

BEFORE THE INDIAN CLAIMS COMMISSION

THE MESCALERO APACHE TRIBE and bands thereof,)
ex rel. Solon Sombrero, Fred Pellman,)
Eric Tortilla and Victor Dolan;)

THE APACHE TRIBE OF THE MESCALERO RESERVATION)
on behalf of, or as successor to, the)
Mescalero Apache Tribe and bands thereof,)

Plaintiffs,)

v.)

THE UNITED STATES OF AMERICA,)

Defendant.)

Docket No. 22-B

Decided: July 7, 1966

Appearances:

Weissbrodt, Weissbrodt & Liftin,
with whom were Jay H. Hoag and
Clarence G. Lindquist,
Attorneys for Plaintiffs.

Frank De Nunzio, with whom was
Mr. Assistant Attorney General
Edwin L. Weisl, Jr.,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Scott, Associate Commissioner, delivered the opinion of the Commission.

The Apache Tribe of the Mescalero Reservation is a recognized tribe of American Indians and is authorized to bring this claim in a representative capacity on behalf of the Mescalero Apache Tribe. The claim was timely filed on February 3, 1948, as part of the original

petition filed in Docket No. 22. The petition herein as amended and as severed from the original claim, and filed separately in Docket No. 22-B, on behalf of the Mescalero Apache Tribe, conforms to the statutory requirements of the Indian Claims Commission. These issues are not disputed by the defendant.

The cause of action to be considered by the Commission at this time arises from the allegation of the plaintiffs that the Mescalero Apache Tribe and the various bands of which it was comprised aboriginally used and occupied to the exclusion of others certain lands now in the State of New Mexico. The plaintiffs contend that these lands were taken by the United States without payment of any kind and that the United States is liable therefor in accordance with the Indian Claims Commission Act (60 Stat. 1049).

The land claimed by the plaintiffs lies entirely within the boundaries of the present State of New Mexico. It is bounded on the west by the Rio Grande River, on the south and east by the southern and eastern boundaries of the State of New Mexico, and on the north by a line drawn generally below the 35° latitude.

The United States acquired sovereignty over the claimed area by the terms of the Treaty of Guadalupe Hidalgo which was ratified on February 2, 1848 (9 Stat. 922).

The Mescalero Apaches were a nomadic people moving over a vast territory in search of subsistence. Although using the mountains to their greatest advantage, they also used and occupied the semiarid

valleys and plains, managing to exist where less hardy individuals could not.

Like most of their Apache brothers they were bold, proud and jealous of their liberty and independence. This explains their reputation as a hostile and warlike group which they acquired in part by attempting to retain and protect the area they considered to be theirs.

Prior to American sovereignty, the Mescalero occupied a great expanse of territory in the present State of New Mexico, extending from the Rio Grande River across the Pecos River and into the plains.

Defendant's expert witness, Mr. Albert H. Schroeder, stated:

The region through which the Mescalero roamed, from the time this name was employed in the mid-1700's into the American Period, was roughly bounded on the east by the Pecos River, beyond which they hunted buffalo, and on the west by the Rio Grande.

In aboriginal times the Mescalero Tribe had no centralized political organization. The band was the focus of economic activity and of great importance with reference to solidarity. The chiefs or leaders of these bands had limited authority based primarily upon their popularity. There is no evidence of any territorial conflict or dispute between the Mescalero bands. The historical reports and ethnological accounts established that the bands cooperatively and amicably used the entire range of Mescalero territory. No band had the right to exclude another band from hunting and gathering in any part of the Mescalero territory.

The defendant contends that since there was no tribal organization prior to American sovereignty, this could not have been a tribal occupancy of the claimed area.

This contention has been urged a number of times in previous cases. It has been held that the lack of political cohesion, in itself, was no defense when it was shown that among the autonomous villages in a small area there existed an identifiable group of American Indians with strong ties of kinship and friendship, close cultural ties, and also that there were areas of land used in common by all the people of the group. The Yavapai Tribe, et al. v. United States, 15 Ind. Cl. Comm. 68, 95, 193; Washoe Tribe v. United States, 7 Ind. Cl. Comm. 286; The Muckleshoot Tribe of Indians v. United States, 3 Ind. Cl. Comm. 658, 674, 675; The Nooksack Tribe v. United States, 3 Ind. Cl. Comm. 479, 494; The Lummi Tribe v. United States, 5 Ind. Cl. Comm. 525, 546. The Commission in this case has found that the character of the Mescalero Apache follow the precepts in these cases. Although not having an overall political organization, they did form a distinct ethnic group composed of people bonded together by a common language, a common culture and social organization, common customs, common descent, interlocking kinship, inter-related economic activities, and a consciousness derived from these bands that they were one people. The solidarity of the Mescaleros received its most concrete expression in the recognition of the common right of all Mescalero people to subsistence resources throughout the Mescalero range.

Although the historical evidence prior to American sovereignty located the Mescaleros in only a general way, the reports of government officials and military officers during the early American period

established specific locations within the general area previously described.

Finding of Fact No. 18 sets forth these reports specifically. There is no question that from the beginning of American sovereignty the Mescalero Apache Indians continued to exclusively use and occupy that territory which they had occupied from time immemorial. These reports place them in the Gallinas, Oscura, San Andres and Organ Mountains on the west. References showed the Mescaleros in the Tularosa Valley. Reports of Mescaleros in the Capitan, Sierra Blanca, Sacramento and Guadalupe Mountains are numerous and still more reports established occupation of the area east of these mountains and across the Pecos River.

The defendant contended that the Mescaleros did not occupy the areas in which they were found exclusively; that other Indians used much of the claimed area. The defendant in support of this contention cited a number of historical documents showing the presence of various Indian groups in the claimed Mescalero territory from time to time. For the most part these reports were recitations of attacks and raids after which the Mescaleros were again reported in the same areas previously described and the intruders had left. There is no evidence that any of these invaders attempted to establish residence in, or made permanent use of these areas. Attacks reducing tribes and hindering their activities do not terminate Indian title where raiders do not attempt occupation or permanent settlement. Red Lake Chippewa v. United States,

6 Ind. Cl. Comm. 247, 320; Confederated Salish and Kootenai Tribes of the Flathead Reservation v. United States, 8 Ind. Cl. Comm. 40, 74.

At the beginning of the American period, the policy and program of the federal government relating to the Mescaleros was largely confined to pacifying the tribe, keeping the members of the tribe from the settlements along the Rio Grande and in the northern part of the territory, preventing their attacks on white persons moving into and through the Mescalero country and restraining the incursions of the Mescaleros into the Mexican Republic.

Defendant's expert witness, Dr. Averam B. Bender, gives a descriptive account in his report:

* * *

From time to time, "talks" held by civil and military officers with important Mescalero chiefs or large assemblages of tribesmen emphasized the government's desire for peace with the Indians, who in turn, generally professed friendship and a strong desire for peace. Although the primary object of the government was "to do ample justice to the Indians", nevertheless, the latter complained that their lands were shrinking and their food supply was being depleted. They begged assistance and when this was not forthcoming fast enough or in sufficient quantities, they took to the warpath.

In many instances, the "talks" were followed by treaties /agreements/ in which the government pledged to furnish the tribesmen with gratuities in the form of provisions, clothing, implements, and other needs in return for the Indians' relinquishment of certain areas and permission to build roads and establish military posts and a promise to maintain peace. Unfortunately, gratuities often found their way into the hands of unscrupulous traders, who furnished the tribesmen whiskey and guns. Some treaties, like Lane's and Meriwether's were not ratified by the United States Senate. The only ratified treaty /agreement/ with the Mescaleros, in 1852, as well as the unratified agreements, were not always observed either by the Indian or the white man. Lack of power on the part of chieftains to compel obedience, land hunger of frontiersmen, and profit motive of speculators were almost insurmountable obstacles in the path of treaty observance.

* * *

In the face of such conditions clashes were inevitable. The Mescaleros, often confronted with starvation, stole cattle and plundered the settlers. The defendant maintained that this was an established way of life for the Mescaleros and that raiding over most of the vast territory claimed was the only use they made of it. It is the position of defendant that such use cannot be a basis upon which to establish Indian title. If this were the only type of evidence introduced to establish the claim asserted by plaintiffs, there could be no other course than to hold that plaintiffs' claim must fail. The defendant's position is not entirely argumentative. There was a portion of the claimed area running from north to south between the Rio Grande and the Oscura, San Andres and Organ Mountains which has been excluded primarily for this reason. However, the evidence is clear and substantial that the Mescaleros exclusively used and occupied the major portion of the claimed territory in Indian fashion for subsistence purposes and do not rely merely upon evidence of raids to establish or to extend the use area.

Plaintiffs' expert, Dr. Harry W. Basehart, presented an exhaustive study on the Mescalero subsistence patterns and socio-political organization based primarily upon informant testimony with historical evidence utilized wherever possible to supplement the ethnographic accounts. Dr. Alfred B. Thomas, plaintiffs' expert historian, stated that the boundaries on his maps were based on Dr. Basehart's study and maps.

It is the contention of defendant that the plaintiffs' case was virtually wholly based on informants' testimony and that this evidence was of little or no probative value.

Defendant moved to strike certain of the testimony and related exhibits of Dr. Basehart. The University of New Mexico conducted an exhaustive anthropological and ethnological study of the Mescalero Indians. This work was done under the direction of Dr. Harry W. Basehart, Head of the Department of Anthropology of the University. Defendant's contention was that certain of the aged Mescalero informants were still living at the time of the hearing, and, therefore, since they were not present at the hearings involved to testify, any portion of the study based on information supplied by them should be excluded. This motion was denied. The Commission's order reads as follows:

ORDER OVERRULING DEFENDANT'S MOTION TO STRIKE

Upon consideration of the defendant's motion filed December 6, 1960, to strike the testimony of Dr. Harry W. Basehart and to strike Plaintiffs' Exhibits Nos. 741, 742, 743, 747, 751 and 759, Petitioners' Response to the Motion to Strike filed December 19, 1960, Defendant's Reply to the Petitioners' Response filed December 29, 1960, Argument of Counsel on the Motion heard February 6, 1960, Petitioners' Further Reply to Defendant's Motion filed herein February 20, 1961, and Defendant's Further Response thereto filed herein March 6, 1961, and the Commission now being fully advised in the premises, finds that the witness Basehart correlated his study and the testimony and exhibits based thereon from ethnic, historical and documentary sources, including statements made to him during his field investigation by living members of petitioner's tribe, and that the said testimony of the witness and the above numbered exhibits should be given such weight as entitled to under the circumstances, and that defendant's motion to strike should be overruled.

IT IS THEREFORE ORDERED that the defendant's said motion be, and the same is hereby overruled and denied.

It is apparent that each and every location or boundary found on the maps in question was not substantiated by historical documents and

official reports. However, generally speaking, this evidence was supported and corroborated not only by the historical data but also by defendant's own expert witnesses. It has been pointed out that Mr. Albert H. Schroeder, defendant's expert historian, placed the Mescaleros between the Rio Grande and Pecos Rivers beyond which they hunted buffalo from the mid-1700's into the American period. Likewise, Dr. Averam B. Bender, also one of defendant's expert witnesses, stated that from the beginning of American occupation to the reservation period in the 1870's, Mescaleros generally were found between the Rio Grande and Pecos Rivers, in southern New Mexico.

The weight to be accorded informants' testimony was passed upon by the United States Court of Claims in Pueblo de Zia v. United States, Slip Opinion, Appeal No. 9-62 (decided April 16, 1964). The Court held:

***But it must be remembered that the testimony offered by these witnesses was corroborated. We cannot agree with appellee that "testimony of that kind is literally worthless and was justifiably not given any weight by the Commission." Such evidence is entitled to some weight; it cannot be ignored or discarded as "literally worthless."

The problem presented by the defendant's motion to strike is somewhat different than that presented and ruled upon by the Court of Claims in the Pueblo de Zia case. Therein the Indians did testify in the proceedings before the Commission. In this matter, the Commission had before it the information taken from aged Indians as it was woven into the fabric of a comprehensive investigation, study, report and relevant testimony. The Commission has weighed all of these in its consideration of this matter. Our study of the record as a whole supports our view

that generally the information furnished the University of New Mexico by these aged Indian informants is corroborative of reports of the military and civilian officials of the government and of historical and other relevant documents submitted by the plaintiffs and the defendant.

In looking at these maps, Plaintiffs' Exhibits 747, 751, 748, and 750, it is obvious that plaintiffs' claim in the central and most of the northeastern portion of the staked plains east of the Pecos River is not substantiated by these maps or any other evidence. For that reason that part of the claimed territory has been omitted from the final award of the Commission.

In aboriginal times the Mescalero Apache obtained from their entire territory a meager existence. It was necessary in their annual cycle of subsistence activity to travel great distances by horse and mule. With the advent of white settlements in the area, numerous instances of the aboriginal occupants suffering from starvation were recorded. It was, therefore, necessary for them to continue to use these vast areas of land which, without due consideration of the relationship of their necessities to the existent geographic availability of resources, might seem disproportionate to their population.

In 1855, a treaty for the cession of the land involved herein, reserving an area to the Mescalero was negotiated, but was not ratified. Thereafter, the defendant in a series of efforts sought unsuccessfully to change the Mescalero way of life from that of the far-flung geographic

annual cycle for subsistence to the way of life of restricted area agricultural and military confinement.

On May 29, 1873, an Executive Order was issued setting apart an area along the slopes of the White and Sacramento Mountains as a reservation for the Mescalero Apache Indians. This reservation was enlarged by subsequent Executive Orders issued February 2, 1874, October 20, 1875, May 19, 1882, and March 24, 1883. On the latter date, the reservation finally became the permanent home of the Mescalero Apaches. We have found that the date of the original Executive Order, May 29, 1873, is the date on which the United States, without payment of compensation and in the absence of any ratified treaty of cession, took from the Mescalero Tribe its Indian title to the land described in our Finding No. 37 within the State of New Mexico. Cf. United States v. Santa Fe Railroad Co., 314 U. S. 339.

In the western portion of the claim along the Rio Grande River there are a number of Mexican and/or Spanish Land Grants. We believe these do not extend into the geographic area which we have found and described in our Finding No. 37 as the area of Mescalero lands taken by defendant on May 29, 1873. However, if either or both the parties upon checking the area described in Finding No. 37 with the Bureau of Land Management, is of the opinion any confirmed Spanish or Mexican Land Grant is included therein, pursuant to an appropriate timely motion, further proceedings will be held to determine the location and extent thereof. The parties are granted thirty days from the date of this decision to bring an appropriate motion for such proceedings.

Any acreage within any confirmed Spanish or Mexican Land Grant which may hereafter be shown for this record to lie within the geographic area described in our Finding No. 37, will be excluded therefrom. (cf. Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422 (1959); Pueblo de Isleta v. United States, 9 Ind. Cl. Comm. 619 (1959), aff'd. 152 C. Cls. 866 (1961), cert. denied 368 U.S. 822 (1961)).

Therefore, based on the findings of fact and legal conclusions heretofore set forth in this case, as well as the record as a whole, the Commission concludes that the Mescalero Apache Indians exclusively used and occupied the lands described in Finding of Fact No. 37 from time immemorial until said lands were taken by the United States without payment of compensation to said Indians on May 29, 1873. Unless motion is received within thirty days from the date of this decision to determine the question of whether the area described in our Finding No. 37 encompasses any confirmed Mexican or Spanish Land Grants, and the extent and location thereof, this case will proceed to the determination of the fair market value of said lands as of May 29, 1873, and what offsets, if any, defendant is entitled to under the provisions of the Indian Claims Commission Act.

T. Harold Scott
Associate Commissioner

Concurring:

Arthur V. Watkins
Chief Commissioner

n. M. Holt
Associate Commissioner