In the Supreme Court of the United States

OCTOBER TERM, 1976

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THE HOPI TRIBE,

Petitioner,

v.

THE UNITED STATES

and

THE NAVAJO TRIBE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF CLAIMS

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Petitioner, The Hopi Tribe, prays that a Writ of Certiorari issue to review the opinion of the United States Court of Claims entered on January 30, 1976.

OPINIONS BELOW

The Order of the Court of Claims from which review is sought was entered on January 30, 1976 (not yet reported; appended hereto as Appendix I). The Order of the Court of Claims was entered in an appeal from the Indian Claims Commission's Opinion on Title, Findings of Fact and Conclusions of Law and Interlocutory Order dated June 29, 1970, reported at 23 Ind. Cl. Comm. 277 (appended hereto as Appendix II). (Note—Appended materials appear in a separate Appendix filed herewith).

JURISDICTION

The Order of the Court of Claims for which this review is sought was entered on January 30, 1976, (appended hereto as Appendix I). This Order was entered in an appeal from the Indian Claims Commission taken pursuant to authority granted at 25 U.S.C. Section 70(s) (b). Petitioner's claim in the Indian Claims Commission was filed pursuant to authority granted by the Indian Claims Commission Act (25 U.S.C. Section 70 *et seq.*). The Appeal in the Court of Claims was taken from the Opinion on Title, Findings of Fact and Conclusions of Law, and Interlocutory Order of the Indian Claims Commission dated June 29, 1970, (23 Ind. Cl. Comm. 277; appended hereto as Appendix II). After entry of such interlocutory Order in the Indian Claims Commission, Petitioner had twice sought reconsideration of that Order and the supporting findings prior to seeking review in the Court of Claims

(See 31 Ind. Cl. Comm. 16 (1973), appended hereto as Appendix III, and 33 Ind. Cl. Comm. 72 (1974), appended hereto as Appendix IV).

Petitioner also sought rehearing with a suggestion for rehearing *En Banc* from the Court of Claims following entry of the Order of January 30, 1976, but such Motion was denied in an Order of the Court of Claims dated March 26, 1976, (appended hereto as Appendix V).

Upon motion of the Petitioner, the Honorable Chief Justice of this Court has, in an Order dated June 7, 1976, extended the time for filing a petition for writ of certiorari herein to and including August 23, 1976.

The jurisdiction of this Court to review these matters is invoked pursuant to 25 U.S.C. Section 70(s)(c) and 28 U.S.C. Section 1255.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the holding of the Indian Claims Commission, as affirmed by the Court of Claims, determining the extent and dates of extinguishment of Hopi aboriginal title is in error as a result of its conflict with the decision and holding of *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), affirmed by this Court at 373 U.S. 758 (1963).

2. Whether the Petitioner has been denied due

process of law by the Indian Claims Commission in that:

a. The decision on dates of taking was made without allowing the Hopi Tribe to present oral testimony and otherwise fully develop its case; and

b. The decision on aboriginal claims was rendered by a panel of Commissioners who did not hear the evidence in the case.

3. Whether the decision of the Indian Claims Commission limiting Hopi aboriginal claims is supported by substantial evidence.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provision of the United States Constitution involved is the Fifth Amendment to the United States Constitution which provides in relevant part as follows:

> No person shall *** be deprived of life, liberty, or property, without due process of law;***.

The following statutes of the United States are involved:

> 25 U.S.C. Section 70p (appended hereto as Appendix VI)
>
> 25 U.S.C. Section 70s (appended hereto as Appendix VII)
>
> The Act of July 22, 1958; 72 Stat. 402; Pub. L. 85-547 (appended hereto as Appendix VIII)

The Act of December 22, 1794: 88 Stat. 1712; Pub. L. 93-531; 25 U.S.C. Section 640d *et seq.* (appended hereto in relevant part as Appendix IX)

STATEMENT OF THE CASE

Petitioner, the Hopi Tribe, is a federally recognized American Indian Tribe residing on the Hopi Reservation in North Central Arizona. In 1951, Petitioner filed a petition with the Indian Claims Commission to assert claims for compensation against the United States as authorized by the Indian Claims Commission Act (25 U.S.C. Section 70 *et seq.*). Because the aboriginal title claim of the Hopi Tribe overlapped with a portion of that of the Navajo Tribe, the Hopi claim (Docket No. 196) was consolidated with that of the Navajo claim (Docket No. 229).

In an order dated October 13, 1958, (appended hereto as Appendix X) the Indian Claims Commission (hereinafter sometimes referred to as the "Commission") specifically limited the scope of the initial hearing on the Hopi claim to the issue of title. The hearing on the issue of Hopi title was held before a panel of three Commissioners and the record on the issue of Hopi aboriginal title was ordered closed on May 22, 1963.

The Commission entered its Opinion of Title (Appendix II) more than seven (7) years after the closing of the record on aboriginal title, during which time cer-

tain additional exhibits were received and proposed findings submitted. During those seven years, all of the Commissioners who heard the Hopi case had left the Commission. The Opinion on Title and accompanying Findings of Fact and Conclusions of Law and Interlocutory Order (23 Ind. Cl. Comm. 277; Appendix II) were issued by a panel of Commissioners, none of whom had attended the hearing or heard the testimony presented.

Further, despite the express limitation on the scope of the hearing imposed by the Commission itself, the Commission's Opinion on Title includes findings on, and makes a determination as to, the dates of taking by the United States, both within and without the Hopi 1882 Executive Order Reservation, which matters were clearly outside the limits of the hearing as set by the Commission. See Order of October 13, 1958 (Appendix X). The Hopi Tribe made a timely motion for a further hearing on the dates of taking and for a rehearing and amendment of the findings. The Commission, in an Order dated June 2, 1971 (appended hereto as Appendix XI) granted the motion in part, but limited the evidence to be presented to "documentary evidence on the date or dates of taking, which is not already a part of the record." The Hopi Tribe submitted additional exhibits but was never allowed to present oral testimony on the issue of the dates of taking. Following oral argument, the Commission on July 9, 1973, entered an opinion and order denying the Hopi motion to amend the previous findings (31 Ind. Cl. Comm. 16; Appendix III). A second motion to amend the find-

ings was also denied by the Commission on January 23, 1974 (33 Ind. Cl. Comm. 72; Appendix IV).

In addition to these serious procedural irregularities, petitioner challenged the underlying findings of the Commission in both its motions to the Commission and its appeal to the Court of Claims. The appeal to the Court of Claims included the issue of the lack of substantial evidence to support the Commission's finding as to the extent of the Hopi aboriginal claim as well as the incorrect determination of dates of taking on less than all the evidence in the case. Indeed, the finding of the Indian Claims Commission on the extinguishment of Hopi Indian title in the 1882 Executive Order Reservation as of June 2, 1937, (Sec. 23 Ind. Cl. Comm. at 288; Appendix II), is in direct conflict with a holding affirmed by this Court in the case of *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962) aff'd 373 U.S. 758 (1963) (hereinafter sometimes referred to as "Healing"). The *Healing* case proceeded under a special jurisdictional act to determine Hopi and Navajo interest in the 1882 reservation (See Pub. L. 85-547; the Act of July 22, 1958; 72 Stat. 402; Appendix VIII), and confirmed that the Hopi Tribe had a one-half interest in said reservation as of June 2, 1937. Congress has expressly recognized that the Hopi Tribe still does have such an interest in Pub. L. 93-531; the Act of December 22, 1974; 88 Stat. 1712; 25 U.S.C. Section 640d *et seq.* (Appendix IX).

Petitioner submitted a lengthy and detailed brief to the Court of Claims together with a substantial ap-

pendix. The short, two-page Order of the Court of Claims (Appendix I) approving and affirming the decisions and orders of the Indian Claims Commission fails to meaningfully address or even comment upon any of the issues raised in the appeal by the Hopi Tribe.

REASONS FOR GRANTING THE WRIT

1. There exists a real and substantial conflict between the holding of the Indian Claims Commission and the decision in the case of *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962) aff'd 373 U.S. 758 (1963).

The Commission found that the Hopi Tribe in 1882 had aboriginal or Indian title to a tract of land which included all of the Hopi Executive Order Reservation of 1882 (Finding 20, 23 Ind. Cl. Comm. at 305; Appendix II). *Healing v. Jones* held that by the establishment of the Executive Order Reservation the Hopi Tribe acquired reservation title to all of the 1882 Executive Order Reservation in the following language:

> the Hopis acquired immediate rights in the 1882 reservation upon issuance of the December 16, 1882 order.
>
> The right and interest thereby gained by the Hopis was the right to use and occupy the reservation, the title to the fee remaining in the United States. (210 F.Supp. at 138).

The Hopi Tribe, therefore, had both Indian title and reservation title in 1882 to the entire Executive Order Reservation. *Healing* further held that the Hopi

rights in the entire reservation had never been abandoned (210 F. Supp. at 184). The *Healing* case concluded:

> The rights of the Hopi Indian Tribe, acquired on December 16, 1882, under the executive order of that date, to use and occupy the entire 1882 reservation for and on behalf of the Hopi Indians, were never terminated by Congressional enactment, administrative action, or abandonment, but after February 7, 1931, the Hopi Indian Tribe was validly required to share equally with settled Navajo Indians and, after June 2, 1937, with the settled Navajo Indian Tribe, the use and occupancy of that part of the reservation in which individual Navajos and the Navajo Indian Tribe were validly settled. (*Healing*, Conclusion of Law number 11).

Although the Commission adopted by reference "all the proceedings and determinations in the case of *Healing v. Jones*" (Finding 21, 23 Ind. Cl. Comm. at 307; Appendix II), it created an irreconcilable inconsistency with *Healing* when it determined:

> ***on June 2, 1937 the United States extinguished the Hopi Indian title to 1,868,364 acres of land in the 1882 Executive Order Reservation, lying outside te boundaries of "land management district 6";***. (23 Ind. Cl. Comm. at 311; Appendix II).

A reservation title confirming an aboriginal or Indian title constitutes more than an executive order privilege and more than an Indian title standing alone. By the Act of December 22, 1974, (Appendix IX), Congress protected the Hopi title and rights to the un-

divided interest as determined in *Healing* by authorizing a partition of the 1882 Reservation outside of district 6 (the so called "Joint Use area"). If the Commission decision is allowed to stand, an offset for the land returned to the Hopi could be allowed. In this manner, the government in permitting the Navajo Indians to occupy all of the joint use land and depriving the Hopi Tribe the use of the same, as asserted in Counts 5 through 8 in the Hopi Tribe's Petition to the Commission, would fall far short of fair and honorable dealings with the Hopi people.

The Commission in 1960 held that the Uintah Utes:

> . . . were entitled to, and were in the rightful and exclusive possession of the Uintah River Valley in the then Territory of Utah and that the defendant in placing the Band of White River Utes thereon, without the consent of the plaintiffs, and without compensating them therefor, is liable to plaintiffs for the value of an undivided one-half interest in the lands of said reservation. *Uintah Ute Indians of Utah* v. *United States*, 8 Ind. Cl. Comm. 620, 644 (1960).

That decision is compatible with *Healing v. Jones*. But, when considering the settlement of the Navajo Tribe on the Hopi Reservation in Hopi aboriginal territory, the Commission somehow reached a different conclusion.

Stripped of all legalistic juggling and prestidigitation the facts remain that when the Navajo Tribe was settled on the Hopi reservation in 1937, one-half of the land outside of district 6 was taken. The other half was

reserved for the Hopi Tribe as clearly established by the evidence in *Healing* and later confirmed by Congressional action. Navajo use of the complete area, including the Hopi half, created a trust responsibility in the United States to protect the out-numbered Hopi people from the preemption of Hopi lands by their powerful Navajo neighbor. Justice demands a fair rental as asserted in Counts 5 through 8 of the Hopi Petition to the Commission.

Healing v. Jones was a suit to quiet title. It did quiet title to one-half of the joint use area in the Hopi Tribe. The unique combination of Indian and reservation title has never been extinguished but is being effectuated by partition. The Commission holding that the entire Hopi title was extinguished, (23 Ind. Cl. Comm. at 288 and 311; Appendix II), is in direct contradiction to the *Healing* case.

> 2. Petitioner has been denied procedural due process of law in both the Indian Claims Commission and the Court of Claims.
>
> A. The decision of the Indian Claims Commission on dates of taking was made without allowing the Hopi Tribe to present oral testimony.

The Opinion on Title and supporting findings include findings as to the date of taking of Hopi interests by the United States. These findings were made by the Commission after receiving evidence only on the issue of title in a hearing expressly limited to the receipt of evidence on the issue of title. Petitioner moved the Commission for a further hearing on the issue of the dates of taking but was only granted the oppor-

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tunity to present "documentary evidence." The Commission has never allowed the Hopi Tribe to present oral evidence to fully develop its position on the important issue of dates of taking.

Petitioner submits that this limitation on the presentation of evidence constitutes a deprivation of procedural due process of law as guaranteed by the Fifth Amendment to the U.S. Constitution in that Petitioner has been denied a constitutionally sufficient "opportunity to be heard." Petitioner further submits that this limitation is violative of the express statutory directive under the Indian Claims Commission Act which requires that:

> The Commission shall give reasonable notice to the interested parties *and an opportunity for them to be heard and to present evidence* before making any final determination upon any claim. *** (25 U.S.C. Section 70p; Appendix VI) (Emphasis added).

The Commission's Opinion on Motion dated July 9, 1973 (31 Ind. Cl. Comm. 16; Appendix III), recognizes but never really responds to this issue. The Opinion recognizes that the Hopi Tribe had asserted "that it had not been afforded an opportunity to present its complete evidence as to the date or dates of taking of its aboriginal lands" (31 Ind. Cl. Comm. at 17). At 31 Ind. Cl. Comm. 18 the Commission acknowledges that the Hopi Tribe "had not been given an adequate opportunity to present evidence on the date(s) of taking" and acknowledges that further documentary evidence was received and that a "rehearing" was held on

the issue on May 22, 1972 at which time the documentary evidence was received. This Opinion does not acknowledge that the Hopi Tribe was expressly limited by Order of the Commission to presenting only documentary evidence and that the "rehearing" did not provide the Tribe with an opportunity to present its oral evidence in any form.

Petitioner submits that this issue is appropriate for review by the Supreme Court not only as presenting a denial of fundamental procedural due process of law, but also as an appropriate case for this Court to exercise its supervisory powers over the lower federal courts. This case presents for review not only constitutionally deficient trial level procedures, but presents, as well, in the order of the Court of Claims on the intermediate appeal from the Indian Claims Commission (Appendix I), an example of an apparently superficial review coupled with an uninformative order. Petitioner's position before the Court of Claims was presented in a brief and separate appendix in excess of 70 and 88 pages respectively. Detailed briefs were also submitted by the government and Navajo appellees. The record before the Court of Claims was very lengthy. The Court of Claims order from this record and presentation of the parties, consumes barely two (2) pages, with the bulk of the opinion reciting the course of the proceedings below. The decision does not specifically address a single issue raised by any of the parties but states in operative part only as follows:

> After consideration of the record, the briefs, and oral argument of counsel, the court concludes

> that the findings made by the Commission support its decisions and orders and the same are supported by substantial evidence.
>
> We conclude further that there is no error of law in the decisions of the Commission and that the same should be affirmed.
>
> Accordingly, the decisions and orders of the Commission are approved and affirmed, and the case is remanded to the Commission for further proceedings in accordance with this order.

Petitioner submits that the Court of Claims has failed to fulfill the statutory requirements for such a review set forth in 25 U.S.C. Section 70s(b) (Appendix VII) and that supervisory review of that Court and the Indian Claims Commission is appropriate herein.

> B. The decision of the Indian Claims Commission, made by a panel that did not hear the evidence, is inconsistent with the requirements of procedural fairness.

The evidence presented at the hearing on the issue of title was lengthy, involved, and consisted of both oral and documentary evidence. The evidence was, in addition, frequently conflicting. Following the hearing, additional exhibits were submitted together with proposed findings from all parties. In the seven (7) years following the hearing, each of the three commissioners who attended the hearing, were exposed to the witnesses, and heard the evidence, left the Commission.

Petitioner submits that the rendition of an opinion, particularly an opinion which is beyond the scope of the factual evidence presented, by a panel none of

whom were exposed to the evidence, is procedurally unfair and violative of due process of law. The hearing which the Indian Claims Commission Act requires (25 U.S.C. Section 70p; Appendix VI), to be meaningful, must provide that the fact finder is able to hear the evidence and to weigh the credibility of the witnesses.

The Commission panel issuing the Opinion on Title betrayed its lack of familiarity with the record and the course of the proceedings below by including in that Opinion on Title findings on the dates of taking, which matters were beyond the scope of the hearing which had been specifically limited by order of the Commission itself, to the issue of title. As developed above, the Hopi Tribe has never to this day been afforded an opportunity to fully present its case on the issue of dates of taking.

To further illustrate the failure of the Commission to familiarize itself with the extensive record inherited from a previous panel, Petitioner demonstrated to the Court of Claims that the Commission based its decision regarding the extent of Hopi territorial aboriginal possession, not upon natural boundaries, but, upon the false assumption that "Horses played a minor part in the Hopi life style so that the distance from their villages at which they carried on their activities depended on how far they could safely travel by foot" (31 Ind. Cl. Comm. at 21; Appendix III). Petitioner drew to the attention of the Court of Claims that Friar Dominquaez with Father Escalante in the late 1700's made the following observation:

> We travelled by extensive plains on which the herds of cattle and *horses* of Moquis graze . . . (Exhibit 23b (Hopi) p. 10) (Emphasis added.)

In 1776 there were large herds of cattle drifting out to the west, out of Moencopi, and north of there illustrating that the Hopi had to keep their sheep, horses and cattle far enough from their farm lands so that these creatures did not eat their corn patches. (Exhibit 15a (Navajo) p. 7; Exhibit 22 (Hopi) pp. 1, 2). In the same year, Escalante passed some uninhabited houses where horses and cattle had been pastured by the Hopi Indians. (Exhibit 24 (Hopi) p. 12).

Escalante further discovered that Moqui was composed of:

> . . . seven pueblos totalling 7,949 soles who devoted themselves to raising *mustangs, horses,* sheep, cattle and other animals . . . (Exhibit 25a (Hopi) p. 4) (Emphasis added).

It is, therefore, obvious that the Hopis had many horses in the 1700's but they were not confined to that century. In 1878, history records that although the Hopis had been plundered for years by the Navajos and occasionally by the Apaches, they still owned a number of horses and cattle and extensive herds of sheep. (Exhibit 416). Moreover, in 1878, records indicate that burros were used by the Hopi. (Exhibit 43 (Hopi)). Thus we see that the Hopis possessed horses long before the United States obtained sovereignty over their territory and extending thereafter to the period in question.

Again, as developed above, the Court of Claims has failed to even respond specifically to these issues in its statutorily mandated review function over Indian Claims Commission cases. The Hopi Tribe has been denied any meaningful review to determine whether or not the Commission's findings are in fact supported by substantial evidence (the review standard imposed on the Court of Claims by 25 U.S.C. Section 70s (b); Appendix VII), on which proposition the Hopi Tribe vigorously contends that the findings are not so supported.

Petitioner submits that review herein is appropriate by the Supreme Court both to consider the serious constitutional challenge to the decision making procedures of the Indian Claims Commission, and also to exercise its supervisory powers over both the Court of Claims and the Indian Claims Commission to provide petitioner with both its day in court and a reasonable and reasoned review thereafter.

> 3. Petitioner is entitled to a reasoned review to determine whether or not the findings of the Indian Claims Commission limiting Hopi aboriginal claims is supported by substantial evidence.

25 U.S.C. Section 70s(b) (Appendix VII) specifies what the review standard for the Court of Claims shall be in handling appeals from the Indian Claims Commission.

> ***On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which

> event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section.

As developed above, Petitioner's appeal to the Court of Claims has been almost summarily disposed of in an order which makes no reference to any of the issues on appeal raised by the Hopi Tribe or the other parties, makes no reference to any of the evidence, arguments, or to the record, and provides no discussion or reasoning in support of its conclusion that the orders of the Commission should be approved and affirmed.

Petitioner has not been given the kind of reasoned review which the Indian Claims Commission Act requires.

CONCLUSION

The Commission has failed to reconcile the critical discrepency between its decision and the *Healing* decision which has been affirmed by this Court.

Serious procedural irregularities which have oc-

curred in the Indian Claims Commission have been ignored by the Court of Claims. Petitioner believes that these irregularities constitute not only a denial of its rights to due process of law, but, that they are of such a serious nature as to warrant this Supreme Court in exercising its supervisory authority over both these inferior tribunals to steer them back to the accepted and usual course of judicial proceedings appropriate for the federal court system.

Petitioner respectfully requests that the Supreme Court issue a writ of certiorari and conduct an appropriate review of the issues raised herein.

Dated this August 23, 1976.

Respectfully submitted,

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