BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO DE PECOS, PUEBLO DE JEMEZ, AND PUEBLO DE JEMEZ ACTING FOR AND ON BEHALF OF PUEBLO DE PECOS, Petitioners,	)	
v.	)	Docket No. 174
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: December 11, 1959.

Appearances:

Claud Mann, Dudley Cornell, and
W. J. Claybergh,
Attorneys for Petitioners.

W. A. Rochow, with whom was
Mr. Assistant Attorney General
Perry W. Morton,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Watkins, Commissioner, delivered the opinion of the Commission.

The original petition in this case, filed July 30, 1951, by the Pueblo de Pecos, presented a claim based upon the alleged inadequate and insufficient award of the Pueblo Lands Board and payment by Congress of $1.50 an acre, or $28,145.00, for the loss of the 18,763.53 acre Pueblo de Pecos Grant, shown in the patent and plat market Exhibit A attached to the petition. The petitioners prayed for judgment in such

amount as would provide just and fair compensation for such loss, less the payment already received.

In its first defense, the defendant alleged that "claimant is not a proper plaintiff since by virtue of the Act of June 16, 1936 (49 Stat. 1528), the Indian Pueblos of Jémez and Pécos were consolidated and merged into the Pueblo de Jémez and all rights and claims of either of said tribes became vested in the consolidated tribe, The Pueblo de Jémez".

Thereafter, on July 25, 1955, the Pueblo de Pécos filed a motion for leave to amend its petition by making "Pueblo de Jemez, acting for and on behalf of, Pueblo de Pécos" claimant in the case and by amending Paragraph VII to include a plea of lack of fair and honorable dealings. The defendant filed objections to the motion and moved to dismiss the petition.

After receipt of briefs thereon, the Commission issued a Per Curiam Opinion (December 13, 1955; 4 Ind. Cl. Comm. 130) and Order overruling the defendant's objections and motion, and allowing the addition of the Pueblo de Jémez as a separate party claimant and as a party "acting for and on behalf of, Pueblo de Pécos," and the amending of Paragraph VII. An amended petition was filed April 30, 1956, with typewritten inserts making the authorized amendments.

Both the petitioners (Pet. Findings pp. 1-2) and defendant (Def. Brief, p. 3) agree that the issues to be decided at this time are (a) whether the Pécos Pueblo and Jemez Pueblo are separate tribes entitled to assert a claim before this Commission, and (b) whether the action of the Pueblo Lands Board in awarding the Pecos $1.50 an acre for the loss

of the lands and water rights involved was res judicata as to the questions presented by the amended petition.

PETITIONERS AS PARTIES

The petitioners argue that they are each Indian tribes entitled to file and prosecute this claim (Pet. Brief, p. 3-4) and that the defendant is estopped to deny the right of the Pecos to assert the claim because of the approved attorney contract of the Pecos (p. 5). The position of the defendant (Def. Brief, pp. 36-38) is that the Commission erred in reaching the conclusion in 4 Ind. Cl. Comm. 130 that the Act of June 16, 1936, did not abolish the Pueblo de Pecos as a tribe; that the Pueblo de Pecos is not a proper party; and that the amended petition with Pueblo de Jemez as a petitioner was filed after the expiration of the time allowed for filing claims.

It is only necessary to here state that the Commission stands on its former decision concerning the parties herein, as reiterated in Finding 2. Since the addition of the Pueblo de Jemez as a petitioner did not in any way prejudice the defendant in this action, the fact that the amended petition was filed after the time for filing claims is immaterial.

RES JUDICATA

Both parties brief this question (Pet. Brief, pp. 5-10; Def. Brief, pp. 22-36). It is the contention of the defendant that the award of $1.50 per acre by the Pueblo Lands Board to the Pueblo de Pecos for loss of the lands in the Pecos Pueblo Grant is res judicata of the claim now before the Commission. The Board's determination is contained in its

reports. Of the four reports in evidence which are all dated August 4, 1930, Report No. 3 (Def. Ex. 5) and Report No. 4 (Def. Ex. 6) are not important in the present controversy.

Report No. 1 (Def. Ex. 3) is entitled, "Report of Title to Lands Granted or Confirmed to Pueblo Indians", and is made under Section 2 of the Act of June 7, 1924 (43 Stat. 636). Material parts thereof are set out in Finding 6 herein. The Pecos Pueblo Grant is described by metes and bounds (pp. 4-8 of Def. Ex. 3). The report notes (p. 9) that the Pecos had been greatly reduced by constant attacks by hostile Indians, that it suffered several severe epidemics and was from 1825 subjected to every form of coercion and compulsion on the part of the local Mexican authorities. A grant was actually made within this Pueblo area in 1825 and possession given, as appears from an 1825 report of a committee which asked that "all their lands be restored to the natives of the Pueblo of Pécos of which they were plundered" (See Def. Ex. 11, the document in Spanish, and Def. Ex. 10, a translation). Report No. 1 then states that, because of the continued harrassing, the seventeen remaining members of the pueblo accompanied their kinsmen to Jémez, where they and their descendants have since lived (p. 10). "In 1855 an examination of the title to the Pécos Pueblo was made by the Surveyor General, who approved it and recommended confirmation of the grant. This action Congress took by the Act of December 22, 1858. In 1864 a patent was issued to the same." In 1859 the Pécos Pueblo requested that their lands be restored to them or that they be sold or leased for their account and additional lands purchased for them in the Jemez section (pp. 10-11). This, together with

later and similar requests, made it appear to the Board that there was never any intentional abandonment of their rights by the few surviving Pecos Indians. The Board recommended that a study be had of this long deferred request and that suitable lands be purchased near Jémez, if possible (p. 11). Church records show there were about 250 claiming Pecos ancestry. "They are recognized as a separate entity and are accorded an officer in the annual election."

Report No. 2 of the Pueblo Lands Board (Def. Ex. 4) is entitled "Report concerning Indian Titles Extinguished" and is made under Section 6 of the Act (See Finding 7 herein). The area of the Pecos Pueblo Grant is set out as 18,814.559 acres (p. 1 of Def. ex. 4). There were 339 adverse claims by non-Indian claimants covering the entire area (p. 2). The Board determined "that title to all of the lands within the external boundaries of the Pecos Indian Grant is extinguished." "It does not appear that there are any water rights lost to the Indians to which specific mention should be made". The ownership of the various tracts was determined by a survey and study by the Cadastral Engineer and "by an independent investigation conducted by the Board". "It is the belief of the Board that seasonable prosecution upon the part of the government would have resulted in protecting this Indian claim" (pp. 2-3). Therefore, an award was made for the loss sustained (pp. 3-5). The Board acknowledged the difficulty of determining a fair basis for the award. It determined that the figures for the entire tract should be based on its approximate average value from the occupancy of this territory in 1846 to the time of the award, which was set at $1.50 per acre or $28,144.995. The Board then sets out a number of transactions and conveyances within the area (pp. 5-9). "In

1868 eleven of the survivors of the Pécos Pueblo sold their interest in the grant to one John Ward, who had been Indian Agent and was on very friendly terms with the people, the idea being that he would resell three-fourths of it, if possible, for the benefit of the People of the Pueblo" (p. 5). In 1873 the Pécos Indians conveyed to Frank Chapman what interest they had in the grant of 18,763.35 acres for a consideration of $5,000.00. The same year Ward conveyed to Chapman for a consideration of $5,000.00. Other conveyances were for varying interests and for named considerations of from one dollar to $19,038.63. There is some indication that "in the years 1841-1842 a proceeding was brought before the then Governor of Mexico looking to the abandonment of this Pueblo" (p. 7). The fact that Congress later confirmed the grant in the Pueblo made it appear to the Board that the Governor's approval, if he gave it, was not in accordance with the existing laws of Mexico at that time. Another line of title, based on the 1825 Mexican Grant, developed in the settlers who occupied the congested areas within this grant (p. 9). This made necessary a quieting title action after the 1912 agreement mentioned above. "This suit ended in the settlers generally conveying any interest which they might have in the entire grant to the holders under the long line of transfers referred to, reserving to themselves however the particular tracts which they then claimed and occupied." The concluding paragraphs of Report No. 2, which are largely reiteration, contain a finding that the amount of money received by the Indians in the transactions in which they were parties was an inadequate sum for this large acreage (p. 10).

The defendant describes the Pueblo Lands Board as a quasi-judicial body (Def. Brief, p. 24). It was composed of three members, one representing the Secretary of the Interior, another the Attorney General, and a third appointed by the President of the United States. The 1924 Act directed the Board to investigate, determine and report upon all lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the board shall find not to have been extinguished in accordance with the provisions of the Act. Section 6 required reports of other matters in respect to each pueblo, including the tracts of land and water rights appurtenant thereto in the possession of non-Indian claimants. If the Board found that such tracts could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of the Indians, the United States was made liable for such loss and the Board was to determine the amount of loss and award compensation. The Board was also required to report the fair market value of such tracts and water rights exclusive of any improvements made therein or placed thereon by non-Indian claimants.

Section 6 provided that "such report and award shall have the force and effect of a judicial finding and a final judgment upon the question and the amount of compensation due to the Pueblo Indians from the United States for such losses". At any time within 60 days after the filing of such report with the United States District Court, the United States or

any Pueblo or Indians affected thereby could appeal to that court for judicial review of the Board's findings. In any such proceeding the report of the Board was prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be rebutted by competent evidence which all interested parties had a right to present. The District Court could confirm, modify or reverse the findings of the Board and any party aggrieved could appeal to the United States Circuit Court of Appeals.

Since no appeal was taken either by the United States or by the Pueblo de Pecos, it is the position of the defendant that the Board's award is a final judgment fixing the value of the lands and water rights lost by the Pecos Pueblo and such judgment is not subject to review or revision by this Commission (Def. Brief, p. 25).

The petitioners do not appear to question the power of the Pueblo Lands Board to make a determination which could, under the rules of res judicata, bar the subsequent relitigation of the same issue between the same parties. Rather the petitioners argue that the defense of res judicata is not applicable here because the Board failed to follow the provisions of the Act of 1924 and, therefore, the Pecos claim could not have been decided on its merits (Pet. Brief, p. 6). An exception to the principle of res judicata, as defined in 50 CJS 51, Sec. 626, is quoted as follows:

> A judgment in a suit will operate as a bar to a subsequent suit on the same cause of action if, and only if, the judgment and the proceeding leading up thereto involved, or afforded full legal opportunity for, an investigation and determination of the merits of the suit.

The petitioners say that the Board failed to follow the dictates of Congress in the following respects:

1. The fair market value of the water rights were not considered by the Board in making the awards.

2. The Board did not appraise or make a thorough investigation as to the amount of water available.

3. The Board committed error of judgment in not allowing interest or loss of use in considering damages.

These three alleged failures of the Board do not bring the award to the Pécos within the exception set out above. Congress required the Board to investigate and report its findings and awards. This it did in the case of the Pécos. Petitioners' Finding 4 admits that hearings were held leading to the award to the Pécos Pueblo and that the Pueblo was represented by legal counsel. The reports and determination of the Board are in evidence. Apparently the reports on the Pécos were filed in the United States District Court to start the running of the 60 days within which any party could proceed in that court to question the Board's determination. Congress thereafter paid the award. This all tends to show that the proceeding leading up to the award "involved, or afforded full legal opportunity for, an investigation and determination". The petitioners have not proved otherwise. The petitioners' complaints rather go to the manner in which the Board decided the matter. Such matters could have been presented to the District Court on appeal. Since there was no appeal, one can only assume, lacking evidence to the contrary, that the Pécos at that time were satisfied with the award and the proceedings of the Board leading up to it, at least to the extent that they did not wish to appeal.

The petitioners next argue that "the defense of res judicata cannot legally be applied where the Ward was not represented otherwise than by the Guardian or where the latter conducted the litigation negligently or where the interest of the Ward and the Guardian are in conflict", citing 50 CJS 341, Sec. 797 (Pet. Brief, p. 7). Petitioners' Finding 4 asserts that the interests of the government, as Guardian, and the Pecos as Ward, were in conflict; that the Pueblo was not represented by legal counsel of its own choosing; and that the litigation was conducted negligently. Supporting evidence referred to by footnote is largely from Senate Subcommittee hearings.

In response, the defendant says (Def. Brief, p. 34):

> But petitioners have not produced one bit of evidence to show that the counsel provided by the government failed properly to represent them and present their claim to the Board. Furthermore, some Pueblos saw fit to appeal their cases to the District Court and employed private counsel to prosecute such appeals. No such action was taken by these petitioners and there is no evidence that they ever requested private counsel to represent them before the Pueblo Lands Board.

In the absence of legal cases to definitely support petitioners' proposition, it appears to the Commission that the United States should not be held strictly to the standards which may be set for guardians and wards regarding conflict of interest in litigation and furnishing legal counsel. The United States, as a sovereign, is a composite of all its people. Thus any claim against that sovereign could narrowly be said to be a conflict of interest, because any recovery is going to be partially paid by the claimant, as a part of the United States. It could also be technically argued that the government, in prosecuting a criminal and at the same time providing

counsel for the accused, is acting in conflict with itself. But the United States as sovereign it is in a unique situation. It is immune from suit and can only be sued by its own consent (91 C.J.S. Sec. 176). Congress has power to prescribe conditions on which attorneys will be allowed to represent claimants before any of the courts of the government (Sec. 197). Congress furnishing for many years a special attorney to represent the Pueblo Indians of New Mexico was an act of beneficence to give the Indians counsel without cost to them, and since all attorneys are sworn to protect the interests of their clients, the fact that they were paid by the government should not make their efforts in asserting a claim against the United States subject to attack.

Neither is there sufficient evidence to establish that the litigation was conducted negligently. The petitioners do not dispute and would take advantage of some of the findings of the Board, such as the finding that even though the Pécos had left their lands, "there never was an intentional abandonment of their rights", and that the Pécos were entitled to an award because "seasonable prosecution upon the part of the Government would have resulted in protecting this Indian claim" (Pet. Finding 5, Fn. 8). Petitioners question the amount of the award, relying mainly on statements made at subsequent Congressional hearings as to what the Board considered in making its awards. The Board did take into consideration water rights (Def. Brief, Appendix, pp. 40-61). The Board's statement, previously quoted, that "it does not appear that there are any water rights lost to the Indians to which specific mention should be made" does not mean that the Pécos River passing through the grant had no bearing on the value of the land and the

amount of the award. The Board did not set a separate specific figure for loss or water rights. The Board did not include any interest in its awards and was not required to do so by statute. Neither was it required to consider "loss of use".

Why did not the Pécos appeal the Board's award in the United States District Court? The record does not answer this question, and as previously stated in this opinion, it can only be assumed that the Pecos at that time were satisfied with the award. We certainly do not have sufficient facts now to say that counsel for the Pécos negligently conducted the litigation by not proceeding to question the award in the District Court. Shortly after the Board's proceedings, a number of Pueblos asked Congress to increase their awards but no such request appears to have been made by the Pécos. The petitioner says (Pet. Finding 5, Fn. 9, p. 17):

> In fairness to other Pueblos of New Mexico the Senate Committee on Indian Affairs, after reviewing the awards made by the Board, recommended that said other Pueblos were entitled to additional compensation. But in its report the Committee did not even mention or refer to the Pécos Pueblo or to the award made by the Board to it. (Def. Ex. 16)

The fact that the Committee did not recommend an additional award for the Pecos and that Congress did not make one tends to indicate that there was little or no dissatisfaction with the Pecos award.

The final argument of the petitioners is that "there is much to litigate in this proceeding that was not decided when the Pueblo Lands Board made its award", naming again "the question of interest, water rights and loss of use" (Pet. Brief, p. 9). Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195, is cited as setting forth a second branch of the rule of res judicata (Pet. Brief, pp. 8-9):

> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a Judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the Judgment conclusive in another action.

While the determination and award of the Pueblo Lands Board was made in accordance with the provisions of the Act of June 7, 1924, and the present claim is brought under Section 2 of the Indian Claims Commission Act of August 13, 1946, the basis of both claims is the loss to the Pécos Indians of the lands of the Pécos Pueblo Grant. As previously quoted from the Board's Report No. 2, the award for the entire tract of $1.50 an acre was arrived at by figuring "its approximate average value from the occupancy of this territory in 1846 to the present time" (1930). This was done because the Board found that "there is no way to get at the actual value of this land in its entirety as it was at the time that the Government might have acted or at the time when the members of the Pueblo disposed of their holdings".

Pursuant to the Act of June 7, 1924, the determination of the award for loss of lands was entirely in the discretion of the Board. It was within the Board's discretion to base the award on an average value over a period of years, as they did. It should also be noted that no deduction appears to have been made from the award for the considerations which the Pecos Indians had received in previous sales of their lands to private individuals.

The present claim has the same basic issue. Both the Petition and Amended Petition pray that the "defendant be adjudged liable under the Act of August 13, 1946, for an amount that will provide just and fair compensation for the loss of the Pueblo Grant consisting of 18,763.33 acres, less the payment already received under recommendation of the Public Lands Board".

As to the matters petitioners say may be litigated here which were not considered by the Board, it has already been noted that water rights were taken into consideration by the Board. The items of "interest" and "loss of use" seem to be presented in the alternative by petitioners, as the conclusion in their Brief, p. 15, says "plus interest, or loss of use". Neither of these have been recognized by this Commission in its decisions to date as proper elements of loss or damage in cases of this kind. Obviously there was no "taking" of the lands of the Pecos Indians under the Fifth Amendment. Rather, the United States issued a patent for these lands to the Pécos after they had moved from the Pécos Pueblo Grant, and the Pecos Indians later sold their lands to other parties. This is admitted by the petitioners when they say (Pet. Brief, p. 11), "It was the non-action of the Government that resulted in the loss of the Pecos Grant lands by the Pecos Indians to others". This is precisely the finding of the Lands Board and the basis of its award, as set out in footnote 19 in support of petitioners' statement.

So even though the present claim is considered a new and different cause of action within the meaning of the second branch of the rule of res judicata, the basic matters in issue are the same as in the proceedings

of the Lands Board, and the Board's decision as to such matters is conclusive.

It is therefore the conclusion of the Commission that the petitioners have had a determination of their claim of liability on the part of the United States for the loss they suffered in regard to the lands of the Pécos Pueblo Grant. The determination and award of the Pueblo Lands Board, which became a final judgment, is res judicata of the claim now before the Commission. Accordingly, the amended petition should be dismissed and it will be so ordered.

Arthur V. Watkins
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner