BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SAN ILDEFONSO,	)	Docket No. 354
	)	
PUEBLO OF SANTO DOMINGO,	)	Docket No. 355
	)	
PUEBLO OF SANTA CLARA,	)	Docket No. 356
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: May 9, 1973

Appearances:

S. Bobo Dean, Attorney for Plaintiffs. Darwin P. Kingsley, Jr., Karelson & Karelson, Richard Schifter, and Strasser, Spiegelberg, Fried, Frank & Kampelman were on the Briefs.

Howard G. Campbell, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

These cases arise under clause 4 of section 2 of the Indian Claims Commission Act (25 U.S.C. § 70a) and involve the taking by the United States of plaintiff's lands without the payment of any compensation. Each plaintiff's claim is separate and distinct; the claims are not consolidated but are proceeding together for convenience in dealing with common issues.

The three plaintiffs are communities of town-dwelling Indians who live along the Rio Grande in northern New Mexico. During the period of Spanish sovereignty each plaintiff received a land grant from the crown, which was later confirmed by the United States. Additional lands have been set aside for Santa Clara and San Ildefonso as Indian Reservations. Santo Domingo holds a half interest in a small confirmed Spanish grant made jointly to it and the neighboring Indian pueblo of San Felipe. Each plaintiff formerly enjoyed use and occupancy under aboriginal title of a larger area including but extending well beyond its present land holdings. Parts of these larger areas were granted to third parties by the Spanish or Mexican governments. Other parts were taken from the plaintiffs by the United States. It is these latter parts only which we are concerned with here.

The Government has stipulated that it is liable to each plaintiff for the uncompensated extinguishment of aboriginal title land. Accompanying the Government's separate but similar stipulation with each plaintiff there is a map showing the outer boundaries of that plaintiff's area of aboriginal title and the parcels within it which the plaintiff still holds or which were granted away by prior sovereigns. On the map accompanying the Santo Domingo stipulation, however, a tract designated "San Felipe Indian Reservation" is also shown within the aboriginal boundaries, although it was not set aside until 1902, by Executive order of President Theodore Roosevelt.

On December 17, 1969, following filing of the stipulations, the Commission entered an order setting the instant cases for trial on the single question of ascertaining the date or dates on which the Government extinguished the plaintiffs' aboriginal titles to their respective stipulated areas of use and occupancy. On January 28, 1970, at the suggestion of the plaintiff, the Commission superseded the foregoing order with a new one, ordering tried, in addition to the question of the date of taking, "the question of the Indian title of the plaintiff in Docket No. 355 to an area of approximately 8,600 acres now within the San Felipe Indian Reservation."

After trial on June 18, 1970, the parties submitted proposed findings and briefs, and the two questions specified in the order of January 28, 1970, are now before the Commission for decision.

I. The Dates of Taking

The record shows that the United States used at least three methods to dispose of those parts of the plaintiffs' aboriginal occupancy areas for whose taking the parties have stipulated it is liable. The first method was by conveyances under the public land laws to various grantees at different times; the second was by inclusion in the Jemez Forest Reserve;[1/] and the third was by

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1/ The Jemez Forest Reserve was established by a proclamation of President Theodore Roosevelt dated October 12, 1905 (Pl. Ex. TD-1) issued under authority of sec. 24 of the act of March 3, 1891, ch. 561, 26 Stat. 1103, as amended 16 U.S.C. §471. By Executive order of President Wilson dated April 6, 1915 (No. 2160), it was merged with the Pecos National Forest, and the combined forest was named the Santa Fe National Forest. Pl. Ex. TD-2.

inclusion in New Mexico Grazing District No. 1 created under the Taylor Grazing Act.[2/] The plaintiffs contend the proper taking dates for the lands conveyed under the public land laws are the dates the Government issued patents to the grantees. For the lands included in the Jemez Forest Reserve, they contend for the date of creation of the reserve -- October 12, 1905. For the lands placed in the Taylor Grazing District, they contend for the date of establishment of the district -- June 21, 1941, except in the Santa Clara case (Docket No. 356), where aboriginal title land not included in the original grazing district was brought in on December 14, 1944, by an order extending the district boundaries.[3/]

The Government contends that the plaintiff's aboriginal titles were extinguished on December 22, 1858, the date of an act of Congress (11 Stat. 374) confirming the report of the Surveyor General of New Mexico on the validity of plaintiffs' Spanish land grants and ordering patents to issue.

Alternatively, the Government contends the entries and claims of rights by non-Indians under the public-land laws within the plaintiffs' aboriginal areas had become so numerous by December 31, 1905, that they extinguished Indian title as of that date.

2/ Grazing District No. 1 in the State of New Mexico was established by order of the Secretary of the Interior dated June 12, 1941, issued under authority of sec. 1 of the Taylor Grazing Act, 43 U.S.C. 315. See 6 Fed. Reg. 3040 (1941).

3/ 9 Fed. Reg. 14650 (1944).

In our decision on the Zia, Jemez, and Santa Ana pueblo cases,[4] where the facts were quite similar to the instant cases, we held the correct dates of taking were the date of establishment of the Jemez Forest Reserve, the date of inclusion in Grazing District No. 2, and the various dates of adverse entries under the public land laws. The Government argued there that an 1854 act of Congress[5] extinguished the pueblos' titles of its own force. That law, among other things, established the office of Surveyor General of New Mexico, authorizing him to investigate and report on lands claimed under prior sovereigns' grants, provided for donations of 160-acre tracts to white inhabitants of New Mexico, and, in section 7, provided that "any of the lands not taken under the provisions of this act shall be subject to the operation of the Preemption Act of fourth September eighteen hundred and forty-one..." [ch. 16, 5 Stat. 453]. We rejected the Government's contention. Here the Government's argument is somewhat different. It states that the Indians abandoned their aboriginal titles outside their confirmed grants by accepting patents for the grants under the 1858 act.

The Government cites the Walapai case in support of its contention.[6] There the Supreme Court stated that the 1854 act

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4/ Pueblo de Zia v. United States, Docket 137, 19 Ind. Cl. Comm. 56 (1968).

5/ Act of July 22, 1854, ch. 103, 10 Stat. 308.

6/ United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941).

> . . . merely called for a report to Congress on certain land claims. If there was an extinguishment of the rights of the Walapais, it resulted not from action of the surveyor general but from action of Congress based on his reports. We are not advised that Congress took any such action.

Here, of course, Congress did act, by the statute of 1858. Under authority of that act, patents were issued to the plaintiff pueblos for areas they occupy to the present day. The Government contends their acceptance of these patents extinguished their aboriginal titles to outlying areas, just as did the Walapais' acceptance of the Walapai reservation in the cited Supreme Court case.

The situation of the present plaintiffs, however, differed significantly from that involved in United States v. Santa Fe Pacific R.R., supra. There, the Government was under no legal duty to create the Walapai Reservation. Here, international law obliged it to respect the land grants of prior sovereigns. Beard v. Federy, 70 U.S. (3 Wall.) 478, 491-492 (1866); Treaty of Guadalupe Hidalgo, Art. VIII, 9 Stat. 922, 929 (1848). The patents authorized by the 1858 act were in confirmation of such grants. To hold, in these circumstances, that the plaintiffs' acceptance of the patents extinguished their aboriginal title to outlying areas would be equivalent to stating the United States made them pay for what they already owned and what it was already solemnly obligated to confirm.[7/] There is no showing of an

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7/ In Pueblo de Zia v. United States, 11 Ind. Cl. Comm. 131, 164 (1962), rev'd on other grounds, 165 Ct. Cl. 501 (1964), we held that New Mexico Indian Pueblos could claim aboriginal title even if they had received valid Spanish grants. The pueblos plaintiff in Zia, like those here, had accepted United States patents for their Spanish grants. The Zia case thus implicitly ruled against the defendant's present theory.

actual abandonment in 1858 of land previously used. The Government's contention for an 1858 taking date must be rejected.

Our 1968 Zia decision[8/] is irreconciliable with the defendant's position that the settlements, claims, entries, and intrusions by non-Indians within the plaintiffs' aboriginal boundaries extinguished Indian title to the areas which remained uninvaded. The Government now urges us to overrule Zia (see Transcript, June 18, 1970, pp. 6-8), asserting that the controlling factor is that the various tracts, whether entered or not entered, were open to entry under the laws of the United States.

If the plaintiffs' aboriginal title areas were open to entry, it would not necessarily follow that the Indian title was extinguished before they were actually entered. United States v. Santa Fe R.R., 314 U.S. 339, 349 (1941); Plamondon ex rel. Cowlitz Tribe v. United States, 199 Ct. Cl. 523, 467 F.2d 935 (1972), aff'g Docket 128, 25 Ind. Cl. Comm. 442 (1971). To show extinguishment, there must be shown an exercise of dominion over the land inconsistent with the continuance of Indian title. Here, the defendant has not established that the Government intended to assert dominion over the plaintiffs' aboriginal title areas by making Federal public lands in New Mexico open to entry.

The General Land Office adopted a circular on May 31, 1884, in structing its field officers "to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon

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8/ See note 4, supra.

lands in the possession of Indians who have made improvements of any value whatever thereon." See 3 Land Decisions 371 (1884). In 1887 and again in 1903 the circular was reissued with amplifying language, so as to apply to:

> ... lands in the possession, occupation and use of Indian inhabitants, or covered by their homes and improvements. 9/

The circular was expressly applicable to "every land district... in any part of the public-land States and Territories."

Congress in 1891, when it established the Court of Private Land Claims to pass on the validity of alleged Spanish and Mexican grants in New Mexico, enacted: 10/

> No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or right to any land or place.

Thus it appears that the national policy of respecting unextinguished aboriginal title was in effect in New Mexico in the decades before 1905, and there was no intent to make all plaintiffs' areas legally open to entry. Cf. Cramer v. United States, 261 U.S. 219 (1923).

The defendant placed maps and excerpts from the records of the Bureau of Land Management in evidence showing the claims, applications,

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9/ See 6 Land Decisions 341 (1887); Circulars and Regulations of the General Land Office, United States Government Printing Office, Washington: 1930, pp. 651-652; 43 C.F.R. § 2013.6 (1972).

10/ Act of March 3, 1891, c. 539, 26 Stat. 860.

and entries on file prior to 1906. There were fairly numerous intrusions into the western part of the San Ildefonso area and the southern and extreme eastern parts of the Santo Domingo area. They consist largely of coal declaratory statements and mineral entries. In each case the parcels adversely claimed make up much less than half of the total acreage. In the case of Santa Clara, there was intrusion into only one fractional section at the extreme northeastern corner of the aboriginal title area. The witness who compiled the maps and excerpts was unable to state which claims and entries went to patent, and which were cancelled, rejected, or abandoned.

With the friendly farming Indians of the Southwest, the Government pursued a policy more respectful of property rights than with the nomadic tribes, who were hostile, or considered potentially so. Absent clear and convincing evidence of intent to extinguish, an intent to protect the rights of these Indians must be inferred.

Under the circumstances, the fact that some entries were allowed in the plaintiffs' aboriginal areas is evidence of official negligence, or lack of knowledge of the plaintiffs' areas, rather than of an intention on the part of the United States to extinguish their whole titles. See Gila River Pima-Maricopa Indian Community v. United States, Docket 228, 27 Ind. Cl. Comm. 11, 15 (1972). We reject defendant's theory that the plaintiffs' Indian titles to their entire aboriginal areas were extinguished in 1905, or at any other date, by reason of the areas' being open to entry under the public land laws.

In regard to those parts of the plaintiffs' lands disposed of by the United States to third parties, a further question remains about the date of taking. The plaintiffs urge that the correct taking dates are those on which patents issued, rather than the dates of entry as we held in Pueblo de Zia v. United States, 19 Ind. Cl. Comm. 56, 77 (1968). We adhere to Zia.[11/]

The plaintiffs' aboriginal title areas include several surveyed sections numbered 2, 16, 32, and 36, which, if nothing intervened, were granted to New Mexico for the support of public schools by the Acts of June 21, 1898, c. 489, 30 Stat. 484, and June 20, 1910, c. 310 §6, 36 Stat. 561.

Unextinguished Indian title prevents the vesting of school sections in a state. Minnesota v. Hitchcock, 185 U.S. 373, 388 (1902); cf. State of Alaska v. Udall, 420 F.2d 938 (9th Cir. 1969), cert. denied, 397 U.S. 1076 (1970); United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941). All or nearly all of the sections numbered 2, 16, 32 or 36 appear to have been included in the outer perimeters of the Forest Reserve or Grazing District withdrawals (or patented to third parties). For such sections the date of inclusion or entry are the taking dates. Pueblo de Zia v. United States, Docket 137, 19 Ind. Cl. Comm. 67, 73 (1968).

11/ But we have found patent dates to govern in the case of mining claims. Papago Tribe of Arizona v. United States, Docket 345, 21 Ind. Cl. Comm. 403, 405 (1969). We suggest this distinction because the residence and cultivation requirements of the Homestead Act (43 U.S.C. §164) provide for visible and substantial disruption of customary Indian use, whereas the requirements of marking the boundaries on the ground and doing $100 of annual assessment work under the Mining Law (30 U.S.C. §28) do not.

To summarize, we hold the following to be applicable taking dates as of which the plaintiffs' former lands should be evaluated:

Land	Date
Included in Jemez Forest Reserve	October 12, 1905
Placed in New Mexico Grazing District No. 1	June 21, 1941
Taken by extension of Grazing District No. 1	December 14, 1944
Granted to third parties under agricultural land laws	Entry dates
Granted to third parties under mineral land laws	Patent dates
School sections	Dates included in one of preceding categories.

II. The San Felipe Indian Reservation

The plaintiff Pueblo of Santo Domingo claims that it had tenancy in common with the Pueblo of San Felipe, under aboriginal title, of the tract President Theodore Roosevelt set aside in 1902 as a reservation exclusively for San Felipe.[12/] Santo Domingo contends the Executive order constituted an uncompensated taking of its interest, and prays judgment for one half the tract's value as of 1902.

The Government does not brief Santo Domingo's arguments on the merits. Instead, it claims that plaintiff has stipulated to exclude the San Felipe Reservation from its claim. Santo Domingo replies that

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12/ The Pueblo of San Felipe is not a party here, nor is it a claimant in any other docket before the Commission.

the stipulation contains no such language, but even if it did, the Commission should relieve it from the effect of this mistake of fact to reach the merits of the issue.

The pertinent parts of the stipulation referred to, which was filed with the Commission on October 29, 1969, read as follows:

> 2. . . . The Pueblo of Santo Domingo aboriginally and exclusively used and occupied the area delineated on the attached map, and the Defendant is liable for extinquishing the Petitioner's title to said area.
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> 3. There shall be entered an interlocutory order ... that the Petitioner has established Indian title to an area comprising approximately 77,237.24 acres and delineated on a map prepared by the Bureau of Land Management in August 1967.

The map accompanying the stipulation shows a broad line surrounding what the legend identifies as "claimed aboriginal area." The San Felipe Reservation is clearly within the line. The San Felipe Reservation is listed in the legend of the map among the tracts whose acreage must be deducted from the 223,000.00 acres of the depicted aboriginal area to arrive at the 77,237.24[13/] acres mentioned in paragraph 3 of the stipulation. If the San Felipe Reservation was aboriginally owned exclusively by Santo Domingo, as the parties in paragraph 2 of the stipulation (quoted above) agreed it was, and if in 1902 it was set aside by the Government exclusively for San Felipe without compensation

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13/ When we deduct the acreages shown from 223,000.00 we get 77,237.92 acres instead of the figures stipulated by the parties.

to Santo Domingo, as it was, the consequences are obvious. Why then did the parties in paragraph 3 deduct its acreage from the area for which the defendant will be liable? The stipulation gives no explanation of this internal contradiction. It exhibits an inconsistency characteristic of inadvertent agreements signed without a real meeting of the minds.

The record shows that after entry of the Commission's order setting the Santo Domingo case for trial on the single issue of the taking date, the plaintiff's attorney on January 21, 1970, wrote as follows to our Chief Counsel:

> As we have discussed, I am enclosing a proposed revised form of order in the above referenced dockets. It is my understanding from my discussion with Howard Campbell at the Department of Justice that agreement had been reached for scheduling two issues for trial on June 18, 1970: the date of taking with respect to all three cases and the original Indian title of the Pueblo of Santo Domingo, the petitioner in Docket No. 355, to 8,600 acres now within the San Felipe Indian reservation.
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> I have asked Mr. Campbell to confirm to you that this was the understanding.

The end of the letter bears the notation, "Cc: Howard G. Campbell, Esquire."

The Commission's second order of January 28, 1970, expanding the issues to include the question of title to the San Felipe Reservation, is in the form submitted with plaintiff's letter. There is no corresponding letter from defense counsel. At the trial on June 18, 1970, defense counsel did not object to plaintiff's evidence on the

San Felipe issue, and offered evidence directed to the merits of the same issue (Transcript, 10-11). Finally, he stated:

> . . . Now what happened, in Santa Clara was probably my fault. BLM, naturally, understood that it was to eliminate any valid Spanish grants that might be within the claimed areas, because that had been confirmed. And what to do with the San Felipe reservation of 8,000 acres never occurred to me, because I didn't know anything about it. . . (Transcript, p. 12)

The following colloquy between plaintiff's and defendant's counsel occurs at page 15 of the transcript:

> Mr. Dean: I can establish that after the map was prepared, based upon the area of the claim, which did include most of the San Felipe Indian reservation, the Government declined to stipulate as to the plaintiff's aboriginal title with respect solely to the San Felipe area. Is that an accurate --
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> Mr. Campbell: Sure, that is a question for the Commission to decide.

It is thus clear that the stipulation of October 29, 1969, does not embody any real understanding of the parties concerning the San Felipe Reservation.

The prevailing rule on repudiation of improvident stipulations is thus stated in Carnegie Steel Co. v. Cambria Iron Co., 185 U.S. 403, 444 (1902):

> But while the stipulation is undoudtedly admissible in evidence it ought not to be used as a pitfall, and where the facts subsequently developed show, with respect to a particular matter, that it was inadvertently signed, we think that upon giving notice in sufficient time to prevent prejudice to the opposite party, counsel may repudiate any fact inadvertently incorporated therein. This practice has been frequently upheld in this and other courts. The Hiram,

1 Wheat, 440; Hunt v. Hollingsworth, 100 U.S. 100, 103; Malin v. Kinney, 1 Caines, 117; Barry v. Mut. Life Ins. Co., 53 N.Y. 536.

The right to repudiate improvident stipulations includes matters of law as well as fact, and extends even to stipulations for settlement. Hunt v. Hollingsworth, 100 U.S. 100 (1879); The Hiram, 14 U.S. (1 Wheat.) 440 (1816); Future Plastics, Inc. v. Ware Shoals Plastics, Inc., 407 F.2d 1042 (4th Cir. 1969); Chouest v. A&P Boat Rentals, Inc., 321 F. Supp. 1290 (1971); cf. Swift & Co. v. Hocking Valley Ry., 243 U.S. 281 (1917). A strong statement in favor of relieving a party from one fact mistakenly agreed to in a stipulation, while letting the remainder of the stipulation stand, was made by the Court of Claims. American Food Products Co. v. United States, 73 Ct. Cl. 526 (1932).

We do not read United States v. Southern Ute Indians, 402 U.S. 159 (1971), as modifying Carnegie Steel. Southern Ute simply does not deal with the question of whether a party can be relieved of an improvident stipulation prior to judgment. It held, rather, that after entry of a consent judgment in a prior case between the same parties, the plaintiff in a new action apparently concerning the same subject matter could not escape res judicata by showing that the stipulation upon which the prior judgment was based really did not mean what it said.[14/]

14/ Hunt v. Hollingsworth, 100 U.S. 100, 103 (1879), emphasizes that parties should be permitted to recede from improvident stipulations "at any time before final hearing and judgment."

All the conditions for partial repudiation of a stipulation given in Carnegie Steel are met in the instant case. The evidence shows the stipulation to be factually inaccurate: Santo Domingo's use of what is now the San Felipe reservation was not exclusive but joint. Admissions of attorneys for both sides, quoted above, show that their apparent agreement to discharge the Government from liability for taking the area was inadvertent. Our order of January 28, 1970, almost five months before the trial, broadening the issues to include the question of title to the San Felipe Reservation, if not the plaintiff's prior letter, gave defendant notice of the pro tanto repudiation in ample time to avoid prejudice.

Under such circumstances, to now hold the plaintiff barred from claiming compensation for the Government's taking of the Santo Domingo interest in the San Felipe Reservation would be wholly irreconcilable with the remedial purposes of the Indian Claims Commission Act. Accordingly, we turn to the merits of the question.

Santo Domingo and San Felipe are neighboring Indian villages, occupying contiguous confirmed Spanish land grants. Their inhabitants speak the same Keres Language, practice the same religion, and take part in each other's ceremonies. In the late eighteenth century the two pueblos submitted a joint application to obtain title to the land lying between them to the Spanish governor of New Mexico, who granted it, in the name of the King, on September 10, 1770. At least since that date the two peoples made common use of the entire area now

embraced in the San Felipe Executive Order Indian Reservation and the adjacent confirmed Santo Domingo-San Felipe Joint Grant. In the late nineteenth century, the two pueblos petitioned the Court of Private Land Claims for confirmation of the 1770 grant as to the entire area. In a 3-2 decision dated December 8, 1898, the court confirmed only the northern part, the present-day joint grant. Counsel in the proceedings before the Court of Private Land Claims was provided for the pueblos by the Government. The pueblos appealed to the Supreme Court of the United States; but Congress failed to appropriate funds for further legal services, and the appeal was dismissed for want of prosecution.

The Executive order creating the present San Felipe Indian Reservation was issued largely at the urging of the attorney who had represented the United States before the Court of Private Land Claims in opposition to the pueblos' petition. He stated that while he felt the court was correct in holding the area not included in the Spanish grant, it had been immemorially in the joint possession of the two pueblos. His conclusion is amply supported in the present record. Our Findings 11 to 20, infra, show that the evidence of joint use and occupancy by Santo Domingo and San Felipe is clear, convincing and uncontradicted.

Santo Domingo's and San Felipe's understanding that they had joint title to what is now the San Felipe Executive Order Reservation was based on their interpretation of the Spanish grant of 1770, but the decision of the Court of Private Land Claims is res judicata

against any contention that the two pueblos had joint legal title to the subject tract. They either had joint aboriginal title or no title at all. 15/

Because of the uncontradicted positive evidence of the joint use of the area by the two pueblos, exclusive of all others, the Commission concludes that here is proven a true joint aboriginal title, heretofore only hypothesized. 16/ Aboriginal title has been defined as:

> . . .the right because of immemorial occupancy to roam certain territory to the exclusion of any other Indians and in contradistinction to the custom of the early nomads to wander at will in the search for food. 17/

The assertion of the right to exclude others is central to the concept of property in land. Inclusion of the requirement for "exclusive" use in the usual formulation for aboriginal title requires that some special connection between that claiming tribe and that land must be shown. Where mere use breeds title, "exclusiveness" provides a focus for the evidentiary problem of showing land owned as opposed to land used without ownership, including that used in common with others. Common use of land casts doubt on true proprietorship; ordinarily, without evidence of exclusiveness, the conflicting

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15/ Despite some evidence to the contrary, neither pueblo could successfully assert exclusive use of the tract.

16/ See, e.g., Iowa Tribe v. United States. 195 Ct. Cl. 365 (1971); infra, note 26.

17/ Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945). See also United States v. Santa Fe Pacific R.R., 314 U.S. 335, 339 (1941).

inferences cannot be resolved to support a finding of title in either or both users. See e.g. Hualapai Tribe v. United States, Docket No. 90, 18 Ind. Cl. Comm. 382 (1967).

No legal principle, however, bars joint aboriginal title. The assertion of a right to exclude others can exist in joint tenants as well as in sole proprietors. That such title has not been observed in previous proceedings reflects the usual absence of positive evidence, such as documents, to show an explicit joint interest in addition to common use.

Indian tribes originally possessed full powers of sovereignty. From time to time these powers have been limited or extinguished by Federal law. But what is not expressly taken away remains within the domain of tribal sovereignty.[18/]

Sovereign power includes the ability to hold land in common with other sovereigns.[19/] We know of no law which deprived the pueblos of New Mexico of this ability.

Among the aboriginal sovereign powers of Indian tribes was that of making treaties with each other. The power continued after American independence; and Federal approval was not a prerequisite to validity, even of treaties whereby one tribe sold land to another. The tribes

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18/ F. Cohen, Handbook of Federal Indian Law 122 (1941).

19/ Cf. Convention with Great Britain of October 20, 1818, 8 Stat. 248.

had power to sell partial interests and thus create joint tenancies.[20]

As well as justification from legal theory for the existence of joint aboriginal title, there is historical evidence of its existence in the treaties. In a number of treaties the Government accepted joint land cessions from two or more Indian tribes.[21] Another treaty contains the following language:

> The Miamies explicitly acknowledge the equal right of the Delawares with themselves to the country watered by the White River. 22/

It was not uncommon for treaty language to provide for joint title interests, although it is not always clear whether a new title was created or a pre-existing joint aboriginal use recognized.[23] The Court of Claims held the Treaty of Grouseland to constitute a recognition by the United States of joint title to

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20/ United States v. Emigrant New York Indians, 177 Ct. Cl. 263 (1966). Cf. Treaty of Doaksville, November 4, 1854, between the Choctaw and Chickasaw Nations, 10 Stat. 1116 (ratified by the U.S. Senate, although the United States was not a party).

21/ E.g., Treaty of Fort Wayne of June 7, 1803, with Delawares, Shawanoes, Putawatimies, Miamies, Eel River, Weeas, Kickapoos, Piankashaws, and Kaskaskias nations of Indians, 7 Stat. 74 (Article 3d provides for joint cession of the Great Salt Spring); Treaty of L'Arbre Croche and Michilimackinac of July 6, 1820, with Ottawa and Chippewa nations of Indians, 7 Stat. 207 (cession of "the Saint Martin Islands in Lake Huron, containing plaster of Paris").

22/ Treaty of Fort Wayne of September 30, 1809, with the tribes of Indians called the Delawares, Putawatimies, Miamies and Eel River Miamies, 7 Stat. 113, 114.

23/ Treaty of Washington, D. C., of May 27, 1836, with Ottawa and Chippewa nations, 7 Stat. 491.

certain land in a signatory tribe and a non-signatory tribe.[24/]

The Court of Claims stated in the first case which clearly enunciated the requirement of exclusiveness to establish aboriginal title:

> In all cases there must have been actual use or occupancy and not mere constructive or desultory possession; some mastery of a tribe over the soil to the exclusion of all others, or the joint possession of two or more tribes such as gave to each something of a fixed habitation or use of the land as hunting ground to establish a title by occupancy. 25/

At least four other times the Court of Claims has stated that there can be joint aboriginal title of two or more tribes, based on amicable possession in common.[26/]

When it is proved by such clear evidence as here that two tribes like the Santo Domingos and the San Felipes in conscious privity made joint amicable use of a definite area for a long time, to the exclusion

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24/ United States v. Kickapoo Tribe, 174 Ct. Cl. 550, 554 (1966), construing Treaty of August 21, 1805, 7 Stat. 91. The signatory tribe was the united nation of the Miamis, Eel River, and Weas. The non-signatory was the Kickapoo Tribe. As authority for its holding the Court of Claims cited the dictum in the aboriginal title case, Sac and Fox, infra, note 26; see 174 Ct. Cl. 555.

25/ Choctaw and Chickasaw Nations v. United States, 34 Ct. Cl. 17, 51 (1899), rev'd on other grounds, 179 U.S. 494 (1900).

26/ See Sac and Fox Tribe of Indians v. United States, 161 Ct. Cl. 189, 202, 315 F.2d 896, 903, cert. denied, 375 U.S. 921 (1963); United States v. Kickapoo Tribe, 174 Ct. Cl. 550, 555 (1966); Confederated Tribes of the Warm Springs Reservation, 177 Ct. Cl. 184, 194 (1966); Iowa Tribe of the Iowa Reservation v. United States, 195 Ct. Cl. 365 (1971).

of all other Indians, we have no hesitation in holding that they had joint aboriginal title.[27/]

The defendant extinguished the Santo Domingo one-half interest on June 13, 1902.

The case will now proceed to trial to determine the values of the various parcels taken from the plaintiffs by the defendant. With respect to the tracts disposed of to third parties, the parties are encouraged to confer and agree upon an average valuation date or a series of average dates for the groups of dispositions made during successive periods.

Richard W. Yarborough, Commissioner

We concur:

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

27/ This discussion attempts to avoid mixing the title determination with an entity determination by making it clear that we regard the two pueblos as separate entities, rather than stating the case as being one of a super-entity for the purpose of holding joint title to the subject tract, with the sub-entities performing other separate functions. If a complete merger of two tribes into one entity were required as a prerequisite for joint title, joint title need never have been so consistently hypothesized, for such a question would be resolved by the entity determination. Cf. Iowa Tribe v. United States, supra, at 370.

Kuykendall, Chairman, concurring in part and dissenting in part.

I concur with the majority except insofar as they have determined that the Pueblo of Santo Domingo (Docket 355) held aboriginal title to an undivided one-half interest in the tract of land described in finding 12. This holding is based upon a finding that the Santo Domingo Indians and the San Felipe Indians had amicably used and occupied one particular 8600 acre tract in common for a long time. From this fact the majority has concluded that the two pueblos owned joint aborigiral title to the tract. The facts pertaining to the grant of land by Spain to the two pueblos for joint use, which are set forth fully by the majority, do not, in my opinion, require or enable the Commission to conclude that the two pueblos possessed joint title of any kind.

Santo Domingo's claim is one based on aboriginal or Indian title and must rest on proof of actual, exclusive, and continuous use and occupancy for a long time prior to the loss of the property. By allowing this tribe to recover on the basis of its common use of a small area with another Indian pueblo, the majority has thereby excepted this plaintiff from the requirement that its Indian title be established by exclusive use and occupancy.

To reach this result the majority has relied on several footnoted comments of the Court of Claims which suggest the general possibility that two or more tribes might acquire aboriginal title by inhabiting certain territory in "joint and amicable possession." While neither this Commission nor the court has ever found an instance of "joint aboriginal title," I believe the Court of Claims contemplated that such a possibility might

exist only when two or more tribes had become so closely allied or integrated in their land use and occupancy that they had in fact become virtually one land-using entity or what might be termed "joint owners" of the land. But I do not believe this concept is applicable to a situation where two separate entities, each possessing Indian title to its own lands, attempt to assert "joint Indian title" to an area between their respective lands which is commonly used by both tribes. I will refer only to two of the latest decisions of the Court of Claims, which along with many preceding opinions cause me to disagree with my fellow Commissioners:

In Seminole Indians, v. United States, 197 Ct. Cl. 350, 356 (1972), involving overlapping Creek and Seminole aboriginal land claims in Florida the court said:

> . . . . two groups cannot both have been in exclusive and long-continued possession of the overlapping area at the time it came into the hands of the United States; the claims are mutually exclusive.

In the case of the Iowa Tribe and the Sac and Fox Tribe (Docket 135), the Iowa plaintiffs were found to have held aboriginal title to a defined tract while the Sac and Fox were found to have held aboriginal title to other defined lands. The plaintiffs were denied recovery for lands which neither exclusively used and occupied. In its decision on December 10, 1969, the Commission specifically considered the claims to areas which were commonly used. The reasons and authority for rejecting such claims are succinctly set forth therein. Iowa Tribe v. United States, Docket 135, 22 Ind. Cl. Comm. 232, 278-83 (1969), affirmed 195 Ct. Cl. 365 (1971).

On appeal the Iowa and the Sac and Fox plaintiffs sought reversal of the Commission's determination that the two tribes did not have joint Indian title to the unawarded lands. In affirming the Commission the court noted, at page 370:

> . . . The Iowas and the Sac and Fox did not consider themselves, and were not treated, as a single or closely integrated entity, but rather as separate political groups which were friends or allies (for the most part). their use of the same lands may have been in common -- like much of Indian use of the midwestern and western regions -- but the Commission could properly decide that it was not proved to be truly joint, and therefore that each separate tribe's claim to Indian title would have to be tested on its own distinct basis.

In the instant case the Santo Domingo and the San Felipe were not a single or closely integrated entity. The Santo Domingos had aboriginal title to a defined area and the San Felipes possessed similar title to other lands. As in the case of the Iowas and the Sac and Fox, there was an area between their respective lands which was commonly used by the two tribes. But this fact does not warrant a finding of "joint Indian title." As a separate and distinct entity, the Santo Domingo tribe's claim must be tested on its own merits. It may recover for the lands which it exclusively used and occupied, but it may not recover for part of the 8600 acre tract used in common with another friendly pueblo and, therefore, not exclusively used and occupied by it.

Jerome K. Kuykendall, Chairman