

BEFORE THE INDIAN CLAIMS COMMISSION

THE SAN CARLOS APACHE TRIBE OF ARIZONA; )  
 )  
 THE WHITE MOUNTAIN APACHE TRIBE OF THE )  
 FORT APACHE INDIAN RESERVATION: )  
 )  
 THE WHITE MOUNTAIN APACHE TRIBE OR GROUP, )  
 THE SAN CARLOS APACHE TRIBE OR GROUP, )  
 THE CIBECUE APACHE TRIBE OR GROUP, )  
 THE SOUTHERN TONTO APACHE TRIBE OR )  
 GROUP, and the several bands of each )  
 of them, ex. rel., respectively )  
 Clarence Wesley (White Mountain, )  
 Jess J. Stevens (San Carlos), Nelson )  
 Lupe, Sr. (Cibecue), and Ernest )  
 Cutter (Southern Tonto); )  
 )  
 THE WESTERN APACHE and each group and )  
 band thereof, ex. rel. Clarence )  
 Wesley, Jess J. Stevens, Nelson )  
 Lupe, Sr., and Ernest Cutter, )  
 )  
 THE NAVAJO TRIBE OF INDIANS, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 22-D

Docket No. 229

Decided: June 27, 1969

Appearances:

Abe W. Weissbrodt, with whom was I.S. Weissbrodt, Attorneys for Plaintiff in Docket No. 22-D.

Harold E. Mott, with whom were Norman M. Littel and Leland O. Graham, Attorneys for Plaintiff in Docket No. 229.

Milton E. Bander, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant in Docket No. 22-D.

Walter A. Rochow, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant in Docket No. 229.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the Opinion of the Commission.

On February 3, 1948, the Apache Nation, ex rel., Fred Pellman, et. al. and the Apache Tribe of the Mescalero Reservation filed a claim under the Indian Claims Commission Act against the United States on the basis of original Indian title for land in Arizona, New Mexico and Texas, including the area which is now the subject of the claim in Docket No. 22-D.

Thereafter, on October 18, 1950, a first amended petition was filed in Docket No. 22. The plaintiffs in Docket No. 22-D were added to the title as additional parties plaintiff. On May 25, 1959, the Commission entered an order directing the severance of several claims from Docket No. 22, including the Yavapai claim subsequently filed as Docket No. 22-E and the Western Apache claim subsequently filed as Docket No. 22-D.

The Western Apache "Second Amended Petition" in Docket No. 22-D was filed May 25, 1959. After the trial of the Yavapai case, the Commission entered an order on October 10, 1961, severing the northeast portion of the area claimed in that case and assigned it Docket No. 22-J; the petition for the Northern Tonto group in Docket No. 22-J was filed October 10, 1961. The plaintiffs in Docket Nos. 22-D and 22-J claim separate but contiguous areas.

The Navajo Tribe of Indians, plaintiff in Docket No. 229, alleges aboriginal title to some of the same lands claimed by both the Western Apache in Docket No. 22-D and the Northern Tonto in Docket No. 22-J. Consequently, Dockets 22-D, 22-J and 229 were consolidated for trial by order of the

Commission dated April 24, 1964. Although consolidated for purposes of trial, the claims in Dockets 22-D and 22-J are not conflicting and will be treated separately by the Commission.

Under the "Second Amended Petition," plaintiffs in Docket No. 22-D allege that the defendant, the United States, wrongfully took their aboriginal lands without the payment of compensation therefor and seek compensation for the wrongful taking of these lands under Section 2(4) of the Indian Claims Commission Act.

The claimed lands in Docket No. 22-D are in the southeastern portion of the present state of Arizona and comprise approximately 9,545,000 acres. This area covers a distance of about 180 miles from north to south and 140 miles east to west. It extends from Hay Lake and Snowflake, Arizona, on the north to the Winchester, Pinaleno and Rincon Mountains in the south, and from the Mazatzal, Pinal and Santa Catalina Mountains on the west to the San Francisco and Blue Rivers on the east.

Defendant disputes the validity of plaintiffs' title to large portions of the claimed area on both the north and south as well as to some smaller areas on the eastern and western boundaries. The Navajo Tribe of Indians, plaintiff in Docket No. 229, is also asserting aboriginal title to approximately 1,435,000 acres of area claimed in Docket 22-D north of the Mogollon Rim.

Defendant admits that the Western Apache (Docket 22-D) used the southern part of the claimed area for hunting and gathering but contends that the area

was used primarily as a base for raiding activities to the south and southeast and that the hostile Papago and Chiricahua Indians continued to range in this area. Likewise, defendant contends that the area north of the Mogollon Rim was a common hunting and gathering area for the Western Apache, the Tontos and the hostile Navajo. Defendant also concludes that some areas along the western boundary of the claim were used by Yavapais rather than Western Apache, that the identity of the Indians using a triangular shaped section in the northwest part of the claimed area is unknown, that a section along the eastern boundary of the claimed area was used by the Mogollon Apaches, and that a corridor of land along the Upper Gila River from Bylas to Solomon was hardly used at all.

The Court of Claims has said that "...aboriginal title must rest on actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of property." Sac and Fox Tribe of Oklahoma, et. al. v. The United States, 161 Ct. Cls. 189, 201, 202 (1963), cert. denied, 375 U.S. 921. With these elements in mind, we believe Western Apache plaintiffs have proven aboriginal title to the disputed area on the south as described generally by Dr. Aschmann, one of defendant's expert witnesses, and noted in our Finding No. 4. The Western Apache drove the Sobaipuri Indians from this area in 1762. According to the testimony of defendant's expert witness, Dr. Aschmann, no other Indians occupied this area even temporarily or seasonally after 1775. The hostile presence of other Indians in this area after that time was for retaliatory raiding and did not result in any permanent or seasonal use. Such hostile sporadic incursions in the area does not prevent

the Western Apache from asserting their aboriginal title thereto. In addition to the testimony and evidence presented by plaintiff's experts, Mr. Schroeder, defendant's witness, testified that the Western Apache had seasonal campsites in this area. The intermittent or seasonal use of this same area by the Western Apache for hunting and gathering in fulfilling domestic needs is sufficient to satisfy the continuous use and occupancy necessary in proving aboriginal title. The Spokane Tribe of Indians, et. al., v. United States, 163 Ct. Cls. 58, 66 (1963), The Confederated Tribes of the Warm Springs Reservation of Oregon v. The United States, 177 Ct. Cls. 184 (1966). The raiding activities of the Western Apache from this area would have no adverse effect on their aboriginal title thereto nor would retaliatory raiding by the Papago or Chiricahua render Western Apache occupation of this area non-exclusive. The Omaha Tribe of Nebraska, et. al., v. United States, 4 Ind. Cl. Comm. 627, 649-650 (1957). The period of almost a century from 1775 until these Western Apache lands were taken in the 1870's was of sufficient duration to establish aboriginal title.

Plaintiffs have also proven aboriginal title to the corridor of land along the upper Gila River extending from Bylas to Solomon. Even assuming the factual correctness of Dr. Aschmann's statement that this area was barren and slightly or scarcely used, although exclusively, it has long been held that barren areas which a particular group of Indians may only use as a land bridge between more productive aboriginal areas are also considered part of that group's aboriginal title lands. Alcea Band of Tillamooks v. United

States, 103 Ct. Cls. 494, aff'd. 329 U.S. 40 (1946).

With respect to the area along the western boundary generally extending from the juncture of the Verde and East Verde Rivers south to Winkelman, Arizona, which the defendant would exclude, we believe there is substantial evidence showing this to be a traditional farming, hunting and gathering area for the Western Apache and that it was so considered by the Yavapai. We do not doubt that the Yavapai, who were friendly to the Western Apache, were seen in this area on occasion. However, the occasional Yavapai use of this area was not adverse or to such an extent so as to prevent the Western Apache from being considered the aboriginal owners. The Sac and Fox Tribe of Indians of Oklahoma, et al., v. The United States, supra, The Spokane Tribe of Indians, et al. v. The United States, 163 Ct. Cls. 58, 66 (1963).

We also disagree with defendant's exclusion from the Western Apache aboriginal title lands of the triangular shaped section in the northwest part of the claim just south of the Mogollon Rim and the area along the eastern boundary extending generally from Sierra Montosa on the north, south to Guthrie, Arizona. Here we have a question of the identity of aboriginal occupants. Plaintiffs say they were Western Apache. Defendant says the identity of the occupants is unknown. We think the evidence in the record clearly identifies the Western Apache as the most probable occupants. We believe the Indians who exclusively used and occupied the eastern boundary area, who have been identified as Mogollon Apaches by defendant's witness Mr. Schroeder, were part of the overall land using entity which we have termed Western Apache.

The disputed area north of the Mogollon Rim presents a different picture. Statements written by Grenville Goodwin (Plaintiff's Exhibit 413, Defendant's Exhibit AHS-57), an intensive student of the Western Apache on whom plaintiffs rely very heavily, indicate that in the northern part of the claimed area the extent of exclusive use and occupancy by the Western Apache falls short of that claimed by the 22-D plaintiffs. There is substantial evidence in this case that the Navajo Tribe, plaintiff in Docket No. 229, had been using at least part of this area for some time prior to 1870. The archaeological data in Navajo Exhibits 520-0 and 520-P as well as the ethnological evidence presented in Docket No. 229 by the Navajo Tribe convinces us that the northern boundary of the Western Apache aboriginal area should be some distance south of that claimed by 22-D plaintiffs. For these reasons we have placed the northern boundary south of the area used by the Navajos; we include only those areas exclusively used and occupied by the Western Apache.

The defendant proposes November 9, 1871, the date of President Grant's Executive Order establishing the White Mountain Indian Reservation as the "acquisition" date of the Western Apache aboriginal lands. Plaintiffs suggest December 14, 1872, the date President Grant by Executive Order enlarged the White Mountain Indian Reservation by adding to it a described tract known as the "San Carlos division of the White Mountain Indian Reservation." Of the two dates, December 14, 1872 is the preferable one corresponding with the establishment of the larger reservation to contain all the Western Apache. However, it was not until the conclusion of General Crook's

1872-73 campaign that the Indians of Central Arizona were concentrated on the various reservations, so in conformity with our conclusions in Docket Nos. 22-E and 22-J, May 1, 1873 is selected as the date of extinguishment of the Western Apache aboriginal title.

Defendant has also adduced the general argument that plaintiffs' proof of aboriginal title is defective because they have failed to delineate specific and separate tracts for each band composing the Western Apache group. The Confederated Tribes of the Warm Springs Reservation of Oregon v. The United States, 12 Ind. Cl. Comm. 664, 727 (1963), is quoted as authority for this position. Needless to say, since the filing of defendant's brief, the Commission, in response to the direction of the Court of Claims (177 Ct. Cls. 184), has modified the language in the Warm Springs case so that defendant's argument is no longer applicable, The Confederated Tribes of the Warm Springs Reservation of Oregon v. The United States, 18 Ind. Cl. Comm. 354, 358 (1967). The anthropological evidence supports a finding of sufficient unity among these groups to make "Western Apache" a single land using entity.

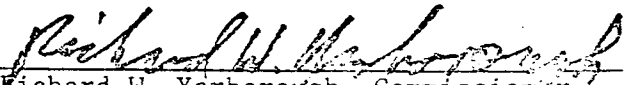
In summary, the Western Apache, as an identifiable group of American Indians and a single land using entity, have proven "...actual, exclusive and continuous use and occupancy..." of the area described in Finding No. 11 herein for a long time prior to the loss of these lands.

Therefore, based on the Findings of Fact and legal conclusions hereafter set forth in this case, as well as the record as a whole, we conclude that the Western Apache, as an identifiable group of American Indians, held aboriginal title to the lands described in Finding of Fact No. 11 herein, and that the Western Apache did not voluntarily abandon any of the lands so held.

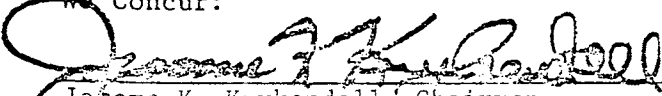


We also conclude that the Western Apache aboriginal title lands outside the enlarged White Mountain Reservation established by the Executive Orders of November 9, 1871, and December 14, 1872, were wrongfully taken by the United States on May 1, 1873; that by successively diminishing the enlarged White Mountain Reservation by Executive Orders dated August 5, 1873, July 21, 1874, April 27, 1876, January 26, 1877, March 31, 1877, and December 22, 1902, the United States wrongfully took from the Western Apache additional aboriginal title lands as described in the said Executive Orders as of the dates of the Orders; that the Western Apache aboriginal title lands were taken by the United States without the payment of compensation; and that under Section 2(4) of the Indian Claims Commission Act plaintiffs in Docket 22-D are entitled to recover from the defendant on behalf of the Western Apache the fair market value of these lands so taken as of the above dates. An order will be entered accordingly.

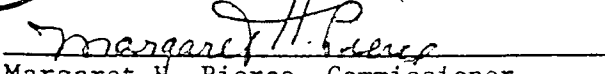
As this opinion and the findings of fact upon which it is based involve both Dockets 22-D and 229, they are applicable to both dockets insofar as the claim of the Navajo Tribe, plaintiff in Docket 229, overlaps the area to which the Western Apache held aboriginal title as determined by the Commission in Finding of Fact No. 11 herein.

  
Richard W. Yarborough, Commissioner

We Concur:

  
Jerome K. Kuykendall, Chairman

  
John T. Vance, Commissioner

  
Margaret J. Pierce, Commissioner

  
Brantley Blue, Commissioner