

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,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 182

Decided: October 6, 1977

Appearances:

Weissbrodt & Weissbrodt,
Abe W. Weissbrodt, Attorneys for the
Plaintiffs, Howard L. Sribnick and
Richmond F. Allan were on the briefs.

Dean K. Dunsmore, with whom was
Assistant Attorney General Peter R.
Taft, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

Docket No. 182 consists of two types of claims, both of which arise out of the period during which the plaintiffs' ancestors were held as prisoners of war on the Fort Sill Military Reservation in Oklahoma.

One claim is for an accounting for funds and other property allegedly owned by plaintiffs' ancestors.

The second claim -- and the one which is the subject of this proceeding -- is that while held as prisoners of war on the Fort Sill Military Reservation the plaintiffs' ancestors acquired a compensable interest in certain lands of the said military reservation. The plaintiffs have made a claim under section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050 (1946), for the taking by the defendant of the title allegedly so acquired. Pursuant to the Commission's order of June 11, 1975, there has been no trial of this claim. Instead, the parties have submitted to the Commission documentary evidence, exhibits, rebuttal evidence, and objections thereto, upon which a determination of defendant's liability, if any, relative to these claims is to be made.

The succession of events upon which this claim is predicated are set forth in the accompanying findings of fact. In summary what occurred was as follows. During the years 1871 to 1875, the United States established reservations for the Chiricahua Apaches within their aboriginal homelands in Arizona and New Mexico. In 1876, the Government decided to move all Chiricahua Apaches from their ancestral homelands and settle them on the San Carlos Reservation. Periodically, parties of Chiricahua Apaches fled from this reservation and returned to their homelands where they engaged in hostilities. Government policy was to hold all members

of the tribe responsible for the acts of these insurgent parties. During 1885 and 1886, the government assembled the Chiricahua Apaches, men, women and children, living on the San Carlos Reservation, and waged war against and captured the insurgent groups. The final group apprehended was that under Chief Geronimo. On September 4, 1886, they surrendered after agreement that they would have the status of "prisoners of war." Immediately thereafter, 381 Chiricahua Apaches, including men, women and children from the reservation, were rounded up, seized and transported as prisoners of war to Forts Marion and Pickens in Florida where they joined an insurgent group of Chiricahua Apaches previously captured and transported there and where the Geronimo group was transported shortly thereafter. In April of 1887, the Chiricahua Apaches were transferred to the Mount Vernon barracks in Alabama, where they were confined until September 1894.

In 1890, the War Department decided for several reasons, including the declining health of the Apaches in the alien climate of Alabama, that they should be transferred to Fort Sill, Oklahoma, where they could be permanently settled. The War Department could not transfer the Apaches to Fort Sill, however, because of an 1879 statute, 20 Stat. 295, 313-14, expressly prohibiting the removal of any Apache Indians to the Indian Territory unless Congress first specifically authorized such removal.

In 1894, legislation was introduced permitting the transfer of the Apaches to Fort Sill. Opponents of the transfer to Fort Sill amended this proposed legislation to permit transfer to anywhere except

the Indian Territory. Finally, a compromise was reached in conference whereby the Secretary of War was authorized to transfer the Apaches ". . . to such military reservation or reservations as he may select," Act of August 6, 1894, 28 Stat. 233, 238. Under the authority of this legislation, the War Department transferred the Apaches to the Fort Sill Military Reservation in October 1894, with the intention of permanently settling them there as an agricultural community.

During the first few years of their confinement at Fort Sill, Congress appropriated funds to be used for purposes of erecting buildings and purchasing agricultural equipment and supplies for the Apaches' "maintenance and support" as "prisoners of war." Act of February 12, 1895, 28 Stat. 654, 658, and March 16, 1896, 29 Stat. 60, 64. The Apaches worked diligently during this period constructing dwellings, fencing grazing lands, raising crops, and, generally, constructing a viable agricultural settlement.

The Fort Sill Military Reservation and the Fort Sill wood reserve were originally part of the Kiowa, Comanche and Apache Reservation which had been established by two treaties dated October 21, 1867, 15 Stat. 581 and 15 Stat. 589. By Executive order of October 7, 1871, the Fort Sill Military Reservation, comprising 23,040 acres, was created out of the Kiowa, Comanche and Apache Reservation. The wood reserve, comprising 26,880 acres, was created out of the same reservation by Executive order of March 2, 1892. The United States took the remaining lands of the Kiowa, Comanche and Apache Reservation on June 6, 1900, and these lands were opened to settlement in 1901.

On February 17, 1897, representatives of the War and Interior Departments executed an agreement with the Kiowa, Comanche and Kiowa Apache Tribes providing for the addition to the Fort Sill Military Reservation of two separate tracts totalling 26,987.30 acres which these tribes understood were to be used, along with the original reservation, ". . . only for military purposes and for the permanent settlement thereon of the Apache Prisoners of War." Pursuant to this agreement, an Executive order was issued on February 26, 1897, adding this acreage to the Fort Sill Military Reservation ". . . for exclusive use for military purposes and for the permanent location thereon of the Apache Prisoners of War." By Executive order of September 20, 1901, 893.07 acres more were added to the Fort Sill Military Reservation "for the use and benefit of the Apache prisoners of war."

In 1894, when the War Department moved the Apache prisoners to Fort Sill, and in the years following until approximately the beginning of the year 1904, the expressed intention of the War Department was that the Apaches would remain permanently at Fort Sill. During the last years of the 19th century, the sole purpose of the military garrison at Fort Sill was to serve as a deterrent to possible Indian-white hostilities. In fact, the garrison's duties consisted of controlling the Apache prisoners and their intercourse with nearby whites. During these years the War Department anticipated that these duties would soon become unnecessary and that the military reservation at Fort Sill would then

no longer be needed. Plans were made that when the military reservation was vacated, the Department of the Interior would assume jurisdiction over the Apaches (at which time the Apaches would lose their status as prisoners of war) and that eventually the Apaches would receive individual allotments of the former military reservation lands. This is what the Apaches were led to believe by government officials with whom they dealt. This is what the Executive branch, including the President and the Secretaries of War and the Interior, intended, as evidenced by Executive orders and reports issued and statements made by and to the respective secretaries during this period. Finally, this is what Congress was told in reports and other communications from the Executive branch.

During this period, Congress, apparently cognizant of these intentions of the Executive branch, appropriated funds for the Apache prisoners in three acts: Act of March 3, 1901, 31 Stat. 1133, 1173; Act of June 28, 1902, 32 Stat. 419, 467-68; Act of February 18, 1904, 33 Stat. 15, 26. The language of the two latter acts was almost identical to that of the earliest act which appropriated funds ". . . for the support and maintenance of the Apache prisoners of war permanently established at Fort Sill, Oklahoma, under control of the War Department."

The War Department never did relinquish its use of Fort Sill or give up its control over the Apache prisoners. Initially, the military was better equipped to protect the Apaches from the dangers of white civilization and to protect the whites from feared outbreaks (which never

materialized) by the Apaches. At the beginning of the 20th century, the army decided that it needed a large artillery training facility. By 1905, authorities in the War Department had decided that the best facility available for that purpose was Fort Sill. Artillery units were first stationed at Fort Sill in 1905, and by 1910 Fort Sill had been designated the site of the army field artillery school which was in full-scale operation by 1911. Thus, in the first years of the century the War Department became increasingly opposed to relinquishing jurisdiction over the Fort Sill Military Reservation, but did not object to the Apaches remaining there. By 1910, however, it became apparent that the presence of the Apaches severely impeded use of Fort Sill as a field artillery installation. At this point, the War Department began advocating the removal of the Apache prisoners, with their consent, based upon the opinion of the Judge Advocate General that the Apache prisoners had acquired a compensable interest in the lands of the Fort Sill Military Reservation.

The future status of the Apaches was finally resolved in the Congress. Beginning in 1910, bills were introduced both to allot the Fort Sill Military Reservation to the Apache prisoners and to remove them and allot them lands on some other reservation. Congress finally acted in 1912 when, as part of the Act of August 24, 1912, 37 Stat. 518, 534, appropriating funds for the Bureau of Indian Affairs, it enacted the following:

For the relief and settlement of the Apache Indians now confined as prisoners of war at Fort Sill Military Reservation, Oklahoma, on lands to be selected for them, by the Secretary of the Interior and the Secretary of War, two hundred thousand dollars, to be expended under such rules and regulations as the Secretary of the Interior and the Secretary of War may prescribe.

By March 7, 1914, the last Apache prisoners had been removed.

Seventy-six chose to remain in Oklahoma and received allotments purchased for them; 163 were transferred to the Mescalero Reservation in New Mexico.

The question we must resolve is whether the Apache prisoners acquired compensable title to any of the lands of the Fort Sill Military Reservation and, if so, when they were divested of said title.

Plaintiffs assert that Congress accorded them recognized title to the entire Fort Sill Military Reservation including the wood reserve, except 372.45 acres added by the Executive order of August 29, 1907. Plaintiffs urge that the three appropriation acts of March 3, 1901, 31 Stat. 1133, 1173; June 28, 1902, 32 Stat. 419, 467-68; and February 18, 1904, 33 Stat. 15, 26, ". . . effected recognition in their own right and of their own force. . . ." (Pl. Reply Brief, June 9, 1976, at 4-5). Plaintiffs further argue that in the years preceding these enactments the Executive branch intended and regarded the Apaches' settlement at Fort Sill to be permanent and final and that Congress was aware of this state of affairs when it enacted the statutes cited above which provided funds ". . . for the support and maintenance of the Apache prisoners of war permanently established at Fort Sill, Oklahoma, under control of the

War Department." (Act of March 3, 1901, supra; emphasis added.) The final element of plaintiffs' argument is that Executive actions and statements after the above-cited Congressional enactments, particularly the 1910 opinion of the Judge Advocate General of the Army that the Apache prisoners had been granted "permanent status" at Fort Sill, reveal the contemporaneous construction accorded the enactments and confirm that the intention of Congress was to accord the Apaches recognized title.

Defendant argues that, regardless of what the intent of the Executive branch may have been, the three appropriation acts do not express an intent to confer recognized title upon plaintiffs nor does the legislative history of any of the three acts in any manner support such an interpretation. Defendant's position is that the use by Congress of the words "permanently established" in these acts reflects only Congress's awareness of the War Department's intentions with respect to the Apache prisoners but cannot be construed to express the necessary ". . . definite intention to accord legal rights, not merely permissive occupation." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955).

Our resolution of this controversy lies between the extreme positions of the litigants. To begin with, we find it impossible to accept the plaintiffs' argument that any or all of the appropriation acts of March 3, 1901, June 28, 1902 and February 18, 1904, supra, effected recognized title ex proprio vigore to the entire Fort Sill Military

Reservation. In these three acts, Congress appropriated funds for certain enumerated purposes "for the support and maintenance of the Apache prisoners of war permanently established at Fort Sill, Oklahoma, under control of the War Department" (emphasis added). Since there is nothing in the legislative history of these acts to guide us, we must construe the intent behind Congress' choice of words under the normal rules of construction. We must determine whether, in using the words "permanently established" in these acts, Congress intended thereby affirmatively to accord the Apaches legal rights to Fort Sill or whether the words were used merely in a descriptive or casual manner to identify the recipients of these appropriations.

Recognition of title must be predicated upon ". . . the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279 (1955). It is not to be based upon ". . . ritualistic wording in a treaty or statute, but on the legislative purpose, gleaned from the enactment, to acknowledge Indian ownership." Minnesota Chippewa Tribe v. United States, 161 Ct. Cl. 258, 267 (1963) (aff'g in part, rev'g in part Docket 18-B, 8 Ind. Cl. Comm. 781 (1960)).

That Congress may legislate in appropriation acts upon non-appropriation matters is established. See Isbrandtsen - Moller Co. v. United States, 300 U.S. 139, 147 (1937). But, in such an instance, "the appropriation must plainly show a purpose to bestow the precise authority which is claimed." Ex Parte Endo, 323 U.S. 283, 303n.24 (1944).

In the instant case, plaintiffs would have us hold that two words contained in a subordinate adjective clause within an appropriation act evidence Congress' definite intention to accord the Apaches legal rights to over 75,000 acres of land. To state the proposition thusly is to refute it. We hold that the intent of these three acts was only to appropriate funds to support and maintain the Apache prisoners--not to grant them legal rights of permanent occupancy in the Fort Sill Military Reservation.

See Tee-Hit-Ton Indians v. United States, supra; Confederated Bands of Ute Indians v. United States, 330 U.S. 169 (1947); Seminole Indians of Florida v. United States, Docket 73-A, 25 Ind. Cl. Comm. 25 (1971), appeal dismissed, 200 Ct. Cl. 417 (1973). But cf. Minnesota Chippewa Tribe v. United States, supra; Kickapoo Tribe v. United States, Docket 316, 15 Ind. Cl. Comm. 628, 656-58 (1965), rev'd in part on other grounds, 178 Ct. Cl. 527 (1967).

While we are thus in agreement with defendant with respect to plaintiffs' claim of recognized title to the entire Fort Sill Military Reservation, we will not dismiss the claim because our analysis of the facts compels us to conclude that the plaintiffs were accorded compensable Executive order title to a certain portion of the Fort Sill Military Reservation. Plaintiffs have not themselves asserted a claim based upon Executive order title. The facts of this case relevant to the question of Executive order title present a close question. Our decision predicated upon the existence of Executive order title reflects our conclusion that

the most reasonable interpretation of what was intended was to accord the Apaches rights of permanent occupancy to the lands set aside by both the 1897 and 1901 Executive orders, and that such intent is confirmed by the best evidence available--the contemporaneous interpretations thereof.

In the case of Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543 (1968) (rev'g in part Docket 350-F, 16 Ind. Cl. Comm. 341 (1965)), lands were set aside for the Fort Berthold Indians pursuant to three Executive orders, issued in 1870, 1880 and 1892. In 1886, the Government and the Fort Berthold Indians entered into an agreement providing for the cession of part of their reservation lands for \$800,000. The agreement provided that the Fort Berthold Indians would take individual allotments of the diminished reservation and that the United States would hold the residue after allotment in trust for twenty-five years at which time the United States would convey the residue to the tribes in fee simple. In 1891, Congress ratified the agreement but amended it to provide that, after all individual allotments had been made, the residue of the land ". . . shall be held by the said tribes of Indians as a reservation." 26 Stat. 1032, 1035. On June 17, 1892, an Executive order was issued providing that certain lands ". . . be, and the same is [sic] hereby, withdrawn from sale and settlement, and added to the Fort Berthold Indian Reservation. . . ." I Kappler 883, 884.

The Commission held that the plaintiffs had a compensable interest in the lands added to the reservation by the Executive orders issued in 1870 and 1880 because Congress confirmed reservation title upon the tribes in the Act of March 3, 1891, supra, thereby recognizing plaintiffs' title to these lands. With respect to the lands added to the reservation by the 1892 Executive order, however, the Commission held that the plaintiffs had no compensable interest because those lands were added after the 1891 act and Congress took no subsequent action to recognize plaintiffs' title to these lands. Underlying the latter holding was the fact that Executive order title was not compensable under then-existing law. The plaintiffs appealed, inter alia, the Commission's holding with respect to the lands added by the 1892 Executive order. The Court of Claims reversed, holding that Executive order title is compensable under the Indian Claims Commission Act. 182 Ct. Cl. at 561.

The court based its holding on the plain language of section 2, clause (1) of the Indian Claims Commission Act, 60 Stat. 1049, 1950 (1946), ". . . which expressly provides that the Commission shall hear and determine '. . . claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President. . . .' [Emphasis supplied]." 182 Ct. Cl. at 561. The court reasoned that the phrase "Executive orders of the President" must refer to ". . . those interests in lands bestowed upon Indians by Presidential Executive orders," and that the inclusion of a reference to such interests in the act must mean that Congress intended to make such interests compensable. Id., at 562.

In the instant case, under the Executive order of February 26, 1897, 26,987.30 acres were ". . . set apart and added to the military reservation at Fort Sill, Oklahoma, for exclusive use for military purposes and for the permanent location thereon of the Apache Prisoners of War." Later, on September 20, 1901, fractional portions of sections totalling 893.07 acres were added by Executive order to the Fort Sill Military Reservation ". . . for the use and benefit of the Apache prisoners of war."

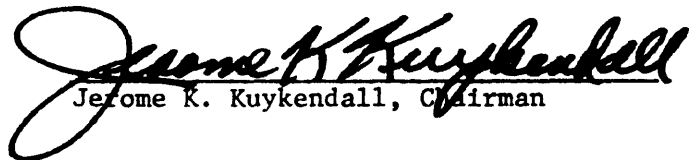
As we have indicated earlier in this opinion, the evidence in this case establishes that at the time of these two Executive orders the sole military function of the Fort Sill garrison was to protect the Apaches and neighboring whites from each other and to foster the peaceful development of the Apache community at Fort Sill. The language of the Executive orders manifests the intention of the President that the lands thus set aside were for the permanent use and benefit of the Apaches. Given the known purpose of the military garrison at Fort Sill, the inclusion of the words "for military purposes" in the 1897 Executive order cannot reasonably be construed to detract from the intention of that order to grant rights of permanent occupancy to the Apaches.

Subsequent, reasonably contemporaneous interpretations of the Executive orders by the Secretary of War, the Secretary of the Interior, the Commissioner of Indian Affairs and the Judge Advocate General of the Army substantiate the conclusion that the intent of the Executive orders was to grant the Apaches rights of permanent occupancy in the lands thus reserved. See Cabazon Band of Mission Indians v. United States,

Docket 148, 21 Ind. Cl. Comm. 119, 124 (1969), where the Commission held that a 1911 Interior Department document was a "reasonably contemporaneous" interpretation of an 1876 Executive order and was to be accepted as an "authoritative interpretation" of the intent of that order.

Thus we hold, under the authority of the Fort Berthold case, supra, that the plaintiffs were granted compensable Executive order title to 26,987.30 acres of the Fort Sill Military Reservation on February 26, 1897, and to 893.07 acres of said reservation on September 20, 1901. They were divested of said title on August 24, 1912, by virtue of the Act of that date, supra.

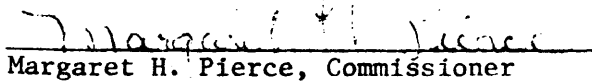
Subsequent proceedings will be held to resolve all other issues involved in this claim.

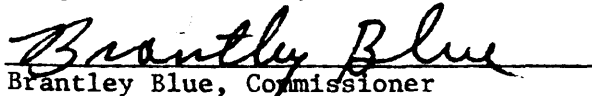

Jerome K. Kuykendall, Chairman

We concur:


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner