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BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: December 17, 1970

ADDITIONAL FINDINGS OF FACT

The Commission finds the following facts, which are supplemental to facts numbered 1 through 33 previously entered herein:

34. Land Description. As a result of findings of fact by the Commission on March 7, 1968 (19 Ind. Cl. Comm. 56 (1968)), an interlocutory order entered that day, and a stipulation between the parties filed August 27, 1968, the following acreages are determined to have been taken by defendant on the dates specified and by the means listed:

	<u>Acreage</u>	<u>Date</u>	<u>Method of Extinguishing Indian Title</u>
Tract A	34,900.27	October 12, 1905	Creation of Jemez Forest Reserve
Tract B	16,811.74	1920 (average date)	Homestead or Preemption Entry
Tract C	230,703.72	April 4, 1936	Creation of Taylor Grazing District No. 2
<hr/> 282,415.73 Total Acres			

The area to be valued is located in Sandoval County, New Mexico, north and west of Bernalillo. This is in the north-central part of the state. The total area is 282,415.73 acres. By reason of its distribution and its interspersal with lands not valued, its greatest dimensions are approximately 33 miles from north to south and 35 miles from east to west.

In an area of this size there are substantial variations in elevation and topography. The range in elevation is from about 5,500 feet to 9,000 feet above sea level. The elevation rises to 6,100 feet in the west and, in general, decreases eastward toward the Rio Grande. However, the forest area in the northeast rises above 6,500 feet, and Mesa Prieta reaches 7,522 feet.

The area includes rolling foothill country, high mountain ranges, deep canyons, and sandstone mesas with almost perpendicular slopes rising hundreds of feet.

35. Drainage. Drainage is generally to the south and southeast. The principal streams are the Jemez River, Salado Creek and the Rio Puerco. The Jemez River, which with its tributaries provides water to all three of the petitioning Pueblos, becomes practically dry during the summer. Since its course takes it south through the grants of Canyon de San Diego, Jemez, San Ysidro, Zia and Santa Ana, it furnishes but little water to the lands which are the subject of this evaluation. Salado Creek, which empties into the Jemez River just below the San Ysidro Grant, serves only a small area in Township

15N, Range 1E. The Rio Puerco forming the western boundary of the area has near perpendicular banks in many areas interrupted by numerous narrow and steep arroyos. The river, which is extremely alkaline, becomes a subsurface flow in some places except during the rainy season. Erosion in its watershed is severe.

36. Climate and Precipitation. The climate of this area varies from semiarid to continental, with moderate temperatures in summer and long cold winters. Freezing temperatures have been recorded in all months except June, July and August. The growing season is about six months except in the upper elevations where it is reduced to three months.

In winter the moisture comes from the Pacific Ocean. Since intervening mountains precipitate most of it before it reaches the area, winters are fairly dry except in the higher mountain areas. Most of the annual precipitation moves upward from the Gulf of Mexico during the warmer months, half of it falling from July to October. It varies from 9 or 10 inches in the lower elevations to 30 inches in the higher mountain reaches.

37. Soils. The soils in the forest portion of the area have developed from tuff and pumice. They occur in sloping mesa tops and steep canyon side slopes. Erosion is moderate to high, since these slopes range from 5 to 75 percent from the horizontal.

The soils in the eastern part of the grazing district areas occur on rolling upland, with much of the land steep and deeply dissected. Slopes are moderate from 1 to 25 percent from the horizontal except for the Santa Ana mesa in the east. Erosion varies from moderate to high. The soil capability of this part of the area has generally been classified as suitable for grazing.

Toward the west the land is rougher, developed from shale and sandstone except in the Mesa Prieta which is weathered basalt. Erosion is moderate to high with most slopes ranging from 1 to 9 percent, but some as much as 45 percent.

38. Vegetation. Elevation, climate, precipitation, soils, topography, slope, exposure, humidity and other factors combine to determine the native vegetation of the different parts of the subject area. Three regions or zones of vegetation predominate: The Canadian zone with elevations from 8,000 to 9,500 feet, the Transition zone between 6,500 to 8,000 feet, and the Upper Sonoran zone between 5,500 and 6,500 feet. The forest area (Tract A) to be valued as of 1905 is primarily in the Transition zone with extensions through the Canadian zone in the northeast portion. With increasing altitude the vegetation shifts from ponderosa (yellow) pine to Douglas and white fir and aspen. There is an understory of blue grama, galleta, little blue stem, mountain brome and other grasses. In the lower areas a scattering of pinyon and juniper predominates. The relatively high precipitation

in the upper areas provides considerable grazing for summer range, but the terrain prevents full use of the grazing capability.

The Taylor Grazing District area (Tract C) to be valued as of 1936 is primarily in the Upper Sonoran zone with extensions into the Transition zone. The eastern portion of the area has some Indian rice grass and giant drop seed with the rough broken land having some pinyon and juniper and the remainder mostly scattered woody shrubs. In the western portion alkali sacaton, side oats grama, cholla, western wheat grass and scattered pinyon, juniper, and four-wing salt bush are to be found.

39. Surveyors' Comments on Land. Any prospective purchaser of the areas to be valued would have noted the surveyors' township descriptions. These surveys, which occurred between 1881 and 1934, were made by professional surveyors who relied upon the technology current at the time of the surveys.

Of the 24 townships or partial townships involved, general descriptions were given with respect to 23. Comments were regularly made of the roughness of the land, the generally sandy nature of the soil, its dryness, and the limited vegetation. In some instances there are references to settlers and to the possibility of dry farm cultivation, often with the qualification that in dry years satisfactory crops would be impossible. There are some references to good grazing areas and to good irrigable acreage. Only the townships in the forest

area refer to timber which could be used for anything but fuel or fenceposts.

40. Transportation and Access. The roads and trails leading into this area on the respective valuation dates were of a relatively primitive nature. Not until recently was direct access to Santa Fe, 35 miles to the east, possible. Railroads provided no access to this area in 1905, or even in 1936. There was thus a lack of adequate transportation to exploit the forest resources on the valuation date here involved. In 1936, however, State Highway No. 44, running from Bernalillo through Cuba to Farmington, New Mexico, did pass within a mile or two of the gypsum deposits at White Mesa, which is located in Tract C.

41. Towns and Settlements. The nearest large, non-Indian settlements to the Zia, Jemez and Santa Ana Pueblos were the towns of Bernalillo, Albuquerque, and Santa Fe. Direct access from the subject area to Santa Fe, approximately 35 miles to the east, was not possible, and the economic activity or interest of the subject area was limited almost exclusively to Bernalillo and Albuquerque.

Apart from Albuquerque and Bernalillo, there were no towns of particular economic significance to the lands in issue. However, four small non-Indian communities did exist near and beyond Jemez as self-sustaining centers with various economic pasts. Of the four towns, Cabezón appeared the more prosperous but has been

abandoned since the valuation date pertinent here. The others included Jemez Springs, San Ysidro and Cuba, all of which remain in existence today.

42. Comparable Sales. The following sales occurred during the approximate period here involved and they provide an indication of the value of the subject lands.

- a. The Bernabe Montano Grant of 44, 070.66 acres was purchased by the Government on November 27, 1934, for \$132,211.98, or \$3.00 per acre. This grant lies south of the western part of Tract C. The Rio Puerco runs diagonally through it. Its elevation is comparable to that of the western end of the grazing lands, as is its rainfall.
- b. The Ojo del Borrego Grant of 16,602.40 acres was purchased by the Government on November 27, 1934, for \$48,239.40, or about \$2.90 per acre. This grant lies south and east of the forest lands (Tract A). This land is somewhat higher than the average of the grazing lands, and its annual precipitation is somewhat greater.
- c. The Ojo del Espiritu Santo Grant of 113,141.15 acres was purchased by the Government on December 27, 1934 for \$282,852.87, or about \$2.50 per acre. It is located north of Taylor Grazing District No. 2, and is bounded on the west by the Rio Puerco. Its elevation toward the east exceeds 9,000 feet, and its rainfall ranges from 12 to 25 inches per year.

- d. The Canada de los Alamos and Lamy Grants of 27,561 acres were sold in 1901 for \$32,000, or about \$1.16 per acre.
- e. The San Cristoval Grant of 81,239 acres was sold in 1907 for \$141,733.00, or about \$1.75 per acre.
- f. The Piedra Lumbre Grant of 49,748 acres was sold in 1909 for \$49,748.00, or \$1.00 per acre.
- g. The Baca Location No. 1 of 99,289 acres was sold in 1909 for \$247,512.00, or about \$2.49 per acre.
- h. The Ramon Vigil Grant of 31,803 acres was sold in 1911 for \$37,225.00, or about \$1.17 per acre.
- i. The Ojo del Borrego Grant of 16,080 acres was sold in 1920 for \$16,000.00, or about \$1.00 per acre.
- j. The LaMajada Grant of 24,018.75 acres was sold in 1919 for \$25,000.00, or about \$1.04 per acre.

43. Highest and Best Use of Tract A. The valuation date for the forest area is October 12, 1905. For the 8 homesteads within that area, totaling 1,272.35 acres, it is the average date of 1920.

In 1905 and continuing beyond 1920 the timber in the forest area was relatively inaccessible to any economical means of logging.

Therefore, in spite of the potentially valuable commercial stands of

timber, the highest and best use of the land was for grazing, using the timber for domestic purposes only. Supplemental values were provided by hunting and fishing and by the prospect of holding the timber for its eventual commercial use.

44. Expert Witnesses -- Tract A. The plaintiffs' forestry witness, Mr. Dahl J. Kirkpatrick, computed the commercial operable forest land to be 29,061 acres. On the basis of the United States Forest Service records, he estimated that in 1905 there was a total of 199,420,462 board feet of timber on this land. Mr. Kirkpatrick did not find any records of sales of timber in the immediate area in 1905. Instead, he used stumpage price data of the Forest Service for the period of 1910 through 1920, depicted the prices graphically, and then projected a curve backward in time to 1905. On this basis, he estimated an average stumpage value of \$2.20 per thousand board feet in 1905 for the various types of timber on this land. His total estimated stumpage value is \$2.20 times 199,420.462 thousand board feet or \$438,725.01.

Mr. Dewey Dismuke was the plaintiffs' primary witness on value. Mr. Dismuke accepted the foregoing timber appraisal of Mr. Kirkpatrick. He then estimated that in 1905 Tract A had a livestock grazing capacity of two head of cattle per section. The capacity of land to graze one cow for a year he has calculated to be worth \$326.00. The detailed computations followed in arriving at this value are set out in Finding No. 48, below. With this computed value, together

with some watershed and recreational value, he appraised the tract at a value of \$1.50 per acre, or \$52,350.40 for grazing, watershed and recreational purposes. Adding the timber value produced a sum of \$491,075.41 as the total estimated value of Tract A, or about \$14.07 per acre.

Mr. R. Howard Sears, the defendant's primary appraiser, computed the potentially merchantable and usable timber in the forest area to be 23,899 acres. He estimated the average volume of merchantable timber to be 5,000 board feet per acre, or 115,000,000 board feet for the entire tract. However, primarily because of inaccessibility, he concluded that the timber had no separate commercial value in 1905. Nevertheless, he determined that the higher elevations and more densely vegetated areas, such as Tract A, did have a higher market value than the lower, more arid lands. He considered land with a good stand of timber to be worth up to twice as much as the same type land without timber.

On the basis of sales data examined, and considering the elevation, location, size, and soil characteristics of each tract separately, Mr. Sears evaluated Tract A at \$2.50 per acre, or a total for the entire tract of \$87,250.00.

45. Highest and Best Use of Tract B. The 77 homestead entries were scattered throughout the land being evaluated and were in general the better parcels of land available. They were usually relatively level and in some cases adapted for irrigation and cultivation.

However, an inadequate supply of water was available, and it is agreed that the highest and best use of these lands is for grazing rather than horticulture.

46. Expert Witnesses -- Tract B. Mr. Dismuke, the plaintiffs' expert witness, appraised the homestead lands in Tract B at a market value in 1920 of \$68,423.78 for the entire tract. This was arrived at by estimating that they had a carrying capacity of 8 cattle per section, or a carrying capacity for the entire area of 210 cattle units year-long. By multiplying 210 cattle units year-long by \$326.00, the computed value of land required for the grazing of one cow (the computation of this value is set out in detail in Finding No. 48, below), Mr. Dismuke has calculated for plaintiffs that this tract is worth \$68,460.00. This is approximately \$4.07 per acre, or \$68,423.78 for all of Tract B.

The defendant has introduced evidence that most of these homestead tracts were on rivers or streams near roads and small settlements. Some of them supported small farming operations and as such were improved. Thus, they were considered to be much more valuable per acre than the La Majada Grant which sold for \$1.04 per acre at auction in 1919. This tract contained 24,018.75 acres. The Ojo del Borrego Grant was sold at \$1.00 per acre in 1920. This grant also is considerably inferior to the homestead parcels. They are considered by defendant to be comparable with the Baca Location No. 1, which sold for \$2.49 an acre in 1909. Mr. R. Howard Sears, defendant's expert witness,

valued these homestead lands at \$3.00 per acre or \$50,450.00 for all of Tract B.

47. Highest and Best Use of Tract C. Both parties are agreed that the highest and best use of this land in 1936 was for grazing and raising livestock, and we so find. This land also contained large gypsum deposits.

48. Expert Witnesses--Tract C. In estimating the value of Tract C for grazing purposes, Mr. Deway Dismuke, the plaintiffs' expert witness, estimated its grazing capacity at 6.6 cattle units per section year-long. He has stated that the records of the Albuquerque office, Bureau of Land Management for Grazing District 2, were examined relative to livestock carrying capacity on this land. However, his estimate of grazing capacity seems to be his independent judgment based on various factors in addition to the Bureau of Land Management records.

There are about 360.46 sections of land in Tract C. Multiplying this by 6.6 cattle per section, Mr. Dismuke calculated that Tract C would support 2,379 head of cattle year-long. Mr. Dismuke then calculated the value of grazing capacity per head by using the following three land purchases by the Government. ^{1/}

^{1/} Copies of the deeds of sale to the Government of these grants, defendant's Exhibit S 39-A, show the following sale dates:

Ojo del Borrego Grant	November 27, 1934
Ojo del Espiritu Santo Grant	December 27, 1934
Bernabe M. Montano Grant	November 27, 1934

We accept these dates of sale, but we do not consider this variance in the evidence crucial.

	<u>Purchase Price</u>	<u>Date Purchased</u>	<u>Acres</u>	<u>Cost Per Acre</u>
Ojo del Borrego Grant	\$ 48,239.40	May 2, 1935	16,602.40	\$3.00 ^{2/}
Ojo del Espiritu Santo Grant	282,852.87	June 19, 1936	113,141.15	2.50
Bernabe M. Montano Grant	132,211.98	June 19, 1936	44,070.66	3.00
	<u>\$463,304.25</u>		<u>173,814.21</u>	

Mr. Dismuke next prepared the following table, apparently based on his best judgment, to depict the grazing capacity of these three grants:

	<u>Acres Per Cow Unit Year-Long</u> ^{3/}	<u>1936 Carrying Capacity C. Unit Year-Long</u>	<u>Purchase Price Per C. Unit Year-Long</u>
Ojo del Borrego Grant	103	160	\$ 300.00+
Ojo del Espiritu Grant	125	900	314.00+
Bernabe M. Montano Grant	122	360	367.00+
		<u>1,420</u>	

The next step was to take the total purchase price for the three grants, \$463,304.25, and divide it by 1,420, the total number of cattle units. The quotient is \$326.00, which Mr. Dismuke considered the average price paid for the amount of land required for the grazing of one cow.

^{2/} While the sale appears to have been originally computed at precisely \$3.00 per acre for 16,079.80 acres, a subsequent survey indicated a greater actual acreage for the grant. This resulted in a slightly lower average per acre figure. See Finding of Fact No. 42, supra.

^{3/} Mr. Dismuke's estimate for Tract C of 6.6 cattle per section translates to 96.97 acres per cow unit year-long.

Combining his previous calculations, Mr. Dismuke multiplied the 2,379 cattle he estimated could graze on Tract C by \$326.00, the value of land required for one cow, and the product is \$775,554.00, his estimate of the value of Tract C for grazing purposes.

Next, he divided the \$775,554.00 value for Tract C by its 230,703.72 acres, and arrived at a price of \$3.36 per acre, or \$775,164.50 for all of Tract C for grazing purposes.

Mr. Henry S. Birdseye, a geologist and expert witness for the plaintiffs, testified that there is a remaining reserve of gypsum in Tract C of approximately 187,407,780 tons. On the basis of gypsum purchases in the area, Mr. Birdseye testified that the economic conditions in New Mexico immediately following World War II would have justified construction of at least one gypsum products plant in New Mexico prior to the construction of the American Gypsum and Kaiser Plants in 1958. Mr. Birdseye estimated a net value for gypsum in the ground in 1936 of \$.97 per ton and a potential mining rate of 95,000 tons per year, as is now being supplied to the American Gypsum Company plant. He further testified that even in the absence of increasing prices since 1936, a mining rate of 95,000 tons per year would produce a pre-tax profit of about \$1,000,000 every eleven years.

Mr. Dismuke estimated, on the basis of Mr. Birdseye's report, that 1,900,000 short tons of gypsum could have been produced, and that this would have been worth ten cents per ton sold as the price due the landowner as royalty. On this basis, Mr. Dismuke evaluated the gypsum on Tract C at \$190,000.00. Added to the grazing value of \$775,164.50, this yielded a sum of \$965,164.50, or about \$4.18 per acre.

Mr. Oberbillig, the defendant's expert witness, testified that the gypsum deposits in this area of New Mexico were virtually inexhaustible. He further stated that the economic situation in 1936 dissuaded anyone from considering entering the gypsum business. Gypsum products were chiefly used in the construction industry, and that industry had declined drastically at that time. The volume of new construction had dropped by 1936 to less than one-third the amount it had been in 1929. This decrease in construction was reflected in the amount of gypsum mined. Mr. Oberbillig further testified that because of the abundant supply of gypsum in other areas in New Mexico, the absence of a substantial market, the abundant supplies of gypsum elsewhere in the United States, and the state of the construction industry in 1936, the known presence of this gypsum deposit did not materially enhance the value of Tract C grazing lands as of April 4, 1936.

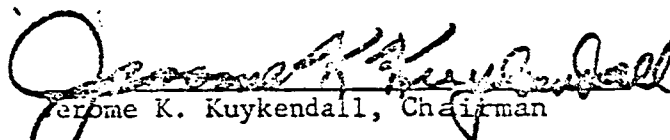
Mr. Sears developed extensive market data and consulted numerous persons with intimate and expert knowledge of past and present real estate values in this area. He considered the elevation, location, size, and soil characteristics of each tract separately, as well as precipitation, topography, and vegetation. On the basis of these factors, he concluded that the market value of Tract C as of April 4, 1936 was \$2.00 per acre or \$461,100.00 for the entire tract.

49. Conclusions. In arriving at our ultimate finding of the fair market value of the lands held jointly by the Pueblos of Zia, Jemez, and Santa Ana we have considered the lands as divided into

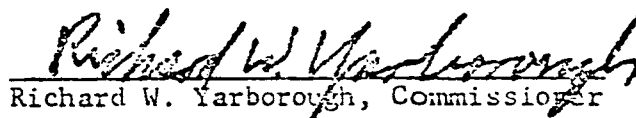
three separate tracts according to the date of taking. We find that the fair market value of the three tracts, considered separately as of the respective dates of taking, totals \$938,000. This sum is reached as follows:

Tract A	34,900.27 acres	(1905)	\$ 125,000
Tract B	16,811.74 acres	(1920)	63,000
Tract C	<u>230,703.72 acres</u>	(1936)	<u>750,000</u>
Total	282,415.73 acres		\$ 938,000

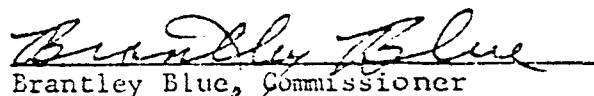
Since these lands held by the plaintiffs under Indian title were acquired by defendant without payment of compensation, plaintiffs are entitled under Clause (4), Section 2, of the Indian Claims Commission Act to recover from defendant \$938,000, subject, however, to deductions for such offsets as may be allowable.


 Jerome K. Kuykendall, Chairman


 John I. Vance, Commissioner


 Richard W. Yarborough, Commissioner


 Margaret J. Pierce, Commissioner


 Brantley Blue, Commissioner