

BEFORE THE INDIAN CLAIMS COMMISSION

THE LIPAN APACHE TRIBE and bands thereof, ex rel., Pedro Mendez and Philemon Venego;

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 Lipan Apache Tribe and bands thereof, and the Mescalero Apache Tribe and bands thereof,

Plaintiffs,

THE TONKAWA TRIBE OF INDIANS OF OKLAHOMA, amalgamated with and successors in interest to the Texas Tonkawa Tribe, and the Texas Lipan Tribe, and the Texas Karankawa Tribe,

Second Intervenors,

v.

Docket No. 22-C

THE UNITED STATES OF AMERICA,

Defendant

Decided: March 14, 1975

Appearances:

Abe W. Weissbrodt, Attorney for Plaintiffs, I. S. Weissbrodt and Ruth W. Duhl, of Weissbrodt & Weissbrodt, were on the brief.

Tom Diamond, Attorney for Second Intervenors.

William F. Smith, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The claims asserted herein originally appeared in a petition that was filed February 3, 1948, on behalf of the Apache Nation, alleging aboriginal title to a vast area of land in present day Texas, New Mexico, Arizona, and portions of adjoining states, and claiming damages under Section 2 of the Indian Claims Commission Act for the uncompensated taking thereof by the defendant. Said petition, Docket No. 22, was subsequently amended on October 18, 1950, to include other tribes or bands of Apachean Indians, as well as individuals appearing in a representative capacity. On May 25, 1959, by order of the Commission, several claims were severed from Docket No. 22 and a "Second Amended Petition", designated Docket 22-C, was filed by the Apache Tribe of the Mescalero Reservation, on behalf of the Lipan Apache Tribe and the Mescalero Apache Tribe, alleging the loss of aboriginal title lands in south and west Texas. On August 6, 1965, the Commission granted the defendant's motion to dismiss the claims herein for failure to state a claim under our Act, on the basis that the Lipans and Mescaleros had no aboriginal rights to Texas lands because the Republic of Texas had never acknowledged that such rights existed. Lipan Apache Tribe v. United States, 15 Ind. Cl. Comm. 532. On appeal, the Court of Claims reversed the Commission and remanded the case for the purpose of determining by trial two principal issues, namely, the extent, if any, of Lipan and Mescalero aboriginal title to lands in Texas, and, whether under the circumstances alleged by the plaintiff by which such aboriginal titles were extinguished, the United States can be held liable for damages under our act. Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967).

On May 20, 1969, the Pueblo de San Antonio de la Ysleta de Sur, also known as the Tigua Indian Community, on behalf of itself and the Senecu Piros, Mansos, and Suma Indians, filed an application to intervene in this docket. In its application the intervenor asserted tribal ownership to lands in west Texas including certain portions that were claimed by the plaintiff on behalf of the Mescalero Apaches, and claimed damages for the uncompensated taking of said lands by the United States, as well as damages for the subsequent loss of hunting, fishing, mineral, and water rights. The Commission approved the intervenor's application on November 5, 1969. 22 Ind. Cl. Comm. 1 (1969). However, as a result of the decision in the case of Kiowa, Comanche and Apache Tribe v. United States, 202 Ct. Cl. 29 (1973), cert. denied, 416 U.S. 936 (1974) [rev'g Docket 257, 24 Ind. Cl. Comm. 405 (1971); 26 Ind. Cl. Comm. 101 (1971)], the Commission reconsidered its previous order granting intervention and on January 15, 1975, ordered the intervenor's claims to be dismissed. 35 Ind. Cl. Comm. 302 (1975).

The issues now before the Commission came on for a hearing on November 23, 1970. During the course of the hearing the parties placed into the record an enormous amount of documentary material in support of their contentions. In addition, each side relied heavily on the extensive reports and supporting testimony of expert witnesses.

The hearing was concluded on November 25, 1970, with the parties being charged with briefing the issues.

On January 25, 1972, the Tonkawa Tribe of Indians of Oklahoma filed an application to intervene in this case, claiming aboriginal title to all the land herein claimed by the plaintiff on behalf of the Lipan Apaches, by reason of the subsequent amalgamation of the Texas Lipan Tribe with the applicant and the latter's succession to Lipan interest in the claim. The Commission granted the Tonkawa motion to intervene on April 20, 1972, for the sole purpose of permitting the Tonkawa Tribe to establish, on the present record, its rights of successorship to whatever Lipan interest the plaintiff could show in the subject matter of this lawsuit. Based on the record as it now stands the Commission has concluded that the Tonkawa intervenor has failed to prove rights of successorship in the Lipan interests in this case, and that the intervenor's petition should be dismissed. ^{1/}

^{1/} Our conclusion that the intervening Tonkawa Tribe is not the successor in interest to the aboriginal Lipan Apache Tribe does not affect whatever rights those members of the Tonkawa Tribe who are descendants of members of the aboriginal Lipan Apache Tribe may have in the outcome of this lawsuit. Since the principal plaintiff has brought the instant Lipan claim in a representative capacity, any award should ordinarily benefit as a class all eligible Lipan descendants wherever situated. However, who can actually participate in any such award is a question for congressional and administrative determination Peoria Tribe of Indians of Oklahoma v. United States, 169 Ct. Cl. 1009 (1965), modifying and affirming Docket 314-Amended, 12 Ind. Cl. Comm. 392 (1963). See also The Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570 (1967) affirming in part and reversing in part Docket 93, 15 Ind. Cl. Comm. 267 (1965).

The combined tracts claimed by the plaintiff on behalf of the Lipan and Mescalero Apaches are contiguous and are in excess of 60 million acres. They include, generally, all of that land in Texas south and west of the Colorado River as far as the Rio Grande River and the State of New Mexico. A more detailed description of the overall claimed area is set out in the Commission's finding No. 3.

At the 1970 hearing, the plaintiff sought to prove that the Lipan and Mescaleros did in fact aboriginally own some 60 million acres of Texas land until February 1, 1881, when the United States, by force of arms, drove these Indians from their ancient lands and extinguished their Indian titles. Apart from challenging the essential facts of Lipan and Mescalero aboriginal titles to land in question, the defendant has again fallen back on the same legal defense which the Court of Claims rejected in the recent appeal--namely, that no Indian tribes were accorded aboriginal rights to any lands in Texas during that period of history when Texas was a republic. The law of the case now being to the contrary, the Commission has no valid reason not to follow it. Thus, if it can be shown that the Mescalero or Lipan Apache Tribes possessed Indian title to any lands in Texas, and that the United States was either directly or indirectly responsible for the subsequent loss of such Indian title, the plaintiff has made a case under our act. We think that the plaintiff has made a case for both the Lipan and Mescalero Apaches, but not to the extent as contended.

The early history of Texas and the surrounding areas of the vast southwest shows that the initial white contact with the aboriginal occupants thereof was accomplished through the efforts of the 16th century Spanish conquistadors and Spanish missionaries.

In 1541, Coronado, the Spanish explorer, found Apache Indians on the extensive plains of what is now eastern New Mexico and west Texas. It was not until the late 1600's and early 1700's that the Spanish missionaries in old Mexico made serious efforts to reach those Indian tribes residing north of the Rio Grande River. By 1718, missionary zeal had established a new Spanish mission and presidio well above the Rio Grande at present day San Antonio, Texas. It was from the San Antonio mission that the first genuine contact with the Lipan Apaches took place.

Prior to 1718, the Lipan Apaches had been living well north of San Antonio on the upper reaches of the Colorado, Brazos, and Red rivers. However, there had begun a gradual but steady movement southward by the Lipans into the San Saba and Llano river region just west and northwest of San Antonio. This Lipan migration was occasioned by the warlike efforts of the Comanches, a relatively large and volatile tribe of nomads who would (insofar as other Indians are concerned) dominate the Texas scene for years to come.

Early Spanish records have little to report on the Mescalero Apaches. These Indians were living for the most part north of the 32d parallel of north latitude in the mountainous regions of eastern New Mexico. They were quite mobile and their raiding activities carried them considerable distances southward into west Texas and across the Rio Grande River into Mexico. The Mescalero

range is generally acknowledged to have been limited to that area between the Pecos and Rio Grande rivers. Like their eastern neighbor, the Lipans, the Mescalero usually avoided contact with the Comanches.

As the record shows, Spanish missionary efforts among the Lipan Apaches fell far short of expectations. Even though the Lipans frequented the San Antonio mission to the delight of the resident padres, their visits were prompted more for reasons of personal safety than spiritual enlightenment. The nearby presidio offered sanctuary and some protection from the more powerful and numerically superior Comanches, who were steadily and relentlessly forcing the Lipan Apaches out of the San Saba and Llano river region. In 1758, a Comanche war party wiped out the Spanish mission on the San Saba River near present day Menard, Texas. In the years that followed, the Lipans receded to the southern part of Texas as far as the Rio Grande River. In the 1760's at the behest of these Indians, the Spanish established several new missions in the southern part of the claimed area. Under hostile attacks by the Comanches and their allies, these missions ultimately failed. Thereafter, until Mexico won its freedom from Spain in 1821, the Lipan Apaches, who numbered anywhere from 500 to 700 persons, were reported to be consistently in the southern part of the Lipan claimed area as well as in the neighboring Mexican provinces below the Rio Grande River.

Throughout the history of the Spanish period of sovereignty over the claimed area, the Lipan Apaches had been caught between opposing forces -- the entreaties and pacification efforts of the Spanish missionaries on one hand, and genuine extermination by the Spanish military on the other. Nevertheless, it was still the warlike Comanches that really disrupted Lipan

use and occupancy of a major portion of the claimed area. Coming down from the north, the Comanches drove southwestwardly along the famous "Comanche War Trail" until they had reached the Rio Grande River where they crossed and raided into Mexico. The "Comanche War Trail" soon became a well-travelled strip of land and a veritable no-man's area that was used by many tribes. As located, it effectively bisected the two areas claimed herein by the plaintiff.^{2/}

Other factors that minimized the extent of Lipan use and occupancy of the lands within the claimed area were the energetic colonization program launched during the Mexican regime (1821-1836), the Indian and land policies of the Republic of Texas (1836-1845), and the steady erosion of Lipan tribal strength through constant warfare with hostile Indians and the white settlers.

The colonization program of the Mexican government had been particularly effective in laying a solid foundation for new white settlement in eastern and central Texas, and within the Lipan claimed area. Over 16,280,000 acres of Texas land were granted during the Mexican regime and over 20,000 people were settled in and around the eastern portion of the Lipan claimed area.

The ascendancy of Texas to a republic in 1836 did not slacken the thrust of new settlement. Spanish and Mexican laws governing grants, colonization, minerals, mines, water and related property interests were retained by the newly founded Republic of Texas. By the time Texas entered the Union an additional 26,000,000 acres of land had been granted, and the total non-Indian

^{2/} As set forth in the Commission's finding 7(a) the evidence of record does not sustain Lipan or Mescalero aboriginal title at any time to that area covered by the Comanche war trail. Accordingly, this is not a situation wherein the Commission must decide the effect of repeated Comanche raiding activity over either Lipan or Mescalero aboriginal lands.

population approximated 142,000 persons. The contradictory policies of peace and war with the Indians that had been pursued by Presidents Houston and Lamar during the brief life span of the Texas Republic did little to protect alleged Indians rights to Texas soil. Vigorous land promotions continued, new settlements expanded, and the mutual antagonism between whites and Indians spawned bloody confrontations along an ever widening frontier.

On the other hand, by simple geographical location, the Mescalero Apaches, in their western haunts, had managed to escape relatively all the turmoil and strife that had been visited upon the eastern tribes. Even though the record fails to document Mescalero presence in Texas during the period of the Texas Republic, reports following the annexation of Texas indicate that the Mescaleros still ranged in those areas between the Pecos and Rio Grande rivers where they had been pictured during the latter part of the Spanish regime and during the Mexican period.

The 1845 annexation of Texas into the federal union ushered in a new chapter in the history of Indian-white relations--a chapter that would conclude with the forced removal in 1859 of almost all the Texas Indians to reservations and sites outside the state. With the State of Texas retaining ownership of its public lands, and with the United States assuming full responsibility in the field of Indian affairs, there began an era of extreme confusion. Texas, no longer concerned with an official Indian policy, yielded to the rising clamor to open its public lands for new settlement. The sentiment to remove the native tribes from the scene grew stronger. Without having control of the prime Indian resource, the land itself, the United States was powerless to deal effectively with the problem of the white encroachment upon traditional Indian hunting grounds.

On May 15, 1846, the United States concluded a treaty of peace with the several Texas tribes, including the Lipans. Under this treaty the Indians acknowledged that, henceforth, they would look to the Federal Government for protection. There had been some expectation that a new boundary would be fixed between the Indian country and the new white settlements. It never came to pass. Instead the 1846 Treaty called for the possible future location of a string of trading houses, agencies, and other posts along the frontier.

Following the termination of the two-year Mexican War in 1848, more federal troops were moved to the Texas frontier with a great number being deployed along the Rio Grande River to police the border against Indian raids into old Mexico. A new line of military forts and camps was established from Ft. Worth to Eagle Pass on the Rio Grande.

Gold discoveries in California and Colorado in 1849 and 1851 brought a new rush of white settlers, transients, land speculators, and other characters into and across Texas. Buffalo hunters, ranging far and wide across the Indian hunting grounds, decimated the diminishing herds of buffalo. The Indians, now greatly alarmed, stepped up raiding activity along the entire frontier.

By 1852, the growing feeling among state and federal officials that it was time to consign the Texas Indians to reservations began to take hold. Following initial efforts along this line, the Texas legislature in 1854 authorized the setting aside of some twelve leagues of public land for Indian reservations, the lands to be selected, surveyed, and administered by the Federal Government. The sites finally selected after consultation with

the Indians included an 18,576 acre site below Ft. Belknap on the Brazos River, an adjoining 18,576 acre tract intended for the use of those Indians west of the Pecos River, principally the Mescalero Apaches and the Lipans who were now hunting west of the Pecos River outside of the Lipan claimed area, and a third 18,576 acre tract on the Clear Fork of the Brazos River for the use of the Comanche Indians. The western Indians, however, refused to cross the Pecos River and their tract was simply added to the Brazos reserve.

The significance of the Lipan hunting west of the Pecos River in 1854, when considered with contemporaneous reports of smaller Lipan groups being encamped at other locations, points to the fragmentation of the Lipan Apaches as an effective tribal entity. A further sign of Lipan tribal deterioration during this same period is a depressing statistical report of the Lipan population, some 250 to 300 persons, wherein there was observed but few children and a disproportionate number of aged Indians. After January 1854 reliable reports confirm the continuing presence of Lipans living in Mexico south of the Rio Grande.

In the next few years events moved rapidly. By 1855, the Texas Indians, except for the Lipans in Mexico and the Mescaleros west of the Pecos River, were now on the assigned reservation. Even some southern Comanches had moved to their reservation. Filling the void, however, was a strong influx of degrading alien tribes, such as northern Comanches, bands of Delawares, Kickapoos, and Shawnees, and Mexican renegades. In the meantime,

military operations were being stepped up against the Mescalero further to the west. More new forts were soon constructed and, as the military frontier moved further westward, so did the white settlements.

As the Indian depredations continued, the wrath of the white settlers was soon directed toward the reservation Indians. Increasing political pressure, the formation of punitive vigilante groups, and sporadic attacks on the reservation Indians, finally convinced federal officials of the necessity of the removal of the Texas Indians from the reserves. In August of 1859, Agent Robert Neighbors led the reservation Indians out of Texas and across the Red River.

Reports of Lipan activity in the Lipan claimed area following their exodus in 1854 to Mexico, point to sporadic and inconsequential raiding activity along the Rio Grande River, mostly in the company of other renegade Indians from Mexico. Contrary to the plaintiff's contentions, we do not find these Lipan raids to reflect a serious effort to defend or regain lost tribal lands in Texas. For all intents and purposes, the Lipans had ceased to exist as a tribe sometime after 1854, having been compelled by circumstances beyond their control to remove themselves south of the border. Their subsequent history is simply one of further fragmentation and diminishing numbers.

Admittedly, the situation in Texas following annexation in 1845 was unusual with Texas owning all public lands and the United States in charge of Indian Affairs. However, under the solemn 1846 peace treaty, the United States had assumed the role of protector of those Texas Indians who participated in that treaty. In our judgment the Federal Government did not fulfill its

role as protector of the Indians. The evidence shows that the military forces of the United States played an active role in securing the rights of the white settlers, first by participating with the Texas authorities in the initial placement of the Texas Indians on a reservation in 1854 and, secondly, by finally removing them in 1859 to new locations outside the state. Under these circumstances we find that the aboriginal rights of these Texas Indians to Texas lands were effectively extinguished by the United States.

The fact that the Lipans fled to Mexico in 1854 and 1855 does not change their circumstances or alter their situation. The Lipan movement to Mexico could hardly be called a voluntary one and we do not find it to be voluntary or in any sense an abandonment of aboriginal rights. Instead, we find that the Lipan aboriginal rights were extinguished as effectively as if these Indians had been herded on the assigned reservation and eventually removed to the Indian Territory as were the other Texas tribes.

While it is not possible to fix the precise date of the taking of the Lipan Apache lands we must reject plaintiff's date of 1881 as wholly ^{3/} unrealistic and not supported by the evidence. It could be argued that 1859 is the cutoff date because the federal policy of removal had now been carried out. In the absence of a specific date of taking the Commission's choice must be somewhat discretionary, if reasonable under the

^{3/} Although the plaintiffs have sought the 1881 taking date since the trial of these claims, they had previously asserted a more reasonable 1859 taking date for both Lipan and Mescalero aboriginal title lands in the original petition and during oral argument on defendant's 1965 motion to dismiss.

circumstances.^{4/} We believe that November 1, 1856, is an appropriate date of the extinguishment of the Lipan aboriginal title to their Texas lands, since this date represents the approximate mid point between the initial Lipan settlement in Mexico in January of 1854, and the United States removal from Texas of all the Texas tribes east of the Pecos River in August of 1859. A description of the Lipan Apache aboriginal lands is set out in the Commission's finding 16(a).

Excepted from the above ruling is the Mescalero Apaches whose situation remained quite different. While military operations had been stepped up against the Mescaleros in West Texas in the 1850's, the results were minimal, since the principal habitat of this tribe was still the mountain ranges of southern New Mexico. It was not until 1862 that effective military operations in New Mexico against the Mescalero caused them to sue for peace and the situation began to change. By early 1863 hundreds of Mescaleros had journeyed to Ft. Sumner on the Bosque Redondo ready to accept reservation life. However, this was also the reservation

^{4/} In Gila River Pima-Maricopa Indian Community v. United States, 204 Ct. Cl. 137 (1974), aff'g Docket 228, 27 Ind. Cl. Comm. 11 (1972), the Court of Claims, in citing the Commission's discretion with respect to fixing a date of taking when no such precise date is available, stated the following:

The determination of the precise point is a matter of judgment, selection, and evaluation, resting on an overall appraisal of the several facts and factors. There is no text of statute or treaty or other document to supply the answers; nor is there any dispositive judge-created rule of decision. In these circumstances it seems immaterial whether the issue of the taking-date be called one of law, or of fact, or a mixed question; what is critical is that there must of necessity be discretion and leeway to pick a particular date within a reasonable range.

site for thousands of displaced Navajos who had been rounded up by Kit Carson during the same year. Greatly outnumbered by their ancient foes, the Mescaleros fled the reservation and returned to their old haunts. In the 1870's new measures were taken to return the Mescaleros to the reservation life. Finally, on May 23, 1873, President Grant issued an Executive Order establishing a permanent Mescalero Reservation in New Mexico.


The Commission has already determined that Mescalero Indian title to lands in New Mexico was extinguished on May 23, 1873, the date of the aforementioned Executive Order.^{5/} Since Mescalero Apache aboriginal land claims in west Texas are but an extension of their aboriginal land claims in New Mexico, Mescalero aboriginal rights in Texas were also extinguished following the issuance of the 1873 Executive Order.

A description of those lands aboriginally owned in west Texas by the Mescaleros, which ownership was extinguished without the payment of any compensation by the United States as of May 23, 1873, is set out in the Commission's finding 16(b).

This case shall now proceed for a determination of the acreage, exclusive of any confirmed Spanish, Mexican, or Republic of Texas land grants, and the fair market value of the Lipan and Mescaleros award areas

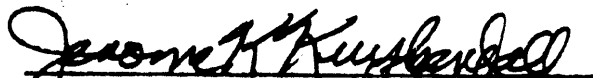
^{5/} Mescalero Apache Tribe v. United States, Docket 22-B, 17 Ind. Cl. Comm. 100 (1966).

as of their respective taking dates, and to a resolution of all other matters bearing upon the extent of the defendant's liability to the plaintiff.



Brantley Blue, Commissioner

We concur:



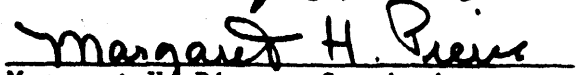
Jerome K. Kuykendall, Chairman



John T. Vance, Commissioner



Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner