

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF NAMBE,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 358
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: November 9 1965

Appearances:

Richard Schifter, Darwin P. Kingsley, Jr., and Frank E. Karelsen, III, Attorneys for the Petitioner.

Howard G. Campbell, with whom was Mr. Assistant Attorney General Edwain L. Weisl, Jr., Attorneys for the Defendant.

OPINION OF THE COMMISSION

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

The Pueblo of Nambe is an American Tribe of Indians residing in the State of New Mexico. It has been recognized by the United States as an organized tribe, capable, and with the right to file a claim before this Commission.

The petitioner filed a claim based on an alleged taking, by the defendant about 1908 without compensation, of land which the claimant was in possession of under a claim of Indian title.

The claim covered an area of approximately 45,000 acres located in Santa Fe County, New Mexico, which is delineated in detail in our Finding 3. Within the area of the metes and bounds description, but at no

time a part of this claim, is the so-called Nambe Pueblo Grant which was confirmed by the United States to the petitioner in 1864 by the issuance of a patent.

We have found that the petitioner held Indian title to approximately 45,000 acres described in our Finding 3 on the date when they were taken, to wit, October 12, 1905, by the defendant without compensation to the Nambe Tribe.

As required by the Indian Claims Commission Act we now state our reasons for adoption of the findings and conclusions we have entered. First we point out the great similarity between this case and that of the Pueblo of Taos v. United States, 15 Ind. Cl. Comm. 666. This similarity is explained by petitioner in the introductory notes to its Requested Findings:

"\*\*\* Petitioner and defendant recognize that Nambe and Taos, both Pueblo settlements, have exhibited similar social, cultural and economic patterns. They settled in the same general area at roughly the same time, and established largely identical patterns of land use. In both cases, the pueblo settlement was on the floor of a valley, near a river. In both cases, the Indians made extensive use of the mountains to the east for hunting, gathering, grazing and religious purposes.

"The cases of the Pueblo of Taos and Nambe were tried simultaneously. Petitioner and defendant used the same expert witnesses in both cases. In some instances, testimony was given jointly for both cases. See testimony of Dr. Jenkins, 1962 Tr. 45 et seq. A great many of the same exhibits have been introduced in both cases. In the light of these facts and because of the similarity of the claims, the parties have agreed that in order to avoid needless repetition, they would incorporate by reference in their findings and brief in Docket No. 358 many of the points covered in the findings and brief in Docket No. 357."

And defendant, in its Objections to Petitioner's Findings of Fact (p. 1) stated:

"As petitioner observes, the cases of the Pueblos of Taos and Nambe were tried simultaneously. Both parties used the same expert witness or witnesses in each. Much of the testimony and evidence was applicable to pueblos in general, and so to each case. It was understood that, in order to avoid unnecessary duplication, material from Taos, for example, could be incorporated in Nambe by reference.

"With the exception of pages 1 to 44, inclusive, the small volume of Nambe transcript is duplicated in the larger Taos transcript, Docket No. 357. Therefore when transcript references are made they will be to the Taos testimony unless otherwise indicated.

"In law and in fact the two cases, Taos and Nambe, are identical as to the aboriginal or Indian title issue. The difference is that Taos involves the additional consideration of the Blue Lake-Pueblo Lands Board matter.

"The defendant offered to submit this case on documents (Nambe Tr. 33). To a large degree we may say that this was done. Defendant's expert witness, Dr. Harold Dunham, took the stand briefly only for the purpose of clarifying some seeming ambiguities. (Nambe Tr. 37-44)

As in the Pueblo of Taos case, petitioner has presented evidence to establish exclusive possession and use from time immemorial, or for a long time, otherwise known as Indian title. Testimony of Indian witnesses was used to establish the boundaries of the claimed area which were well defined in the minds of the elderly Indians who were interviewed by Dr. Ellis, archaeologist and historian who testified before the Commission on behalf of the petitioner. Dr. Ellis interviewed the elderly Indians individually, in their respective homes, and found their recollections wholly consistent and thus mutually corroborative. (Pet. Ex. 18, pp. 47-50; Tr. 1962, p. 18) Relevant biographical information concerning these elderly Indians is set forth by Dr. Ellis in Pet. Ex. 18, p. 1 and in the 1953 and 1954 transcripts. The dates of birth and qualifications of the principal informants are as follows:

Antonio Vigil, who testified before this Commission was born in 1887. He was a war captain of the Nambes from the age of 14 and was responsible for patrolling the Nambe lands to see that trespassing did not occur (Tr. 1953, pp. 4-7).

Antonio Trujillo testified that he was born in 1889, and assisted Dr. Ellis by giving information as to the location of certain Nambe places. Mr. Trujillo's son, Amedo Trujillo, born in 1936, has worked for the Forest Service, knows the area well, and at the time Dr. Ellis made her investigation, assisted his father in locating places on the map (Pet. Ex. 18, p. 1).

Elemente Vigil, born 1893, testified before the Commission as to the grazing of cattle in the Nambe Falls area, the Frijoles Canyon area and in the mountainous areas. He also testified that if stray cattle came into the Nambe area they were driven off (Tr. Sept. 9, 1954, pp. 3-14).

Martin Vigil, born 1891, is a member of the Pueblo of Tesuque, immediately to the south of Nambe. He testified as to the boundary between the Pueblos. (Tr. Sept. 7, 1954, pp. 22-27)

Pete Vigil, born 1906, testified before the Commission. His testimony supported that given by the other Indians enumerated above (Tr. July 20, 1953, p. 23).

The boundaries of the claimed area were defined by the use which members of the Pueblo of Nambe made of the land. Knowledge of the boundaries of the area of aboriginal use and occupancy was transmitted from generation to generation, generally by the grandfathers of the

Pueblo. In addition, the new war captains and governors of Nambe were taken by their predecessors in office around the Nambe lands and shown each of the boundary markers delineating the area of Nambe land use (Pet. Ex. 18, p. 46).

In effect, as in Pueblo of Taos, supra, each of the elderly Indian witnesses testified that the area about which he was testifying was in the possession of and was used exclusively by the Nambe Indians, and that it was a tribal tradition that the area had been so used by his ancestors from time immemorial.

The Commission will now incorporate its reasoning and language used in the Taos case, supra, to establish Indian title by the petitioner as to the area described in Finding 3 since both cases are so similar as to be almost identical as to the aboriginal or Indian title issue. In fact, defendant as noted before in his introductory note, stated specifically that:

"In law and in fact the two cases, Taos and Nambe, are identical as to the aboriginal or Indian title issue. The difference is that Taos involves the additional consideration of the Blue Lake-Pueblo Lands Board matter." (Defendant's Objections to Petitioner's Findings of Fact, p. 2)

The Blue Lake-Pueblo Land Board matter referred to above was a matter considered exclusively in the Taos case and is not in any way a part of the Nambe claim.

The use of the land by these Indians helped establish the boundaries. Knowledge of these boundaries was transmitted from generation to generation, generally by the grandfathers. Thus, this knowledge became a tribal tradition. For testimony of these witnesses see Transcript of September 8, 1954, and December 13, 1956; also Petitioner's Exhibit 18, pp. 78-84.

Dr. Ellis, who was familiar with other Indian peoples, testified that the attitude of the Nambe Indians toward land they considered their own was quite different from that of the nomadic Indians. The relationship of the Nambe Indians toward other land "is closer to that of our agricultural society." (Tr. 1962, p. 52) Dr. Ellis' generalization, with which we agree, can be expanded and illustrated from our findings in the instant case and from other cases which we have considered.

The Nambe Indians' use of the subject lands began, according to their tradition, sometime in the year 1300. While the evidence shows that these Indians relied heavily on agriculture for subsistence, they did not do so entirely. Much of their area had an altitude of about 6,000 feet, which meant a short growing season of approximately 100 days. Because of this situation, they relied less on farming than the other Pueblos to the south and used hunting and gathering to supplement their needs. However, the country in which the Nambe Indians settled was sufficiently varied in topography, climate and elevation, to enable them to obtain all of their needs within a relatively limited area. Water, wildlife, grazing lands and various mineral substances were found in the mountains to the east. Fertile fields for planting and grazing lay in the lower elevations near the Pueblo village. It was never economically necessary for them to expand beyond this base.

Nevertheless, they lived in the general Pueblo pattern. They established the central village of Nambe as a permanent home for the tribe, which according to the Indian witnesses and traditions, had remained continuously occupied from that time to the present day. They also occupied

a well defined area surrounding the village which they used for farming, grazing, hunting and other purposes. The area claimed consisted of about 45,000 acres. From the date of its establishment to the present day, their permanent home, together with the surrounding areas which they used, has been their only home and source of subsistence. Except for the communal dwellings in which they were housed and the surrounding areas which were used in common, they had many of the characteristics of the early white settlers who had villages with surrounding fields privately owned, but with grazing areas publicly used.

Under the circumstances then, the attitude of the Indians toward the land they considered their own would undoubtedly be very similar to that of the white settlers toward their villages, homes and supporting farm land. Thus there would come into being community and private traditions which would have higher probative value than would be the case with Indian tribes which had no permanent dwellings or villages and who traveled extensively in search of game and gathered over wide areas, often in conflict with neighboring Indian tribes. With these nomadic Indians it would be unlikely that they would have the same attachment to their lands and homes as would the Nambe and other Pueblo Indians.

As stated in the Taos case, the difference in attitude and the use of lands claimed may be the explanation of what appears on its face to be a contradiction of rulings in a number of cases before this Commission, as well as before the Court of Claims, wherein a dim view was taken of so-called informant testimony from Indians who had a financial interest in the outcome of these cases, and who were very vague with respect to what they had been told by elderly Indians. In other words, these

statements were not based on well founded traditions as seems to exist in the Pueblo cases.

With all this in mind, we believe considerable weight should be given to the Indian witnesses' testimony in this case. No Indian witnesses, or other witnesses, were offered by the defendant to rebut petitioner's Indian testimony.

#### Expert Witnesses

The next line of evidence presented by petitioner is that received from expert witnesses and it is relevant principally with respect to the claim based on Indian title. Dr. Florence Ellis, anthropologist and archaeologist; and Dr. Myra Jenkins, historian, appeared in behalf of the petitioner and Dr. Harold H. Dunham, historian, appeared in behalf of the defendant.

Dr. Florence Ellis of the Department of Anthropology, University of New Mexico, received her Ph.D. at the University of Chicago in 1934. After receiving her doctorate, Dr. Ellis taught at the University of New Mexico and spent the summer of 1940 and 1941 living in the Taos areas and doing research on the Spanish-American cultures in that area. She testified as an expert witness for the petitioner and stated that the Nambe Indians first entered the areas claimed by petitioner about 1400 and established a village located near the present site of Nambe Pueblo village (Pet. Ex. 19, pp. 33-37). Dr. Ellis' testimony and report are based upon archaeological and legendary evidence gathered during her work among the Nambe people, which she contends establishes where and when the ancestors of the present Nambe settled, how long they remained and in what activities these Indians engaged. On cross examination Dr.



Ellis stated that the area claimed by petitioner and designated in Finding 3, was exclusively used by the petitioner in 1848 (Tr. 1962, p. 10). Detailed findings of Dr. Ellis' archaeological excavation and the great amount of work she put in are reported in Bet. Ex. 18, particularly on pages 15 through 36 and Findings 4 through 16.

Petitioner's expert historian, Dr. Myra Jenkins, who obtained her Ph.D. from the University of New Mexico and has done extensive work in Latin America, Mexico, and New Mexico, supported the testimony of the Indian witnesses and Dr. Ellis, showing that the Nambe Indians exclusively used and possessed the lands claimed by them for hunting, gathering, farming and grazing from time immemorial (Pet. Find. 4 through 16; Tr. 1962, pp. 409-444).

Dr. Harold H. Dunham, who received his Ph.D. from Columbia University appeared as an expert historical witness for the defendant. He is the author of a pamphlet entitled, "A Historical Study of Land Use and Occupancy of the Nambe Indian Pueblo Up To 1848" which was introduced into evidence as Def. Ex. No. 1. From his testimony it is evident that Dr. Dunham has done extensive research on New Mexico Territory history. He cites, among others, the following authorities, all of which were introduced in evidence as exhibits: Adams and Chavez, Ex. 23; Hodge, Ex. 24; Twitchell, Exs. 25 and 31; Bandelier, Ex. 30; and Bancroft, Ex. 33.

Dr. Dunham testified that by 1846 to 1848 the Spanish outnumbered the Indians 6 to 1 and were much stronger than the Indians, especially in the field of armament and defendant therefore assumed that the Indians

could not have exclusively used and occupied the areas they now claim (Tr. 1962, pp. 259-264; Def. Fdgs. 10 and 17).

Petitioner replies to this claim by stating that even though the Spanish outnumbered the Indians by 1848, and even though they had sufficient force and power to take any land they wished from the Pueblo Indians, they did not do so, but took the bottom land and left the hilly uplands to the exclusive use and occupancy of the Indians because they had no use for the mountainous areas.

The defendant contends that the royal grant to the petitioner, by the strongest possible implication, limited the Indians to tracts granted (Def. Pro. Fdg. 15; Def. Brief, para. Nos. 27 and 28). However, the Court of Claims has expressly ruled on this point in Pueblo de Zia v. United States, Slip Opinion, p. 2, Appeal No. 9-62 (1964). In that case the Court states that the petitioner therein could present a valid claim based on aboriginal title to public lands despite the fact that the petitioners involved had received a valid Spanish Grant of another parcel of land.

The Commission concludes that in view of the decision reached by the Court of Claims in the Zia case, supra, that petitioner may maintain an additional claim for additional areas other than that land contained in the valid Spanish land grants.

The Commission also concludes that the pattern of use described in Findings 4 through 16 existed in 1848 in the areas described in Finding 3 and that it continued with few encroachments until the establishment of the Forest Reserve about the year 1905, when the United States

informed the Pueblo of Nambe that the land which the Pueblo considered its own was now public land of the United States.

Defendant introduced no evidence contradicting the findings of Dr. Ellis and seems willing to concede the accuracy of her testimony (Tr. 1962, pp. 144-145), but maintains that such testimony should be received only as background since the function of anthropology is to construct a history where none as such exists, and that since such history exists in the present case, little or no weight should be given to Dr. Ellis' testimony; that such testimony should be received and considered, if at all, as stated above, as background or as it may particularly illuminate the areas of religion and customs. However, the Commission and the Court of Claims have repeatedly held that this type of evidence is entitled to consideration on the issue of Indian title. In Pawnee Tribe of Oklahoma v. United States, 124 C. Clms. 324, the Court of

Claims stated:

"The Indian Claims Commission Act reflects the intent of Congress that the cases arising under that Act should be decided on a complete and full record concerning all the ascertainable facts."

And in the Snake or Piute Indians, v. United States, 125 C. Cls. 241, that Court stated:

"The problem of establishing such exclusive occupancy title by immemorial possession as of the date too remote to admit of testimony of living witnesses, and where no deeds or patents exist, is not a simple one. At best, the ultimate fact of beneficial ownership by exclusive possession and occupancy can only be inferred and found from many separate events and a variety of documentary material . . ., evidence of an expert type from anthropologists and historians, correspondence in the records of various Government departments and officials with reference to or having a bearing on the tribe or the area in question, and, in fact, anything having any relevance which can be unearthed."

In reviewing the expert testimony the Commission agrees with the petitioner that the defendant's evidence concentrates upon such events as governmental policies and individual exploits and that it is necessary and proper to go beyond this and utilize all possible evidence to determine what lands the Nambe Indians did or did not hold by reason of Indian title on the critical dates in this proceeding.

We believe that the expert testimony of Dr. Florence Ellis should be given considerable weight because of her archaeological work in the field which furnished strong evidence of the presence of Nambe Indian villages and activities in the claimed areas, continuously or for a long time prior to and including 1848 when United States sovereignty came into being in the area. This evidence is more completely set out in our Findings 4 through 16. Dr. Ellis also gave her opinion as an expert anthropologist that the Nambe Indians in effect had Indian title to the claimed area.

The testimony of Dr. Myra Jenkins supports and confirms to a considerable extent the testimony and documentation of Dr. Ellis.

With regard to the expert historical witness of the defendant, Dr. Harold H. Dunham, the Commission concedes that he has done considerable research on the question under discussion, but feels that neither his testimony nor his documentary work refute the evidence presented by the petitioner, since both his testimony and his documentary evidence deals with matters that have already been ruled on by this Commission in the Zia case, supra, or pertain to matters that are not relevant to the question of Indian title.

Documentary Evidence

There is other evidence in existence which supports the Pueblo claim and this is documentary material taken from Government files. Here we find repeated statements of Government officials that the Pueblo of Nambe Indians have used the claimed land since time immemorial. These statements were made by men who were in the area and who were thoroughly familiar with the facts (Pet. Exs. 7-16; Def. Ex. 1).

What these documents establish is that the Pueblo Indians had been left undisturbed in the use of their aboriginal hunting, grazing and gathering lands until the first decade of the 20th century. It was only when the Forest Reserves were created that the Indian people were told that these lands could no longer be used by them without restrictions. This limitation on the Pueblo Indians created a great deal of furor, resulting in an investigation by the Bureau of Indian Affairs. The Bureau did, in fact, find that the creation of the Forest Reserves had caused the Pueblo Indians to be squeezed out of their ancient lands and urged that certain portions of the lands be returned to the Pueblos in the form of an Executive Order Reservation. The Government documents received in evidence which support this view are as follows: Pet. Exs. 1-4, 6, 7, 11-15 and 17. However, these exhibits deal for the most part with factual situations similar to those presented in the Zia decision, supra, or refer to matters irrelevant to this proceeding.

In summation, defendant has based its defense on these points:

(a) The population of the area during the critical date of 1848 showed that the Spanish outnumbered the Indians by 6 to 1. Petitioner answered this argument by pointing out that the Spanish, regardless of

their much larger population, preferred and used what to them seemed the more desirable bottom land and left the mountainous areas to the exclusive use and occupancy of the Indians. On this point the logic of the situation is clearly with the petitioner.

(b) Defendant next contends that the Royal Spanish Grant limited the petitioner to the area contained in the grant. However, this defense is ruled out by reason of the Court of Claims decision in the Zia case supra.

(c) Defendant then questions whether the evidence received supports the claim of Indian title urged by petitioner. But defendant introduced no evidence rebutting the testimony of Dr. Ellis and Dr. Jenkins, the traditions of the Nambe Indians that they had occupied and used the areas for a long time, and the documentary evidence which largely supports the testimony of the expert witnesses and the Nambe traditions.

Thus, there is substantial evidence supporting our Finding 23 awarding the subject tracts to the petitioner. In fact, there is very little evidence to the contrary.

Under the circumstances, and based on the entire record in this case, we are of the opinion that the petitioner has sustained its claim of Indian title to the tract of land described in our Finding 3, and that the defendant took this land from the petitioner without compensation on October 12, 1905, when it was proclaimed a part of the National Forests.

An interlocutory judgment or order will be entered to the effect that petitioner had Indian title to the subject tract of land on the

date it was taken from petitioner by the defendant, and that proceedings to determine the exact acreage of the said tract and its fair market value at the time of taking will be authorized.

Arthur V. Watkins  
Chief Commissioner

We concur:

Wm. M. Holt  
Associate Commissioner

T. Harold Scott  
Associate Commissioner