

BEFORE THE INDIAN CLAIMS COMMISSION

THE HAVASUPAI TRIBE OF THE HAVASUPAI)	
RESERVATION, ARIZONA,)	Docket No. 91
)	
THE NAVAJO TRIBE OF INDIANS,)	Docket No. 229
)	
Petitioners,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: December 30, 1968

Appearances:

Royal D. Marks, Attorney of Record for
Havasupai Petitioner

Norman M. Littell, Attorney of Record
for Navajo Petitioner

Walter A. Rochow, with whom was Mr.
Assistant Attorney General Clyde O.
Martz, Attorneys for Defendant

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the Opinion of the
Commission.

The Havasupai Tribe of the Havasupai Reservation, Arizona,
timely filed a petition with the Indian Claims Commission under the
Act of August 13, 1946. In this petition, the Havasupai Tribe
alleges that the defendant, the United States, wrongfully deprived

it of its aboriginal lands and seeks recovery of compensation from the defendant for this wrongful taking under Section 2 of the Indian Claims Commission Act.

The Navajo Tribe of Indians, petitioner in Docket No. 229, also claims aboriginal title to some of the same lands alleged to have been exclusively used and occupied from time immemorial by the Havasupai Tribe, petitioner in Docket No. 91. Because of these conflicting claims, the defendant made a "Motion For Consolidation, For Purposes of Trial, of Overlapping Claims" on March 17, 1960. The Commission issued an order granting this motion April 25, 1960.

In accord with this order of the Commission, the hearing and trial to determine the aboriginal title of the Havasupai Tribe and the question of the liability of the United States for the alleged wrongful taking of such lands began on April 28, 1961 and continued through May 5, 1961. Another hearing was held July 5 and 6, 1961, and the trial was concluded September 13, 1961. During the course of the hearing, expert witnesses presented by both parties testified on the issues involved in the case. Many exhibits were offered by the parties and received by the Commission. Counsel for the Navajo Tribe had the opportunity to cross examine the expert witnesses who gave testimony concerning the area claimed by both the Navajo Tribe and the Havasupai Tribe. Later in November, 1961, during the hearing in Docket No. 229, expert witnesses for the defendant and

the Navajo Tribe testified respecting the above overlap area. Counsel for the Havasupai Tribe had the opportunity to cross examine these witnesses. The record in Docket No. 229 with respect to the overlap area is officially part of the record in this case.

The claimed land lies in the north central part of the State of Arizona and contains approximately 3,363,000 acres. Generally speaking, it is bounded on the north by the Colorado River; on the east by the Colorado and Little Colorado Rivers; on the south by a line connecting the San Francisco Mountains, Bill Williams Mountain and Mount Floyd; and on the west by the north-south line of the Hualapai Reservation. The claim is outlined on Petitioner's Exhibit 124(A) with the dotted black line forming the western boundary of the claimed area. The part of the claimed area also claimed by the Navajo Tribe is the area east of a line extending from the San Francisco Peaks northwesterly through Slate Mountain along a line generally following the western rim of the Coconino Basin and reaching the Grand Canyon Village on the north. It is outlined as the greenhatched area on Petitioner's Exhibit 103.

The Havasupai Tribe of Indians have lived from time immemorial in north central Arizona. They speak one of the dialects of the Yuman language and are related, linguistically at least, to the

Hualapai. Their long time residence in the claimed area is in accord with the oral tradition of the present day Havasupais and is amply confirmed by archeological and historical evidence. Historical references to the Havasupai are rather sparse because of the inaccessibility of the area where they lived and because they were smaller in number and more peaceful than some of the other Indian tribes and consequently received less attention. . However, the records of those who made expeditions into the claimed area confirm the widespread use of this territory by the Havasupai or their ancestors.

In historical times the Havasupai Tribe has always been comparatively small comprising from 250 to 300 members. They usually had friendly relations with the Hualapai on the west and the Hopi to the east. Their traditional enemies were the Yavapai on the south and the White Mountain and Tonto Apaches to the southeast. They were intermittently hostile and friendly to the Navajos who lived to the east and the Paiutes to the north. Because of the numerical size of their tribe, any warfare with hostile tribes was chiefly defensive.

The main villages of the Havasupai were in Cataract Canyon, a branch of the Grand Canyon of Colorado. The Havasupai have occupied the villages in this Canyon from aboriginal times to the

present. They had small farms in the canyon aggregating from 100 to 200 acres where they raised crops such as corn, beans, squash, peaches and melons. However, these small garden plots located in Cataract Canyon were never numerous or productive enough to provide the food needed for the members of the tribe. Therefore, as a matter of necessity, their agricultural economy in Cataract Canyon has always been supplemented by other small farms in the area and by hunting and gathering over a wide range of territory surrounding Cataract Canyon.

The hunting and gathering in areas other than Cataract Canyon was characterized by single families or small groups of Havasupai spreading out and covering comparatively large areas in search of the necessities of life. On occasion these hunting and gathering expeditions took them outside the claimed area into locations also used by other tribes for hunting and gathering. Their trading expeditions to the Hualapai, Hopi and Navajo also took them beyond their aboriginal borders. A visual representation of the hunting, farming and gathering areas used by the Havasupai as testified to by petitioner's expert witnesses is found on Petitioner's Exhibit 124(A).

The Havasupai claim is based on the traditions of the members of the tribe and historical references to their use of this area.

There is no disagreement between the petitioner and defendant as to the western or northern boundaries of the Havasupai aboriginal lands except where the eastern and southern boundaries affect the extension of these western and northern boundary lines. The defendant contends that the Yavapai also used much of the lands claimed by the Havasupai on the south and that the Navajo were using a large part of the claimed area on the west.

The Court of Claims has set forth the necessary elements of aboriginal title 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." The Sac and Fox Tribe of Indians of Oklahoma, et. al., v. The United States, 161 Ct. Cls. 189, 201-202 (1963).

We agree with the defendant that as of the taking dates in the 1880's the Havasupai did not meet the exclusive use and occupancy requirements set forth above with respect to all of the claimed area. Both the Yavapai on the south and the Navajo on the west were using some of the claimed area at that time. However, we believe the Havasupai boundary of exclusive use and occupancy did extend farther south and west than alleged by the defendant.

The evidence indicates that there was a "no man's land" or joint use area on the south which was used from time to time by both the Havasupai and the Yavapai, who were continuously hostile

to each other. Therefore, we have set the southern boundary so as to include only the area shown by the evidence to have been used exclusively by the Havasupai. This boundary includes the Havasupai hunting and gathering areas at Trinity Mountain, Round Mountain, Mount Floyd, Apache Spring, Howard Mesa, Howard Spring, Mount Sitgreaves, and Mount Kendrick.

The area concerning which there is much conflict of testimony and evidence is the eastern one third of petitioner's claim. This area is also claimed by the Navajo Tribe. The Navajos contend that they exclusively used and occupied this area for some time prior to 1848 and base this claim on historical, ethnological and archeological evidence. The defendant does not dispute that they used the area but avers that it was at a much later date than that alleged by the Navajos.

Dr. Robert C. Euler, an expert anthropologist offered by the Havasupai petitioners, testified that no other Indians were in the claimed area from 1665 to 1889 except friendly visitors, refugees, raiders, or traders. Such trading, temporary visiting by friends at the sufferance of the aboriginal owner, or raiding by enemies does not prevent the establishment of the exclusive use and occupancy required for aboriginal title under the Indian Claims Commission Act. Spokane Tribe of Indians, et. al., v. United States, 163 Ct.

Cls. 58, 68-69; Omaha Tribe of Nebraska, et. al., v. United States, 4 Ind. Cl. Comm. 627, 649-650; Lummi Tribe of Indians v. United States, 5 Ind. Cl. Comm. 543, 552. Dr. Euler's conclusions were based on his own research in which he said he had examined "...all of the important and a great deal of the material of lesser importance relating to this area...1665 until virtually the present day." (Tr. 1182-1183) Dr. Euler also commented that other prominent anthropologists such as Spier, Kroeber, Gifford and Goodwin, did not refer to Indians other than the Havasupai in this area. (Tr. 1046-1047).

The Navajo Tribe offered Mr. Lee J. Correll, an archeologist, who testified that the Navajos had used and occupied the overlap area for some time prior to 1848 and continued to use it from that time forward. Mr. Correll's testimony as to the identification and dating of the sites in the overlap area was based on the information contained in Navajo exhibits 520-P and 526-Q, reports on the archeological sites investigated in the overlap area. The testimony of the Navajos themselves also placed their ancestors in the overlap area for some years prior to 1848.

The two expert witnesses offered by the defendant, Mr. Schroeder and Dr. Florence Ellis, both disagreed sharply with Mr. Correll's interpretation of the information contained in Navajo exhibits 520-P and 520-Q. They disagreed with the identification

and dating by Mr. Correll of most of the sites in the overlap area. Their general conclusion was that such sites as could be identified as Navajo were a result of the Navajo occupation of the area since the late 1850's. They both relied on the same information in the above exhibits as did Mr. Correll.

As we have stated in previous cases, the nature of archeological evidence such as herein presented is such that experts can sharply disagree, and honestly so, on the meaning of the evidence. The many variables in this kind of evidence make it impossible, in most cases, to ascertain with scientific preciseness either the date of a site or the exact tribal identity of the Indians who inhabited it on a particular date. Dendrochronology as a means of dating is inexact because of the nature of the wood samples, the probable use by the Indians of trees which had been dead for some time, and the habit of carrying used wood from one site to another. Pottery and structural features are also fallible means of identifying or dating a site. It is not always clear to which Indian tribe a particular pottery sherd belongs, but even when this can be determined with reasonable exactness, there was so much trading of pottery among the Indian tribes of this area that identification of a site by this means would still be speculative. There was an overlapping of the periods when the particular types of pottery

were in vogue so that precise dating based on pot sherds alone is almost impossible. Different tribes living in the same general area tended to borrow from each other some structural features in building habitation sites so there is no consensus among the experts as to which site complexes in the overlap area are typically Navajo or Havasupai. The Commission appreciates the great diligence of the parties in amassing the archeological evidence presented, but this evidence does little to add any precision to our effort to ascertain the probable boundaries of exclusive use and ownership at the relevant dates.

Evidence of Havasupai use is spread thinly throughout the area claimed; undoubtedly they had exclusive use of it at one time. Also, we do not question that there was a general movement westward by the Navajo during the 19th century. In the eastern Havasupai claim area Navajo presence during the 19th century is so well established in certain locations, around Grey Mountain and parts of the Upper Coconino Basin, that we cannot say the Havasupai had maintained their exclusive use of the area as of the date of taking. On the other hand, sparse or uncertain evidence of Navajo presence in other parts of the overlap does not convince us that as of the date of taking the Havasupai should not be considered still the exclusive aboriginal owners of that area, even though individual

or transient Navajo may also have been found there. We believe the eastern boundary line of the Havasupai aboriginal title area which we have established in Finding No. 11 is supported by the weight of all the evidence as a reasonable approximation of the area still exclusively Havasupai in the 1880's.

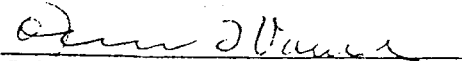
Therefore, based on the findings of fact and legal conclusions heretofore set forth in this case, as well as the record as a whole, we conclude that the Havasupai Tribe of the Havasupai Reservation, Arizona, petitioner in this case, held aboriginal title to the lands described in Finding of Fact No. 11 herein; that petitioner did not voluntarily abandon any of the lands so held; that by establishing a reservation for the petitioners on June 8, 1880 and March 3, 1882, the United States wrongfully took petitioner's aboriginal title lands without the payment of compensation therefor; and that under Section 2 of the Indian Claims Commission Act the petitioner is entitled to recover from the defendant the fair market value of these lands so taken as of the above taking dates. An order will be entered accordingly.

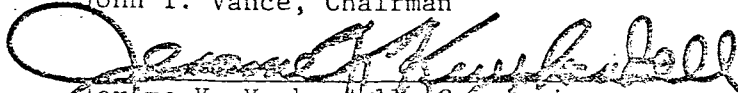
As this opinion, and the findings of fact upon which it is based, involve both Dockets 91 and 229, they are applicable to both the said dockets insofar as the claim of the Navajo Tribe,


petitioner in Docket 229, overlaps the area to which the Havasupai Tribe, petitioner in Docket 91, held aboriginal title as determined by the Commission in Finding of Fact No. 11 herein.

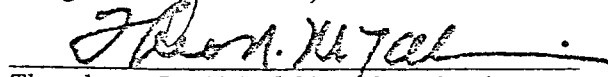

Richard W. Yarborough, Commissioner

We Concur:


John T. Vance, Chairman


Jerome K. Kuykendall, Commissioner


Margaret H. Pierce, Commissioner


Theodore R. McKeldin, Commissioner

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FINDINGS OF FACT

1. Capacity. The Havasupai Tribe of the Havasupai Reservation, Arizona, petitioner in Docket No. 91, is an identifiable group of American Indians residing within the present state of Arizona. Petitioner has a tribal organization recognized by the Secretary of Interior and is authorized to maintain this action under the provisions of Section 2 of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

2. The Claim. The Havasupai Tribe timely filed its claim under the Indian Claims Commission Act for recovery of compensation for the loss of a large tract of land which it claims to have exclusively used and occupied from time immemorial until deprived of such use and occupancy by the United States. A description of the land for which compensation is claimed is as follows:

