BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO DE ZIA, PUEBLO DE JEMEZ, AND PUEBLO DE SANTA ANA, Petitioners,	)	
v.	)	Docket No. 137
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: March 7, 1968

Appearances:
Claud S. Mann and M. J. Clayburgh
Attorneys for the Petitioners.

Walter A. Rochow, with whom was
Mr. Assistant Attorney General
Clyde O. Martz, Attorneys for the
Defendant.

OPINION OF THE COMMISSION

Commissioner Kuykendall delivered the opinion of the Commission.

This case is now back before the Commission on remand from the Court of Claims. In the original hearing before this Commission, petitioners claimed compensation from the United States for the taking of 520,000 acres of land to which they claimed Indian title. The Commission held that 221,366 acres of this claimed area were private property, granted to the owners by the governments of Spain and Mexico, at the time United States sovereignty attached to the area and for this reason recovery was denied petitioners for this area. The Commission also denied recovery for the remaining 298,634 acres on the ground that petitioners had not proved their case. Petitioners appealed this last holding to the Court of Claims. The Court of Claims reversed the Commission and held that petitioners held

Indian title to these 298,634 acres of land as of 1848 and remanded the case to the Commission to determine the date the United States took this acreage from petitioners and the valuation of the land as of that time. The question now before the Commission for decision is the date of taking. A hearing has been held, documentary evidence presented, and briefs filed.

Petitioners argue that 51,713.66 acres of the recovery area were taken by the United States when they were included within the exterior boundaries of the Jemez Forest Reserve by the proclamation of President Theodore Roosevelt dated October 12, 1905. Petitioners cite two cases, Pueblo of Taos v. United States, 15 Ind. Cl. Comm. 666, 702; and Pueblo of Nambe v. United States, 16 Ind. Cl. Comm. 393, 420, as proof that the inclusion of Indian title lands within a national forest created by Presidential proclamation constitutes a taking under Section 2 of the Indian Claims Commission Act. Defendant has submitted evidence that 36,172.62 acres rather than 51,713.66 acres as proposed by petitioners were within the boundaries of the Jemez Forest Reserve (Pet. Ex. 14). We believe defendant's claim is the correct one and have so found in Finding 28 herein.

Petitioners contend that the remaining 246,902.34 acres were taken as of April 4, 1936, when the order of the Secretary of Interior including these lands within the boundaries of Grazing District No. 2 became effective under the Taylor Grazing Act of June 28, 1934.

Defendant does not specifically deny that the creation of the Jemez Forest Reserve in 1905 and Grazing District No. 2 in 1936 constitute a taking of land. However, defendant maintains that the lands in question here were

already taken from petitioners by the United States long before the 1900's. During the hearing before the Commission, defendant argued that Indian title to the above lands was extinguished when Congress enacted the Atlantic and Pacific Railroad Company Land Grant Act of July 27, 1866, or at least by March 9, 1872, when the Railroad filed a map of definite location showing where it intended to build. Now, however, defendant contends

> "... upon reexamination of the relevant cases and the facts pertaining to this and other Pueblos, we believe that the 'taking' or, more properly, the 'extinguishment' of Pueblo 'Indian' titles occurred in 1854 as a result of the Act of July 22, 1854, 10 Stat. 308, and that the 1866 grant to the railroad was only one in a series of acts showing that by the 1854 Act the United States adopted a policy which effected an extinguishment of petitioners' Indian title." (Def. Brief, pp. 3-4)

The substance of defendant's argument is that because the United States asserted ownership over the petitioners' aboriginal lands as evidenced by such things as the Atlantic and Pacific Railroad Land Grant Act of July 27, 1866 (14 Stat. 292), the Act of June 21, 1898 (30 Stat. 484) granting school lands to the Territory of New Mexico, the creation of the Jemez Forest Reserve by Executive Order dated October 12, 1905, the Enabling Act of June 21, 1910 (36 Stat. 557, 561) granting school lands to the State of New Mexico, Executive Orders granting reservation lands, surveys and patents under the Homestead Laws, patents issued for railroad grant lands, and grazing fees, that the petitioners' Indian title to their aboriginal lands had been extinguished by implication in 1854 under the Act creating the office of Surveyor-General of the Territory of New Mexico. The thrust of this argument is that the United States would not have asserted ownership in this way unless the title to these lands had already been extinguished.

This is a circular argument that does not hold up under close examination. The assertion of ownership and control over lands may in itself be a taking but such actions do not necessarily mean that these lands had already been taken at an earlier date as contended by defendant.

As defendant pointed out in its brief, the purpose of the Act of July 22, 1854, establishing the Office of Surveyor General of New Mexico was,

> "... to ascertain the origin, nature, character and extent of all claims to lands within that Territory which might have existed under the laws, customs and usages of Spain and Mexico. A full report of his findings was to be submitted to Congress with his decision as to their validity or invalidity. He was also to report on all pueblos in the Territory, 'showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land.' These reports were to be submitted to Congress for such action as might be deemed just and proper with a view to confirming all bona fide grants." (Def. Brief, p. 8)

From defendant's description of the Act it seems clear that its purpose was to recommend to Congress how the laws, customs and usages of Spain and Mexico affected the claims to land within the Territory rather than to recommend any action by Congress which would affect Indian title to lands based on aboriginal occupancy. On this very point, the Supreme Court in United States v. Santa Fe Pacific Railroad Company, 314 U.S. 339, 350, 351 said, referring to the Acts of July 22, 1854 and July 15, 1870:

> "These Acts did not extinguish any Indian title based on aboriginal occupancy which the Walapais may have had. In that respect they were quite different from the Act of March 3, 1851, 9 Stat. at L. 631, Chap. 41, passed to ascertain and settle certain land claims in California. ... The Acts of 1854 and 1870, unlike the Act of 1851, merely called for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the Surveyor General but from action of Congress based on his reports. We are not advised that Congress took any such action. In its absence we must conclude that these Acts were concerned not with the problem of ascertaining the boundaries of Indian

> country but with the problem of quieting titles originating under Spanish or Mexican grants."

However, defendant argues that,

> "... even though the Act of July 22, 1854, 10 Stat. 308, did not operate to extinguish Indian title to lands of savage tribes such as the Walapais, ...it did so as to the Pueblo Indians. The Pueblo Indians were specifically covered by the Act and it was clearly contemplated that Congress would act with regard to their claims. It was also clearly indicated that Congress intended to confirm all bona fide grants and by implication, no other rights were to be recognized. ... The subsequent action taken by the Congress or authorized by it, not only bears out this intent, but indicates an assertion of full ownership of all parts of the area not included in a valid grant from Spain from and after the 1854 Act." (Def. Brief, p. 7) (Emphasis supplied)

In the Santa Fe case the Supreme Court also said:

> "... treaties negotiated with Indian tribes, wholly or partially within the Mexican cession, for delimitation of their occupancy rights or for the settlement and adjustment of their boundaries, constitute a clear recognition that no different policy as respects aboriginal possession obtained in this area than in other areas." (p. 346)

The fact that the petitioners are Pueblo tribes and had land grants from Spain and Mexico should not place them in a different position than the Walapai with regard to their Indian title lands. If the Act of July 22, 1854, did not extinguish the Indian title of a tribe such as the Walapai, it would have the same effect, or lack of it, on the Indian title of Pueblos such as petitioners. Petitioners' Indian title was not extinguished by the Act of July 22, 1854, and we have so found in Finding 24 herein.

We consider next the effect of the Atlantic and Pacific Railroad Company Land Grant Act of July 27, 1866 (14 Stat. 292), on the question of the date of taking of petitioners' lands. Under this Act the United States granted certain public lands, including much of petitioners' aboriginal lands, to the Atlantic and Pacific Railroad Company. However, the Act made

the grant subject to the encumbrance of Indian title with the agreement that the United States would extinguish the Indian title to all lands falling under the operation of the Act as rapidly as consistent with public policy and the welfare of the Indians, and only by their voluntary cession. (Def. Ex. T-2)

One of defendant's arguments is that this treatment of petitioners' lands as public lands by the defendant is a sure indication that petitioners' Indian title had been extinguished. However, the Atlantic and Pacific Railroad Land Grant Act of 1866 refers to the lands granted to the railroad as "public lands" and "public domain" even though they were expressly granted with the encumbrance of Indian title. (Def. Ex. T-2) This makes it clear that the passage of this Act asserting ownership over the "public domain" did not extinguish Indian title to these lands or imply that such title had already been extinguished. Defendant has admitted in its brief that the United States took no action at the time to extinguish the Indian title to the subject lands, all of which were included within the boundaries of that grant. (Def. Brief, p. 15) As the Supreme Court said in the Santa Fe case, p. 344:

> "...in the absence of such extinguishment the grant to the railroad 'conveyed the fee subject to this right of occupancy.'"

Under the Acts of June 21, 1898 (30 Stat. 484) and June 20, 1910, (36 Stat. 557, 561) Congress granted to the Territory of New Mexico and the State of New Mexico 27,306.18 acres of petitioners' Indian title lands for the support of schools. This grant included all or part of sections 2, 16, 32 and 36 in each Township within the Public Domain, not otherwise reserved or withdrawn. Under the provisions of the Enabling Act

of 1910 all the lands granted by the United States thereunder to the State of New Mexico, including sections 2, 16, 32, and 36 of each Township had to be,

> "... selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and non mineral public lands of the United States within the limits of said State, by a Commission composed of the governor, surveyor-general or other officer exercising the functions of a surveyor-general, and the attorney-general of said state;..." (Def. Ex. T-39, Sec. 11)

These school grants made in the Enabling Act were also specifically made subject to any Indian title. Section 2, second declares:

> "... the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to ... all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall be acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States;..." (Def. Ex. T-39, Sec. 2)

Clearly, petitioners' Indian title to the 27,306.18 acres of their aboriginal lands, which were granted to the State of New Mexico under the 1910 Enabling Act, was not extinguished by the passage of that Act. The selections and patents for school lands under the terms of the Enabling Act and within petitioners' Indian title lands did not occur until 1960 or later. However, during the interim these same lands were included within the exterior boundaries of Grazing District No. 2 under the Taylor Grazing Act.

Acting pursuant to Sec. 24 of the Act of March 3, 1891, President Theodore Roosevelt by proclamation dated October 12, 1905, created the

Jemez Forest Reserve in the Territory of New Mexico. In the proclamation President Roosevelt said,

> "... that there are hereby reserved from entry or settlement and set apart as a Public Reservation, for the use and benefit of the people, all the tracts of land, in the Territory of New Mexico, shown as the Jemez Forest Reserve on the diagram forming a part hereof." (Pet. Ex. 3)

Thus 36,176.62 acres of petitioners' Indian title lands were included within the exterior boundaries of the Jemez Forest Reserve as outlined on the above mentioned diagram.

In Pueblo of Taos v. United States, 15 Ind. Cl. Comm. 666, 702, we said:

> "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."

We used similar language in describing the same type of situation in Pueblo of Nambe v. United States, 16 Ind. Cl. Comm. 393, 420.

We found in the above cases that the creation of the forest reserves had caused these Pueblo Indians to be squeezed out of their ancestral lands and constituted a taking of these lands.

The Court of Claims in a recent case also held that the creation of a Forest Reserve constituted a taking of land by the United States from the Tlinget and Haida Indians of Alaska. Tlinget and Haida Indians of Alaska, v. United States, ____ Ct. Clms. ___, Decided Jan. 19, 1968 (Slip Opn. p. 3). We recognize a similar set of facts in the present case. The creation of the Jemez Forest Reserve by the proclamation of President Theodore Roosevelt placed restrictions on the use of these lands so that the petitioners were

effectively deprived of them and such proclamation constituted a taking of such of petitioners' lands as fell within the boundaries of said reserve, except for such parcels of land as may have been legitimately entered at an earlier date. We have so found in Finding 28 herein.

The Taylor Grazing Act was approved June 28, 1934 (48 Stat. 1269). Pursuant to this Act on November 26, 1934, President Franklin D. Roosevelt signed an Executive Order withdrawing all of the vacant, unreserved and unappropriated public land in New Mexico and eleven other western states from settlement, location, sale or entry "subject to existing valid rights." Under the date of March 27, 1936, the Secretary of Interior pursuant to the Taylor Grazing Act, issued his "order establishing Grazing District No. 2 in the State of New Mexico." (Pet. Exs. 1-T, 2-T) This district included all of petitioners' aboriginal title lands that had not been included in the Jemez Forest Reserve. The effective date of the above order was to be the date the order was published in the Federal Register, April 4, 1936. Among the regulations for the administration of these grazing districts was the obtaining of a license and the payment of grazing fees. With respect to one of the petitioners herein, the defendant has said:

> "After the enactment of the Taylor Grazing Act in the early 1930's, the Indian service assisted the Pueblo of Santa Ana in obtaining a grazing license on certain public domain which it had been using for livestock grazing as long as the inhabitants of that Pueblo could remember." (Def. Ex. T-27)

We believe, and have so found in Finding 32 herein, that the establishment of Grazing District No. 2 by order of the Secretary of Interior as published in the Federal Register April 4, 1936, and made pursuant to the Taylor Grazing Act approved June 28, 1934, placed restrictions on

petitioners' use of their aboriginal lands falling within said district so as to constitute a taking of these lands under Section 2 of the Indian Claims Commission Act.

By Executive Order dated December 19, 1906 (3 Kapp. 688) a tract of unspecified acreage and by Executive Order dated October 4, 1915 (4 Kapp. 1029) a tract containing 908.48 acres both included within the area for which petitioners are claiming compensation, were set aside as reservations for the Indians of Jemez Pueblo, one of the petitioners herein. These lands were not a part of the acreage taken as a result of the creation of the Jemez Forest Reserve and petitioners were using these lands at the time they were set apart as reservations for the Indians of Jemez Pueblo. Consequently, these lands were never taken from petitioners by the United States.

Under Act of Congress dated April 12, 1924 (43 Stat. 92) 368.85 acres of land included within the acreage for which petitioners are claiming compensation were set aside as a permanent reservation for the Zia Indians, one of the petitioners herein. These lands were not a part of the acreage taken as a result of the creation of the Jemez Forest Reserve and petitioners were using this tract at the time it was set apart as a reservation for Zia Pueblo. Consequently, these 368.85 acres were never taken from petitioners by the United States.

This situation is similar to the recent Court of Claims case where the Court held that Indian title to some areas belonging to the Tlinget and Haida Indians in Alaska had never been extinguished and compensation for such lands was denied. The Tlinget and Haida Indians of Alaska v. United States, ____ Ct. Clms. ___; decided January 19, 1968, Slip Opinion p. 3, 179.

Since the above lands granted to petitioners by Executive Orders and Act of Congress were never taken from petitioners by the United States, defend- and is not liable to petitioners for the value of these lands.

Intersprrsed throughout petitioners' Indian title area are many thousands of acres of land which were legitimately entered and settled at various times from the late 1800's through the 1920's. These entries included land falling within the boundaries of both the Jemez Forest Reserve and Grazing District No. 2 created under the Taylor Grazing Act (Def. Ex. T-22). The taking dates of these parcels are the dates when these lands were entered and the parcels are to be valued as of those dates. However, petitioners and defendant may agree to an average of values to avoid the burden of valuing each separate tract. Creek Nation v. United States, 302 U.S. 620, 622. Such an agreement, of course, would be subject to the concurrence of the Commission. In the event that any of the lands falling within the Jemez Forest Reserve area were legitimately entered prior to October 12, 1905, when said Reserve was created, the taking dates of such parcels would be the earlier dates and the acreage of said parcels would be subtracted from the 36,176.62 acres taken by the creation of the Jemez Forest Reserve.

In summary, we have rejected defendant's arguments that petitioners' lands were taken under the Act of July 22, 1854 (10 Stat. 308), creating the office of Surveyor General of New Mexico Territory or under the Atlantic and Pacific Railroad Company Land Grant Act of July 27, 1866 (14 Stat. 292). We have found that pursuant to the Act of March 3, 1891, 36,176.62 acres of petitioners' lands were taken by Executive Order of October 12, 1905, creating the Jemez Forest Reserve and are to be valued as

of that date, except for such parcels as may have been entered earlier. We have also found that by Executive Order of December 19, 1906 (3 Kapp. 686), an unspecified number of acres in Township 16 North, Range 1 East were set apart as a reservation for the Indians of Jemez Pueblo, one of the petitioners herein, and by Executive Order dated October 4, 1915 (4 Kapp. 1029) another tract of land containing 908.48 acres was also set apart as a reservation for the Indians of Jemez Pueblo. Since petitioners were using these tracts at the time they were so set apart, these two tracts of land have never been taken from petitioners by defendant. Consequently, petitioners' aboriginal title therein has not been extinguished and they are not entitled to compensation for these lands under Section 2 of the Indian Claims Commission Act.

Under the Congressional Act of April 12, 1924 (43 Stat. 92), 386.85 acres in Township 15 North, Range 2 East were set aside as a reservation for the Indians of Zia Pueblo, one of the petitioners herein. Since petitioners were using this tract of land at the time it was so set apart, said tract has never been taken from petitioners by defendant. Consequently, petitioners are not entitled to compensation for these lands under Section 2 of the Indian Claims Commission Act. In addition, we have found that thousands of acres falling within petitioners' Indian title area were entered and settled from the late 1800's through the 1920's. The date of evaluation of these lands is the dates on which the various tracts were entered. However, subject to the concurrence of the Commission, the parties may agree to an average of values for these tracts to avoid the burden of valuing each separate tract. In a similar case the Supreme Court has suggested that:

"A fair approximation or average of values may be adopted to avoid burdensome detailed computation of value as of the date of disposal of each separate tract." (Creek Nation v. United States, 302 U.S. 620, 622)

We have found that the remainder of petitioners' 298,634 acres to which they held Indian title was taken under the Taylor grazing Act of June 28, 1934 (48 Stat. 1269), and is to be valued as of April 4, 1936, the date on which the Order creating District No. 2 became effective and petitioners could no longer use these aboriginal lands without restriction. The exception again being any parcels of land which were patented prior to April 4, 1936. The case will now proceed to a determination of the fair market value of said lands as of the valuation dates, and to a determination also as to what offsets, if any, defendant is entitled to under the provisions of the Act. An order will be entered accordingly.

Jerome K. Kuykendall
Jerome K. Kuykendall, Commissioner

We concur:

Wm. M. Holt
Wm. M. Holt, Commissioner

T. Harold Scott
T. Harold Scott, Commissioner

John T. Vance
John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner