otherwise annoy them, the stockmen and others must seek relief under the State laws. You are expected, however, to use such influence as you may have over them to cause them to give up these expeditions and stay within the limits of their reservation. * * *

From this report from the Agent, it is thought that the permit referred to by Miss Perkins as giving the Indians permission to graze their cattle is one that has been issued to them upon payment to the proper County officials of a grazing tax or license. If, as is supposed, the Indians have complied with the grazing laws of this County, it is not seen but that they have just as good a right to graze their stock as the whites, provided, of course, that they do so peaceably; and it is hoped that they will in justice be allowed the same privileges as the white stockmen enjoy.

The foregoing contains the most specific references to the San Juan County, Utah, area in the archival materials prior to and during the year 1900. Other materials relate to the Navajos generally.

There is no evidence that the Indians complied with the state laws. For the next decade, the people from Bluff and people involved with the Antes' mission at Aneth figure most predominately in the archival material.

In March 1901 (Nav. Ex. 371), Utah Senator Thomas Kearns reported the Governor of Utah claimed the Navajos and Utes were engaging in depredations. The Ute agent stated that the Utes did not bother anyone and owned few sheep and goats at the Navajo

Spring Agency, but suggested the Navajos were the subjects of the reports because the Navajo reservation was to the south, and many of the Navajos owned large herds of sheep, cattle and ponies, and some grazed their stock in Utah and hunted there. He stated that houses alleged to have been built on the north side of the San Juan River were not built by Utes, nor did any of them have any intention of residing there (Nav. Ex. 372). 12/

In September 1902 settlers at Bluff petitioned the Secretary of the Interior for help for the Navajos who within a radius of 50 to 75 miles of the town were in a destitute condition (Nav. Ex. 375). Indian Agent Hayzlett went from the mouth of McElmo Creek along the San Juan River and requested the Indians to come see him, none said they were hungry and refused an offer of a \$1 a day job with the railroad. He saw few sheep as most of the Navajos had their flocks out in the mountains as there was no grass along the river, but some had crops of melons and pumpkins which "looked good and a number of ditches." He stated that there was not a white settler on either side of the river about Bluff nearer than 70 or 80 miles "still the people in

12/ In May 1901 the Ute Agent found 8 to 10 Navajo families within the Ute Navajo Springs Agency who claimed they had the Navajo Agent's permission to plant crops there that spring. He stated that for the last 5 or 6 years some of the Navajos had done so. He requested the Navajos be informed to stay on their own reservation and asked for their police to remove them. In reply the Navajo Agent at Ft. Defiance stated he had never given the Navajos permission to enter the Ute reservation for any purpose, but asked that they not be removed until they harvested their present crop (Nav. Ex. 373 & Enc.).

the state want the Indians called back to the reservation." He advised them to stay and improve the lands, and make permanent homes if they liked and if they desired to file on the lands, he would assist them. Three said they wanted to remain and make permanent homes, and he asked Antes to assist them with their papers. He asked for additional farmers and additional irrigation development work (Nav. Ex. 377).

Other reports were made of poor conditions of the Navajos. These pertained to Indians inside the reservation, as well as any outside. On November 17, 1902, Hayzlett discounted reports that 6,000 Navajos were starving as the Census Bureau for that "whole district" (apparently the northwestern part of the reservation) showed only 1,747 (Nav. Ex. 381). However, subsequently, he reported that Indians along the mountains and in the Chinle Valley which extends from Cana Desha north to the river opposite Bluff were in need of food, but the Indians along the river were all right (Nav. Ex. 392). This was in agreement with a letter from Mary Eldridge in December 15, 1902, to the same effect (Nav. Ex. 384).

In December 1902, Miss Sophie Hubert who worked at Antes' mission wrote to the Commissioner requesting more schools for the Navajo children. She stated there were 15 children at their school but that there were 50 to 60 more children living within 10 to 12 miles up and down the river (Nav. Ex. 383).

William T. Shelton, Superintendent of the Navajo San Juan School, Farmington, New Mexico, in his letter of April 30, 1904, to the Commissioner reported on a trip to Aneth. He stated that about 95 percent of the Indian country he passed through was a wild, barren, inhospitable waste, devoid of all vegetation, except for an occasional growth of cottonwood trees along the river. The remaining 5 percent consisted of small sandy tracts located here and there along the river; some of which were being cultivated by the Indians when possible to get water and in a most primitive way. He stated:

The general condition of the Indians west of the Four Corners, and along the river where most of the Indians are located, as to ideas, customs, morality and progress, is far below the average of the Navajos heretofore met with.

But those below Aneth and about Bluff City,

with all of their bad points most of them will work when given the opportunity, and if afforded the proper assistance could no doubt accomplish something, as they frequently take out ditches themselves; but which are usually washed out at the first high water, owing largely to their primitive structure.

(Nav. Ex. 397).

On April 18, 1904, Antes asked the President to extend the Navajo reservation north of the river at Aneth (Nav. Ex. 399 Enc.).

He stated that several small bottoms of the San Juan River on its north bank had been occupied by Indians for many years and are occupied by them. He stated that the land was government land subject to settlement, but no filing had been made upon it, although "there have been numerous attempts to settle upon it by white men, but in every case, it has been abandoned as impracticable except that three trading posts have remained." He requested the area to be reserved for the Indians except for the sites of his mission and school and the Aneth Post Office which he conducted. He stated:

The Indians have all along come across the river, from their reservation, and have camped here, and sometimes built themselves cabins and tried to raise crops. No one but Indians want any of this land for homes, and yet there has been more or less friction, and a constant probability of contention and eviction by stockmen who want the whole country for their stock.

The Commissioner questioned whether the Indians would not be amply protected by allotments or Indian homesteads (Nav. Ex. 399).

Superintendent Shelton in his report to the Commissioner, dated July 30, 1904 (Nav. Ex. 403), recommended against allotments or Indian homesteads because of the isolated conditions, the Indians' few opportunities to come in contact with civilized people, and because these Indians were far behind the Indians located on some

other parts of the reservation. Although he had not at that time made a trip to inspect, he recommended the addition to the reservation suggested by Antes. 13/

The March 2, 1905, letter by the Commissioner to the Secretary of the Interior (Nav. Ex. 412) recommended the addition to the reservation and referred to a report by Shelton, dated February 15, 1905, of a recent trip he made into the area. Shelton said he had

13/ Shelton placed on a rough sketch (not included with Nav. Ex. 403, but separate as Nav. Ex. 1) where he had remembered the different settlements of Indians are located along the north side of the river in Utah and inside the boundary in question. He estimated 250 Indians in the area, but said the number may be considerably more or less. He stated he had only been a few miles below the mouth of McElmo Canyon and had little idea of the number and location of the Indians between there and Montezuma Creek. He could remember only one tract of land about 500 acres, which seemed to be of agricultural potential, located 2 miles below the mouth of McElmo Creek, but this would require the "taking out of a good ditch, before it will be of practical use to the Indians." Other small parcels of land up and down the river were in danger of being destroyed by high water at any time. "To more fully demonstrate the poor condition of this land, it has been frequently located and settled upon by white people, who in every instance, have starved out and given it up." The best benefit for the executive order reservation would be to protect grazing land for the Indian stock. He had been told that stockmen near Bluff, "frequently run in thousands of sheep in this section, which eat out what little food there is, leaving the Indian stock to suffer." (Nav. Ex. 403).

A Harriet Peabody (who had been teaching at Aneth for 5 years) in a letter of July 8, 1904, to the Commissioner recommended allotments for the Indians. She had checked the surveys and found that one camp is just below the survey which ends at the Butter Canyon. "Near Aneth the Indians have their lands all fenced, their irrigating ditches made and are doing quite good farming." She couldn't understand why Shelton didn't think they were ready for allotment, but indicated they needed schools and "someone to assist them in their work and to teach them to respect each others rights" (Nav. Ex. 402).

found 250 Navajos living within the boundaries of the proposed area, but no white settlers, except three traders, that the Indians had lived there many years, using the range for grazing their stock, and "although it is very poor grazing land, it would be cruel not to protect their rights and permit them to remain there unmolested." He found no evidence of Indian depredations, only strong exchanges of words between an Indian sheep grazer and a white grazer about sheep. He stated "if whites would stay away and leave the Indians alone there would be no complaints."

The President by Executive Order of March 19, 1905, approved the extension as described by Antes, an area bounded on the north by a line extending from the mouth of the Montezuma Creek eastward to the Colorado state line (Nav. Ex. 399). Because of difficulties involved in surveying the boundary of the extension of the reservation as described in that order, a new executive order modifying the description was recommended to conform to survey lines (Nav. Ex. 415, 416), and approved as Executive Order No. 324A of May 15, 1905. 2 NAVAJO TRIBAL CODE 342 (1970).

Protests against the 1905 Executive Order addition to the Navajo reservation were made by the Commissioners of San Juan County, Utah (Nav. Ex. 420), and the two senators from Utah, George Sutherland and Reed Smoot (Nav. Ex. 421). One of the

concerns of the Utah people was that further reservations in Utah would be created and Indians from Colorado and Arizona would be moved in as had happened years previously when a large number of White River Utes were taken out of Colorado and brought into Utah in the Uncompahgre Reservation in Uintah County. The Acting Commissioner responded by saying:

The office is not aware that any steps have been taken looking to the withdrawal from sale and settlement and setting apart for Indian purposes, any other small reserves or reservations of any kind * * * Should application be made for such purpose upon the part of the Indians or those interested in their welfare, the matter would receive thorough investigation and very careful consideration before presenting the subject to the Department. It may be added that there is no information now before the office to justify the setting aside of other reserves for Indian purposes in San Juan County, Utah, and that the Office has no present intention of recommending such action (Nav. Ex. 426).

This statement belies any contention that the manifested governmental policy at that time envisaged any withdrawal or governmental appropriation of public lands for Navajos in Utah outside the reservation limits as extended by the 1884 and 1905 Executive Orders. Instead, the necessity for individual Indians to make settlements in accordance with the laws is manifested in a report by Shelton during that same year (Nav. Ex. 423). 14/

14/ Shelton visited Aneth and Bluff following charges made by Harriett Peabody and her friend J. M. Holly, (whom she was trying to get employed as an additional farmer for the Indian Agency

He described two Indian settlements, one by a Navajo Tom, and Jim Joe's camp, 10 miles below Bluff, as follows:

There is not more than 50 acres in either of these tracts and they are practically cultivated in common by the Indians. The farms at both of these camps are mixed up, the Indians farming patches here and there without regard to lines, and it will take some time with a good interpreter to get them to understand that they should each choose a certain amount of land and locate on it permanently in order that it may be legally held by them. Each of the Indians who have farms, with improvements, at these camps should be taken care of when these locations are made, but it will be a difficult matter and will take considerable time to get them to understand the importance and necessity of having their lands laid out to conform to the section lines or in a more regular manner.

I have requested the Surveyor General and the Register of the U.S. Land Office not to permit any white settlers to locate on any of these lands; and will take steps as early as possible to locate the Indians permanently upon the lands.

In addition to giving notice to the Land Office of Indian settlements, notices were also given to Indians who made settlements outside the reservation, warning others not to interfere with their rights.

15/

fn. 14 (cont.)

at Aneth), that Mormons from Bluff were removing Indian fences and house logs and blocking their roads (Nav. Exs. 408, 411). After investigating the charges, Shelton reported July 25, 1905, that there had been no such trouble, that the Indians said they had no trouble about roads or fencing, and that they had sold some poles and old logs to the people at bluff (Nav. Ex. 423).

15/ See, e.g. Nav. Ex. 427 of that same year. Similar notices had been issued earlier to protect Navajos outside the reservation in

The understanding that the extension of the reservation by the executive order would not affect prior rights and also the fact that there had been exploratory mining activities along the San Juan River is reflected by a report by Shelton in that year (Nav. Ex. 419). 16/

Proposals for schools for the Navajo children in Utah gave two locations: one at Bluff where the citizens offered to sell the town improvements to the Agency (Nav. Ex. 430), and at Aneth, where Antes maintained his small school. In 1905 Superintendent Shelton had recommended the establishment of a boarding school at Aneth, saying that there were "something near a thousand Indians living in the section contiguous to this point", that those Indians were more ignorant and less progressive than those on other parts of the reservation (Nav. Ex. 407). No action was then taken.

fn. 15 (cont.)

other areas who had settled and made improvements deemed in compliance with the homestead laws, e.g. Nav. Exs. 301, 304-306, in 1894, and Nav. Exs. 174, and 181 in 1883.

16/ On June 13, 1905, Shelton reported to the Commissioner that there were 113 placer mining claims within the new addition to the reservation which he would investigate (Nav. Ex. 419). On July 24, 1905, he reported that the mining claims were located in 1904, except for two groups of claims of 160 acres each on March 9th and 10th, 1905. He recommended that if the claimants had filed on the property in accordance with the laws they be permitted to work their claims as they were not located on the lands occupied and used by the Indians. He believed the mining claimants would soon give up, as "numerous attempts" had been made to extract flaked and flour gold from the sand and gravel in the river. He also believed the claimants were interested in obtaining eastern capital and then selling the claims, but felt that if they were required to do their assessment work and to comply strictly with the mining laws, they would not be on the reservation longer than one year.

In 1907 Antes closed his mission school (Nav. Ex. 433) and requested the Government to protect his property from the erosion by the river (Nav. Ex. 434). Of course, at this time, the area was within the 1905 executive order reservation. On February 13, 1907, Shelton described the Aneth area at the mouth of McElmo Creek as 500 acres of river bottom land on which 30 families of Indians lived year round with permanent homes and improvements and 200 acres cultivated. He requested \$1,000 for riprapping to prevent river erosion (Nav. Ex. 436). However, on April 16, 1907, Shelton recommended against the preventive work as the river had already carried away much of the land and property, only one Indian would be affected and it was cheaper to move him than to take protective action against the river (Nav. Ex. 441). On June 10, 1907, Shelton reported only one family remained at Aneth, the rest were all scattered (Nav. Ex. 495).

Sometime prior to 1916 a government school was built at Aneth, but at least as of June 20, 1918, the school was not being used and an inspector recommended against its use, suggesting it would be better to transport the pupils to the San Juan school (Nav. Ex. 554). 17/

17/ A report of a special agent's inspection of the reservation in 1916 indicated that a school had been built at Aneth, apparently to get rid of Antes by buying his old house. The agent criticized the location because of the proximity to the river and its location on the "most barren, desolate and desert looking spot one could find anywhere, * * * far away from the world." He stated that the Indians were anxious to have the school open and were in favor of

In 1907 more complaints were made concerning Indians off the reservation. In response to a letter complaining that the Utes and Navajos were monopolizing the stock range on Montezuma Creek, Shelton stated it had been impossible for him to handle the Indians properly in that section, being located so far away, and he was not in a position to say just "what rights the Indians have off the reservation, or that whites have any more rights than Indians, as he had never been advised" (Nav. Ex. 497).

On July 9, 1907, the supervisor of the then Monticello National Forest, which is north of the 1933 extension area, complained of

fn. 17 (cont.)

educating their children, "although they are the poorest, most backward and most neglected Indians on the Reservation" (Nav. Ex. 551).

Antes by that time was considered a trouble maker. As early as 1899 Antes' reputation was questioned (Nav. Ex. 363). Later Shelton reported he was not to be believed and that he made money presumably from donations to his mission for very little appeared to have been expended on the Indians (Nav. Ex. 472).

In 1907 Antes had made charges against employees of the Indian Office, from the Commissioner to the Superintendent, his wife, the farmer at Aneth, and military personnel and Mrs. Peabody. After an investigation he retracted these charges. Col. Scott of the Army investigated the charges. He found that Antes had a bad reputation, was a trouble maker and had caused some of the unrest among the Navajos at that time (Nav. Ex. 474). Antes' reputation apparently was also not favorable among some of the Indians. In statements many indicated they had never heard of him bringing or sending any provisions to the settlement for the Indians, he had not treated the children at his school well, and had lied concerning conditions of the Indians in that area (Nav. Ex. 442a and Encs.). Antes left the reservation after retracting his charges, but later returned. In 1911, the Superintendent reported Antes was trading with the Indians without authorization, getting their sheep and then grazing them within the reservation without a permit (Nav. Exs. 538a, 543).

about 50 "renegade" Utes and Navajos committing depredations (Nav. Ex. 499). Many of the archival materials from 1907-1909 concern incidents involving a band of Navajos led by Bai'alilii (By-a-lil-le), and Polly, their arrest on the reservation by military forces about four miles from Aneth south of the river, their imprisonment, and subsequent release (Nav. Exs. 442, 445, 446, 474, 489, 514-518). As reflected from these documents this group and their leaders were considered by Government officials to be the major source of trouble between the Navajos and the non-Indians and among other Navajos. 18/

In one of the reports of the military expeditions into San Juan County, Utah, following these difficulties, on August 12, 1908, military personnel stated that the merchant at Bluff had traded with about 950 adult Navajos and 65 Utes at his store the past year (Nav. Ex. 478). He reported the Utes lived in the vicinity and caused trouble, but the Navajos were well-behaved and did not. One-half

18/ By-a-lil-le was reported to be a medicine man and many of the Indians considered him to be a witch and were afraid of him (Nav. Ex. 474, Tr. 419). The Superintendent reported By-a-lil-le tried to influence other Indians against sending their children to school, against restrictions on selling their sheep, and against changes in Navajo marriage customs (primarily to do away with polygamy) (Nav. Ex. 437, see also Tr. 580). Col. Scott reported that the capture of By-a-lil-le was well handled and was warranted as he had made threats to kill the superintendent and farmer, had terrorized neighboring Indians, "had interfered with the peace, order and progress of the community," and he and his followers were well armed. "If therefore the Government desired to maintain its supremacy and give protection to the white settlers in Utah, Colorado and New Mexico, as well as to the law abiding and progressive Indians, the arrest of By-a-lil-le and his supporters was imperative" (Nav. Ex. 474).

of the Navajos had houses within a radius of 60 miles from Bluff, but the remainder roam from place to place having no "permanent section". This could include an area within and without the reservation then established.

In 1910, in addition to minor complaints such as an Indian having a non-Indian's pony (Nav. Ex. 529), while non-Indians took an Indian's cow (Nav. Ex. 526), the Utah Fish and Game Commission complained that Navajos and Utes were violating the State's laws, especially by killing deer in large numbers by driving them over ledges (Nav. Ex. 530). The Commissioner advised local agency authorities to warn the Indians against violating the State's game laws and to tell them they were liable to arrest if they did so. Id. Superintendent Shelton promised to cooperate with the State authorities and to continue to warn Indians not to violate the State laws. He gave some Indians permits to hunt outside the reservation, however (Nav. Ex. 531).

During the next decade, the archival material sheds little light on Navajo occupancy in this area, except for a report by the Navajo Superintendent on November 15, 1917 (Nav. Ex. 553), that a number of Indians were living outside the reservation in Utah, at least four of whom had made considerable improvements and had constructed irrigation work of some value, but white settlers were

beginning to crowd them out (Nav. Ex. 553). He suggested they file Indian homesteads on their improved lands. There is no indication as to just where those Indians were located. 19/

Between 1914 and 1923, the most serious trouble between Indians and non-Indians in San Juan County, Utah, appears to have been with a group of "renegade" Utes and Piutes led by Polk and Posey (Nav. Exs. 552, 556, 560, 562). This group in the past had continually refused to go to the Ute reservation. A proposed solution was to give them allotments. In 1923 a special allotting agent recommended allotments for the Posey Band in Allen Canyon (which he identified as meaning the creek named Allen Canyon, Hammond Canyon, and Cottonwood Creek) (Nav. Ex. 562). These are north and west of the area in question here. About 125 to 150 Utes in the Polk band claimed Montezuma Creek as their home. He stated they had nothing in the nature of improvements, some had raised corn on Montezuma Creek in the past, but they had gone away and the land had been filed on by non-Indians, some had sold what they called their homes to white men, but at present they had nothing, and he did not think a contest could be successful against white men filed on land occupied by the Indians.

19/ In 1911 the Superintendent of the Ute Navajo Springs Agency complained to the Commissioner that Navajos were grazing on the diminished Ute reservation, which adjoins this area to the east (Nav. Ex. 536).

Of most interest here, he indicated that from the Rentz's store in T. 39 S., R. 24 E., south to the mouth of Montezuma Creek the land was occupied by Navajos who lived there all the time and made good use of the land. Id. He made no recommendations for the Polk band as the land in Montezuma Creek north of the store for seven miles was homesteaded.

Pressure for land in the area was increasing by 1921 for the Farmer at McElmo reported that white stockmen were encroaching upon the reservation (Nav. Ex. 559). He stated that the oldtime stockman had been very reasonable and had a tendency to observe the range rights of others, but because the open range was being taken by settlers, the sheep and cattlemen were engaged in a scramble for what range was left. He stated the new and younger elements had decided to defy them claiming they could not be forbidden from herding their stock on the reservation because there was no fence separating the reservation land. The Superintendent advised the Farmer of statutory authority to remove non-Indians from the reservation and to prevent them from trespassing upon it. Id. Much of the archival material in the late 20's and early 1930's pertains to meetings, letters, and reports which led up to the 1933 Act extending the boundaries of the Navajo reservation.

Administrative Policies Toward Navajos Outside the Reservation

We have previously mentioned that the Navajo reservation established by the 1868 Treaty has been enlarged. It is now more than double the size of the 1868 reservation. See the executive orders and statutes adding land to the reservation set out in the appendix in 2 NAVAJO TRIBAL CODE (1970).

The archival materials include some of the requests by the Navajos, and reports and investigations which led up to specific additions to the reservation. Thus, the first Navajo request reflected by the record was made in 1876, with the Navajos claiming their population was growing and there was not sufficient land within the reservation to sustain them. They asked for an addition to the reservation with the Mancos Creek being the north boundary (Nav. Ex. 138). That would have included lands in New Mexico and Colorado in the Four Corners area, but not Utah. That request was not granted, but by Executive Order of October 29, 1878, a large area west of the Treaty reservation was added in Arizona and by Executive Order of January 6, 1880, an addition to the south, west and east was made in Arizona and New Mexico.

From the period of the 1880's, 1890's and early 1900's, reports, often of special investigators of the reservation, or of the Indian

agent in charge, generally stated that many Navajos were living off their reservation. Except for reports that have previously been mentioned, complaints concerning the Navajos appear to have been in the New Mexico or Arizona area. At times the reports recommended additions to the reservation to meet the growing Navajo population needs; other times, they only recommended further appropriations and help, and especially water and irrigation development within the reservation. 20/

20/ For example, on July 31, 1882, Indian Inspector Howard (Nav. Ex. 159), reported at least 8,000 Navajos off the reservation in Arizona and estimated over half the Navajo Tribe was outside the reservation boundaries. He recommended the reservation be extended 100 miles to the west with the north boundary the line between Utah and Arizona, that the Navajos who lived only by stock raising be required to stay on the enlarged reservation, but Navajos who had fixed farms be given special passes and allowed to remain where they were.

In 1883, Agent Riordan stated that the reservation was too small to support the 17,000 Navajos and requested help and resources (Nav. Exs. 169, 170, 175). The next year he took some Navajo chiefs to Washington to present their land problems to officials (Nav. Ex. 193). In 1886 a special agent visited the San Juan area in New Mexico and recommended an expenditure of \$50,000 for irrigation works within the reservation (Nav. Ex. 239). With the development of water and restoration of a small strip of land in New Mexico to the reservation, he believed the reservation could support the Tribe and the Navajos should be brought upon the reservation when water was developed. (This small area had been added to the reservation by Executive Order January 6, 1880. The small strip was opened to the public land laws in 1884, but restored to the reservation in 1886.)

On March 1, 1889, Indian Agent C. E. Vandever, recommended a small extension of the reservation to the south. He generally recommended that all non-resident Indians be compelled to live within the reservation, and keep their flocks and herds within it to avoid trouble between them and white settlers (Nav. Ex. 253).

In July 1892, the Commissioner requested the military to make a survey of the reservation to show the conditions of the people,

It is apparent from the archival material that during this same time period there was some vacillation in the views of the Indian

fn. 20 (cont)

their water resources, etc., so he could make recommendations in view of the friction between the people of New Mexico and Arizona and the Navajos (Nav. Ex. 265). Nav. Ex. 266 is a report of part of this survey by Lieutenant Odon Gurovitz. On the San Juan in Utah he reported that McElmo Creek, Montezuma Creek, Recapture Creek, etc., were then dry. Within the reservation he recommended the irrigation of only one strip near Bluff with the settlers there to receive the contract to do the work and teach the Indians. The report of the Commissioner to the Secretary dated February 10, 1893, requested appropriations for irrigation works, employees, etc., based on the survey reports of the entire reservation area (Nav. Ex. 268). He stated that 9,000 of 18,000 Navajos were off the reservation but shouldn't be returned until the water resources were developed.

In December 29, 1893, Plummer reported to the Commissioner that the reservation and the Indians were in an impoverished condition and requested agricultural supplies and additional farmers. He indicated he received complaints about the Indians leaving the reservation especially to the south and west and recommended extending the reservation to the Little Colorado River on the west and making the southern line an extension of the Moqui (Hopi) reservation. If this were done he suggested the whole tribe could be induced without difficulty to occupy only their own lands (Nav. Ex. 300) (A large area west of the Hopi reservation, created by Executive Order of December 16, 1882, was added to the Navajo reservation in Arizona by Executive Order of January 8, 1900).

As to complaints by an agent for the Atlantic and Pacific Railroad at Gallup, New Mexico, that settlers did not want to purchase intermingled railroad land adjoining lands occupied by the Indians, Plummer stated that he could not do much about the Indians leaving the reservation and suggested the agent help to get further appropriations for the Indians (Nav. Exs. 300, 302). He also requested the Governor of New Mexico to get help in having water developed on the reservation by the Government, suggesting it could support twice the number of Indians "even with their extravagant, improvident habits" (Nav. Ex. 303). He requested an allotting agent especially to help Indians living to the south and east of the reservation (Nav. Ex. 307). Thereafter some allotments were made (Nav. Ex. 308). The need for water and irrigation work to be done within the reservation was emphasized by an inspector of the reservation in 1896 (Nav. Ex. 353). He noted that hundreds of the Navajos were entirely off the reservation.

Office and military personnel concerning Navajos leaving the reservation to graze their herds of sheep, goats, and horses. Prior to 1895, the evidence clearly shows those personnel ordered Navajos who roamed the area with their flocks to return to the reservation, but permitted Indians making settlements to stay and comply with the laws. As the population of the Tribe increased, their flocks increased, and range conditions within the reservation deteriorated, such personnel increasingly recommended either a course of non-action by Government officials or persuasion by "discreet and judicious" means to return the Navajos to the reservation without first using military force (see, e.g., the Acting Secretary of the Interior's letter of April 9, 1887, to the Commissioner (Nav. Ex. 246)). However, until after 1900, if there were complaints in San Juan County, Utah, concerning the Navajos in that area, officials usually ordered them back to the reservation unless they had made a substantial settlement. It is evident that because of the desolation and difficulties in communication and transportation to that

fn. 20 (cont)

An inspection of the Navajo reservation was made in 1901 by a special agent (Nav. Ex. 374) who generally considered the Navajos to be able to take care of themselves with respect to their grazing activities. He stated that many of the flocks were ranged outside of the reservation and changed from summer to winter range "and so far as the agent or his employees are concerned, they have no care or supervision over them." His inspection appeared to be in the New Mexico area, and he recommended that the farming potential of that area be exploited.

area, many of the Indians there received little supervision. At times, as the incidents at Mitchell's ranch and at Antes' mission show, they were influenced to leave the reservation by the inducements of non-Indians. They also left the reservation periodically to trade.

There was no recognition in the evidence that the Tribe had any rights to the land outside the reservation but only that individual Indians could acquire property rights by compliance with the settlement laws, in accordance with the general policy of encouraging individual Indians to make permanent settlements and farms and abandon nomadic or semi-nomadic wandering.

In 1881, Agent Eastman protested against an order by the commanding military officer General William T. Sherman that all Indians living off Indian reservations would be considered "hostiles", and requested the Navajos be excepted as many had always lived off their reservation, especially along the line of the Atlantic and Pacific Railroad (not near the Aneth area) (Nav. Ex. 154). Sherman responded that the reservation as enlarged was big enough to accommodate the Tribe and that he had advised the Navajos at the time of the 1868 Treaty that if they relinquished their tribal rights and adopted white ways they could acquire land outside the reservation (Nav. Ex. 156). This reflects the understanding at that time that if an

Indian gave up his tribal affiliation and became a citizen he could acquire public lands in accordance with the general public land laws.

Some of the archival materials allude or refer specifically to circulars of the General Land Office [now the Bureau of Land Management] giving instructions concerning the protection of Indian occupants of land (Nav. Exs. 213, 214, 219, 221, 240). These circulars were issued following enactment of the 1875 Indian Homestead Act.

Circular dated May 31, 1884, 3 L.D. 371, to the Registers and Receivers of the Land Offices states:

Information having been received from the War Department of attempts of white men to dispossess non-reservation Indians along the Columbia River and other places within the Military Department of the Columbia of the land they have for years occupied and cultivated, and similar information having been received from other sources in reference to other localities where land is occupied by Indians who are making efforts to support themselves by their own labor, you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon.

In order that the homes and improvements of such Indians may be protected, as intended by these instructions, you are directed to ascertain, by whatever means may be at your command, whether any lands in your district are occupied by Indian inhabitants, and the locality of their possession and improvements as near as may be, and to allow no entries or filings upon any such lands. When the fact of Indian occupancy

is denied or doubtful, the proper investigation will be ordered prior to the allowance of adverse claims. Where lands are unsurveyed no appropriation will be allowed within the region of Indian settlements until the surveys have been made and the land occupied by Indians ascertained and defined.

Circular approved October 27, 1887, 6 L.D. 341-42, by the Acting Secretary to the General Land Office Commissioner, Registers and Receivers, and United States Surveyors-general, quoted the May 31, 1884, circular completely and then stated:

The foregoing instructions apply to every land district and to all lands occupied by Indian inhabitants in any part of the public land States and Territories of the United States.

It has been officially represented that these instructions are disregarded, and that public land entries have been allowed upon lands on which Indian inhabitants have their homes and improvements and in some cases where the Indians have so resided for a number of years, cultivating the soil, and making the land their permanent homes.

The allowance of such entries is a violation of the instructions of this Department, an act of inhumanity to defenseless people, and provocative of violence and disturbance.

You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon lands in the possession, occupation, and use of Indian inhabitants, or covered by their homes and improvements, and you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. It is presumed that you know or can ascertain the localities of Indian possession and occupancy in your respective districts and you will make it your duty to do so, and will avail yourselves of all information furnished you by officers of the Indian service.

Surveyors general will instruct their deputies to carefully and fully note all Indian occupations in their returns of surveys hereafter made or reported, and the same must be expressed upon the plats of survey.

For specific instructions concerning the Indian Homestead Act, see Circular of August 23, 1884, 3 L.D. 91. For instructions pertaining to Indian allotments outside reservations under Section 4 of the General Allotment Act of 1887, as amended, see Circular dated June 15, 1896, 22 L.D. 709, as amended by Circular of June 27, 1899, 28 L.D. 569.

Prior to the general instruction to surveyors to note all Indian occupancy in their survey returns given in the Circular of October 27, 1887, specific instructions had been issued by the Commissioner of the General Land Office to the Surveyor General of Utah to instruct his deputies to

* * * note the location and extent of improvements of non-reservation Indians falling within their field of operations, the same to be designated in their notes of survey and on the plats, in order that Registers and Receivers, may be enabled to conform to the requirements of the Circular of May 31, 1884. * * * (Nav. Ex. 61-A).

Similar instructions were given again in 1885 that "Lands in the occupation of Indians or native inhabitants will be carefully delineated." (Nav. Ex. 61-B). Thereafter, similar instructions were

incorporated into the general instructions for surveying the public lands. They were in effect at the time of the Page and Lentz Survey which surveyed the two school sections in question here.

Surveys of the Area

The State has relied on the absence in the survey records of any reference to Navajo occupancy on these sections to support its contention that there was not occupancy of the sections at that time. The Tribe, however, contends that analysis of the entire history of the survey provides evidence of substantial Navajo occupation of the area.

It is evident that the survey contract No. 215, dated October 29, 1897 (Nav. Ex. 356), which included a survey of the town of Bluff, was extended to the areas in question without significant proof of settlers (Nav. Exs. 61-F-H). The fieldnotes of the Page and Lentz survey for the subdivision and meander lines of T. 40 S., R. 24 E., conducted in February 1899, stated there were no settlers in the township

* * * but at one time a small settlement was located at the mouth of Montezuma Wash extending through secs. 31 and 32, the ruins of old cabins mark the places at the time. The township would be considered good grazing

at all seasons of the year. Numerous seeps along the Montezuma Wash supply stock with water * * * (State Ex. 23).

The fieldnotes of the survey of subdivisions of T. 40 S., R. 26 E., also conducted during February 1899, indicated there were no settlers in the township. The township was described generally as fine grazing and range land (State Ex. 25).

In the other surveys made by Page and Lentz at this time, specific reference is made once to Navajo Indians in the fieldnotes of T. 43 S., R. 26 E., to the extent only of indicating that a trading post there dealt with Ute and Navajo Indians (State Ex. 32). Two settlers were noted. Settlers were noted in T. 41 S., R. 25 E., where there was a trading post and post office at Holyoke, and Antes' mission and the McElmo settlement (State Ex. 28). These townships were on the north side of the river from the Navajo reservation and were included in the 1905 extension of the reservation. In T. 41 S., R. 24 E., the fieldnotes indicated there were several claims with buildings and fences along the San Juan River but the settlers had recently moved to Bluff and the town of Montezuma had been abandoned (State Ex. 28). Another abandoned settlement was noted in T. 42 S., R. 26 E., at Riverview, Utah, which was located "during excitement over placer mining, but since abandoned", although two settlers remained in the township (State Ex. 31). Ancient ruins were noted

in T. 40 S., R. 25 E., and the township was stated as fine grazing and range lands, but no settlers were noted (State Ex. 24).

The Tribe points to a field check of the Page and Lentz survey by Edward Faison in 1899. Faison reported missing corners, corners inaccurately placed, etc., concluding that where the surveyors "had reason to believe that their work would be examined, it is splendid, at other places, it bears numerous evidences of gross carelessness" (Nav. Ex. 61-P). Page had accompanied Faison and attempted to justify the missing corners by stating they had been destroyed by Indians, as this was an area used by them for sheep range (Nav. Ex. 369). Faison denied Page's claim that "Ute and Navajo Indians" had destroyed them, as he had found corners in good condition "in the midst of their villages, close to their hogans, along well travelled trails and on the only public road running East and West through the contract, while in the most isolated sections no corners could be found" (Nav. Ex. 61-P). His remarks are not pinpointed to any specific township nor does he distinguish between Utes and Navajos. We note that the public road referred to, from Bluff to Cortez, Colorado, traversed the McElmo Creek section (see plat of T. 40 S., R. 26 E. (State Ex. 7)). Although Faison criticized the accuracy of the surveys as to the monumentation and running of certain lines, he made no criticism of any failure in the Page and Lentz survey to

note Indian occupants, although he had rechecked the area with their fieldnotes. Where and what he meant by "Indian villages" is not known.

Only improvements and cultivation were specifically noted in the Page and Rentz surveys. Lands were noted as being good grazing and range lands, but no reference was made to grazing use either by the non-Indians or Indians. Whether or not this was because grazing use was considered insufficient occupancy to note is not known.

The inaccuracies in the monumentations and running of some of the survey lines takes away from the presumptive weight to be given to the surveys, but not to the extent the Tribe suggests as strongly showing Navajo occupancy where they were not questioned in that regard, and where references to Indians by Faison do not distinguish between Utes and Navajos or show where they were located. The deficiencies of monumentation, etc., noted by Faison were corrected prior to approval of the survey. We note that the Tribe's witness, Edward O. Plummer, in doing his archaeological work, reported he had found all the corners of the McElmo section but only two of the corners of the Montezuma Creek section (Tr. 508-9).

Fieldnotes of a survey executed by Miller and Thoma in 1912, of subdivisions of T. 39 S., R. 25 E., indicated there were no settlers in that township, but stated "Several Navajo Indians who live in

T. 39 S., R. 24 E., have been grazing sheep and goats in the parks and on the mesas." (State Ex. 18). The notes also stated there were no known white settlers in Ts. 36 to 38 S., Rs. 24 to 26 E., but "[t]here are several Ute Indians, living up Montezuma Canon about 12 miles from the road crossing with the Montezuma Canon, who graze sheep and goats in the canon and on ridges" Id. Other surveys by Miller and Thoma that year in the general area refer generally only to unspecified grazing use but do not mention Indians. 21/

Later surveys in the area prior to 1933 generally mention grazing use, but no reference is made of Navajos, although one reference is made of Paiutes. 22/ These surveys tend to show there was

21/ The fieldnotes for T. 39 S., R. 26 E., noted the only improvements were of one settler who had a cabin and corrals, S. Brown, and stated the lands were used for grazing, but not by whom (State Ex. 19). In connection with T. 39 S., Rs. 21, 22, 23 E., fieldnotes mention grazing use, and prehistoric ruins, but no settlers (State Exs. 14-16). The fieldnotes of a survey relating to T. 38 S., R. 22 E., mention cultivation and a fence by a settler (State Ex. 9). There were no settlers mentioned in T. 38 S., R. 23 E., but a spring was noted as used by stockmen and freighters supplying good water for stock (State Ex. 10). 22/ A retracement of the Utah-Colorado boundary line and of the subdivision of T. 38 S., R. 26 E., in 1915, reflected prehistoric ruins, no settlers, but a reservoir and rock cabin used by sheep herders in the winter (State Ex. 13). In surveys in 1919, fieldnotes pertaining to T. 38 S., R. 24 E., indicated two small stone buildings and a corral were used as winter quarters by a cattle company and the land was being used mostly for winter grazing, but not by whom (State Ex. 11); the fieldnotes pertaining to T. 38 S., R. 25 E., noted two settlements and also approximately 40 Paiute Indians in sections 30, 33-35, having small garden plots, wickiups or hogans in canyon bottoms (State Ex. 12). In 1928, a dependent resurvey of the north boundary of T. 41 S., R. 21 E., subdivisions and meanders, noted winter grazing of cattle and sheep, with the forage showing many years of overgrazing, no land suitable for farming, and no settlers (State Ex. 26).

substantial grazing use made throughout the Aneth area, but there are indications much of the grazing was by non-Indians.

The reference in 1912 to "several Navajo Indians" in State Ex. 18 is the strongest indication in all of the information concerning the surveys of Navajo occupancy in the area. That was within a township of the Montezuma Creek area, one township north of the Montezuma section. However, this does not establish that the Navajos were in the disputed section at that time or earlier.

Navajo Allotments in the Area

The Tribe contends that the records of allotments in the Montezuma Creek area provide conclusive evidence of Navajo settlement along Montezuma Creek before 1900. Only two of the allotment applications, however, in that area claimed occupancy prior to 1900. A third, that of Jim Joe, claimed occupancy prior to that time in secs. 11, 12, 14, T. 41 S., R. 20 E., an area west of the Montezuma Creek area and near Bluff. These applications were made in 1923 when the same allotting agent made allotments for the band of Utes and Piutes in Allen Canyon. The application of a son of Burnt House Woman, Hosteen Oh Dee Teel (Dishface), then age 55, claimed occupancy for 35 years (1888) for grazing sheep and planting corn and gardens. He claimed rather substantial improvements on the SW 1/4 sec. 2, T. 39 S., R. 24 E., of a 14 x 30 feet log house, 2 hogans 15 feet in diameter, a sheep

corral and some cultivated land (Nav. Ex. 36A). He also asserted in his affidavit that he had built a log house 12 x 18 feet thirty-five years ago, at which time he had fenced most of the land. Id. The application of Sleepy Bitsee (Sleepy's daughter), age 40, claimed occupancy for 26 years (1897) for grazing sheep, and living on the land in the winter time. She listed the following improvements in the SE 1/4 sec. 16, T. 39 S., R. 24 E., a hogan 18 feet in diameter, a hogan 15 feet in diameter, and a sheep corral 300 feet in diameter (Nav. Ex. 55A). The General Land Office status report indicated that the survey of the land was approved March 8, 1916. The State was notified of the allotment application as it was on a school section and of its right to protest allowance of the allotment, but did not do so. Id. The record is not clear as to whether patent ever issued for this allotment (see Nav. Ex. 55A and B).

Of the other eleven applications by adult Navajos for their own allotments, five showed occupancy beginning prior to 1910 and six showed occupancy beginning after that time. 23/ A statement in the

23/ The names of the allottees, their age, claimed years of occupancy, location, type of use, and improvements are as follows:

1. Sleepy, age 55, 20 years (1903), N 1/2 NW 1/4 sec. 25, T. 39 S., R. 24 E., several acres of cultivated land, some fences, and a hogan (Nav. Ex. 49).
2. Nagashi Bitoshie (Caroline Rentz), age 50, 20 years (1903) SW 1/4 sec. 25, T. 39 S., R. 24 E., two acres corn cultivated, hogan and some fencing (Nav. Ex. 50).
3. Asthanie Yashie, age 52, 17 years (1906), E 1/2 E 1/2 sec. 17, T. 40 S., R. 24 E., a hogan and a wire corral, grazing sheep use (Nav. Ex. 44).

Director's decision that the only allotment in T. 40 S., R. 24 E., was to Jelly in section 30 is corrected to show the allotments indicated in note 23 to the adult Navajos in that township. There were additional allotments to minor children.

The closest allotments to the disputed Montezuma Creek section are those of Asthanie Yashie in the E 1/2 E 1/2 sec. 17, adjoining that section, and of two for her minor children in the SE 1/4 sec. 8 and the NE 1/4 sec. 20, T. 40 S., R. 24 E., which corner the disputed section (see State Ex. 2). She was the daughter of Burnt House Woman

fn. 23 (cont.)

4. Whitehair, age 51, 15 years (1908), S 1/2 NW 1/4 sec. 25, T. 39 S., R. 24 E., used land for grazing sheep and growing corn (Nav. Ex. 39).

5. Whitehorse, age 51, 14 years (1909), SE 1/4 SE 1/4 sec. 30, T. 40 S., R. 24 E., 14 years (1909), a log house 16x30, log stable, two hogans, five acres of gardens, fences and irrigation ditches used for garden and sheep raising (Nav. Ex. 47).

6. Jellie, age 46, 12 years (1911), S 1/2 NE 1/4 and N 1/2 SE 1/4 sec. 30, T. 40 S., R. 24 E., stone house 14x16, hogan 16 feet diameter, garden and sheep raising (Nav. Ex. 46).

7. Jane Begodie, age 45, 8 years (1915), SE 1/4 sec. 26, T. 39 S., R. 24 E., hogan, sheep corral, well, used for grazing sheep (Nav. Ex. 52).

8. Natani Bega, age 40, 8 years (1915), NE 1/4 sec. 26, T. 39 S., R. 24 E., 15 foot hogan, horse corral, used for grazing sheep and living (Nav. Ex. 45).

9. Mark T. Sone, age 32, two years (1921), SW 1/4 sec. 24, T. 39 S., R. 24 E., 18 foot hogan, 1/2 mile irrigation ditch, some cultivated land, some fencing, used for sheep grazing, planting corn (Nav. Ex. 34).

10. Laura Dechene, age 26, 2 years (1921), SE 1/4 sec. 23, T. 39 S., R. 24 E., for grazing 200 sheep and goats, three acres cleared for cultivating next year.

11. Slim, age 23, 2 years (1921), E 1/2 NW 1/4 and lots 1 & 2, sec. 30, T. 40 S., R. 24 E., three acres corn and garden, 1/4 mile of wire fence, 1/4 mile of irrigation ditch, and summer hogan, used for garden.

and the mother of two of the witnesses for the Tribe, Joe and Tom Biletso (Tr. 163, 221, 224). Tocito Springs, about which much of the testimony of the Navajo witnesses pertains, is within her allotment close to the section 16 line (see Nav. Ex. 10-J-1).

As the Director's decision pointed out, it is significant that allotments made to descendants of Burnt House Woman, were not made of the disputed section, although as the allotment of Sleepy Bitsee indicates, State sections were selected, at least where occupancy was alleged prior to the vesting date of the State's title. It is also significant, that although the Tribe has claimed occupancy by Burnt House Woman and her family around Tocito Springs prior to 1900, Asthanie Yashie who was 52 in 1923, only asserted occupancy of land including the springs which would begin in 1906 (see note 23 and Nav. Ex. 44).

Although some of the allotment applications listed only a grazing usage and a small garden area, others listed some enclosures and dwelling places. A witness for the State questioned whether some of the improvements at that time were as substantial as indicated in the applications and doubted there were other Navajo improvements in the area.

This witness, Neil F. Stull, was an employee of the General Land Office in 1923 and 1924 assigned to investigate the mineral

character of the allotments. During that time he visited each of the allotments (Tr. 1130). In his mineral report, he stated that the area was "desolate and barren", that "the Indians have lived in the region for a great many years and have done some farming and sheep grazing" (State Ex. 1A). He testified, however, that this comment was not from his own knowledge but from what he had been told (Tr. 1150), and that he relied on the statements of the allotting agent as to the adequacy of the settlement and occupancy requirements of the Indians (Tr. 1135-36). He also testified he saw only a few herd of sheep and goats tended by Indian women, no fences to any extent, and no buildings except about three hogans described as made out of native stone, circular, with a hole in the roof, and generally about 15 feet in diameter. He said they were fairly conspicuous (Tr. 1139, 1170). He also explained that as to the allotments selected for the minor children of the adult allottees there was no necessity to build any type of dwellings on those parcels (Tr. 1170-71). No improvements or other acts of settlement are required for allotments for minor children of qualified adult allottees who have maintained settlement on their allotment. Rollandine Ruth Landergen, A-29362 (July 17, 1963). Stull also stated that at that time the area north of the line of the 1905 addition to the Navajo reservation in Utah was known as a Ute area (Tr. 1157). He testified also as to the presence of

another cultural group in the area at that time whom he had seen in his travels through the San Juan County area, Basques, who were migratory sheep owners ranging sizable herds of sheep (Tr. 1132-33, 1160), but were later put out of business when the Taylor Grazing Act became effective. Id.

The allotment sites appear generally to be along the water sources and where there were springs. There is a strong indication that the lands selected were those deemed the best for farming potential (see also Tr. 677), which suggests an expectation of a more permanent settlement and development of the land by the Indians. The Director has indicated the fact allotments were made to descendants of a Navajo named Burnt House Woman, (about whom much of the testimony concerning occupancy, especially, of the Montezuma section, revolves) but they did not select the Montezuma section, supports an inference that the section was not considered their permanent home. As the allotment of Sleepy Bitsee shows, school sections were selected, at least where occupancy was alleged prior to the vesting date of the State's title, and they were at least aware at that time of a means of acquiring title to land outside the reservation. Although the Tribe contends that other Navajos may not have been allotted either because they were away at that time or because the allotting agent did not have time to get to them, the overall testimony of the Navajo witnesses seems to indicate that despite their rather isolated life

news concerning happenings in the area spread. Thus, some of the older Navajo witnesses testified as to their recollections of the surveyors in the area much prior to that time, while others heard of their being in the area. Thus it is realistic to assume, even recognizing the significant cultural differences between the Navajos and the non-Indians at that time, that other Navajos would have heard of the allotments and if they had desired one, would have asked the officials to help them. In any event, the fact that only two of the 13 adult allottees claimed occupancy beginning before 1900, although all were 23 or older in 1923, tends to show there was more occupancy in the area after 1900.

Archaeological Sites

To establish Navajo occupancy of the two disputed sections and the general area around the sections, the Tribe presented some 346 site reports (found in Nav. Exs. 10-A-G) prepared by J. Lee Correll, an anthropologist employed as Director of Field Research for the Tribe (Tr. 1201), David Brugge, employed by the Tribe to do anthropological research (Tr. 1078), with assistance by Edward O. Plummer, head of the Tribe's Land Use and Survey Department (Tr. 491). As indicated by the Director, this team relied heavily upon Navajos who now live in the area to locate and identify the sites of Navajo occupancy. Because there was no timber found on the sites within

the disputed sections and adjoining sections as shown on Nav. Exs. 10-J-1 and 10-J-2, which was susceptible to tree dating (Tr. 1275), they relied on the informants for establishing the date of the use of the site (Tr. 1222-27). Brugge testified that the physical remains shown on the sites were compatible with the information given by the informants (Tr. 1305-06), who were all Navajo Indians (Tr. 1317). Correll described their modus operandi after locating a site and the information recorded (Tr. 1326-37). The site reports generally designated the location by landmarks, prominent features of the terrain, and survey and map information; described each structure or remnant, noting Navajo cultural distinctions; noted pottery, artifacts, trade materials, or other cultural associations which would reflect age and users; would give the informant's history of the use of the site and occupants; and usually included a photograph of the site.

Information concerning the sites and Navajo occupancy outside the disputed sections was presented to establish a pattern of Navajo occupancy north of the San Juan River prior to 1900 and thereafter. Site and other information of occupancy after that date was presented to show continuing occupancy. Many of the site reports where occupancy was alleged prior to 1900 showed no remaining usable structures, only remnants of structures, such as a few scattered pieces of wood or rocks, others showed no remnants whatsoever, reliance being solely upon the informant's statement as to past use.

The large majority of the sites are outside the disputed sections, with many of them being outside the present boundaries of the reservation to the north and west in Utah and north and east in Colorado. A substantial majority of the reports of the sites on or within sections adjoining the disputed sections, as shown located on Nav. Exs. 10-J-1 and 10-J-2, show dates of occupancy of various Navajos beginning after 1900, most after 1920. 24/ This is true with respect to all the sites except a group located considerably north of the disputed area.

To refute the Tribe's evidence, a witness for the State, Dr. Floyd W. Sharrock, Assistant Research Professor in anthropology at the University of Utah testified as to his perusal of the Tribe's site reports and examination of the sites on the disputed sections and adjoining sections. Because the nature and extent of occupancy as reflected by improvements and use is of importance in this case, we shall describe the reports of the sites within the disputed section which indicate occupancy prior to 1900. They shall be referred to only by site number as they are all found within the Tribe's Exhibits 10A-G and arranged by site number. We shall also add some of Dr. Sharrock's comments concerning the sites.

24/ The Tribe's exhibit No. 10-I is a tabulation of the sites summarizing various data from the site reports. We note for the record a substantial, but understandable, error on page 11 of this tabulation in listing sites numbered 135 through 150 as being within T. 40 S., R. 26 E., whereas the reports and Nav. Ex. 10-J-1 show the numbered sites within T. 40 S., R. 24 E.

Nav. Ex. 10-J-2 shows the location of the sites within the McElmo section and adjoining sections. Of the 17 sites within section 16, T. 40 S., R. 26 E., five indicate pre-1900 occupancy, one shows a question as to the age to 1907, and another shows occupancy from 1901-09, the others show occupancy beginning after that time. Site 120 is a spring known as "Bubbling Spring" within section 16 and close to McElmo Creek. Although the site report indicates the spring was developed by Navajos of earlier times and gives a probable age of pre-1900, the other sites in the vicinity of the spring date after that time. Thus, sites 93, 96 and 97, in the same quarter of the disputed section, show structures and occupancy of a probable age of 1943 to present (then 1961), 1943 to 1958, and 1958, respectively. Another report of a site in the same subdivision of the section, Site No. 116, gave a probable age of 1908 with use to 1919, as a summer camp, no farming.

The report of site no. 104, the only other site in that subdivision, gave a question as to the probable age to circa 1907. The report indicates that the site "was only a temporary homesite as they used only tents and had no definite stock corral." Although it indicates the site was occupied by Chii Yashi and his family before the flu epidemic (1918), it states they probably spent about a year at the site and then moved about three miles west. Their move would place them well outside the section. The report indicates

remnants of two shelters and a sheep bedding area. Dr. Sharrock examined the site and stated that artifacts such as tin cans and glass, though not Navajo, could have been used by Navajos as well as others, but the lack of purple coloring in the glass probably dates the site past 1915. From the site report itself, there is nothing to support any dating prior to that time.

Of the four other reports of sites within the McElmo section which give a probable age of pre-1900 or close to that date, one of these for site no. 127, gives a probable age of circa 1901 to 1909. The site report lists three shelters. Photographs of the three shows no more than several rocks and a few wood fragments by a juniper tree.

For site 80, a probable age of 1890's to 1918 is reported with use by a couple who had no children, as one of their camps while grazing sheep in the area. The report describes a rock shelter hogan, with only base stones of the wall remaining, a sheep bedding area, and a lamb pen. Dr. Sharrock testified that the rock shelter was not a shelter hogan, as normally understood, the maximum possible height was never more than three to three and a half feet (Tr. 2094). He saw no charcoal remains or signs of fire use (Tr. 2095). He concluded that the descriptions were exaggerated and there was no evidence conclusively at the site to date it and nothing to show any permanent use (Tr. 2097).

For site No. 103, a probable age of circa 1880 to post 1900 was reported. The structures indicated were a hogan, although no remains of the structure exist, a sheep bedding area, a small draw with two lamb pens at the head of the draw, a windbreak and a shelter, with no structural remains. Dr. Sharrock found only what could have been used as lamb pens. In one of them he found synthetic fibers among the rocks which would date it well into the 20th century. He found no evidence of fires, etc., to show any significant habitation and concluded at most "the site may have been a shortlived camp, more recent than the indicated probable age." (Tr. 2094)

The next site, no. 3, was reported to have been built before 1898 as the hogan, sweathouse and corral area of Hosteen Sleepy. There are differences in the informants' reports: one indicated it was used only in the winters, but that Hosteen Sleepy moved around a lot and had hogans in other places; another indicated Sleepy's family resided at the site for three years, but he also ranged his livestock over a wide area; another indicated he moved to the southeast across the McElmo Creek after the flu epidemic in 1918. If the latter two statements taken together are true, the occupancy must have started well after 1900. The only remnants not destroyed by road and oil well construction are remnants of the sweathouse. Dr. Sharrock observed the sweathouse poles and stated they were in too good a state of preservation to substantiate the probable age indicated in the site report (Tr. 2099).

The last site within the McElmo section for which a pre-1900 date was given in the site report is site no. 111, described as a corraled mesa, five horse trails and a corral. The mesa is within the NW 1/4 of section 16 and the E 1/2 of section 17, and was reported as used for pasturing horses by Navajos and also used by "Paiutes and Utes" when travelling through the area with "permission of the Navajos."

Of some 21 sites within the Montezuma Creek section only four gave probable dates prior to 1900. Site report no. 145 gave a probable age of prior to 1881 to "?" It was reported to have been the residence of Hn. Yidi, husband of Blind Woman who was a daughter of Burnt House Woman, and also to contain a burial place of a Navajo. It reported there was a farm and a playhouse on the site. Dr. Sharrock doubted the evidence of the burial and stated that the farm land was part of the Montezuma Creek bottom, and suggested the site was on the wrong side of Montezuma Creek (if so, it would be within section 17) (Tr. 2078-79). He testified that there was no evidence that the site could be as old as 1881, instead, the evidence that could be dated suggested well into the Twentieth Century (Tr. 2081).

Site report no. 140 gave a probable age of prior to 1900 to circa 1926, used seasonally by Gray-Faced Woman, Kewooshi "Bunion",

her son-in-law, and his wife and children, together with another site (141 in section 15). The family was reported to move about constantly with their large herd of livestock. The indicated structures were a hogan, with only some foundation remaining, two rock shelter corrals, one with a portion of an Anasazi wall. Dr. Sharrock doubted the date as he found no evidence of material which could date the site other than two rubber tires, dated around 1940, and he believed the rock structure remnants from their construction were of an Anasazi site rather than a Navajo site (Tr. 2129-34). Correll testified the rock shelters could have been used by Anasazis, but also by Navajos, and the masonry was Navajo (Tr. 1429-30).

Site 85, with a probable age of pre- and post-1900, was reported to have been the situs of Eddie Nakai's parents' forked-pole hogan, which had been completely obliterated by boulders from a broken stone ledge. There is now a pool dug by the oil company adjacent to the site and Montezuma Creek.

The most important sites are 19A and 19B, with an indicated probable age of late 19th century and post 1900. Nav. Ex. 10-J-1 shows 19A as two different locations, one within section 16 and one within section 17, both on the east side of Montezuma Creek. Site 19B is shown within section 16 on the west side of the hairpin turn of

the Creek. Within site 19A, the report lists three hogans, with only remnants of one remaining, a one-room log house, with the lower part of a stone chimney remaining, three lamb pens, one sunshade (no remains due to road grading), one sweathouse (part of a rock pile, circular depression about five feet in diameter remaining), three corrals (with some remnants). Site 19B is described as a summer camp where sheep were sheared under two large cottonwood trees. The sites were reportedly used by Burnt House Woman and her family, 25/ except the log house was occupied by Joe Biletso's parents. His mother, Azni Yazzie "Short Woman", or Asthanie Yashie as listed on her allotment, was a daughter of Burnt House Woman.

In testifying concerning his examination of sites 19A and B, Dr. Sharrock commented also upon site 136, saying archaeologically the sites could not be separated (Tr. 2069). He suggested that certain structures reported in site 19 were also reported as within site 136, especially the lambing pens and corrals (Tr. 2072). A collapsed hogan site closer to site 19A than site 136,

25/ At least five other sites were indicated as dwelling places of Burnt House Woman within the area of the Montezuma Creek section: site 128, SW 1/4 sec. 22, dated as of 1915; site 192, SE 1/4 sec. 16, dated 1918-22, but also unspecified prior use; site 130, SW 1/4 sec. 15, circa 1912-13 and before; site 133, NE 1/4 sec. 17, site occupied with Slim Todich'ii'nii, grandson-in-law of Burnt House Woman (she is reported here as dying about 1931 but see Big John's testimony which gives the time of her death about 1917 (Tr. 746-47)). Another site, no. 144, SW 1/4 sec. 15, SE 1/4 sec. 16, refers to farm land used by Burnt House Woman, no date given.

but reported in 136, had mill planks and other materials which he indicated would suggest a date after 1930 (Tr. 2073). The Tribe's site report 136 gave a probable age of prior to 1918 to 1947, occupied first by Todichi'ii'nii Tsoh's wife's mother before the 1918 flu epidemic and then lived [~~at~~] by him, his wife and their nine children, and a son-in-law named Frank Johnson, but was abandoned in 1947 following the death of one of the children and Joe Biletso's mother, nearby at site 148 (a windbreak, her burial site is indicated as site 81, also within the disputed section but closer to the section 9 line). The report lists three hogans (only the ring and a few remnants), a corral, four lamb pens, a house (rectangular ground plan, superstructure had been hauled away), a cache under a large sandstone boulder (a corn cob, one horse shoe, two back boards of a cradle board, and three heddle shafts (used for weaving)), and a storage bin (rock shelter three feet wide, 1 1/2 feet deep and eight inches high).

Dr. Sharrock found other cultural material associations, including San Juan Anasazi pottery and chip stone, and historic materials such as pieces of broken glass, which were not Navajo in origin although they might have been used by Navajos (Tr. 2069). He stated that the remnants of hogan 7 listed in site report 19A as within section 16, are actually in section 17, which could readily be assured because the section marker is in the immediate vicinity

12 IBLA 105

*/ **Editor's note: word "at" stricken by eratta -- see headnote at the beginning of this decision.**

(Tr. 2069-72). He doubted that the two large cottonwood trees described in site 19B were "noteworthy trees 60 or 70 years ago" as cottonwood trees grow quite fast and are short-lived (Tr. 2075). He questioned whether the water from Montezuma Creek could have gotten up over the area where Burnt House Woman's hogan was reported to have been or would have washed away all evidence of her occupancy as there were Anasazi pottery and cans and glass on the surface of the area (Tr. 2159). He found considerable evidence that the Anasazi once dwelt in the area (Tr. 2073). Essentially there were no remains which he could identify as distinctively Navajo within site 19 (Tr. 2074). There was some glass which was turning purple which would date it prior to 1915. Id. Both the glass and the Anasazi pottery were on the surface, but he stated there was nothing to indicate the Navajos were responsible for the purple glass being there or for the beer cans which were also there (Tr. 2075).

Generally, Dr. Sharrock testified that the data from the sites he had examined which were reported as turn of the century or earlier "actually refute in most instances, or certainly do not support the contention of that age description" (Tr. 2154). Of the two disputed sections, he testified, "[t]here were no remains predating 1910 and I think 1910 may be a little early there" (Tr. 2155). His opinion that there was not Navajo occupancy prior to 1910 did not pertain to the whole area north of the San Juan River but only as to the two areas of the disputed sections (Tr. 2160).

Even if we were to ignore Dr. Sharrock's characterizations of the sites on the disputed sections, it is apparent from a reading of the site reports pertaining to those sections that there are no physical remains which, by themselves, could be identified and dated as establishing Navajo occupancy prior to and during 1900. Reliance must be, therefore, completely upon the informants to date the sites at that time and, in most cases, to show the existence of any structures whatsoever. As the site reports show on their face, some of the hearsay reports of the informants were contradictory as to dates and location of occupancy, and some would support contrary inferences or conclusions from those which the Tribe draws. For example, with the exception of sites 19A and B, informant statements in other site reports tend to show occupancy by Burnt House Woman in the area after 1900, rather than before; at least, they show her removal from sites 19A and B, as dwelling places thereafter (see note 25).

Some of the Navajo informants identified on the site reports testified at the hearing. Therefore, the hearsay informant statements reflected in the site reports have been evaluated with their testimony and that of the other witnesses and other evidence at the hearing.

Testimony of Elderly Navajos, Utes, and
Non-Indians of the Area

As the Director pointed out, there are irreconcilable differences in the testimony of the Navajo witnesses for the Tribe and the Ute witnesses for the State. This is especially true with respect to their broad generalizations, respectively, that Utes did not live in the area, or that Navajos did not live in the area. When queried more specifically, most witnesses from each Tribe could remember or identify members of the other Tribe within the area, although they would not acknowledge that they "lived" there, at least prior to the 1933 extension of the Navajo reservation to include the area in conflict. The record reflects historical traditions of conflicts between the two groups and cultural differences which might well reflect upon their recollections of observations of peoples and places many decades previously.

There was some conflict in the testimony of the Tribe's witnesses as to the archaeological sites and Dr. Sharrock concerning the reliability of using informants of a particular culture group in doing archaeological research and as to their opinions concerning Navajo occupancy of the area. Dr. Sharrock's comments concerning the use of informants has some bearing upon the difficulties in this case of evaluating the testimony of all of the witnesses, including the

non-Indians, who testified as to their observations of the area, the family, group or tribal traditions relating to the use and occupancy of the area by various people, and may explain some of the contradictions. The Director has quoted Dr. Sharrock's comments suggesting that the Navajo informants' statements were more reliable as to more recent occupation and use, but not reliable as to older events. In addition to the factors of age of witnesses and time span in relation to the events recalled, which affect the reliability of informant information, he indicated that informants from a particular cultural group may not be objective about their own group. He explained this in terms of the general anthropological concept of ethnocentrism - that a person may be least able to understand one's own culture and evaluate its importance because he is "so tied up in it" that he "can't look at it really objectively, only subjectively" (Tr. 2068). Thus, he stated that anthropologists normally study cultures other than their own because they can go and view the other objectively, but as soon as they begin "to feel a real affinity with the group they are studying, then it's time for them to get out". Id.

It is evident that much of the testimony of the witnesses is ethnocentric and that to some extent this tends to explain the obvious blotting out of any significance to the existence of another cultural group. This is particularly illustrated in the discrepancies in testimony between the Navajo and the Ute witnesses as to

the existence of the other group in the area. The Navajos attached extreme importance and individual and group status to the ownership of sizable herds and flocks of livestock, especially sheep and horses (this is evident from the testimony of the witnesses but is particularly reflected in the portion of the transcript of Hatahley v. United States, supra, note 7, submitted as Nav. Ex. 59). Although some Utes had herds and flocks, the records show that many Utes who travelled through the area, subsisted, other than by aid primarily from non-Indians, by hunting game and by gathering wild fruits, berries and edible plant roots. This type of subsistence and the Utes' lack of obvious wealth in Navajo terms of owning livestock degraded the Utes' importance to the Navajos as is reflected in much of the Navajo testimony concerning them.

The Tribe has contended that the testimony of the Utes is so ephemeral that the Utes seem to be an historical apparition, now appearing and then vanishing without leaving a trace, pointing to testimony by a Ute that he had "never stayed in any place more than one month." (Tr. 1578). However, this characterization would also apply to the Navajos. For example, a Navajo witness, a daughter of Burnt House Woman, also indicated that Burnt House Woman would move around with her sheep and wouldn't spend one month in the same place (Tr. 329). In addition to the fact the Navajos were usually wealthier than the Utes in terms of ownership of livestock, they would often

build more substantial structures for their camps which would leave more tangible physical remnants than those of the Utes. Thus, some of their hogans were primarily built of stone or had stone foundations for wooden and mud and brush hogans and sweathouses; whereas, the Utes usually used tents or would make less substantial shelters out of brush, probably comparable to some of the windbreak shelters designated in the Navajo site reports as places of Navajo occupancy. One Navajo witness described the Utes passing through the Tocito Springs area, who "used to arrange branches in a circle and live in them for a while" and then move on (Tr. 401). Utes testified they used the spring, calling it Sandy Spring (see, e.g. Tr. 1752, 1867).

Although there are varying types of Navajo hogans depending on the type of construction material at hand, certain characteristics, such as their circular shape, location of the door to the east, hole in the roof, etc., appear consistent in the evidence. There are, however, differences in the record concerning where the Navajos would locate their hogans and the extent of the time they would spend at the hogan site. For example, the Director's decision quotes from a report entitled "Navajo Houses" contained in the Seventeenth Annual Report of the Bureau of American Ethnology, dated 1895-96 (Nav. Ex. 68), that a hogan would usually be hidden away but near a good fuel supply and not too far from water, although seldom

close to a spring. 26/ At the turn of the century and later, hogans were not necessarily built upon the small areas of land that were farmed along the San Juan River and tributary creeks. 27/ When they were built, they were of a transitory nature as were their farm lands. As late as 1912, in a report on Navajo farming conditions along the San Juan River in New Mexico and Utah, the farmer employed by the Navajo Agency at Shiprock reported it had been impracticable to induce the Indians to build permanent homes and improve the land with permanent irrigation ditches because of the treacherous nature of the river. Crops would be planted at various places at various times, their success depending upon the adequacy of the water (Nav. Ex. 547). He stated:

26/ Of some similarity to this report is a statement by a special agent who investigated difficulties between Indians and non-Indians in the San Juan area of New Mexico (Nav. Ex. 239). Although his comments do not pertain to Utah, his statement casts some light on the life style of the Navajos at that time (Nav. Ex. 237):

"I find that the chief cause of the trouble in the San Juan Country is from the fact that the Indians do not build proper houses upon their lands. Instead of building a cabin or a house fit for permanent residence, the Navajos build "hogans" which consist of a slight excavation in the earth, a rude unplastered and un-mortared stone wall about six feet high covered with a brush roof shingled with clay and containing but a single room. They locate these "hogans" at a distance from water and from their farms, as a rule. When the grass becomes scarce near their "hogans" they drive their herds further up into the mountains or else to a great distance and it may be months before they return to their "hogans". In the meantime, a white man has settled on their farms and fenced in their spring. The Indians claims the land and the right to the water and the white settler relies on his occupation & settlement. This, of course, breeds controversy."

27/ See note 26, supra.

Very few permanent farms have been established in the latter sections referred to. I have known Indians to go thirty miles to plant their crops, and then go back again each time they needed cultivating. It is seldom that the Navajo stock and crops are to be found in the same locality. Their sheep and their camps are usually found where the best grass grows. Their horses and cattle may be twenty or thirty miles away, while their crops may be planted several miles in a different direction. Id.

Some of the testimony of the elderly Navajos would place the hogan sites nearer to water sources. Their testimony, as well as other evidence in the record, establishes the transitory nature of the use of their hogans and of their farming. Farming was done on different sites at different times. For example, Mrs. Susie Jim Hatathley, a daughter of Burnt House Woman, testified that Burnt House Woman raised corn where the new bridge crosses Montezuma Creek in the SW 1/4 of the Montezuma Creek disputed section, but also that she raised corn "down to the San Juan River" (Tr. 332-33). Another witness, Little Wagon, reported Burnt House Woman shared a field in the Coreso mountain area with his father (Tr. 202-03). This was probably prior to 1900 and south of the San Juan River, as that witness testified he moved to the confluence of Montezuma Creek and the San Juan 67 years previously (1899) after moving from the Coreso (Carissa?) mountain area (Tr. 196, 202). Mrs. Hatathley also testified her mother herded sheep from the San Juan River towards Bluff, up to Blanding and near Monticello where they moved for the winter. She added, "[a]t the time there was no Navajos owning

sheep close by. It is not like the present time where there is a lot of people living close together." (Tr. 328). She described Burnt House Woman's home at Tocito Springs as a regular round hogan made out of poles (Tr. 330). In response to a question as to how long the hogan would stand, she stated:

Well, it was this way. They would dismantle those hogans and move it to another place. They didn't just leave it stand at one place and let it stand like that. They would periodically dismantle it and move it again. It didn't remain setting there like they do with the houses * * *. Id.

The Director has quoted her further statement to the effect that in those days the Navajos would simply bundle up everything they had, place it on a horse, and move to another place (Tr. 331).

The transitory character of the occupancy is also reflected in the testimony of most of the other witnesses for the Tribe, including that of Slim Todachiini, whose testimony the Tribe relies upon as establishing that his family were in the area of the disputed Montezuma Creek section prior to 1900. He testified that his parents raised melons, cantaloupe and corn on Montezuma Creek and had some livestock which grazed within a 3-mile radius from Tocito Springs (Tr. 295-96). However, his testimony further indicates that after the one summer after his birth at "Edge of Red Cliffs" south of the San Juan River (Tr. 310), his family moved to another

place south of the river (Tr. 311). The evidence is not clear when his family moved further north. Although he said he saw Burnt House Woman only once, he stated she had a farm and home by the new bridge (Tr. 299), but when asked just where she lived he stated "[S]he didn't live in just one place" and described her herding her sheep in different places and not staying in just one place (Tr. 297).

Although the Tribe has contended, in effect, that the Tocito Springs area was the permanent base camp of Burnt House Woman and some others, the evidence does not support the conclusion that either of the disputed sections was the primary site used by any of the Navajos prior to 1900 or thereafter. This has been explained in part by the Director reflecting upon the Navajos' testimony concerning their "homes" and that it might be consistent with their logic to have many areas considered as their homes at the same time.

There is some testimony which might be read as indicating that the area of Tocito Springs may have been a winter camp for Burnt House Woman (Tr. 298). However, most of the testimony, including that of Burnt House Woman's descendants, and other evidence in the record tends to show that Navajos wintered in other areas when they were outside the reservation where there would be fire wood and shelter, and the immediate areas of the

San Juan River and Montezuma and McElmo Creeks were primarily summer use areas where some farming could be done when conditions were favorable in the creek bottom lands and where water was available (e.g., Tr. 161, 215-16, 333, 369-71, 393-94, 433, 474-76, 661, 701, 730, 871-72). One non-Indian witness for the Tribe, Ira Hatch, a long-time resident in the area, described his observations relating from 1912. He stated that in the winter the Navajos lived at permanent camps with some permanent dwellings from which they did not move (1029, 1054), but in the summer they would go where there was forage for their stock and had only temporary hogans. Id. However, one of the Navajo witnesses stated they had the same kind of houses at winter camps as at summer camps (Tr. 394).

With respect to specific occupancy of the McElmo Creek section, the Tribe has emphasized testimony by Jim Harvey, Robert Lansing, Jack Adiai Neez, Susie Lee and John Rockwell, all older Navajo witnesses. Analysis of their testimony and the other witnesses, however, at best shows transitory grazing use of the general area with use of the water sources in the McElmo section. Nothing can be precisely pinpointed to show tangible occupancy of the disputed section prior to 1900.

As to both sections the Director has discussed some of the specific testimony of the Tribe's witnesses in some detail. We need only add further that many of the direct statements of the

witnesses concerning the occupancy by a given Navajo at the turn of the century were based solely upon family, clan, or tribal tradition as most of the witnesses then alive were only small children in the early 1900's. Some of them did not see the particular Navajo discussed, but indicated he or she had lived in a stated area, presumably because of what others had told them. Other witnesses indicated they saw a given occupant only once or twice. Details as to when and where specific Navajos lived in a stated area are sometimes contradicting. The most specific testimony establishes that the occupancy of any given definite area was transitory. Much of the testimony is simply cumulative and general to the effect that Navajos lived north of the San Juan River between the Montezuma and McElmo Creeks and that other people did not live there. However, some of the specific testimony did indicate the presence of non-Navajos. See, e.g., that of Ben Whitehorse which showed in 1920's that a white man in the area grazed his herds upon the Montezuma Creek section as well as the Indians (Tr. 375-78), and see e.g., that of other witnesses that Utes came through the area (Tr. 400-01, 405, 548, 583, 733, 772).

Among the elderly non-Indian residents of the area who testified, there were some conflicts as to the extent and exclusiveness of the Navajo occupancy in the area. Ira Hatch, a trader with the Navajos,

testified for the Tribe that the Navajos were the only Tribe occupying the area between the Montezuma and McElmo Creeks north of the San Juan River and south of Hatch Trading Post (Tr. 1034). This is denied by the State's witnesses generally. Hatch estimated the total group farms at Montezuma Creek in 1912 or later to be no more than 50 to 100 acres (Tr. 1043). That some of the area was used by non-Indian stockmen from Utah and from Colorado was indicated by Charles Redd (Tr. 2006-23). Other witnesses for the State indicated there were only a few Navajos in the area, mostly along the San Juan River, but they believed the Navajos probably did not occupy the disputed sections in 1900 or for some time thereafter, e.g., Albert R. Lyman (Tr. 1805); Eleanor Ismay (Tr. 1826-30); John Ray Hunt, Jr. (Tr. 1861); J. Monroe Redd, Jr. (Tr. 1942-43, 1957). The Tribe discounts the testimony of these and other witnesses for the State contending they had insufficient opportunity to observe the Navajos in the area.

As with the Navajo witnesses, it is apparent that some of the testimony and opinions of these witnesses to the effect that the Navajos were not the significant group in the area at the turn of the century was based upon their own family and cultural group tradition, history, and stories pertaining to the area, as well as their own observations personally. Some, such as Mrs. Ismay, of the Ismay Trading Post who was raised near the McElmo section as a child and has lived nearby all her life, since the 1920's trading primarily with Utes until more recently with the Navajos,

had good opportunities to observe the area, especially the McElmo area. Her comments to the effect that Utes were a more predominant presence in that area than the Navajos in her childhood are persuasive when considered with all the other evidence in the record which points to that conclusion as to the McElmo section. The Director's characterization of the Navajos having fixed abodes is somewhat generous in view of the evidence which shows there was little permanence to the Navajos' occupancy of any site at the turn of the century and one Navajo could have many different sites for his winter and summer camps, and would move as needed with his flocks of sheep.

With respect to a contention that the Tribe or individual Indians, abandoned the sections, the Tribe has implied the Navajo occupancy in the area was thwarted at times by wrong deeds of the non-Indians in the area, attempting to bring this case within the ambit of Ma-Gee-See v. Johnson, 30 L.D. 125 (1900), where a non-Indian homesteader by gun point, followed by the arrest of the Indian, dispossessed an Indian from his substantial improvements of a farm house, barn, garden, etc. The Indian immediately filed an allotment application and contested the homestead. There is simply no evidence in this case comparable to that. The evidence does not persuasively establish that any Navajo occupying either of the disputed sections was dispossessed from a hogan or farm lands by threats of physical harm.

Prior to 1900, the documentary history we have discussed and some testimony of the witnesses suggest more conflict between the Utes and Paiutes and the Navajos than between the non-Indians and the Navajos (see, e.g., Tr. 772). Except for the incident at Mitchell's ranch (see note 8), there is no evidence of a non-Indian killing a Navajo in Utah, whereas there is evidence of Navajos killing a few non-Indians (see notes 8, 9, also Nav. Exs. 178, 180, 187). The United States engaged in several small military operations in the area when complaints were made by the citizens of the area that Navajos or Utes or Paiutes were committing depredations. These cannot be likened to the Ma-Gee-See situation nor were any of the incidents shown as relating to the disputed sections.

Aside from the United States Government's conducted military operations in the area, the strongest suggestion of any possible actual force being used prior to 1900 is a statement by Albert Lyman that the cowpunchers for the large cattle companies from Texas and elsewhere who operated in San Juan County, Utah, in the 1870's might have fought the Indians, but he stated the settlers in Bluff and Blanding who came into the area after 1880 would not have done so (Deposition 40). He did say, however, that he and other cattle men would have been disturbed to see the Navajo sheep north of the river because of the lack of forage (Dep. 18). He also indicated that the Navajos understood they were to stay on the south side

of the San Juan River, as he saw a man tell a Navajo with her sheep on the north side, "tonaiij", meaning to go to the other side, and the Navajo would move her sheep back across the river (Dep. 14). It is evident that the non-Indians living in the area considered the area north of the San Juan River as public land which they were entitled to graze, while at that time they believed the Navajos were entitled to use only their own lands in the reservation south of the river for grazing, which the non-Indians could not use.

As to post-1900 events there is an indication that one non-Indian, a Jack Majors, in the 1920's or 1930's may have threatened the Navajos and they were fearful of him, although nothing supports some of the Navajos exaggerated statements concerning him (e.g., Tr. 604). By the 1920's as has been indicated, the pressures for use of the federal range had increased by an influx of settlers in the area to the north, expansion of existing cattle operations by non-Indians, and the increase of the Navajos and their flocks of sheep in the area. These pressures led to the expansion of the reservation in 1933 and may have been the focus of some troubles among the conflicting land users. There is some indication that in 1931 or 1932, four Navajo hogans may have been destroyed and poles used by homesteaders north of the area, and some Indian horses killed (Nav. Ex. 616), which had caused bitter feelings

between the Indians and non-Indians, but nothing to show any improvements on the disputed sections were destroyed. Other indications by Navajo witnesses of threats of violence appear to be exaggerated and to stem from the incidents resulting in the Supreme Court decision in Hatahley v. United States, supra (note 7), which occurred well after the passage of the Taylor Grazing Act in 1934, on lands outside the 1933 extension. The actions in killing Navajo horses for trespassing were taken by employees of the United States Grazing Office (now Bureau of Land Management), in enforcing that Act.

As to tribal abandonment of an area so that grants to third parties take effect without any encumbrance of Indian occupancy, see Gonzales v. French, 164 U.S. 338 (1896); Williams v. Chicago, 242 U.S. 434 (1917); Shore v. Shell Petroleum Corp., 60 F.2d 1 (10th Cir. 1932), cert. den., 287 U.S. 656.

Standing of Navajo Tribe to Contest or Protest

Issuance of Patent to the State

With this factual background, we come to a resolution of the legal issues raised in this case. First, we consider the Director's holding that the Tribe is not the proper party in interest to protest the State's application for the confirmatory patent, and that

the Tribe lacks standing because the same occupancy rights in individual Indians which would be sufficient to preclude the vesting of the State's title would, in effect, bar the land from operation of the Act of March 1, 1933, adding "vacant, unreserved, and undisposed of public lands" to the reservation, and section 1(d) of the Act of September 2, 1958, which excepted "valid existing rights" from the declaration of title in trust for the Tribe. The Director stated the Tribe cannot claim title to these school sections for itself by alleging the individual Indian occupancy to defeat the State's title and ignore the effect of that occupancy on its own claim.

It is unnecessary to discuss the contentions of the Tribe and the State on this question to any extent. We have previously indicated that in this appeal the Tribe has taken an additional position that there were tribal rights created by the Utah Enabling Act and tribal occupancy which precluded the grant to the State. This position eliminates its complete reliance on any rights of individual Indians via the doctrine of Cramer v. United States, *supra*.

In any event, if the Director meant the lack of standing in the Tribe to be a jurisdictional defect by which this Department could not entertain its protest, his decision is in error to that extent. We distinguish between the right of the Tribe to have its protest heard and fully considered in this Department and any ruling on the merits of its protest insofar as it asserts title never

passed to the State. As we have indicated, by the Act of June 21, 1934, 43 U.S.C. § 871a (1970), the Secretary of the Interior has a duty to ascertain when title to the numbered school sections vested in the State and any prior conditions, limitations, easements, or rights, if any. In 1965 when the Solicitor ordered a hearing on the Tribe's protest, the rules of practice of this Department provided for private contest proceedings where "any person claimed title to or an interest in land adverse to any other person claiming title to or an interest in such land," or if the elements of a contest were not present, any objection raised to proposed action by the Bureau of Land Management would be deemed a protest and such action would be taken as deemed appropriate in the circumstances, 43 CFR 1852.1-1 and 1-2 (1965). The same rules, renumbered, prevail today, 43 CFR 4.450-1 and 2. The Tribe and the State are considered "persons" within the meaning of these rules. Cf. 43 CFR 1.3 & 2; Sims v. United States, 359 U.S. 108, 112 (1959).

In remanding this case for a hearing, the Solicitor deemed a full hearing on the facts to be appropriate. Full consideration of the appeal from the Director's decision is also appropriate. It is a fact that the disputed sections are now within the exterior boundaries of the Tribe's reservation. It is also a fact that substantial mineral values in the disputed sections are involved, as

well as any other incidental values for the land, which the Tribe has a claim to if the State's claim of title is not sustained. 28/

Therefore, despite any assertions that the Tribe may not have the best claim to the land because of possible superior claims by individual Indians, it has a substantial interest in asserting in its own right or in behalf of its members (but cf. Sioux Tribe of Indians v. United States, 89 Ct. Cl. 31 (1939)) a claim to the land and a challenge to the State's right to the confirmatory patent. This is not comparable to cases involving standing in court proceedings where actual injury to an organization or other legal entity cannot be shown. Cf. Sierra Club v. Morton, 405 U.S. 727 (1972).

Furthermore, it has long been recognized that whether or not in a particular case the United States has the technical status of a guardian or a fiduciary toward an Indian tribe, it does have a special relationship toward such tribe greater than that of a nonparticipating bystander, a sovereign toward its ordinary citizens, or a landowner toward his tenant. Oneida Tribe v. United States,

28/ By the Act of November 20, 1963, 77 Stat. 337, Congress approved a compromise and settlement agreement pertaining to the oil and gas rights in these two sections pending a determination of the disputed title claims between the Tribe and the State, which the Act otherwise did not purport to affect.

165 Ct. Cl. 487 (1964), cert. den. 379 U.S. 946, cited in Navajo Tribe of Indians v. United States, 176 Ct. Cl. 502, 364 F.2d 320, 322 (1966). As this proceeding raises the issue of title to lands within the exterior boundaries of the Navajo reservation, in addition to the duty required under the Act of June 21, 1934, regarding the State's confirmatory patent, this Department has a further duty in view of its special relationship to Indians to assure that the Tribe's claim is fully heard and considered. Therefore, whether this proceeding is deemed a private contest or a protest within the rules of practice of this Department, the Navajo Tribe has been given standing within the Department to challenge the issuance of the confirmatory patent to the State for school sections within the exterior boundaries of the reservation in its own right and for its members regardless of any possible conflicting claims by its members or others. 29/

Because no claims were asserted by any individual Indians in their own behalf as superior to the State and the Tribe following publication of the State's application for patent, it would appear there are no such claimants now entitled to challenge issuance of the patent to the State nor does the evidence reveal any. We, therefore, raise only a quaere as to whether the dictum in the Director's decision was correct in concluding that individual Navajo

29/ But compare the Act of March 2, 1901, 43 U.S.C. § 868 (1970).

Indians might have standing to protest the State's application based upon their own occupancy claims, but it is premature to decide this theoretical issue. 30/

The Director's decision is modified by striking the ruling concerning the standing issue as a ground for dismissal of the Tribe's complaint or protest against the State's patent application, and by modifying the findings and conclusions to conform with our ruling on this issue.

General Findings As to Individual and Tribal Navajo Occupancy

In addition to his ruling on the Tribe's standing, which may well have simply been a further ruling on the merits of the case

30/ We note that support for the position that individual Navajos who were not descendants of Navajos bound by the 1868 Treaty and who may have occupied that area may still have aboriginal occupancy rights, as suggested in United States v. Hosteen Tse-Kesi, *supra*, note 7, is now questionable in view of the subsequent decisions in Healing v. Jones, *supra*, and United States v. Kabinto, *supra*. Any rights of individual Indians in the area as superior to the Tribe, aside from allotted lands, is also questionable in view of the recent *per curiam* order of the Supreme Court in United States v. Jim, Utah v. Jim, 409 U.S. 80 (1972), by which the Court rules that the 1933 Aneth extension Act did not create constitutionally protected property rights in the individual Indians, but gave rights to the Tribe, and that a subsequent Act in 1968, 82 Stat. 121, could broaden the class of beneficiaries under the 1933 Act as to distribution of benefits from mineral royalties. The Court noted that the legislative history of the 1968 Act, specifically, S. REP. NO. 710, 90th Cong., 1st Sess. 2 (1967), reported a difficulty in determining Navajo residents in the Aneth extension, beneficiaries to the fund created by the 1933 Act, since "many Navajo families do not live permanently within the lands set aside in 1933 but move back and forth between this area and other locations."

rather than on the right to appear before the Department, the Director made findings and conclusions on the merits of the Tribe's protest. In considering standards set forth in court decisions, he specifically found there was not occupancy of the disputed sections by Navajos, both in terms of individual Navajos and in terms of Navajo tribal occupancy, sufficient to establish possession and to preclude the State's grant.

As to the individual occupancy, the Director hypothesized that even assuming an extension of the Cramer ruling in the light of the mode of life of the Navajos with the Indians openly asserting dominion over the area encompassing the disputed sections to the exclusion of others, the facts in this case would not support this theoretical situation. He specifically found:

- (1) the individual occupancy on these sections did not begin until after May 1, 1900;
- (2) the area of occupancy judged with respect to the mode of life of the Navajo was vague and indeterminate; and
- (3) the Navajo occupancy was not exclusive nor was dominion asserted.

As to tribal occupancy he cited the standard discussed in United States v. Santa Fe R.R., supra, regarding tribal aboriginal occupancy, as to definable territory occupied exclusively by the

tribe (as distinguished from land wandered over by many tribes), and concluded that there was not sufficient tribal occupancy here, that at most prior to the 1920's the land was only a

* * * no-man's-land used and shared by white stockmen and traders, a few bands of renegade Utes fleeing from the confinement of their Colorado reservations and some Navajo families seeking pasturage for their livestock.

We believe these findings are correct.

In considering the Tribe's contentions, it must be kept in mind that there was no withdrawal of the immediate area embracing these sections for the benefit of the Navajos in 1900. The 1905 executive orders added a small area north of the San Juan River in Utah near the disputed sections, but it was not until the lands were withdrawn in 1932 in aid of the legislation which became the 1933 Act that the area encompassing the disputed sections was set aside for the Navajos and other Indians. This was nearly a third of a century after the time the State's title presumably vested.

Effect of Indian Occupancy and the Utah Enabling Act

Likewise, neither then, nor thereafter, were there any applications filed under the Indian Homestead Act, the General Allotment Act, or any other statute by which property rights could be acquired

from the United States. Therefore, aside from the 1933 and 1958 statutes, which were long after the determinative 1900 date, the only statute upon which the Tribe makes any claim of right under as of 1900 is the disclaimer provision in the Utah Enabling Act as to lands "owned or held by any Indian or Indian tribes." The basic thrust of its supplemental and reply briefs in this appeal relies upon this provision as divesting the State of any right to these sections because of Navajo occupancy of the land. In addition to this statute, the Tribe primarily relies upon a general policy to protect occupancy rights of Indians. It contends that this policy must be recognized here and related to the type of lifestyle, the habits, modes and customs of the Navajos as distinguished from Indians in other parts of the country, such as those in Cramer and Schumacher, and should also be distinguished from standards applicable to occupancy and settlements by white men.

The Tribe amalgamates statements in the court cases regarding individual occupancy rights and tribal aboriginal rights into an additional protected tribal occupancy right which it contends flows from the Utah Enabling Act and court cases pertaining to occupancy rights of Alaska Natives. The amalgamation of undifferentiated concepts and principles from cases with different factual circumstances are fused together under the broad policy of the United States to protect occupancy rights of Indians and a broad rule of statutory construction to construe legislation liberally in favor of the Indians.

a. Statutory Construction Principles

The Tribe's contentions in this appeal relate primarily to the effect of the Utah Enabling Act. It contends, in effect, that the words "owned or held by any Indian or Indian tribes" and "otherwise disposed of" must be construed liberally to benefit Indians. It is unquestioned that courts have often recognized a statutory rule of construction to favor Indians in case of doubt as to the meaning of words in treaties or legislation in their behalf. Squire v. Capoeman, 351 U.S. 1 (1956); and see cases cited in Assiniboine & Sioux Tribes v. Nordwick, 378 F.2d 426 (9th Cir. 1967), cert. den. 389 U.S. 1046. However, the weight due to a rule of statutory construction is but one input into the interpretational equation. The rule of statutory construction in favor of Indians is not sufficient to entitle the Indians here to dispositive deference. As Assiniboine & Sioux Tribes shows, the rule is not inflexible and must give way to other rules of construction where warranted by the circumstances of the case.

United States v. First National Bank, 234 U.S. 245, 259, 262 (1914), would limit the rule of statutory construction in favor of Indians only to treaties or legislation where the consent of the Indians is involved, emphasizing that where legislation contemplated the rights of others and intended to enlarge the right to acquire as well as to part with lands held in trust for the Indians, the Court

would not supply words which Congress omitted "out of any consideration of public policy or desire to promote justice, if such would be the effect in dealing with dependent people." Even where consent of Indians is at issue, the Supreme Court in discussing the rule has suggested it meant no more than that a treaty with Indians would be construed in accordance with the tenor and intent of the parties to the treaty, stopping short of "varying its terms to meet alleged injustices," leaving matters of such "generosity" to Congress. Shoshone Indians v. United States, 324 U.S. 335, 353 (1945). As to whether a jurisdictional act to entertain claims of a specific tribe included lands which had been ceded by the Indians and sold and patented to settlers, the Court considered earlier legislation, administrative acts, and all the circumstances leading to the passage of the Act to interpret the Act. United States v. Creek Nation, 295 U.S. 103, 108 (1935).

The Utah Enabling Act was not simply an Act pertaining to Indians, but was an Act to permit a territory to become a state, to provide the conditions whereby the people of the territory could establish their own government which would be transferred from the federal territorial control to the new state, and other matters, which included the grant of school lands to the new state. As court decisions regarding Indians must be understood with respect to the time they are made and the overall circumstances involved (see FEDERAL INDIAN LAW, supra,

at 23), so must the effect of the Utah Enabling Act. Grants to states for schools have been construed to carry out the intent of Congress. While recognizing the generous policy of the Government with respect to such grants, the Congressional intent as to whether the grant is to take effect must be ascertained by the condition of the country when the acts were passed, as well as the purpose declared on their face, and all parts of the acts should be read together. Johanson v. Washington, 190 U.S. 179 (1903). School grants, in particular that of Utah, have also been interpreted by the Supreme Court in relation to other laws and manifested public policy at the time to determine the extent of the grant. United States v. Sweet, 245 U.S. 563 (1918). Cf. Mobile & O.R.R. v. Tennessee, 153 U.S. 486 (1894), indicating that legislative contracts should be read in light of the public policy entertained at the time they were made rather than at a later period when different ideas and theories may prevail. They have also been construed with respect to facts pertaining to an Indian tribe's aboriginal occupancy rights, the creation of a reservation, and cession of Indian rights, in cases to be discussed, infra.

In short, the interpretation of what lands were deemed to be "owned or held by any Indian or Indian tribes" or "otherwise disposed of" in the Utah Enabling Act, cannot rest alone upon one aspect of the Government's policy toward Indians or upon one rule of statutory construction, but the true legislative intent must be ascertained as of that time in accordance with the usual meaning of the words,

the overall purpose of the Act, and, as we have indicated previously, the overall historical milieu out of which it arose, including the public policy of the time, as well as any court interpretations of comparable provisions in other statutes. This is especially necessary in this case as the Tribe's position sets forth a novel and unprecedented extension of concepts of protection of Indian occupancy in relation to a grant to a third party of land then outside the official boundaries of a reservation for a tribe.

b. Analysis of Sections 3 and 6 of the Utah Enabling Act

In construing the Utah Enabling Act, we first consider the language of the school grant excepting lands subject to it and the disclaimer provision together to understand the entire Congressional intent. The disclaimer provision in section 3 reads:

* * * the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; * * * that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein * * * shall preclude the said State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and

has obtained from the United States or from a person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such Act of Congress may prescribe. (28 Stat. 108)

The school land grant in section 6 provides:

That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain. (28 Stat. 109)

As to the phrase in the disclaimer provision in section 3 of "owned or held by any Indian or Indian tribes," and the words "otherwise disposed of" in the grant in section 6, it is apparent that there is no fixed meaning to these words outside of the context of

the Act and all the aids in interpreting the Act. For example, the word "held" in statutes relating to land often means that land is "owned" but does not ordinarily mean any particular user. However, it has no established primary or legal technical meaning so that its meaning must be determined by the context in which it is used. See cases under "held" in 19 WORDS AND PHRASES (1970). See also cases under "otherwise" and "owned" in 30 WORDS AND PHRASES (1970).

Section 3 refers to the extinguishment of "title" to lands "owned or held by any Indian or Indian Tribes" while the proviso in section 6 refers to the extinguishment of an Indian reservation. The use of the word "title" following the words "owned or held" in the disclaimer provision strongly indicates that Congress had in mind a recognized right in existence at that time or, at the least as to individual Indians, an inchoate right perfectible under existing legislation. If lands had been allotted or otherwise granted to an individual Indian they would fall within the category of "sold or otherwise disposed of" within the excepting language in section 6, and would no longer be public land. Note that in section 3 the phrase "owned or held by any Indian" is repeated as to the State's right to tax the lands of an Indian who has obtained a title to land from the United States or some person "by patent or other grant." This supports an understanding that

Congress envisaged the acquisition of title by individual Indians under the laws then permitting individual Indians to acquire title to lands both inside and outside reservation boundaries. We note that the legislative reports on the disclaimer provision refer to the lands "owned or held by any Indian or Indian tribes" as "such Indian reservation." H.R. REP. NO. 162, 53rd Cong., 1st Sess. 17 (1893); S. REP. NO. 414, 53rd Cong., 2nd Sess. 18 (1894). This indicates that the primary concern of Congress was in requiring the State to relinquish any proprietary interest in those lands which had been set aside as Indian reservations regardless of whether the lands were owned or held by a tribe or had then been allotted to an individual Indian. Cf. Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958), which discussed the legislative history of a similar disclaimer made by the State of New Mexico, indicating that Congress required the disclaimer so as to preclude any possible challenge by the State of "titles" acquired by Indians through grants made by the Governments of Spain or Mexico.

As to the meaning of the word "held" in relation to Indian tribes, the historical perspective is necessary. At the risk of oversimplification it must suffice to say that generally the status

of lands within withdrawals for the benefit of Indians was uncertain in 1894. Thus, whether a tribe was deemed to "own" lands within a treaty or statutory reservation depended upon the specific language used therein. This later led to express statutory language such as that in the 1958 Act pertaining to the Navajo tribe. The status as to executive order withdrawals was even less certain, but they were not considered then as the equivalent of treaty or statutory reservations. See FEDERAL INDIAN LAW, supra, at 613-22; see also Healing v. Jones, supra. The use of the word "held" by an Indian tribe, therefore, would include areas which had been withdrawn for a Tribe but not then considered as falling within the meaning of being "owned" by the Tribe under federal law, although they would be considered as in a reservation and "otherwise disposed of" under section 6 of the Act.

The only other meaning to "held" by an Indian tribe in the context of the Enabling Act is if a tribe's aboriginal occupancy rights had not been extinguished by Congress the tribe's occupancy might be deemed a holding under its aboriginal "title" as determined under the tests for tribal aboriginal occupancy. But see, Shoshone Indians v. United States, supra, at 324 U.S. 346, where the Court indicated that the United States had treated unceded or unrelinquished Shoshone territory in Utah and adjoining states as a part of the public domain in administering the territory as though no Indian land titles were

involved, and expressly referred to the Utah school land grant, 28 Stat. 109, as such a manifestation. In view of the facts of this case, it is unnecessary to decide whether unextinguished and unrecognized aboriginal occupancy could come within the meaning of the Act. It is clear, however, that the reference in both sections 3 and 6 to extinguishing "title" or the "reservation" indicates that Congress was not recognizing any tribal occupancy rights to land which it had already extinguished by treaty or statute or which was not then withdrawn as a reservation for Indians and showed a possibility, in accordance with the overall policy of the time, that existing reservations might be reduced or opened for disposal as public lands. We see nothing in the Utah Enabling Act and in the historical milieu then and in 1900 which indicates that Congress intended to hold in abeyance the State's grant to school lands within an area, where any aboriginal title had been extinguished, where a proportionately few members of a tribe were outside the established reservation boundaries for the tribe and using an even wider undefined area for grazing purposes and certain other limited purposes in a transitory fashion together with Indians from other tribes and with non-Indians also in the area, which is the situation in this case.

It appears that the disclaimer was of lands which would fall within the meaning of lands "otherwise disposed of", or were within a reservation as provided in section 6, and that the two provisions

are in pari materia insofar as determining what lands come within the grant to the State or were excepted from the grant. Therefore, it is essential to determine whether lands would be considered as excepted from the grant because they were "otherwise disposed of" to ascertain the effect of the disclaimer. This conclusion is supported by a consideration of the cases upon which the Tribe relies for its interpretation and other matters essential in ascertaining the true legislative intent. See United States v. Jackson, 280 U.S. 183, 193 (1930).

c. Analysis of Judicial Precedents

One of the most important cases upon which the Tribe relies to establish that protected Indian occupancy may bring the lands within the status of lands "otherwise disposed of" under the terms of the school grant in section 6 of the Utah Enabling Act, 28 Stat. 109, is United States v. Cramer, supra, which held that the possession of a tract of land by individual Indians falls within the clause of the grant to a railroad excepting from its operation lands "reserved * * * or otherwise disposed of." 261 U.S. 219, 230. The Tribe also contends that the Court's reference in Cramer at 228 to the specific 2nd provision in the disclaimer provision in section 3 of Utah's Enabling Act, 28 Stat. 108, which includes Indian tribes as well as individual Indians, indicates that tribal rights were

recognized by Cramer as well as individual rights. The State responds that the rights recognized in Cramer were aboriginal occupancy rights. The Tribe contends that they were not. The quotation from Kabinto, supra, regarding Cramer, suggests they were. In any event, the significant fact is that the Indians in Cramer had no reservation where they could be protected from intrusions of non-Indians. Although a reservation for the Indian tribe had been proposed to Congress, it was rejected and apparently no governmental action was taken to provide for the Indians. The Court equated the individual rights with tribal aboriginal rights by indicating that the policy of protecting "original nomadic tribal occupancy" should apply also to individual Indian occupancy emphasizing "such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life." (Id. at 227.) The Court also distinguished the facts from the case of Buttz v. Northern Pacific R.R., 119 U.S. 55 (1886), which held the fee was granted to the railroad subject to the right of occupancy of Indians and the right of the company immediately attached free from Indian title when the United States thereafter extinguished the Indian title. It indicated that the possession of the Indians in Cramer, however, "was within the policy and with the implied consent of the Government. That possession was definite and substantial in character and open to observation when the railroad

grant was made * * *." Id. at 230. The Court specifically refused to extend the right of the Indians to the entire subdivision but limited it, saying:

Here the claim for the Indians is based upon occupancy alone, and the extent of it is clearly fixed by the inclosure, cultivation and improvements. The evidence does not disclose any act of dominion on their part over, or any claim or assertion of right to, any lands beyond the limits of their actual possessions as thus defined. Under the circumstances, their rights are confined to the limits of actual occupancy and cannot be extended constructively to other lands never possessed or claimed, simply because they form part of the same legal subdivisions. (Id. at 235).

* * * * *

This is in accordance with the general rule that possession alone, without title or color of title confers no right beyond the limits of actual possession. * * * (Id. at 236).

As precedent for any understanding of the phrase "owned or held by any Indian or Indian tribe" in the Utah Enabling Act, the Cramer case would appear to restrict the meaning of "held" to occupancy limited by tangible acts of possession defined by enclosures, cultivation or improvements.

Although the Navajo tribe had an established reservation, whereas the Indians in Cramer did not, the Tribe contends that the standard of occupancy pertaining to the Navajos should be different from Cramer because of the different life style of the

Indians and now because the Tribe is asserting tribal rather than individual rights.

The Tribe relies upon cases regarding Alaska natives to support its contention that there is an additional tribal occupancy right recognized under federal law in addition to the original aboriginal tribal right. Most of the Alaska cases involve interpretations of section 8 of the Alaska Organic Act of May 17, 1884, 23 Stat. 26, pertaining to the then territory of Alaska and which provided:

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for further legislation by Congress. * * *

And, in addition, some of the cases interpret the disclaimer in section 4 of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. Ch. 2 note (1970), which provides in part:

* * * said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the

right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives * * *

The Tribe relies especially upon Miller v. United States, 159 F.2d 997 (9th Cir. 1947), as recognizing Indian rights of occupancy by virtue of section 8 of the Act of May 17, 1884, quoted above, although it rules that aboriginal rights of natives of Alaska had been extinguished by the 1867 purchase treaty between the United States and Russia. It contends that similarly the Utah Enabling Act meant to protect the Indian occupation of the public domain and prevented passage of title to any lands subject to such occupancy. The State points out that in Miller the court expressly distinguished between any tribal type of occupancy and individual rights and recognized only individual rights under the 1884 Act. It also contends that the Miller ruling as to the extinguishment of aboriginal rights has been discredited and overruled by the Supreme Court in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), and Hynes v. Grimes Packing Co., 337 U.S. 86, 106 (1949). The State suggests that the 1884 Act and subsequent legislation pertaining to Alaska merely preserved the right of nondisturbance of the occupancy of the Indians, neither granting nor taking away anything they might otherwise have pending future legislation. Id.; Kake Village v. Egan, 369 U.S. 60 (1962). In response, the Tribe agrees that the 1884 Act pertaining

to Alaska preserved the status quo as to occupancy rights until further Congressional or judicial action was taken, although it was not intended as a grant of permanent rights. Tee-Hit-Ton Indians, *supra*, at 278. It contends that the Utah Enabling Act also preserved the status quo by withholding from Utah any lands occupied by Indians or Indian tribes, and that Congress relinquished its beneficial title to the Tribe by the Act of March 1, 1933, by extending the reservation boundaries to include the area. It contends that the rulings in the Supreme Court cases cited above indicating that there were no compensable rights in the Alaska natives created by such legislation are irrelevant to the question of the protection of their occupancy rights with regard to third persons.

In Kake Village v. Egan, *supra*, the Court discussed the legislative history of the disclaimer provision in section 4 of the Alaska Statehood Act quoted above and found that

[i]t was understood that the disclaimer provision left the State free to choose Indian property if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due.

369 U.S. 65-66. It also found that the provision was suggested by the Interior Department so that Alaska "be dealt with as had other States." *Id.* at 68. Although it indicated that the disclaimer of

right and title by the State was a "disclaimer of proprietary rather than governmental interest," it was the best way to ensure that statehood would neither extinguish nor establish claims by Indians against the United States so that if lands subject to the claim of Indian rights were transferred to the State, the Indians were not thereby to lose the right to make claims against the United States for damages. Id. at 69. Although the case was concerned with State jurisdiction to regulate fishing traps, the discussion does not support any view of the disclaimer provision as creating or confirming occupancy rights in Indians, whose aboriginal rights had been extinguished, which would be superior to a grant of lands to the State. Cf. United States v. Alaska, 197 F. Supp. 834 (D. Alaska 1961).

Another case decided after the Alaska Statehood Act relied on by the Tribe, Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969), did not cite or rely on the disclaimer provision in section 4 of the Act or the discussion in Kake Village regarding the operation of the State grant under that provision; instead, it considered the language in the grant of lands to be selected by the State. The State of Alaska sought summary judgment to compel the Secretary of the Interior to issue it a patent to lands which a native village claimed asserting present and aboriginal use and occupancy. The court found there were genuine issues of material fact to be

decided and refused to then rule as a matter of law "that under no circumstances could Indian trapping, hunting and camping" constitute a condition which would deprive the selected lands of being "vacant, unappropriated and unreserved land" as required by the grant. In making this ruling the court simply noted section 8 of the Act of May 17, 1884. Id. at 940.

The historical uncertainty as to the status of Alaska natives, the nature of any right to lands, and the source of such right was not settled by the dictum in Miller concerning the extinguishment of aboriginal rights by the Alaska purchase treaty and recognition of protection of possessory rights under the 1884 Act. For some discussion of the vacillating policies and views concerning these matters see FEDERAL INDIAN LAW, supra, Chap. XI, B. It is all too evident from the legislative history of the Alaska Native Claims Settlement Act of December 18, 1971, 85 Stat. 688, and the terms of that Act that Congress believed the Alaska natives might have aboriginal land claims which had not been extinguished and for which compensation had not been allowed under the Indian Claims Commission Act, 25 U.S.C. § 70 et seq. (1970). Section 2 of the Alaska Native Claims Settlement Act expressly refers to aboriginal land claims by natives and native groups, and section 4 (85 Stat. 689-90) expressly

extinguished all aboriginal titles and claims of aboriginal title in Alaska based on use and occupancy. 31/

The differences in language between the Alaska 1884 Act and the Utah Enabling Act alone warrant a difference in interpretation. Also, the fact at the time the 1884 Act was passed there was no clear policy concerning the Alaska natives or recognition of what rights they might have differentiates the situation there with the situation pertaining to the Navajos where there had been express provision made for them by a reservation and where there also had been express statutory provision for the creation of individual rights and title to lands outside the reservation under the terms of the Indian Homestead and General Allotment Acts. See Metlakatla Indians v. Egan, 369 U.S. 45 (1962), comparing the situation in Alaska with that in the other states, pointing out that few reservations had been made in Alaska as there had been no need to protect the white settler from the peaceful natives as necessary in the other states. Thus, although court interpretations or applications of Alaska native possessory rights recognized under the 1884 Act, and

31/ Section 2(d) of the Act stated:

"No provision of this Act shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians * * *."

subsequent acts, including the Alaska Statehood Act, are of interest, these differences must be kept in mind because they are reasons for more generous rulings concerning the protection of native occupancy rights than where treaty reservations had been created for a tribe. See an application of this with respect to Departmental regulations to prescribe the necessary occupancy for Alaska natives under the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-71 (1970), Acting Solicitor's Opinion of September 21, 1964, 71 I.D. 340.

Thus, as we have held, the words "owned or held by any Indian or Indian tribes" in the Utah Enabling Act must be considered in light of the existing situation pertaining to Utah and the Indians in that area. Likewise, the provision in the Alaska 1884 Act that "Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them" is considered in light of the situation prevailing in Alaska at that time. In addition to the fact no general provision had been made for the Indians either by reservations or legislation whereby title to the federal lands could be acquired, in 1884 the general public land laws applicable to the other territories and states were not extended to Alaska, except the mining laws, and the possession of non-Indians as well as Alaska natives was therefore protected by the Act as well. In addition to the

then unresolved question as to any aboriginal native claims which prevailed, there was the analogous question of rights of non-Indian settlers, occupants and users of the land, and the Act broadly provided for the non-disturbance of all in that category as of 1884. Cf. Heckman v. Sutter, 119 F. 83 (9th Cir. 1902); Russian American Co. v. United States, 199 U.S. 570 (1905). That Act arose out of different circumstances from the Utah Enabling Act and may not be construed in pari materia with it. Cf. Acting Solicitor's Opinion of September 21, 1964, supra.

As to the standard of occupancy required for recognition of the Indians' occupancy rights the Tribe attempts to find analogies in the facts of the cases pertaining to Alaska natives. The State, however, contends that the standards as enunciated by these cases require proof that the possession or occupancy is exclusive; notorious; of such a nature as to leave visible evidence thereof so as to put strangers on notice that the land is occupied; that the extent of the possession or occupancy must be reasonably apparent; and it must be substantial. As indicated, the Tribe has contended that the particular type of lifestyle of the Indians involved must be the basis for the standard by which the occupancy is recognized citing Mitchel v. United States, supra, and United States v. Santa Fe Pacific R.R. Co., supra. These cases, as the Director indicated, pertained to aboriginal tribal occupancy. Santa Fe expressly used

a standard of "exclusive" occupancy. The Tribe states that words such as "exclusive" and "notorious" are rich in meaning in Anglo-Saxon legal tradition but are inapplicable to the traditional pastoral mode of life of the Navajos or the mode of life of the Alaska natives.

From a statement in United States v. Alaska, 201 F. Supp. 796 (D. Alaska 1962), the Tribe coins its own standard as to the test to be applied, namely, an "essential to livelihood" concept dependent on the context of the natural environment and life style of the individual Indian or Indian tribe in question, as limited by two criteria suggested by that case and United States v. 10.95 Acres of Land, 75 F. Supp. 841 (D. Alaska 1948): (1) whether the native use and occupation is sufficiently intensive to be considered equivalent, in a tribal context, to the traditional "notorious," "exclusive" and "visible" concepts, and (2) whether the native use has been continuous into modern times.

The test actually stated by the Court in United States v. Alaska was that the possessory rights "must not only be notorious, exclusive and continuous, but must also be substantial." 201 F. Supp. at 800. Similar language is used by the court in United States v. 10.95 Acres, adding that the occupancy must be "of such a nature as to leave visible evidence thereof so as to put strangers upon notice

that the land is in the use or occupancy of another, and the extent thereof must be reasonably apparent." 75 F. Supp. at 844. The court refused to hold that navigating and anchoring boats and gathering shellfish without more was sufficient, and that there was no "continuity of use or occupancy sufficiently to put a stranger on notice or enable the Court to fix the boundaries or the area thereof as to the defendants or any one of them." Id. The cases, therefore, give the standard of proof suggested by the State.

A difficulty with the Tribe's suggested semantical innovation of the standard is that its first suggested limitation as to the "intensity" of tribal occupancy suggests an equivalence to the traditional concepts enunciated in the court cases of "notorious," "exclusive" and "visible," but does not suggest how this limitation differs from that in Santa Fe which required aboriginal tribal occupancy to the exclusion of other tribes. It also does not suggest the degree of intensity of use which would meet the equivalency tests or any differences from them.

The State contends that even under the Tribe's proposed test the facts do not meet the suggested standard. The Tribe, however, contends that the lands were used primarily for grazing purposes which use was essential to the livelihood of the Navajos "as a substantial predominant occupant." It contends that the record

"conclusively demonstrates that sheep grazing, an essential condition of Navajo life and livelihood, was the dominant use of the areas here in question as of May 1, 1900." (Tribe's Supplemental Brief, p. 14). It adds that this use has continued over the years. "Indeed, if anything, the use of the lands here in question has probably intensified with the passage of years due to the increase in Navajo population." (Id. at 15-16). It contends the record shows a pattern of Navajo expansion far north of the San Juan River prior to 1900,

* * * fueled by population pressures, by drought, by inadequate forage and by semi-starvation. While the record indicates continuing fluxation of the Navajo-Anglo line of contact, it nonetheless clearly shows that the two sections here in question (one located about three miles and the other about seven miles north of the San Juan River) were well within the perimeter of Navajo use and occupancy both before and after 1900. (Id. at 17).

Because of the nature of the evidence in this case concerning Navajo occupancy the Tribe's position must, at best, rest upon this stated position that the disputed sections were within the perimeter of Navajo use and occupancy as the evidence does not adequately establish actual occupancy of the two disputed sections in 1900. The Tribe asserts it was "a substantial predominant occupant" but not the only occupant of the Aneth extension area. Although the evidence indicates that some Navajos traveled with their flocks of

sheep north of the San Juan River prior to 1900, the record also establishes that the same area was used by non-Indians, primarily livestock men, and by Indians from other tribes.

Under the Tribe's suggested standard of occupancy, however, apparently concurrent use of the area by non-Indians or other Indians might not be fatal to the Tribe's claim. If the Indian occupancy is to be judged, as the Tribe suggests, by the land "essential to their livelihood" according to the mode of life of the particular Indian group, the use of the Utes and Paiutes traversing through the general area to hunt, pick the wild food, and for those few who had flocks to graze them, would be equally applicable. Would the intensity of their use of hunting or gathering the wild food be less substantial or dominant than the Navajos' grazing where both groups traversed wide areas with only transitory encampments? Or would their cultural differences in types of structures used for their camps as well as the means of their obtaining a livelihood make any difference under the Tribe's suggested standard? How is the use by non-Indians to be judged? We pose these questions only to show some difficulties with the Tribe's standard as applied to the facts of this case.

The Tribe's suggested standard of proof for Indian occupancy to be deemed "held" by any Indian or Indian tribes under the Utah

Enabling Act is much less than that imposed by the Supreme Court in Cramer as to an individual Indian who had no reservation, and by the Court in Santa Fe, supra, which prescribed a test of exclusive occupancy for tribal aboriginal title. See also Assiniboine Indian Tribe v. United States, 77 Ct. Cl. 347, 368 (1933), appeal dismissed 292 U.S. 606, where no aboriginal possessory right in a tribe was recognized because other tribes traversed the land as well. We adhere to the recognized standard of exclusive occupancy in these cases. We add, with all due respect to the Indian Claims Commission, the record before us does not establish to our satisfaction such occupancy of the Aneth extension area by the Navajo Tribe to the exclusion of other tribes in the area prior to 1868, and as of the time of the Utah Enabling Act and 1900. This leads to the decisive question in this case. Did Congress by the Utah Enabling Act intend to preclude the grant of the school lands to the State under the factual circumstances involved here? We must conclude that it did not.

While the Tribe asserts that its aboriginal rights are not involved here, the matter of its Treaty and the extinguishment of the Tribe's aboriginal rights are relevant in comprehending the scope of meaning to the words in the Utah Enabling Act. Unlike the situation in Alaska where there was doubt as to the status of native claims to land and there was a clear manifestation that

future legislation would be passed for the acquisition of vested rights, there is no such manifestation expressed in the Enabling Act. Likewise, there are no subsequent acts similar to those involved in Alaska prior to its grant of Statehood specifically recognizing and protecting certain types of occupancy or possessory claims. See, e.g., those pertaining to tidelands discussed in United States v. Alaska, 197 F. Supp. 834 (D. Alaska 1961); or of fishing rights generally, Kake Village v. Egan, supra. The Tribe points to no comparable legislation pertaining to Utah prior to the effective date of its grant which would expressly protect occupancy of an area or of a specified type of use by Indians or groups of Indians.

Regarding the Utah grant, let us also compare cases stemming from the school grants for the States of Wisconsin and Minnesota which provided for lieu selection rights for sections which were "sold, reserved or disposed of." Where by treaty the United States set aside lands as a reservation for Indians before the survey of the school sections which would vest title in the State, and the Indians remained in occupancy of the lands, the Supreme Court held that such reserved lands were excepted from the state's grants. Wisconsin v. Lane, 245 U.S. 427 (1917); United States v. J. S. Stearns Lumber Co., 245 U.S. 436 (1918); Minnesota v. Hitchcock, 185 U.S. 373 (1902). Likewise, where the Indians were permitted

under a treaty to occupy land until required to leave by the President and subsequently by another treaty a reservation of such land was created for them, the Court held the state's title did not vest. Wisconsin v. Hitchcock, 201 U.S. 202 (1906). These cases were prior to the right of Indians to assert claims against the United States. The Court emphasized the alternative available to the State to select indemnity lands for the school sections, whereas the Indians had no alternative right or relief. However, where the Indians by treaty retained the right of occupancy for a time and there was no subsequent treaty confirming their right to the land and they moved from the land, the state was held to have title to the land rather than a party claiming a patent from the tribe under a statute authorizing the tribe to sell certain lands occupied by it. Beecher v. Wetherby, 95 U.S. 517 (1877). The Court in Beecher and in a railroad grant case, Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886), concluded that Congress intended to transfer the fee subject to the existing recognized occupancy of the Indians only so long as it continued.

In United States v. Minnesota, 270 U.S. 181 (1926), the Court held that the state could not be divested of its right and title to lands previously granted to it under its swamp land grant even to benefit Indians, where Indian reservations were created by treaty thereafter, although a reservation prior to the grant excepted such lands from the grant. From these cases, it is

clear that if tribal rights are terminated by relinquishment in a treaty or are abandoned, a state may take the grant unencumbered with a claim of occupancy rights in the Indians, and if the state's title has vested, subsequent action by Congress to create a reservation for Indians cannot affect the state's title. However, if a reservation has been created prior to the grant, the lands are reserved and the state's title cannot vest until the reservation is extinguished. These cases support our conclusion that lands within the established reservation boundaries for the Navajo Tribe did not pass to the state, but lands outside those boundaries were not excepted from the grant or held in abeyance.

d. Other Historical Factors Pertaining to
State Grants and Indian Occupancy
(1) Legislative Framework of Laws

The Congressional framework of laws generally pertaining to state school grants and indemnity selections in lieu of the school sections also militates against the construction which the Tribe suggests. By the Act of February 28, 1891, amending earlier legislation, R.S. §§ 2275, 2276, 43 U.S.C. §§ 851, 852 (1970), and as expressly extended to Utah by the Act of May 3, 1902, 43 U.S.C. § 853 (1970), states were permitted to select other lands where school sections prior to survey were included within any Indian

reservation, although the state could await extinguishment of the reservation and then take the sections in place. The Act required the Secretary of the Interior, without awaiting the extension of the public surveys, to determine by protraction or otherwise the number of townships that would be included in such reservations so that a state may determine the number of sections it could select on a section for section basis. Obviously Congress was not envisaging at that time, when many reservations had been set apart for Indian tribes throughout the country, recognition of tribal rights outside the established reservation boundaries of tribes who had reservations. See Shoshone Indians v. United States, supra.

The history of Congressional treatment of Indians is contrary to any such recognition at that time when there was a general policy to assimilate the Indians and to reduce the established reservation areas so that they could be opened for disposition under the public land laws. The fact that the Navajo reservation was enlarged periodically, rather than reduced, does not signify any difference in Congressional intent in 1894 toward the Navajo Tribe under the Utah Enabling Act. Navajo tribal occupancy outside the original Navajo reservation was only recognized after withdrawals of land in behalf of the Tribe and clear administrative action under the terms of such withdrawals. Healing v. Jones, supra.

Note that by Executive Order of November 14, 1901, certain lands in Arizona were "withdrawn from sale and settlement until such time as the [Navajo] Indians residing thereon shall have been settled permanently under the provisions of the homestead laws or the general allotment act * * *." Of similar effect are two other withdrawals for the Navajos, Executive Order of May 17, 1917, for lands in Arizona and Executive Order of January 19, 1918, for lands in New Mexico. These orders show an intent by the President and the Administration at that time and as late as 1918, to protect individual Navajo occupancy by a withdrawal until the lands could be disposed of to the individuals, rather than to benefit the Tribe as an entity then. Compare these orders with the 1905 Executive Order pertaining to Utah. Of course, no such withdrawal was made for the area in question here until 32 years after the State's title vested, which supports an inference against any governmental recognition of Indian occupancy rights in the area, apart from any that could be acquired by individual Indians in compliance with the settlement laws.

Other than its contentions regarding the Utah Enabling Act, the Tribe has referred to no legislation, and none has come to our attention, whereby the Tribe could acquire a possessory or proprietary interest in lands outside its reservation boundaries at that time. We have indicated, however, that individual Indians outside reservations could acquire interests in land by compliance with specific

statutes, the Indian Homestead Act or section 4 of the General Allotment Act. Those acts have been construed in pari materia, United States v. Jackson, supra. The Act of February 28, 1891, provided also that where settlements had been made before survey with a view to preemption or homestead the grant to the State was subject to the claims of the settlers, and lieu selections could be made for such lands and could also be made where other school sections were "otherwise disposed of by the United States." Under this and the Utah Enabling Act the State could take indemnity for lands in Indian homesteads or which had been allotted under the General Allotment Act.

In interpreting the 1891 Act providing for lieu selections, the Department concluded that as to mere settlements made with a view to preemption or homestead, the State's school grant would be held subject to the settlement and the State could claim the land in place in case the settler failed to perfect his claim, or the State could select other land to satisfy any loss occasioned by the claim. If, however, the lands were within existing allowed entries, they came within the excepting phrase "otherwise disposed of" and the State would have to select other lands as indemnity as the grant would not attach if the entry were subsequently canceled. State of Utah (On Petition), 47 L.D. 359 (1920). A settlement initiated after the survey of the school section could not affect a state's

grant. Fannie Lipscomb, 44 L.D. 414 (1915). See also Hamilton v. State of California, 45 L.D. 471 (1916), which held that possession and improvement of a tract of unsurveyed land by one who at the date of the survey was then disqualified to make a desert land entry did not except the tract from the school grant to the State. Compare Herbert H. Hilscher, 67 I.D. 410 (1960), involving a conflict between an Alaska native and a homestead settler. The native claimed she had lived upon the disputed tract years before with her parents but for the last 10 to 15 years her only occupancy of the tract was storage of a boat. This was deemed insufficient to defeat the intervening claim. In Tillie Buth, 46 L.D. 494 (1918), a homestead claimant's settlement was held not to constitute a valid adverse appropriation preventing a state selection of her claim as she had not complied with the homestead law and did not "seasonably" assert her rights. Therefore, her laches and the intervening state selection defeated her application. These rulings that a State's grant vests where a settlement claim is not perfected apply to settlement claims of Indians under the Indian Homestead and General Allotment Acts.

Although the Tribe contends that cases involving homestead or preemption settlers have no bearing on Indian rights, it has long been recognized that the Indian Homestead Act and section 4 of the General Allotment Act are settlement statutes and part of the framework of laws pertaining to the public lands. The

practice, rules and decisions governing white settlers on the public lands are with certain reasonable modifications due to the habits, character, and disposition of the race, equally applicable to Indian settlers. Lacey v. Grondorf, 38 L.D. 553, 555 (1910).

That case pointed out that Indian settlers on public lands are not in the same situation as are allottees of tribal lands where rights flow from some specific act for the division of tribal property, but are on practically the same footing as white settlers on the public lands. Id. and cf. Acting Solicitor's Opinion of September 21, 1964, 71 I.D. 340, ruling that the Alaska Native Allotment Act should not be construed in pari materia with section 4 of the General Allotment Act as the latter act required a "settlement" whereas the former Act gave a preference right for lands "occupied" by a native. As to section 4 of the General Allotment Act, it was stated in Martha Head, 48 L.D. 567, 571 (1922),

An Indian no more has a vested right to an allotment on the public domain than has a homesteader under the general homestead laws prior to the performance of certain required conditions * * * in the absence of such legislation * * * an Indian would not be entitled to apply for public lands.

Accord, Clark, Jr., v. Benally, 51 L.D. 91, on rehearing, 51 L.D. 98, 101 (1925), which construed section 4 of the General Allotment Acts as one of the nonmineral land laws. Benally was a Navajo who chose land described by the Department as not too advantageous for agricultural

or grazing purposes, but the best grazing land in San Juan County. The Department held it was without authority arbitrarily to deny the allotment on the ground the land was too poor in quality. But see, since the enactment of the Taylor Grazing Act requiring classification of lands before settlement, cases reaching an opposite conclusion on the question of the Secretary's authority to deny an allotment of land which would not constitute an economic agricultural unit for an Indian family. Finch v. United States, 387 F.2d 13 (10th Cir. 1967), cert. denied 390 U.S. 1012 (1968); Hopkins v. United States, 414 F.2d 464 (9th Cir. 1969); but cf. United States v. Arenas, 158 F.2d 730 (9th Cir. 1947), cert. denied 331 U.S. 842.

Although in Cramer and Schumacher, allotment applications had not been filed at the time of the grant to the third party, substantial improvements were alleged and permanent settlement made prior to the time of the vesting of the grant. In these cases the Court and the Department recognized substantial equities in the individual Indian settler and applied general principles of law which have pertained to non-Indian settlers, as well as recognizing the strong protective policy toward Indian occupants. Thus, Cramer applied a general principle regarding possession without color of title in limiting the rights of the Indians to the land enclosed and improved. In Nav. Ex. 245, the Commissioner of the Indian Office in 1887, in response to a New Mexico attorney's question as to whether a white

man could enter land in the possession of a Navajo outside the reservation referred to the General Land Office Circular of May 31, 1884, quoted previously and then quoted from Atherton v. Fowler, 96 U.S. (6 Otto) 513, 519 (1877), which involved conflicting preemption claimants:

The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

This is the essential spirit of the protection also afforded in Cramer, Schumacher and Ma-Gee-See, and recognized by Congress by section 3 of the Act of February 25, 1885, 43 U.S.C. § 1063 (1970). As the Tribe's exhibits of archival materials reflects, where a Navajo occupant made a substantial and permanent settlement on land outside the reservation constructing improvements and providing for himself on his settlement, notices were sent to the land offices of their occupancy, or notices were given to the individual Indians to show to anyone who might question their right to be outside the reservation or interfere with them.

Although under section 4 of the General Allotment Act an Indian who had made settlement upon public land could acquire for himself or his minor children a maximum of 160 acres of grazing land for each one, no applications have ever been filed for these lands, although descendants of several of the Indians upon whom the Tribe relies as occupants of the area at the turn of the century were allotted lands. No matter how inadequate 160 acres of grazing land in that area may be, that was the maximum allowable at that time by Congress. Grazing of open, unreserved public land as stated in Buford v. Houtz, supra, was then permitted generally with the implied consent of the United States. Such grazing use prior to the Taylor Grazing Act created no vested interests in the land. Jane M. Sandoz, 60 I.D. 63, 66 (1947). In the absence of any application for an allotment by an Indian in due time to perfect any inchoate settlement rights under the Indian Homestead Act or General Allotment Act to protect only a grazing use, the State's title vested as of 1900. Cf. Tarpey v. Madsen, 178 U.S. 215 (1900); John David Smith, A-28829 (September 17, 1962). Note that the regulations pertaining to section 4 allotments provide that allotments

are allowable only to living persons or those in being at the date of application. Where an Indian dies after settlement and filing of application, but prior to approval, the allotment will upon final approval be conformed to the heirs of the deceased allottee. 43 CFR 2531.1 (c)(1).

We find there were no permanent structures built upon these disputed sections as of 1900 and the facts are far different from those in Cramer, Schumacher and Ma-Gee-See where there was permanent and substantial occupancy by an Indian seeking protection of his rights. The evidence does not adequately establish that the disputed sections were ever settled upon permanently by identifiable Indians, but at most were only occupied for summer grazing camps in a transitory manner after 1900, as one of many sites occupied by the same few individuals.

We know of no basis under the facts in this case whereby the State could have made an indemnity selection for these lands in the absence of an application by an Indian or non-Indian under the public land laws merely because either may have used the disputed sections for grazing purposes, until the Aneth Extension Act of 1933 authorized such selections under its terms. Cf. Solicitor's Opinion of December 28, 1922, 49 L.D. 376.

(2) Governmental Non-Recognition
of Tribal Rights in the Area.

A further difficulty with the Tribe's position is that the history of the United States Government's administration of the area in question as reflected in this record does not show any recognition that the area was "otherwise disposed of" to the Tribe or being "held" for the benefit of the Navajo tribe. The administration of the area was

inconsistent with that notion. Within the area suggested by the Tribe as the perimeter of its occupancy which was added to the reservation in 1933, ^{32/} applications under the public land laws were allowed prior to that time. For example, in 1907 the State of Utah selected section 10, T. 40 S., R. 26 E., contiguous to the McElmo Creek section 16 in question, as school indemnity land. It was clearlisted to the State in 1910 (State Ex. 33). Two patented desert land entries were initiated in 1907 and two others initiated at that time were later cancelled for reasons not pertaining to Indian occupancy (State Exs. 1, 2, 5, 34, 35). See footnote 16, supra, describing Shelton's report on 113 placer mining claims located prior to but within the 1905 extension of the reservation in Utah. Later much of the land in both townships in question was covered by oil and gas permits in the 1920's (State Exs. 2, 4, 5). One application for a permit for the McElmo section in dispute was rejected by the General Land Office stating that the records showed the land to be school land of the State of Utah (State Ex. 5).

Also, the fact that allotments were allowed to Indians in the Montezuma Creek area under section 4 of the General Allotment Act

^{32/} Generally for the purpose of this discussion this area has been assumed arguendo as including the area added by the 1933 Aneth Extension Act. At the oral argument counsel for the Tribe would not specify the limits of the area alleged to be within that perimeter, suggesting only that the area found by the Indian Claims Commission to have been within its aboriginal occupancy prior to the 1868 Treaty might be a limit, but not conceding that it would be.

militates against the Tribe's position rather than supports it. Section 4 allotments, in distinction to those made inside reservations under section 1 of the General Allotment Act of 1887, 25 U.S.C. § 331 (1970), were authorized for Indians not residing upon a reservation who made settlement upon public lands "of the United States not otherwise appropriated", 25 U.S.C. § 334 (1970). This is the antithesis of the Tribe's contention that the lands were "otherwise disposed of" or "held" for the tribe. In an early contemporaneous construction of section 4 of the General Allotment Act, an opinion by the Assistant Attorney-General, approved by the Secretary of the Interior on June 27, 1899, indicated lands subject to settlement and allotment under that section were not Indian lands subject to the jurisdiction of the Commissioner of Indian Affairs, but were unappropriated public lands falling within the jurisdiction of the Commissioner of the General Land Office, 28 L.D. 564, 568. Therefore, whether the lands sought to be allotted were of the character subject to allotment, whether the required settlement had been effected, whether the Indian applicant had a prior and better claim to the land, and was seeking the land in good faith, rather than to obtain it for the benefit of another not entitled thereto, were questions relating to the disposition of the public lands for the General Land Office to decide. The Indian office was to decide only whether the applicant was an Indian and a non-reservation Indian. Id.

A letter to the Commissioner of Indian Affairs dated September 29, 1932, by officials of the Indian Office and Navajo Agency investigating the area proposed to be added to the Navajo reservation listed 17 non-Indian homesteads within the proposed addition (Nav. Ex. 616). Three of these were patented, one had been allowed, the others were filed in 1931 or 1932. The letter also listed only nine Navajo Indians (apparently the male heads of the families) within the area proposed to be added to the reservation, with a total of 35 children, and having a total of 2450 sheep. It also indicated five other heads of families living on Montezuma Creek had stock and had used the proposed addition. It mentioned 14 other Indians who lived outside the proposed area on Montezuma Creek, San Juan River, and Recapture Wash. It indicated that the Indians lived along Montezuma Creek, Recapture Wash, and San Juan River in the summertime, but ranged their stock and lived on McCracken Mesa in the winter.

The use of McCracken Mesa was mentioned because much of the pressure which led to the 1933 reservation was over complaints by non-Indian stockmen as to Indian grazing on McCracken Mesa to the north. An agreement was reached by the stockmen and Indian Office officials to divide the range between Montezuma and Recapture Creeks between the two groups providing the Indians would not use the non-Indians' winter range during the summer and the non-Indians would not use Indian range at anytime (Nav. Exs. 610, 611, 612, 613).

In the Congressional reports on the bill which became the 1933 Act, there is little specific mention about the lands except a statement that they were "used by Indians". H.R. REP. NO. 1883, 72nd Cong., 2d Sess. 3 (1933). Also, on page 44 of a report by Special Commissioner Hager generally regarding Navajos and proposed extensions of the reservation, in S. DOC. NO. 64, 72nd Cong., 1st Sess. (1932), the Aneth area addition of about 51,480 acres is proposed "in order to take care of a number of allotted Indians and other roving Indians in the vicinity." Nothing in the 1933 Act or its legislative history suggests that Congress then did not recognize the State's title in surveyed school sections at that time or that it intended to affect the State's title without action by the State. Instead, section 2 of the Act, 47 Stat. 1419, provides that the State of Utah "may relinquish such tracts of school land within the areas added to the Navajo Reservation by section 1 of this Act, as it may see fit in favor of the said Indians". It then provides for lieu selections to be made in the same manner as provided in the Enabling Act, except the payment of fees or commissions is waived. This waiver of fees was explained in the legislative history because the reservation was made to benefit the Government in its administration of the Indians (see Commissioner's report in S. REP. NO. 1199, 72nd Cong., 2d Sess. 3 (1933)).

Likewise, the declaration of trust as to public lands within the exterior boundaries of the Navajo reservation for the benefit of the Navajo Tribe in section (d) of the Act of September 2, 1958, 72 Stat. 1687, was made subject to "valid existing rights" and did not purport to affect the existing State title, nor did the Act of November 20, 1963, 77 Stat. 337 (see n. 28). See United States v. Minnesota, *supra*; see also Navajo Indian Reservation, 30 L.D. 515 (1901), concerning the exclusion of lands occupied by mineral claimants from the May 17, 1884, Executive Order addition to the Navajo reservation in Arizona, leaving them part of the public domain subject to disposal under the general land laws, and cited in John D. Archer, Stephen D. Smoot, 67 I.D. 181 (1960), regarding mining claims in the 1905 extension in Utah. See also Solicitor's Opinion, 57 I.D. 547 (1942), holding that Indians who had filed section 4 allotment applications prior to the 1933 Act had acquired equitable rights, as the land was then public land not otherwise appropriated, and the 1933 Act did not cut off their rights, which had already vested.

As the archival materials discussed previously establish, prior to and after 1894 and 1900 officials of the Territory and the State of Utah, the citizens in the area, the military officials and Indian Office officials, regarded the general Aneth area outside the established reservation boundaries as public land subject to use and disposition under the public land laws, and not as land which the

Government was holding for the benefit and use of the Indians. A proposal that the area be set aside for the Ute Indians in the 1890's was rejected. There was no such proposal for the Navajos although many other proposals for additions to their reservation had been made, most of which were ultimately acted upon. We note that existing legislation in 1894 provided for the protection of land "belonging to any Indian or Indian tribe" by subjecting any person who "drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe" to a penalty of \$1 for each animal of such stock. R.S. § 2117, 25 U.S.C. § 179 (1970). ^{33/} Likewise, any person who makes settlement

on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of \$1,000.

The President was authorized to use military force if necessary to remove such person from the lands.

R.S. § 2118, 25 U.S.C. § 180 (1970). Cf. Act of February 25, 1885, 43 U.S.C. §§ 1061-66 (1970).

^{33/} The word "cattle" was interpreted to include sheep. Ash Sheep Co. v. United States, 252 U.S. 159 (1920). That case interpreted an Act of Congress whereby a tribe ceded lands within an established reservation, and held that because the funds from the sale of the ceded lands were to go to the tribe, they remained within the category of "Indian" lands rather than "public lands" within the meaning of § 2117 Revised Statutes. The situation in the present case is different than that in Ash.

Rather than Government officials invoking these provisions to penalize the settlers or the livestock men who drove their stock throughout the Aneth extension area until the agreement reached in the early 1930's purporting to divide the range between the Indians and the non-Indians prior to the 1933 Act, the right of the non-Indians to make settlements and to use the land as grazing land was recognized. Indeed, prior to 1900 military force was used to return Navajo and Ute Indians in southern Utah to their reservations so they would not disturb non-Indians in the area. This is a further manifestation that there was no Governmental recognition of any occupancy right in the Indians in the area superior to the rights of third parties, including the State, but that the contrary was true under the policies of that time.

At most, prior to 1900 there were only a few expressions by Indian officials that Indians outside the reservation would have the same rights to graze upon the public lands as the non-Indians, but that they would also be subject to the same laws, including those within the police power of the State, as non-Indians. The special protection and privileges of Indians in the reservation would not prevail outside the reservation. It is not for us to judge in light of modern day concepts of civil rights the action or inaction of the Government officials prior to 1900 with respect to the Navajo Indians in Utah.

Conclusions

It is only necessary to determine whether there were such occupancy or proprietary rights in the Indians recognizable under the law which affected the presumptive vesting of the State's title to these disputed sections in 1900.

We must conclude that the evidence does not establish that there were. In view of the Congressional policy at that time concerning Indians and the acquisition of individual rights outside Indian reservations, any express or implied consent by Indian officials of Indian occupancy outside the reservation could not create tribal rights to the land superior to the grant to the State. Cf. Healing v. Jones, supra; Jane M. Sandoz, supra.

The Tribe has referred to the evidence which shows the poor range conditions within the reservation and without, the population increase of the Tribe, the sometimes nearly destitute conditions of the Navajos, and other reasons which caused Navajos to go outside their reservation. In essence its contention with regard to occupancy of land "essential to the livelihood" of the Indians goes to the adequacy of the reservation as it was extended from time to time. We note that the record shows that each time an extension of the reservation was recommended, the recommendation usually indicated that the extended area would be adequate to take care of the

needs of the Indians. It is significant that the area including the disputed sections was not added to the reservation until some 33 years after the State's title vested, although other additions had been made to alleviate the problems referred to by the Tribe. With regard to the Tribe's claim of occupancy, we note that recognition of occupancy rights or protection of occupancy rights within the 1933 extension was not even the prime factor leading to the addition to the reservation, but rather the extension was to effectuate a compromise of range conflicts throughout San Juan County, Utah, between Indian and non-Indian grazing users and to make a division of the range. That this division did not work and Navajos continued thereafter to use their preferred range on the McCracken Mesa is reflected by the Hatahley case.

As to whether the reservation and the additions thereto were adequate to support the Indians, and as to their grievances generally with regard to whether the United States Government performed its obligations toward them, this Board is not the proper forum to determine such questions, nor can the State's rights depend on the answers to these questions. Congress has provided under the Indian Claims Commission Act that the Tribe's right to any compensation for its relinquished aboriginal lands and unperformed Government obligations shall be determined by the Indian Claims Commission. The Tribe's pending case before that Commission is the appropriate vehicle for resolution of its claims against the United States Government in this regard.

With respect to the Utah Enabling Act, we conclude that there was no additional tribal occupancy right to lands outside the established reservation boundaries recognized under that Act. In the words of Justice Black in Ute Indians v. United States, 330 U.S. 169, 179-80 (1947),

* * * we cannot, under the guise of interpretation create presidential authority where there was none, nor rewrite congressional acts so as to make them mean something they obviously were not intended to mean. Choctaw Nation v. United States, 318 U.S. 423, 431-432. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so.

In this case, despite the Tribe's claims, the evidence indicates the Indians knew or should have known the land was outside the area allowed for tribal occupancy in 1894 and 1900. The San Juan River was a definite and recognizable natural boundary, unlike the artificial survey line which was the north boundary of the 1905 Executive Order withdrawal, where the Indians and others could be confused as to the boundary. Navajo rights to land outside the reservation superior to the State's rights could then only be acquired by individual Navajos in compliance with the settlement laws, and not by the Tribe until a proper withdrawal of the land was authorized for the Tribe's behalf. Such actions had not been taken in 1900. Therefore, an unencumbered fee simple title then passed to the State.

As indicated in the Solicitor's decision, 72 I.D. 361, 366, the Tribe had the burden of proof to overcome the presumptive vesting of the State's title. This burden has not been satisfied in this case.

To summarize, we sustain the findings and conclusions of the Director except insofar as they have been modified by our discussion. We expressly find and conclude: (1) there was no occupancy of the disputed sections by any individual Navajo in 1900, which could preclude the grant to the State; (2) there was no aboriginal occupancy of a tribe to the disputed sections in 1900 to which the State's title would be subject; (3) the Navajo Tribe's aboriginal rights to lands outside the 1868 reservation were extinguished by the Treaty of 1868; (4) there was no other tribal occupancy of the area including the sections in 1900 under the standards whereby tribal occupancy has been recognized which could preclude the grant to the State; (5) any use of the disputed sections by a proportionately few Navajo families for grazing purposes together with other lands in the area did not affect the State's title; (6) a Navajo tribal right of occupancy outside the established boundaries of the Navajo reservation was not protected or recognized by Congress in the Utah Enabling Act; (7) fee simple title to these disputed sections passed to the State of Utah on May 1, 1900, when the plats of survey were accepted.

The Tribe's challenge to the issuance of the confirmatory patent to the State goes to the entire fee title of the State with all of the incidental benefits of ownership, in particular, the mineral values which have been exploited under the State's oil and gas leases. The school grant to the State of Utah contemplated passage of a full fee simple title to the State. Margaret Scharf, supra. Except for easements or rights granted to private persons prior to the vesting of the State's title, subsequent Congressional legislation could not impose further amendments or limitations to burden the State's grant. The Act of June 21, 1934, did not change this. Associate Solicitor's Opinion, M-36484 (December 26, 1957). The Tribe has not contended there are any easements, rights, or other interests in the land to which the State might take subject by virtue of any Indian use of the land. As we have held, there was no Indian occupancy in this case which could preclude the fee simple absolute grant to the State. The Tribe's protest affords no basis for expressing any limiting rights, easements, conditions, etc., to the State's confirmatory patents to these two sections, as provided under the Act of June 21, 1934. Therefore, the Bureau of Land Management shall issue the patents to the State, when this case is returned to it.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director dismissing the Tribe's protest on the merits is affirmed as modified by this decision.

Joan B. Thompson, Member

I concur:

Martin Ritvo, Member

Frederick Fishman, concurring specially

I agree with the result reached in the main opinion, but believe that the Director's decision more than adequately discussed the pertinent issues. I would adopt the Director's decision in toto, except to hold that the Navajo Tribe had standing to protest the State's application for a confirmatory patent to the two sections in question.

Frederick Fishman, Member

