BEFORE THE INDIAN CLAIMS COMMISSION

THE JICARILLA APACHE TRIBE OF THE JICARILLA APACHE RESERVATION, NEW MEXICO, Petitioner,	)	
v.	)	Docket No. 22-A
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 9, 1966

Appearances:

Guy Martin, with whom were
Robert J. Nordhaus, James L. Kunen,
Davis, Graham & Stubbs, and
Roy T. Mobley,
Attorneys for Petitioner

Bernard M. Newburg, 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.

In the prior proceedings in this matter, we found that, with the exception of the confirmed Spanish and Mexican land grants within

the area, the Jicarilla Apache Tribe held original title to certain lands described in Finding No. 60; and that during both Spanish and Mexican sovereignty large areas of land were granted to individuals and communities which were subsequently confirmed by the Congress of the United States and by the United States Court of Private Land Claims.

In this opinion this Commission stated:

* * *

> This case will now proceed to a determination of the further issues, including all relevant matters concerning Spanish and Mexican land grants, both of law and fact, the amount of acreages contained in said grants and within the boundaries described in our Finding No. 60, and the date of valuation of the lands awarded to the Jicarilla Apache Tribe.

* * *

The interlocutory order issued on the same date provided:

> *** the white citizenry, gradually acquired the aboriginal lands of the Jicarilla Apache Tribe as more particularly described in the Commission's Finding 60;
>
> IT IS THEREFORE ORDERED that this case shall proceed for the determination of the acreage of that area as set forth in the Commission's Finding 60, all relevant matters concerning Spanish and Mexican land grants within said area, and for purposes of the evaluation, the time or times said area was acquired by the United States, provided, however, that, if the parties should mutually agree on said date or dates of evaluation of the lands awarded herein, subject to the approval of the Commission, then this case shall proceed with the hearing on valuation. (Emphasis supplied.)

* * *

The parties have stipulated and we have so found as to the acreage contained within the boundaries described in Finding 60, as depicted by the Bureau of Land Management Map, i.e., 14,026,000 acres including the confirmed Mexican and Spanish land grants.

The parties also stipulated and we have so found that the grants, or portions of them lying within that area, are as follows:

	Acres
Sangre de Cristo	279,700.00
Maxwell	1,642,000.00
Arroyo Hondo	18,900.00
Antoine Leroux	16,500.00
Valle	1,242.36
Pueblo de Pecos	18,763.33
Los Trigos	9,646.56
San Miguel del Bado	5,147.73
San Cristoval	81,032.67
Galisteo	260.79
Agua Negra	17,361.11
Lamy	8,400.00
Pablo Montoya) Baca Location No. 2) Mora)	708,800.00
Las Vegas) Tecelote) Scolly)	1,303,300.00
Antonio Ortiz	163,921.68
Preston Beck) Anton Chico) Perea)	584,600.00
Total	4,859,576.23

It was further stipulated between the parties and we have so found that the portion of Baca Location No. 2 which does not overlap the Pablo Montoya grant, consisting of 52,109 acres, should be considered as subject to Indian title after 1848. Accordingly, the portion of the Montoya grant to be excluded under Finding No. 60 has been reduced in size to 656,691 acres and the total area of the land grants to be considered is 4,807,467.23 acres. The difference between the total acreage of the award area and this land grant acreage is 9,218,532.77 acres.

For determination by this Commission at this time are issues relating to (1) the liability of the United States to the petitioners,

if any, as to the said confirmed land grants, and (2) the date of evaluation.

The Land Grants

The petitioners have presented impressive and voluminous documentary and other evidence and testimony seeking to overturn the long line of decisions in which this Commission has consistently held that the validity of confirmed Spanish and Mexican land grants cannot be questioned.

The defendant has consistently maintained and presented evidence and testimony to support its position, that the United States cannot be held liable with respect to land grants already declared valid by the Congress or the Court of Private Land Claims; and that the validity and extent of confirmed land grants has already been determined by a body vested with judicial capacity, and cannot be re-examined by this Commission.

Counsel for both parties presented this phase of the proceeding in great depth. We have given careful study of and serious consideration to the provocative and illuminating testimony of the experts, the careful selection of relevant documentary evidence and the learned and excellently prepared proposed findings and briefs of the parties.

In brief, the position of the petitioner is that the fundamental Indian aboriginal rights of use and occupancy were not divested by the Mexican and Spanish land grants; that such rights were divested only to the extent that the grantees took physical possession of same; and that the said grants were made by Spain and Mexico subject to the Indian title and rights of use and occupancy.

The defendant contends these questions are stare decisis, and cites a number of cases in which the Commission has considered and ruled on these questions in matters involving other areas which were, as in this case, ceded to the United States by Mexico by the Treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922).

After a careful study and evaluation of the record herein, we are of the opinion that the evidence and testimony does not justify a variance from the position which this Commission has previously taken in matters involving these issues relating to Mexican and Spanish land grants. (Thompson (Indians of California) v. United States, 8 Ind. Cl. Comm. 1, 22 (1959)); Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422, 451, 452-3 (1959); Pueblo de Isleta v. United States, 7 Ind. Cl. Comm. 619 (1959), aff'd. 152 C. Cls. 866 (1961), cert. den. 368 U. S. 822 (1961); Pueblo de Zia v. United States, 11 Ind. Cl. Comm. 131 (1962), rev'd on other grounds C. Cls. Appeal No. 9-62, decided April 17, 1964; Seminole Nation v. United States, 13 Ind. Cl. Comm. 326, 368 (1964)).

We, therefore, hold that the Indian title to the lands embraced within the award area described in Finding No. 60 herein which were in the areas of the confirmed Spanish and Mexican land grants (see our Findings 64 and 65, supra) was extinguished by the prior sovereign and not by the defendant; that these lands never became a part of the public domain of the defendant; and that the defendant has no liability for any tortious acts of the prior sovereigns which may have been committed in the acts which led to the extinguishment of said title. In the

Cochiti case, supra, we expressed our opinion on the various facets of this issue at length.

The Date of Valuation

We next consider the issues which are involved in our determination of the date at which the Jicarillas' Indian title to the said lands was extinguished by the defendant, and thus the date on which the fair market value of these lands must be determined.

In our prior proceeding in this matter we indicated that, based upon the then available facts of record, the extinguishment of the Indian title had been gradual throughout the years following the assumption of sovereignty by the defendant in 1848 up until complete extinguishment in later years by reason of sufficient disruption of their use and occupancy of the award area as to deprive them of their continued use and occupation of the lands in their usual way, i.e., the annual cycle - hunting, gathering, etc. However, based on the facts developed in this supplemental proceeding, we have found that the extinguishment of the said Indian title was not by segments at different times; and that the title to the area was extinguished on the date these Indians were forcibly removed to Fort Stanton on August 20, 1883.

The documentary evidence and testimony presented in this supplemental proceeding has provided a sufficient basis for our final determination of the date of taking. Since there was never a treaty of cession of the said lands and since the early Executive Order Reservations, through no fault on the part of these Indians, proved to be merely abortive attempts

to provide the Jicarillas with a permanent home, it has been necessary for us to determine the date of extinguishment of Indian title on the basis of disruption and deprivation.

We have, therefore, made detailed Findings of Fact numbered 69 through 168 which reflect the chronological historical facts of record and the application of the scientific techniques of the fields of applied geography and anthropology in an effort to determine the degree of confirmation of these through documentary and other acceptable and reliable records.

In this, we have been fortunate in having available, field investigations made by Dr. Frank Hibben in 1933 and 1934, a number of years prior to the institution of this litigation. His findings at that time were made wholly without the instant litigation in mind. He was also fortunate in having for his assistance and information aged Jicarilla Indians, who personally lived and experienced the Jicarilla way of life in the award area during the relative period after the Civil War. Dr. Hibben, distinguished authority in his field, supplemented the information thus received by field investigations and excavations on which he was assisted by these informants. Thus, he was able to confirm their statements. These efforts were supplemented by further field investigations and excavations made by Dr. Hibben in 1958, after he had contracted with the petitioner to do so and to appear as he has at the proceedings before the Commission as an expert witness.

In our Findings numbered 81-98, we have detailed the facts which

have been found from the information provided by the aged Jicarilla informants as they have been, in accordance with the requirements and standards of the archeological profession, confirmed through the said investigations and excavations of Dr. Hibben. These findings also detail the facts resulting from Dr. Hibben's studies and investigations, independent of the information received from these informants. Dr. Hibben's testimony was, in substance, as a mosaic, formed through the woven fabric of all of his sources of information.

This mosaic, as presented by Dr. Hibben, reflects the relevant detailing of the areas of use and occupation by the Jicarillas. It reflected the camp sites, the geographical location of game for the hunt, plants for the gathering and the sacred places for worship, trails and other relevant details of use and occupation. Even general indications of the period of use and occupation after the Civil War were developed which have been of particular value to us in our assessment of other evidentiary material in the record in this matter.

Dr. Leroy Gordon, an expert in the field of applied geography, testified for the petitioner. We have detailed the facts we have found in this particular phase of our overall factual consideration in our Findings of Fact numbered 99-122.

Briefly stated, we have found that during the relevant period surveys were made in the award area by the defendant prior to the voluntary abandonment thereof by the Jicarilla and prior to a disruption of their Indian way of life therein sufficient to deprive them of their

use and occupation thereof. Dr. Gordon provided relevant survey plats and maps of the area for the relevant years.

In our Finding of Fact No. 101 we have set out the number of surveys made each year from 1856 through 1900. The majority of the surveys were between 1879 and 1883. A total of 454 townships were surveyed in this period. Of these 122 were surveyed prior to 1879 and 20 from 1884 to 1900. For the period 1879 through 1883 as follows:

Year	Number of Townships
1879	21
1880	117
1881	128
1882	29
1883	17

Grazing throughout the area was practiced. A few straight lined barbwire fences were erected. These, however, did not deter these Indians from their far-flung activities throughout the area, including the depredations and the killing of cattle grazing therein.

With the exception of brief periods during the abortive attempts to place these Indians on permanent reservations prior to their placement at Fort Stanton in 1883, they used two agency locations as general headquarters. One of these, known as the Abiquiu Agency, was located a short distance west of the Rio Grande River. The other, known as the Cimarron Agency, was located on the Maxwell Grant to the north and east of Santa Fe.

These agencies, however, were not reservations. They were merely ration points. The rations supplied at these locations were sadly

insufficient for the needs of the Jicarilla. As a result, these locations were merely points from which these Indians went throughout this area for their main subsistence in their usual way of life, i.e., the annual cycle - the hunt, the gathering, etc. The Cimarron and the Abiquiu Jicarilla joined together for these activities. For example, on May 23, 1876, an Indian Inspector reported that

> * * * It would be impossible at this season of the year to accomplish their removal by any means which the Government can readily bring into effect, because the majority of them are preparing to go on their annual hunt, on the Plains to the eastward of their homes, and their ponies are in good condition. * * *
> (See Finding No. 126)

On December 27, 1876, the Agent at Abiquiu reported that

> * * * A much larger number than usual of my Apaches have, during the past fall, accompanied the Cimaron Indians to the country between the Cimaron and the Arkansas rivers, in their hunting expeditions. * * *
> (See Finding No. 127)

The relations between the United States and these Indians after the Mexican cession in 1848 until 1887 when the Jicarilla finally went on their present reservation are detailed in our Findings numbered 122 through 168. The record is rich in relevant documentary materials which includes reports of the military, the Indian agents, official correspondence and reports, etc.

The aforesaid abortive attempts to provide permanent reservations for the Jicarilla were made in 1873, 1876, and 1880. These were also noted for the interest in and unsuccessful efforts of the defendant to consolidate the Jicarilla and Mescalero Apaches on one reservation.

The efforts for such consolidation failed because of the mutual objections of the two tribes. The 1883 consolidation, however, was a forced one, carried out by the military. The failure of the 1873, 1876 and 1880 attempts was due primarily to the lack of adequate provisions for these Indians on the reservations, forcing them to return to their old way of life in the award area in each instance.

We have also noted the opposition of the private cattle interests to the placement of the Jicarilla on the reservation which was provided in 1880. This opposition was observed in retrospect in 1887 after investigation when a renewed but successful effort was made at the request of these Indians to provide them permanently with substantially the same reservation area.

It was not until on August 20, 1883, that the old way of life of the Jicarilla in the award area was so disrupted as to deprive them of their use and occupancy of same. This was the date that the military started them on their journey with attendant hardships to Fort Stanton to be joined there with the Mescalero Apaches. Although there was lack of adequate provision for them at Stanton, they stayed on there for three years when many escaped to the award area and attempted to engage in their old way of life to a limited extent and in a limited portion of the area.

But the buffalo had disappeared in 1883. This meant that an important reason for their return no longer existed in 1886. During 1884, 1885 and 1886 settlement was developing in the area. The military

at Fort Union, located near Santa Fe, taking cognizance of the situation, gave sympathetic understanding and assistance in the light of the attendant circumstances which were brought to the attention of appropriate officials in Washington.

These Indians had sent a delegation to Washington a number of years before in an effort to secure a permanent home. So, in 1886, they expressed a desire to be placed on a reservation in the award area. They also named, as their second choice, the area which had been provided by the Executive Order of 1880 but returned to the public domain in 1884. On February 11, 1887, President Cleveland issued an Executive Order providing for the reservation to which they moved in 1887 and on which they reside today. This reservation is, with minor differences, the same as that created in 1880.

We have had occasion in a number of our decisions to apply similar facts in our determinations of the relevant dates of extinguishment of Indian title.

In The Yavapai, et al v. United States, 15 Ind. Cl. Comm. 68-115, as herein, there were abortive efforts to place the Indians on permanent reservations. In 1865 a reservation was established on the Colorado River. From time to time small bands of Yavapai came on the reservation but never stayed long. They, as the Jicarilla, returned to their customary habitat. After miners and settlers arrived in the area hostilities commenced with these Indians and continued without interruption until they were rounded up in 1873 by the military. Many of the

Yavapai alternated between periods of submission when they drew rations and received protection from the whites, and periods when they returned to their old way of life. Finally a reservation was set apart for them in 1871, and on May 1, 1873, the Yavapai, numbering about 2000, were placed on the Camp Verde Reservation. This date was determined by this Commission to be the date of taking of their title.

In Snake or Piute Tribe v. United States, 4 Ind. Cl. Comm. 571A-626, we found that the Indians were deprived of their original Indian use and occupancy title to the lands involved in January 1879 by the action of the United States in forcibly removing them from their lands to the Yakima Reservation and restoring such lands to the public domain without their consent. We stated in part (at page 625):

> * * * The evidence shows that petitioners were actually deprived of their Indian possessory and occupancy rights or title to these lands in January, 1879, when they were removed from their lands and placed on the Yakima Reservation. Whether defendant intended the removal of petitioners' ancestors from their lands was to be permanent or not, it was made permanent in fact, since petitioners were never permitted to return to the lands and they were thereafter restored to the public domain and opened for public sale and settlement, without the consent or payment of compensation to petitioners. The continuous and permanent exclusion of petitioners' ancestors from their lands necessarily relates back to the date of their removal therefrom. Shoshone Tribe v. United States, 299 U.S. 476; 81 L. ed. 360. So, it is our conclusion that the original Indian title was held and owned by petitioners' ancestors to the lands as specifically described in Finding 3 and was terminated and taken by the defendant in January, 1879. * * *

Many of the facts involved in United States v. Santa Fe Pacific Railroad Company, 314 U.S. 343, 86 L. Ed. 260, are similar to the

facts herein. That matter involved the Walapai Indians, and the date of extinguishment of their title to their lands by the United States. We had the same issue to decide in a matter involving the Walapai Indians in The Hualapai Tribe of the Hualapai Reservation, Arizona v. United States, 11 Ind. Cl. Comm. 447-478. In this matter we adopted the date which had been determined by the Supreme Court in the Santa Fe case.

In the Santa Fe case, the Supreme Court stated (at page 347):

> * * * Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues. Buttz v. Northern P. R. Co. supra (119 US p. 66, 30 L ed 334, 7 S Ct 100). As stated by Chief Justice Marshall in Johnson v. M'Intosh, supra (8 Wheat.(US) p. 586, 5 L ed 691), "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. Beecher v. Wetherby, 95 US 517, 525, 24 L ed 440, 441. * * *

Conditions changed. Between 1875 and 1881 there were repeated suggestions for settling the Walapais on some reservation. In 1881 they met in council and agreed to request a reservation. The Court stated, in part:

> * * * "They say that in the country, over which they used to roam so free, the white men have appropriated all the water; that large numbers of cattle have been introduced and have rapidly increased during the past year or two; that in many places the water is fenced in and locked up; and they are driven from all waters. They say that the Railroad is now coming, which will require more water, and will bring more men who will take up all the small springs remaining. They urge that the following reservation be set aside for them while there is still time; * * *

The military conveyed their recommendation for a reservation to the President. Pursuant thereto the reservation was created by an Executive Order dated January 4, 1883. This was the date of extinguishment of Walapai Indian title by the United States determined by the Court.

The Court made the following additional statement which states facts which in large part parallel those in the matter now before us (page 358):

> * * * The lands were fast being populated. The Walapais saw their old domain being pre-empted. They wanted a reservation while there was still time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long-standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seem to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others. Cf. Marsh v. Brooks, 14 How (US) 513, 14 L ed 522; Shoshone Tribe v. United States, 299 US 476, 81 L ed 360, 57 S Ct 244.

In view of all the facts of record and the applicable precedents we hold that the date upon which the United States, without payment of compensation and in the absence of a ratified treaty of cession with the Jicarilla Apache Tribe, took from that tribe its Indian title

to lands within the State of New Mexico which it had used and occupied exclusively since time immemorial, and as set out in our Finding No. 60 herein (excluding confirmed Spanish and Mexican land grants - see our Findings No. 64 and 65), was August 20, 1883, the date the U. S. Army began its removal of these Indians to Fort Stanton. It is true that these Indians reluctantly went to Fort Staton; that conditions there were unfavorable, and, in fact incompatible to their continued presence there; that they had to continue their old way of life while there for part of their subsistence; and that many of them escaped to return to the award area in 1886. However, the move carried out by the military, starting on August 20, 1883, to Fort Stanton resulted in a sufficient disruption of their way of life and interference with their overall use and occupancy of their lands to constitute an extinguishment of their title thereto. This disruption continued for approximately three years before a number of the Jicarillas escaped and returned to the award area, there to pursue their old way of life over a portion of that area and on a limited scale. This disruption was substantial in character and time as distinguished from the prior brief but unsuccessful attempts to place these Indians on reservations.

To this it is relevant to find that although the Fort Stanton reservation was not one of their choice, these Indians had sent a delegation to Washington several years before and had requested a reservation; that after their placement at Fort Stanton they requested the reservation which was created by the Executive Order of February 11,

1887, which is virtually the same one created by the 1880 Executive Order; and that they voluntarily moved thereon in 1887 and have lived there ever since.

The petitioner is entitled to recover of and from the defendant for and on behalf of the Jicarilla Apache Tribe of Indians the fair market value of the lands described in Finding of Fact No. 60 as we have herein designated same to exclude the confirmed Spanish and Mexican Land Grants (see our Findings of Fact Nos. 64 and 65), which represents a total of 9,218,532.77 acres to be so valued, as of August 20, 1883, less such offsets, if any, to which defendant may be entitled under the provisions of the Indian Claims Commission Act (60 Stat. 1049).

T. Harold Scott
T. Harold Scott
Associate Commissioner

Concurring:

Arthur V. Watkins
Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Wm. M. Holt
Associate Commissioner