BEFORE THE INDIAN CLAIMS COMMISSION

THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION, ARIZONA Petitioner, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 90

Decided: May 11, 1967

Appearances:

Arthur Lazarus, Jr., with whom were Royal D. Marks, the law firm of Strasser, Spiegelberg, Fried, Frank & Kampelman and David E. Birenbaum, Attorneys for Petitioner

Howard G. Campbell, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

This case is now before the Commission upon petitioner's motion for a rehearing and for modification of certain findings of fact which have been entered in this matter. Petitioner's motion, filed January 13, 1967, relates to Findings of Fact Nos. 17 through 19, which were entered by the Commission on November 19, 1962 (11 Ind. Cl. Comm. 447, 456-57) and Finding of Fact No. 20, which was entered by the Commission on December 21, 1966 (17 Ind. Cl. Comm. 456).

All of the findings which petitioner seeks to have modified relate to the determination of the area of land to which it was found that the Hualapai Tribe held Indian title. The Commission's decision on the title issue was rendered on November 19, 1962. Thereafter neither party moved for a rehearing or modification of the decision.[1/]

Following the Commission's 1962 decision on the "title phase" of the claim, hearings were conducted in October, 1964, on the valuation issue, and on December 21, 1966, the Commission entered its determination of the fair market value of the lands involved.

At this point in the proceedings on this claim, some four years after our determination on the issues of title, petitioner seeks to have the decision reconsidered and modified. In support of this motion petitioner has submitted that the Commission erred as a matter of law and fact in fixing the boundaries of the territory to which the Hualapai Tribe held Indian title.

Before proceeding to a consideration of petitioner's motion, we will dispose of two of defendant's objections -- namely that petitioner's motion is not timely filed and that the motion is based upon a change of position from that previously taken. Rule 33 of the Rules of Procedure of the Indian Claims Commission deals with motions for rehearing and for amendment of findings. The rule provides that "motions for rehearing shall be filed within 30 days from the time the final determination of

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1/ Defendant did, on December 10, 1962, move to clarify finding of fact No. 17, which motion was denied by the Commission on December 14, 1962. However, such motion sought merely to more precisely delineate the boundaries of the described area.

the Commission if filed with the clerk" 25 C.F.R. § 503.33(a). No final determination has been filed in this case, and, under the clear terms of Rule 33, petitioner's motion has been timely filed. See Confederated Tribes of the Warm Springs Reservation of Oregon v. The United States, October 14, 1966, _____ C. Cls. _____, slip opinion pp. 2-5.

Defendant has also objected on the ground that petitioner initially contended that its use and occupancy was dominant whereas it now claims that there was "joint title" to certain areas. We do not consider that this objection provides any basis for denying consideration of the merits of petitioner's motion.

We turn now to a consideration of the merits of petitioner's motion by which it seeks to have the title issues reopened and the area which has been awarded to the Hualapai enlarged. We are concerned in this case with the area to which petitioner held Indian title, also called "original" or "aboriginal" Indian title. The nature of Indian title has been exhaustively dealt with in innumerable decisions by the courts. This right of occupenacy has been uniformly acknowledged by the courts and statutes of the United States. Indian title has been defined as the right of occupancy acquired by exclusive use and occupancy from time immemorial. In a landmark case in Indian law involving these same Hualapai Indians (therein referred to as Walapai), United States v. Santa Fe Pacific Railroad Co., 314 U. S. 345, the Supreme Court stated, "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were

established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had 'Indian title' . . ."

The nature of Indian title and its prerequisites are perhaps best set forth in one of the Court of Claims most recent decisions. In The Sac and Fox Tribe of Indians et al, v. The United States, App. No. 9-65, decided March 17, 1967, slip op. pp. 11-13, Judge Skelton wrote:

* * *

> Chief Justice John Marshall thoroughly discussed sovereign title and Indian title in the early case of Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 570-603 (1823). He pointed out that when the various parts of the new world were discovered by explorers of the nations of Europe, a principle of international law was developed and recognized by all the nations to the effect that discovery of new land carried with it the right of sovereignty or sovereign title to the discovered land which vested immediately in the sovereign of the nation whose explorer discovered it, subject to the right of use and occupancy by Indians living on it. Of course, the boundaries of discoveries were many times vague and indefinite, and this led to disputes and even wars between the nations over the sovereign or legal title or ownership to a given area of land. But the basic principle of sovereign title was recognized by all. It gave the sovereign the absolute right to sell, give or grant the legal title to another person or to another nation. No one questioned this right once sovereignty was established over land. It was inevitable such a system would develop in the scheme of things as it existed at the time of the new world discoveries. Obviously sovereign or legal title to land could not be in two different nations or persons at the same time, as no sale of it could ever be made under such circumstances.
>
> However, the right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land. This right of use and occupancy by Indians came to be known as

"Indian title." It is sometimes called "original title" or "aboriginal title." It is not the same as sovereign or legal title. Land owned by Indian title is owned by the tribe and not by an individual Indian. It must be used within the tribe and subject to its laws and customs and cannot be sold to another sovereign government nor to a citizen of any sovereign government. Johnson & Graham's Lessee v. McIntosh, supra.

This system of right of discovery and its inclusion of sovereign title subject to Indian title held by Indians living on the land was accepted by the United States and became a part of its laws. Johnson & Graham's Lessee v. McIntosh, supra; Worcester v. State of Georgia, 31 U.S. (6 Pet.) 515 (1832). It has been observed and applied through the years by the Government in its acquisition and sale of land where Indian title existed. In cases involving these situations, the courts have held that sovereign or legal title to land, as distinguished from Indian or aboriginal title, may be obtained (aside from discovery or the purchase from the sovereign of a discoverer) by treaty, statute or an agreement. Otoe and Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 608, 131 F. Supp. 265, 275 (1955), cert. denied, 350 U.S. 848.

Indian title has likewise been defined many times by the courts. For instance this court defined it in the case of Sac and Fox Tribe of Indians of Oklahoma v. United States, 161 Ct. Cl. 189, 201-02, 315 F. 2d 896, 903 (1963), cert. denied 375 U.S. 921, as follows:

> * * * To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclusive, and continuous use and occupancy "for a long time" prior to the loss of the property. (Cases omitted.)

See also Confederated Tribes of the Warm Springs Reservation of Oregon v. United States, App. No. 2-64, decided October 14, 1966, slip op. p. 6, and cases collected therein.

The courts have also construed the terms "use and occupancy" requirement of Indian title to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers. In the case of Mitchel v. United States, 34 U.S. (9 Pet.) 711, 745 (1835), the Supreme Court said:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; * * *.

This concept of Indian title has, in our view, been consistently followed by the courts and this Commission. And it was within this concept that we weighed the evidence in the instant case and reached our determination of the area to which the Hualapai Tribe held Indian title. We found that the Hualapai Tribe exclusively used and occupied that tract of land described in our finding of fact number 17. That area, comprising some 4,459,500 acres (excluding the Hualapai Reservation) was the ancestral home of the Hualapai.

As we stated in our opinion, beyond the Hualapai boundary on the northeast the lands were used by the neighboring Havasupai Indians. The Havasupai, although friendly to the Hualapai, were a separate, distinct land holding tribe of Indians which occupied and used a separate though neighboring area. The Havasupai are petitioners in a separate cause of action which has not yet been decided. In this small intervening area, to the northeast of the Hualapai tract, the lands were variously used and occupied by Hualapai and by Havasupai. Such lands were not exclusively used and occupied by the Hualapai. The lands were not part of the ancestral homelands of the Hualapai. The Hualapai clearly did not have Indian title to those lands, and we did not include them in the area awarded to the Hualapai.

To the west between the Colorado River and the Black Mountains there was an area used and occupied by the neighboring Mohave Tribe.

The Mohave, although also friendly to the Hualapai, were a separate, distinct, land holding tribe of Indians which occupied and used a separate though neighboring area. The area which the Mohave exclusively used and occupied and to which that tribe held Indian title has been determined by this Commission in the Mohave Tribe's claim (Dockets Nos. 295, 283, 7 Ind. Cl. Comm. 219). There was between the Mohave's ancestral homelands and the Hualapai tract a small intervening area which was variously used and occupied by both the Mohaves and the Hualapais. Since this area was not exclusively used and occupied by the Hualapai, that tribe did not have Indian title to the area, and we did not include it in the area awarded to the Hualapai.

Petitioner now seeks to have its 4,459,500 acre tract enlarged to include all, or part, of these two "joint use" areas. Petitioner's motion is grounded on a new principal in the law on Indian title which it contends has been enunciated by the Court of Claims since our original decision on Indian title in this case. Petitioner has referred to this new theory of joint title as the "Warm Springs rule" and argues its creation on the basis of three decisions of the Court of Claims.

In Sac and Fox Tribe of Indians of Oklahoma, et al. v. United States, 161 C. Cls. 189, 202 (fn. 11), 315 F. 2d 896 (April 5, 1963), cert. den. 375 U.S. 921 (1963) the Court of Claims stated:

* * *

> "* * * aboriginal title must rest on actual, exclusive,[11/] and continuous use and occupancy "for a long time" prior to the loss of the property. * * *
>
> * * *

11/ Except where two or more tribes or groups inhabit a defined area in joint and amicable possession."

In The United States v. The Kickapoo Tribe of Kansas, et al., ____ C. Cls. ____ (Feb. 18, 1966; slip opinion, p. 5) the Court stated, "Joint ownership or occupancy by friendly tribes has been acknowledged as possible . . ." And finally in The Confederated Tribes of the Warm Springs Reservation of Oregon v. The United States, ____ C. Cls. _____ (Oct. 14, 1966; slip opinion p. 6, fn. 6) the Court wrote:

* * *

> "There must be a showing of actual, exclusive[6/] and continuous use and occupancy 'for a long time' prior to the loss of the land."

* * *

6/ Joint and amicable possession of the property by two or more tribes or groups will not defeat "Indian title."

While recognizing that in none of the three cited cases was there an application of the "joint title" theory, counsel for petitioner has argued that the Court of Claims went out of its way to use the quoted language because it wished to indicate that in a case where two friendly tribes occupied an area there could still be Indian title. Petitioner's counsel recognizes that neither this Commission nor any court has ever applied this "joint title" theory to an Indian title case. But as counsel argued before the Commission "Now this happens to be a new issue, and we don't have any precedent. All we have are expressions of opinion from the court which indicate which way they will go when they get that new opinion, and I suggest in a lower court which is what this is, it is duty bound to ascertain the law." (Argument on motion for rehearing, Mar. 22, 1967, Tr. 28).

We agree with counsel that the Court of Claims has not by any

decision changed or modified the long established law concerning Indian title. But we cannot agree with counsel that the cited dictum indicates an intention by the Court of Claims to so change the law in some future case. We do not deem it wise to speculate at this time on what might be the possible scope of the Court's intentions when the words "joint and amicable possession of the property by two or more tribes" were included in a definition of Indian title. But we can examine the effect in the three cited cases.

Sac and Fox Case

This 1963 decision was the first of the three cases and involved an appeal by the Sac and Fox Tribe from a Commission decision holding that the appellant did not possess recognized title to the lands in suit but that they had Indian title to a part of those lands. The Commission had excluded two segments of the claimed area on the ground that the Sac and Fox had failed to prove aboriginal use and occupancy of the two excluded segements.

First it should be recognized that the Sac and Fox originally existed as two separate and identifiable tribes of Indians belonging to the Algonquin stock. However, in the early 1700's they were forced by their mutual hostility with the French to form an alliance, politically and socially, so that thereafter they became a merged nation or larger tribe. Even after that period they maintained several separate villages. But these two tribes, the Sac and the Fox, have been considered and dealt with as a merged, single, land using entity. And while it might

be referred to as a joint and amicable possession of the land by the Sac Tribe and by the Fox Tribe, we have never referred to it in exactly those terms. But in any event the Sac and Fox Tribe (or Tribes) have been found to have had a unity in their land use and occupation. And where such use and occupation was exclusive and had been so "for a long time" the Sac and Fox have successfully established Indian title.

The Commission's decision in the Sac and Fox case was affirmed by the Court of Claims--and the affirmance dealt specifically with the two excluded segments. Of course two principal reasons for the exclusion were the short span of time involved in the Sac and Fox use and occupation and the fact that the Sac and Fox actually entered the area by conquest. But the Court's language is significant in commenting on the question of other Indian inhabitation of the excluded areas:

> "In sum the Commission was not compelled by the record to find that the Sac and Fox had an exclusive and unchallenged claim to the disputed areas for the required span of time before 1804; other tribes were in the vicinity, at least until the closing years of the 18th century." (161 C. Cls. 189, 207).

Kickapoo Case

The next decision in this line of cases was in February, 1966, and arose from an appeal by the defendant from the Commission's determination that the Peoria Tribe and Kickapoo Tribes had recognized title to two described areas--each holding an undivided one-half interest in the areas. This case involved recognized title which is in no way similar to or involved with Indian title. Recognized title is not dependent on any Indian use or occupation. The title is derived solely from a Congressional

grant of title. And the fact that there may be joint ownership arising under such a Congressional grant can in no way be related to "joint title" in an Indian title (aboriginal title) case.

Warm Springs Case

The final decision relied on by petitioner was made in October, 1966. The Confederated Tribes of the Warm Springs Reservation appealed from the Commission's determination of the area to which the tribes had Indian title. The Court reversed and remanded the case finding there was not substantial evidence to support the Commission's eastern boundary determination and because, although there was substantial evidence on Snake usage of a portion of the claimed area to support the Commission's southern boundary determination, there was a "hint" of a denial of land because of a common usage of subsistence area by more than one band of Indians i.e., more than one band of Wayampam Indians.

In our Warm Springs decision it is true that the Commission discussed the existence of four Wayampam bands--each with a strong sense of individual land ownership with respect to their immediate village sites and fishing grounds. And we did refer to the lack of political unity between the four bands and the fact that they had maintained their separate identities throughout the treaty negotiations. But the fact remains that the only important determination in this regard in an Indian title case concerns the land using or land owning entity. And in the Warm Springs case we treated the Wayampam as a single land owning entity. This could be viewed as a type of "joint ownership" by four Wayampam bands. But this was really ownership of the entire area by all the four bands and therefore

ownership by one separate, distinct land owning entity--namely the Wayampam bands. This fact has been clarified by the Commission's Order Amending Findings of Fact and Interlocutory Order and the accompanying Opinion, both dated April 4, 1967.

Unfortunately, we failed to make this point clear in our initial Warm Springs decision and this fact caused the Court of Claims to remand this issue for clarification. The Court noted in its opinion that the Commission has followed this doctrine of permitting recovery by an entity comprised of persons who were closely associated economically and culturally and who collectively used the same general area of land. And in commenting on the Commission's adherence to this doctrine and the Court of Claims affirmance thereof, the Court in fact cited this very Hualapai decision now sought to be modified by petitioner. The citation appears on the bottom of page 18 of the slip opinion (The Confederated Tribes of the Warm Springs Reservation of Oregon v. The United States, Appeal No. 2-64, October 14, 1966). The citation "Shoshone Tribe v. United States, 11 Ind. Cl. Comm. 458, 474[22.] " should read "The Hualapai Tribe of the Hualapai Reservation, Arizona v. The United States of America, 11 Ind. Cl. Comm. 458, 474[22.] ." It is clear that the reference was in fact to the Hualapai case since the Indian Claims Commission volume and page citation does refer to the Hualapai opinion and the direct quote in footnote 22 is in fact from page 474 of the Hualapai opinion. That quote is as follows:

> Assuming for a moment that the Hualapai were not a tribe in a political sense, we have a people who all ethnologists agree, spoke the same language, had a common cluture, intermarried, made common use of the lands away from their settlements, shared their own territories, engaged in common economic activities and considered themselves one people. Such factors make the Hualapai an identifiable group and a land-owning entity under the Nooksack, Muckleshoot, and Washoe decisions, supra. (Slip Opinion, p. 19)

There have been a great number of cases before this Commission in which complex issues have been raised concerning the identity of the tribe or group which actually comprised the land owning entity. Actually there have been few instances of a clear-cut, politically unified, tribal land using entity. Often land use areas have been utilized by tribelets, or bands, or other autonomous small groupings or villages. But this Commission has tried to apply a common sense approach to each individual case. Where various groups of Indians joined together to collectively use and occupy in Indian fashion an area of land, we have found such land using entity to have established Indian title to the tract so used. We have not used the argument of separate autonomous villages or groups to defeat a claim based on Indian title. Of course each case must be considered and decided on its own particular facts. But, in general, wherever we have found an overall group of Indians, possessing some unifying linguistic and cultural ties and where such Indians joined in a common use and occupation of a definable area of land, we have found that such a land owning entity possessed Indian title. In such cases the most material factor has been the unity of land use and occupation--the collective use by the entire

group of the entire area. The political unity of the bands or identifiable group may be very weak--indeed it may be virtually non-existent--provided, however, there is a unity in the land use and occupation. It was under this doctrine that we found that the Hualapai Tribe held Indian title to the area described in finding of fact number 17.

But we have never applied this doctrine to include peripheral areas which were not exclusively used and occupied by the land owning entity but which were used and occupied at the same time by other neighboring Indians.

In this Hualapai case we have, we believe, rendered a decision which is fair and just and supported by the evidence of record. The 4,459,500 acres awarded to the petitioner represents its ancestral homelands which the Hualapais had exclusively used and occupied in Indian fashion for a long time. We do not believe that the law or the evidence justifies any enlargement of the area to include the "joint use" areas. And we do not believe that the Court of Claims has indicated any change or prospective change in the established and well settled law of Indian title.

Petitioner has raised one final point in its motion. Petitioner seeks to have the northern boundary changed from the southern shoreline of the Colorado River to the middle of the Colorado River. And it seeks to have the southern boundary changed from its series of straight lines to a description which follows natural watershed boundaries. While we

are aware that perhaps more artful descriptions might be devised for depicting the area awarded the petitioner, we do not consider that sufficient reasons have been given for changing, at this late date, our description of the Hualapai tract as set forth in finding 17.

For the reasons set forth above we have concluded that petitioner's motion should be denied.

Wm. M. Holt
Wm. M. Holt
Commissioner

We concur:

Arthur V. Watkins
Arthur V. Watkins
Commissioner

T. Harold Scott
T. Harold Scott (see concurring opinion)
Commissioner

Scott, Commissioner, concurs with the following Opinion:

Although I have some doubts, as expressed hereinafter as to the issues presented in this matter, I have concurred with my colleagues in order that it may be presented to the Court of Claims as soon as possible, which presently involves the necessity of a unanimous decision.

During the oral argument in this matter I suggested the use of Section 20(a) of our Act to secure the advice of the Court of Claims on the novel question involved as to the eastern boundary question (see Tr., p. 24, et seq). However, counsel for the petitioner herein expressed his preference for the appellate procedure (see Tr., p. 29). Thus, with our decision, a review by the Court is assured.

I am in full agreement with my colleagues as to the western boundary.

As to the northern boundary I have some doubt. For example, if the Indians came to the southern bank of the Colorado River, which is the boundary we have confirmed herein, would it be reasonable to infer that they came to this river merely to look at it or to actually use it? The petitioners here contend the line should be the middle of the stream instead of to the southern bank.

As to the southern boundary I have some doubt in view of the evidence presented. I agree we may use straight lines as authorized by decisions of the Court of Claims. However, assuming the use of a straight line is necessary, it may be that that line should be drawn at a distance further to the south of the line we have approved.

As to the eastern boundary the opinion of my colleagues have clearly and ably presented the precedents to date. The question posed, however, based as it is on statements made by the Court of Claims in these cases, is novel.

T. Harold Scott
T. Harold Scott, Commissioner

BEFORE THE INDIAN CLAIMS COMMISSION

THE HUALAPAI TRIBE OF THE HUALAPAI RESERVATION, ARIZONA, Petitioner,	)	
v.	)	Docket No. 90
THE UNITED STATES OF AMERICA, Defendant.	)	

ORDER DENYING MOTION FOR
REHEARING AND MODIFICATION

The above-entitled cause came on to be heard before the Commission upon the motion of the petitioner, filed on January 13, 1967, for a rehearing and for modification of the Commission's findings on liability, and the defendant's reply thereto, and the petitioner's reply memorandum, and the oral arguments of the parties on March 22, 1967, and the Commission now being fully advised in the premises, and for the reasons set forth in the opinion this day filed herein, finds that said motion should be denied.

IT IS THEREFORE ORDERED that the petitioner's motion for rehearing and for modification of findings on liability be and the same is hereby denied.

Dated at Washington, D. C., this 11th day of May, 1967.

(Signed) Arthur V. Watkins
Arthur V. Watkins
Commissioner

(Signed) W. M. Holt
Wm. M. Holt
Commissioner

(Signed) T. Harold Scott
T. Harold Scott
Commissioner