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I. INTRODUCTION

In *United States v. Dann*,[1] the government brought a trespass action against two Western Shoshone Indians, Mary and Carrie Dann, for violating the Taylor Grazing Act[2] by grazing their livestock on public land without a permit. The Danns defended their actions by asserting that their tribe retained aboriginal title[3] to the disputed lands. The government countered, contending that the Western Shoshone's title to the land had been conclusively extinguished in proceedings before the Indian Claims Commission (ICC).[4] Although compensation for the taking of the land had been appropriated and credited to an interest-bearing account in the Tribe's name,[5] the *Dann* court held that "payment" had not been made. The court's definition of "payment" under the Indian Claims Act could potentially affect title to twelve million acres in Eastern Nevada.[6] Title to other lands for which funds have been appropriated by the ICC, but not distributed to the aboriginal owners, may also be affected. Additionally, the *Dann* decision suggests that Indian tribes can defend their title by asserting that inclusion of Indian lands in a Taylor Grazing district does not extinguish title.

II. BACKGROUND

In August of 1951 the Temoak Band of Western Shoshone Indians filed a petition with the ICC on behalf of the Western Bands of the

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1. 706 F.2d 919 (9th Cir. 1983) [hereinafter cited as *Dann II*].

2. 43 U.S.C. §§ 315-315r (1976) and related regulations found at 43 C.F.R. § 4100 (1981).

3. "Aboriginal title is a right of occupancy arising from exclusive aboriginal possession of land, and it is valid against all parties until it is 'extinguished' by the United States." *Dann II*, 706 F.2d at 922. In *Dann II*, the federal government admitted the historic existence of aboriginal title. The pre-trial order stipulated that in 1848 the disputed lands "were part of a vast area exclusively used and occupied by the Western Shoshone." *Id.* at 933 n.10.

4. The Commission was created in 1946 when Congress enacted the Indian Claim Commission Act. 25 U.S.C. §§ 70-70w (1976). The Commission was empowered to hear and decide claims made by Indian tribes against the United States, including "claims arising from the taking of the United States, whether as a result of treaty of cession or otherwise, of lands owned or occupied by the claimant without . . . payment . . . or compensation." 25 U.S.C. § 70a (1976).

5. Appropriation was a routine legislative step. *Dann II*, 706 F.2d at 926, *citing* House Comm. on Appropriations, Report on Supplemental Appropriations Bill of 1978, H.R. REP. No. 644, 95th Cong., 1st Sess. 53 (1977).

6. *Dann II*, 706 F.2d at 922.

Shoshone Nation alleging that the United States government had taken large tracts of tribal land in Nevada and California without compensating the Indians.[7] Eleven years later the ICC decided that the Indians held aboriginal title to 24,396,403 acres.[8] Of that total, the title to the 2,184,650 acres located in California was found to have been extinguished in March of 1853.[9] The date of taking of the Nevada acreage was less clear, as it occurred over time through the "gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of [Indian] lands by the United States for its own use and benefit, or the use and benefit of its citizens . . . ."[10] The parties stipulated in 1966 that the date of taking of the 22,211,753 acres situated in Nevada was July 1, 1872.[11] In 1972 the ICC awarded the Indians $21,550,000 for the stipulated taking of their lands.[12]

Twenty-three years after the original claim was filed, but before the ICC award had been distributed, another group of Western Shoshone (which included the Danns) petitioned the ICC to stay its proceedings and allow them to intervene. They desired to file an amended claim alleging that aboriginal title had not been extinguished to twelve million acres of Nevada land.[13] The intervention was not allowed, primarily because it was attempted at such a late stage of the proceedings.[14] The United States Court of Claims affirmed the ICC's ruling, noting that the attempted intervention appeared to be an intratribal disagreement over the proper litigation strategy.[15]

The Temoak Band changed its strategy in 1976 and adopted the position advanced by the intervenors.[16] The Temoak Band petitioned the

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7. Western Shoshone Legal Defense and Education Association v. United States, 531 F.2d 495, 496 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 497.

12. *Id.*

13. *Id.* The intervenors feared that if the claim was paid, future attempts to litigate the title to these lands would be barred under 25 U.S.C. § 70u (1976). *Id.*

14. *Id.* at 499. On appeal, the United States Court of Claims in Temoak Band of Western Shoshone Indians v. United States, 493 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973-996 (1979) stated: "We hold that far too much water had gone under the bridge even in 1974; we think the Commission effectuated the will of Congress more perfectly by allowing this case to come to final judgment . . ."

15. *Temoak Band of Western Shoshone Indians*, 593 F.2d at 996:

> The desire of the Indians to make the water flow back under the bridge is explained as a natural reaction to a visible change in legal climate, where Indian claims to own large tracts are reported in litigation or settled favorably to them, whereas, they say, in 1946 the pursuit of a money award . . . seemed the only hope for justice.

16. The Temoak Band asserted that its original decision to seek compensation for the land did not constitute an election of remedies because the Commission had no jurisdiction to quiet title.

Secretary of Interior for an administrative declaration that the Western Shoshone still held title to twelve million acres in Nevada.[17] Pending the Secretary's determination, the Indians asked the ICC to stay its claim proceedings.[18] The stay was denied and the ICC entered its final award.[19] After all avenues of judicial review had been exhausted, the Clerk of the Court of Claims certified the award to the General Accounting Office for payment.[20]

In *Dann*, the district court concluded that aboriginal title had been extinguished by the ICC's actions, and entered summary judgment for the government in the trespass action.[21] On appeal, the Court of Claims held that title to the disputed lands had not yet been litigated, noting that the ICC's actions were grounded on a stipulated taking date.[22] On remand, the district court enjoined the Danns from further trespass, but denied the government damages for the Indians' trespasses that preceded the certification of the claims award.[23] Both sides appealed this decision.[24]

III. THE DETERMINATIVE ISSUE: HAD THE CLAIM BEEN PAID?

The Indian Claims Act provides for congressional appropriation of the amount necessary to pay the Commission's final award determination. Such payment fully discharges the United States from liability for all claims and demands touching any of the controverted matters.[25]

In *United States v. Dann*, the government argued that the Act barred the Western Shoshone from asserting that they still held aboriginal title to the disputed lands.[26] The Indians contended that their title had not been extinguished as none of the appropriated money had yet been distributed to

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Furthermore, neither equitable nor declaratory relief was available against the government until 1976, when Congress amended the Administrative Procedure Act, 5 U.S.C. §§ 702, 703 (1976), to waive sovereign immunity. United States v. Dann, 572 F.2d 222, 227 n.3 (9th Cir. 1978) [hereinafter cited as *Dann I*].

17. *Dann I*, 572 F.2d at 225.

18. *Id.*

19. *Dann II*, 706 F.2d at 923. The Court of Claims noted: "We think it is only Congress that could stay and undo the course of litigation. . . . The essential point of the matter is that the Temoak's true appeal is to legislative grace, not as of right to this court." *Id.*, *citing Temoak Band*, 593 F.2d at 999. *See supra* notes 14 & 15.

20. Both the Indians and the United States appealed the Commission's denial of the stay. The Court of Claims affirmed the Commission's award, holding that it was too late for such a major shift in litigation strategy. The Supreme Court denied certiorari. *Dann I*, 572 F.2d at 225.

21. *Dann II*, 706 F.2d at 923.

22. *Id.*, *citing Dann I*, 572 F.2d at 226.

23. *Dann II*, 706 F.2d at 923.

24. *Id.*

25. 25 U.S.C. § 70u (1976).

26. *Dann II*, 706 F.2d at 924.

the Western Shoshone or used for their benefit.[27]

The indefiniteness of the language of the Indian Claims Act forms the core of the *Dann* decision. The *Dann* court had to discern whether payment occurred at the time of appropriation or at the time of distribution.

To resolve this issue, the court looked to the applicable rules of statutory construction.[28] Indian treaties are to be construed as they were understood by the tribal members who participated in the negotiation process.[29] Treaties are to be liberally interpreted so their protective purposes can be accomplished. Ambiguities are to be resolved in favor of the Indians.[30] These sympathetic rules of construction of Indian treaties have been applied to statutes which address Indian concerns.[31]

Guided by these precepts, the *Dann* court considered the ordinary meaning of "payment." Pursuant to 25 U.S.C. §§ 1401-1407 (1976), appropriated monies could not be distributed or used until the Secretary of Interior had prepared a plan of use and Congress had approved it, or until separate legislation was passed. In the instant case, the Secretary did not submit such a plan within the statutory timeframe.[32] Since more than one year had passed since the appropriation of the funds, separate legislation would be required to free the monies.[33] In light of these "significant legal blocks,"[34] the court concluded that "payment" had not yet occurred.[35]

The court's holding was influenced by assurances made by the Court of Claims to the Indians concerning litigation of title to the disputed lands. In denying the intervenors' petition for a stay of the ICC proceedings, the Court of Claims noted that the title issue was not necessarily foreclosed by the claim proceedings: "[T]he bar. . . does not fall until payment. . . . If the majority of the Identifiable Group wishes to postpone payment, in order to try out the issue of current title, it can, of course, ask Congress to delay making the appropriation and direction which will be necessary to pay the award."[36]

This recourse to Congress was affected by a 1978 amendment which included Indian claim awards in the standing appropriations act.[37] Since no separate appropriation by Congress is now required, the Indians are

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27. *Id.* at 926.
28. The court analyzed the "ordinary meaning of 'payment.'" *Dann II*, 706 F.2d at 926.
29. Tulee v. Washington, 315 U.S. 681, 684-85 (1942).
30. Carpenter v. Shaw, 280 U.S. 363 (1930).
31. Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918).
32. *Dann II*, 706 F.2d at 926.
33. 25 U.S.C. § 1402 (1976).
34. *Dann II*, 706 F.2d at 926.
35. *Id.*
36. *Western Shoshone Legal Defense and Education Association*, 531 F.2d at 503 n.16.
37. Act of Mar. 7, 1978, Pub. L. No. 95-240, 92 Stat. 107, 116 (1978) and Act of May 4, 1977, Pub. L. No. 95-26, 91 Stat. 61, 96 (1977).

precluded from petitioning Congress to delay making the appropriation so that title can be litigated. The Court of Claims maneuvered around the amendment's potential effect on the Indians' title rights by holding that while payment could take place in the absence of congressional action, Congress could still intervene "to permit collateral pursuit of the Western Shoshone claims to continuing aboriginal title."[38]

Faced with the 1978 amendment calling for automatic appropriation, but cognizant of Indian reliance on the old law, the *Dann* court struck a middleground: until distribution of an award has been made, "payment" has not occurred.[39] Further, even if actual payment has been made, Congress can still intervene to allow title litigation.[40]

IV. ANALYSIS

The Dann's key contention was that the Western Shoshone still held aboriginal title to twelve million acres of land in Eastern Nevada. The question of whether payment had been made through congressional appropriation of the Commission's award was determinative in the *Dann* case, but would have been virtually meaningless had the court accepted the government's theory that the Indians' title to the disputed lands had previously been extinguished by application of public laws, creation of a reservation, or inclusion of the land in a grazing district.[41]

The language of the public laws, when read in the light of the general rule that congressional intent to extinguish aboriginal title must be clearly indicated,[42] formed the basis for the court's determination that those laws did not act to extinguish Indian title.

The court first examined the application of the homestead laws[43] to the aboriginally held lands in light of the Preemptive Act[44] and its interplay with the Treaty of Ruby Valley of 1863.[45] Lands to which aboriginal title

38. *Dann II*, 706 F.2d at 927.

39. *Id.* at 925-27.

40. *Id.* at 927, *relying on Temoak Band*, 593 F.2d at 999.

41. *Dann II*, 706 F.2d at 928.

42. *See* Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time is That?*, 63 CALIF. L. REV. 601 (1975).

43. Homestead Act, ch. 75, 12 Stat. 392 (1862) (repealed 1976).

44. Act of July 2, 1862, ch. 79, 12 Stat. 503 (1862).

45. Treaty of Ruby Valley, 18 Stat. 689 (1863). The Western Shoshone Tribe's aboriginal lands were incorporated into the United States from Mexico by the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1948). In 1862, a special commission was created to negotiate a peace treaty with the Indians. The commission was instructed "that they were not expected to negotiate for the extinction of the Indian title. . ." Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 347 (1945). Five separate treaties were signed, but the Treaty of Ruby Valley is the only one directly involved in the *Dann* case. *Dann I*, 572 F.2d at 224.

was still intact were excepted from the provisions of the Preemption Act,[46] which gave a settler on public lands a preferential right to buy his claim.[47] When the preemption law was repealed in 1891, the homestead laws touched all "unappropriated public lands."[48] Indian lands were once again excepted. Disposition of Indian lands was to continue in accordance with treaty provisions.[49] The Treaty of Ruby Valley opened the lands in question to exploration for gold and to mines, mills, ranches and agricultural settlements.[50] The court ruled that this piecemeal provision did not encompass all of the Shoshone's land: "[A]ny loss of territory is only so large as the incursion requires, and the Shoshone retain the rest."[51] In sum, the court found no clear expression of congressional intent to extinguish the Shoshone's title to all of their lands. Only the aboriginal title to the land actually granted as homesteads was lost.[52]

The government's second argument was that aboriginal title had been extinguished by the creation of the Duck Valley Reservation in 1877.[53] The *Dann* court examined the government's actions on two fronts: first in light of the Treaty of Ruby Valley, then with a view towards the power of Congress to take such action. In Article VI of the Treaty the Shoshone agreed that they would become a sedentary, agricultural people whenever the President deemed it expedient to place them on a reservation created within the aboriginal territory. However, Article VI was not satisfied as the Duck Valley Reservation was not located on the Indians' ancestral lands.[54] The court did not question that Congress had the power to extinguish the Indians' title, regardless of the reservation's location, but held that Congress had not demonstrated the requisite intent to extinguish title since it had not acted consistently with the Treaty's provisions.[55]

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46. Act of June 22, 1838, ch. 119, 5 Stat. 251 (1838).

47. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 219-247 (1979).

48. Act of Mar. 3, 1891, ch. 561, § 5, 26 Stat. 1095, 1098 (1891).

49. *Id.* at § 10, 26 Stat. at 1099. A prospective Preemption Act was enacted in 1841. This Act expressly proscribed settlement on public lands to which Indian title had not been extinguished. Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453, 455 (1891).

50. Treaty of Ruby Valley, 18 Stat. at 690, Art. IV.

51. *Dann II*, 706 F.2d at 930.

52. *Id.*

53. The Duck Valley Reservation was created by Executive Order on April 16, 1877. *Dann II*, 706 F.2d at 930, *citing* 1 C. KAPPLER, INDIAN AFFAIRS AND TREATIES 866 (2d ed. 1904).

54. *Dann II*, 706 F.2d at 930. The government believed for many years that the reservation was within the described territories. *Id.*

55. *Id.* at 931, *relying on* United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941). In *Santa Fe*, the court held that the creation of the Colorado River reservation was merely an offer to the Walapais and other tribes to abandon their ancestral homes. The Walapais originally declined, but later petitioned Congress for a reservation. This petition demonstrated the Indians' intent to leave their land. The creation of the requested reservation indicated the government's intent to extinguish aboriginal title. *Santa Fe*, 314 U.S. at 353-358.

Finally, the government urged that aboriginal title had been extinguished by inclusion of the disputed lands in the Elko Grazing District, established under the Taylor Grazing Act.[56] The first prong of this argument was that a grazing district should be considered to be one large ranch.[57] The Treaty of Ruby Valley allowed for the establishment of ranches within the treatied lands,[58] with such establishment working a loss of aboriginal title.[59] The court rejected this questionable construction because "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."[60]

The government's second prong analogized the inclusion of aboriginal lands in a grazing district to the inclusion of such lands in a national forest.[61] In *United States v. Gemmill*,[62] inclusion of Indian lands in a national forest was held to extinguish aboriginal title.[63] However, the *Gemmill* Indians had been forcibly expelled from their land in the 1850's and were subsequently compensated for the loss of it.[64] Taken together, the facts in *Gemmill* were indicative of congressional intent to extinguish aboriginal title. In *Dann*, the court held that this intent could not be gleaned from the mere inclusion of the Indian lands in a grazing district.[65]

In striking down each of the government's theories, the *Dann* court avoided destruction of treaty rights because there was room for doubt as to

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56. 43 U.S.C. § 315 (1976). Under this Act, the Secretary of Interior was empowered "to establish grazing districts . . . of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States . . ., which are not in national forests, [or] Indian reservations . . ., and which in his opinion are chiefly valuable for grazing and raising forage crops." *Id.*

57. *Dann II*, 706 F.2d at 931.

58. 18 Stat. at 690, Article IV.

59. *Dann II*, 706 F.2d at 930.

60. Choate v. Trapp, 224 U.S. 665, 675 (1912). This statement simply expands on the *Dann* court's shorthand expression that "doubtful terms are to be construed in favor of the Indians." *Dann II*, 706 F.2d at 932.

61. *Dann II*, 706 F.2d at 932.

62. 535 F.2d 1145 (9th Cir.), *cert. denied*, 429 U.S. 982 (1976).

63. *Id.* at 1149.

64. *Id.* at 1148-49.

65. *Dann II*, 706 F.2d at 933. The *Dann* court also distinguished the single use of a grazing district from the multiple uses made of national forests. *Id.* at 932. More importantly, the court questioned whether aboriginally held lands could be brought under the provisions of the Taylor Grazing Act as "unappropriated lands." *Id.* Historically, Indian lands have not been considered part of the public domain. The Northwest Ordinance provided for surveying of those lands "in which the titles of Indians have been extinguished." Act of May 18, 1796, ch. 29, § 1, 1 Stat. 464, 465 (1796). Almost a century later, the Preemption Act was passed. It expressly proscribed settlement on public lands to which Indian title had not been extinguished. Act of Sept. 4, 1841, ch. 16, § 10, 5 Stat. 453, 455 (1891). The *Dann* court could have buttressed its decision and strengthened the Indians' position with the clear language of these Acts.

congressional intent. The holding is in harmony with precedent.[66] The trust relationship between the federal government and Indian tribes weighs heavily against implied abrogation of treaties: "[A]n extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards."[67]

V. CONCLUSION

In *United States v. Dann*, a simple trespass action against two Western Shoshone Indians expanded into a dispute involving title to approximately twelve million acres in Eastern Nevada.[68] The government contended that aboriginal title had been extinguished as a matter of law by the application of the public land laws, creation of a reservation, and inclusion of the disputed lands in a grazing district.[69] Each of these theories fell under the weight of the well-established rule that, absent a clear showing of congressional intent, aboriginal title will not be extinguished.[70] This holding makes it clear that Indian tribes can strongly contend that application of the public land laws does not work an extinguishment of aboriginal title.

If the court had accepted any one of the government's theories, the question of whether payment had been made would have been rendered moot. The payment question became determinative in *Dann* only because the Indians' title to the disputed land was found not to have been extinguished as a matter of law, contrary to the urgings of the government.[71]

The possibility of litigating title to the disputed lands would have been similarly foreclosed if the court had held that payment had been made based on the stipulated taking date.[72] However, guided by sympathetic rules of statutory construction, the court held that even though funds had been placed in an interest-bearing trust fund for the Shoshone, the significant legal obstacles in the path of distribution or use of these monies precluded a finding that appropriation amounted to payment.[73]

On remand to the district court, the final questions which must be answered are whether aboriginal title had been preserved to the date of trial and, if so, whether the Danns share in that title.[74] The determination

66. *See* Menominee Tribe v. United States, 391 U.S. 414 (1968).
67. *Santa Fe*, 314 U.S. at 355.
68. *Dann II*, 706 F.2d at 922.
69. *Id.* at 928.
70. *Id.* at 929. *See supra* notes 42 & 59.
71. *Id.* at 933.
72. 25 U.S.C. § 70u (1976).
73. *Dann II*, 706 F.2d at 926.
74. *Id.* at

of these issues will ultimately decide the ownership of twelve million acres of Eastern Nevada land.