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Do Government Rights Prevail, or Are Shoshone Indians Trespassers in Their Own Country?

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by Richard B. Collins

United States
v.
Mary Dann and Carrie Dann
(Docket No. 83-1476)

To be argued November 5, 1984

ISSUE

Do the Dann sisters, Shoshone Indians, have the right to occupy eight sections of Nevada desert land that they and their ancestors have used as a cattle ranch for a century? The federal government concedes that the Shoshone Indians once had Indian title to the land but claims that title has been extinguished, the land is public domain and the Danns are trespassers. This question has reached the Supreme Court in a bramble of legal technicalities.

FACTS

The Shoshone Indians originally occupied much of the Great Basin. (Most Americans know of Sacagawea, the Shoshone woman who guided the Lewis and Clark expedition in 1804-06.) But their occupancy was necessarily very sparse in the harsh climate. They lived in small bands widely separated from one another and had no larger political organization. The Dann sisters are members of one band of about thirty persons who continue to occupy the same stretch of Nevada desert as their ancestors. In the last century, the band shifted from their traditional means of livelihood to cattleraising, and they have put in buildings, fences, wells and other improvements. The Dann sisters, now in their fifties, were born on the ranch.

The Danns were left alone until 1974, when the federal government sued to remove them from eight sections (about 5200 acres) of grazing land. It also claimed trespass damages for the Danns' previous use. In defense, they claimed the right to occupy the land under Indian title based on their own continuous possession, or on the original tribal title of the Shoshone Indians, or on the 1863 Treaty of Ruby Valley between the United States and the Western Bands of Shoshone Indians. They won in the federal court of appeals on the second theory—original tribal title. Only this theory is directly at issue in the Supreme Court, although the other two theories could be swept away if the government wins.

In the lower federal courts, the government had two legal arguments to overcome the Danns' claim of original tribal title. It first claimed that the question had already been decided against the Danns in a separate lawsuit in the Indian Claims Commission. Its second argument attempted to persuade the lower federal courts that tribal title had actually been extinguished. Both arguments failed, but the government asked the Supreme Court to hear only the first of them—based on the Indian Claims Commission case.

Indeed, in the case now before the Supreme Court, the government bases its claim on section 22 of the Act, which says that "payment" of a claims judgment "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." The government says the Western Shoshone claim has been paid, and this defeats the Danns' claim of original Indian title.

In the lower federal courts, the Danns opposed this argument in three ways. They maintained that they were not represented in the Indian Claims Commission case. They showed that for several years after the government sued them in 1974, they had tried to have their ranch excluded from the claims case. In the alternative, they argued that "payment" of the claim does not occur until there is a plan to distribute the judgment among the Western Shoshone Indians or actual payment to them. Third, they argued that section 22 does not apply to them even if the claim has been paid. (Of course, they also said that section 22 does not defeat their individual occupancy claim or their treaty claim.)

The federal court of appeals agreed that payment had not yet occurred, so the government could not rely on section 22. It also rejected related arguments based on the Indian Claims Commission case (res judicata and collateral estoppel in legal jargon). Only the payment question is now squarely before the Supreme Court.

BACKGROUND

Congress set up the Indian Claims Commission in

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1946 to decide money claims against the federal government by Indian tribes, bands, or other groups for taking Indian land and other wrongs that had occurred before that year. One important basis for these claims was original Indian title.

Under federal law, Indian tribes had an ownership right to the lands they occupied, known as original (or aboriginal) Indian title. (The British before us and other European nations observed the same rule.) It was a peculiar kind of ownership, because tribes could not sell the land to anyone except the federal government, and their ownership was fully protected against everyone except the federal government. The federal government could take the land, and the Indians had no basis to sue the government except to the extent Congress decided to allow a claim. The 1946 Indian Claims Commission Act was such a law. It allowed a broad range of claims, but under limiting conditions. The government agreed to pay for original Indian title based on the value of the land when taken without interest. Since the land was usually taken long ago, failure to pay either interest or current value for the land sharply limited the claims.

Original Indian title was just decribed in the past tense, because in most parts of the United States, it was extinguished long ago. (Today's Indian reservation lands are under other forms of ownership than original title.) Extinguishment occurred by treaty or agreement with tribes, act of Congress, abandonment by a tribe, forfeiture caused by going to war against the United States, or simply seizure of land by the federal government. But in a few places, original Indian title may survive, and the Danns' ranch is one of them. Congress could pass a law extinguishing their title without compensation, but it has not yet done so. Instead, the government argues that their land was either given up under the Treaty of Ruby Valley or physically seized by the federal government, and in either case that Shoshone title was extinguished under Indian Claims Commission proceedings.

In 1951, several Shoshone Indian groups filed a claim with the Indian Claims Commission seeking payment for taking original Shoshone title to millions of acres in six states. Since there was no single political organization of all Shoshones, the Commission first had to work out how the widely dispersed Shoshones would be represented. The claim was divided among distinct regional groups of Shoshones. One of these was the Western Shoshones, whose claim area included the Danns' ranch. The Western Shoshones in turn had no collective political organization, so the Commission designated one of its bands, the Temoak Band, to represent all Western Shoshones in pursuing the claim. After a trial, the Commission decided that the Western Shoshones had had original title to more than 22 million acres in Nevada, But it decided that extinguishment of Nevada titles depended on physical seizure. Rather than have a complex trial about physical seizure of particular parcels, the lawyers for the government and for the Western Shoshones agreed that all original titles in the Nevada claim area had been extinguished and that the "average" date of extinguishment was July 1, 1872. There is some dispute about whether this agreement included the Danns' ranch, but the ranch was clearly within the claim area generally.

The Commission then valued the land taken as of 1872 at $21,350,000—slightly less than $1 per acre. The full judgment on the Western Shoshone claim was more than $26 million, and its determination became final in 1979. This amount was automatically appropriated in the same year and set aside in the Treasury in trust for the Western Shoshones. But there is yet no plan for disposition of the fund to tribes or individuals—a fact that figures in the Danns' case.

SIGNIFICANCE

The importance of this case to the Danns is obvious. Its significance for others depends on whom one asks. The Danns' claim is based in part on continuous possession of their ranch. Few other Indians can make a like showing, so a decision for the Danns that depends on this fact would not have broad impact.

The Danns' side is supported by the Western Shoshone National Council as friend of the Court. It views the Danns' claim to apply to other federal lands in the Western Shoshones' original territory. The federal government agrees and fears that a decision for the Danns would interfere with its management of all federal lands in the area. At the other extreme is the American Land Title Association, which supports the United States as friend of the Court. It worries that a decision for the Danns would apply as well to private landowners in the Western Shoshones' original territory. The Shoshones deny making any claim to private land.

Whether the Danns' case will be of importance outside northern Nevada depends on the basis for the decision. Most Indian Claims Commission judgments have been "paid" under any view of the question, but some sizable ones have not.

The picture is clouded by legal complexities. If the Danns succeed because the Western Shoshones' claim has not yet been paid, the government's case will revive when it has been paid. On the other hand, the Danns have legal arguments that don't depend on the payment question.

ARGUMENTS

***For the United States** (Joshua I. Schwartz, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)*

1. The deposit of the Claims Commission award into a trust account for the Western Shoshones is "payment" of the claim, and section 22 of the Indian Claims Commission Act bars the Danns from claim-

ing original Indian title to lands covered by the award.

For Mary Dann and Carrie Dann *(Counsel of Record, John D. O'Connell, 44 Exchange Place, Salt Lake City, UT, 84111; telephone (801) 532-5835)*

1. The Indian Claims Commission judgment does not bar the Danns regardless of the payment question.
   A. The Indian Claims Commission Act does not authorize the extinguishment of Indian title.
   B. The Danns were denied participation in the claims case and were not adequately represented in it, so that barring them under it would deprive them of due process of law.
   C. The claims case judgment does not defeat the Danns' individual occupancy claim to the land.
2. Payment of the claims award has not been made.