

BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA INDIAN)	
COMMUNITY, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 228
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: December 17, 1970

Appearances:

Z. Simpson Cox, with whom was associated L. J. Cox, Jr., Marion R. Smoker, Alfred S. Cox, Ira L. Schneier, C. M. Wright, Samuel P. Goddard, Jr., and Wilkinson, Cragun & Barker, Attorneys for Plaintiffs.

David M. Marshall, with whom was associated Glen E. Taylor, Acting Assistant Attorney General, Attorneys for Defendant.

OPINION OF THE COMMISSION

Commissioner Yarborough delivered the opinion of the Commission.

This case was timely filed against the United States under clauses (3), (4) and (5), section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049, 1050).

The plaintiffs here, the Pima and Maricopa Indians, contend they held Indian title, based on aboriginal use and occupancy, to a large tract of land in south-central Arizona and that such use and occupancy continued until the land was subsequently acquired by the defendant without a treaty or compensation given therefor. The plaintiffs also claim that the subject tract was granted to their ancestors in fee

by the Spanish Government and the fee title was subsequently recognized by the defendant.

The defendant, on the other hand, denies the existence of any actual grant of the subject tract to the Pimas and Maricopas and further contends that the area which the Pimas and Maricopas exclusively and continuously used and occupied before and during the mid-19th century did not extend beyond the limits of the present Gila River Indian Reservation.

Hearings on the claim were held from July 23 through August 10, 1962. By agreement of the parties the issues were limited to (1) the identifiability of the Pima and Maricopa Indians and the plaintiffs' capacity to present this claim and (2) whether the Pima and Maricopa Indians held title to the claimed area. The issue relating to the date of the alleged "taking" of the tribal lands was reserved for a subsequent hearing.

The plaintiffs and defendant have placed in evidence voluminous documents, historical records, and the testimony of knowledgeable experts, all of which have been of great help to the Commission in making its determination.

The record is replete with historical accounts, Government reports, correspondence and other documents which establish the continuous existence of the Pimas and Maricopas in this general area since earliest Spanish times to the present. The evidence also shows that the Pimas and Maricopas, although distinct Indian tribes ethnologically, have long been closely associated by their interaction and interdependence

for social, economic, and defensive purposes and in their use and occupancy of their ancestral lands. The Pima and Maricopa constituted a single land owning entity.

The subject tract was under Spanish sovereignty from the 16th century until Mexico declared its independence in 1821. Mexican control lasted until 1848 when that part of the subject tract north of the Gila River was ceded to the United States by the Treaty of Guadalupe Hidalgo. The southern portion of the claimed area then came under American control on December 30, 1853, by virtue of the Gadsden Purchase. Due to the more intensive settlement within the subject tract by non-Indians after 1853, the United States Government decided to establish the Gila River Indian Reservation in 1859 for the Pimas and Maricopas. Finding the original reservation inadequate, it was ultimately enlarged to its present 372,000 acres by seven Executive Orders between 1876 and 1915, the greatest single enlargement being on November 15, 1883.

To support the contention that the Pimas and Maricopas had ownership of the claimed land by a Spanish grant, the plaintiffs placed in evidence various correspondence and records which made reference to such grant. One example, the most explicit, is the 1859 letter from Sylvester Mowry, Indian Agent, to the Commissioner of Indian Affairs, in which Agent Mowry advised that information which he had obtained indicated that the Pimas and Maricopas were entitled to fifty leagues of land (See Finding of Fact No. 3).

While there were other references to the Pima-Maricopa claim of actual title to land, there are no particulars concerning the alleged

grant. No document has been placed in evidence describing the bounds of any such grant. Furthermore, there was never any effort by the Pimas and Maricopas to formalize such grant before the Court of Private Land Claims or the Congress of the United States. We do not feel that the text of the letter above and the other brief mentions of a possible Spanish grant are sufficient to sustain a finding that the Pimas and Maricopas held a fee title to the claimed lands.

Since there is no ground to support plaintiffs' claim of recognized title, we shall now consider the aboriginal title claim. Aboriginal Indian title is based on exclusive and continuous use and occupancy of land, in Indian fashion, from time immemorial or for a long period of time. In determining the geographic limits of the area which was exclusively used and occupied by the Pimas and Maricopas, the Commission has carefully considered the nature and sources of the evidence and has weighed it accordingly.

The principal expert witness for the plaintiffs, Dr. Paul H. Ezell, testified before the Commission at length. Based on his examination of virtually all the available material concerning the Indians in the area, Dr. Ezell described a tract which he considered had been exclusively used and occupied by the Pima and Maricopa Indians. We are in substantial agreement with Dr. Ezell's conclusions.

Another of plaintiffs' experts, Dr. Alfonso Ortiz, testified that the Pimas and Maricopas used and occupied some additional lands beyond those ascribed to them by Dr. Ezell. Dr. Ortiz' expert opinion was largely based

on "ethnographic references," i.e., information gathered from interviews with Pima and Maricopa informants who recounted the traditions, histories, and incidents of their tribes as told to them by their ancestors. The defendant has strenuously objected to Mr. Ortiz' testimony, arguing it is based on self-serving utterances made by informants who have a vested interest in the fruits of this litigation.

In Pueblo de Zia, et al. v. United States, 165 Ct. Cl. 501 (1964), the Court stated that the oral testimony of Indians who were descendants of the members of the tribe who had actual knowledge of the extent of use and occupancy of the land claimed, which knowledge had been passed down by word of mouth, was entitled to some weight particularly when corroborated by documents or other evidence. The Commission is aware of the inherent weaknesses of testimony based on "ethnographic references," but it is also obvious that we must consider an unusually broad spectrum of evidence in order to ascertain and describe a situation which existed over 100 years ago.

The defendant argued that because the Pimas and Maricopas were primarily sedentary farmers with an agriculturally based economy, the area which they exclusively used was much smaller than would have been necessary for Indians who were basically hunters and gatherers. The defendant has contended that any hunting, fishing, gathering or grazing outside the bounds of the present reservation would have been unnecessary or so infrequent and sporadic that a claim of Indian title could not be based on such use. Defendant's expert, Dr. Allen Hackenberg, prepared a report and testified that the Pima-Maricopa actual, exclusive and continuous

occupancy and use did not extend to land beyond the limits of the present 372,000 acre Gila River Indian Reservation. However, we have found the defendant to be too restrictive in defining the limits of the area which the Pima and Maricopa exclusively used and occupied. The plaintiffs have presented convincing evidence that a greater area than the present reservation was exclusively used and occupied by the Pimas and Maricopas before and during the mid-19th century.

About half of the Pima-Maricopa subsistence was satisfied by agricultural endeavors in average years. In the late 18th century the primary Maricopa fields were along the Gila River from Gila Bend to the Buckeye Hills and those of the Pimas were just above the Gila and Salt River confluence. In the first quarter of the 19th century most of the Maricopa irrigated fields were relocated further eastward so that by the mid-19th century the Pimas and Maricopas were carrying on their farming activities side by side from the Gila-Salt confluence to the vicinity of Sacaton. At the critical dates in this case, then, most of the cultivated fields were located within the present reservation. However, the hunting, fishing and gathering activities of the Pimas and Maricopas, which satisfied the other half of their subsistence requirements, were often carried out far outside the present reservation area.

Gathering, hunting, and fishing were traditionally important and necessary aspects of the Pima-Maricopa way of life. Reliance on these activities was even more intense when there was a crop failure due to drought or flooding. In this part of the country, where the arid

climate was not conducive to supporting abundant plant and wildlife, an unusually vast area was necessarily used for gathering edibles and hunting wild game. The area which the Commission has found to have been held by the Pimas and Maricopas by aboriginal title was based primarily on their essential hunting and gathering activities as set out in the Findings of Fact herewith.

Certain previous decisions involving the aboriginal title claims of neighboring Indian tribes have been argued by both parties to support or defeat various contentions arising in the present litigation. In The Yavapai, et al. v. United States, 15 Ind. Cl. Comm. 68, amended 15 Ind. Cl. Comm. 193 (1965), we found the southern border of Yavapai tribal lands to be generally along the mountains north of the Gila Valley. We also found that south of this line was a "no man's land" which was not used exclusively by either the Yavapais or the Pimas and Maricopas. The evidence in the present case is consistent with our Yavapai finding that there was a buffer zone between these hostile tribes. There is evidence in the record which indicates Pimas and Maricopas would sometimes hunt and gather far into Yavapai territory, particularly along the upper Hassayampa River near Wickenburg. The failure to show exclusiveness of use, however, defeats the claim of aboriginal title to that area.

The western limit of Pima-Maricopa tribal lands as claimed by the plaintiffs is where the Mohawk Mountains intersect with the Gila River. Plaintiffs rely on our finding in Quechan Tribe of the Fort Yuma Reservation, California v. United States, 8 Ind. Cl. Comm. 111, 145

(1959) that "[t]he Halchedoma and Maricopa Indians occupied the Gila River area in the Mohawk Mountains." The plaintiffs also rely on the reports of Anza, Diaz, and Font who found Maricopas below Painted Rock to the Mohawk Mountains in the 1760's and 1770's. The present record shows, however, that Maricopa use and occupancy of the area along the Gila River below the Painted Rock Mountains had ceased well before 1800. Even in the 1770's there were only signs of former cultivation below Gila Bend. We feel that the requisites for establishing Indian title by the plaintiffs have been satisfied westward to the Gila Bend Mountains and the Painted Rock Mountains. We cannot, however, find probative support for plaintiffs' contention that the Gila River area below the Painted Rock Mountains was used by the Maricopas after 1800.

The defendant contended that the hostilities of the Yumas, Yavapais and Apaches were an important factor which limited the area of possible exclusive use and occupancy by the Pimas and Maricopas. The possibility of attack by a hostile tribe on a Pima or Maricopa who might venture more than a few miles from his village, in defendant's view, significantly constricted the territory the Pimas and Maricopas could have held by Indian title. We cannot agree with this contention. The possibility of attack by hostile tribes was an important factor for the Pimas and Maricopas in locating their villages and required that hunting, fishing, and gathering be done in groups as opposed to individually. The attacks on the Pimas and Maricopas were not, however, for the purpose of making conquests or acquiring their land. The inability of a tribe to keep raiders out of its territory does not

affect the exclusiveness of occupancy and does not terminate Indian title.

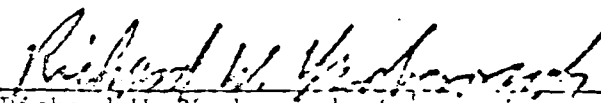
To the south of the Pimas and Maricopas were the Papagos, a friendly tribe with whom the plaintiffs carried on trade. Often Papagos would give physical labor during harvest time in exchange for a share of the crops reaped. Papago use of Pima-Maricopa land was permissive and did not defeat the exclusive occupancy requirement in establishing Indian title. In Papago Tribe of Arizona v. United States, 19 Ind. Cl. Comm. 394 (1968) we stated in Finding of Fact No. 17 at page 411:

"[A]pparently both Papago and Pima recognized a boundary between their lands running from Table Top Mountain to Ped Rock."

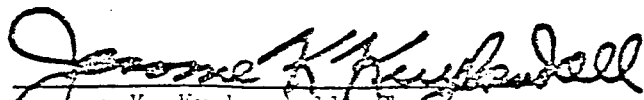
The record of the instant case supports this finding and we hereby reaffirm this common border.

Based on the record as a whole the Commission has made the Findings of Fact herewith and has concluded that the Pima and Maricopa Indians had aboriginal title to the lands described in Finding of Fact No. 23.

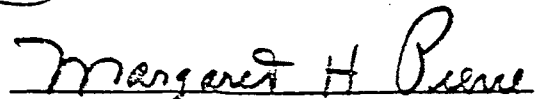
As the parties did not submit evidence relating to the date of extinguishment of aboriginal title the case will now proceed to a determination of that issue, and the determination of acreage to be excluded, if any, from the area to be valued.

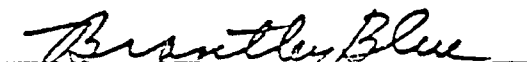

Richard W. Yarborough, Commissioner

We concur:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Margaret J. Pierce, Commissioner


Brantley Blue, Commissioner