BEFORE THE INDIAN CLAIMS COMMISSION

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| PUEBLO OF TAOS, | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Docket No. 357 |
| | ) | |
| THE UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |

ORDER TO SHOW CAUSE WHY THE COMMISSION'S FINDINGS, OPINION AND INTERLOCUTORY ORDER OF SEPTEMBER 8, 1965 RELATING TO THE PLAINTIFF's TOWN OF TAOS CLAIM, SHOULD NOT BE VACATED

On September 8, 1965 the Commission issued its Findings of Fact No. 20 through 25, 15 Ind. Cl. Comm. 666, 682 et seq., and an Opinion and Interlocutory Order, 15 Ind. Cl. Comm. 688, 703 et seq., relating to plaintiff's second claim, designated: Town of Taos Claim. It now appears from a review of the record in conjunction with plaintiff's October 17, 1969 motion for summary judgment for interest (separated as Docket No. 357-A) that Findings 20 through 23 and 25 and the resultant Opinion and Order are erroneous in the following respects:

Finding 20, 15 Ind. Cl. Comm. 682, states that in 1864 the United States conveyed to the Pueblo of Taos, by way of patent, approximately 17,360 acres. The finding fails to state that the patent was not the usual land patent whereby the United States conveys a portion of public domain, but merely a quitclaim issued in confirmation of prior Spanish and Mexican land grants. A pertinent portion of the patent reads:

> . . . this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands and shall not affect any adverse valid rights should such exist. 1/

The finding further fails to disclose that (1) the United States never had a proprietary interest in the 17,360 acres and in consequence the patent in fact was not a conveyance of title, 2/ and (2) as will be explained in greater detail herein, the Pueblo Lands Board found that adverse valid rights to much of the tract sufficient to preclude subsequent recovery by the United States for the tribe, did in fact exist.

Finding 21 states that over a period of time non-Indians settled on the land believing in good faith that they had good title, but that the decision in United States v. Sandoval, 231 U.S. 28 (1913) implied that they did not have good title. The Sandoval case made it clear that the Indian Trade and Intercourse Act 3/ had applied to pueblo Indians of New Mexico since 1851, making most efforts to alienate Indian lands thereafter,

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1/ The identical proviso is contained in the confirming act of December 22, 1858 (11 Stat. 374) upon which the patent is based.

2/ Cf. Osage Nation of Indians v. United States, 119 Ct. Cl. 592 at 648, 661; 97 Fed. Supp. 265, cert. denied, 120 Ct. Cl. 826, 342 U.S. 896 (1951) (on appeal of Docket No. 9, 1 Ind. Cl. Comm. 43 (1948)), discussing the decisions of the Circuit Ct., and the Supreme Ct. in United States v. Leavenworth, Lawrence & Galveston R. Co., 26 Fed. Cases 901 (Cir. Ct., D. Kans. 1874), aff'd. 92 U.S. 733 (1875) and United States v. Missouri, Kansas & Texas Ry. Co., 26 Fed. Cases 1276 (Cir. Ct., D. Kans. 1874), aff'd. 92 U.S. 760 (1875), holding that patents issued by the United States to Kansas and in turn by Kansas to the railroads, were invalid because the United States hadn't owned the land when it purported to grant it to Kansas.

3/ Act of June 30, 1834, 4 Stat. 729. Although the act was extended to the Indian tribes of New Mexico in 1851, 9 Stat. 587, §7, for forty-four years following United States v. Lucero, 1 N. M. 422 (1869) until the Sandoval decision, it had been understood that the proscription against alienation of Indian lands did not apply to lands of pueblo Indians.

without the consent of the United States, invalid. However, Finding 21 fails to disclose that some of the non-Indian claims stemmed from bona fide purchases and from a conflicting Spanish land grant that predated the 1851 application of the Indian Intercourse Act.

Finding 21 further states that the Pueblo Lands Board's responsibility was to determine the status of land granted and confirmed to the pueblos, and that non-Indians were to be given title if they could prove either (a) continuous, exclusive and adverse possession under color of title since January 6, 1902, with taxes paid, or (b) continuous, exclusive and adverse possession since March 16, 1889, with taxes paid, but without color of title. This, especially when considered with Finding 22, invites the erroenous conclusion that determinations of title and awards under the act were made only by the Pueblo Lands Board and only on the basis of the adverse possession provisions of the act.

The final paragraph of Finding 21 states:

> To compensate the Pueblos for the loss of land which was to be confirmed in non-Indian ownership, the United States undertook to pay the Pueblos for these lost lands on the basis of valuation reports prepared by the Pueblo Lands Board.

The statement is misleading in that it suggests that the United States assumed liability for all loss of pueblo lands reported by the board. In fact the liability of the United States was limited by Section 6 of the act to lands and appurtenant water rights lost to the Indians

through failure of the United States to seasonably prosecute any right of the United States or of the Indians. The board found that, measured by its value, well over half of the lands lost to the plaintiff were not within this category.

Finding 22 states in part:

> 22. The Pueblo Lands Board held hearings to determine whether the non-Indian claims of adverse possession within the Taos Pueblo Grant were tc be recognized and, if so, to determine the value of the land in order that the Pueblo could be compensated. The Board found that a sizable portion of the Pueblo Grant had been encroached upon by non-Indians and under the standards of the Pueblo Lands Act, confirmed the acquisition of this land in non-Indian ownership. The total value of the Pueblo grant lands to which title of the Pueblo of Taos was extinguished was, according to the Board's own appraisers, $458,520.61. However, the Pueblo Lands Board awarded the Pueblo only $76,128.85.
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> The difference between award and appraisal of $382,391.76 can be divided geographically as follows:

| | Appraisal | Award |
|---|---|---|
| Extinguishment of title in Town of Taos | $297,684.67 | 0 |
| Extinguishment of title outside Town of Taos | 160,835.94 | $76,128.85 |
| | $458,520.61 | $76,128.85 |

The finding is incomplete and confuses the provisions and effect of the Pueblo Lands Act. The Pueblo Lands Board was authorized by the act to make several basic reports. Under Section 2 of the Act the board determined and reported on lands, within the boundaries of land granted or confirmed to the pueblo tribes by any sovereign, or acquired by said Indians as a community by purchase or otherwise, title

to which the board found not to have been extinguished in accordance with the act. A separate report was filed for each pueblo. The board was not to include in such reports any lands of non-Indian claimants who, in the board's opinion, held and occupied such lands in adverse possession in accordance with the provisions of Section 4 of the act. The board thus made an initial determination under Section 2, of which lands were held adversely to pueblo interests under Section 4.

Section 3 provided that the Attorney General would file suits to quiet title to all lands so reported.

Section 4 provided that all persons claiming title or ownership to lands in such suits (adversely to the Pueblo claims) could plead as a defense, adverse possession under color of title and payment of taxes thereon from January 6, 1902 until passage of the Act, or adverse possession with claim of ownership but without color of title and payment of taxes thereon from March 16, 1889 to the passage of the act.

Section 5 provided that such pleas, successfully maintained would entitle the claimants to a decree in their favor with the effect of a quitclaim from the United States and said Indians.

Thus, although not stated in Finding 22, the Federal District Court, in suits filed under Section 3, made a final determination of whether non-Indian claims of adverse possession were to be recognized and confirmed in non-Indian ownership. The adverse possession provisions of Section 4 were pleadable by way of defense in such suits, in which proceedings the board had no part.

Section 6 provided that the board would also report for each pueblo: (a) the extent of land and appurtenant water rights within the exterior boundaries of lands granted or confirmed to the pueblo but in possession of non-Indian claimants at the time of such report and which were not claimed for the Indians by any report of the board; (b) whether or not the United States could have recovered same for the pueblo by seasonable prosecution under the New Mexico statutes of limitation; and (c) the value of said lands and water rights and the loss, if any, suffered by the Indians through failure of the United States to seasonably prosecute their rights. As stated previously herein, the section contains the further limiting provision that the United States would be liable and that the board would award compensation to the pueblo for such loss. It is clear that, contrary to the implication of Finding 22, the act did not contemplate that the United States' liability (measured by loss to the pueblos through failure of the United States to seasonably prosecute their rights) would necessarily equal the appraised value of the total property lost. The difference could be explained by the fact that in some instances the pueblo received a quid pro quo when it parted with the property, and in some instances the board determined that the United States could not have recovered for portions of the property to which pueblo title had been extinguished.

Finding 22 appears inaccurate in that the initial award by the board to the Pueblo of Taos under Section 6 of the Act for land outside of the Town of Taos, was not the $76,128.85 shown in Finding 22, but only

$48,497.00, representing the portion of the land valued at $160,835.94 which the board determined that the United States could have recovered by timely suit. 4/

In 1930 the board awarded the Pueblo of Taos the additional amount of $27,631.85 5/ representing the board's determination of the loss to the pueblo from successful presentation of claims by non-Indians in suits authorized by Section 3 of the act. Such losses did reflect the successful pleading of defenses provided in Section 4 of the act.

Finding 22 further states:

> No award was made by the Pueblo Lands Board to Taos Pueblo of the Town of Taos, even though that Town was located within the Pueblo Grant, as confirmed to the Pueblo in 1864. Defendant claims that this failure to make an award stems from a waiver by Taos Pueblo of the Pueblo's rights to the land in the Town of Taos in return for what they understood was a promise of the Blue Lake Area.

The second sentence in the above quoted portion of Finding 22 is in error in that (1) the claim narrated therein was not made by the defendant but by the plaintiff (see plaintiff's proposed finding 28); and (2) the claim appears to be contrary to fact as will be explained subsequently

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4/ The difference is significant in relation to plaintiff's motion for summary judgment in Docket No. 357-A, which is premised on the theory that Sections 4 and 5 of the act relating to the defenses of adverse possession, constituted a Fifth Amendment taking. These sections appear not to have been invoked in the board's award of the $48,497.00 under Section 6 of the act.

5/ This amount, together with the $48,497.00 initial award, constitutes the $76,128.85 award referred to in Finding 22. Under the Act of May 31, 1933, 48 Stat. 108, Congress authorized payment to the Pueblo of Taos of an additional $84,707.09, constituting the full balance of the $160,835.94 alleged appraised value of the land outside of the Town of Taos.

herein.

Finding 22 also relates that a Senate Committee had reported that the Taos Pueblo had advised the board that no claim would be asked by the pueblo for the Town of Taos if the board would recommend that the Blue Lake area be patented to the pueblo, but for reasons unknown to the committee the board neither incorporated a recommendation thereon in its reports, nor included any of the values of the tracts within the Town of Taos in its award.

In fact, in its report under Section 6, the board determined that the Town of Taos could not have been recovered for the pueblo because of a conflicting Spanish land grant of 1796 whereby a portion of the pueblo grant was conveyed by the Spanish Governor of New Mexico to seventy-three Spanish families who established the Spanish Town of Taos thereon. Said conveyance, which allegedly occurred 52 years prior to United States' sovereignty over New Mexico, 55 years prior to the extension of the Indian Intercourse Act to the plaintiff tribe, and 68 years before the United States' quitclaim patent to the Taos Pueblo, imposed no liability upon the United States, was not invalidated by the Indian Trade and Intercourse Act, and conceivably generated "adverse valid rights" within the scope of the penultimate paragraph of the patent. The water rights appurtenant to the land had been determined by usage, by pueblo-Spanish compact, and by court decision. In 1900 the Court of Private Land Claims, in a suit in which the Taos Pueblo and the United States were parties defendant, had confirmed title to 1,899.89 acres, including the Town of Taos, in

the successors in interest to the non-Indian grantees under the 1796 grant. The board concluded that there was no loss to the pueblo from the failure of the United States to attempt to recover this land and appurtenant water rights for the pueblo, and accordingly issued no award thereon. Special Commissioner Hagerman, representing the Secretary of the Interior on the Pueblo Lands Board, testified that Pueblo of Taos had acceded to the loss of the Town of Taos before the Blue Lake issue was raised. Although Mr. Hagerman, who was entrusted by the board to determine the Blue Lake issue, was in favor of granting the Blue Lake area to the Taos Pueblo, the board, acting on the advice of the Commissioner of Indian Affairs, declined to make any recommendation on the Blue Lake area, as a matter not within its jurisdiction. By failing to disclose these reasons of the board for not issuing an award for the Town of Taos, Finding 22 wrongly implies a great inequity in the disparity between the $297,684.87 alleged appraised value of the Town of Taos and the absence of an award therefor. Further inequity is also incorrectly implied by the failure of Finding 22 to disclose the board's reasons for not recommending a patent for the Blue Lake area in exchange for the plaintiff's proffered waiver of its claims. The implied inequity is stated more positively in Finding 23, and in Finding 25 the Commission found the defendant liable for $297,684.87 less the value of the Blue Lake use permit and offsets.

The Commission's Opinion of September 8, 1965, 15 Ind. Cl. Comm. 688, 703 et seq., appears to be in error in that: (1) it stated that the background and history of plaintiff's second claim as set out in

Findings 20 through 23 is not contradicted; (2) it cites page twenty-nine of defendant's brief to the effect that the board concluded that the plaintiff was entitled to recover $297,684.67 for the Town of Taos, without pointing out the error of this contention, viz., that although the board allegedly placed that value on the Town of Taos, it found, for reasons stated, supra, that the defendant was not liable for the loss thereof to the plaintiff; and (3) it concludes that the defendant was indebted and liable to the plaintiff for the amount of $297,684.67 less the value of the Blue Lake use permit and offsets.

The Commission's Interlocutory Order of September 8, 1965 appears to be in error in the following respects:

(1) In spite of the quit claim nature of the 1864 patent (which was issued subject to adverse claims, which the Pueblo Lands Board subsequently determined barred recovery) the order concludes as a matter of law that the plaintiff had established recognized title by means of the patent;

(2) In spite of the fact that there was no taking by the defendant, the order concludes as a matter of law that the defendant extinguished plaintiff's title to the entire pueblo grant described as 17,360 acres including the Town of Taos in 1933 [6/] (there is no apparent basis for this conclusion other than the additional appropriation of 1933 referred to in note 5, supra, for the land outside of the Town of Taos);

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6/ Plaintiff now contends that Section 5 of the Pueblo Lands Act constituted the act of taking and that the date of taking was the 1924 date of enactment of the Pueblo Lands Act.

(3) The order concludes as a matter of law, but without apparent basis, that the defendant agreed to pay plaintiff the sum of $297,684.67 as purchase price of the entire grant, and awards said sum less the value of the Blue Lake use permit and offsets. In fact, defendant never agreed to pay any amount as purchase price for said land, and further, the $297,684.67 was not even the alleged value of the entire grant but only of the portion thereof comprising the Town of Taos for which the defendant, for the reasons stated herein, appears not to be liable. 7/

IT IS THEREFORE ORDERED, for the reasons stated herein, that the parties show cause why the Commission's Findings of Fact No. 20 through 23, and 25, 15 Ind. Cl. Comm. 666, 682 et seq., and the related portions of the Opinion and Order, including the award, 15 Ind. Cl. Comm. 688, 703 et seq., should not be vacated.

Dated at Washington, D. C., this 21st day of February, 1971.

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

7/ By Commission Order in Dkt. 357 (22 Ind. Cl. Comm. 444 (1970)) the plaintiff was granted leave to file a new petition designated as Dkt. 357-B, covering, inter alia, its claim to 17,390 acres allegedly comprising the aforesaid Spanish grant (Royce Area 670).