

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO de ZIA ET AL.,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 137

Decided: September 11, 1962

Appearances:

Dudley Cornell and Claud S. Mann, Attorneys for Petitioners.

Walter A. Rechow, with them was Mr. Assistant Attorney General Ramsey Clark, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Watkins, Chief Commissioner, delivered the opinion of the Commission.

The three petitioners, Pueblo de Zia, Pueblo de Jemez and Pueblo de Santa Ana, are each a tribe of Pueblo Indians having a common interest in the subject matter of this claim and entitled to sue under the Indian Claims Commission Act. They have and maintain separate pueblo villages near each other in Sandoval County, New Mexico, north of the city of Albuquerque. Each village is located in a Spanish grant made to the respective Pueblos. These grants have been confirmed by Congress and patents issued therefor.

The original petition, filed July 9, 1951, contained three causes of action: They are as follows:

(1) Petitioners claimed a tract of land in Sandoval County, New Mexico, called Ojo Del Espiritu Santo and aggregating 382,849 acres. Petitioners alleged that aboriginal title to this tract was recognized by the Spanish government and that the defendant as guardian of the petitioners had failed to protect their rights resulting in the loss to the petitioners of the above lands.

(2) Petitioners alleged that aboriginal title to the same tract of land was recognized by the defendant based on the official acts of certain representatives of the defendant; that in spite of this recognition the defendant failed in its fiduciary obligation to the petitioners by permitting others to take possession of these lands in derogation of the rights of petitioners; and that the loss of said lands was due to the lack of fair and honorable dealings on the part of the defendant.

(3) The petitioners alleged title to the same land by virtue of a Spanish grant made to petitioners on August 6, 1766, and that due to neglect of representatives of the defendant the above Spanish grant was not confirmed to the petitioners by defendant resulting in the loss of said grant to the petitioners.

Each of the above causes of action prayed for an award of just compensation for the loss of said lands.

An amended petition was filed March 17, 1952, in which the tract referred to in counts 1, 2 and 3 was alleged to contain 410,000 acres

although the description of the land remained the same. A fourth count was added based on aboriginal title to a larger tract which extended the eastern boundary of the tract described in count one so as to include 520,000 acres.

By order of September 22, 1955, the Commission permitted further amendments to the Amended Petition consisting of the addition of an Exhibit C and certain allegations concerning translations from Spanish in Exhibits A and C.

The defendant has denied the right of the petitioners to recover on any of their four causes of action.

Counts one, two and four of petitioners' amended petition are based on aboriginal title. Count three is based on a grant made to the petitioners by the Spanish government. We will discuss count three first.

THE SPANISH GRANT OF AUGUST 6, 1766

Petitioners allege that a Spanish grant dated August 6, 1766, "granted full, permanent and complete title, with full rights of possession and usage, jointly to these three claimants, of a tract of land aggregating 410,000 acres, commonly called Ojo del Espiritu Santo (Holy Ghost Spring)." Defendant alleges that all the issues presented by petitioners respecting this grant have been judicially and finally determined by the Supreme Court in Zia et al. v. United States, 168 U.S. 198, and are, therefore, res judicata.

The facts concerning the litigation which culminated in this United States Supreme Court decision are briefly as follows. On

November 28, 1892, the three Pueblos filed a Petition for Confirmation of the Ojo del Espiritu Santo Valley Grant in the United States Court of Private Land Claims. The defendants were the United States, Pedro Perea, Jacobe Perea, Mariano S. Otero, Charles H. Gildersleeve and Carlos W. Lewis. The petition alleges that, upon the request of the three Pueblos and after an examination and report by the chief alcalde, the Governor General of the Province of New Mexico on August 6, 1766, made to them "a formal and final grant in fee absolute, coupled with no conditions whatsoever other than that in case of necessity the horses of the royal garrison of Santa Fe might be pastured thereon . . .;" that they were given "juridical and royal possession of said tract"; that from the date of the grant they used and occupied the tract; that on February 7, 1874, the Surveyor General had reported said grant to Congress for confirmation but the same had not been finally acted upon by Congress, and that a preliminary survey had been made. Two conflicting grants are set out which individual defendants claim. One is a grant to Luis Cabeza de Baca made May 23, 1815, for a tract of land called the Ojo del Espiritu Santo grant, which Congress had confirmed. The other is a grant to Jose Miguel Garcia and his associates made on March 6, 1798 (known as Canon de San Diego Grant), which had been confirmed by Congress. These grants are alleged to be either void or inferior to the prior 1766 grant to the Pueblos. The United States denied the claim of the Pueblos, asserting that "whatever rights in and to said property the plaintiffs may have ever had was purely a permissive right or license, subject to a

revocation by the authorities at any time or subject to be forfeited by abandonment of non-user." (Def. Ex. 1, p. 7)

The case was tried in 1893 and both oral and documentary evidence were received. On August 10, 1893, the Court of Private Land Claims ordered the grant rejected and the petition dismissed, holding that the grant was not a fee, but a license to pasture.

Upon appeal to the Supreme Court briefs were filed by the appellant Pueblos and by the United States. The case was argued October 12, 1897, and on November 15, 1897, the Supreme Court entered its decree affirming the decree of the Court of Private Land Claims. In its opinion the Supreme Court discusses in some detail the merits of the case, the documents involved in the grant to the Pueblos, and the intention of the parties, and concludes:

Upon the whole, we are of the opinion that the court below was correct in holding that the grant in question did not vest the title to the land in the petitioners, but was a mere license to use them for pasturage, and that such license, if not revoked by the subsequent grants, was revoked by the treaty of Gudalupe Hidalgo, ceding this entire territory to the United States.....; and that in the language of Sec. 13 of the Act of March 3, 1891 (26 Stat. 854, Chap. 539) creating the Court of Private Land Claims, the title to the land in question was not one "lawfully and regularly derived from the government of Spain," or "one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant has a lawful right to make perfect, had the territory not been acquired by the United States." (Def. Ex. 7, p. 207)

The res judicata rule, which has been invoked by the defendant as denying petitioners' right of recovery based on Count Three of their Amended Petition, precludes the re-litigation between the same parties or their privies of any rights, questions or facts distinctly

put in issue and directly determined on the merits by a court of competent jurisdiction. The rule has been succinctly stated by the United States Supreme Court in Southern Pacific Railway v. United States, 168 U. S. 1, 48 as follows:

The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. . .

Previously the Court had declared in New Orleans v. Citizens Bank, 167 U.S. 371, 396 that:

The estoppel resulting from the thing adjudged does not depend on whether there is the same demand in both cases, but exists, even though there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by the judgment between the parties or their privies . .

However, the Supreme Court in Cromwell v. County of Sac, 94 U.S. 351, 353 declared another aspect of this rule as follows:

.....there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, including parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.... 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.

Along this line the petitioners thus maintain that this is a different cause of action and that the allegations of the Third Count of the Amended Petition present the following four important and vital issues that were not raised or determined in the Zia case.

1. The representation of these petitioners in said case was contrary to law and invalid and thus the Supreme Court should have dismissed the case without prejudice.
2. The translations of the Spanish documents upon which the opinion was based were erroneous in very material respects.
3. The Third Count of the Petition in this case is based upon an entirely different theory from that in the Zia case, supra, namely, (a) that the defendant was under a fiduciary duty, that is, as Guardian of the Indians, to protect these Claimants in their grant of said lands, and (b) that Petitioners lost their lands as a Spanish grant due to the negligence of and due to the unfair and dishonorable dealings of the Defendant. (Pet. Brief, pp. 19-20)
4. That the validity of Petitioners' Spanish grant had been recognized by United States Officials prior to the Zia, et al case, supra.

Defendant, on the other hand, contends that the causes of action are the same and that the same basic issue is involved in both cases and has already been decided on the merits in the prior case.

We do not feel called upon at this time to decide whether or not the two causes of action are identical since it is not necessary for a determination of the issue before us. We believe that regardless of whether the causes of action are treated as identical or different that

the legal result will be the same. The fundamental issue decided in the Zia case was: What right, title or interest did petitioners acquire in the Ojo del Espiritu Santo lands by virtue of their 1766 grant from Spain? Basically, this is the same issue which is before us in Count Three of the present case.

In spite of the fact that petitioners have presented what they deem four important issues that were not determined in the previous suit, in our opinion none of these arguments can avoid the application of the doctrine of res judicata in the Third Count of the instant case. Facts concerning the attorney contract with the Pueblos in the Zia litigation and the manner of its execution is not material in this case. Their representation before the Supreme Court was not questioned in those proceedings, and no showing now would affect the validity of these judgments. As to the translation of the Spanish documents, it is not the prerogative of this Commission to speculate as to how vital the United States Supreme Court might have considered the changes in translation made by Dr. Jorrin or what its decision might have been had it had before it the testimony of Dr. Jorrin and Dr. MacCurdy. The Opinion of the Court indicates that many things were given consideration, including the wording of the documents involved in the 1766 grant. For instance the Court comments on the fact that "the valley was already used as a pasture ground for the horses of the royal garrison" (Def. Ex. 7 p. 204), that "there was no claim of a grant of the lands, such as the other applicants were seeking to acquire, but a request to have them considered as their pasture ground, and as the

pasture ground for the horses of the royal garrison" (Def. Ex. 7 p. 203), and that "within a few years thereafter a grant was made of the entire tract to other parties" (Def. Ex. 7 p. 205). The opinion of the Court below is quoted in part as saying:

It seems quite unreasonable to suppose that, if this area in controversy had been granted as an estate in fee to the land, the same granting authority would have deliberately granted a portion of the same land to a third party only twelve years after the former grant, repeat a like act in 1815 and afterwards, and that, too, of land situate near the capital, grazed upon by the royal horses of the capital garrison, and the local alcalde directed in every case to report officially whether the land proposed to be granted was unoccupied, or that the grant would be to the injury of third parties. (Def. Ex. 7, p. 205)

It is clear that the testimony of Dr. Jorrin and Dr. MacCurdy did not introduce a new issue that was not considered by the courts in the Zia case. It is rather additional evidence on the same issue, and the petitioners have not established that such additional evidence would prevent the former judgments from being res judicata.

Petitioners' third contention is that the third count of the petition in this case is based upon an entirely different theory than that in the Zia case, namely, that the defendant was under a fiduciary duty as guardian of the Indians to protect these claimants in their grant of said lands, and that petitioners lost their lands as a Spanish grant due to the negligence and the unfair and dishonorable dealings of the defendant. In Pueblo de Isleta v. United States, 7 Ind. Cl. Comm. 619, this Commission referred to the relationship between the Pueblo Indians and the United States as similar to that of guardian and ward. But the defendant's alleged duty to protect the petitioners herein in their grant assumes the existence of certain

rights in the granted land at the time of the 1848 Treaty of Guadalupe Hidalgo. The Supreme Court, however, has determined that the three Pueblos had no such rights, their grant of a license to pasture having been revoked by, or prior to, the 1848 treaty. Nowhere in their third cause of action do the petitioners claim that they are entitled to a recovery herein for the unfair and dishonorable dealings of the defendant if the Pueblos only received a revocable license to pasture in 1766. The conclusion is therefore inescapable that petitioners' third count, while on a different theory, is based on the very issue controverted and determined in the Zia case.

On this point the Court of Claims has said that the fair and honorable dealings clause of the Indian Claims Commission Act

...obviously has reference to the fundamental character of the claim rather than to the theory on which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission.... If the claims made by appellants in these cases could be again heard and determined by the Indian Claims Commission, it would be difficult to imagine a claim, even though previously considered and decided on the merits by the court, which could not be relitigated before the Commission merely by basing the claimed right of recovery on the provision of clause (5) supra. Clause (5) was intended, as its language clearly shows, when considered in the light of its history and other provisions of Section 2, to cover only moral claims based on justice and fair dealings or broad principles of equity and justice, with respect to which no court had theretofore made a determination on the merits, or could have made such determination under the terms of prior jurisdictional acts. The Western (Old Settler) Cherokee Indians and the Eastern (Emigrant) Cherokee Indians v. The United States, 116 C. Cl. 665.

The last issue which the petitioners say was not determined in the Zia case, is the claim that the validity of petitioners' Spanish grant had been recognized by United States' officials prior to the

Zia case. As evidence of this claim two official acts are set out as follows:

In the year 1873 the U.S. Attorney for New Mexico advised with these petitioners on their Spanish grant to "Ojo del Espiritu Santo" and recognized it as a valid title. In 1874 the Surveyor General of New Mexico who was advised of the laws of Spain and Mexico investigated their claim and then decided petitioners had an absolute grant to the said lands and full possession under it. (Pet. Brief, Fdg. 18, p. 42)

This does not constitute a new issue but is evidence material to the issue decided in the Zia case. The 1873 letter of T. B. Catron (Ex. B. attached to the Amended Petition) is the opinion of an attorney and the 1874 opinion of the Surveyor-General (Ex. A attached to the Amended Petition) was actually before the Courts in the Zia case and is shown at page 32 of the Transcript of Record (Def. Ex. 1). The recommendation that Congress ought to confirm the 1766 grant was only a recommendation, which Congress did not choose to follow.

In their reply brief (pp. 34-36) the petitioners make the additional argument that by the admission of the defendant the Court of Private Land Claims had no jurisdiction to adjudicate the respective rights of the petitioners as against the Baca heirs and assigns who were named parties defendant with the United States. Therefore, it is said, the resulting adverse judgment cannot be considered as res judicata to the issues now before the Commission. Petitioners point to the separate answers of the United States and the Baca heirs as placing in the issue the conflicting grant to Louis Cabeza de Baca.

It must be admitted, however, that the Court of Private Land Claims had jurisdiction to determine the validity of the 1766 grant as

against the United States. The court determined that question, and in the present claim by the same petitioners against the United States, such adjudication is res judicata. The fact that the Indian Pueblos joined certain individuals as parties defendant could not adversely affect the validity of the judgment as to the Indians and the United States.

In line with the conclusions set out above, it is the opinion of the Commission that the judgment of the Court of Private Land Claims and the Supreme Court Opinion affirming the same have judicially determined that the three Pueblo petitioners had no rights in land by virtue of their 1766 grant from Spain either at the time of or after the Treaty of Guadalupe Hidalgo, and that said judgments are res judicata of the claim set forth in Count Three of the Amended Petition herein.

ABORIGINAL TITLE

Counts One, Two and Four of Petitioners' Second Amended Petition are based on some aspect of aboriginal title. Under Count One petitioners claim that the Spanish government recognized the aboriginal title of petitioners to the Ojo del Espiritu Santo tract containing 410,000 acres which is described in petitioners' Spanish grant of 1766. Petitioners further contend that the United States, having full knowledge of such recognition and being duty bound to recognize and protect these rights of petitioners, has failed so to do, resulting in the loss of the above land. Their theory in this regard seems to be that the Mexican government, in assuming sovereignty over this territory in 1821, recognized the property rights which the Indians held under the

Spanish government. Then the United States by the Treaty of Guadalupe Hidalgo in 1848, recognized every title and right to property which Mexico had recognized as good and valid before the cession. Therefore, the United States was legally bound to recognize petitioners' title by virtue of the Treaty of Guadalupe Hidalgo, and its failure to do so has resulted in the loss of said lands to the petitioners.

It is obvious that this line of reasoning is only as effective as the validity of its first premise. The issue, then, is whether or not the Spanish government recognized, in a legal sense, the title of petitioners to the Ojo del Espiritu Santo lands claimed herein. This issue was discussed by the Commission in Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422, 450, wherein we said:

It is quite plain that the Spanish recognized the right of the Indians to use such lands "as may be conveniently necessary for them to cultivate and to sow and raise cattle; and the lands which they now have shall be confirmed to them and others which shall be necessary shall be given them.".... However, while these and other laws of the Recopilacion show a purpose to protect the Indians in their occupancy of lands in New Spain, they created no vested legal rights in the Indians which we are required to recognize.

We have carefully re-examined the evidence and arguments presented on this issue and see no reason for changing our view. Petitioners had no vested right in the subject lands under Spanish law which the United States was bound to recognize under the Treaty of Guadalupe Hidalgo. Since all the other allegations in Count One are subordinate to and dependent on petitioners' right to recover under Spanish law, we conclude that petitioners are not entitled to recover under Count One and have so held in Finding 6 herein.

In Count Two the petitioners alternately claim that defendant recognized the aboriginal title of petitioners to the lands described in Count One through the official acts of its officers and is now estopped from denying such recognition. Petitioners assert further that after such recognition the title to the subject lands was lost due to the lack of fair and honorable dealings on the part of the defendant as guardian of the petitioners. Defendant's response is that Congress alone is the source of "recognized title", citing Tee-Hit-Ton Indians v. United States, 348 U.S. 272, and that there is nothing in the record before this Commission of any Congressional action or intention to recognize the title of these petitioners.

Petitioners' theory in this regard is not entirely clear. However, it appears that they are proceeding under the theory of "recognized title". In their brief they quote from the Commission's decision in Pawnee Indian Tribes of Oklahoma v. United States, 1 Ind. Cl. Comm. 230, 265 citing Alcea Band of Tillamooks v. United States, 329 U.S. 40, as follows:

For if there was such a recognition of Claimant's Indian Title, no proof of original Indian title would be necessary in order to establish a compensable interest in the lands ceded.

It is therefore necessary, if the petitioners herein seek to avoid the necessity of proving aboriginal title, for them to alternatively show by substantial evidence that the defendant recognized petitioners' title in such a manner as to meet the requirements laid down by this Commission and the Courts in cases of "recognized title." This the petitioners have not done.

The only official acts of employees of the United States relied upon (Pet. Br., pp. 12-14) are those of the United States Attorney, and the Surveyor General of New Mexico, already referred to in petitioners' claim that their 1766 Spanish grant had been recognized by the United States officials, and of the Commissioner of Indian Affairs who on June 14, 1884, wrote a letter to the Surveyor General (Def. Ex. 35). These deal principally with the 1766 grant to the three Pueblos and fall far short of proof of "recognized title." In the Tee-Hit-Ton case, referred to in this connection by the defendant, the Supreme Court said:

There is no particular form for Congressional recognition of Indian right of permanent occupancy. . . It may be established in a variety of ways but there must be the definite intention by Congressional action or authority to accord legal rights, not merely permissive occupation. (Tee-Hit-Ton v. U.S., 348 U.S. 271, 278)

The evidence presented in this case shows no such definite intention either by Congressional action or authority. We find, therefore, that there was no "recognition" by the United States of petitioners' title to the said lands which would entitle them to recovery under Count Two of their petition.

In Count Four, petitioners have extended the eastern boundary of their claim under the other counts so as to allege aboriginal title to 520,000 acres. Defendant has objected to the additional 110,000 acres included under this count on the ground that it is a new cause of action filed under the Amended Petition March 17, 1952, more than seven months after the statutory bar in Sec. 12 of the Indian Claims

Commission Act had run. However, the Commission has determined on numerous occasions that the extending of the boundaries of lands claimed does not set forth a new cause of action which would be barred by Sec. 12 of the Act. (Tx. 6). Therefore, this contention of defendant cannot be sustained.

Under Count Four, petitioners have alleged aboriginal title, based on exclusive use and occupancy, of 520,000 acres exclusive of the Pueblo grants in this area. This includes the 410,000 acres described in the other counts of the petition and an additional 110,000 acres lying directly east. The subject lands can be divided into two categories:

1. Lands which were the subject of Spanish or Mexican grants prior to the Treaty of Guadalupe Hidalgo.
2. Lands which became part of the public domain of the United States by virtue of the Treaty of Guadalupe Hidalgo.

Petitioners allege aboriginal title to both categories. Petitioners also allege that they have been deprived of the exclusive use and occupancy of said lands as a direct result of defendant's disregard of its responsibilities as guardian of petitioners and because of defendant's unfair and dishonorable dealings toward petitioners.

Defendant has denied petitioners' right to recover asserting that petitioners had no rights of aboriginal use and occupancy under the laws of Spain or Mexico and therefore, obtained no such rights when United States sovereignty attached to the subject lands under the treaty of Guadalupe Hidalgo in 1848. In Mohave Tribe of Indians of Arizona, California, and Nevada, et al., v. United States, 7 Ind. Cl. Comm.

219, 259, 260, 262, 263, the Commission had this same issue before it and said:

Defendant contends that under the laws, usages and customs of either Spain or Mexico, which countries owned and governed the lands herein claimed for many years prior to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, there were no tribal rights of aboriginal use and occupancy recognized by those governments. Defendant's position in this respect is that the petitioner had no greater rights in the lands claimed as against the United States than they held under the sovereignties of Spain and Mexico... It is unnecessary, however, to dwell on this contention at any length since the Supreme Court of the United States has long ago decided adversely to defendant's contention that aboriginal rights of the Indians who inhabited lands in the cession obtained from Mexico in 1848 were to be treated differently by the United States from other Indian Lands in this country....

Indian title, or aboriginal use and occupancy, is a natural right as distinguished from a property right, which remains in Indian tribes until extinguished or abandoned. This right of use and occupancy has been recognized as existing in Indians since the establishment of our Government and this policy has been held to apply to land acquired in the 1848 Mexican Cession in the Santa Fe case....

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 346 is cited in the Mohave case, supra, as a "landmark case in Indian law," which reviews a number of Supreme Court decisions and concludes that "no different policy as respects aboriginal possession obtained in this area (1848 Mexican Cession) than in other areas."

In the Mohave and Santa Fe cases, supra, the Indians involved had not received valid Spanish or Mexican grants and in the Pueblo cases decided thus far by the Commission, all of the land in question has been included in valid Spanish grants to private individuals. The Commission has not yet decided the question of the claim of aboriginal title by Pueblo Indians who had themselves received a valid Spanish or

Mexican grant. In the instant case, each of the three petitioning Pueblos was the recipient of a Spanish grant which was subsequently confirmed by Congress and patents issued therefor. The issue to be determined then is whether or not Pueblo Indians who were the recipients of a valid Spanish or Mexican grant also have a valid claim, based on aboriginal title, to public lands lying outside their grants.

It is clear from the Commission's opinion in the Mohave case, supra, that aboriginal title to lands in this area is not to be determined by Spanish or Mexican law. On the contrary, under the Mohave decision and its interpretation of the Santa Fe ruling, Indians could claim aboriginal title to such lands as became part of the public domain of the United States under the Treaty of Guadalupe Hidalgo and which they used and occupied exclusively at that time. We believe that the Mohave and Santa Fe decisions give petitioners the same rights to aboriginal title as those given to other Indian tribes in this area in spite of their having received valid Spanish grants. We conclude, therefore, that petitioners are entitled to proceed against defendant based on aboriginal use and occupancy of the subject lands.

Defendant also contends that any of the lands included within the exterior boundaries of the various Spanish grants in conflict with the area herein claimed by the petitioners did not become a part of the public domain of the United States under the 1848 cession and, therefore, cannot be claimed by virtue of aboriginal title.

This issue is similar to that presented to the Commission in Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422, and Pueblo de

Isleta v. United States, 7 Ind. Cl. Comm. 619 which was affirmed by the Court of Claims. In these two cases the Commission held that Indian title did not exist in lands which never became part of the public domain, that is, lands which had passed to private ownership by virtue of Spanish or Mexican grants made prior to the Treaty of Guadalupe Hidalgo. In the Cochiti case we said:

.....the title to those lands, which included the 'claimed area' never passed to the United States by the Treaty of Guadalupe Hidalgo, nor did it pass from Spain to Mexico by the Treaty of Cardova of August 24, 1821, between these two nations.

It is a principle of International Law, adopted by the courts of the United States, that a cession by a conquered nation is not a cession of the property of the inhabitants of such nation..... (7 Ind. Cl. Comm. 422, 452)

In the instant case this holding disposes of the claim by petitioners of aboriginal title to any parts of the claimed area that had been the subject of a valid Spanish or Mexican grant.

By admission of the petitioners the following grants encroach upon the claimed area, as shown on Pet. Ex. 14 and Def. Ex. 39, with the patents in evidence indicated below:

Ojo de Borrego Grant (Def. Ex. 18).
Ojo de San Jose Grant (Def. Ex. 20).
Canada de Cochiti Grant (Def. Ex. 22).
Canada de San Diego Grant (Def. Ex. 23, Pet Ex. 9).
Ojo del Espiritu Santo Grant (Def. Ex. 24, Pet. Ex. 11).
San Isidro Grant (Def. Ex. 25, Pet. Ex. 10).

Since these grants were all held valid and patented by the United States, they were private property, as of the time of the Treaty of Guadalupe Hidalgo. Therefore, petitioners' claim of aboriginal title to these areas must be rejected.

However, it is obvious from an examination of the exhibits referred to above that these grants cover only 221,366 acres of the 520,000 acres in the claimed area. It is therefore incumbent upon the Commission to rule upon petitioners' claim of aboriginal title to the remaining 298,634 acres.

Aboriginal title or "Indian Title" is based upon exclusive use, occupancy, and possession. Alcea Band of Tillamooks v. United States, 329 U.S. 40. "Actual occupancy of the....land must be shown as any other fact and the mere fact that no other tribe is shown to have claimed it, or part of it, does not dispense with the necessity of proving exclusive possession in order to sustain a claim of original Indian title." Quapaw Tribe v. United States, 1 Ind. Cl. Comm. 469, 488. It must also be shown that the occupant had possession to the exclusion of other tribes, constructive possession not being sufficient. United States v. Santa Fe, 314 U.S. 339. However, "the rule of 'exclusive use and occupancy' must be reasonably applied. The term 'exclusive' is definable as excluding or having the power to exclude, limiting or limited to possession, control, or use by a single individual or organization, and as applied to use and occupancy of land by aboriginal Indians involves considerations of the 'land using entity'." Confederated Tribes of the Umatilla Reservation v. United States, 8 Ind. Cl. Comm. 513, 552. The date of exclusive use and occupancy of the claimed lands is also of vital importance since "this Commission has previously held that the date on which the United States became sovereign over the area in question is material because original Indian title could be no

greater than that held when the United States sovereignty attached." Minnesota Chippewa Tribe v. United States, 8 Ind. Cl. Comm. 781, 819, 820. Therefore, under Count Four of the Amended Petition in this case, the issue to be decided ultimately is: What portion of the claimed area, aside from valid Spanish grants, did the petitioners exclusively use and occupy as of February 2, 1848, the date of the Treaty of Guadalupe Hidalgo, when United States sovereignty attached to the subject lands?

Petitioners have presented ethnological, archeological, and historical evidence bearing on this issue. The defendant, relying on a legal argument not sustained by the Commission, presented no evidence on this point. However, "the burden is upon the plaintiff to prove its case. While the jurisdictional act waives the lapse of time, it does not thereby shift the burden of proof to the defendant, nor does the jurisdictional act by its terms excuse the absence of proof by the plaintiff." The Creek Nation v. United States, 7 Ind. Cl. Comm. 117, 134. The proof must be such that liability is not based on mere speculation. Saginaw Chippewa Indian Tribe of Michigan v. United States, 2 Ind. C. Comm. 400.

Petitioners presented the testimony of a leading member of each of the three Pueblos regarding the use and extent of the occupation of the claimed area by petitioners. This testimony was based on the oral traditions handed down to the witnesses by their forefathers. Testimony was taken concerning the location and use of religious shrines, and the traditional use of areas for farming, herding, hunting and gathering.

However, all of these witnesses were comparatively young men (ages 47 to 59) who, in point of time, are far removed from the issue in question and who have an obvious interest in the outcome of the case. (Tr. 211) There was no specific evidence presented as to the source of these traditions other than that they were received from their forefathers. Their testimony respecting the time of occupation, a very important point in this case, was vague and general throughout. Although they testified that the claimed lands had been used by the three Pueblos from time immemorial and that many of the religious shrines are still in use today, one witness admitted that during his lifetime the Indians had been restricted to their patented areas. (Tr. 47) The same witness also said that the Pueblos never sold any of their land despite the intrusions of Spanish, Mexican and white peoples. (Tr. 61) He also mentions the traditional battles in the area with the Navajo raiders and the Spanish (Tr. 70-73) but could give no estimate of the population of the Pueblos at the time in question. (Tr. 88) Another witness admitted that even today some of the religious shrines are used "secretly by trespass" when they are located on lands not occupied by the Indians (Tr. 104) and that probably other Indians hunted in some of the claimed area. (Tr. 209)

Petitioners presented the expert testimony of an historian.

Although many statements were made regarding the extent of the use and occupation of the claimed area by the Pueblos, these related, for the most part, to a much earlier period than is at issue in this case. The diminution of the Indian population because of attacks from Apaches, Navajos and Spanish in the late 1600's (Tr. 187-188), the epidemics of

measles and smallpox which further reduced the population of the Pueblos (Tr. 191) in the 1700's and the Spanish land policy which was deliberately intended to consolidate the Indians for census, taxation and proselyting purposes (Tr. 196) would have an important bearing on the extent of petitioners' exclusive use and occupancy of the claimed area as of 1848. However, the effect of the above facts on such exclusive use and occupancy were not shown, neither was any attempt made by the witness to pinpoint the extent of petitioners' exclusive use and occupancy of the claimed area as of the critical date.

Petitioners presented an expert archeologist and much testimony, based on archeological evidence, was taken concerning the location of the petitioning Pueblos from 1200 A.D. to 1700 A.D. Other similar testimony was given concerning the use and occupancy of the claimed area post-1700 A.D. Most of the testimony concerned lands outside the claimed area or sections which were the subject of valid land grants from the Spanish government and, therefore, privately owned. None of witness' testimony even closely pinpointed the area of exclusive use and occupancy as of 1848. By witness' own admission any calculation as to the population of the Pueblos would be "exceedingly speculative". (Tr. 321, 346) The record contains data from the writings of a reputable ethnologist indicating that the three petitioning Pueblos had a combined population of less than 1000 in 1850. Petitioners' witness disputes the accuracy of these figures but admits that "there just isn't any real known data for getting accurate figures on this". (Tr. 357) The Annual Report of the Secretary of the Interior dated June 30,

1936, gives the combined population of the three Pueblos as 1120. The witness did say that the Santa Anas farmed in the southwest corner of the claimed area until 1875 (Tr. 314) but did not give the source of this information. Presumably it was based on the traditions of the Pueblos as was the petitioners' claim to ownership of peach orchards in this general area. (Tr. 317) All witnesses seem to agree, however, that no other Indians permanently inhabited this area although the Navajos raided a good deal from the north and west, sometimes penetrating to the Pueblos themselves. (Tr. 318-319) The Spanish, admittedly, did inhabit some of the claimed territory. (Tr. 197)

After a close and careful study of all the exhibits introduced and the testimony presented in this case, and viewing the evidence of petitioners in the most favorable light, we are of the opinion that the evidence offered is so vague and indefinite that a finding of aboriginal title in the petitioners to any of the claimed area would have to be based on mere conjecture. Saginaw Chippewa Indian Tribe of Michigan v. United States, 2 Ind. Cl. Comm. 400. An order, therefore, will be made in accordance with our findings and with this opinion, denying relief.

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner