

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,)	Docket Nos. 30 and 48
CASPER CALIO,)	
)	
THE NAVAJO TRIBE OF INDIANS,)	Docket No. 229
)	
Plaintiffs,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: April 1, 1970
Appearances:

Abe W. Weissbrodt, Attorney for
Petitioners in Dkt. Nos. 30 and 48

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

Norman M. Littell, Esquire, and Leland
O. Graham, Esquire, Attorneys for the
Navajo Tribe of Indians, Docket No. 229,

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

OPINION OF THE COMMISSION

Chairman Kuykendall delivered the opinion of the Commission.

The Apache plaintiffs and the Navajo Tribe of Indians are each asserting overlapping Indian title claims to a tract of land located in the southwestern part of the State of New Mexico.^{1/} No other Indian tribe is claiming this overlap area.

The overlap area is included in, and forms a part of, that tract originally claimed by the Apache plaintiffs in the companion case, The Fort Sill Apache Tribe of the State of Oklahoma, et al., v. United States, 19 Ind. Cl. Comm. 212 (1968). On January 31, 1968, and prior to our decision in the Fort Sill case, the Commission granted a "Motion To Separate The Claims To The Overlap Area", whereby the overlap area was removed from the Fort Sill case and assigned the docket numbers herein.

As a result of our Fort Sill decision a part of the southern boundary of the overlap area now coincides with the northern boundary of the lands found to have belonged to the same Apache plaintiffs in the companion case. Except for the Navajo claim to the overlap area, all Apache title claims to the subject tract could have been resolved in the Fort Sill case. Our adjudication herein determines with finality the northern boundary of the tract awarded to the Apaches in the Fort Sill case. The Fort Sill record is the record in this proceeding, with the addition of that evidence offered by the Navajos in Docket No. 229. In like manner, the date of taking in the Fort

^{1/} Specifically, the Apache plaintiffs are seeking recovery under section 2(4) of the Indian Claims Commission Act (60 Stat. 1050, 25 U.S.C. §70a) for a non-treaty taking of their lands without the payment of any compensation. The Navajo seek recovery under section 2(3) of the Act, claiming that they were paid an unconscionably low consideration for the cession of all of their lands under the Navajo Treaty of June 1, 1868, 15 Stat. 667.

Sill case, September 4, 1886, applies herein with respect to the extinguishment by the United States of whatever interest the Apaches may have enjoyed in the overlap area.

As early as the 1620's the Apaches were observed in a broad area between the San Mateo Mountains and the western border of New Mexico. The southern portion of the overlap area, and in particular the Plains of San Augustin, was an avenue of travel for the Apaches not only between their village sites but in conducting trading activities. As early as the 1700's the Apaches were trading Mexican cattle at trading posts as far away as Santa Fe. Cordero's report in 1796, Cortez' history in 1799 and Escudero's in 1832 support Apache use and occupancy of this area.

The record herein discloses the existence of Apache abodes in the San Augustin Plains area of the southern sector in 1755, 1764, 1769, 1788, 1856, 1864. Apaches were also living east of said Plains along the Rio Grande River and in the Magdalena Mountains in 1660, 1675, 1680, 1776, 1791, 1792, 1793, 1799. New habitats to the west of said Plains were established by the Apaches between 1851 and 1868. The reports of American agents and military personnel confirm the Apache presence in the southern sector of the overlap area over an extended period of time through the 1860's. The record in support of exclusive Apache use and occupancy in the northern sector is more obscure.

The early explorers of the Spanish and Mexican periods reported that some Apache bands were moving about in the area south of the

pueblo of Acoma, down through the Magdalena Mountains, and in the northern portion of the subject lands. Later, the presence of other Indians, particularly the Navajos, is indicated.

Commencing about 1700 the Navajos in greater numbers began to venture southward into north central New Mexico, but it was not until after the middle of the nineteenth century that they began to appear north of and within the northern sector of the overlap area. During the Spanish and Mexican period, the Navajos constantly raided and terrorized the Indian pueblos and Spanish settlements just north of the overlap area. With the advent of American sovereignty in 1848, strenuous efforts on the part of the United States military authorities finally quelled further Navajo raiding activity. The southern movement of Navajos, individually and in groups, became more pronounced during the so-called "flight period" (1858-1868), a time when they were fleeing in all directions from the troopers to escape incarceration at Bosque Redondo (Fort Sumner). While the Navajos were moving into the northern reaches of the overlap area, the Apaches were exiting southward to avoid contact with them.

The Navajo Tribe has presented for our consideration a great deal of archaeological evidence, including extensive tree ring data, in order to establish the validity and the antiquity of Navajo habitats and sites within the overlap area. In most instances, however, many of the alleged Navajo sites proved to be non-Navajo, or at least their identity was conjectural. Other sites seemed to be temporary

habitats that were utilized during the "flight period".

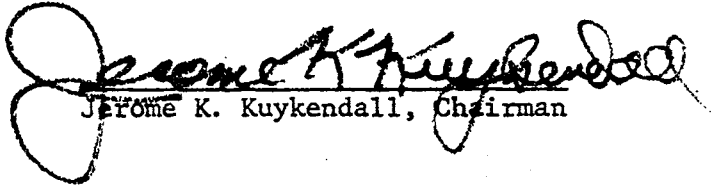
However, the Navajo presence in the northern portion of the overlap did cause the Apaches to leave and to recede further south nearer the Apache homeland. Even after the Navajos had settled their differences with the United States under the Treaty of January 1, 1868 (15 Stat. 667), and had begun to move on to their new reservation northwest of the overlap area, there is little if anything in the record to show that prior to the 1886 date of taking the Apaches made any serious attempts to reclaim the northern portion of the subject tract.

From a consideration of all the evidence, the Commission is of the opinion that the Apache plaintiffs, as of September 4, 1886, the applicable date of taking, held Indian title to that portion of the overlap area which is described by metes and bounds in our Finding of Fact No. "14". We further conclude that on the aforementioned date of taking the United States extinguished the plaintiffs' Indian title to said lands without the payment of any compensation.

As to the balance of the overlap area, which is roughly the northern portion thereof, the evidence does not support Apache title claims. Furthermore, we think that the failure of the Apaches to return to the northern portion during a twenty year period prior to

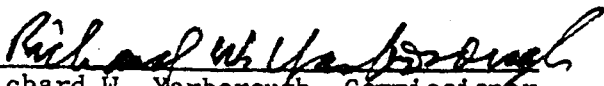
the 1886 date of taking amounts to a relinquishment or abandonment of whatever rights they might have had to the balance of the overlap area.^{2/}

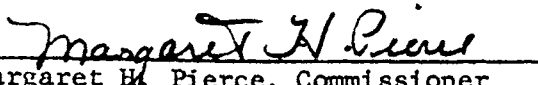
This case shall now proceed to a determination of the acreage of the lands awarded to Apache plaintiffs, the fair market value thereof as of September 4, 1886, and all other issues that will determine the extent of defendant's liability to the plaintiffs.

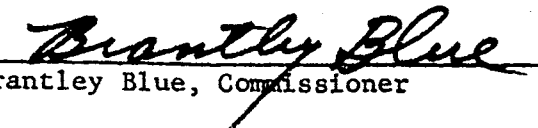

Jerome K. Kuykendall, Chairman

Concurring:

John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

^{2/} Any final determination of Navajo aboriginal rights to the northern portion of the overlap area, i.e., that part not awarded to the Apache plaintiffs herein must await the Commission's adjudication of the Navajo principal claim in Docket No. 229.