

1952

W. M. Young v. Joe Doe Felornia : Appellants' Petition for Re-hearing and Supporting Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. R. YOUNG, et al.,
Plaintiffs and Respondents

vs.

JOE DOE FELORNIA, et al.,
Defendants and Appellants

and

W. R. YOUNG, et al.,
Plaintiffs and Respondents

vs.

JOE DOE FELORNIA, et al.,
Defendants and Appellants

Civil
#727

NO. 7772

Civil
#728

APPELLANTS' PETITION FOR RE-HEARING
and
SUPPORTING BRIEF

FILED
JUN 17 1952

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POINT 5. The court should have given the Navajo defendants leave to make proof of their aboriginal and ancestral rights under their defense, set up in the defendants' answer. The court should have found that these matters are questions of fact

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POINT 6. The court should have reversed the decision of the trial court in this cause

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POINT 7. The court should not have assumed, without proof, certain facts which were assumed in reaching its opinion, namely:

a. That these Navajo defendants are a part of and bound by the Treaty of 1868, without permitting the defendants to show by competent evidence that they are not

bound by the Treaty of 1868, as shown by their pleadings.

b. The court should not have assumed that the Aneth Extension, mentioned in said opinion, was set aside for the benefit of these Navajo defendants, in the absence of proof upon the subject

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POINT 8. The court should not have disregarded the allegations of the plaintiffs' complaint, which is alleged to give the court jurisdiction and by which they are bound, that these Navajo defendants are residents and citizens of San Juan County, State of Utah, and then find that they are Treaty Indians

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POINT 9. The court should have sustained the claim of the Navajo defendants under the Treaty of Guadalupe Hidalgo, upon which their rights are founded, as set forth in our answer

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. R. YOUNG, et al., Plaintiffs and Respondents	}	
vs.		Civil #727
JOE DOE FELORNIA, et al., Defendants and Appellants	}	
and		NO.7772
W. R. YOUNG et al., Plaintiffs and Respondents	}	
vs.		Civil #728
JOE DOE FELORNIA, et al., Defendants and Appellants	}	

APPELLANTS' PETITION FOR RE-HEARING
and
SUPPORTING BRIEF

Comes now the defendants and appellant
in each of the above entitled causes, through
their counsel Knox Patterson, Esq. and O. A.
Tangren, Esq., and respectfully petition the

court to grant a re-hearing in the said cause for the reason and upon the grounds and on the points following:

STATEMENT OF POINTS

POINT 1: The court should have sustained each of the points raised by our motion to dismiss for the reason that the United States Government is an indispensable party to the action, as shown by Record 51-52, and that the trial court was without jurisdiction to decide the Federal questions.

POINT 2: The court should have found that the ancestral rights of the Navajo defendants to occupy the territory in dispute was not lost to them by the Treaty of 1868, between the United States Government and certain representatives of the Navajo People.

POINT 3: The court should have found, as a matter of law, that the Taylor Grazing Act of 1934 protected the rights of the Navajo defendants rather than finding that

such Act abolished the rights of said defendants.

POINT 4: The court should have found that the Enabling Act of Utah did protect the rights of the Navajo Indians rather than finding that such Act abolished the rights of these Navajo defendants.

POINT 5: The court should have given the Navajo defendants leave to make proof of their aboriginal and ancestral rights under their defense, set up in the defendants' answer. The court should have found that these matters are questions of fact.

POINT 6: The court should have reversed the decision of the trial court in this cause.

POINT 7: The court should not have assumed, without proof, certain facts which were assumed in reaching its opinion, namely:

a. That these Navajo defendants are a

part of and bound by the Treaty of 1868,

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without permitting the defendants to show

by competent evidence that they are not bound by the Treaty of 1863, as shown by their pleadings.

b. The court should not have assumed that the Aneth Extension, mentioned in said opinion, was set aside for the benefit of these Navajo defendants, in the absence of proof upon the subject.

POINT 8: The court should not have disregarded the allegations of the plaintiffs' complaint, which is alleged to give the court jurisdiction and by which they are bound, that these Navajo defendants are residents and citizens of San Juan County, State of Utah, and then find that they are Treaty Indians.

POINT 9: The court should have sustained the claim of the Navajo defendants under the Treaty of Guadalupe Hidalgo, upon which their rights are founded, as set forth in our answer.

ARGUMENT

POINT, 1:

It is elementary and does not require the citation of authorities to show that Federal Courts have jurisdiction in all cases arising under our constitution, treaties and congressional acts pursuant thereto.

It is obvious that the court's decision in this case attempts to construe not only the constitutional rights of these Navajo Indians but the Treaty of 1868, the Enabling Act of Utah, and the so-called Taylor Grazing Act, all of which are deemed to be Federal questions and thoroughly discussed in our original and reply briefs.

Here we are dealing with Indians alleged, by respondents, to be residents and citizens of the State of Utah, undoubtedly set up to give the court jurisdiction. Obviously, if they are residents and citizens

of the State of Utah, they are not included under or bound by the Treaty of 1868.

In the case of *Caeser vs. Krow*, 176 Pac. 929, (Ore.) the court says:

"State courts were not given jurisdiction of controversies necessarily involving the determination of the title, and, incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States, by the provision of the Act of August 15, 1884 (29 Stat.at L.286, C.290) delegating to the Federal Circuit Courts the power to determine such questions, since the purpose of that act to continue the exclusive federal control over disputes concerning allotments which, prior to that act, could only have been decided by the Secretary of the Interior, is manifested by its provision that a judgment or decree in any such controversy shall be certified by the court to the Secretary of the Interior, and by the provision of the Act of February 6, 1901 (31 Stat.at L.760, c.217), that in such suits 'the parties thereto shall be the claimant as plaintiff and the United States as party defendant.'"

In re *United States vs. Kagama*, 118 U.S. 375, 30 L ed. 228, we quote:

"The obligation to protect the Indians from local hostility, and to provide for their maintenance, instruction, and civilization, has always been recog-

nized as a national obligation, which could not, with justice to the Indians, be intrusted to local governments."

McKay vs. Kalyton, 1906, 204 U.S. 458:

"State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and, incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States, by the provision of the Act of August 15, 1894 (28 Stat.at L. 286, Chap.290)."

See Minn. vs. Hitchcock, 1901, 185 U.S. 960.

See also Patawa vs. United States (cc-Ore), 132 Fed. 893, and

Parr vs. United States (CC-Ore), 132 Fed. 1004.

Fellows vs. Blacksmith, et al., 19 How. 366, bears upon the question as to whether the Navajo defendants are bound by the Treaty of 1868, to quote:

"The removal of tribes and nations of Indians from their ancient possessions to their new homes in the west, under Treaties made with them by the United States, have been, according to the

usage and practice of the government, by its authority and under its care and superintendence. And, indeed, it is difficult to see how any other mode of a forcible removal can be consistent with the peace of the country, or with the duty of the government to these dependent people, who have been influenced by its counsel and authority to change their habitations.

"The negotiations with them as a quasi nation, possessing some of the attributes of an independent people, and to be dealt with accordingly, would seem to lead to the conclusion, unless otherwise expressly stipulated, that the Treaty was to be carried into execution by the authority or power of the government, which was a party to it; and more especially, when made with a tribe of Indians who are in a state of pupillage, and hold the relation to the government as a ward to his guardian. It is difficult to believe that it could have been intended by the government that these people were to be left, after they had parted with their title to their home to be expelled by the irregular force and violence of the individuals who had acquired it, or through the intervention of the courts of justice. As we have seen, the Seneca Nation upon the four reservations consisted of a population of some two thousand six hundred and thirty-three souls; and if we include the Tuscaroras, whose lands were also purchased under the same Treaty, nearly three thousand. It is obvious that any such litigation would be appalling."

We posed this question in both our original brief and our reply brief, that is to say, what is the state court to do to enforce the decree of this court and the decree of the trial court. The above case is certainly authority for the fact that courts have not jurisdiction in the first instance to try the case and, second, they have not the jurisdiction or authority to enforce its decree. It seems quite obvious they could not banish them from the State. Have they the authority to put them in jail on a contempt order, or any other enforcement order, that would make these Navajo criminals of the State? May they seize their sheep and even take their milk goats, the very subsistence of these Navajos? We think they may not do so and the trial court was wholly erroneous in holding them in contempt. These Navajos, regardless of their situs and residence,

are wards of the government and the government will protect those rights.

Let us quote from a Utah case, *Wo-Gin-Up's Estate*, 192 Pac. 267, quoting from the syllabus:

"Under Act Cong. March 3, 1875, Sec. 15 (U.S.Comp.St.Sec. 4611) providing that any Indian who has abandoned tribal relations shall, upon making a satisfactory proof, be entitled to the benefit of Homestead Act May 20, 1862, c. 75, 12 Stat. 392, a finding of the land board, awarding an Indian a homestead, is a conclusive adjudication that he had abandoned tribal relations."

This raises the question of an Indian's allotment, and of the Indian allotments which these Navajos have acquired on this area in dispute, but we will discuss this under Point 2, which to some extent will overlap and support Point 1.

POINT 2:

It appears that the court in holding that we are bound by the Treaty of 1868 relies upon the case of *United States vs.*

lows vs. Blacksmith, et al., 19 How.366.

When these cases are carefully analyzed they favor the appellants contention rather than respondents. In the first mentioned case, the question of whether all of the bands of the Seneca Indians and some other bands were bound by the treaty in question, was raised first on appeal, after findings by the court of claims that all the Indians involved in the suit were actually parties to it, and the Supreme Court of the United States, in commenting on that question, held that such matter was one that must have been raised in the trial court and said, at Page 470:

"But if these be material facts, they were equally so when the findings were made at the first hearing, and the attention of the court should have been then called to the matter, and a more particular finding requested. The motion contemplates an order upon the court to send up the testimony upon which it had found the ultimate fact that these three tribes were

parties to the treaty, and inferentially for us to pass upon the sufficiency of that testimony to establish such ultimate fact. If the finding of these probative facts were deemed material within the case of *United States v. Pugh*, 99 U.S.265 (25:322), application should have been made when the case was first sent here for a finding of such facts."

And it will be noted also that during the negotiations leading up to the final consummation of the Treaty, President Van Buren, realizing the importance of binding all the bands, sent a message to Congress in which he stated, in part:

" * * * In respect to all the tribes, except the Senecas, the result of this application has been entirely satisfactory, it will be seen by the accompanying papers that of this tribe, the most important of those concerned, the assent of 42 out of 81 chiefs has been obtained. I deem it advisable under the circumstances, to submit the treaty in its modified form to the Senate for its advice in regard to the sufficiency of the assent of the Senecas to the ammendment proposed."

Because of this message the Senate apparently considered it necessary to get the assent of all the headmen, which was done.

We think a careful reading of this case plainly shows whether or not all the bands assented to the treaty is a question of fact, to be established upon the trial.

The other case, *Fellows vs. Blacksmith*, which is quoted in the case of *United States vs. New York Indians*, the question of whether or not the Tonawanda band of Indians was represented by its chiefs and headmen in the execution of the treaty was raised for the first time in the argument on appeal. This also after the finding by the lower court that they were bound, so even though there is a strong statement contained in that decision, it would appear, under the facts and circumstances of that case, to be purely obiter dictum.

And let it be remembered that in both the above mentioned cases, the Indians were fighting for the right to be represented under the treaty.

The court cites United States vs. Sante Fe Pacific Railroad Company, 314 U.S. 399. We wish to refer to the language of the court which has out and out adopted the position of the plaintiffs in this case. We will under score that part of the court's decision which we regard as wholly unfounded, as a matter of law and as a matter of fact:

"In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any title rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too."

There is something else in this decision:

"For a long time it remained unsurveyed. Cattle men used it for grazing and for some years the Walapais received little benefit from it. But in view of all of the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands."

This case has other interesting excerpts which serve as a guide to aboriginal rights. Quoting both from Nathan R. Margold, who tried the case for the government, and also the court's opinion:

"Indian title connoted the Indian possessory right based on aboriginal occupancy had been recognized by treaty, statute or otherwise." * *

"In the absence of express language to the contrary, a Federal grant of public lands does not constitute an extinguishment of Indian occupancy rights." * *

"The act of March 3, 1865 (13 Stat at L 541,553, chap 127), establishing the Colorado River Reservation did not effectuate a termination of Walapai occupancy rights outside of that reservation in the absence of a binding agreement between the United States and the Walapai."

(NOTE: This caption cites New York Indians vs. United States, Supra, which is cited by this court in its opinion.)

"Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." * *

considered as sacred as the fee simple of the whites.' Whatever may have been the rights of the Walapais under Spanish law, the Cramer Case assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy. Though the Cramer Case involved the problem of individual Indian occupancy, this Court stated that such occupancy was not to be treated differently from 'the original nomadic tribal occupancy.'" * *

"Nor is it true as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer Case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.' 261 US at 229, 67 L ed 626, 43 S Ct 342."

May we respectfully move this court to again consider this Sante Fe case, for the reason that the opinion of the court in that case in rejecting a part of the Walapais claim was predicated upon the acquiescence and acceptance by the Walapai themselves, something entirely wanting in the Navajo case.

Again we say that the court places too much stress upon the fact that our Navajos were taken from Utah territory by force and violence and held in captivity at Fort Sumner for several years, this does not make them a part of the organized tribe, it makes them no part of the Treaty of 1868.

Certainly there is no curse upon these Indians because they are called Navajo.

May we also call the court's attention to many segments of tribes of the Apaches, of the Shoshones, and many other bands of Indians.

What have we done that shows any acquiescence or acceptance of the Treaty of 1868? There is simply nothing alleged, except in broad terms, that says we are bound by it, without any factual support to that effect. On the contrary, we al-

lege in our answer, see brief Pages 4-8, inclusive, that we are an independent band of Navajos, having no tribal relations with other bands of Navajos; that we are self supporting and have never received any benefits from other Navajo nations, tribes, or bands.

It is historically known, that the headman of this band of Utah Navajos was Kagalia; that he slipped away and was never captured by Kit Carson, or any of his renegade bands of Indians sent to capture these defendants; that after our Navajos were released from Fort Sumner, after 3 or 4 years of cruel imprisonment, they were told to go back to their former homes.

We believe it can be established by evidence that these particular Navajo Indians were sent back to their hogans prior to the enactment of the 1868 Treaty.

This court will not contend that our Navajo defendants are a party to a treaty to which they never personally or tribally or through their headmen agreed. That is contrary to all rules of law and procedure.

Look at the Treaty of 1868, it is not so all inclusive and satisfying as it might be. In Article 9 we find this language:

"The tribes who are parties to this agreement, hereby stipulate that they will relinquish all right to occupy any territory outside the reservation."

What right have we to assume that these poor, suffering, ignorant, stupid Indians knew 85 years ago that they had such a thing as aboriginal rights, guaranteed to them under the Treaty of Guadalupe Hidalgo. Mind, you, this right was not well developed at that time but became ingrafted in our jurisprudence in

the following years.

Look again at Article 8:

"Any Navajo who leaves the reservation * * he, or they, shall forfeit all the rights, privileges and annuities confirmed by the terms of this Treaty."

It does not say they will forfeit their rights under aboriginal occupancy.

"They will do all they can to induce Indians now away from the reservation * * to abandon such life and make the reservation their permanent home."

This clearly shows that they are dealing with many bands, segments, or clans of the Navajo people, and that all were not included in the treaty agreement.

Returning now to the principles of law set forth in the Utah case, supra. Let us look at Section 334, Title 25, Indians, Fed. Code Ann.:

"Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States

not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in section 331 for Indians residing upon reservations."

Now bear in mind, that the government has had knowledge that these several hundred Indians were living off the reservation and within the territory claimed, for more than a century. They were never molested until the so-called Taylor Grazing Act gave those cowboy officials down there a hunch that because they received leases upon this area that the Indians were out, and they proceeded forthwith to take possession.

We cite our briefs heretofore filed, showing that the Taylor Grazing Act, as well as the Enabling Act, protected the rights of the Indians.

It is admitted that during this span of years, many of these Navajo Indians

took up Indian allotments, pursuant to the aforesaid statute. This statute was repealed in 1934. After that date the Navajos, like the white settlers, were refused the right to make further Indian allotments or homestead, but the pertinent fact remains, that for many years, prior to 1934, there was granted to these Indians a great many allotments which could, even now, be carried to patent, although the government reserved title for 25 years with the right of extension.

These allotments are "as sacred as the fee simple of the whites."

Pray tell us how these Indians got these allotments, "Indians not residing upon a reservation"? Certainly the proper land office officials made their investigation and found that these Navajo defendants were residing outside of a reservation, which qualified them to take such allotments.

We think the law is clear, that you cannot go behind the findings of the land office, except in case of mistake or fraud. Is it not evident that the government itself has established the rights and status of these Indians, which, together with long usage of the past, qualified their aboriginal rights. Without doubt the government had knowledge of this Indian occupancy and that it was established years before the Mormon Pioneer moved into that area in 1880.

Let us refer to the case of *Montoya vs. United States*, 180 U.S. 261, quoted in our reply brief, Page 30. This case is clear upon the point that there may be many bands to a tribe of Indians, as the Apaches, Shoshones, and Navajos. It also defines the term tribe or band.

To exactly the same effect is *Milton C. Connors, Jr. vs. United States*, which is quoted in our reply brief on Page 32.

POINT 3:

Certainly we are not bound by the Taylor Grazing Act of 1934, because the Act itself specifically eliminates any land occupied, reserved or otherwise appropriated.

POINT 4:

Likewise the Enabling Act expressly reserves any land occupied by Indians.

POINT 5:

Self assertive.

POINT 6:

The court should have remanded the case to the district court of San Juan County, Utah, for the reason that in any event the decision of the district court is a nullity in the fact that it has no manner and no authority for enforcing a decree against these Navajo defendants.

POINT 7:

Self assertive.

POINT 8:

Self assertive.

POINT 9:

Self assertive.

CONCLUSION

The court must realize that these Navajos are in a terrible judicial predicament. We have a circuit court decision: After Judge Ritter said "I cannot enforce any decree on this point", he was instructed to try out the questions of fact, exactly as they are set up in our defense.

As we have heretofore stated to the court, we are not impinging upon the rights of this court to make its own decision, regardless of the federal court, but at the same time, obviously, the situation should be harmonized.

May we take the easy way out by just saying we are Navajos, without any

reference to our pleadings?

Is every Navajo bound, regardless of his past and present situs? If so, the government of the United States is exercising arbitrary authority over every Indian by tribal name, regardless of consequence.

We respectfully request:

1. That the court take into account the enforcement of the decree of the trial court.

2. That the court consider the jurisdiction of the state court to determine the questions involved.

3. That the court make further findings and conclusions with reference to the enforcement of the trial court decree.

4. That the court reverse its decision and likewise reverse the decision of the trial court.

5. That the court consider the question that this court, having found that these Navajos are treaty Indians, must now seek relief from the legislative branch of government, and not by local courts.

Dated this 16th day of June, 1952.

Respectfully submitted,

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