BEFORE THE INDIAN CLAIMS COMMISSION

THE NORTHERN TONTO APACHE TRIBE or group, and each group and band thereof, ex rel. Harrington Turner;	
THE YAVAPAI and the groups and bands thereof, ex rel., Calloway Bonnaha, Harry Jones, Fred Beauty, and Warren Gazzam;	
THE WESTERN APACHE and each group and band thereof, ex rel. Clarence Wesley, Jess J. Stevens, Nelson Lupe, Sr., Harrington Turner and Ernest Cutter;	Docket No. 22-J
THE YAVAPAI-APACHE INDIAN COMMUNITY, The Fort McDowell Mohave-Apache Community, The San Carlos Apache Tribe of Arizona, The White Mountain Apache Tribe of the Fort Apache Indian Reservation, each on its own behalf, on behalf of the several bands and groups of each of them respectively, and each on behalf of the Northern Tonto Apache Tribe or group, and each group and band thereof;	
THE NAVAJO TRIBE OF INDIANS,	Docket No. 229
Plaintiffs,	
v.	
THE UNITED STATES OF AMERICA,	
Defendant.	

Decided: June 27, 1969

Appearances:

Abe W. Weissbrodt, with whom was I.S. Weissbrodt, Attorneys for Plaintiff in Docket No. 22-J.

Harold E. Mott, with whom were Norman M. Littel and Leland O. Graham, Attorneys for Plaintiff in Docket No. 229.

Milton E. Bander, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant in Docket No. 22-J.

Walter A. Rochow, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant in Docket No. 229.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the Opinion of the Commission.

The events leading to the hearing of the present claim are set out in detail in the findings of fact herein and our Opinion in Docket No. 22-D. Though the claims in Docket Nos. 22-D and 22-J are separate, these cases were consolidated for purposes of trial. The claims are not overlapping. However, the Navajo Tribe, plaintiff in Docket No. 229, is also claiming aboriginal title to part of the area described in this claim. As a result of this overlapping claim and amended claims in other dockets, evidence and testimony concerning the use and occupancy of the area claimed in this docket have been received by the Commission during the hearings in the Yavapai and Navajo cases as well as this one. Therefore, this evidence and testimony in each of these cases are part of the overall record in this case.

The claimed area in Docket No. 22-J is situated in central Arizona and comprises approximately 1,537,280 acres. It is completely surrounded by the aboriginal title claims of other Indians including the Havasupai in the northwest, the Navajo on the north and east, the Western Apache on the southeast and the Yavapai on the south and west.

The plaintiffs claim that the Northern Tonto is a distinct and separate group of Indians formed from a union of the Yavapai and Apache Indians, that they held aboriginal title to the claimed area and that the United States took these aboriginal lands from them in March 1875, without the payment of compensation. The Navajo Tribe claims aboriginal title to

approximately 414,000 acres in the northeast part of the claimed area. None of the other adjacent Indian tribes are asserting any overlapping claim.

Defendant denies the Northern Tonto claim of aboriginal title on the ground that there was no such entity as Northern Tonto at a time pertinent to the claim. It is not disputed by the defendant that parts of the claimed area were used and occupied by a group of Indians formed from a merger of the Yavapai and the Athabaskan Apaches, but it is claimed that this merger came so late that the new group had not occupied the land long enough for aboriginal title to ripen and that the Yavapai and Apache aboriginal occupants had constructively abandoned it. The defendant contends that the central part of the claimed area was exclusively used and occupied by the Yavapai and presumably would allow recovery for this area to the Yavapai plaintiffs in Docket No. 22-E. Defendant also believes that there was hostile Navajo occupation in the northeast sector of the claimed area from the late 1850's until the 1870's.

It is undisputed that both the Yavapai and Apache used and occupied parts of the claimed area prior to the formation of the so-called Northern Tonto group. It is also undisputed that a separate group of Indians formed from a union of the Yavapai and Apache inhabited at least parts of the claimed area for some time prior to the loss of Indian occupancy. The plaintiffs claim the Northern Tonto group was formed long before American sovereignty over the area began in 1848. Their witness, Dr. Opler, felt it would take considerable time for such a fusion to take place and the leading authority, Grenville Goodwin, thought the fusion of the Apache and

Yavapai "...not a very recent one." The defendant contends the formation of the Northern Tonto group came some time after the date of American sovereignty; its witness, Dr. Schroeder, believed that it took place in the 1860's or later.

Although we do not know the specific date when the Northern Tonto came into existence as a single land using entity, we agree with Goodwin and Opler that it would take considerable time for such an amalgamation to take place following the original uniting of the Yavapai and Apache. In 1874 Lt. Schuyler observed:

> "The so-called Tontos are mainly half breed Apaches and Apache Mohaves (Yavapai), as a rule they speak both languages, and style themselves either Apaches or Apache Mohaves as the humor strikes them...They partake of the peculiarities and features of both tribes, and generally speak both languages, although incorrectly. (DX40(1) pp. 40-41)

We think this evidence strongly suggests that the Northern Tonto had existed as a distinct entity at least one or more generations by that time.

Aboriginal title requires actual and continuous exclusive use and occupancy "for a long time prior to the loss of the property." Sac and Fox Tribe of Oklahoma, et al., v. United States, 161 Ct. Cls. 189, 201-202 (1963). Although no specific length of time is required, the period of exclusive use and occupancy must be of sufficient duration so that the rights of aboriginal title will "...have time to take root, transforming a conquered province into domestic territory." (Ibid p. 206) In the present case the territory in question had been conquered and domesticated by the aboriginal components of the Northern Tonto long before American

sovereignty attached to the area. The Northern Tonto had become a single land using entity and the exclusive users and occupants of most of the claimed area, not as a result of conquest, but as the natural consequence of the friendly cooperation and intermarriage of their ancestors, the bordering Yavapai and Apache Indians who inhabited the claimed area before them. Accordingly, we have held that the Northern Tonto Indians were an identifiable group and a single land using entity for a sufficient length of time to hold aboriginal title to the lands which they exclusively used and occupied.

With respect to the aboriginal title area of the Northern Tonto, we believe there is substantial evidence showing them to be the exclusive users and occupants of the claimed area except for a portion of the northeast sector. Admittedly there was some visiting, trading and intermingling by the Northern Tonto with the friendly Yavapai and Western Apache in areas other than the northeast sector. However, there was no hostile or adverse use or occupancy by these tribes, thus Northern Tonto aboriginal title in these areas was unaffected.

In the northeast part of the claimed area there is evidence of Navajo use and occupancy from at least the late 1850's if not before. The archaeological data in Navajo Exhibits 520-0 and 520-P as well as ethnological and historical evidence convinces us that the Northern Tonto did not exclusively use and occupy all of this area as of the taking date. Therefore, we have drawn the northeast boundary so as to include only those areas exclusively used and occupied by the Northern Tonto.

The plaintiff and defendant also differ as to the taking date. The defendant says it was November 9, 1871, when the Camp Verde Reservation was established by Executive Order. Plaintiff insists it was March, 1875, when the Northern Tonto were removed from the Camp Verde Reservation located partly within their aboriginal territory to the San Carlos Reservation located wholly outside these aboriginal boundaries. We cannot agree with either of these positions.

Unlike some of the Western Apache, the Northern Tonto along with the Yavapai utterly refused to go on the reservations provided for them. It was only after a vigorous military campaign by General Crook during the fall and winter of 1872-1873 that the Northern Tonto were finally forced to the Camp Verde Reservation. By May, 1873, virtually all the Northern Tontos had been placed on the Camp Verde Reservation, and in this manner and at this time were deprived of their aboriginal lands outside this reservation. Therefore, we have found the taking date of the Indian title lands of the Northern Tonto located outside the Camp Verde Reservation is May 1, 1873. The United States took the remaining Northern Tonto aboriginal title lands April 23, 1875, when the Camp Verde Reservation was restored to the public domain by Executive Order.

Based upon the findings of fact and legal conclusions heretofore set forth in this case, as well as the record as a whole, the Commission has concluded the Northern Tonto is an identifiable group of American Indians and a single land using entity, and that it held aboriginal title to those lands described in Finding of Fact 17 herein; that the Northern Tonto did

not voluntarily abandon any of these lands so held; that by placing the Northern Tonto on the Camp Verde Reservation the United States wrongfully took the Northern Tonto aboriginal title lands outside the said reservation without the payment of any compensation; that by restoring the Camp Verde Reservation to the public domain the United States wrongfully took the remaining Northern Tonto aboriginal lands without the payment of any compensation; and, that under Sec. 2(4) of the Indian Claims Commission Act, the plaintiffs are entitled to recover from the defendant on behalf of the Northern Tonto Indians the fair market value of their aboriginal lands located outside the Camp Verde Reservation so taken as of May 1, 1873, the date the Indians were placed on the Camp Verde Reservation and the fair market value of their remaining aboriginal lands as of April 23, 1875. An appropriate order will be entered.

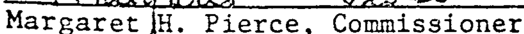
As this opinion, and the findings of fact upon which it is based, involve both Docket Nos. 22-J and 229, they are applicable to both dockets insofar as the claim of the Navajo Tribe, plaintiff in Docket No. 229, overlaps the area to which the Northern Tonto held aboriginal title as determined by the Commission in Finding of Fact 17.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner


Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner