BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT SILL APACHE TRIBE OF THE STATE OF OKLAHOMA,

THE CHIRICAHUA APACHE TRIBE, Ex Rel. SAM HAOZOUS, BENEDICT JOHZE, JAMES KAYWAYKLA, ROBERT GOODAY, DAVID CHINNEY,

THE WARM SPRINGS APACHE BAND, Ex Rel. SAM HAOZOUS, BENEDICT JOHZE, RAYMOND JOHN LOCO,

THE CHIRICAHUA APACHE BAND, Ex Rel. ROBERT GOODAY, DAVID CHINNEY, CASPER CALIO,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket Nos. 30-A and 48-A

Decided:

Appearances:
Abe W. Weissbrodt
Attorney for Petitioners

I. S. Weissbrodt and Morton Liftin
of Weissbrodt, Weissbrodt & Liftin
Roy T. Mobley, Esquire
James L. Kunen
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Rodey, Dickason, Sloan, Akin & Robb
Of Counsel

Howard G. Campbell, with whom was associated
Mr. Assistant Attorney General Clyde O. Martz,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Scott, Commissioner, delivered the Opinion of the Commission.

This matter came on regularly for hearing for the purpose of determining Indian title to certain lands, claimed by Petitioners to have been held by them and their predecessors by virtue of exclusive use and occupancy from time immemorial. The Petitioners allege that the said lands had been unlawfully taken from them by force of arms and otherwise by the United States without their consent and without any compensation whatsoever.

Subsequent to the hearing in consolidated Docket Nos. 30, 48 and 229, on January 31, 1968, the Commission granted a Motion to Separate the Claims to the Navajo Overlap Area created by conflicting claims without any prejudice to rights of Petitioners in Docket No. 229, designating new Docket Nos. 30-A and 48-A for determination of the claims for taking by the United States of the claimed territory excluding the said overlap area to which title is asserted by the Petitioners herein and the Navajo Tribe of Indians. (See the said overlap area above the green dashed line on Petitioners' Exhibit 434) The Commission's said Order accepted for filing in said new Dockets the pleadings and briefs theretofore filed in Docket Nos. 30 and 48, and further ordered that

> 3. Insofar as applicable to the claims presented in Docket Nos. 30-A and 48-A, the testimony and exhibits received in evidence at trial and the proposed findings of fact, objections to proposed findings of fact and briefs of the petitioners and defendant in Docket Nos. 30 and 48 are hereby accepted and constitute the record in Docket No. 30-A and Docket No. 48-A, and the claims in Docket Nos. 30-A and 48-A shall proceed to separate and final determination in said Dockets.

The total lands claimed by Petitioners are located in what is now the southwestern part of the State of New Mexico and southeastern

portion of the State of Arizona. Petitioners claimed an area, which includes the said Navajo overlap not involved herein, described in their Petition in Docket Nos. 30 and 48 as follows:

> ..... the southern boundary of the ancestral lands of the petitioners within the present United States is the boundary line between the United States and the Republic of Mexico. On the east, the boundary of the ancestral lands of the petitioners was the Rio Grande River. On the north, in the present State of New Mexico, the ancestral lands of the petitioners included the Gallinas and Datil Mountains and Rito Creek, including the present townsite of Quemado in New Mexico. On the west, in the present State of New Mexico, the ancestral lands of the petitioners included the present towns of Spur Lake, Luna, Reserve and Glenwood and included the San Francisco Mountains and the San Francisco River, and on the west, in the present State of Arizona, included the present towns of Duncan, Wilcox, Johnson, Elgin, Benson and Parker Canyon, including Dos Cabezas Mountains, Dragoon Mountains and Mule Mountains.

The exact boundaries of the claimed area, including the Navajo overlap not involved herein, are more specifically delineated on the map of the area admitted in evidence as Petitioners' Exhibit 433.

Petitioners allege that no treaty of purchase or cession and no agreement or contract has ever become operative between the United States, on the one hand, and any of the Petitioners on the other hand, whereby any of the Petitioners conveyed, sold, transferred, ceded or otherwise relinquished any of their ancestral lands or their rights or interest therein.

Defendant, the United States, denies that Petitioners, or any or all of them, were or are in fact or law a tribal organization or organizations constituting an identifiable group within the meaning of the

Indian Claims Commission Act (60 Stat. 1049), or that Petitioners have the authority to bring this action in their own behalf or as successors to or representatives of any Indian tribe or group that may have at any time occupied the claimed territory. Defendant denies that Petitioners have any title to those lands within the claimed area constituting grants of land made by the governments of Spain and Mexico, or that the Petitioners occupied the claimed lands and territory exclusively from time immemorial, or that they were deprived of the use thereof by the United States.

Before the hearing, and upon motion of Defendant, Docket Nos. 30, 48 and 229 were consolidated for the purpose of trial. The claim of the Navajo Tribe of Indians in Docket No. 229 to a portion of territory claimed by Petitioners (northern portion in State of New Mexico) was denied by the Petitioners and by the Defendant. Pursuant to the aforesaid Order of the Commission, no determination will be made herein as to title in the overlap area also claimed by the Navajo Tribe of Indians. This is included in the metes and bounds description set forth in Paragraph 5 of its Amended Petition in Docket No. 229, with its perimeter delineated with a black line, with station numbers on Navajo Exhibit 510, Place Name Map, and specifically delineated in the Frontispiece of Proposed Findings of Fact in Behalf of the Navajo Tribe of Indians, with the solid line indicating the southern boundary of the Navajo claim in the overlap area. This Navajo overlap is also shown herein as the area above the green dashed line on Petitioners' Exhibit 434.

The Commission has heard the testimony of witnesses appearing on behalf of the various parties, has read a certified transcript of their testimony, and has examined all of the exhibits introduced into evidence by all parties concerned. We have carefully weighed the value of the evidence presented, evaluated the testimony of the witnesses, and observed their conduct upon the witness stand; and being otherwise fully advised in the premises we have made our Findings of Fact numbered 1(a) through 15.

The tribes and bands of Apache Indians who are alleged to be the holders of Indian title to lands which are the subject matter of these consolidated proceedings are referred to herein as Petitioners. This designation will include the actual claimants herein as well as any Apache groups for whom Petitioners claim to be the lawful successors or representatives.

Based upon the pleadings, and from the evidence produced by all the parties herein, we conclude that the questions and issues to be resolved are as follows:

1. Whether Petitioners constitute an identifiable entity entitled to bring the subject action;

2. Whether Petitioners held Indian title and what were the boundaries of the lands to which such title was held;

3. Were Petitioners' lands wrongfully or unlawfully taken by the United States, and if so, on what date?

We are of the opinion that the Petitioners sustained their burden of proof with convincing and conclusive evidence sufficient to resolve these issues substantially in their favor.

The claims herein were timely filed on May 26, 1948, and this Commission has jurisdiction to hear and decide said claims.

We have found that the Petitioner, the Fort Sill Apache Tribe of the State of Oklahoma, is a tribe or identifiable group of American Indians, recognized by the Secretary of the Interior as having the authority to represent its members, and is qualified to present this claim pursuant to the provisions of Section 10 of the Act of August 13, 1946 (60 Stat. 1049). This tribe represents, and for the purposes of this proceeding, embraces the members and the rights of these other Petitioners: The Chiricahua Apache Tribe, the Warm Springs Apache Band, and the Chiricahua Apache Band.

Petitioners allege that the claimed territory was held and occupied by three separate bands, constituting a single entity, to-wit: (a) the Chiricahua Apache Band, otherwise known as the Central Chiricahua Apache Band, and otherwise known as the Tcokanen; (b) the Warm Springs Apache Band, otherwise known as the Eastern Chiricahua Apache Band, and otherwise known as and including the Warm Springs Apaches, the Mimbres, the Coppermine Apaches, the Ojo Caliente Apaches, the Mogollons, and the Tchiene; and (c) the Southern Chiricahua Apache Band, otherwise known as the Ndenkai.

Defendant asserts that five independent, distinct and wholly separate Indian bands occupied the claimed territory, to-wit: (a) Chiricahua Apache, (b) Mogollon Apaches, (c) Copper Mine Apaches, (d) Mimbres Apaches, and (e) Warm Springs Apaches.

It is true that the record does not present a strong case for political cohesion of the various bands as one political unit, although there is something about their history of joining in pursuits of hunting, as well as marauding, that resembles some type of intermittent and somewhat intangible federation. But such cohesion is not the controlling test, where, as in this proceeding, it is so clearly demonstrated that there existed strong ties of kinship and friendship, close cultural and ethnic ties, common customs, common language, common land use, and the expressed consciousness upon the part of the diverse member groups that they were one people.

Although there is evidence of political unity and of United States officials dealing with the Chiricahua Apaches as a tribe, the ethnological evidence alone establishes that the several bands of claimant Indians meet all the requirements of an identifiable group and a land-owning entity for purposes of the Indian Claims Commission Act. In our recent decision on the question in Hualapai Tribe v. United States, 11 Ind. Cl. Comm. 447, 474, we stated:

> "Assuming for the moment that the Hualapai were not a tribe in a political sense, we have a people who all ethnologists agree spoke the same language, had a common culture, intermarried, made common use of the lands away from their settlements, shared their own territories, engaged in common economic activities and considered themselves one people. Such factors make the Hualapai an identifiable group and a land-owning entity under the Nooksack, Muckleshoot, and Washoe decisions, supra ....."

This language is equally applicable to the Chiricahua Apaches in the present case.

That political unity in the sense of an organized and centralized governmental structure is not essential, in the defining of an identifiable tribe under the Indian Claims Commission Act, has been repeatedly enunciated in many cases. See Muckleshoot Tribe of Indians v. United States, 3 Ind. Cl. Comm. 658, 675; Nooksack Tribe v. United States, 3 Ind. Cl. Comm. 479, 494; Snohomish Tribe v. United States, 4 Ind. Cl. Comm. 549, 569, 570; Duwamish Tribe v. United States, 5 Ind. Cl. Comm. 117, 137-138; Suquamish Tribe v. United States, 5 Ind. Cl. Comm. 140, 163-164; Lummi Tribe v. United States, 5 Ind. Cl. Comm. 525, 546; Northern Paiute Nation v. United States, 7 Ind. Cl. Comm. 322, 386-397, 416; Washoe Tribe v. United States, 7 Ind. Cl. Comm. 266, 286-287; Shoshone Nation v. United States, 11 Ind. Cl. Comm. 387, 409-434; Mescalero Apache Tribe, et al v. United States, 17 Ind. Cl. Comm. 100; and Yavapai Tribe, et al v. United States, 15 Ind. Cl. Comm. 68, 95, 193. Cf. Upper Chehalis Tribe v. United States, 140 C. Cls. 192, 195-196;Hualapai Tribe v. United States, 11 Ind. Cl. Comm. 447, 472-476.

In arriving at our Findings, the most convincing evidence as to the fact that these Indians constituted one unified, identifiable Indian tribe, came from the writings and reports of the earlier explorers, missionaries, scouts and military men. Such evidence is substantial for the Spanish and Mexican periods. From them, we were able to conclude that Petitioners, and no other Indians, dominated by continuous use and occupancy most of the claimed area from time immemorial. The writings and reports from the early American period substantiated

many of the preceding observations, but were more helpful in the matter of confirming the cultural and ethnic ties existing between the various Apache bands who occupied the subject territory.

Our conclusions as to the ethnic and cultural relationships of the various Apache bands are substantiated by the testimony and studies of the expert witnesses. Their testimony provided reliable and convincing evidence that supports the ultimate Findings of Fact and Conclusions in this matter.

From the evidence presented, we are not able to conclude positively what names the various groups gave themselves prior to and during the early part of Spanish exercise of sovereignty. Later, the Indians seemed to accept the names given them by the white people, which related to the geographical areas which particular Indians appeared to have used and occupied or from which they came. Accordingly, it is not necessary for the Commission to reach any conclusion other than its Finding that all of the groups which used and occupied the claimed area, by whatever name they were known and whatever portion of said lands they appeared to occupy, constituted one unified, identifiable tribe of American Indians properly represented in this proceeding by the Petitioners, and we have so found. Ethnological and historical materials referring to a group of Indians in a certain geographical location by different names, with evidence that these referred all to the same group, establishes identity of that group and the name given is irrelevant. Skokomish Tribe v. United States, 6 Ind. Cl. Comm. 152.

The evidence is preponderant in this case to establish that the Petitioners used and retained possession of a considerable portion of the claimed area from time immemorial, and, in any event, for a time sufficiently long to satisfy the requirements of applicable law and decisions and we so hold. They defended their territory diligently and fiercely against the invasions of other Indian tribes and of the whites, including citizens of Spain, Mexico and the United States. Their occupancy of the area, maintained through continuing use for purposes of hunting of game and harvesting of uncultivated crops of various kinds, as well as habitations in permanent sites for fixed periods of time, covers a rather definitely defined portion of the claimed area.

Much of the vast territory used and occupied by these Apaches is semiarid. This explains why a nomadic, nonagricultural people would need such extensive territory over which to conduct their operations of hunting and gathering of native roots, berries, mescal, etc. Likewise, it can be understood that as a supplement the Apaches engaged in the raiding of and stealing from Mexicans below the border and white settlers above, and the increased practice of trading the fruits of their raids for the necessities of livelihood.

From the contact of the first Spanish explorer, the Apaches were known as a fierce, hostile, and warlike people, determined to halt the invasion of the white man, and to defend their vast territory against encroachments from any source. Their ferocity and their fighting

proclivities discouraged other Indians from encroachment, and succeeded at many times in completely repelling and removing the advancing white settlers.

During the period of American sovereignty, these Indians suffered a reduction in their numbers due to losses from their warlike encounters with both Indians and whites. We held in Mescalero Apache Tribe, et al v. United States, supra, that attacks reducing tribes and hindering their activities do not terminate Indian title where opposing raiders do not attempt occupation or permanent settlement, a precedent established in 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.

Other portions of the claimed area Petitioners occupied only sporadically for the purpose of occasional hunting and exploratory operations, as well as for marauding and banditry purposes. Over such lands, located in Arizona in the southwest corner of the claimed area and in New Mexico in the northeasterly and northwesterly portions of the claimed area, the evidence in this case does not sustain a finding that they occupied same pursuant to any aboriginal title, nor was the occupancy of such proprietary or continuing nature as to support a claim of continuing and exclusive Indian title. Some of such lands (a) was shared with other Indian tribes, such as the Navajo, or (b) was in the nature of a "no-man's land" which served as a battle ground in which to buttress off the attempted invasions of other nomadic or

marauding Indian groups. Common usage of an area cannot ripen into Indian title by one of the users (with others considered permissive users). Permissive use doctrine cannot apply until one of the users has obtained exclusive control. Confederated Tribes of Umatilla Reservation v. United States, 14 Ind. Cl. Comm. 14. Where historical data has been lacking in these matters before the Commission, it has taken evidence of other kinds into consideration, including the nature of the country, its resources, subsistence economy of the Indians, and information in the record pertaining to their Indian neighbors. Washoe Tribe of Nevada and California v. United States, 7 Ind. Cl. Comm. 282. The cultural and economic life of the tribe must be considered. Samish Tribe v. United States, 6 Ind. Cl. Comm. 159.

Witnesses in this matter have stressed locations of habitations of these Indians, indicating that they existed throughout the claimed area. Most of these were identified in comparatively recent times. The Commission has taken such locations into consideration as possibly indicative of tribal habits and occupancy "for a long time," particularly those identified with the eighteenth century and shown in Petitioners' Map marked Exhibit No. 434 which covers the period through 1796, and Petitioners' Map 435 which covers the period 1797-1876. However, habitation is not a sole requirement for establishing such exclusive use and occupancy as would ripen into Indian title. In recognition of the habits of these particular Indians as hunters of

game and gatherers of natural products of the soil, we have found that their use and occupancy of areas used for their various economic pursuits ripened also into valid Indian title. From the time of the first reports available, and extending through most of the American period, there are continuing and consistent documents establishing that these Indians habitually traversed the southern portions of New Mexico and Arizona into Mexico. They maintained habitats in Mexico. They hunted and gathered foodstuffs in Mexico. And there is recurring evidence of their raids against Mexicans and Mexican settlements -- a part of an economic fact of life for these Indians in their business of obtaining horses and goods, often in support of trading activities with white merchants at Santa Fe and elsewhere. This evidence of traversing such lands regularly in pursuit of an economic way of life constitutes substantial evidence of continuous and exclusive use and occupancy in support of their claim of aboriginal Indian title to the lands so traversed. We adopted similar findings under somewhat analagous facts as to occupancy in Omaha Tribe of Nebraska v. United States, 4 Ind. Cl. Comm. 662. Our conclusion in the instant case is consistent with our decisions whenever this condition is found to exist. This view is typified by our language in Pawnee Indian Tribe of Oklahoma v. United States, 5 Ind. Cl. Comm. 268, at p. 279:

> "It is true that in 1829 and 1833, the permanent villages of the Pawnees were all located on the Platte and Loup rivers in Nebraska, but the evidence shows they

> obtained their subsistence largely from hunting. We think that such lands south of the Platte River as were used in connection with their hunting and controlled by the Pawnees should be considered as being held under Indian occupancy and use title the same as their village areas. It is noted that the Commissioners who dealt with the Pawnees in 1833, estimated their number at 12,000, so it is not difficult to see how such a powerful and numerous tribe would of necessity occupy in Indian fashion and control a large territory as hunting grounds. That the Pawnees had a concept of ownership of such lands and some idea as to the extent thereof, is shown by their reactions when the defendant assigned a portion thereof to the Delawares ....."

In our determination of the boundaries of the lands to which we have found the Petitioners have established valid Indian title we have also relied upon the basis of criteria defined in Snake or Piute Indians v. United States, 125 C. Cls. 241, at p. 254, as follows:

> "..... The problem of establishing such exclusive occupancy title by immemorial possession as of a date too remote to admit of testimony of living witnesses, and where no deeds or patents exist, is not a simple one. At best, the ultimate fact of beneficial ownership by exclusive possession and occupancy can only be inferred and found from many separate events and a variety of documentary material such as reports of early explorations, maps by explorers or Government engineers, reports of military expeditions, letters and contemporaneous reports of Government representatives writing from the areas in question, annual reports of the Secretaries of War prior to 1849, and of the Secretaries of the Interior after that date, Senate and House Executive documents, contemporary newspaper articles, evidence of an expert type from anthropologists and historians, correspondence in the records of various Government departments and officials with reference to or having a bearing on the tribe or the area in question, and, in fact, anything having any relevance which can be unearthed ....."

There was no act, treaty or agreement by the United States which constituted its recognition of title in Petitioners or others to the claimed lands. There was no treaty or purchase, cession, agreement or contract which became operative between the United States and any of the Petitioners. Likewise, the Petitioners did not consent to the taking of the lands described in our Finding No. 13(a), nor did the United States pay to them any compensation for such taking. However, the Defendant has the right to a future hearing to present evidence herein, if any, of an offset or counterclaim as may be authorized under the provisions of the Indian Claims Commission Act.

From a consideration of all the testimony and of the documents accepted as exhibits in this proceeding, we have held that the Indian tribes or bands represented by the Petitioners, constituting one identifiable Indian group, held aboriginal title to the lands described in our Finding No. 13(a) which are located within the present States of New Mexico and Arizona. We have excluded any lands which may be located within said boundaries which are within the areas of confirmed Spanish and Mexican land grants. This exclusion conforms to the rule laid down in Pueblo de Cochita v. United States, 7 Ind. Cl. Comm. 422 (1959); Pueblo de la Isleta v. United States, 9 Ind. Cl. Comm. 619 (1959), aff'd. 152 C. Cls. 866 (1961), cert. denied 368 U. S. 822 (1961). If it is found there were such areas within the boundaries of the lands described in Finding No. 13(a), a determination of the boundaries and number of acres contained in such grants will be made by the Commission at a future hearing.

The United States acquired sovereignty over the claimed area by the terms of the Treaty of Guadalupe Hidalgo which was ratified February 2, 1848 (9 Stat. 922), and by virtue of the Gadsden Purchase dated December 3, 1853 (10 Stat. 1031). Possession of the lands which Petitioners claim were taken from the aforesaid tribes as holders of the aboriginal title was actually acquired by the United States by force of arms on September 4, 1886, the date of surrender of the Chiricahua Apaches under Geronimo, and when the members of the tribe, as prisoners of war, were removed from occupancy of lands in the States of New Mexico and Arizona and transported to the State of Florida. We have found that date to be the date of taking of the area described in our Finding No. 13(a) by the United States without payment to Petitioners of any compensation.

Indian title is that title which is established by exclusive use and occupancy "from time immemorial" or "for a long time." In this instance the claimant Apaches, though forcibly and temporarily ejected by actions of the United States from portions of their residence from time to time (and though small portions thereof were held adversely on what appears as a permanent basis), never ceased to proclaim their right of ownership. Furthermore, they employed every means available to them (raids, warfare, occupancy when possible, protests) to regain possession and to oust the trespasser. They engaged in no act of relinquishment or abandonment. They were temporarily repulsed, defeated, deprived and ousted, but the fight continued with ferocity and

erseverance until further effort became impossible - with the final conquest and complete surrender under Geronimo on September 4, 1886. Until that event the United States was not completely or permanently in continuous, open, notorious possession of these lands. From that date further resistance by the Apaches ended. We find no prior date for which this conclusion can be reached.

So long as wild game was plentiful and sources of other food readily accessable, the traditional Apache way of life satisfied these Indians. However, they had early exposure to the more advance accouterments of the white man, and they soon came to covet and to seek for themselves such aids to living as horses, firearms, utensils and wearing apparel. When game and other food became less available, these possessions of the white man became more attractive, and means of engaging in some commercial exchange to acquire these items was sought. The answer was found in marauding and raiding to procure the good of one white man to trade for the goods of another white man.

Like most tribes or nations of American Indians, these Apaches had not developed an organized society, culture and economy which could match the more advanced civilization of the invading white man whose numbers and superior political, cultural and economic practices demanded that he obtain additional natural resources and land. The Indian was unable to adapt his society to the challenge of a more advanced civilization.

In fact, he seemed to resist change. He sought then, even as many of his descendants do today, to preserve his traditional culture and way of life, resisting adoption of new social and economic practices.

In reality, the Indian was no match for the aggressive, superior capabilities of the white intruders. He struggled valiantly to maintain a status quo that was irresistibly destined for defeat. It was inevitable that he could not withstand the aggressive pressures of this new civilization, nor could he match military might of advanced weapons and methods. And his fate would become that of conquered peoples throughout history -- except for a certain benevolence upon the part of his conqueror -- and certainly, except for the Indian Claims Commission Act.

In light of our findings and conclusions, we find it unnecessary for us to decide questions raised by the pleadings and discussed to some extent by witnesses as to whether (a) the United States breached treaties or agreements, (b) the United States practiced fraud or duress, (c) the United States was guilty of unconscionable settlements and agreements or engaged in dealings with these Indians which were not fair and honorable, or (d) there was unilateral mistake in the agreements. (See 25 C.F.R. 503.22(f)(1))

Unless a motion is made within thirty days from the date of this decision to determine the question of whether the area described in our Finding No. 13(a) 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 September 4, 1886. The said valuation hearings have been placed on the Commission's Trial Calendar for August 20, 1969.

T. Harold Scott, Commissioner

Concurring:

John T. Vance, Chairman

W. M. Holt, Commissioner

Jerome K. Kuykendall, Commissioner

Richard W. Yarborough, Commissioner