

BEFORE THE INDIAN CLAIMS COMMISSION

THE PAPAGO TRIBE OF ARIZONA, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 345

Decided: Sept. 10, 1968

Appearances:

Royal D. Marks, with whom were Arthur Lazarus, Jr., and David E. Birenbaum, Attorneys for the Petitioner.

Lester Reynolds, with whom was Mr. Assistant Attorney General, Clyde O. Martz, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This case is timely filed against the United States under Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a). The petitioner is a tribe of American Indians residing within the territorial limits of the United States.

The petitioner alleges Indian title based upon aboriginal use and occupancy of a large area of land in southwestern Arizona. The tract is bounded generally by the Tinajas Altas - Gila Mountain Range, the Gila River, the Santa Catalina - Rincon - Patagonia Mountain Range, and the American - Mexican International Boundary.

Since the earliest Spanish exploration, Papago ("the Bean Eaters") has been the name ascribed to the desert-dwelling Indians found in this area (and south into Mexico). There is virtually continuous documentation of their presence in this area to the present time.

The subject tract was under Spanish dominion from the early 16th Century until Mexico succeeded to it in 1821. Mexican sovereignty lasted until the Gadsden Purchase in 1854, when the Mexican Government ceded lands including the subject tract to the United States. Due to the constantly expanding non-Indian settlement within the subject tract after 1854, the United States Government decided to concentrate the Papago Tribe within a reservation. Two former attempts to locate all the Papagos on a reservation had failed -- the San Xavier Reservation, in 1874; and the Gila Bend Reservation in 1882. Finally, a generally satisfactory solution, at least to the United States, was arrived at, and the present Papago Indian Reservation was established on February 1, 1917. Thereafter, adjustments and additions were effected and the Papago Indian Reservation emerged in its present form.

The Spanish called that part of Sonora north of the Altar and San Ignacio Rivers "Alta (Upper) Pimeria." The Spanish called that part of the Upper Pima Country in which the subject lands are found the "Papagueria."

The names Pimeria and Papagueria were derived from aborigines who lived in the areas. Pimeria came from the Pima Indians, a large

group with the common bond of the Piman language. The Spanish found three main Indian groups in the Papageria -- the Pimas, the Sobaipuris and the Papagos, all speaking Piman languages and mutually peaceful. The dominant group in the Papageria, as the name suggests were from very early times the Papagos. The Pimas, called Gila Pimas, were settled in the north on the Gila River, where the tribe is found yet. The Sobaipuris were settled along the San Pedro and Santa Cruz Rivers and were wholly absorbed within the Papago Tribe in the 18th Century.

For convenience, we shall discuss the Papago claim of aboriginal title to the area in the terms of three zones: Western, Central and Eastern. The Western Zone extends from the area of Yuma occupancy along the Colorado River to the west to the Growler Mountains on the east, between the Gila River and the International Boundary. The Central Zone includes the land between the Growler and Baboquivari Mountains, from the boundary north to the line of Pima occupancy. The Eastern Zone includes the Altar and Santa Cruz River Valleys, from the boundary north to beyond Tucson.

It is not contested that the Central Zone has been occupied and used by the Papago since time immemorial. Much of their population has been centered here, and most of the area has been incorporated into the Papago Indian Reservation of today.

In this arid area, the necessary search for water and food forced

constant movement on the Papago -- movement from permanent water in the mountains to agriculture in valleys during the rainy season, to gathering the fruit of the saguaro cactus when ripe, to gathering all the many other edibles they managed to find in their land of little rain. Although in historical times aggregated into larger "defense villages," the normal economic unit seems to have been the extended family band, moving often in search of food. Of necessity, a far greater area was used for food gathering than that area immediately associated with a permanent village. For the purpose of finding aboriginal title, we are obliged to look to the whole area used in an Indian fashion.

In the Western Zone, this principle becomes of great importance. West of Ajo, the land becomes more arid and supports less vegetation and game. The defendant denies that any Indians did live or could have lived in this forbidding area. Nevertheless, the record shows sufficient use of water holes and food resources for us to find that the area as far as the Tinajas Altas-Gila Mountains was capable of use and was occupied to a sufficient extent by Papago Indians to support a finding of aboriginal title.

Most of the Papago lands were not used for agriculture. The bulk of the evidence is that the Papago population stayed at 5000 to 6000 persons for about four centuries, and that only about 20% of their food came from farming. There is voluminous evidence and testimony of record showing the nomadic character of Papago life, and of their hunting and

gathering activities throughout the Western Zone. Though thinly dispersed, wild plants and game were present throughout the zone. Mesquite beans, a Papago staple, were found in abundance in the northwestern portion of the subject lands. The Papagos of the western zone survived largely through hunting and foraging; some of their villages and hunting camps, and many of their water tanks, were in the Western Zone, north and south. The Court of Claims' comments in a recent case are applicable:

"Had the Seminoles chosen to live by food-raising alone, we would regard the 'village' evidence (stressed by the Government) as a persuasive consideration in limiting the Seminoles' 'title' to the land falling within the compass of their permanent home sites, i.e., the northern half of the peninsula. Cultures that stake their survival upon a close union with the soil, as in the case with primitive food-raising economies, would not demand the vast tracts of land required for a nomadic, hunting existence. But the Seminoles - as was the case with many other Indian groups - survived not simply through farming, but by food-gathering and hunting as well. In other words, Seminole land-use clearly encompassed more than the soil actually 'possessed.' Therefore, other aspects of the Seminole pattern of life demand consideration." United States v. the Seminole Indians of Florida, et. al., Ct. Cl., App. No. 11-65, decided June 9, 1967 (Slip Opinion, p. 9).

However short a time the Indians could stay at one spot before exhausting its food and water resources and having to move on, their exclusive use of the area as a whole "for a long time" establishes their aboriginal title. Defendant has assembled many reports of travelers who failed to sight Indians in this area during the period of acquisition of sovereignty, but we feel the evidence establishes that the Papago were

present and using the Western Zone to a sufficient extent for Indian title.

The Eastern Zone is composed of the Santa Cruz River Valley and its surrounding mountains. The earliest Spaniards found Indians here and this Valley was chosen by the famed Father Eusebio Kino for the founding missions for the Indians at Tumacacori, Guebavi and San Xavier del Bac in the years after 1687.

It is defendant's contention that the Indians found by the Spanish in the Santa Cruz Valley (and the San Pedro Valley to the east) were the Sobaipuri, a separate and distinct tribe from the Papago or Pima, although speaking a related language, and that the Sobaipuri were extinct as a tribe by the end of the 18th Century because of disease and heavy Apache raiding. Further, that the Papago came to the Santa Cruz Valley only after recruitment by the Spanish to replace the decimated Sobaipuri at the missions.

The Commission feels that it is unnecessary to find whether the Sobaipuri were a separate tribe. It is undisputed that there were Papago in the Santa Cruz Valley in the latter half of the 18th Century when the Sobaipuri were absorbed into that Papago population. Insofar as those Papago continued to occupy and use lands formerly used in an Indian fashion by the Sobaipuri, the Papago succeed to their rights of aboriginal title. Undoubtedly this is correct here, where the merger took place

several generations before any dealings between the merged tribe and the United States. See United States v. The Seminole Nation, supra, at 11; Confederated Salish and Kootenai Tribes v. United States, 8 Ind. Cl. Comm. 40 (1959).

In any event, defendant further contends, Apache raiding had forced abandonment of the Santa Cruz Valley in 1854, when U. S. sovereignty attached to the area. Without considering whether Indian title could have been acquired or re-acquired after 1854, or whether as a matter of law the raiding alone could cause defeat of the Papagos aboriginal title claim (see Omaha Tribe v. United States, 4 Ind. Cl. Comm. 627; Confederated Salish and Kootenais Tribes, etc. v. United States, 8 Ind. Cl. Comm. 40 (1959)) we find that the Papagos were using the Santa Cruz Valley during the period in question, at least to the full extent possible under the Apache threat.

The Apaches had engaged in raiding forays in the Santa Cruz Valley since the time of Father Kino. The raiding was intensified in the 1811-1821 decade during the Mexican War for Independence. The raids cost the Papagos dearly in pillage and bloodshed, but the Apaches never "took" the Papago land. They did not settle west of their mountain ridge boundary, the Santa Catalina - Patagonia Mountain Range. Apache raiding continued, however, until after the Civil War when the United States finally subdued them. Papago hunting and gathering and farming, to the extent

possible, continued throughout the 18th and 19th Centuries in the Santa Cruz Valley.

The defendant maintains that the Apaches dominated the valley until after the Civil War and that the Apache ascendancy ended Papago use and occupancy sometime before 1854. The Commission is aware that evidence of Papago use and occupancy in and after 1854 is meagre. Defendant's evidence negating Indian presence in this period has much force, but falls before positive evidence of continued Indian use. In 1852, John R. Bartlett found Papagos at St. Xavier del Bac, and found their recent camp sites between the Santa Cruz River and the eastern boundary of the subject lands. We must conclude that there was no abandonment and the Apache raids did not terminate petitioner's use and occupancy of the subject lands to their eastern boundary, the Santa Catalina to Patagonia ridge line.

The Papago claim of aboriginal title to the lands of the three zones is adequately supported by the evidence and is more fully detailed in our Findings of Fact. The southern boundary of the subject lands is the International American-Mexican Boundary. The evidence and arguments of the parties leave no doubt that the petitioner exclusively used and occupied in Indian fashion from time immemorial all the lands from the Sonoran Altar Valley in the south to near the Gila River in the north.

On the western end of the northern boundary, the line is fixed in relation to the Gila River, but stops short of it. No doubt the Papago



made some use of the River, but did not settle there or attempt agriculture there; the boundary as drawn includes only the area where the desert-dwelling Papago undoubtedly had exclusive use. In the Gila Bend area, despite the Papago population of the Gila Bend Reservation on the Gila River, we find no evidence of exclusive aboriginal use of the River area by the Papago. To the northeast, the evidence supports a rather clear demarcation between lands traditionally Pima and lands traditionally Papago.

The Gadsden Purchase of 1854 brought the subject lands under United States sovereignty and they became public lands by the Act of July 22, 1854 (10 Stat. 309). Among other things, that Act provided for the application to the new public lands of the pre-emption laws of the Territory of New Mexico other than on lands covered by claims based on Spanish or Mexican law. Only American citizens or persons who had filed declarations of intention to become American citizens could exercise the right of pre-emption. The United States opened the Arizona public lands to homesteaders by the Act of July 26, 1866 (14 Stat. 251). The United States also disposed of some of the subject lands to railroads, and for parks, schools and national forests.

The laws mentioned above caused a large incursion of non-Indian settlers into the subject lands. The settlers established homes and ranches, and staked out mining claims. Unlike the Apaches, who invaded

the subject lands, raided the Papagos and left, the settlers came to stay. The white settlers were there to raise cattle, to trade, to farm and to work the rich mines of the Papago Country.

Friction between the settlers and the Papagos became so pronounced that the United States Government began to think in terms of Indian reservations. The San Xavier del Bac Reservation was created by Executive Order on July 1, 1874 and the Gila Bend Reservation was created by Executive Order on December 12, 1882.

The river reservations proved to be a highly unsatisfactory solution for the Papagos. Both of them confined the Papagos who went to them in very small and inadequately productive areas. The San Xavier and Gila Bend Reservations were surrounded by non-Indian settlers of aggressive intent, who constantly encroached upon the small reservation areas.

Papago-settler relations were distinctly unpleasant as the 20th Century began. The United States Government was again thinking in terms of "concentrating" the Papagos on an adequate reservation. Upon the basis that Papagos had lived in the area for many generations, the Papago Indian Reservation was established there by Executive Orders 2300 and 2525, dated January 14, 1916 and February 1, 1917 respectively.

The Papago Indian Reservation was a sizeable land area -- some 2,225,000 acres. A jagged strip about six miles wide, running roughly east-west across the waist of the reservation, was excepted. As the

strip consisted of about 475,000 acres of the best land in the area, even this large reservation was not a completely successful cure for Papago discontent. Restoration of the strip and other additions to the Papago Indian Reservation were effected by the Act of February 21, 1931, (46 Stat. 1212), the Act of July 28, 1937 (50 Stat. 536), and the Act of June 13, 1939 (53 Stat. 819).

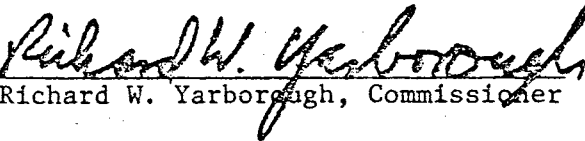
The Papago Indian Reservation was open to mineral entry from its inception in February 1, 1917, to October 28, 1932. On the latter date, the Secretary of the Interior closed the reservation to mineral entry, but Congress reopened it to mineral entry by the Act of June 18, 1934, (48 Stat. 984). Finally, by Act of May 27, 1955 (69 Stat. 67), Congress withdrew Papago reservation lands from future mineral entry.

This Commission concludes that the Petitioner in the instant case had Indian title to the lands described in Finding No. 25. The two present Papago Reservations within this boundary are to be subtracted from the gross area of the lands described in Finding No. 25. The Spanish and Mexican land grants will be excluded as in previous decisions. Pueblo de Cochiti v. United States, 7 Ind. Cl. Comm. 422 (1959).

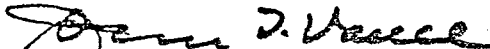
As the defendant declined to submit evidence on the date or dates of taking under his view of the claim, the case will now proceed to the

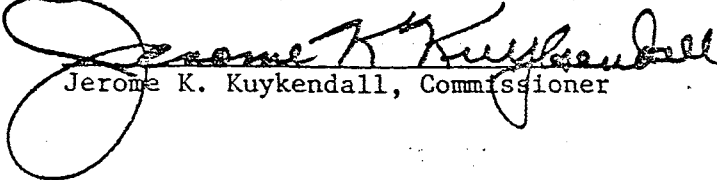
determination of that issue, all other issues being reserved for future proceedings.

An order consistent with the foregoing opinion will be issued.

  
Richard W. Yarborough, Commissioner

We concur:

  
John T. Vance, Chairman

  
Jerome K. Kuykendall, Commissioner