BEFORE THE INDIAN CLAIMS COMMISSION

THE NAVAJO TRIBE OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 229
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: June 29, 1970

Appearances:
Norman M. Littell, with whom were Harold E. Mott, and Leland O. Graham, Attorneys for Plaintiff.

Walter A. Rochow, with whom was Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for the Defendant.

OPINION OF THE COMMISSION

Chairman Kuykendall delivered the opinion of the Commission.

In this law suit the Navajo Tribe of Indians is asking the Commission to award it additional compensation under Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050) for the cession of its Indian title lands to the United States under the Treaty of June 1, 1868 (15 Stat. 667). Plaintiff tribe asserts that it held Indian title to some forty million acres of land at the time of the 1868 Treaty and that the United States paid the Navajo tribe an unconscionably low consideration for the cession of these lands. The subject tract is located principally in northeastern Arizona and northwestern New Mexico, and extends northward into southeastern Utah and southwestern Colorado.

Because of the territorial extent of plaintiff's claim, the claims of several other Indian tribes against the United States overlap some of the same areas claimed by the Navajo Tribe.[1/]

Defendant denies that the Navajo tribe had Indian title to such an extensive area in 1868, and further denies that it is liable to plaintiff for any additional compensation based on the 1868 Treaty cession.

The prime issue to be resolved at this stage of plaintiff's claim is the territorial extent of the Navajo tribe's aboriginal land holdings.

The record in this case has been enormous, containing more than 10,000 pages of transcript, a plethora of documentary material, and many volumes of reports prepared by expert witnesses in the fields of archaeology, ethnology, anthropology and history in support of their conclusions. In addition to the testimony of the expert witnesses, the Commission heard the testimony of aged Indians relative to traditional family and tribal use and occupancy of the claimed area.

In determining the extent of Navajo aboriginal land ownership as of 1868, the Commission has relied wherever possible on the historical and documentary evidence contemporary with the Spanish, Mexican and

---

1/ The Pueblo de Acoma, plaintiff in Docket No. 266
The Pueblo of Laguna, plaintiff in Docket No. 227
The Havasupai Tribe, plaintiff in Docket No. 91
The Western Apache, plaintiff in Docket No. 22-D
The Northern Tonto, plaintiff in Docket No. 22-J
The Chiricahua and Warm Springs Apache, plaintiffs in Docket No. 48
The Fort Sill Apache, plaintiff in Docket No. 30
The Hopi Tribe, plaintiff in Docket No. 196

CV-6417-201 NN010053

American periods of sovereignty. The archaeological evidence was quite extensive, covering twenty-three volumes of site reports dealing with over 1,400 abandoned Indian habitation sites throughout the claimed area with detailed explanations as to the date of occupation and identity of the occupants of each site. It was here that the Commission found a great deal of conflicting testimony among the experts. There was sharp disagreement with respect to dating many of the archaeological sites and the identification of the Indians who inhabited them. As it might be expected, most of the differences involved the peripheral areas of the claimed tract.

The record shows that the Navajos had entered the northeastern part of the claimed area sometime between 1300 A.D. and 1500 A.D., and from there spread out principally to the south and west. From the beginning the Navajos had been an aggressive people living a semi-nomadic life. They never lived in permanent villages as did the Pueblo tribes, but were very mobile and roamed over and utilized a broad area of land for farming, food gathering and hunting. At the time of the Spanish conquest of New Mexico, the Navajos were the first Indian tribe to cause the Spanish authorities any serious trouble. They repeatedly raided the new Spanish settlements and neighboring Pueblo villages. The Spanish practice of capturing and enslaving individual Navajos was another reason for the continued conflict during this period.

During the Spanish period the Navajos acquired the horse. In this way they increased their mobility and came into further conflict with the Spanish settlers. The acquisition of livestock, particularly sheep, during the same period caused the Navajos to utilize even more territory as they extended their residences into new areas that were compatible with their pastoral economy. While the Navajo history throughout both the Spanish and Mexican periods has been one of continual growth in population and land use, their conflict with the Ute Indians to the north prevented any Navajo movement in that direction. The Pueblo tribes and Spanish settlers blocked any significant Navajo inroads to the east, and the Apache tribes to the south were a barrier to any extensive conquest of that area. They, therefore, ranged westward and concentrated in the Canyon de Chelly and the Tunicha, Lukachukai and Carrizon Mountains, an area traditionally considered to form the heart of the Navajo homeland.

With the signing of the Treaty of Guadalupe Hidalgo in 1848, American sovereignty attached to the claimed area. From this point on the United States officials sought through negotiation to end the conflicts between the Navajos and local settlers. When these efforts proved fruitless, the decision was made to relocate all the Navajos to the east at Fort Sumner on the Pecos River in eastern New Mexico. Colonel Kit Carson was charged with the responsibility of carrying out this decision. By April of 1864, Colonel Carson's efforts resulted

in most of the Navajos being interned at Fort Sumner, although a substantial minority were widely scattered and in hiding throughout much of the claimed area.

The situation at Fort Sumner proved to be unsatisfactory to both the Indians and the military authorities. Finally, on June 1, 1868, a United States Indian Peace Commission led by General William T. Sherman consummated a treaty between the Navajo leaders and the United States (15 Stat. 667). Under this treaty, which was ratified July 25, 1868, the Navajo Tribe, in exchange for a reservation containing about three and one-half million acres and for other stated consideration, ceded to the United States its aboriginal rights to any territory outside of this reservation while retaining limited hunting rights to the unoccupied lands contiguous thereto.

Despite the size of the new Navajo Reservation, the daily economic needs of a comparatively large Navajo population, estimated at 12,000 for the 1848-1868 period, required the Navajo to exploit a larger area. Governor Meriwether had reported in 1855 that the Navajos were growing corn, wheat, beans, pumpkins, melons, peaches and wild potatoes with about 5,000 acres under cultivation. He also estimated that they had harvested as high as 60,000 bushels of corn per year and were the owners of 200,000 head of sheep and over 10,000 horses.

Defendant agrees that by the 1860's the Navajos were found in the peripheral areas of the subject tract and even beyond, but maintains that this was a situation caused in large measure by the campaigns

carried out against the Navajos by the United States military in the 1850's and early 1860's. Therefore, defendant argues that Navajo occupancy of those areas during this period was too recent and tenuous to establish aboriginal title. The defendant would have the Commission restrict the Navajo aboriginal title lands to an area south of the San Juan River, north of the Acoma and Zuni Pueblo grants, east of the 1882 Executive Order Reservation that was set aside for the Hopi Indians, and west of the Rio Grande River. Whether the Navajos were in some of these areas early enough to establish aboriginal title is, therefore, both a factual and legal issue here. The Commission agrees with defendant that the presence of Navajos in some of the border areas of the claim was the result of United States military pressure and that such occupation was too close in time to the cession date in 1868 to allow aboriginal title to "take root". 2/ We are also convinced that other Indian tribes were also using some of these border areas. We think, however, that defendant's conclusions as to the territorial extent of the Navajo Tribe's aboriginal title at the time of the 1868 Treaty of cession are too restrictive. The pressure of population

---

2/ ... The status of aboriginal ownership is not accorded tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy 'for a long time'. . . The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory. (The Sac and Fox Tribe of Indians of Oklahoma, et al., v. United States, 161 Ct. Cl. 189, 205, 206; 315 F.2nd 896, 905 (1963); cert. denied, 375 U.S. 921 (1963))

growth, the earlier military and other campaigns of the Spanish and Mexicans against the Navajos, and the ecological and environmental features of the claimed area, when considered with the nature and pattern of Navajo use of the territory, calls for a much larger aboriginal area to be awarded the Navajo plaintiff than that which the defendant would allow.

There is substantial evidence that the Navajo boundary in the north and northeastern part of the claim should be above the San Juan River so as to include a large part of the headwaters and tributaries of the San Juan. It was reliably reported as late as 1851 that the Navajos were planting crops and living on both sides of the San Juan. Plaintiff's archaeologists located more than 200 Indian sites north of the San Juan River, which sites they considered to be Navajo. There is evidence of a conflict between the Southern Paiutes and Navajos in some of the claimed area north of the San Juan in the present State of Utah, and there had been skirmishes between the Navajos and the Utes in a part of the claimed area north of the San Juan River in Colorado. Plaintiff's expert, Dr. Kluckhohn, admitted that the Utes lived in and claimed part of this Colorado area during the American period. We have drawn the Navajo boundary on the north and northeast so as to include only the land exclusively used and occupied by the Navajos.

The northeast boundary includes the headwaters of the San Juan River and also the territory where the Navajos first entered the claimed area during the 1300 A.D. - 1500 A.D. period. Farther south along the eastern part of the claim we have included Mesa Prieta, Big Bead Mesa, and Cebolleta Mountains, and Mount Taylor in the Navajo aboriginal area. For the most part, this follows the Navajo claim line and also the boundary line proposed by defendant. Still farther south in the southeast part of the claimed area the Pueblo Indians of Laguna and Acoma were located on Spanish grants. These Pueblo Indians had been farming, herding and food gathering long before American sovereignty attached not only on their granted land, but considerably beyond. Navajo occupancy in this Pueblo region was far too recent in time and was non-exclusive. From Big Bead Mesa the boundary line of plaintiff's territory extended westward to Mount Taylor and from there to Ramah, New Mexico, and includes parts of the Zuni Mountains and some of the headwaters of the Zuni River. These were areas frequently used by the Navajos.

In the southern part of the claimed area, the watershed of the Little Colorado, the Puerco River of the west, and the Zuni River were extensively used by the Navajos to pasture their stock, especially in the autumn or winter when there was snow in the north. The Navajo also ranged near Quemado and Salt Lake, and at times went even further south on raiding expeditions, even so far as into the states of

Chihuahua and Durango in Mexico. In 1851 it was reported that 400 Navajos were camped on the Gila River many miles to the south of the claimed area, ostensibly for raiding purposes.

By 1864 a United States Army report indicated that the Navajos had expanded into ". . . the Sierra de los Ladrones, Sierra Datil, Sierra Escudilla, Sierra de Luera, Sierra Tulerosa, Sierra Negrita, the northern slopes of the Sierra Blanca of the West and the great basin or plains of San Augustin." 3/ The areas just mentioned are on the southern border of the Navajo claim and are also claimed by some of the Apache tribes. We have excluded these areas from the Navajo aboriginal territory because the Apache were using and occupying some of them and also because Navajo occupancy there was either temporary or too recent in time to establish their claim. Consequently, we have drawn the Navajo southern boundary line to the north of those places.

In the west, the Navajo aboriginal claim area conflicts with those of the Hopi, Havasupai, and Northern Tonto. The evidence of record excludes from the Navajo aboriginal territory the 1882 Hopi Executive Order Reservation and other areas directly west of it, such as the Coconino Basin, the Painted Desert, Tuba City, Moencopi Plateau and Grey Mountain. Navajo occupancy in scattered parts of these areas prior to 1868 was principally during the period when the Navajos were fleeing from the

3/ Plaintiff's Exhibit No. 335.

United States military in the late 1860's prior to their removal to Fort Sumner. It is also clear from the evidence that the San Francisco Mountain area had been commonly used by other Indian tribes as well as the Navajo for many years before and during the periods relevant to the issues in this case. However, we think that by the 1868 Treaty cession date the Navajos had perfected Indian title to some of the areas both north and south of the 1882 Executive Order Reservation. In 1863 Superintendent Doty reported to Commissioner William P. Dole that the Hopis were ". . . in constant fear of the Navajos, whose country nearly surrounds theirs, who frequently attack them and drive off their flocks of sheep and herds of cattle." (Emphasis supplied. Plfs. Ex. 290)

From this and other contemporary statements, as well as the archaeological and ethnological evidence in the record, we have concluded that the Navajos held aboriginal title in accordance with the boundaries we have set for them in the western part of the claimed area. We have included in this part of the Navajo aboriginal territory some of the places occasionally visited by the Hopis for religious or other purposes. The record also indicates the appearance of some members of other Indian tribes in the Navajo territory from time to time for visiting, trading, or raiding. Others occasionally crossed over the Navajo country. Such sporadic and infrequent use of these lands by Indians of other tribes does not invalidate the Navajo aboriginal title to these areas.

CV-6417-201 NN010061

In line with previous decisions of this Commission, we have excluded from the Navajo aboriginal title area all confirmed and patented Spanish and Mexican land grants or parts thereof falling within the perimeter of the Navajo boundaries that have been established in this case.

In summary, the issues in this case were primarily ones of fact. Plaintiff asserted aboriginal title to approximately 40 million acres exclusive of Spanish or Mexican grants. The Havasupai, Hopi, Northern Tonto, Western Apache, Chiricahua Apache, Fort Sill Apache, Pueblo de Acoma and the Pueblo of Laguna each claimed part of this acreage, their aggregate claims totaling approximately half of the Navajo claim. Defendant's view of the Navajo claim further reduced it to about 10,000,000 acres. Under the circumstances, the boundary lines we have drawn for the Navajo Tribe could not be exact but they are reasonably approximate and we believe they are fully supported by the record as a whole.

Based on the findings of fact and legal conclusions hereafter set forth in this case, as well as the entire record, we have concluded that the Navajo Tribe of Indians, as an identifiable group of American Indians, held aboriginal title to the lands described in Findings of Fact No. 17 herein, except for the Spanish and Mexican grants or parts thereof contained therein. We also conclude that these aboriginal title lands were ceded by the Navajo Tribe to the United States as of July

25, 1868, the effective date of the June 1, 1868, Treaty except for the territory reserved to them by Article 2 of the said Treaty.

The case shall now proceed to a determination of the acreage of the lands ceded by the plaintiff to the defendant under the 1868 Treaty, the fair market value thereof as of July 25, 1868, the effective date of the Treaty, the consideration received by the plaintiff for said cession, and all other issues that will determine the extent of defendant's liability to the plaintiff.

Jerome K. Kuykendall, Chairman

Concurring:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner