

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO OF SANTO DOMINGO,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 355
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: August 17, 1978

Appearances:

Jay R. Kraemer, Darwin P. Kingsley, Jr., Attorneys for Plaintiff. Karelsen, Karelsen, Lawrence & Nathan and Arthur Lazarus, Jr., Richard Schifter, Fried, Frank, Harris, Shriver & Kampelman were on the briefs.

Roberta Schwartzendrubér, with whom was Assistant Attorney General James W. Moorman, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

We have before us the question of the eastern boundary of plaintiff's area of aboriginal occupancy. In 1969 the parties stipulated that the area plaintiff held by aboriginal title was as shown on an accompanying map made by the Bureau of Land Management, and that defendant was liable to plaintiff for extinguishing that title. Thinking the boundaries settled, the Commission set the matter down for trial as to dates of taking only, and determined the dates in Pueblo of San Ildefonso et al. v. United States, Dockets 354 - 356, 30 Ind. Cl. Comm. 234, 244-249 (1973). We included a written description of the boundaries of this plaintiff's aboriginal title area

in the accompanying findings.

In 1975, the plaintiff filed a motion for correction of the findings, asking that we move the eastern boundary of the aboriginal title area eastward so as to include two turquoise mines. Plaintiff's counsel state they always intended to include these mines, but mistaken instructions were given to the map maker at the Bureau of Land Management. We reopened the question of the eastern boundary by an order dated November 26, 1975, and held a trial to determine where the boundary really is on May 18 through 20, 1977. On May 2, 1978, the final brief, plaintiff's reply, was filed.

Upon study of the evidence it became clear that we were dealing with two mining zones, not two "mines" in the sense that word is ordinarily used in English.^{1/} The first zone is in section 21, T. 15 N., R. 8 E., surrounding Turquoise Hill; and the second is in section 5, T. 14 N., R. 8 E. on the slopes of Mount Chalchihuitl. In old Spanish the word "mina" was sometimes used to signify the location where minerals were found, rather than a worked mine; and in New Mexico the English word "mine" has been used in the same sense.

^{1/} The two zones were identified in papers prepared by the lawyers, and in some of the testimony, as the Tiffany and the Cash Entry mines; but the evidence shows that these were American mines, reopened in the 1880's over ancient workings. The Cash Entry was not even a turquoise mine, but a producer of lead, zinc, and silver.

We find from the evidence that the Pueblo of Santo Domingo had aboriginal occupancy of the two mining zones and the surrounding area, described in finding No. 24 issued herewith.

The most remarkable mine in the area at issue, and one of the most remarkable mines in the world, was described in 1858 by W. P. Blake, who was among the first Americans to see it. In an article in 25 American Journal of Science 227 (1858), entitled On the Chalchihuitl of the Mexicans, Blake wrote:

The descriptions of this stone led me to regard it as Turquoise, and hearing that it was yet procured in small quantity by the Indians from a mountainous district not over twenty miles from Santa Fe, I visited the locality and collected several specimens.

The mountains form a group of conical peaks and are known as Los Cerrillos. They are southeast of Santa Fe, and north of the Placer or Gold mountains, from which they are separated by the valley of Galisteo river. . . .

On reaching the locality I was struck with astonishment at the extent of the excavation. It is an immense pit with precipitous sides of angular rock, projecting in crags, which sustain a growth of pines and shrubs in the fissures. On one side the rocks tower into a precipice and overhang so as to form a cave; at another place the side is low and formed of the broken rocks which were removed. From the top of the cliff, the excavation appears to be 200 feet in depth and 300 or more in width. The bottom is funnel-shaped and formed by the sloping banks of the debris or fragments of the sides. On this debris, at the bottom of the pit, pine trees over a hundred years old are now growing, and the bank or refuse rock is similarly covered with trees. This great excavation is made in the solid rock, and tens of thousands of tons of rock have been broken out. This is not the only opening; there are several pits in the vicinity, more limited in extent, some of them being apparently much more recent.

* * * * *

. . . It seems hardly possible that such an amount of rock could have been removed by men without the aid of powder and machinery. The evidences were, however, conclusive that it was the work of the aborigines long before the conquest and settlement of the country by the Spaniards. It does not appear that anything has been done in the great pit for a long time. This is shown not only by the pine trees growing in it, but by the lichen-covered sides, and by the piles of rock, gray with age, around the margin. Fragments of ancient Indian pottery can easily be found among the rocks at all of the excavations. It is said that the Indians have a tradition that eight or nine of their tribe were once suddenly buried by a fall of rocks from the side of the great pit. Since that time they have been afraid to work in it. This is probable, and it is indicated by the condition of the locality. The place is, however, occasionally visited by Indians from a distance, but their operations appear to be confined to the surrounding openings, or to breaking up masses of rock which were formerly removed. The fragments which they procure are taken to one of the Indian pueblos on the Rio Grande, where the art of grinding and perforating them for beads is yet known. How this is accomplished, I could not ascertain. Two or three Indians, only, go to the locality at one time, and while there they live in the cave or recess in the face of the cliff.

The pueblo referred to in the foregoing quotation was almost certainly Santo Domingo. In a later article, "Aboriginal Turquoise Mining,"²¹ American Antiquarian 282 (1899) (pl. supp. ex. 50) the same author stated:

. . . Kunz records, on the authority of Major Hyde, who was exploring the Cerrillos locality in 1880, that the Pueblo Indians from Santo Domingo warned him that the mine was sacred, and that the turquoise (chalchuite) he was taking from it must not go into the hands of those whose saviour was not Montezuma.

In 1866 James F. Meline referred to unidentified Indians visiting the Cerrillos at night for turquois.

In 1882 W. B. Sloan found Pueblo Indians working in the Mount Chalchihuitl pit and reported, "Knowing the Indians seem to think they have the right to this mine, and being at this time alone, I did not get any specimens."

Victor Garcia, currently Governor of Santo Domingo, testified that he and his father before him mined turquoise in the Cerrillos area and that non-Santo Domingo Indians did not. He stated that the mines of the area had belonged to his people since before the time of Columbus. Santiago Lovato, a Santo Domingo Indian 88 years old, testified that he held an important position of a religious nature with his tribe, which required him to be familiar with the boundaries of the Pueblo's lands as passed down from generation to generation. He stated that the places known today as Mount Chalchihuitl and Tiffany Mine were believed by the total population of Santo Domingo to be rightfully theirs. He told of going to mine several times when he was twenty years of age or younger, and on one occasion chiseling out and carrying away a 25 to 35 pound chunk of turquoise. He stated his father mined in the area before him and that the Mount Chalchihuitl mine belonged to the Santo Domingo Tribe before his father was born.

Adolph Bandelier wrote in his journal in 1880:

. . . Santiago [a Pueblo informant] told me that the pits of the Cerrillos were made by the Indians of San Marcos, San Cristobal, San Lazaro, to whom these turquoise mines belonged. After they were driven out, they turned over the mines to the Queres [Keres].

In his Final Report of 1892 Bandelier wrote:

. . . The Tanos of Santo Domingo regard themselves as the owners of the site [of the turquoise mines] and visit it frequently to procure the stones that are much esteemed by them.

In 1893, Governor L. B. Prince of New Mexico wrote:

. . . The neighboring Pueblo Indians of Santa [sic] Domingo Pueblo Village, had a knowledge of and trade in such 'Chalchuite' (their name for it, meaning about what we do in saying money) as they had kept from inheritances and by occasional finds in looking about these old mines, that they seem to think even now as a part of their monopoly.

The following article appeared in Southwestern Mines in November

1910:

Threatening him with death if he interfered with their plans of robbing the Tiffany turquoise mines, 14 miles south of Santa Fe, N. M., a band of Santa Domingo Indians approached the home of Manager J. P. McNulty and after leaving a guard of about 16 warriors at the mouth of the shaft, descended the 125-foot shaft by means of a rope, ascending with some of the much sought for stone. Efforts have been made by Santa Fe officials to capture some of the band, but so far their chase has been in vain as Mr. McNulty is unable to identify any of those brought before him.

The Indians still claim the turquoise mines from which their forefathers took turquoise centuries ago, but the title is in the American Turquoise Company which the Tiffanys of New York are the principle stockholders.

In 1915 the Santo Domingos were called "for a long time the chief traders in the turquoise from Los Cerrillos." The geologist J. E. Pogue's unreferenced statement of the same year that "For a long period the Queres of San Felipe were the chief traders in the Cerillos product," is uncorroborated by anything else in the record.

In 1933, unidentified Indians were said still to visit the mines and hold ceremonies at the oldest of the holes.

In 1935, Leslie White wrote in the Memoirs of the American Anthropological Association:

The Domingo Indians manufacture a great deal of jewelry. They have easy access to the turquoise mines at Cerillos. From a nearby mountain they get a whitish mineral which they use to make beads.

Elsie C. Parson in 1939 called Santo Domingo "the turquoise center."

The evidence summarized above of exclusive Santo Domingo use of the turquoise area through most of the 19th Century is greatly preponderant even though the literature makes occasional reference to other transitory Pueblo associations. In the critical period here, before and after American sovereignty attached, and up to and even during the period of American mining in the area, Santo Domingo use and assertions of dominion are sufficiently documented to convince us of that Pueblo's aboriginal title to the area involved. Aboriginal title need not exist from time immemorial; a long time is enough.

Sac and Fox Tribe v. United States, 179 Ct. Cl. 8, 383 F.2d 991, cert. denied, 389 U. S. 900 (1967), aff'g in part, rev'g in part, Docket 135, 15 Ind. Cl. Comm. 248 (1965).

Joe C. Tenorio, a member of the Santo Domingo council, testified that he was familiar with the traditions of his people, and that the Keres Sun and Corn clans and the Tano Isi clan were all formerly resident at the now abandoned Pueblo of San Marcos and used to mine turquoise at the nearby Cerrillos mines. These clans, at separate times, migrated to Santo Domingo, where their descendants survive.

Defendant has exerted much energy in attempting to discredit this tradition by reference to Spanish documents of the Pueblo Rebellion period. But there is no necessary inconsistency between Spanish history and tribal tradition, since the tradition does not fix the dates of the migrations nor rule out intermediate stops while they were taking place. In any event, we think the correctness of the migration tradition is immaterial to the validity of the plaintiff's claim before this Commission.

Defendant contends that Santo Domingo possession was not exclusive, citing the arrest in 1910 of four Cochiti Indians for raiding the Tiffany mine. Plaintiff explains that one of these was half Santo Domingo, and the context of the exhibit implies that the Cochitis had gotten their turquoise from Santo Domingo prior to that one

raid. The story of a single Zuni who got some turquoise out of a mine in 1890, after asking the Santo Domingos how to get permission, is certainly not enough to defeat the claim of exclusive possession. In any event, when these incidents occurred American miners had already disturbed the exclusiveness of Santo Domingo's possession. Nor does the variety of pottery types found at the mines necessarily show that Indians of the several villages where the pots were made worked the mines, for there has been substantial inter-pueblo trade in pottery since prehistoric times. The pottery, moreover, is from a period too remote to be decisive in this case.

Defendant further contends that Indian pueblos did not claim sole ownership of natural resources. Bandelier's authority is to the contrary, as was the testimony of plaintiff's native witnesses. We find the great preponderance of the evidence favors sole aboriginal ownership in Santo Domingo.

The additional area east of the stipulated area of aboriginal occupancy which the plaintiff is here claiming has been outlined on a map prepared by the Bureau of Land Management on May 13, 1977 (joint exhibit 1). According to the map it contains 4,300 acres. A legal description is given in finding 24 accompanying this opinion. We described the Santo Domingo area of aboriginal occupancy in our 1973 decision as parcels A to F. See 30 Ind. Cl. Comm. at 262-265. The additional area is immediately adjacent to the east side of parcel E.

Of course, the Santo Domingo exclusive use and occupancy of the turquoise mines would not necessarily carry with it Indian title to 4,300 surrounding acres. However, the extended area is approximately the one described in the hearing before Commissioner Holt in Santa Fe in 1954 and shown on the map, exhibit 2 in evidence, as part of the traditional horse pastures of the Pueblo. This old exhibit also supports plaintiff's contention that the exclusion of the Tiffany and Cash Entry mines from the stipulated area of aboriginal occupancy was by mistake, since both are shown within rather than on the boundary. Exact boundaries of aboriginal title areas are frequently impossible to draw. In such cases, and this is one of them, reasonable approximation is sufficient. Snoqualmie Tribe v. United States, 178 Ct. Cl. 570, 372 F.2d 951 (1967), rev'g in part, aff'g in part Docket 93, 15 Ind. Cl. Comm. 267 (1965); Confederated Tribes of Warm Springs Reservation v. United States, 177 Ct. Cl. 184 (1966), rev'g Docket 198, 12 Ind. Cl. Comm. 664 (1963); Upper Chehalis Tribe v. United States, 140 Ct. Cl. 192 (1957), rev'g Docket 237, 4 Ind. Cl. Comm. 301 (1956). We accept the new eastern boundary shown in joint exhibit 1 and described in the findings.

In an effort to defeat the plaintiff's claim of exclusive possession, defendant has shown a number of Spanish mining concessions which may have involved the area in issue. All the Spanish mines were abandoned before the time of the American conquest of New Mexico. None was confirmed by the United States.

Only one can be said with reasonable certainty to have been within the area at issue, and that one cannot be located on the ground with the evidence of record. In our 1973 decision, we held that unpatented American mining claims did not defeat aboriginal title. See 30 Ind. Cl. Comm. at 243. We follow a similar rule with regard to the abandoned Spanish mining concessions here involved.

Certainly there was mining in the area before the Mexican period. Much of it may have been carried on in trespass under Spanish law. Many of the workings, indeed all of the earlier ones, were Indian, perhaps operated by the plaintiff's members or their predecessors in interest. Again, it is impossible to determine from the evidence how extensive mining was at any given time. The operations started 1200 years ago and have continued sporadically ever since. Very large pits, shafts, and tunnels could be created over such a time span without a large enough working force ever being on the ground to disturb Indian use and occupancy of more than a small part of the area at issue. See findings 25 and 26. There is just not enough clear evidence before us to justify a holding that Indian title was extinguished during the Spanish period.

Even assuming it was, however, we would be constrained in the circumstances of this case to hold that Indian title had reattached by the time of the American conquest. The evidence shows no beneficial use of the claimed area by anyone other than Santo Domingo

Indians from 1820 to 1865. The heirs of the Spanish miners are not asserting title to the area. When they worked it to the limits of their antique technology, so far as the record shows, they abandoned it back to the Indians. We know of no law which forbade this. Aboriginal titles are not static. Indian tribes could acquire aboriginal title from one another without the knowledge or consent of the sovereign; and there is no reason, under the circumstances of this case, why they could not reacquire it from whites. Cf. Turtle Mountain Band v. United States, 203 Ct. Cl. 426, 490 F.2d 935 (1974), aff'g Dockets 113 et al., 23 Ind. Cl. Comm. 315 (1970).

Both parties have asked us, if we should find the plaintiff had aboriginal title to the area in issue, to find the dates of extinguishment. The plaintiff urges us to use the same dates applicable to plaintiff's other aboriginal title lands under finding 10 at 30 Ind. Cl. Comm. 273-274. The defendant urges us to use either 1848, the date of the Treaty of Guadalupe Hidalgo, 9 Stat. 922, or 1879, when the American prospectors overran the area.

The question of taking dates is not before us. By our order of March 3, 1976, we set this case for trial on the single issue of the location of the eastern boundary of Tract E. We ordered the date postponed several times, but never expanded the issues to be tried. The stipulation we had before us in 1973 not only outlined plaintiff's aboriginal title area, but contained a confession by

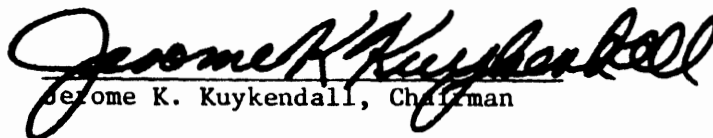
the United States that it was liable for extinguishing the plaintiff's title thereto. See 30 Ind. Cl. Comm. at 259. No such confession is before us in regard to the additional area.

We have not changed our view on extinguishment of aboriginal title set out in our 1973 decision, but believe further briefing and an expanded record essential to an informed decision in regard to the additional area.

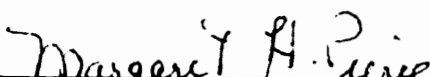
The case will proceed for the purpose of determining whether, or when, plaintiff's title to the additional area was extinguished and defendant's possible liability on that account.


Richard W. Yarborough, Commissioner

We concur:


Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner



Margaret H. Pierce, Commissioner



Brantley Blue, Commissioner