BEFORE THE INDIAN CLAIMS COMMISSION

CABAZON BAND OF MISSION INDIANS OF CALIFORNIA, Plaintiff,	)	
v.	)	Docket No. 148
THE UNITED STATES, Defendant.	)	

Decided: 6-18-69

Appearances:

Robert J. Kilpatrick of Wise, Kilpatrick & Clayton, and Raymond C. Simpson, formerly of Simpson & Daley, with whom was Judge Merrill Brown, formerly of Wing, Wing & Brown, Attorneys for Plaintiff.

Milton E. Bander, with whom was Mr. Acting Assistant Attorney General J. Edward Williams, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the Opinion of the Commission.

This claim was timely filed for compensation for three contiguous tracts of land in California. The Plaintiff asserts its claim in the alternative under Clauses 1, 4, and 5 of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a).

The tracts are located in the existing town of Indio, which is in California at the intersection of Interstate 10 and State Route 111. The parties agree that the three tracts may be identified as Section 24, Township 5 South, Range 7 East; the north half of Section 19, Township 5

South, Range 8 East; and the west half of the southwest quarter of the said Section 19. References hereinafter to "Sections 24 and 19" will be understood to comprehend the three identified tracts.

The Plaintiff originally postulated three alternative theories of liability. First, that the Plaintiff enjoyed the exclusive use and occupancy of the claimed areas for a sufficiently long time to secure aboriginal title. Second, that the Plaintiff was the beneficiary of recognized title, albeit recognized by Executive Order rather than by Congress. And third, that the General Allotment Act of 1887 conferred on the Plaintiff an interest actionable under the fair and honorable dealings clause of Section 2 of the Indian Claims Commission Act of 1946, 25 U. S. C. 70a (hereinafter "the Act")as to Sections 24 and 19.

The Defendant disputed the aboriginal title theory on the facts. The Defendant conceded the Executive Order recognized title, but disputed whether Executive Order recognized title is compensable. The Defendant denied that the General Allotment Act of 1887 conferred on the Plaintiff any actionable interest in Sections 24 and 19.

The areas of interest in the case at bar were surveyed in the 1850s. The surveyors, including things of interest in the field notes, observed when they got to T. 5. S. R. 7 E. on December 21, 1855 that:

> The quality of land in this Township is generally of a good average 2d rate. Portion of it is alkali. There is a well of Water in Township on Section 24 - - also an Indian Village.

The surveyors also observed that there was an Indian trail, bearing east

and west, between Ranges 7 and 8, and two other Indian trails also bearing east and west between Sections 24 and 19. On March 30, 1856, the surveyors observed:

> In the S. W. corner of sec. 19 there is an Indian Rancheria.

While the surveyors did not identify the Indians whose Village and Rancheria they located, nor the Indians who used the trails the surveyors noted, the Defendant's expert witness established that the Section 24 Village was "Paltewat" near Indio. Indians also knew this Village as "Pala Tejua" and as "Palt Wait". "Pala Tejua" could reasonably be translated as "water found", which seems to further relate the site to the surveyors' description of Section 24 (supra). The surveyors' choice of the term "Rancheria" is obscure, but if, as the Commission believes, it was selected to denote a place of cultivation as opposed to a place of habitation, then the anthropologist William Duncan Strong was correct when he expounded:

> Paltewat. The last village occupied by people who are here classified as Desert Cahuilla was one-half mile northeast of Indio, at paltewat (water found). The wavaaikiktum (place name of a canyon in the hills east of Indio) clan lived here and had seven or eight houses at the time under consideration. One of these was the dance house, and was occupied by the net. They likewise were an independent ceremonial group. Their food-gathering territories were mostly in the vicinity of the village.

Thus Strong located the place of habitation, near water, and the adjacent place of cultivation (it will be remembered that Section 19 is due east of and immediately adjacent to Section 24), and the east-and-west bearing trails between the two. It is apparent that "Paltewat" near Indio was

the area described in the surveyors' notes in the 1850's.

A member of the Cabazon Band testified that the well dried up before 1910. He further testified that before the well dried up, he (as a child) used to accompany his mother to the well where she could find and use for water transport empty five gallon cans discarded on Section 24 by whites. He tied the well to his own tribe, the Cabazon Band, by testifying that his father at one time had cattle, horses, and donkeys, and that this particular well was used to water the livestock, as well as for a supply of the Cabazons' own drinking water. The witness explained under cross-examination that his people were shot at by whites when the Cabazons sought to take water from the Section 24 well, but he could not recall the years of the shootings.

The "whites" alluded to by the witness were, first, personnel of the Southern Pacific Railroad, the desert route of which to Fort Yuma via the San Gorgonia Pass had been established by 1861. This route included way stations in the Coachella Valley in which Indio is located. Apparently the Southern Pacific authorities did not care that their way station on Section 24 was on Indian land, although they must have been aware that the said Section 24, not being an odd-numbered section, was not part of the railroad's land grant. Those authorities were apparently equally indifferent to the known fact that Section 19 was reserved for Indian use before the Southern Pacific Railroad occupied it, and, therefore, although an odd-numbered section, was not a part of the railroad's land grant. The track crossed Section 24 diagonally; the railroad's depot, icehouse, hotel

roundhouse, subsidiary buildings, and railroad yards were there. The railroad's use of or desire for a portion of Section 19 is unclear from the record in the case at bar; however, the Commission notes the useful proximity of the desired portions of Section 19 to the well-used Section 24.

In 1865 and 1866 various of the Cabazon Band were discovered living on Section 24, cultivating in Section 19, and walking to and fro between those sections on well-established trails (supra). There is testimony that their graveyard, or cemetary, was there. There is testimony that their well, a well dug by the very same Cabazon Indians, was there. But there is no contemporary testimony of the presence of these, or any other, Indians during the ensuing decade.

By Executive Order of May 15, 1876, President Grant set apart as reservations, for the permanent use and occupancy of the Mission Indians of southern California, a number of parcels of land. The last three were:

> Cabazons. - Township 7 south, range 9 east, section 6;
>
> Village. - Township 5 south, range 8 east, section 19;
>
> Village. - Township 5 south, range 7 east, section 24.

Section 6 is one of the three sections which, together but not contiguous, were denoted the "Cabazon Indian Reservation". The remaining two sections making up that Reservation were Section 30, immediately south of Section 19, and Section 32, immediately south and east (diagonally) of Section 30.

The indeterminate language of the Executive Order denoting three consecutive sections as "Cabazon", "Village", and "Village" does not

establish whether Sections 24 and 19 were intended to be ascribed to the Cabazon Band whose villages were there, or whether those two Sections were merely set apart for the use of whatever Indians might at some future date be found to have villages there. The Commission must look elsewhere for an authoritative interpretation. Fortunately, there is one. Several individuals had made desert entries on Sections 24 and 19 in 1911 and when it was determined by the Department of the Interior that the allowance of such entries would block other plans for those two sections, the entrymen were asked to remove themselves and their belongings. It would have been adequate notice if the Department of the Interior "Notice to Vacate" had specified that the several entrymen were intruders on Indian Reservation lands. But the Department went further. In each notice it was stated, specifically, that ". . .you are residing on the Cabazon Indian Reservation . . ." (emphasis supplied).

This Commission is impressed that a reasonably contemporaneous and utterly unbiased determination of the effect of the Executive Order was that Sections 24 and 19 were set apart as Cabazon reservation lands and not merely reservation lands for unidentified Indians. This Commission finds no fault with the interpretation of the Department of the Interior. It follows that the only possible conclusions are that Sections 24 and 19 were exclusively used and occupied in Indian fashion by the Cabazon Band for at least two decades preceding 1876, and that the Executive Order of May 15, 1876, created the Cabazon Band reservation, as to Sections 24 and 19, out of land which was previously used and occupied under aboriginal title.

We have, then, aboriginal title transmuted into Executive Order title in 1876. The next consideration is whether the Cabazon Band voluntarily abandoned Section 24 or Section 19, or both, between the dates when Executive Order title attached and when the United States finally disposed of all of Section 24 and a part of Section 19.

As noted above, the Southern Pacific Railroad early arrived in the Coachella Valley and early established a major depot operation at Indio, squarely athwart the Cabazon Band's ancestral lands. The lure of available water from the Cabazons' dug well was undoubtedly a factor in this selection. However, interaction between whites and Indians produced the inevitable frictions and the effect on the Cabazons' water supply was twofold. First, railroad personnel and railroad facilities made the sections under consideration a lot less useful to the Plaintiff who could no longer run stock on unfenced plains and who found continual and increasing interference with their efforts to grow hay and feed. Second, United States authorities declined to take any step which would assure the continued productivity of the Cabazons' well and instead aided the development of nearby artesian wells which literally sucked the Cabazon hand-dug well dry. These factors forced the Cabazon Band into a slow and grudging retreat to other pieces of their land.

Mention was made above of three sections, 6, 30, and 32, which in 1960 were known as the "Cabazon Indian Reservation". The source of

Section 6 was, of course, the Executive Order of May 15, 1876. But Sections 30 and 32 can be traced to the "Smiley Commission" report. The Smiley Commission was established by the Act of January 12, 1891 (26 Stat. 712), which provided for the appointment of three commissioners by the Secretary of the Interior to select a reservation for each band or village of Mission Indians in California. The Commission was chaired by Albert K. Smiley, hence the name.

On December 7, 1891, the Smiley Commission remarked as to the Cabazon Band that there were then no Indians on "the present Reservation on the desert near Indio called Village", that is, Sections 24 and 19. The Smiley Commission also remarked that there were then none of the Cabazon Band on Section 6, the Southern Pacific Railroad having taken it over. The Commission found Indians (arguably Cabazons since the report is found under the "Cabazon" section) as of the survey dates on Sections 30 and 32, Township 5 South, Range 8 East. In view of the conditions existing on the survey dates, the Smiley Commission recommended that Sections 24 and 19, along with Section 6, be restored to the public domain, and that Sections 30 and 32 be named the Cabazon Reservation. It seems apparent that at some time in 1891, the white pressures against the Cabazons' continued presence in Sections 24 and 19 were at least momentarily overwhelming, and that they were forced to retreat south and east to Sections 30 and 32.

By Executive Order dated December 29, 1891, President Harrison created the Cabazon Indian Reservation consisting of Sections 30 and 32 and expressed his intention to proclaim restoration of Sections 24, 19, and 6 to the public domain.

The Smiley Commission recommendations, no matter how well-intentioned, did not keep the Cabazon Indians from continuing to try to make use of their ancestral lands in traditional Indian fashion. They attempted to draw water for agriculture; they were driven off with guns. They attempted to pasture livestock; they encountered railroad tracks and restrictive fences. They attempted day-to-day living; they found there was no living to be had. They sought water; their well was dry. And despite the pressures, a Cabazon Indian yet managed to eke out an existence on Section 24 as late as 1912.

The Commission must conclude that while the majority of Cabazon Indians were forced to withdraw from Sections 24 and 19 by white pressures over which they could exercise no control, they did not in any sense effect a voluntary abandonment of those two sections.

Meanwhile, there were other problems to occupy the minds of the Interior officials concerned with the welfare of Mission Indians, and uppermost among these problems were space and water facilities for the Torres-Martinez Indians. Sections 16, 22, and 26, Township 7 South, Range 8 East, of the Torres-Martinez Reservation lay some eleven miles

south and three miles east of the Cabazon Band's Section 24 and 19. Immediately east of each of those three sections were Sections 15, 23, and 25 which belonged to the Southern Pacific Railroad Company. There was a distinct possibility that if the railroad sold its three sections, development would "rob" the Torres-Martinez Indians of their water, or a large part of it. Consequently, Interior officials determined that it would be desirable if the railroad's Sections 15, 23, and 25 could be acquired for the benefit of the Torres-Martinez Band.

Considering that the Southern Pacific Railroad had three sections which the Interior officials wanted for an Indian reservation, and also considering that the railroad had preempted Section 24 to which it had no legal claim, the idea was born that the railroad might be induced to exchange the three undeveloped sections numbered 15, 23, and 25 for the Cabazon's Section 24 which the railroad had developed extensively for railroad purposes. Protracted negotiations, inspections, and appraisals led to the position that the railroad's three sections ought to be exchanged for property of approximately equal value, which proposition in turn encouraged railroad officials to decline to exchange their Sections 15, 23, and 25 for the Cabazons' Section 24 alone. Further negotiations led the parties to agree that an exchange of the railroad's sections for Section 24 and part of Section 19 would result in an approximately equal exchange in point of view of value. When the legal authority for the transaction

was established, it then became necessary to establish that Sections 24 and 19 had in fact never been restored to the public domain, so as to be available for private entry. It was recommended that the Commissioner of the General Land Office "..... be directed to note the withdrawal from all forms of settlement and entry or other disposition of the land described [Sections 24, 19, and 6], until such time as the exchange with the Southern Pacific Railroad Company can be effected ....." The legal device settled upon was a determination that a separate and specific proclamation of the President was necessary to open the land, and that such proclamation had never been issued. This legal position was confirmed by the Department of the Interior in its Docket D-17249.

With this decision in hand, the final step preliminary to the recommended exchange of Cabazon property for railroad property became possible: the various entrymen were advised that their applications had been accepted in error, that each of them was then trespassing on Cabazon land, and that each of them was directed to remove himself. The deed from the Southern Pacific Railroad was dated May 29, 1912, but the patent transferring the Cabazons' land to the railroad was dated December 11, 1914.

The sole purpose of the transaction deeding Cabazon land to the Southern Pacific Railroad and receiving other land back from the railroad was expressed by the Office of Indian Affairs:

> This Office would indeed be recreant to its trust if it were to present any other line of action in this case than that heretofore recommended; and it is believed that the proposed exchange should be pushed to an early completion. It is not concerned with any benefit that might accrue to the railroad company, but it is looking mainly to the interests of the Torres Mission band which has already lost much land to which it was justly entitled. The lands to be obtained from the railroad company [Sections 15, 23, and 25] are surrounded practically by the string, - checkerboard-shaped - part of the Torres Reservation in Township 7 South, Range 8 East, and if title is given to the United States for these three sections, at least a part of the reservation belonging to these Indians will have a compact form. This will increase their value, especially for grazing and agricultural purposes.

It may be emphasized that the Interior officials were not concerned with the benefit to the Southern Pacific Railroad; much less were they concerned with the detriment to the Cabazon Band, which lost much and gained nothing.

The Defendant suggests that the Cabazon Band's receipt of Sections 30 and 32 in 1891 was "adequate compensation" for the Band's loss of Section 24 and most of Section 19 some twenty-three years later. It may be that in some future phase of this case, Sections 30 and 32 will have some bearing upon the outcome, but the assignment of those sections to the Cabazon Band were not intended as compensation for the subsequent loss of Sections 24 and 19 and in fact they did not comprise compensation or consideration for the latter transaction.

It is apparent that the transaction between the United States and the Southern Pacific Railroad for the benefit of the railroad and the

Torres Mission Band is precisely the situation which the Court of Claims had under consideration in The Three Affiliated Tribes of the Fort Berthold Reservation, et al., v. United States, 182 Ct. Cl. 543 (1968). In that case, the Court was discussing at length the situations where the plenary power of Congress over tribal property could be upheld as a legitimate exercise of the duty which the Government owed a dependent people, or could not be upheld because the Government had taken tribal property in a constitutional sense, and had obligated itself to pay just compensation for it. The Court suggested as a guideline that "Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee."

The Court quoted the following rationale from United States v. Creek Nation, 295 U. S. 103 (1935), at 109, 110:

> While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." (emphasis supplied)

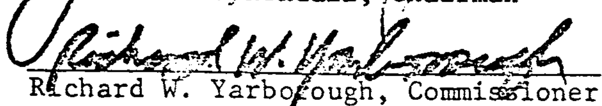
Here there was certainly no attempt to give the Cabazon Band full, or any, compensation for its ancestral lands, but the land was taken by the United States from the Cabazons and in effect donated by the United States to the Torres Mission Band. The transaction does not meet the standard or guideline supplied by the Court of Claims in the <u>Fort Berthold</u> decision, <u>supra</u>.

The Plaintiff has sustained its burden of proving that it is entitled to just compensation under Clause 1 of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a). Specifically, the Plaintiff has proved that its title was recognized by the Executive Order of May 15, 1876, and was taken without compensation as of December 11, 1914, when the United States patented the land to the Southern Pacific Railroad.

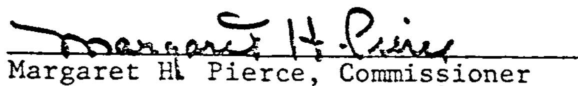
John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman



Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner