BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SANTO DOMINGO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 355
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: April 18, 1977

Appearances:

Darwin P. Kingsley, Jr., Attorney for Plaintiff. Arthur Lazarus, Jr., S. Bobo Dean, Fried, Frank, Harris, Shriver & Kampelman were on the Briefs.

Roberta Swartzendruber with whom was Acting Assistant Attorney General Anthony C. Liotta, Attorneys for Defendant.

OPINION ON MOTION FOR REHEARING

Yarborough, Commissioner, delivered the opinion of the Commission

We consider again the Santo Domingo claim in which the plaintiff is contending it lost part of its Spanish Pueblo grant through an erroneous survey of the north boundary made in 1859 by U. S. Deputy Surveyor R. E. Clements and a subsequent decision of the Pueblo Lands Board. The true north boundary, plaintiff says, is where U. S. Deputy Surveyor Wendell V. Hall placed it in a resurvey made in 1907. We denied plaintiff's motion for summary judgment on December 22, 1976 (39 Ind. Cl. Comm. 241). Plaintiff has now moved for reconsideration of that decision, and has

moved for a call upon the Attorney General to produce the evidence that was before the United District Court for the District of New Mexico, when, in 1921, it made a finding in the unreported case of United States v. Pankey, that Hall correctly located the northeast corner of the Santo Domingo grant on the earth's surface.

With its motion for reconsideration of the denial of the motion for summary judgment, plaintiff has supplied evidence, and called our attention to evidence previously overlooked, that the Hall survey, contrary to what we wrote last December, was actually accepted by the Commissioner of the General Land Office. This evidence is of a secondary nature, the actual letter or endorsement of acceptance of the Commissioner not being supplied. We think the matter is immaterial. We did not deny summary judgment because we believed the second survey was unaccepted, but because we were not convinced it was correct.

The plaintiff has singled out the statement made on page 246 of our opinion, "There is no substantial conflict in the evidentiary material before us. . ." Plaintiff interprets this to mean that its evidence favoring the correctness of the Hall resurvey stands uncontradicted. All we meant was that the evidence submitted by the parties on the question of what happened was not in conflict. Clements' and Hall's surveys are obviously irreconcilable. We regard the earlier one as sufficient evidence in itself of a location of plaintiff's north boundary so different from where Hall placed it as to preclude summary judgment, since we find no legal doctrine giving conclusiveness to one survey or the other.

Plaintiff also points to the change of position of the defendant in now opposing the motion for summary judgment, after earlier bringing the Pankey case on the theory that the Hall survey was the correct one. It is true that admissions made in pleadings in prior litigation are admissible in evidence in a later case against the interest of the pleader. But, as the Court of Claims stated in Donald M. Drake Co. v. United States, 153 Ct. Cl. 433, 444 (1961):

> . . . Such admissions are sometimes referred to as informal or quasi-admissions to distinguish them from judicial admissions. Quasi-admissions lack the force and estoppel effect of judicial admissions, which latter operate only in the cause in which the admissions appear. Wigmore on Evidence, 3rd Ed., Sec. 1066. . . [Quasi-] admissions are not conclusive but are subject to explanation and contradiction. . .

We have yet to see any direct evidence on where the north boundary described in plaintiff's Spanish grant ought to be. We have the conflicting expert opinions of Clements and Hall and a number of other official acts and statements which come into evidence under hearsay exceptions. Because the matter is before us at this time only on motion for summary judgment we cannot weigh the conflicting proof, but plaintiff will have an opportunity to meet its burden of proof at trial.

In regard to the plaintiff's motion for a call, we note first that it is directed only to the Attorney General, and that it is answered by the affidavit of the Department of Justice attorney assigned to this case stating that to the best of her knowledge and belief the material sought to be produced is not in the possession of the United States.

Because we question whether the Attorney General is the appropriate agency to be called upon to produce the evidence in question, or, if he is, whether the affidavit of the attorney is a sufficient response, we shall discuss this matter informally with the parties to see if further action is required.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner