49TH CONGRESS, 2d Session. } SENATE. { EX. DOC. No. 52.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

Supplementary report of the surveyor-general of New Mexico on the private land claim of Petaca grant, No. 105.

JANUARY 25, 1887.—Referred to the Committee on Private Land Claims and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, January 24, 1887.

SIR: Pursuant to the requirement of the 8th section of the act of Congress approved July 22, 1854 (10 Stat., 308), I have the honor to transmit herewith, for the consideration of Congress, the supplementary report of the surveyor-general for New Mexico, dated February 17, 1886, in the matter of the private land claim known as the Petaca grant, No. 105, with the accompanying communication from the Commissioner of the General Land Office.

Very respectfully,

L. Q. C. LAMAR,
Secretary.

The PRESIDENT OF THE SENATE PRO TEMPORE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 21, 1887.

SIR: I have the honor to transmit herewith, for submission to Congress, the supplementary report in duplicate of the surveyor-general of New Mexico, known as the Petaca grant, No. 105.

By an examination of the record in the case, the following facts are disclosed:

On the 29th January, 1836, José Julian Martinez, for himself and others, presented the following petition to the ayuntamiento of Ojo Caliente, viz:

RESPECTABLE AYUNTAMIENTO: I, José Julian Martinez, resident of this jurisdiction, appear before your honor, and together with my father, Antonio Martinez, Francisco Antonio Atencio, and the sons of the latter, with all submission and under the most legal protestations, represent and state:

That it being our intention to engage in the recommendable occupation of agriculture so as by this mode to aid in the support of our families, and being satisfied that up the river from this jurisdiction there is a tract of public land, which is called the Petaca, we therefore pray your honor that, in case no injury would result to any third

party, and you know of no individual owning said land, which your honorable body will please ascertain, and inform the illustrious provincial deputation whatever you may deem proper in respect to our application, which is a favor we solicit, &c.

On 22d February following the ayuntamiento made their report as follows, viz:

The respectable ayuntamiento, over which I have the honor to preside, inasmuch as that the parties in the grant accompanying the foregoing petition have not cultivated nor placed any kind of improvement on the land which was given them in the long period of full twelve years, and which is now again applied for, are of opinion that the same should be granted to the new applicants, for the reason that the former have forfeited the right granted them, for the cause stated and under the conditions expressed in said grant, observing that this ayuntamiento also believe that the children of Francisco Antonio Atencia should not become a party in the said possession, as they are minors, subject to paternal control, and do not possess the knowledge necessary to empower or give authority to petition in their names for that which they are not in a condition to acquire in this manner.

The most excellent deputation will direct as may be most in accordance with the laws.

JOSÉ ANTONIO MARTINEZ.
JOSÉ MANUEL MARTINEZ,
Secretary.

OJO CALIENTE, *February* 22, 1836.

On February 25, 1836, Governor Perez made a preliminary concession in the following terms, viz:

Having seen the action of the ayuntamiento of Ojo Caliente, of date 22d instant, in which they say there is no objection to granting the applicant and his associates the land mentioned, the former grantees not possessing now any right therein, they having abandoned the same, the alcalde of said place will place those who now apply for the same in possession thereof in the required form and in conformity with the law on the subject, setting forth the general donation, in which shall necessarily be stated the boundaries of said possession, and without prejudice to any third party, also binding the grantees to the obligation prescribed by the laws to acquire title, for which purpose the alcalde shall take charge of the general document of distribution, which shall be for the archives, and he shall give testimonies therefrom, as may be requested of him, on payment of his corresponding fees, &c.

Under date of March 25, 1836, the alcalde proceeded to the land conceded by the governor, and placed them in possession.

I proceeded to distribute said land in the presence of the parties interested, giving to each one of those mentioned in the list 150 varas in a direct line, designating to them as their boundaries on the south the entrance to the cañoncito and lands of José Miguel Lucero, on the north the hill commonly called the Tio Ortiz hill, on the east the creek of the Aguaje of the Petaca, and on the west the boundary of the Vallecito grant, within which limits the said new quarters were located. Of these I donated only to Citizen Felipe Jaquez from the boundary of Vicente Martin to that of Eusebio Chaves, the land being a narrow strip and of little utility. Thereupon I donated to Citizen Manuel Lujan two small valleys, which were not measured with the line, and reach to the distribution of the cañoncito, and I donated to Citizen Mariano Peña two small valleys, very narrow, without varying; and continuing, I donated to Citizen Antonio Eluterio Ortiz, in the same cañoncito, a small valley, also without varying; following the same course in the said cañoncito, I donated to Citizen José Francisco Lucero a small valley, also without varying; and to José Antonio Lucero another small valley, the boundary thereof being on the south, the mouth of the same cañoncito, leaving them for a plaza 150 varas, and 50 for women's gardens, and 50 for ingress and egress, there remaining at the mouth of the Cañada de la Dorada for common watering-places 150 varas in a direct line, which donation I made in the name of national sovereignty, in conformity with the law on the subject, the grantees mentioned in the annexed list understanding that the pastures, forests, waters, and watering-places are in common, and they were further informed that he who fails to occupy and cultivate the land granted within the term of five years in order to acquire title the same cannot be by him sold, exchanged, nor alienated, &c.

To this paper is attached a list comprising some thirty-six individuals, including the three petitioners.

These are all the papers filed in evidence as a basis for their claim.

At the hearing before the surveyor-general in the year 1875 two witnesses were examined, who testify substantially that the town of Pe-

taca contains about thirty families; that the land has always been settled and occupied, except on several occasions the inhabitants were driven off by hostile Indians; they always returned to their homes and work. Said town was in existence in the years 1846 and 1848. Most of the original settlers are now dead. The land is still in the possession of the original petitioners and the descendants of those deceased. They do not know the boundaries. They have no interest in the claim.

At the date of this preliminary concession the laws of 1824 and the regulations of 1828 were in force.

Under these laws and regulations the governor, only with the approval of the departmental deputation, was authorized to make grants of lands to individuals.

The regulations of 1828 provided that to make a grant definitively valid the preliminary concession of the governor was to have the approval of the departmental assembly. Upon the approval the governor would then issue the definitive title, giving directions for the survey or segregation of the claim. After all these acts had been performed they were to have their title papers recorded in a book kept for that purpose.

The Supreme Court has held that *the record was the grant*, and without it the title was not divested. (United States *v.* Teschmacher *et al.*, 22 Howard, p. 405. See also 1 Black, p. 227, and cases cited.)

In this case the only evidence of title filed is the petition, the report of the ayuntamiento, the preliminary concession by the governor, and the act of possession. It was never approved by the deputation; no definitive grant was ever issued; no record was ever made.

The act of the alcalde placed the parties named in the list in possession of 150 varas each, with the exception of several where the quantities were not given, but described as small valleys. Assuming that the parties were placed in possession of 150 varas square each, we have to each party 22,500 square varas, or 810,000 square varas for the thirty-six persons; or about 144 acres, with pastures and watering-places common to all.

The claimants in this case have failed to prove a legal title under the laws, usages, and customs of the Mexican Government; but it is shown that they entered upon, occupied, and cultivated the allotted lands, and were in possession of the same at the date of the treaty of 1848, and hence may be held to have an equitable claim to the amount actually so occupied. The present or preliminary survey, which was made at the request of grant claimants, covers an area of 186,977.11 acres, a quantity grossly in excess of the amount conceded by the governor. These preliminary surveys are not determinative of quantity, and are in no sense conclusive upon the Government, but are at best only the parties' own description of the claimed out-boundaries within which a grant, if valid, should be located.

The surveyor-general recommends confirmation to the extent of the lands actually occupied and cultivated.

If confirmation is made, it is my opinion that it should be to the thirty-six persons named in the act of juridical possession, their heirs and legal representatives, and should be limited to the quantity of land actually occupied and cultivated in 1848; not in any extent exceeding the limitation of town grants, namely, four square leagues, and to include the town of Petaca.

I am, sir, very respectfully, your obedient servant,

WM. A. J. SPARKS,
Commissioner.

Hon. L. Q. C. LAMAR,
Secretary of the Interior.

Transcript of the supplementary report of the surveyor-general of New Mexico, in the matter of the private land claim, file No. 179, *reported No.* 105, *to José Julian Martinez et al., for the Petaca tract.*

[File No. 175. Reported No. 105. Grant to José Julian Martinez *et al.* for the Petaca tract.]

SURVEYOR-GENERAL'S OPINION.

Supplementary.

UNITED STATES SURVEYOR-GENERAL'S OFFICE,
Santa Fé, N. Mex., April 17, 1886.

Private land claim known as José Julian Martinez *et al.* or the Petaca grant. File No. 179. Reported No. 105.

A petition was filed in this office February 12, 1875, purporting to be presented on behalf of the heirs and legal representatives of José Julian Martinez *et al.*, but the names of the claimants are not stated. On February 20, 1875, Surveyor-General Proudfit recommended the confirmation of the claim by Congress, and it is now before me for re-examination under instructions of the Commissioner of the General Land Office, of December 11, 1885.

The land claimed is described as follows: "On the north the hill commonly called the Tio Ortiz, on the east the creek of the Aguaje de la Petaca, on the south the entrance to the cañoncito and the lands of José Miguel Lucero, and on the west the boundaries of the Vallecito grant." A sketch map filed with the petition represents the tract as extending from north to south 15 miles, and from east to west 6 miles.

In support of the claim a document in the Spanish language was presented, by which it is shown that in January, 1836, José Julian Martinez, on behalf of himself, his father, Antonio Martinez, and Francisco Atencio and his sons, unnamed, presented a petition to the ayuntamiento of Ojo Caliente, requesting a grant of a tract of land called Petaca, situated up the river from said place, no specific description of the land being given. The petition requested that a report be made by said ayuntamiento to the provincial deputation as to the propriety of making the grant.

On February 22, 1836, José Antonio Martinez, as president of said ayuntamiento, reported to the deputation that inasmuch as the parties (not naming them) to whom the lands had formerly been granted had failed to cultivate and improve them they had forfeited their rights, and it was recommended that the lands be granted to the petitioners, except that the sons of Atencio be excluded on account of their minority.

On February 25, 1836, Governor Perez, then the civil and military chief of this Territory, issued his decree stating that he had seen the proceedings of the ayuntamiento of Ojo Caliente, in which it was stated there was no objection to granting the land mentioned to the applicant and his associates, as the former grantees had abandoned it and forfeited their rights, and he directed the alcalde of the jurisdiction to place the applicants in possession of the land in conformity with the law on the subject, setting forth the general donation, in which shall necessarily be stated the boundaries of the possession, and binding the grantees to the obligations prescribed by law to acquire title, for which purpose the alcalde was to take charge of the general document of distribution, which shall be for the archives, and to give *testimonios* thereof as might be requested. The signature of the governor to this document appears to be genuine. It corresponds with numerous signatures of the same person on papers in the archives of this office. The evidence of one of the attesting witnesses to the proceedings of the alcalde was taken, and he identified the paper and his own signature. On March 25, 1836, José Antonio Martinez, as the alcalde of Ojo Caliente, as his report states, in compliance with the decree of the governor, distributed the land to the interested parties, a list of whom are appended to his report, which contains thirty-five names, in which are included the persons named in the petition praying for the grant, and it is stated that 150 varas in a direct line were assigned to each of the parties named. The general boundaries of the tract are given as follows:

"On the south the entrance to the cañoncito and the lands of José Miguel Lucero; on the north the hill commonly called the Tio Ortiz hill; on the east the creek of the Aguaje of the Petaca; and on the west the boundaries of the Vallecito grant."

The documents presented as evidence do not seem to have been in the archives of the Mexican Government, nor is it shown that any record of the grant was ever made. As to the evidence necessary to establish a grant, and the necessity of showing the making of a record thereof in cases of this character, reference is made to the decisions cited below.

"Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed.

"The colonization regulations of 1828 constitute the 'laws and usages' by which the validity of a Mexican title is to be determined." (Peralta *v.* United States, 3 Wall., 434.)

It is also stated in the same case that the Mexican nation attached a great deal of form to the disposition of its lands, and required a record to be made, and that the record constituted the grant. (See, also, Pico *v.* United States, 2 Wall., 279, and United States *v.* Knight, 1 Black, 227.)

The oral evidence taken shows occupation of the lands claimed since the alleged date of the grant, but there is no evidence showing who owned the land when the case was filed, or when Mr. Proudfit rendered his decision, or the names of any of the descendants, heirs or assigns of the original grantees in existence at these dates, although it is stated that some of such descendants were then residing upon the land. Mr. Proudfit recommended that the title be confirmed to the heirs or legal representatives of José Julian Martinez and others named in the act of possession.

In July, 1883, one S. S. Farwell, who claimed to be a part owner of the land, filed in this office a petition asking for a reconsideration of that portion of the report of Surveyor-General Proudfit, which relates to the parties to whom the title should be confirmed, claiming that none but the heirs and representatives of José Julian Martinez, Antonio Martinez, and Francisco Antonio Atencio should be included as confirmees. In pursuance of this petition, on August 1, 1883, Surveyor-General Atkinson made a report upon this question, in which he held that the legal and equitable title to the land vested in the persons last named, and recommended that the title be confirmed to them. He held that as these persons were the only ones named in the petition to the governor, the grant was made to them alone, and that the alcalde exceeded his jurisdiction in placing others in possession. If this is a question for the determination of the surveyor-general, Mr. Atkinson failed to consider one material question bearing upon this matter. The proceedings of the alcalde show that the original petitioners were present when the lands were divided and portions assigned to each of the thirty-five persons named, and as it does not appear that objection was made by the petitioners, their assent must be implied. If, under this state of facts, the persons to whom the land was assigned took possession thereof in good faith, and improved it, the original petitioners would now be estopped from claiming title. It would seem, however, that this is a question for the decision of the courts rather than for this office or Congress. The important questions now are, Was there a valid grant made? If so, does the evidence show the existence of any party having an interest in the land? And if these questions are answered in the affirmative, is the land correctly surveyed?

In considering the validity of this grant, I must be governed by the Mexican colonization law of 1824, and the regulations thereunder of 1828. According to these and the authorities I have cited, the grant cannot be held legally valid. No record of the grant is shown, and the condition of its validity is therefore not complied with. The equity of the claim is a different question. The genuineness of the grant is sufficiently established. The grantees were legally put in possession of the land, and continued to hold and occupy it without any adverse claim until its alienation to other parties. The strictness of the law of 1824 as to the record evidence of grants was never followed in New Mexico, where grant claimants were too much accustomed to hold the evidence of their titles in their private custody, although they frequently deposited them in the public archives. When the United States took possession of these archives they were, therefore, necessarily incomplete, and some of them in all probability were scattered and lost in the year 1870 through the reckless conduct of William A. Pile, who was then governor of New Mexico. In the light of these facts, I think it would be a great hardship to reject altogether the claim now made, and that justice will be best served by recognizing an equitable title to the land granted.

As to the question of parties, I deem it unnecessary to decide as between them who should receive the patent for the land should Congress perfect the equitable title into a legal one. That question can best be settled by another tribunal, while the parties in interest are sufficiently shown by the papers to justify the examination and adjudication of their claim.

The survey of the tract is clearly wrong. Its area, as given in the sketch-map, is 15 miles long by about 6 miles wide. This is undoubtedly a very liberal estimate, as such sketch-maps uniformly overstate the real amount. The survey made in 1878 makes the land 20 miles from north to south, with an average width of about 10 miles, being much more than double the claim made in the sketch map, and embracing an area of 186,977 acres. As the grant was made to only three persons, this would be much more than the limit fixed by the law of 1824, of 11 square leagues to each person, and the effect of this survey is to hold in reservation from actual settlers the excess, if not a still larger area. I have no means of knowing the true area of this grant, but the uniform policy which has prevailed in New Mexico, of enormously stretching grants by extravagant surveys, involves this grant in suspicion, and strengthens the reason I have given for the necessity of a resurvey.

Guided by these views, I commend to the favorable consideration of Congress the right of the proper claimants to an equitable title to the land actually covered by the grant, subject to the right of the United States to all minerals found therein, and I respectfully suggest to the Land Department the propriety and necessity of a resurvey in aid of the just settlement of the claim, and with a view to the release of the lands now unlawfully segregated from the public domain.

Copies in triplicate of this opinion are forwarded as required.

GEORGE W. JULIAN,
Surveyor-General.

SURVEYOR-GENERAL'S OFFICE,
Santa Fé, N. Mex.

I, George W. Julian, surveyor-general within and for the Territory of New Mexico, do hereby certify that the above and foregoing is a full, true, and complete copy of the supplementary report of the surveyor-general for New Mexico, dated April 17, 1826, in the matter of the private land claim, file No. 179, reported No. 105, known as the grant to José Julian Martinez *et al.* for the Petaca tract, as the same appears on file in this office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of this office, at Santa Fé, N. Mex., this 14th day of June, A. D. 1886.

[SEAL.] GEORGE W. JULIAN,
Surveyor-General.