BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF TAOS, Plaintiff,	)	
v.	)	Docket No. 357-A
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: February 4, 1974

Appearances:

Darwin P. Kingsley, Jr., and Richard Schifter, Attorneys for Plaintiff.

Roberta Swartzendruber, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Background of This Proceeding

This case is before the Commission for decision of the issues raised by our Order to Show Cause, dated February 10, 1971, 24 Ind. Cl. Comm. 414.

On September 8, 1965, the Commission issued findings, an opinion, and an interlocutory order in Pueblo of Taos v. United States, Docket 357, 15 Ind. Cl. Comm. 666. The plaintiff's second claim in that proceeding was for compensation for loss of the land occupied by the Spanish town of Taos. With respect to that claim, our interlocutory

order of September 8, 1965, concluded:

> 1. That the petitioner has established recognized title by way of patent from the defendant to the petitioner to a tract of land particularly defined on defendant's Exhibit No. 101-A by the yellow area with a white center marked #1, and consisting of approximately 17,360 acres; that defendant extinguished the title of said petitioner to said area in 1933, and under the circumstances herein found agreed to pay the sum of $297,684.67 as purchase price for said land; that petitioner shall have and recover said sum from defendant, less the value of the use permit referred to in Finding No. 23, less offsets if there be any.

By Commission order of August 13, 1969, the plaintiff's second claim in Docket 357, and all other claims arising from proceedings under the Pueblo Lands Act, 43 Stat. 636 (1924), as found by this Commission at 15 Ind. Cl. Comm. 666 (1965), were redesignated as Docket 357-A.

On October 17, 1969, the plaintiff moved for summary judgment holding defendant liable for interest at the rate of 5% per annum on amounts due the plaintiff under the provisions of the Pueblo Lands Act, "* * * which are unpaid * * * or were paid belatedly". In fact, plaintiff was seeking interest on $76,128.85 paid belatedly under the Pueblo Lands Act, as well as on $84,707.09 supplementally awarded by Congress under the Act of May 31, 1933, 48 Stat. 108, and on the $297,684.67 (less the value of the Blue Lake use permit) awarded by the Commission on September 8, 1965, supra.

In reviewing the evidence in relation to the plaintiff's motion, it became apparent to this Commission that our decision of September 8, 1965, contained several errors and apparent errors, which are evidenced

by the following facts which we now deem established:

(1) The town of Taos occupied only 926 acres of the land patented to the plaintiff by the defendant.

(2) The defendant never agreed to pay the plaintiff $297,684.67 as the purchase price for any of its land. The $297,684.67 figure was merely the valuation for the 926 acres in the town of Taos. The figure was arrived at in 1932 by the Senate Committee on Indian Affairs, from appraisals previously prepared by the Pueblo Lands Board.

(3) The defendant did not extinguish title to any of the 17,360 acres in 1933.

(4) The Pueblo Lands Board determined that no award was due under section 6 of the Pueblo Lands Act for the town of Taos because it appeared to the board that:

(a) the town of Taos had been established under a conflicting Spanish land grant,

(b) the defendant could not have recovered the town of Taos lands by seasonable prosecution, and

(c) accordingly the defendant was not liable for their loss to the plaintiff.

On February 10, 1971, we ordered the parties to show cause why our decision and award of September 8, 1965, relating to the plaintiff's town of Taos claim, should not be vacated. (24 Ind. Cl. Comm. 414.) On the same date we issued an opinion and a companion order denying the motion for summary judgment. (24 Ind. Cl. Comm. 406, 413.) By the latter order

we held that neither the Pueblo Lands Act, nor the actions of the Pueblo Lands Board thereunder, constituted the taking by the United States of private property for public use within the meaning of the Fifth Amendment of the Constitution of the United States.

The parties filed lengthy responses to our show cause order. Oral argument was heard on the matter on April 28, 1972, after which supplemental legal memoranda were submitted by the parties.

Plaintiff's Town of Taos Claim

A considerable amount of new evidence relating to the Taos Pueblo grant, the allegedly conflicting Spanish land grant and the decision of the Pueblo Lands Board has been introduced by the parties in connection with the Commission's order to show cause. We have also had the benefit of extensive briefing by counsel for the parties. Having considered the entire matter over the period since the oral argument in April 1972, we have, in the light of the additional evidence and other material available to us, come to the conclusion that the action of the Pueblo Lands Board in its decision of March 17, 1927, with respect to the town of Taos did constitute a taking of the plaintiff's title to the town of Taos lands without just compensation in violation of the Fifth Amendment of the Constitution of the United States.

The Pueblo Lands Act of June 7, 1924, 43 Stat. 636, provided for the establishment of a Pueblo Lands Board to adduce evidence and report on lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the

United States or of any prior sovereign, or acquired by said Indians as a community by purchase or otherwise, title to which the board should find not to have been extinguished in accordance with the Act. A separate report was to be filed for each pueblo.

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 from March 16, 1889, and payment of taxes thereon from March 16, 1899, 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 as against the United States and said Indians * * *".

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[1/] 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. The section further provided that the United States would be liable and that the board would award compensation to the pueblo for such loss.

Prior to the enactment of the Pueblo Lands Act, the plaintiff had legal title to four square leagues of land granted to it by Spain in 1689. The town of Taos was an encroachment on 926 acres of that grant. The plaintiff's title to its grant, including the 926 acres, had been confirmed as supreme by Spain, Mexico, the United States and the State of New Mexico. Said title could not be terminated without consent of the sovereign. No sovereign had granted such consent prior to the enactment of the Pueblo Lands Act. Furthermore, at any time prior to the enactment of the Pueblo Lands Act, the United States could have legally ejected the adverse claimants from the town of Taos. See United States v. Sandoval, 231 U.S. 28, 48 (1913).

1/ "Seasonable prosecution," was subsequently construed in Pueblo De San Juan v. United States, 47 F.2d 446 (10th Cir. 1931) as:

> [W]ithin ten years from the time the non-Indian claimants' adverse possession began or within ten years (the period prescribed by the limitation statute of New Mexico) after such possession began and after such lands came under the sovereignty of the United States * * * .

In the case of Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 684-85, cert. denied, 404 U.S. 950 (1971), the Court reviewed the history of the legal considerations applicable to and the criteria to be applied when the United States deals with Indian property. The Court there indicated that in dealing with Indian property Congress can act in one of two capacities -- either it can exercise a guardianship over Indian property, derived from its plenary power recognized in the Constitution to control tribal Indian affairs, or it can exercise its fundamental power of eminent domain and take Indian property, for which it must pay just compensation. A court must evaluate the individual circumstances of a particular case to determine, where Congress has not expressed an intention to condemn, whether and when a taking has nevertheless occurred as a result of the Federal Government's conduct. Where a taking is sought to be predicated on the Government's disposition of Indian property to third parties, the criterion is whether Congress in disposing of the property has made a good faith effort to realize its full value for the Indians; whether it has in effect performed the trustee's traditional function of transmuting property into money. If the Government does so, there is no taking. If, on the other hand, the Government fails to make such an effort, it can be liable for a taking if it gives or sells the property to a third party. See also Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 819-20 (1971); Three Affiliated Tribes v. United States, 182 Ct. Cl. 543, 557 (1968) (aff'g in part, rev'g in part, Docket 350-F, 16 Ind. Cl. Comm. 341 (1965)).

In the case of the town of Taos lands, the Pueblo Lands Act, by providing standards of adverse possession under which the adverse claimants to the town of Taos could establish title thereto, legislated extinguishment of the plaintiff's title to the town of Taos. Implicit in the Act was the plan of the Congress to extinguish plaintiff's title to the town of Taos lands, among others, since, when the Act was passed, it was common knowledge that the adverse claimants to the town of Taos and other areas in other pueblos had been in adverse possession for periods in excess of those established by section 4 of the Act. Section 6 of the Act left it for the Pueblo Lands Board to determine whether compensation would be paid for any particular lands. The legislative scheme that not all lands transferred from the plaintiff would meet the standards of the Act for compensation fails to meet the tests for the trustee's exercise of plenary power. Thus when on March 17, 1927, the Pueblo Lands Board rendered its decision that the United States was not liable to the plaintiff for the town of Taos lands and that it could not award compensation to the Pueblo of Taos for the loss of the town of Taos lands, such action constituted the definitive act of taking with respect to said lands because such decision, effectuated under the plan authorized by Congress in Section 6 of the Pueblo Lands Act, actually deprived the plaintiff of title to these lands without a good faith effort on the Government's part to realize full value for the Indians. See Three Affiliated Tribes v. United States, supra, at 568.

To demonstrate the validity of the plaintiff's title to the town

of Taos prior to the Pueblo Lands Act, it is necessary to retrace a bit of the complex history of the town of Taos.

Although the record does not show definitively when the present town of Taos was founded, it is clear that it came into being during the Spanish regime.

A Pueblo Lands Board member, Charles H. Jennings, stated at the 1931 Senate Indian Subcommittee hearing that the archives in Santa Fe, New Mexico, show that the town of Taos was a "Mexican" town as far back as 1680. New Mexico was still under Spanish dominion at that time. If the town of Taos did exist in 1680, it apparently was short lived for we note that in 1680 the Taos Pueblo spearheaded a great united Pueblo revolt during which virtually all of the Spanish in New Mexico were killed or driven out.

In 1689, the Spanish issued the Pueblo de Taos Grant to the plaintiff in recognition of the plaintiff's title to a square tract of land stretching one league in each cardinal direction from the church in the Pueblo of Taos.

In 1776, Frav Dominguez visited the Pueblo of Taos. His journal related that sometime prior to that date the Spanish had a small settlement at the present site of the town of Taos. It was built with the consent of the Pueblo.

When Comanche raids became troublesome, the settlement was abandoned and torn down and the settlers moved within the Pueblo of Taos, where they built and occupied a small block of houses along with a church and convent. In 1776, they were still living within the Taos Pueblo but

were beginning construction of a settlement farther south, apparently at the site of Ranchos de Taos, which lies several miles south of the present town of Taos.

It appears that the present town of Taos, which was initially called Fernando de Taos, was begun in 1796. In that year the Spanish Governor of New Mexico issued the Fernando de Taos Grant to 73 Spanish families who began the settlement of the town of Taos. The Fernando de Taos grant lay along the southern edge of the Pueblo de Taos Grant, without overlapping it. The Fernando de Taos grant document states that the grant is bordered on the north by the "boundaries of the Indians of Taos."

For years, however, there was considerable confusion and disagreement as to the location of the boundary between the grants. It was not long before the Spanish settlers began to encroach on the plaintiff's land. Ultimately the town of Taos extended onto 926 acres of the southwest corner of the plaintiff's 1689 grant.

In 1815, the plaintiff complained to the Spanish authorities over the Spanish encroachments on its lands and asked that its 1689 grant be cleared of trespassers. At that time the Spanish encroachment onto the Pueblo de Taos Grant measured 4,680 feet from east to west, and 10,862 feet from north to south, and included three villages. Undoubtedly one of the villages was the fledgling town of Taos.

The Spanish Governor attempted to settle the dispute by issuing three decrees, each of which upheld the plaintiff's 1689 grant as

inalienable, holding that the lands could not be given away or sold without permission of the King.[2/]

New Mexico was under Mexican sovereignty from 1821 to 1848. During that period the Pueblo Indians of New Mexico were still considered to be wards of the government even though they were Mexican citizens by law. The pre-1821 Spanish laws restricting the alienability of Indian lands remained in effect. Title to pueblo lands remained in the pueblos, although laxity on the part of local officials enabled many non-Indians to obtain illegal holdings on Indian lands.[3/]

The United States gained sovereignty over the area at issue here under Treaty of Guadalupe Hidalgo, which was signed on February 2, 1848, ratified on May 30, 1848, and proclaimed on July 4, 1848, 9 Stat. 922. The Pueblo Indians, including the plaintiff tribe, were protected in their property by Article IX of the treaty.[4/] Under Article IX the United States promised them, eventually, "* * * all the rights of citizens of the United States * * *" and, in the meantime, that they would be "* * * maintained and protected in the free enjoyment of their liberty and property * * *".

2/ The decrees, however, did not order the settlers to leave the plaintiff's lands, but rather urged that the matter be settled by compromise and that the settlers should placate the Indians, whose rights to the four square leagues were incontestable.

3/ United States Department of Interior, Federal Indian Law, at 891-92 (1966).

4/ United States v. Sandoval, 231 U.S. 28 (1913); United States v. Joseph, 94 U.S. 614, 618 (1876). See also Federal Indian Law, n. 3, supra, at 893.

By Section 7 of the Act of July 27, 1851, 9 Stat. 587, the Indian Trade and Intercourse Act of 1834, 4 Stat. 729, was made applicable to New Mexico. The 1834 Act provided that no conveyance of Indian lands would be valid unless made by treaty or convention pursuant to the Constitution.

By the Act of July 22, 1854, 10 Stat. 308, Congress provided for the appointment of a Surveyor General of New Mexico. The Surveyor General was charged, inter alia, with ascertaining and reporting the origin, nature, character, and extent of all land claims, and the nature of the pueblos' land titles.[5/]

On September 30, 1854, the Surveyor General filed a report on the land claims of thirteen Indian pueblos, including the Pueblo of Taos. He recommended that the claims of the pueblo Indians be confirmed by Congress as speedily as possible.

On December 22, 1858, Congress acted favorably on the Surveyor General's report by confirming the plaintiff's land claims.[6/] See 11 Stat. 374. The statute called for a survey of the confirmed lands.

The Surveyor General completed his survey of the 1689 Pueblo de Taos Grant on September 25, 1860. The survey notes and map show the town of Taos lying within the four square leagues of the grant.

5/ Federal Indian Law, supra, n. 3, at 894.

6/ Id., at 895.

On November 1, 1864, the United States issued a quit claim patent to the plaintiff, for approximately 17,360 acres, including the 926 acres occupied by the town of Taos. The patent, which was issued under the authority of President Lincoln, was in confirmation of the prior Spanish land grant. In our opinion the patent and the 1858 confirmation statute attested to the validity of the plaintiff's title to the four square leagues, including the town of Taos lands, granted to the plaintiff by Spain under the Pueblo de Taos Grant of 1689.

United States v. Joseph, supra, n. 4, involved a situation in which a non-Indian had settled upon ten acres of the land patented to the Taos Pueblo by the United States. The Supreme Court held that the United States' 1858 confirmation of the Taos Pueblo's land grant constituted recognition of the Indians' previous title stemming back to the Spanish land grant, and that the Taos Pueblo's title was superior to that of the United States. 7/ The court ruled that the defendant could be ejected or punished civilly for trespass. The court also held that the pueblo Indians were not Indians within the meaning of the Indian Trade and Intercourse Act of 1834, and that the defendant was not subject to the fine assessable under that act.

7/ See United States v. Joseph, supra, 94 U.S. at 619. The use of the term "recognition" in this case should not be confused with the term "recognized title." The latter term means "*** the granting to the Indians by Congress of a permanent right of occupancy in lands;" in other words, the creation in praesenti of a new right. See Minnesota Chippewa Tribe v. United States, Docket 18-U, 14 Ind. Cl. Comm. 360, 371 (1964).

On January 21, 1878, the claimants under the 1796 Fernando de Taos grant filed a petition for confirmation of their grant by the United States. The petition was approved by the Surveyor General on June 10, 1881, in a decision which described the grant as bounded on the north by the boundary of the Indians of Taos.

The Surveyor General caused the Fernando de Taos Grant to be surveyed in June 1883, by John Shaw, a U. S. Deputy Surveyor. The field notes and plat of the Shaw survey agree that the north boundary of the Fernando de Taos Grant coincided with the south boundary of the Pueblo de Taos Grant. However, neither the notes nor the plat show the location of the town of Taos.

Under the Act of March 3, 1891, 26 Stat. 854, the Court of Private Land Claims was created to hear and dispose of claims of holders of Spanish land grants.

On February 28, 1893, the claimants under the Fernando de Taos Grant filed a petition with the Court of Private Land Claims to confirm their grant. 8/ An amended petition of April 6, 1897, included the Pueblo of Taos and the United States as defendants.

In an interlocutory decision of October 5, 1897, the Court of Private Land Claims discussed in general terms the manner in which Spanish grants were divided between common lands and private lands such as town

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8/ The case was captioned Juan Santistevan v. United States, No. 149.

lots. No reference was made to the town of Taos.[9/]

On September 2, 1899, a second hearing was held by the Court of Private Land Claims at which there was heard disputed testimony as to whether the town of Taos was within or without the Taos Pueblo Grant. The court issued its second opinion on September 5, 1899. That opinion also is silent as to the location of the town of Taos. The court held, however, that the Taos Pueblo Grant could not be disturbed and that only allotted lands lying outside of the pueblo grant could be confirmed as part of the Fernando de Taos Grant. The court based its decision to protect the pueblo lands upon the 1815 decrees by the Spanish Governor of New Mexico. As noted, supra, those decrees held that the Taos Pueblo's rights to the lands of its 1689 grant were incontestable, and that the lands were inalienable except through official consent of the King.

On August 16, 1900, the Court of Private Land Claims submitted its final findings of fact, repeating that the Fernando de Taos Grant was bounded on the north by the boundary of the Indians of Taos and that the grant was correctly delineated and surveyed in the plat and field notes of the Shaw survey of June 1883. The court's eighth finding provided that the survey to be made under its decree should in all respects confirm the Shaw survey.

The U. S. Attorney filed his report on the case on August 25, 1900, recommending no appeal, and stating:

9/ The defendant urges that the court would not have dwelt at length on the status of town lands if it had not felt that the town of Taos was within the Fernando de Taos Grant. This cannot be read into the court's decision.

> The land in question is all under cultivation and in the possession of people who have held it for generations, the settlement of Taos being one of the most populous in the territory.

The defendant argues that this statement refers to the town of Taos as though it were an integral part of the Fernando de Taos Grant. Logic dictates an opposite conclusion, however, since the town of Taos, being a business and residential area, would perforce be excluded from the cultivated area thus described.

The survey of the Fernando de Taos Grant, as directed by the 1900 decree of the Court of Private Land Claims, was made by Mr. Jay Turley in 1901, under a contract with the Surveyor General of New Mexico. Mr. Turley was unable to confirm the Shaw survey. Rather, he found that Shaw had erroneously located the north boundary of the Fernando de Taos Grant (and the coinciding south boundary of the Pueblo of Taos Grant) 16.17 chains, or 1,067.22 feet, farther north than it should have been. The discrepancy was reported to the Assistant Attorney for the Court of Private Land Claims, who advised that the error should be corrected and that the Fernando de Taos Grant should not be allowed to overlap the Taos Pueblo Grant.

The Surveyor General appointed a special examiner to examine the Fernando de Taos Grant and the conflicting surveys. On the recommendation of the examiner, the Turley survey was approved by the court on April 8, 1902.

A patent was issued for the Fernando de Taos Grant, on the basis of the Turley survey, on February 25, 1909. The patent specified that it was without prejudice to the rights of the Pueblo of Taos under the grant confirmed to it and the surveys and patent issued to it by the United States.

In an apparent effort to deny the obvious fact that the town of Taos encroaches on the Pueblo de Taos grant, the defendant erroneously argues that the Shaw survey in essence found that the town of Taos lay outside the Taos Pueblo league and thus within the Fernando de Taos Grant.

In support of its argument, the defendant alleges that "the church" in the town of Taos lies 17 chains, or 1,122 feet, north of the true south boundary of the Pueblo of Taos Grant, and that the "* * * Shaw survey brought the Fernando de Taos boundary within 55 feet of the church, thus [by inference] locating at least a portion of the town within the Fernando de Taos Grant". (Def's Response to Order to Show Cause, at 48) Defendant's Map Ex. 357-A shows at least five churches in the town of Taos. The defendant appears to have confused a church lying near the southern edge of the town with the "Catholic Church" used as a landmark in the Turley survey. The latter church was at least a half mile north of the true boundary between the two grants.

In further support of its argument, the defendant states that the center of the plaza in the town of Fernando de Taos is designated by a U. S. Geological Survey bench mark located 27 chains, or 1,782 feet,

north of the true inter-grant boundary. The defendant urges that the proximity of the town plaza to the boundary between the grants compels the conclusion that part of the town extended south of that boundary.

In this argument the defendant has lost sight of the following pertinent facts:

(1) The Shaw survey was found to be erroneous and ultimately was rejected by the court.

(2) The Shaw survey did not disclose the location of the town of Taos.

(3) The court found that the two grants did not overlap. The fact that a small portion of the town of Taos may have lain south of the true inter-grant boundary, in the Fernando de Taos Grant, is thus inconsequential.

We are of the opinion that the Turley survey places the town of Taos within the Pueblo de Taos Grant. The Surveyor General's 1860 survey, supra, of the Pueblo de Taos Grant also places the town of Taos within that grant.

The New Mexico Enabling Act of 1910, 36 Stat. 557, under which New Mexico gained statehood in 1912, provided:

> [T]he people inhabiting said proposed State do agree and declare that they forever disclaim all right and title * * * to all lands lying within [its] boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been 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 * * * . [Emphasis added.]

The purpose of the above provision was to preclude any possible challenge by the state to Indian titles acquired by grants from Spain. The provision was not intended to limit the provisions of the Trade and Intercourse Act of 1834, supra, in invalidating conveyances of Indian land. 10/

In effect, the above provision of the New Mexico Enabling Act constituted confirmation by the State of New Mexico of the plaintiff's title to the Pueblo de Taos Grant, including the 926 acres occupied by the town of Taos. The provision also constituted affirmation by the defendant of its prior confirmation of the plaintiff's title to those lands.

The New Mexico Enabling Act was upheld in United States v. Sandoval, 231 U.S. 28 (1913). That decision, in effect, overruled the holding in United States v. Joseph, supra, that the Indian Trade and Intercourse Act of 1834 did not apply to the pueblo Indians of New Mexico. The effect of the Sandoval decision was to place a cloud over any non-Indian title to lands acquired from pueblo Indians without congressional consent. Thousands of settlers on Indian lands became concerned that they might be ejected. Whole communities were in danger of being disrupted. The matter was of grave public interest.

To safeguard the rights of settlers who had in good faith acquired land within pueblo Indian land grants, and to do justice to the pueblo Indians at the same time, Congress enacted the Pueblo Lands Act, supra.

10/ Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958).

In view of the additional evidence produced in response to our show cause order, it is clear that the Pueblo Lands Board erred in its belief that the town of Taos was established under a conflicting Spanish land grant. However, notwithstanding this error, it appears certain that the Board would have reached the same conclusion, that under the adverse possession standards of Section 4 of the Act, the United States could not have recovered the town of Taos lands by seasonable prosecution. The Board, and the plaintiff in its appearance before the Board, were aware that the adverse claimants had been in adverse possession of the town well in excess of the maximum periods of adverse possession set by Section 4 of the Act. The Board and the plaintiff appear to have been equally certain that the adverse claimants could show payment of realty taxes for the statutory periods prescribed by the Act. The plaintiff disclaims any contention that it sustained any loss as a result of the Board's failure to require the adverse claimants to prove their claims.

Collateral Estoppel

The plaintiff contends that the Commission is not prevented by the doctrine of collateral estoppel from reaching a different conclusion than did the Pueblo Lands Board when it determined that the Government was not liable, under the Pueblo Lands Act, for the plaintiff's loss of the town of Taos. We agree, but for different reasons.

The plaintiff reasons that the Pueblo Lands Board decision is not subject to protection of the doctrine of collateral estoppel because the board erred in not finding itself bound by that doctrine to follow the

1899 decision of the Court of Private Land Claims in the case of Juan Santistevan v. United States, supra, n. 8. The plaintiff contends that in this decision the court held that the 926 acres of the town of Taos were not in the Fernando de Taos Grant but were in the Pueblo de Taos Grant. In fact the court made no reference to the 926 acres or the town of Taos, but instead held that the Pueblo de Taos Grant was inalienable and that it was not overlapped by the Fernando de Taos Grant. The confirmatory Turley survey plat does show the town of Taos in the Pueblo de Taos Grant, but does not show the number of acres involved.

The primary issue before the Pueblo Lands Board was not under which Spanish grant, or grants, the town of Taos was held, but whether the United States could have recovered the town by seasonable prosecution within the meaning of Section 6 the Pueblo Lands Act. Since that issue had not been a factor in the Santistevan case, that case could not collaterally estop the board in its decision.[11/]

The issue before this Commission is not whether the Pueblo Lands Board correctly determined whether the defendant could have recovered the town of Taos lands by seasonable prosecution within the meaning of Section 6 of the Pueblo Lands Act. The Board's decision on that question is res judicata. The issue before this Commission is whether the Pueblo Lands Act or the Board's decision thereunder constituted

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11/ Commissioner v. Sunnen, 333 U. S. 586 (1948).

a taking by the United States for public use of the plaintiff's title to any portion of its 1689 grant lands, including the 926 acres occupied by the town of Taos, without just compensation in violation of the Fifth Amendment. This issue was not before the Pueblo Lands Board. Indeed, the Board had no authority to determine it. It follows that this Commission is not precluded by collateral estoppel or res judicata from determining this issue.

Plaintiff's Blue Lake Claim

On September 18, 1926, the Governor of the Pueblo of Taos, and twenty-two members of the Taos Pueblo Council, constituting a majority, called on the Pueblo Lands Board. The delegation was accompanied by Mr. Francis Wilson, an attorney who had previously performed legal services for the Pueblo of Taos, both as a Government-appointed legal counsel and as a private practitioner. Mr. Wilson was not the pueblo's attorney before the Pueblo Lands Board. Judge Hanna and Mr. Cornell, the unofficial legal advisors for the pueblo under retainer of the American Indian Legal Defense Association, were already present in the hearing room when the delegation arrived. They had not been consulted about the appearance of the delegation.

The Governor of the Pueblo of Taos addressed the Board, and stated that it was the pueblo's intent not to present a claim for the town of

Taos.[12] The members of the council agreed. One member of the council added that the Indians should receive some compensation for their position.[13]

The Pueblo Lands Board met again on October 4, 1926. The meeting was attended by Congressman Freer of Wisconsin who was a member of the Indian Committee of the House of Representatives. Mr. Freer, acting merely as a friend of the Taos Indians, stated that the Indians had waived their rights to the town of Taos with the understanding that they were to have Blue Lake Canyon transferred to them in exchange. He felt that the Indians had been misled unintentionally. He protested their waiver and urged the Board to carry on its hearings to determine the rights of the claimants.

Mr. John Collier, Secretary of the American Indian Legal Defense Association, was present at the October 4th meeting. He stated that discussions regarding the exchange of the claims of the Indians to the town of Taos for "Blue Lake and Canyon" had been held with Commissioner Burk in 1920 or 1921. He added that the Indians and their attorneys had taken it for granted that the waiver was made with the understanding that in exchange the Indians wanted a recommendation from the Board that Congress grant them the Blue Lake watershed.

12/ It appears that the Governor's statement had been prompted by Mr. Wilson. At the subsequent Senate Committee hearings, a Taos Indian witness testified that Mr. Wilson had told the Taos Pueblo Council that if the Council would appear before the Pueblo Lands Board and waive its claim to the town of Taos, the Government would give the Blue Lake area to the Taos Pueblo.

13/ Three years later Judge Hanna recalled that on the morning of that hearing Mr. Wilson appeared with several Indians and said that an agreement had been reached under which the Indians would not insist upon an award or compensation for the town of Taos, provided they were given the Blue Lake Area.

The Board explained that it could not take any official action in the matter. Board member H. J. Hagerman, the representative of the Secretary of the Interior, was absent. The other members expressed an inclination to make such a recommendation unofficially, but the matter was passed over until the full Board could meet.

On September 30, 1926, Board member Hagerman had written to the Commissioner of Indian Affairs, expressing his opinion that it would be a good thing for the Board to recommend the "Blue Lake - town of Taos" exchange as urged by Mr. Collier. On October 4, the Commissioner replied, stating that Blue Lake could not be set aside as a reservation by Executive order and that the Bureau of Forestry would likely oppose congressional action to that end. Mr. Hagerman responded on October 13, 1926, thanking the Commissioner for his suggestion that the Board make no recommendations outside of its jurisdiction and stating that he would advise the Board against mentioning Blue Lake in its report.

To clarify the record, the Taos Pueblo submitted a written statement to the Board in October 1926. They alleged that waiver of their right to demand a showing of proof by the townlot claimants in the town of Taos was conditional upon a recommendation by the Board and the Secretary of the Interior to the administration and to Congress that the "Pueblo River watershed" be transferred to the Department of the Interior as a Taos Indian reservation. They promised that if the reservation were established they would waive any rights to cash compensation from the

Government for the town of Taos area, and would further waive their right of independent suit therefor.

In 1932, S. 2914, which provided for patenting the Blue Lake area to the plaintiff, was introduced in the 1st Session of the 72nd Congress but was not enacted. Under the Act of May 31, 1933, 48 Stat. 108, the plaintiff was granted a renewable 50-year permit to use approximately 30,000 acres of the Blue Lake area. This area was enlarged to 37,000 acres on May 5, 1936. The area remained a part of the national forest system of the United States. The act provided that the use permits would define conditions under which natural resources under control of the Department of Agriculture and not needed by the Indians would be made available for commercial use, and that such permits should establish safeguards for supervision and operation of the area for national forest purposes and other purposes.

We do not regard these events as constituting the effectuation of an agreement between the plaintiff and the United States, trading the town of Taos for the Blue Lake area. The Pueblo title to the town of Taos was extinguished unilaterally by operation of the Pueblo Lands Act, without compensation. Not having proper authority, the United States officials involved made no promise for the return of the Blue Lake area. There was no censensual transaction. The 1933 Act's use

permit for the Blue Lake area was not compensation for the town of Taos, for there is no evidence to show that the use permit's value was thought in good faith to represent the value of the town of Taos; the measure was the Indians' desire for the former, not the value of the town. Even if satisfying the Indians' desire were the measure, rather than giving full value, the 1933 Act gave something less than satisfaction. The long effort by the Taos Pueblo to get title to the Blue Lake area that culminated in the 1970 Act, discussed below, demonstrates that the 1933 Act did not provide what was asked for by the plaintiff.

The Blue Lake area was included in the plaintiff's aboriginal land claim before this Commission in Docket 357. By our decision of September 8, 1965, we found that the plaintiff had aboriginal title to approximately 130,000 acres, including the Blue Lake area. We also found that the defendant took those lands without payment therefor, on November 7, 1906, by making them a part of its national forests.[14/]

By our order of September 8, 1965, we directed that this claim proceed to a determination of acreage and value. In the second portion

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14/ Findings 3, 11, and 19, 15 Ind. Cl. Comm. at 666-669, 674-676, 682.

of that order, quoted supra, we directed that the value of the plaintiff's use permit for the Blue Lake area be deducted from the $297,684.67 award which we had granted to the plaintiff in this case for its loss of the town of Taos. The latter directive is modified by this decision. (See Offsets, infra.)

By our order of February 18, 1970, we granted the plaintiff leave to sever its Blue Lake claim from Docket 357 and to include it in a new docket numbered 357-B.[15/] The order provided that the Blue Lake area, consisting of 48,000 acres, should be described by metes and bounds in a Schedule A, which was to be attached to paragraph 7 of the petition in Docket 357-B. To date the plaintiff has not filed the amended petition authorized by our order of February 18, 1970. In consequence, the Blue Lake claim remains in Docket 357.

In its response to our show cause order of February 10, 1971, the plaintiff suggested that we may wish to consider the Blue Lake area in the framework of the aboriginal occupancy claim, in which it is included, rather than in the context of the Pueblo Lands Board claim. The defendant responded with a lengthy argument that the Blue Lake area can never be made a part of the plaintiff's aboriginal occupancy claim because the plaintiff has never been deprived of the Blue Lake area. The defendant has lost sight of our above-discussed findings and order of September 8, 1965, to the contrary.

15/ 22 Ind. Cl. Comm. 444.

Public Law 91-550, "Returning" the Blue Lake Area to the Plaintiff

Public Law 91-550, 91st Cong., 2d Sess., was enacted on December 15, 1970. (See 84 Stat. 1437.) This law which amended Section 4 of the Act of May 31, 1933, 48 Stat. 108, declares that the 48,000 acres of the Blue Lake area are held by the United States in trust for the Pueblo of Taos.

Section 4(b), as amended by Public Law 91-550, provides that the lands shall be part of the Pueblo of Taos Reservation. The section also provides:

(1) that the plaintiff shall use the lands for traditional purposes only;

(2) all use shall be subject to such regulations for conservation purposes as the Secretary of the Interior may prescribe; and

(3) except for such uses the lands shall remain a wilderness area.

Section 4 (c), as so amended, provides:

(1) that lessees or permittees shall be given an opportunity to renew their leases or permits as if this act had not been enacted, but

(2) the Pueblo de Taos may obtain relinquishment of such leases or permits under such terms and conditions as may be mutually agreeable, and

(3) the Secretary of the Interior is authorized to disburse, from tribal funds in the Treasury of the United States, so much thereof as necessary to pay for such relinquishments and for the purchase of rights or improvements on said lands owned by non-Indians.

Section 4(d), as so amended, directs this Commission to determine the extent to which the value of the interest in land conveyed by this Act should be credited to the United States, or should be set off against any claim of the Taos Indians against the United States.

It is apparent from the conditions under which the 48,000 acres of the Blue Lake area are held in trust for the plaintiff under P. L. 91-550 that the plaintiff has received something less than a fee simple return of the land, and proof will be required as to the value of the interest.

Value of the Town of Taos Claim

We adopt the figure of $297,684.67, as the principal sum of the damages in the plaintiff's town of Taos claim. This was the valuation of the 926 acres which was determined by the Senate Committee on Indian Affairs based on appraisals prepared by the Pueblo Lands Board. To this principal sum there must be added simple interest at the rate of 5% per annum from the date of taking, March 17, 1927, until the date upon which the principal sum is paid. Interest at the rate of 5% per annum must be included in order to achieve just compensation under the command of the Fifth Amendment for the taking of the town of Taos lands. Red Lake Band v. United States, Docket 189, 30 Ind. Cl. Comm. 437, 443 (1973).

Offsets

The value of the 50-year permit granted the plaintiff in 1933 to use the Blue Lake area and the value of the return of the Blue Lake area to the plaintiffs under P.L. 91-550 shall be treated as offsets

and may be asserted by the defendant either under this Docket 357-A or under Docket 357.

In evaluating these lands returned to the plaintiffs, the parties' attention is invited to the case of United States v. Pueblo de Zia, 200 Ct. Cl. 601 (1973) (aff'g in part, rev'g in part Docket 137, 26 Ind. Cl. Comm. 218 (1971)), and to the case of Citizen Band v. United States, Docket 96, 19 Ind. Cl. Comm. 379 (1968).

Claims for Interest on Money Paid Belatedly Under the Pueblo Lands Act

By our order of February 10, 1971, 24 Ind. Cl. Comm. 413, we denied the plaintiff's motion for summary judgment for interest at the rate of 5% per annum on $76,128.85 paid belatedly under the Pueblo Lands Act, and on $84,707.09 supplementally awarded by Congress to the plaintiff. These payments were made as compensation for that portion of the plaintiff's 1689 Spanish land grant outside of the town of Taos to which the Pueblo Lands Board found that the plaintiff's title had been extinguished. The Board found that the lands involved could have been recovered by seasonable prosecution and that the defendant was liable for failure to recover the lands. The $76,128.85 was awarded to the plaintiff by the Pueblo Lands Board in two separate awards of $48,497.00 and $27,631.85. The $84,707.09 was supplementally awarded by Congress under the Act of May 31, 1933, 48 Stat. 103, "* * * in compensation to the [pueblo of Taos], in payment of the liability of the United States to the [pueblo of Taos] as declared by the Act of June 7, 1924 [The Pueblo Lands Act]".

We have examined the language of the following appropriation acts which authorized appropriation of the monies due the plaintiff under the Pueblo Lands Act.

Act of March 4, 1929, 45 Stat. 1562, 1569:	$48,497.00
Act of March 4, 1931, 46 Stat. 1552, 1566:	27,631.85
	$76,138.85
Act of June 22, 1936, 49 Stat. 1757, 1764:	$28,235.69
Act of August 9, 1937, 50 Stat. 564, 572 :	28,235.70
Act of May 9, 1938, 52 Stat. 291, 299 :	28,235.70
	$84,707.09

These acts specify that the sums appropriated were compensation in settlement of damages, or in settlement of the liability of the United States as declared by Congress under the Pueblo Lands Act.

Earlier in this opinion we have explained our reasons for reversing our decision of February 10, 1971, 24 Ind. Cl. Comm. 406, holding that neither the Pueblo Lands Act nor the actions of the Pueblo Lands Board constituted the taking of plaintiff's town of Taos lands without compensation in violation of the Fifth Amendment of the Constitution. Consistent with that reasoning we are of the opinion that with respect to plaintiff's lands outside the town of Taos there was no taking of said lands within the meaning of the Fifth Amendment. As we pointed out earlier, the determining factor where a taking is sought to be predicated on the Government's disposition of Indian property to third parties is whether Congress in disposing of the property has made a good faith effort to realize its full value for the Indians. See Klamath and Modoc Tribes v.

United States, supra. With respect to the plaintiff's lands outside the town of Taos, we believe that the awards of the Pueblo Lands Board, together with the supplemental awards by Congress for these same lands for the express purpose of compensating the plaintiff for the liability of the United States to the pueblo declared by the Pueblo Lands Act, constituted a good faith effort on the part of the United States to give the Taos Pueblo the full value of their lands. These transactions therefore constituted an exercise by the United States of its plenary power to manage the property of its Indian wards for their benefit rather than an exercise of its power of eminent domain. See Three Affiliated Tribes v. United States, supra, at 557-59. See also Pueblo of Pecos v. United States, 152 Ct. Cl. 865, cert. denied, 369 U.S. 821 (1961) (aff'g Docket 174, 8 Ind. Cl. Comm. 195 (1959)), wherein the Court of Claims upheld the Commission's decision that there had been no taking of the lands of the Pueblo of Pecos within the meaning of the Fifth Amendment of the Constitution where the Pueblo Lands Board had, under section 6 of the Pueblo Lands Act, made an award to the Pueblo of Pecos for lands within the Pecos Pueblo Grant which the Board determined could have been recovered by the United States for the Pueblo of Pecos by seasonable prosecution.

The Commission today will enter findings of fact and an accompanying order accomplishing the conclusions dictated by the foregoing opinion. We will also, as part of said order, vacate our order in Docket 357 of February 18, 1970, 22 Ind. Cl. Comm. 444, insofar as it granted plaintiff

leave to file a new petition with respect to its Blue Lake claim to be designated as Docket 357-B. We do this because the matter to have been litigated in said Docket 357-B has been resolved by the enactment of Public Law 91-550, supra, and the plaintiffs, therefore, have never complied with said order by filing a new petition. This case may now proceed for determinations of (1) the amount of interest payable on the principal sum of $297,684.67, and (2) the allowance of any offsets the defendant may choose to assert hereunder.

Richard W. Yarborough, Commissioner

We concur:

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Kuykendall, Chairman, dissenting in part:

Although I agree that the decision of the Pueblo Lands Board resulted in the alienation of plaintiff's title to a portion of the town of Taos and that the defendant is liable therefor by virtue of the Trade and Intercourse Act, I do not agree that this loss of title constituted a taking of plaintiff's property by the defendant in contravention of the Fifth Amendment. This question has been decided by this Commission in a case which clearly controls the decision in this case and which has been affirmed by the Court of Claims.

In Pueblo of Pecos v. United States, Docket 174, 8 Ind. Cl. Comm. 195, the plaintiff contended it was entitled to interest on an award made by the Pueblo Lands Board. In that case, as in this one, there were adverse claims against lands within the plaintiff's (Pecos) Grant. The Board determined that title to all the lands within the Pecos Grant was extinguished and that by "seasonable prosecution" the Government could have protected the subject lands. Accordingly, an award was entered for the loss sustained by the plaintiff. The Commission thereafter held, as had the Pueblo Lands Board, that the Pecos Grant was lost to third parties as a result of the inaction of the Government. On appeal the Court of Claims noted that "The Commission * * * held that there had been no taking of the lands and that the claim for interest was without merit" and ordered that the Commission be affirmed. 1/

1/ 152 Ct. Cl. 865, cert. denied, 369 U.S. 821 (1961)

This case is similar and analogous to cases involving land in New York State which had been owned by Indian tribes there. Cf. Seneca Nation v. United States, 173 Ct. Cl. 912 (1965) (aff'g Docket 342-H, 12 Ind. Cl. Comm. 552 (1963)); Seneca Nation v. United States, 173 Ct. Cl. 917 (1965) (aff'g in part, rev'g in part Dockets 342-A, et al., 12 Ind. Cl. Comm. 755 (1963)); Six Nations v. United States, 173 Ct. Cl. 899 (1965) (aff'g Docket 344, 12 Ind. Cl. Comm. 86 (1963)); Oneida Nation v. United States, 201 Ct. Cl. 546 (1973) (aff'g in part, remanding in part Docket 301 (Claims 3 through 8), 26 Ind. Cl. Comm. 138 (1971)). These cases involved the alienation of lands owned by Indians in New York -- lands in which the United States held no proprietary interest. They enunciate the rule that the Trade and Intercourse Act not only prohibited the alienation of such lands without the consent of the United States, but also that because of the special relationship created, the Federal Government had an obligation to see that third parties dealt fairly with the Indians and that the tribes received a conscionable consideration for their lands.

All of these decisions are in accord with Pueblo of Pecos, supra, and no Fifth Amendment taking was found to have occurred in any of them.

The majority assert that the defendant did not make a good faith effort to obtain full value for the Indians and cite three recent opinions of the Court of Claims[2/] to support its conclusion that a failure to do so resulted in a Fifth Amendment taking by the United States.

2/ Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 819-20 (1971); Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 684-85, cert. denied, 404 U. S. 950 (1971); Three Affiliated Tribes v. United States, 182 Ct. Cl. 543, 557 (1968) (aff'g in part, rev'g in part Docket 350-F, 16 Ind. Cl. Comm. 341 (1965)).

The instant case is not one in which the United States carelessly or wantonly failed in its duty to protect the Indians. As the Commission has pointed out, the defendant's authorized agent, the Pueblo Lands Board, determined that no award was due the plaintiff for the town of Taos because the town had been established under a conflicting land grant and the defendant could not have recovered the town by a seasonable prosecution. The Board thus made two honest mistakes -- one of fact and one of law -- but those mistakes do not result in a Fifth Amendment taking.

The Congress naturally made no award to the plaintiff for the loss of its lands on which the town of Taos was situated, but it did conscientiously and diligently pursue the matter of procuring the Blue Lake area for the plaintiff.[3/] These efforts resulted in the inclusion of Section 4 in H. R. 4014 which became Public Law No. 28, Laws of 1933, approved May 31, 1933, 48 Stat. 108. The other sections of this act contained authorizations for appropriations in settlement of liability under the Pueblo Lands Act.

Section 4 of the act authorized the Secretary of Agriculture to grant the Pueblo of Taos a permit to occupy said lands and use the resources thereof for the personal use and benefit of the tribe for fifty years with provisions for renewal, and contained various protective clauses for the benefit of the Taos Pueblo.

The provisions in Section 4 largely satisfied the desires of the Taos Indians, except that they feared that the permit might be revoked.[4/]

3/ See plaintiff's Exhibits 81 and 82 which are portions of a report of the Senate Committee on Indian Affairs entitled "Survey of Conditions of Indians in the United States" issued on January 6, 1932.

4/ Plaintiff's Exhibit 81, supra, at 11171.

It may be noted in passing that in 1970 the Taos were the beneficiaries of an Act of Congress which amended Section 4 of the Act of 1933 and gave them the permanent right to use and occupy the Blue Lake area. 5/

The Act of May 31, 1933 (which also contained Section 4 which authorized the first Blue Lake permit) is cited by the majority among other authorizing acts as indicating that the United States made a good faith effort to realize full value for the plaintiff and that there was no Fifth Amendment taking. Yet, the fact that in the same act the plaintiff was given what was asked for in lieu of its title to a part of the town of Taos is ignored.

These facts clearly show that there was no Fifth Amendment taking of plaintiff's title to a portion of the town of Taos.

Jerome K. Kuykendall, Chairman

5/ 84 Stat. 1437, An Act to Amend Section 4 of the Act of May 31, 1933 (48 Stat. 108).