BEFORE THE INDIAN CLAIMS COMMISSION

THE NAVAJO TRIBE OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 229
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 2, 1977

Appearances:

William C. Schaab, Attorney for Plaintiff.

Dean K. Dunsmore and James M. Mascelli, with whom was Assistant Attorney General Peter R. Taft, Attorneys for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

On December 10, 1976, the defendant filed herein a "Motion for Summary Determination," wherein an order was sought determining that the United States:

> ". . . may not be required to compensate the Navajo Tribe for the aboriginal title lands of the Navajo Tribe to which the United States extinguished plaintiff's title pursuant to the Treaty of June 1, 1868, 15 Stat. 667, 2 Kappler 1015, but which the United States subsequently returned to the Navajo Tribe."

The crux of defendant's argument in support of its motion is that the plaintiff tribe in its original petition specifically and unequivocally

disclaimed any recovery for those aboriginal title lands subsequently returned to the tribe and that any attempt to seek a recovery for the returned lands at this stage of the proceedings would be a new claim that is barred by the jurisdictional limitations imposed under section 12 of the Indian Claims Commission Act (25 U.S.C. 70k).

On January 18, 1977, the plaintiff tribe responded in opposition to defendant's motion alleging among other things that a clarifying amendment to the original petition which was filed in 1954 relates back to the original petition and sets the overall claim in proper prospective; thus, according to the plaintiff,

> "The language in the original petition upon which the defendant bases its jurisdictional argument, in effect conceded as offsets, all lands which were returned to the plaintiff after 1868." 1/,

and, since the 1954 amendment did not contain any such disclaimer with respect to those aboriginal title lands subsequently returned to the plaintiff tribe,

> "No claim was thus added; the only effect of the amendment was to require the defendant to prove any offsets it might later claim." 2/

The plaintiff offered the further argument that if the 1954 amended petition did in fact add a claim not expressly delineated in the original petition, there was adequate notice from the language in the original petition to appraise the defendant of the general fact

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1/ P. 6, "Plaintiff's Response to Defendant's Motion for Summary Determination."

2/ Ibid.

situation which would give rise to the subsequent claim--hence there is no want of jurisdiction and the matter falls squarely within the rule laid down in Snoqualmie Tribe of Indians v. United States.[3/]

Further responses by the parties have added little if anything to the above positions and we need not refer to them.

Both sides recognize that the key to resolving this matter is the question of jursidiction. Accordingly, we shall look carefully at the language in the original petition that was filed herein by the plaintiff on August 8, 1951, and the sequence of events that transpired thereafter:

Plaintiff's original typewritten petition sought recovery on three counts with judgment being requested as follows:

> WHEREFORE, petitioner prays judgment against the United States in the amount of the fair value of the lands and interest in lands, wrongfully taken from petitioner, as described in Section 5 hereof, saving and excepting only those lands partially restored to the petitioner embraced within its present reservation. . . .
>
> . . . .
>
> (a) That the said Treaty of 1868 and each and every provision thereof is invalid and void on the grounds of fraud, duress, unconscionable consideration and unilateral mistake; that the lands described in Section 5 of Count One other than those embraced within the present Navajo Reservation, were wrongfully seized and taken from petitioner by said fraud and duress.
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> . . . .

3/ 178 Ct. Cl. 570 (1970) aff'g in part, rev'g in part, and remanding in Docket 93, 15 Ind. Cl. Comm. 267 (1965), 9 Ind. Cl. Comm. 25 (1960).

> WHEREFORE, petitioner prays that the Commission enter judgment against the respondent for the fair and just value of all of such lands wrongfully removed from the petitioner lying between the boundary lines of petitioner's present reservation and the boundary line of the Navajo homelands as described in Section 5 of Count One, ...
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> . . . .
>
> WHEREFORE, petitioner prays judgment against the United States in the amount of the fair value of the lands described in Section 5 of Count One, saving and excepting only those land partially restored to the petitioner embraced within its present reservation. . . . [Emphasis added.]

On September 1, 1954, (ostensibly for the purpose of complying with the Commission's rule governing the filing of printed petitions) the plaintiff filed an "Amended Petition" setting forth anew the causes of actions enumerated in the original petition but with considerable less verbiage. Missing from the prayer for relief was the delimiting language relative to any claim to the aboriginal lands subsequently returned to the Navajo Tribe:

> "Wherefore, petitioner prays for a determination that petitioner is entitled to recover:
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> 1. Just compensation under the Fifth Amendment for the land described in paragraph No. 5 of this petition taken by the United States, or, if that is not granted, in the alternative,
>
> 2. For the fair value of the land described in paragraph No. 5 of this petition ceded to the United States under the Treaty of June 1, 1868, 15 Stat. 667, 2 Kappler 1015,
>
> 3. For such further relief as in consonant with fair and honorable dealing and as this Commission may deem just." 4/

4/ P. 7, 8 - Amended Petition, September 1, 1954.

On September 6, 1954, the Commission conducted an initial hearing in this docket. At that time, plaintiff's counsel, Mr. Littell, outlined the historical events leading up to the June 1, 1868 Navajo Treaty of Cession. 5/ In commenting upon the need of additional land for the Navajos following the 1868 Treaty, Mr. Littell stated the following:

> It was subsequently necessary to expand the reservation which was done by executive order, all of which with one exception which need not be discussed here but in the legal aspect of the case will be thoroughly discussed, all of which were confirmed by acts of Congress so that the boundary line confirms this territory, (illustrating) which now embraces the present reservation and for the purpose of our claim we have therefore made no claim for an area removed from the Navajos if any portion of it were restored by these executive orders, which they were in later years.
>
> So that the claim which lies before the Court, roughly speaking, is the difference between the lands which were occupied by the Navajos and held firmly and under control by them and reflected in the black line of this map and the present authorized areas of Navajo occupancy. 6/

On January 25, 1960, at a hearing involving the overlapping aboriginal title claims of the Navajo and Hopi tribes of Indians, counsel for the Navajo plaintiff, Mr. Sonosky, again identified for the Commission's benefit the extent of the Navajo aboriginal title claim as pleaded in this docket;

> "On this map which I will identify for this purpose as plaintiff's exhibt 510 for identification, there is outlined in black on the exterior the extent of the amount of the Navajo claim.
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> . . . .

5/ 15 Stat. 667.

6/ P. 7, Transcript of September 6, 1954--the map alluded to by Mr. Littell is Plaintiff's Exhibit 3.

. . .Inside of the black line there is defined in red the exterior boundaries of the Navajo Reservation, which is not a part of this claim.

. . . .

The Commission will notice on the same map small areas defined in red over on the eastern section near stations 17, 18, 19, and 20. These, too, are part of the Navajo Reservation and are not a part of the claim.

The Commission will also notice on the same map areas defined in green. These are substantially the Spanish grant areas, areas for which the Spanish or Mexican Government issued grants.

In this case the Navajos make no claim for those areas covered by the grants.

The total acreage covered in these exterior boundaries, the gross acreage without any exceptions, is approximately 40,850,000 acres. We deduct from that the 17,034,000 acres which represents the Navajo Reservation and the Spanish land grants which are not a part of the claim. Therefore, that leaves within the claimed area approximately 23,817,000 acres. These acreage figures are approximate.

This case is one of the common garden variety that the Commission has had before it scores of times. It is an unconscionable consideration case based on the Treaty of 1868 between the United States and the Navajo Tribe." 7/

Later on, in the course of further hearings on the Hopi-Navajo overlapping aboriginal title claims, we find additional confirmation of the extent of the Navajo claim in the colloquy between Commissioner Scott, then presiding, and Mr. Littell, the Navajo counsel:

"Commissioner Scott: . . . .Of course the Navajo are not praying in their petition to be paid for the area of the Reservation because they now have that.

7/ P. 24, 25, Transcript of January 25, 1960.

"Mr. Littell: This is right. This is what I was going to explain. 8/

and finally

"Mr. Littell: . . . .This is the outer claim as I read the legend of the aboriginal claim of the Navajos. This is the present extent if the Navajo Reservation subject to the dispute over the Hopi Executive Order area of about two and a half million acres in the heart of it.

Leaving that out of the picture, our claim was for the difference between the present reservation and the outside. . . ." 9/

On June 29, 1970, the Commission issued its findings of fact, opinion, and interlocutory order in this docket wherein it determined the extent of the Navajo Tribe's aboriginal title lands as of the effective date of the June 1, 1868 Treaty of Cession. 10/ The boundaries of the plaintiff's aboriginal land holdings as determined by the Commission are set forth in detail in the Commission's finding of fact No. 17. 11/ In finding of fact No. 18, the Commission excluded from the aboriginal title lands certain Spanish and Mexican land grants situated either whole or in part within the boundaries of said aboriginal title lands. 12/ We ordered that the case proceed for a determination of the

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8/ P. 7715 - Transcript of October 20, 1961.

9/ P. 7716 - Ibid.

10/ 23 Ind. Cl. Comm. 244 (1970).

11/ Ibid, p. 272.

12/ Ibid, p. 273, 274. The Navajo Tribe did not have aboriginal title to the lands situated within the boundaries of the Spanish and Mexican land grants as of the effective date of the 1868 Treaty of Cession. Thus, they are automatically excluded from the aboriginal title area.

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acreage and the 1868 fair market value of the area awarded to plaintiff tribe, the consideration paid by the United States for said lands and

> "all other issued [sic] determination of the extent of defendant's liability to the plaintiff tribe." 13/

We think the record supports the defendant's motion to the effect that the plaintiff's claim in this docket is limited to a recovery for those aboriginal title lands not returned to the Navajo Tribe following the 1868 Treaty of Cession. In other words, the present Navajo Reservation is not a part of plaintiff's aboriginal title claim in this docket. The record further shows that this has been the clear understanding of the parties and Commission until questioned now by plaintiff's present counsel.

While the Commission is not persuaded by plaintiff's contentions that a claim for the aboriginal title lands within the Navajo Reservation is still viable, we will comment briefly on several points raised in plaintiff's response to defendant's motion for summary determination.

Initially plaintiff states that the "award area" as delineated in the Commission's 1970 aboriginal title decision is the law of the case, and since this "award area" included aboriginal title lands within the Navajo Reservation, plaintiff is entitled to recover for the entire area. While, we agree that the 1970 aboriginal title decision is the law of case, we do not agree that our delineation of the 1868 aboriginal holdings of the Navajo Tribe is the "award area."

13/ 23 Ind. Cl. Comm. 244, 276.

As the Commission indicated earlier in its opinion in the 1970 decision, the "prime issue" was the extent of Navajo aboriginal title lands as of June 29, 1868, the effective date of the Navajo Treaty of Cession. The determination of the actual acreage of the award area was one of the issues to be determined at the value phase of this case.

In the instant case, the net "award area" subject to evaluation is the 1868 aboriginal title area less certain exclusions; i.e. the Spanish or Mexican land grants and the present Navajo Reservation.

Plaintiff further contends, as indicated earlier in this opinion, that the Commission had the requisite jurisdiction to consider plaintiff's 1954 amended petition. This is true provided no new cause of action was presented. As indicated earlier the defendant and the Commission were reassured by the plaintiff on several occasions that the 1954 amended petition was not intended to alter the scope of the aboriginal title claim spelled out in the original petition. To avoid the obvious, the plaintiff's present counsel would have the Commission construe the language in the original petition as accomplishing the purpose of the 1954 amended petition on the basis that plaintiff's former counsel, Mr. Littell, "misspoke himself," and, by disclaiming the Navajo Reservation lands in the original petition, Mr. Littell was merely conceding offsets.

Of course, the more recent developments in the law of offsets that are more favorable to plaintiff were not available to Mr. Littell when he filed his 1951 petition.[14/] While plaintiff's present counsel has the

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14/ United States v. Pueblo De Zia, et al., 200 Ct. Cl. 601 (1973), affirming in part, reversing in part, and remanding Docket No. 137, 26 Ind. Cl. Comm. 218 (1971), 21 Ind. Cl. Comm. 316 (1969).

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advantage of hindsight, we find Mr. Littell's handling of the matter of the Navajo Reservation lands as a potential offset against his aboriginal title claim not to be unreasonable considering the applicable case law on offsets in 1951.

Finally, plaintiff contends that, even if the 1954 amended petition added a claim not specifically set forth in the original petition, the facts in this case call for an application of the Snoqualmie rule which permits a post August 13, 1951[15/] amendment to relate back to the original petition. Snoqualmie Tribe of Indians v. United States, supra.

In Snoqualmie, the court allowed a post 1951 amendment to an original timely filed petition on the basis that the broad language of the original petition and the fact situation generated therein gave sufficient notice to the defendant that it might have to defend against the claim set forth in the subsequent amendment. Therefore, the amendment relates back to the original petition and there is no want of jurisdiction to hear the amended claim. In the Courts view "notice is the test."

In the instant case the facts are substantially different than those in the Snoqualmie case. Here the defendant was clearly and unequivocally given "notice" in the original petition that it would not have to defend against the claim now being pressed by plaintiff's

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15/ The cutoff date for the filing of claims that occurred prior to August 13, 1946, was August 13, 1951. 25 U.S.C. 70k.

counsel. Under these circumstances the current attempt to broaden the original claim in effect states a new claim which the Commission lacks jurisdiction to hear.

We therefore conclude that defendant's motion for summary determination should be granted. Plaintiff's claim in this matter is limited to those aboriginal title lands of the Navajo Tribe to which the United States extinguished title pursuant to the Treaty of June 1, 1868, but which the United States did not subsequently return to the Navajo Tribe.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

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