IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF JEMEZ, a federally recognized Indian tribe, Plaintiff, v. **UNITED STATES OF AMERICA**, Defendant, and **NEW MEXICO GAS COMPANY**, Defendant-in Intervention.	)	Case No. 1:12-cv-800 (JB)(JHR)

PLAINTIFF PUEBLO OF JEMEZ

MOTION IN LIMINE

TO EXCLUDE CERTAIN EVIDENCE

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INTRODUCTION

The Pueblo will present evidence at trial confirming that it established its aboriginal Indian title to the lands at issue long before 1848, and has retained that title to the present day. As the Tenth Circuit Court of Appeals confirmed, the only way in which that aboriginal Indian title could have been extinguished was pursuant to the laws of the European sovereign that exercised political control of these lands at any given time. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1153-1161 (10th Cir. 2015). And, again as confirmed by the Court of Appeals, Spain, Mexico, and the United States all required a specific act by the Sovereign itself to effectuate an extinguishment of aboriginal Indian title. *Id.* Evidence not demonstrably related to the issue of the Sovereign's extinguishment of aboriginal Indian title is irrelevant.

The United States has conceded in other litigation that "[t]he Pueblos came under American jurisdiction in 1848 with their aboriginal rights as recognized by American law fully intact, including their aboriginal rights to water, and nothing had occurred during the previous 250 years of Spanish and Mexican rule in New Mexico that had any effect on those rights whatever." *United States on behalf of Pueblos of Jemez v. Abousleman*, No. CV 83-1041 MV/WPL, 2016 WL 9776586 at 7 (D.N.M. Oct. 4, 2016), *report and recommendation adopted*, No. CV 83-01041 MV/WPL, 2017 WL 4364145 (D.N.M. Sept. 30, 2017). In that litigation the United States also conceded that after 1848: "The Pueblos never entered into any treaty with the United States, for the cession of any of their lands or for any other purpose, nor did they engage in any other act after 1848 that effectuated a relinquishment of the Aboriginal Lands or their associated water rights." *Id.* Yet in this case, the United States has identified an expert whose opinion focuses entirely on factual issues after 1848, none of which involve action

by Congress to extinguish Jemez Pueblo's aboriginal Indian Title. That testimony and similar testimony and facts are irrelevant. Fed. R. Evid. 401 and 402.

"The rules of evidence contemplate the admission of relevant evidence, and the exclusion of irrelevant and potentially prejudicial evidence." *Sec. and Exch. Comm'n v. Goldstone*, 233 F. Supp. 3d 1149, 1165 (D.N.M. 2009) (Browning, J.) (citing Fed. R. Evid. 401, 402 & 403). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401. "Irrelevant evidence, or that evidence which does not make a fact of consequence more or less probable, however, is inadmissible." *Securities*, 233 F. Supp. at 1165. However, even if the evidence may be deemed to in some way be relevant, it may be excluded if "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Id.* at 1165-1166.

Plaintiff Pueblo of Jemez submits this motion in limine asking the Court to exclude, pursuant to Federal Rules of Evidence 401, 402 and 403, evidence as to uses of the Valles Caldera occurring after 1848 except for evidence that has a direct and demonstrable connection to the issue of extinguishment by Congress of Jemez Pueblo's aboriginal Indian title.

LEGAL STANDARD

The admission or exclusion of evidence in advance of trial is a matter that is committed to the sound discretion of the trial court:

> We review a district court's exclusion of evidence for an abuse of discretion. In reviewing a court's determination for abuse of discretion, we will not disturb the determination absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment. In doing so, we give deference to the district court's evidentiary rulings.

Cartier v. Jackson, 59 F.3d 1046, 1048 (10th Cir. 1995) (internal citations omitted) (affirming propriety of district court's exclusion of evidence in response to a motion in limine); *accord F.D.I.C. v. Wheat*, 970 F.2d 124, 131 (5th Cir. 1992) ("appellate courts confer great deference on the trial court's rulings on [motions in limine]."). This Court should exercise its discretion and exclude evidence of any use of the lands at issue after 1848 unless the evidence has a direct and demonstrable connection to the use of the Valles Caldera by Jemez Pueblo.

ARGUMENT

I. All Evidence of Land Use by Other Than Jemez Pueblo after 1848 is Irrelevant to Whether the Pueblo Holds Continuing Aboriginal Indian Title to the Valles Caldera.

A. Jemez Pueblo Established Indian Title by Exclusive Use and Occupancy Long Before United States Accession in 1848.

At trial the Jemez Pueblo will present evidence showing that it established aboriginal Indian title through exclusive use and occupation of the areas of the Valles Caldera claimed in this litigation and that it has maintained that title to the present day. If the Court agrees that the Jemez Pueblo has made this showing, then the only remaining issue before the Court will be whether the Pueblo's aboriginal Indian title was ever extinguished by an act of Congress. If the Court feels the showing has not been made, then extinguishment is not an issue. Either way, evidence of use by others after 1848 will be irrelevant.

The evidence will show that the Towa-speaking Hemish people migrated from the vicinity of the Four Corners area to the Jemez Mountains and vicinity beginning around 1300 C.E.,[1] and controlled and dominated the core of the mountains; including the Valles Caldera, and areas to the west, southwest and south of the Caldera; from the mid-13th Century C.E. and

[1] Liebmann, Matthew, Expert Report (March 23, 2018) at 5 ("Liebmann Rpt.).

thereafter.[2] The entire area that includes the Valles Caldera and the surrounding Jemez Mountains is named for these high mountain people. Plaintiff's expert, Dr. Mathew Liebmann in his Expert Report of March 23, 2018, states:

> Ancestral Jemez people were the exclusive occupants of … the VCNP [Valles Caldera National Park] between 1500-1650 C.E. Archaeological surveys have documented 100 archaeological sites with evidence for architecture within the boundaries of the VCNP. All these farmsteads date to the centuries between 1300-1700 C.E.

Liebmann Rpt. at 9 (footnote omitted). After discussing ceramic assemblages found in the area, Dr. Liebmann states:

> For this reason, we can conclude that ancestral Jemez people – and only ancestral Jemez people – constructed and occupied the fieldhouses located within the boundaries of the VCNP between 1500-1650 C.E. These fieldhouses are the only specimens of prehistoric architecture located on the VCNP, and they are unambiguously Jemez in their cultural affiliation. Ancestral Jemez people were thus the exclusive occupants of the land known today as the VCNP between 1500-1650 C.E.

Liebmann Rpt. at 11-12 (footnote omitted). The Hemish prospered and ultimately constructed more than 35 large pueblos throughout the Jemez Mountains. Liebmann Rpt.at 6. The Hemish people dominated the mountain mass, with the exception of areas of the outer escarpment in the east and south of the Caldera rim, which were occupied by Tewa and Keres-speaking peoples. Because of the steep slopes from the rim down into the Caldera, the topographic rim of the Valles Caldera, left by the explosion of the ancestral Jemez Volcano more than a million years ago, formed a natural boundary between the Hemish people in the interior of the Mountains and the Tewa and Keres Pueblos on the sloping flanks of the Caldera to the east and south.

Plaintiff's expert testimony and other evidence will prove that Jemez Pueblo established aboriginal Indian title in the Valles Caldera between the 13th and 18th centuries by exclusive use

[2] Ferguson, T.J., Ethnographic Information about Pueblo of Jemez Use of the Valles Caldera (2018), Expert Report, at 61 ("Ferguson Rpt.").

and occupancy "for a long time."[3] The only remaining issue to be resolved at trial will be whether that title was extinguished by Spain, Mexico, or the United States Congress.

B. The Law of Indian Title.

Indian title has been a fundamental part of Anglo-American property law since the founding of the Republic. It is the root of all title in the United States – the first title in every chain of title. *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1146 (10th Cir. 2015). The origins, history and law of Indian title in the United States is extensively covered in the Tenth Circuit Court of Appeals' Opinion in this case. *Id*. at 1152-61. For purposes of this motion, however, it is important to review the rules established by the United States Supreme Court and other Article III Courts governing the extinguishment of Indian title. As discussed *infra*, as a result of the structuring of both the Indian Claims Commission ("ICC") and of its proceedings, the ICC often based its liability findings on alleged "takings" incompatible with the law of extinguishment of Indian title as stated in *United States v. Santa Fe Pac.* R.R. *Co.*, 314 U.S. 339, (1941) and other United States Supreme Court decisions.

The following is a summary of the controlling Supreme Court law of Indian title:

1) "once established in fact, it endures until extinguished or abandoned."[4]

2) it is "as sacred as the fee simple of the whites"[5] and "entitled to the respect of all courts until it should be legitimately extinguished."[6]

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[3] The "for a long time" requirement for establishing aboriginal Indian title can be as short as twenty-one years. *E.g., Sac and Fox Tribe of Indians of Okl. v. U.S.*, 383 F.2d 991, 992 (Ct. Claims 1967); *see also Strong v. United States* 207 Ct.Cl. 254 (1975) (Forty years, *citing* 31 Ind. Cl. Comm. at 121) and *id.* at 280-281 (thirty years, *citing The Spokane Tribe of Indians v. United States*, 163 (Ct.Cl. 58, 68 (1963)).

[4] *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487, 492 (1967), citing *Santa Fe Pacific*, 314 U.S. at 345, 347.

[5] *Mitchel v. United States*, 34 U.S. 711, 746 (1835); *Santa Fe Pacific*, 314 U.S. at 345; *Cherokee Nation v. Georgia*, 30 U.S. 1, 48 (1831) (Baldwin, J., concurring). *See also*, e.g., *Beecher v. Wetherby*, 95 U.S. 517, 526 (1877) (same).

3) it "could [can]not be interfered with or determined except by the United States."[7]

4) the underlying fee can be conveyed by the United States subject to Indian title.[8]

Johnson v. M'Intosh, 21 U.S. 543 (1823), provides the seminal discussion of the nature of Indian title, as referenced by the Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*):

> As indicated in Santa Fe, the fundamental propositions which it restated were firmly rooted in earlier cases. In Johnson v. M'Intosh, 8 Wheat. 543, 5 L.Ed. 681 (1823), the Court refused to recognize land titles originating in grants by Indians to private parties in 1773 and 1775; those grants were contrary to the accepted principle that Indian title could be extinguished only by or with the consent of the general government. The land in question, when ceded to the United States by the State of Virginia, was 'occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.' Id., at 586, 5 L.Ed. 681. See also id., at 591—597, 603, 5 L.Ed. 681.

Id. at 669. *See Oneida I*, 414 U.S. at 669 fn. 5 for citations to 13 such cases.

> With the adoption of the Constitution, Indian relations became the exclusive province of federal law. *Oneida I, supra*, 414 U.S., at 670, 94 S.Ct., at 778–779 (citing *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L.Ed. 483 (1832)). From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, 8 L.Ed. 25 (1831), and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites." *Mitchel v. United States*, 9 Pet. 711, 746, 9 L.Ed. 283 (1835). This principle has been reaffirmed consistently.

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[6] *Johnson* v. *M'Intosh*, 21 U.S. 543, 592 (1823).

[7] *Buttz v. Northern Pacific Railroad*, 119 U.S. 55 (1886); *Pueblo of Jemez*, 790 F.3d at 1158) (quoting *Buttz*, 119 U.S. 1955); *see also*: *Johnson*, 21 U.S. 543 (1823); *Worcester v. Georgia*, 31 U.S. 405 (1832); *Mitchel v. United States*, 34 U.S. 711; *Chouteau v. Molony*, 16 How. 203 (1853); *Holden v. Joy*, 17 Wall. 211 (1872); *United States v. Shoshone Tribe*, 304 U.S. 111 (1938); *Santa Fe Pacific.*, 314 U.S. at 345; *Cramer v. United States*, 261 U.S. 219, 227 (1923); 25 U.S.C. Sec. 177.

[8] *Johnson* v. *M'Intosh*, 21 U.S. 543, 592 (1823); *Buttz*, 119 U.S. 55 (conveyance of fee from govt. subject to unextinguished Indian right of occupancy); *Cramer*, 261 U.S. at 229' *Santa Fe Pacific*, 314 U.S. at 344-45; *Pueblo of Jemez*, 790 F.3d 1143.

Oneida Cty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 234–35 (1985) (*Oneida II*) (footnote omitted).

C. The Law of Indian Title Extinguishment.

The Indian Trade and Intercourse Act (aka Indian Non-Intercourse Act) requires express Congressional authorization to extinguish or convey Pueblo Indian Title:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. §177. The statute's meaning is clear. In the absence of express Congressional authorization extinguishing Pueblo Indian title, that title remains intact. *Santa Fe Pacific*, 314 U.S. at 347 (1941); *see also, United States v. Candelaria*, 271 U.S. 432, 442 (1926). There is no exemption from the Act's proscription that would allow non-Indian, Indian or administrative interference to extinguish aboriginal Indian title.[9]

The United States Supreme Court's decision in *Santa Fe* is the touchstone for any analysis of the actual status of Indian title and whether it has been legally extinguished. To summarize the holdings in *Santa Fe*, Indian title can only be extinguished by:

a. "plain and unambiguous [Congressional] action,"[10]

b. a treaty of cession,[11]

c. purchase (pursuant to Congressional enactment or Treaty)[12]

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[9] The Indian Trade and Intercourse Act of June 30, 1834, 23 Cong. Ch. 161, 4 Stat. 729 (June 30, 1834), was extended over 'the Indian tribes in the Territories of New Mexico and Utah' by §7 of the Act of February 27, 1851, 31 Cong. Ch. 14, 9 Stat. 574, 587.

[10] *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 345, 347 (1941); *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 248, (1985).

[11] *Id. at 347; Cherokee Nation v. State of Ga.*, 30 U.S. 1, 2 (1831).

d. collective (official) tribal abandonment.[13]

The decision in *Oneida II* reaffirmed previous holdings that only the federal government can extinguish Indian title. Speaking of the Indian Non-Intercourse Act,[14] the Court said:

> "The pertinent provision of the 1793 Act, § 8, like its predecessor, § 4 of the 1790 Act, 1 Stat. 138, merely codified the principle that a sovereign act was required to extinguish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio.* * * * All of the subsequent versions of the Nonintercourse Act, including that now in force, 25 U.S.C. § 177, contain substantially the same restraint on the alienation of Indian lands."

Oneida Cty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 245–46, (1985). At 470 U.S. 245, n.16, the *Oneida II* court cites *Oneida I*, 414 U.S. 661, 670 (1974); *United States v. Candelaria*, 271 U.S. 432, 439 (1926); and *United States v. Sandoval*, 231 U.S. 28, 45–47, (1913) in support of its holding.

Moreover, as reiterated in *Oneida II*, the canons of construction applicable to Indian law require liberal construction in favor of Indians when courts address issues of aboriginal Indian title. *Id*. at 247. *Pueblo of Jemez*, 790 F.3d 1143, 1162 (10th Cir. 2015).

The *Santa Fe Pacific* Court also found that the Indian Department's forcible removal of the Walapais from their tribal lands to an Indian reservation created for them was ineffective to extinguish the Walapais' aboriginal Indian title. It did not constitute a "voluntary cession" of tribal land within the meaning of the act granting land to the railroad and providing that the United States should extinguish Indian title to lands within that grant only by the Tribe's voluntary cession. *Santa Fe Pacific., supra*, 341 U.S. 341 at 353-56 (1941).

D. Indian Claims Commission Case Law is Inapplicable to this Article III Court's Extinguishment of Title Analysis in this Action.

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[12] *Santa Fe Pacific*, 314 U.S. 339 at 347.
[13] *See, Santa Fe Pacific*. 314 U.S. 339 at 354-56.
[14] Sec. 12, 23 Cong. Ch. 161, 4 Stat. 729; 25 U.S.C. Sec. 177.

Once established, aboriginal Indian title cannot be extinguished by incursions or interference. United States Supreme court decisions are absolutely clear that once aboriginal Indian title has been established, only the federal government can extinguish title and only in accordance with the clear principles of law stated in *Santa Fe Pacific* and many other Supreme Court decisions.

Due to unique and peculiar circumstances, the ICC and the Court of Claims[15] made findings of Indian title "takings" and "extinguishment" that are absolutely incompatible with the fundamental nature of Indian title and incidents of extinguishment as stated by the Supreme Court in countless decisions since the founding of the Republic. Because of that, this Court cannot be guided by rulings *on the extinguishment* of Indian title contained in cases originating in the ICC and authorized in the Article I Court of Claims by special jurisdictional acts. However, ICC and some special jurisdictional act cases also explored *the establishment of Indian title* in detail under a wide variety of circumstances. They are an important addition to the analysis performed by the Article III Courts when considering the establishment of aboriginal Indian title. However, the jurisdiction of the ICC was limited to adjudicating compensation for Congressionally authorized extinguishment of aboriginal Indian title prior to August 13, 1946.[16]

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[15] Now the United States Court of Federal Claims.

[16] The Court of Claims and the ICC were Article I Courts. Only Article III Courts have jurisdiction to adjudicate whether a "taking" as a matter of Anglo-American property law actually occurred. The ICC had jurisdiction to adjudicate compensation payable to tribes for land takings to which the parties had stipulated, but lacked jurisdiction to adjudicate the status of title or the ownership of land. §2 of the Indian Claims Commission Act, 79 Cong. Ch. 959, 60 Stat. 1049, 1050 (August 13, 1946) ("ICCA") states: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe …: (4) claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; …." "It was not within the jurisdiction of the Indian Claims Commission to extinguish Indian title on its own authority, nor did the Commission purport to exercise such jurisdiction. The ICC only had the power to award compensation for claims arising on or before August 13, 1946, whether those claims arose from the taking of

Because of that, the extinguishment analysis performed by the ICC and Court of Claims is irrelevant to the extinguishment analysis that must be performed by this Article III Court.

The Indian Claims Commission Act was adopted in the context of changing Indian policy – a shift away from the New Deal administration of John Collier (which supported restoration of tribal entities through the Indian Reorganization Act, 73 Cong. Ch. 576, 48 Stat. 984 (June 18, 1934)), to the policy of termination of the special relationship between the federal government and Indian tribes of Dillon S. Myer and Glenn L. Emmons in the 1950s.[17] At the time the ICC was established, it was widely believed that tribes would soon pass out of existence and be fully assimilated into the dominant society. Legal counsel for plaintiff tribes and for the Government were influenced by the broad political and cultural assumption that title to all Indian lands outside of Bureau of Indian Affairs recognized reservation boundaries had somehow been "taken" or extinguished.[18] In the context of (1) termination policy, (2) the monetary only remedy of the ICCA, and the (3) contingent compensation of the claims attorneys, almost no lawyer was motivated to prove continuing Indian title.[19] As a result, the "takings" identified by the ICC and the Court of Claims as the basis for United States monetary liability and tribal compensation

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aboriginal title or other action of the United States. 25 U.S.C. § 70a." *United States v. Dann*, 706 F.2d 919, 928 (9th Cir. 1983), *rev'd on other grounds*, 470 U.S. 39, (1985) *(Dann II)*; *United States v. Dann*, 873 F.2d 1189, 1198 (9th Cir., as amended on *denial of r'hg,* April 27, 1989) (*Dann III*)., *cert. denied*, 493 U.S. 890 (1989).

[17] *See*, Metcalf, R. Warren, *Termination's Legacy The Discarded Indians of Utah* (Univ, of Neb. Press 2002) at 4, *et seq*.

[18] One exception to the rule was Taos Pueblo, which steadfastly insisted on the return of full control of its sacred Blue Lake and the surrounding forest area, an effort that was ultimately successful as to Blue Lake itself and a riparian corridor leading to Blue Lake. Pub. L. No. 91-550, 84 Stat. 1437, (Dec. 15, 1970).

[19] An outstanding exception was Felix S. Cohen, the noted attorney and scholar of Indian law, and author of the Handbook of Federal Indian Law, U.S. Government Printing Office, Washington, D.C. Cohen left government service in 1947 after federal policy shifted from one of support for tribal governments to that of terminating tribal sovereign status. He went into private practice litigating Indian land claims. Exhibit 4, February 20, 1967 letter from Richard Schifter, General Counsel, Association on American Indian Affairs, to Alden Stevens, President, Association on American Indian Affairs, at 2.

were often simply spurious and provide no guidance to this Article III Court.

1. Fictitious Takings.

Events of extinguishment adopted by the ICC at odds with the law of Article III Courts include "**by gradual encroachment of whites, settlers and others,** … the way of life of these Indians was disrupted and they were deprived of their lands" (*Shoshone Tribe v. United States*, 11 Ind. Cl. Comm. 387, 416 (1962)) (emphasis added); inclusion of Pueblo lands in a National Forest "caused these Pueblo Indians to be **squeezed out of their ancestral lands** and constituted a taking of these lands", *Pueblo de Zia, et al. v. United States*, 19 Ind. Cl. Comm. 67, 74 (1968) (emphasis added); *Pueblo of Nambe v. United States*, 16 Ind. C1. Comm. 408, 420; *Pueblo of Taos v. United States*, 15 Ind. C1. Comm. 688, 702; inclusion in a Taylor Grazing District, *Pueblo de Zia, et al. v. United States*, 19 Ind. Cl. Comm. 67, 74 (1968); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975); entries pursuant to the homestead laws; *United States v. Pueblo De Zia*, 474 F.2d 639, 641 (Ct. Cl. 1973); *Dann I*, 706 F.2d at 929; and, shockingly, by a mere "**fit of absentmindedness** [by the trustee United States]" *Gila River Pima-Maricopa Indian Cmty. v. United States*, 494 F.2d 1386, 1394 (Ct. Cl. 1974) (emphasis added). Each of the "methods" of extinguishment in cases cited above were adopted by the ICC and Court of Claims based on tacit stipulations of counsel for both sides that a taking occurred.[20] The only issue left to be resolved by the ICC and Court of Claims was *when* the stipulated taking occurred. The date of taking was important to an historical appraisal to determine compensation,

[20] For example, in *Pueblo de Zia*, 19 Ind. Cl. Comm. at 68, plaintiff's counsel argued that the ICC decisions in *Pueblo of Nambe v. United States*, 16 Ind. C1. Comm. 393, 420; and *Pueblo of Taos v. United States*, 15 Ind. C1. Comm 666, 702 were "proof that the inclusion of Indian title lands within a national forest created by Presidential proclamation constitutes a taking under Section 2 of the Indian Claims Commission Act." Defendant United States "[did] not specifically deny that the creation of the Jemez Forest Reserve in 1905 and Grazing District No. 2 in 1936 constitute a taking of land", but argued for an earlier taking date. *Pueblo de Zia*, 19 Ind. Cl. Comm. at 68-69. An earlier taking date would reduce the amount paid by the United States because land prices increased over time.

and, ultimately, to the value of claims counsel's contingent fee.[21] The ICCA provided only for damages awards, not quiet title or return of the land to tribal control. Where there had been no legal taking or extinguishment of title, the "taking" often had to be conjured. In essence, the ICC and the Court of Claims allowed counsel to make up the law to suit their mutual objectives – resolution of the claim for the lawyers for the United States, and payment of fees to counsel for the plaintiff tribe (who could be paid only with a percentage of the ICC monetary award based on the value of lands "taken").[22]

This memorandum reviews below, in chronological order, four cases which serve as egregious examples of "non-takings" for which the tribal petitioners were compensated by the ICC, and which subsequently have been cited as precedent for the imaginary "takings" which were the basis of liability. All incidents of "taking" identified by the ICC in these cases were either not appealed or were affirmed by the Court of Claims. What occurred in these four cases makes clear the fictitious nature of the alleged "takings" and the irrelevance of these holdings to the issue of extinguishment to be adjudicated by this Article III Court.

a. The Western Shoshone Identifiable Group Case (1962).[23]

The 1863 Treaty of Ruby Valley did not cede any Western Shoshone land to the United States, but provided rights-of-way across the Great Basin for access to California.[24] "Congress did not want the Doty Treaty Commission to negotiate for a land cession because the

[21] ICCA §15, 60 Stat. 1053 provides for tribal claims attorneys to be paid a contingent fee.
[22] A huge benefit to the United States of agreeing to compensate tribes for bogus "takings" was to quiet title to hundreds of millions of acres of public lands in the Western United States at very low historical values. *See, Dann II*, 470 U.S. 39 and *Dann III*, 873 F.2d.1189.
[23] *Western Shoshone Identifiable Group v. United States*, 11 Ind. Cl. Comm. 387 (1962).
[24] 18 Stat. 689 (Oct. 1, 1863); June 26, 1866, Ratified; Oct. 21, 1869.

Government wanted the Western Shoshones to remain self-sufficient."[25] Over time, the federal government treated Western Shoshone lands as "public domain" and initiated administration of those lands under various public land laws. Based on no more than these facts, lawyers for the "Western Shoshone identifiable group" brought a claim before the ICC seeking compensation for a "taking".[26] In its 1962 decision on liability, the ICC did not provide a taking date that could be the basis for an historical valuation, saying only that, "the Western Shoshone identifiable group exclusively used and occupied [its territory] … until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands." *Shoshone Tribe*, 11 Ind. Cl. Comm. at 416.

Bereft of a taking date, counsel for the Indians and the United States stipulated to July 1, 1872, as the "date of valuation". A subsequent Ninth Circuit decision, using bootstrap logic, transmuted this into a date of extinguishment.

> The government argues that the most appropriate date for the extinguishment of tribal title to the lands in question is the date stipulated by the parties to the claims proceeding for the valuation of all the lands taken: July 1, 1872. We agree that this is the most appropriate date. As the Supreme Court stated in *Dann*, the Indian Claims Commission had entered an order in the claims proceeding holding that "the aboriginal title of the Western Shoshone had been extinguished in the latter part of the 19th century." *Dann*, 470 U.S. at 41–42, 105 S.Ct. at 1060 (citing *Shoshone Tribe v. United States*, 11 Ind. Cl. Comm'n 387, 416 (1962)). **It is true that the taking was not actually litigated**, *see Dann I*, 572 F.2d at 226; *Dann II*, 706 F.2d at 919 (1983), but **the payment of the claims award establishes conclusively that a taking occurred.** From the claims litigation, we can only conclude that the taking occurred in the latter part of the nineteenth century."

[25] The Congressional. Globe, 37th Cong., 2d Sess. May 13, 1862, at 2092 attached as Exhibit 1; O'Connell, John D., Constructive Conquest in the Courts: A Legal History of the Western Shoshone Lands Struggle—1861 to 1991, 42 Nat. Resources J. 765 (Fall 2002) at 768.
[26] *Shoshone Tribe*, 11 Ind. Cl. Comm. 387.

Dann III, 873 F.2d at 1198-99 (emphasis added). Thus, on a date when absolutely nothing happened in Nevada or in Washington, D.C. that could have constituted legal extinguishment, there were few if any white settlers on Western Shoshone lands in Nevada, and the Forest Reserve Act of 1891 and the Taylor Grazing Act of 1934 had yet to be imagined, the Western Shoshones somehow lost their homeland. *Dann III*, 873 F.2d at 1189. A "valuation date" is, of course, not precedent for extinguishment of Indian title.

b. The *Zia Pueblo* Case (1968).[27]

The convoluted course of the *Zia* case was ultimately narrowed to a joint claim by the three Pueblos of Zia, Jemez, and Santa Ana for compensation for a "taking" of 298,634 acres of aboriginal Indian title lands then federally-administered as National Forest and Taylor Grazing lands. *Pueblo De Zia v. United States*, 165 Ct.Cl. 501, 508 (1964). The Court of Claims found that creation of the Jemez Forest Reserve and New Mexico Taylor Grazing District No. 2 extinguished aboriginal Indian title even though the Executive Order implementing the 1934 Taylor Grazing Act expressly preserved "existing valid rights," which included the Pueblos' Indian title. This ruling was subsequently criticized by both the Article III Court in *Dann I*, 706 F.2d at 932. ("We do not find in the Taylor Grazing Act any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope") and the Interior Department Solicitor ("it is our conclusion that any argument advanced on the premise that the Taylor Grazing Act or its implementation could extinguish Indian title would be erroneous.") (Exhibit 3).

c. The *Gila River Pima-Maricopa* Case (1970).[28]

[27] *Pueblo de Zia, et al. v. United States*, 19 Ind. Cl. Comm. 56 (1968); *aff'd in part, rev'd in part on other issues, United States v. Pueblo De Zia*, 474 F.2d 639 (Ct.Cl. 1973) (*Zia IV*).

The ICC and lawyers for the parties involved were once again faced with the obstacle of unextinguished Indian title in the *Gila River* case. After rejecting four proffered methods of extinguishment (all noncompliant with Supreme Court law), the Court of Claims described the ICC's conundrum thusly:

> Once it had decided—properly, as we have found—not to accept 1859 as the time of taking, the Commission was faced with a difficult task. Unlike some other cases, there was here no formal cession by the Indians, no express indication by Congress (or its delegate) of a purpose to extinguish at a specified time, and no single act (or contemporaneous series of acts) of the Federal Government which indisputably erased native ownership at one swoop. The Indian appellants say that, in these circumstances, the presumption of **the Santa Fe opinion requires the tribunal to hold that there was no general taking at all** until some unequivocal action by Congress (such as, they concede but only arguendo, the Taylor Grazing Act of 1934). We think, however, that this is a case in which the history of the award area is such that the Commission could permissibly stop short of an uncontroverted and unmistakable sign from Congress.

Gila River Pima-Maricopa Indian Cmty. v. United States, 494 F.2d 1386, 1392 (Ct. Cl. 1974) (emphasis added).

The Commission arbitrarily chose 1883 (when the reservation size was doubled) as the "taking" date. The Court of Claims affirmed on the rationale that the Commission had discretion to simply **choose** a date.[29] The Court noted that the white population of Arizona was increasing during that period, and that "[a]t some point in the on-going process, begun in 1859, of carving out for the Pima-Maricopa tribes the lands which were clearly theirs, the Government must have concluded, for itself, that the end had been reached—that the reservations now included everything to which the Indians were properly entitled." *Id.* at 1392-93.

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[28] *Gila-River Pima-Maricopa Indian Cmty. v. United States*, 24 Ind. Cl. Comm. 301 (1970), *aff'd* 204 Ct. Cl. 137 (1974).

[29] *Cf. U.S. v. Dann*, 873 F.2d 1189, 1198 (9th Cir. 1989) ("The Claims Commission had no jurisdiction to extinguish title on its own authority; it simply had jurisdiction to award damages for takings or other wrongs that occurred on or before August 13, 1946").

Judge Nichols concurred with a historic and stunningly candid description of what was really happening:

> I join in the opinion and judgment of the court, with the caveat that in my view nothing happened in 1883 that could have constituted a taking of these Indians' heritage, at least not in the traditional eminent domain sense. In a true Fifth Amendment case such looseness in fixing a taking date would be unacceptable, even though at times it must be a jury verdict sort of thing as to the exact hour. Here, however, we are not talking in an eminent domain sense and we are dealing with an extinguishment' of aboriginal title rather than a true taking. The idea that the Commission has a broad discretion to choose among a number of conceivable dates, in the situation we have here, has the sanction of necessity. **An extinguishment date we must have.** Yet the truth is, we know the Indians once had their 3,751,000 acres and by 1946, by common understanding, had them no longer, but when they lost them defies determination. The United States was acting, it was at all times supposed, with undeviating benevolence. The idea of expropriation was never entertained, yet **in a fit of absentmindedness [by the trustee] the deed was somehow done**.

Id. at 1394 (emphasis added, citation omitted). One must wonder whether the Indians shared the alleged "common understanding," or accepted the proposition that their trustee could simply seize their lands in "a fit of absentmindedness." But somehow they lost the vast majority of their homeland to what can only be characterized as a political and cultural imperative as opposed to a legitimate adjudication of title.

d. The *San Ildefonso Pueblo* Case (1973).[30]

In *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct. Cl. 1975), once again large tracts of Indian title lands had never been taken or extinguished. Counsel for both sides, and the ICC and the Court of Claims, struggled to find credible rationales for compensation for takings that never happened. The ICC went a step further than the *Western Shoshone Identifiable Group* and *Zia* decisions by combining two specious methods of Indian title

[30] *Pueblo of San Ildefonso, et al. v. United States*, 30 Ind. Cl. Comm. 234 (1973), *aff'd* 206 Ct. Cl. 649 (1975).

extinguishment – Congressionally unauthorized Government administrative trespass and "gradual encroachment of whites." As the Court of Claims explained:

> In the instant case, the United States allowed and sanctioned—over a period of several decades beginning around 1870—the intrusion of white settlers and miners onto appellees' aboriginal lands. The encroachment was gradual; the native Americans were displaced over a period of many years. In circumstances such as those presented here, it is entirely consistent with reality for the Commission to find that aboriginal lands were 'taken' on the dates of the various entries under the public land laws. Confronted with this type of record, the Commission has resorted to practical solutions. The parties have been 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.

United States v. Pueblo of San Ildefonso, 513 F.2d 1383, 1391 (Ct. Cl. 1975) (citation omitted). This may have made practical sense, but its results cannot conscionably be considered precedent in an Article III Court on the issue of extinguishment of aboriginal Indian title.

This decision is also remarkable because the original 1951 ICC land claim petitions for the Pueblos of San Ildefonso, Santo Domingo, and Santa Clara denied takings and sought damages for trespass on their Indian title lands and breach of trust by the United States for not protecting those lands.[31] The ICC petition that initiated *Pueblo of San Ildefonso v. United States*, Dkt. 354, expressly disavows any claim of taking by the United States:

> Petitioners do not intend by any assertion in this complaint to concede that their rights have been terminated as to any particular tract used, claimed, or possessed by it when such lands first came under the jurisdiction of Defendant. Petitioners are informed and believe, and on such information and belief, assert the fact to be, that by far **the greater part of such land**, outside of the original San Ildefonso Pueblo Grant and other Pueblo grants, purchases, and reservations, **is still held by Defendant without being subject to valid vested rights of third parties**. As to all such lands upon which no valid grant to any third party has ever been made, Petitioners do not claim that such land has been taken by Defendant or that Defendant is bound to pay just compensation as for such a taking of land, but on the contrary, Petitioners claim only compensatory damages for such interference with their exclusive use of such land as shall be proven to have taken place prior to the entry of judgment herein.

[31] Hughes, Richard W., *Indian Law*, 18 N.M. L. Rev. 403, fn. 97 (1988).

Petition, ¶8 at 4 (emphasis added).

Nonetheless, in 1969, attorneys for both sides filed stipulations with the ICC in which the lawyers for each Pueblo *stipulated that the lands had been taken* and that the United States was liable for just compensation, rather than trespass and breach of trust damages. The stipulation did not specify taking dates.[32]

When new General Counsel[33] for Santo Domingo Pueblo informed the Pueblo's Council of the stipulation, Council members indicated they were unaware of the stipulation. The Council instructed its new legal counsel to file a motion to be relieved of the unauthorized stipulation and return to the original theory of the case because the Pueblo considered all of its ancestral territory sacred and always wanted to recover control of those lands. That motion was denied. *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087 (Ct. Cl. 1981).

Judge Nichols, perhaps troubled by a growing sense of injustice in the adjudication of Indian land cases, filed a lengthy dissent, concluding with the following:

> [T]he prophet Job lamented: "Would that mine enemy had written a book." This court, like other courts, is not entirely without enemies, and I do not know anything we could say or do that would give them more satisfaction than the panel opinion herein.

Id. at 1093.

The Ninth Circuit in *Dann I* directly addressed the holding in *Pueblo of San Ildefonso* that inclusion of Indian title land in a Taylor Grazing District effects extinguishment, and characterized the true nature of the decision:

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[32] October 29, 1969 Stipulation as to Standing to Sue, Liability and Area, *Pueblo of San Ildefonso v. United States*, Docket 354 before the Indian Claims Commission, attached as Exhibit 2.

[33] Undersigned Counsel Thomas E. Luebben served as General Counsel for Santo Domingo Pueblo for a decade during the 1970s and 80s.

> The government also contends that cases such as *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383 (Ct.Cl.1975), make clear that inclusion of aboriginal lands within a grazing district under the Taylor Grazing Act extinguishes Indian title. **The issue in *San Ildefonso*, however, was *when* a taking occurred of aboriginal lands; the taking itself was not in question.** The court made quite clear that when aboriginal title is extinguished over a period of time by a series of encroachments, practical compromises have to be made in choosing a date. The Commission rationally chose the date on which the lands were incorporated into a grazing district. 513 F.2d at 1390-92 (emphasis added).
>
> **Quite a different situation is presented when the dispute is over *whether* aboriginal title has been taken.** We do not find in the Taylor Grazing Act any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope. We do not find such an expression by implication in the Act's specific exclusion of Indian reservations. Indeed, we question whether aboriginally held lands can properly be characterized as "unappropriated and unreserved lands" forming a "part of the public domain" to which the Taylor Grazing Act applies." . . . **In any event, in the absence of a clear expression of congressional intent to extinguish title, the granting of a patent by the government and the acceptance of leases from that patentee have been held not to extinguish aboriginal title,** *Cramer v. United States*, 261 U.S. 219, 234, 43 S.Ct. 342, 346, 67 L.Ed. 622 (1923), **and the same rule has been applied to other grants**, *e.g., Buttz v. Northern Pacific R.R.*, 119 U.S. 55, 7 S.Ct. 100, 30 L.Ed. 330 (1886); *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574, 5 L.Ed. 681 (1821). **The grantee in such cases takes subject to the Indian right of occupancy. *Id.* We see no reason why the far more equivocal act of granting a grazing permit should effect an extinguishment.**

Dann I, 706 F.2d at 932 (emphasis added, footnote omitted). The ICC and Court of Claims decisions in *Pueblo of San Ildefonso*, 513 F.2d 1383, 1386 (Ct. Cl. 1975) illustrate how the extinguishment stipulations of a tribe's lawyers, coupled with the imperative that "[a]n extinguishment date we must have," led to reported Article I Court decisions, subsequently cited as precedent, that are utterly inconsistent with controlling Supreme Court and other Article III Court authority.

In 1978 the Interior Department Deputy Solicitor prepared a memorandum opinion on "The Relationship of the Taylor Grazing Act to the Extinguishment of Indian Title," specifically

whether the Act "authoriz[ed] extinguishment of Indian title to lands."[34] After a lengthy and thorough analysis, the memorandum states unequivocally that "it is our conclusion that any argument advanced on the premise that the Taylor Grazing Act or its implementation could extinguish Indian title would be erroneous." Exhibit 2 at 1. The memorandum states that "[s]o long as the tribe exists and voluntarily does not abandon its ancestral lands, its title and possession are sovereign and exclusive and can only be disturbed by the United States in plain and unambiguous action. *Mattz v. Arnett*, 412 U.S. 481 (1973)." Exhibit 2 at 1. The Memorandum addresses the authority of *Zia* and *San Ildefonso* as precedent:

> There are two cases decided by the Indian Claims Commission and reviewed by the Court of Claims from which it may be argued that the inclusion of Indian lands in grazing districts pursuant to the Taylor Grazing Act did operate to extinguish Indian title. In Pueblo of San Ildefonso v. United States, 30 Ind. Cl. Comm. 234 (1973), the Commission simply followed its earlier decision of Pueblo de Zia v. United States, 19 Ind. Cl. Comm. 56 (1968). In both cases the Pueblos were advocating later dates of extinguishment for the purpose of claims against the United States, while the United States was claiming that Congressional action establishing a Surveyor General for the New Mexico territory established the date of extinguishment. There was no issue as to actual extinguishment of title, the Commission stated, "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." At page 236. (Emphasis in original.)
>
> The sole issue litigated in an adversary context was the date of extinguishment, the Pueblos advocating later dates, while the United State[sic] argued for the earliest dates possible, since the date of taking determined the value of the land and thus, the monetary damages to be paid the Pueblos. The premise on which the cases proceeded was that in fact extinguishment had occurred at some point in time. It was agreed by the parties that extinguishment had occurred, the issue was when?
>
> * * *

[34] Memorandum, Interior Department Deputy Solicitor to Daniel Beard, Deputy Assistant Secretary, Land and Water Resources, "The Relationship of the Taylor Grazing Act to the Extinguishment of Indian Title," January 6, 1978 ("DOI Solicitor's Memorandum") at 5-6, attached as Exhibit 3.

> General principles of due process require that where actual disputes over taking of property exist, that each side be given the opportunity to advocate its position in the full adversary context. Where a tribe does not agree that extinguishment has taken place, the question of whether or not extinguishment could take place pursuant to the Taylor Grazing Act would necessarily have to be addressed.
>
> Any such analysis of the Taylor Grazing Act, its history and purpose brings one to the ultimate conclusion that **neither the Taylor Grazing Act nor its implementation can operate to extinguish Indian title**.

Exhibit 3 at 5-6 (footnote omitted, emphasis in bold added).

2. Exceptions to ICC Stipulated Takings.

The Court of Appeals in this case relied extensively on the writings of Felix Cohen, and included a footnote confirming Mr. Cohen's unquestionable stature in the field of Indian law. *Pueblo of Jemez*, 790 F.3d at 1147 n. 2.

Cohen did not share the general assumption that all Indian title lands had been "taken".[35] In 1941 he obtained a stunning victory as counsel for the United States in *Santa Fe Pacific*, which reaffirmed the doctrine of aboriginal Indian title.[36] Cohen left the Interior Department in 1947, going into private practice. In private practice Cohen assisted Pueblo legal counsel who were pursuing claims before the newly created ICC, and he did so on a fee for service basis.[37] He drafted the petitions for the Pueblos of Santo Domingo, Nambe, San Ildefonso, Santa Clara and Taos.[38] These unique petitions denied that all Indian title outside of established reservation

[35] The Court of Appeals favorably cited and relied upon Cohen's 1947 law review article in which he noted that some lands in the Southwest remained subject to unextinguished Indian title; Cohen, "Original Indian Title", 32 Minn. L. Rev. 28, 33-34 (1947). Cohen's "unextinguished Indian title" analysis served as the basis for the Government's case in *Santa Fe Pacific.*
[36] *See*, McMillen, Christian W., Making Indian Law, Yale University (2007) at 159, 161.
[37] Letter from Richard Schifter, General Counsel, Association on American Indian Affairs, to Alden Stevens, President, Association on American Indian Affairs (Feb. 20, 1967), attached as Exhibit 4 at 2. Cohen was a major author of the Indian Claims Commission Act and ethically refused to represent tribal claimants on a contingent fee basis, which is why he is not listed as counsel of record in any ICC litigation.
[38] Exhibit 4 at 3.

boundaries had been extinguished.[39] *See, e.g.*, Hughes, Richard W, *Indian Law*, 18 N.M. L. Rev. 403, fn. 97 (1988). The petition in *Pueblo of Santo Domingo v. United States*, ICC Dkt. 355, sounded in tort and sought damages for the federal government's trespasses on tribal lands and failure to protect the Pueblo's rights of use and occupancy without alleging any taking. *Pueblo of Santo Domingo v. United States*, Dkt. No. 355 (Cl. Ct., filed August 11, 1951), Petition at 2-3, ¶6; 11-14, ¶¶ 20-26; *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1088 and fn.1, *cert denied*, 456 U.S. 1006 (1981).

Felix Cohen died in 1953. Claims counsel for San Ildefonso, Santo Domingo and Santa Clara Pueblos subsequently stipulated with the Justice Department to title "takings," and the resultant United States liability to pay monetary takings damages. Because there had been no actual takings by the United States consistent with the holdings in *Santa Fe*, once the Pueblo proved Indian title to areas for which it sought compensation, the contest shifted to a determination of faux dates of "taking." The Justice Department sought the earliest possible taking dates to minimize the historical appraisal, and the tribes' attorneys sought the latest, but the fact of taking had been expressly or implicitly stipulated.[40]

3. Once Established, Non-Indian and Indian Trespass, and Federal Administrative Interference, Cannot Extinguish Aboriginal Indian Title.

Indian title is the most durable of titles in Anglo-American property law, apart from that of the United States itself, because it is not subject to taxation, tax forfeiture, adverse possession,

[39] *Pueblo of San Ildefonso v. United States*, Dkt. No. 354 before the ICC, Petition at ¶¶ 7-8 (Ct. Cl. filed August 11, 1951), attached as Exhibit 5.

[40] "Without exception, the Commission, the Court of Claims, and the claims attorneys operated on the explicit premise that unless a pre-1946 taking of the tribe's lands was established, no compensation was obtainable. The attorneys thus resorted to, and the courts indulged, novel theories of 'takings' in utter disregard of the Supreme Court's command [*Santa Fe Pacific*] that only Congress can extinguish Indian title and then only by express and deliberate act." Hughes, *Indian Law*, 18 N.M. L. Rev. at 418 (1988) (footnotes omitted).

improvident sale, condemnation or involuntary extinguishment without Congressional action. Once established, it cannot be extinguished by non-Indian or Indian intrusions or encroachments, short of conquest. There is no allegation of conquest at issue in this case.

The ICC and Court of Claims decisions discussed above, as well as other Article I Court decisions which suffer from the same fundamental flaw, are not applicable to the issues in this case because a "taking" of Indian title was presumed by counsel for both parties in those cases. As a result, the issue of whether aboriginal Indian title was actually extinguished as a matter of law was not litigated in an adversarial proceeding conducted in an Article III Court. In contrast to those cases, controlling precedent established by Article III Courts is clear in its requirement that Congressionally unauthorized use, transfer, occupation and even seizure of aboriginal Indian title lands by federal administrative fiat and non-Indian interference with Indian use and occupancy simply does not, and cannot, effect an extinguishment of aboriginal Indian title. *E.g.*, *Pueblo of Jemez at* 1161 ("the [*Santa Fe*] Court held that aboriginal possession and occupancy of an Indian tribe "survived a course of congressional legislation and administrative action that had proceeded on the assumption that the area in question was unencumbered public land").

4. *United States v. Pueblo of San Ildefonso* and *Pueblo De Zia v. United States* are not Precedent for a Claim That Non-Indian or Indian Trespass Can Extinguish Indian Title.

In its opinion in this case, the Court of Appeals states that:

> [W]hether the Jemez Pueblo can establish that it exercised its right of aboriginal occupancy to these lands in 1860 and thereafter is a fact question to be established on remand, where it will have the opportunity to present evidence to support its claim. To do so, it must show "'actual, exclusive, and continuous use and occupancy 'for a long time' of the claimed area." *Native Vill. of Eyak v. Blank*, 688 F.3d 619, 622 (9th Cir. 2012) (quoting *Sac & Fox Tribe*, 383 F.2d at 998).

Pueblo of Jemez, 790 F.3d 1143, 1165 (10th Cir. 2015).

The Pueblo alleges it has held aboriginal Indian title since prior to Spanish settlement. As Defendant has conceded in other litigation**,** nothing has occurred since to divest the Pueblo of its aboriginal Indian title. *United States on behalf of Pueblos of Jemez v. Abousleman*, No. CV 83-1041 MV/WPL, 2016 WL 9776586 (D.N.M. Oct. 4, 2016), *report and recommendation adopted*, No. 83CV01041 MV/WPL, 2017 WL 4364145 (D.N.M. Sept. 30, 2017): Doc. No. 4362 at 7.

The Court of Appeals went on to note that:

> The government contends the Jemez Pueblo cannot prove "exclusive" use because the Baca heirs used the land. **But the "exclusive"** part **of the test meant only that in order to establish aboriginal title, a tribe "must show that it used and occupied the land to the *exclusion of other Indian groups.*"** *Pueblo of San Ildefonso*, 513 F.2d at 1394 (emphasis added); *see also Native Village of Eyak*, 688 F.3d at 624 ("Exclusivity is established when a tribe or a group shows that it used and occupied the land to the *exclusion of other Indian groups*."); *Zuni Tribe of N.M. v. United States*, 12 Cl.Ct. 607, 608–09, 617–20 & nn. 13–15 (1987) (holding Zuni exclusively used and occupied lands where no evidence other tribes used and occupied lands); …."

Pueblo of Jemez, 790 F.3d at 1165-66 (emphasis in bold added, emphasis in italics in original).

In discussing *Santa Fe Pacific* in connection with its analysis of this pending action, the Appeals Court confirmed existing Article III Court precedent holding that adverse administrative action does not compromise Indian title:

> While *Santa Fe* is important in the development of Indian law because it reaffirmed principles first established in *Johnson v. M'Intosh*, reaffirmed that aboriginal title is not determined by treaty, and applied the doctrine of aboriginal title to the Mexican cession area, it is more important for yet another reason that is directly relevant to the case before us. That is, the Court held that aboriginal possession and occupancy of an Indian tribe "survived a course of congressional legislation and administrative action that had proceeded on the assumption that the area in question was unencumbered public land." Cohen, *supra* at 56. Accordingly, "the decision stands as a warning to purchasers of real property from the Federal Government, reminding them that not even the Government can give what it does not possess." *Id.*

Pueblo of Jemez 790 F.3d 1143, 1160–61 (10th Cir. 2015).

Having rejected the proposition that Indian title can be extinguished by unauthorized governmental activities and trespass by non-Indians and non-Jemez Indians inconsistent with *Santa Fe Pacific* and amounting to no more than trespass and breach of trust, the Court confirmed that:

> To show "actual" and "continuous use," on the other hand, the Jemez Pueblo must show, as it alleges in its Complaint, that the Jemez people have continued for hundreds of years to use the Valles Caldera for traditional purposes, including hunting, grazing of livestock, gathering of medicine and of food for subsistence, and the like.

Pueblo of Jemez, 790 F.3d at 1166. [41]

II. General Evidence Beyond that Relevant to Extinguishment of Title Should be Excluded.

The only relevant evidence regarding the issue of extinguishment of the Pueblo of Jemez's aboriginal Indian title is any evidence showing that a sovereign extinguished that title. Because the United States controlled this area beginning in 1848, and because Article III Courts have never waivered from the requirement that only Congress can extinguish aboriginal Indian title to lands in the United States, the only evidence relevant in this action to the issue of extinguishment after 1848 is evidence of express Congressional action. There is no such evidence.[42] All other evidence is irrelevant and must be excluded. By way of specific example, all testimony by the United States proposed expert Dr. Terence Kehoe must be excluded.[43]

Fed. R. Evid. 702 allows testimony by an expert witness only if that testimony "will help the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. 702(a). *See*

[41] Although in dicta the Court cited to ICC cases for the proposition that "actually substantial interference by others" might give rise to an ICC claim that would bar this action, as noted above that type of "interference" would only give rise to a trespass claim not cognizable before the ICC.

[42] The Defendant here has conceded this very issue in other litigation. *Abousleman,* Doc. No. 4362 at 7.

[43] Kehoe, Terence Expert Report, March 23, 2018 ("Kehoe Rpt.).

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 591 (1993). The trial judge is tasked with "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id*. at 597. The second inquiry "is related to the first. Under the relevance prong of the *Daubert* analysis, the court must ensure that the proposed expert testimony logically advances material aspects of the case … The evidence must have a valid connection to the disputed facts in the case." *Vondrak v. City of Las Cruces*, No. CIV 05-0172 JB/LAM 2009 WL 3241555, *8-9 (D.N.M. Aug 25, 2009). "If the expert's proffered testimony fails on the first prong, the court does not reach the second prong." *Id*. Rule 702 requires "a valid … connection to the pertinent inquiry as a precondition to admissibility." *Kumho Tire Co., Ltd. V. Carmichael*, 526 U.S. 137, 149 (1999) (citation omitted).

Here, Dr. Kehoe's proposed testimony does not have a direct and demonstrable connection to the issue of aboriginal Indian title because it concerns use of the lands in question from 1863 to the present. None of his proposed testimony goes to the issue of Congressional action taken to extinguish the Jemez Pueblo's title. His proposed testimony therefore is irrelevant, and any probative value it might have is substantially outweighed by a danger of confusing the issues, undue delay and wasting time.

The majority of Dr. Kehoe's testimony relates to the period between 1918 and 2000, and the use of Baca Location No. 1 by the Bacas and their successors in interest, the Bonds and the Dunigans. Dr. Kehoe opines that this use by non-Indians limited the Pueblo of Jemez's access and use of the Valles Caldera. Kehoe's testimony details the activities of the owners of the Baca Location No. 1, such as grazing, logging, and fencing the property (Kehoe Rpt. at 12-17). Kehoe details the purchase of the Baca Ranch by the Bonds in 1919, and discusses the timber rights, logging, fencing and grazing of the area, improvements made to the land, easements, and oil and gas leases. (Kehoe Rpt. 21-25). He discusses the Dunigan purchase of Baca in 1962 and their

management, and he confirms Jemez Pueblo continued gathering plants, collecting obsidian, and traveling to Redondo Peak on foot for religious purposes. (Kehoe Rpt. 44). Finally, a significant portion of Kehoe's proposed testimony addresses his opinion that other Indians sometimes entered the area (p. 5).

None of this evidence in any way addresses Congress or Congressional action. It therefore is irrelevant to the issue of extinguishment of Jemez Pueblo's Indian title, and should be excluded.

CONCLUSION

Once the Pueblo demonstrates it has aboriginal Indian title, then evidence of use of the land by others, occasional interference and restrictions imposed by the owners of the Baca Ranch, and more recent restrictions imposed by the Valles Caldera National Monument and National Park administrations, is irrelevant. Whether non-Indians (or Indians) interfered with the Pueblo's continuing use and occupancy is not an issue because Congress has taken no action to extinguish Jemez Pueblo's Indian title consistent with the opinions entered by the United States Supreme Court and other Article III Courts. Non-Indian and Indian interference with the Pueblo's Indian title, once established, is no more than trespass. Holdings of the Indian Claims Commission and the Court of Claims, both Article I tribunals, that interference with Indian use and occupancy of Indian title lands by "gradual encroachment" of whites, incursions by other Indian tribes short of outright conquest, or Government administrative actions, are not applicable to the issues before this Article III Court, and are irrelevant to this case.

This Court should grant this motion and enter an order *in limine* excluding evidence of non-Jemez Pueblo entry or use of the lands at issue, or interference with Plaintiff's use and occupancy of these lands, because that evidence is irrelevant and inadmissible.

Date: August 17, 2018 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the day of August 17, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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