

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

DKT/CASE NO. 83-1476

TITLE UNITED STATES, Petitioner v. MARY DANN AND CARRIE DANN

PLACE Washington, D. C.

DATE November 5, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner, :
v. : No. 83-1330
MARY DANN AND CARRIE DANN :
-----x

Washington, D.C.

Monday, November 5, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:30 o'clock a.m.

APPEARANCES:

ROBERT A. MC CONNELL, ESQ., Assistant Attorney General, Office of Legislative Affairs, Department of Justice, Washington, D.C.; on behalf of the petitioner.

JOHN D. O'CONNELL, ESQ., Salt Lake City, Utah, on behalf of respondents.

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1 After a short statement of the facts, we will
2 explain why we feel the Court of Appeals should be
3 reversed and the consequences of such a reversal.

4 QUESTION: May I ask, Mr. McConnell, do I
5 understand there is some kind of Congressional
6 consideration of a settlement of this litigation or
7 something?

8 MR. MC CONNELL: The respondents would state
9 that there needs to be Congressional --

10 QUESTION: No, is there in fact anything
11 pending in the way of a Congressional solution?

12 MR. MC CONNELL: No, there is not.

13 QUESTION: There is not.

14 MR. MC CONNELL: In this case, it is important
15 to know there were actually two cases, one, the first
16 case before the Indian Claims Commission, and the second
17 case, this one here, both in which -- both involved a
18 claim of title, specifically, Western Shoshone title to
19 lands in Nevada.

20 Here, the respondents have a patented
21 homestead in Nevada, and on that homestead land, which
22 is not in dispute here, they have their homes, they have
23 other structures, they have fenced in areas, and indeed
24 they have their water supply for their cattle
25 operation.

1 It is on contiguous federal public lands next
2 to the homestead that they have had their cattle grazing
3 without a permit, a Bureau of Land Management permit.
4 It is because they have been grazing without a permit
5 that we find that wrongful, and it is because of that
6 that we brought the ejectment action which started this
7 case.

8 QUESTION: Mr. McConnell, suppose we affirm,
9 and I will give you the same question, suppose we
10 reverse? What happens? Doesn't Congress still have to
11 act?

12 MR. MC CONNELL: The only remaining thing
13 here, it is our position, is that Congress will
14 eventually have to take an affirmative action,
15 affirmatively act to pass legislation to distribute, to
16 distribute funds that have already been paid. We draw
17 major significance and a distinction between payment and
18 distribution, but that is the act that Congress would
19 have to deal with, is distribution.

20 QUESTION: Certainly whatever we decide here
21 does not tie the hands of Congress, does it?

22 MR. MC CONNELL: No, that is correct.

23 QUESTION: Are we spinning our wheels in this
24 case?

25 MR. MC CONNELL: No, I don't believe so, Mr.

1 Justice Blackmun. What we have here is the finality
2 provisions of 22(a), and specifically if, as we believe,
3 22(a) has been satisfied, payment has taken place, then
4 the respondents here are precluded from using a claim of
5 title, Western Shoshone title as a defense in the action
6 started here, the ejectment action brought by the
7 government.

8 And so that remains to still require them to
9 get a permit to graze on federal public lands. The
10 defense, as I just mentioned, that was brought up and
11 brought forward by the respondents was that they were
12 Western Shoshone Indians, that they had Western Shoshone
13 title to the lands, and because of that they had a right
14 to use and occupy the lands in question.

15 QUESTION: That sort of a defense is no good
16 against the government, is it, aboriginal title? Apart
17 from the Indian Claims Commission, anything the
18 government got by the Treaty of Guadalupe Hidalgo, it
19 can kick anybody it wants to off of.

20 MR. MC CONNELL: Well, you are correct, but we
21 have had a long history in this country of trying to
22 resolve Indian matters in a fair and understanding way.
23 In this case, Indian title, aboriginal title was title
24 for nothing more, as this Court has found before,
25 nothing more than really an occupancy as and between

1 Indians,

2 QUESTION: Let's try to be precise. If the
3 government brings an action, an ejection against
4 someone, claiming that the government owns the land, and
5 the defense is aboriginal title, that simply is -- that
6 is summary judgment for the government, is it not?

7 MR. MC CONNELL: It should be. It should be.
8 Yes, Your Honor. But that was the defense that was put
9 forward here.

10 QUESTION: Isn't that all that is claimed
11 here?

12 MR. MC CONNELL: It is claimed that aboriginal
13 title, that they have aboriginal title --

14 QUESTION: They have given up any claim for
15 recognized title other than aboriginal?

16 MR. MC CONNELL: Mr. Justice Blackmun, I am
17 not sure that they may have given up any other claim,
18 but certainly before the Indian Claims Commission. The
19 Indian Claims Commission was designed and established
20 only to consider tribal claims and not individual
21 claims, and here, they are using a claim of tribal title
22 as their defense against the ejection action.

23 QUESTION: Well, the Claims Commission found
24 that aboriginal title had been extinguished.

25 MR. MC CONNELL: That is correct, and that was

1 after eleven years of listening to anthropologists and
2 taking evidence. They found that the aboriginal title,
3 the Indian -- the Western Shoshone title had been
4 extinguished some time prior to 1946. And it is that
5 extinguishment in which we concur.

6 We believe that they do not have Western
7 Shoshone title, and that that had been extinguished,
8 that the claim has been -- a claim was brought by the
9 Western Shoshone to the Indian Claims Commission based
10 on the extinguishment of Western Shoshone title. That
11 was litigated.

12 It has been paid. And therefore the finality
13 section of the Indian Claims Commission Act, Section
14 22(a), has gone into effect, and there is a -- the
15 United States is now -- has full discharge against any
16 claim that would come out of that particular --

17 QUESTION: What have you got to say about the
18 claim that the United States has not gone through the
19 procedures that are necessary under the Act to effect
20 payment?

21 MR. MC CONNEIL: We believe that the
22 government has gone. What has happened is that when the
23 Congress set up the Indian Claims Commission, they set
24 up the process for the hearings. All that has taken
25 place.

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QUESTION: Yes. How about the payment after judgment of the Indian Claims Commission?

MR. MC CONNELL: Section 22(a) establishes that a judgment of the Indian Claims Commission is as a judgment of the Court of Claims, and that -- and then Congress has provided subsequent to the establishment of the Indian Claims Commission that the appropriation, the appropriation that would satisfy that judgment is an automatic appropriation. It is done automatically.

QUESTION: Is there another statute that deals with how payment is to be effected, some procedural detail?

MR. MC CONNELL: The respondents have argued some other statutes that really go to distribution and not to payment.

QUESTION: That is what I am interested in. What is your response to that?

MR. MC CONNELL: Section I believe it is 25 USC 118 that they cite is really a -- it's a 1911 statute that deals with payment. It does not define payment. It certainly is clearly not dealing with payment under the Indian Claims Commission.

And in this case, the Congress has, in fact, subsequent to that statute, established a very meticulous procedure for the entire consideration,

1 presentment and consideration, judgment and
2 appropriation.

3 And at the time they passed the Act, the
4 Indian Claims Commission Act, they did provide, they,
5 Congress, that a ministerial act of appropriating the
6 money would have to take place, but even that has been
7 done away with, and is now an automatic appropriation.

8 That automatic appropriation did take effect,
9 and that is not in dispute here. Both sides agree that
10 the appropriation has taken effect.

11 QUESTION: And so has the Interior, has the
12 Interior got that judgment to its credit now?

13 MR. MC CONNELL: The money has been placed in
14 a trust account in the --

15 QUESTION: Have you reported that to the
16 Secretary of Treasury?

17 MR. MC CONNELL: Yes, the Secretary of
18 Treasury knows the money is there. Yes, the money is in
19 the Treasury. It is in a trust account. It is earning
20 money, as a matter of fact, substantially.

21 QUESTION: What can ever be done with that
22 money? That is tribal money, I take it.

23 MR. MC CONNELL: It is tribal money. There is
24 a vested property right by the claimant, the payee, and
25 we hold it, we, the government, hold it as trustees for

1 their beneficial interest.

2 QUESTION: For whom?

3 MR. MC CONNELL: Well, for the claimant, the
4 Western Shoshone identifiable group. Now, going to
5 Justice Blackmun's question, what now still remains to
6 be done is not to pay the money. The money has been
7 paid to the payee. The government is no longer a
8 judgment creditor.

9 What will need to be done now is to resolve
10 how to distribute that money to individuals, a separate
11 act, subsequent payment.

12 QUESTION: If it is to be distributed, I
13 suppose the tribe could just hold it and use the income
14 from it for the benefit of its members.

15 MR. MC CONNELL: It is -- a lot of different
16 things are possible. What we think is very prudent here
17 is that we wait and try and resolve and get a consensus
18 among the Indians that are included in that identifiable
19 group, and base a distribution plan upon a consensus
20 opinion of those Indians.

21 QUESTION: And what makes you think that the
22 -- let's assume that the judgment really is final with
23 respect to the tribe. Of course, you didn't sue the
24 tribe.

25 MR. MC CONNELL: That's correct.

1 QUESTION: You sued individual Indians.

2 MR. MC CONNELL: That's correct.

3 QUESTION: Why do you think they are
4 foreclosed by the fact of payment? They have never been
5 paid anything.

6 MR. MC CONNELL: They have not been paid
7 anything.

8 QUESTION: Their tribe has.

9 MR. MC CONNELL: The tribe, the Western
10 Shoshone identifiable group has been paid money.

11 QUESTION: So you say that the Indian Claims
12 Commission judgment which you say has been paid
13 forecloses any other claim by the tribe or by any of its
14 members to that particular land for which the money was
15 paid.

16 MR. MC CONNELL: Based on tribal title, yes.
17 Based on tribal title. And that is our fundamental
18 point, is that tribal title has been extinguished, and
19 indeed compensation for that extinguishment has now
20 taken place under Section 22(a).

21 QUESTION: But I suppose the individual
22 Indians have claims that have original title. Let's
23 assume that the tribe had never litigated. There had
24 never been an Indian Claims Commission judgment here,
25 and you sued these individual tribal members.

1 They could claim aboriginal title themselves,
2 couldn't they?

3 MR. MC CONNELL: Well, we would contend that
4 aboriginal title is a tribal title, but the Indians
5 certainly could in the situation that you have put
6 forward make that claim based on that tribal title.

7 QUESTION: But their title is no better than
8 tribal title?

9 MR. MC CONNELL: Not as long as they are
10 basing it on tribal title.

11 QUESTION: Right, so that if tribal -- but
12 their right, their right doesn't last any longer than
13 tribal title does. And if tribal title has been
14 extinguished, so has theirs.

15 MR. MC CONNELL: They may have an individual
16 title, but they have not asserted that there. They may
17 have some other theory.

18 Indeed, the respondents' brief, although not
19 raising this at the Court of Appeals, claims under the
20 Supreme Court's case in Cramer that they may have some
21 individual, separate and apart from Western Shoshone
22 title, but that, the finding in Cramer of title requires
23 an evidentiary submission by them that was not done
24 here, and a finding of facts that just aren't present in
25 this case.

1 But that would go to whether or not they might
2 be able to assert some individual title, but not on the
3 basis of the Western Shoshone title.

4 QUESTION: If an individual Indian or two or
5 three of them brought an action, they would be bringing
6 it in terms of any result for the benefit of the whole
7 tribe, would they not?

8 MR. MC CONNELL: Well, I think it is important
9 that in the context of this particular case, Mr. Chief
10 Justice, the Indian Claims Commission when it was set
11 up, it established a specific procedure for who could
12 come forward and submit claims, and indeed it did
13 provide that Indians, individual Indians could come
14 forward, bands, tribes, but it did also have, as took
15 place in this case, that in the instance where that
16 identifiable group of Indians had among it a recognized
17 tribe, a recognized tribe under the 1934 Indian
18 Reorganization Act, that entity would be the exclusive
19 agent or representative before the Commission.

20 QUESTION: It is something like a class
21 action, in effect?

22 MR. MC CONNELL: Well, there are some
23 similarities, but not -- but really the Indian Claims
24 Commission is a creature of the statute itself, and
25 provided for a specific procedure, specific

1 representation appeals, and all of those were used in
2 this case.

3 So, it would be our position that the final
4 judgment of the Indian Claims Commission was certified
5 by the General Accounting Office. It was then
6 automatically appropriated. The moneys were
7 automatically appropriated, and that payment then put
8 into effect the finality provisions of Section 22(a).

9 The respondents do argue that payment awaits
10 distribution, that payment really didn't happen. It
11 won't happen until distribution. But as I said earlier,
12 we find a major distinction between the appropriation,
13 the payment, and distribution.

14 This Court, I might add, in its decision in
15 1976 in the Delaware Tribal Business Committee v. Weeks,
16 a case which is ignored totally by respondents in their
17 brief, found that very specific thing, that under the
18 Indian Claims Commission Act, payment is separate and
19 apart from distribution. Payment is a payment of a
20 tribal claim, and subsequently there can be a
21 distribution to individuals.

22 We also -- I would say the legislative history
23 makes it pretty clear that Congress intended Section
24 22(a) to be a final -- an act of finality. Those
25 provisions were there to bring finality to the whole

1 process.

2 Indeed, it was a very conscious decision by
3 Congress, because the Department of Justice in fact went
4 before Congress and criticized that very provision, went
5 up and said, you shouldn't pass it, it is not a good
6 idea, because in passing that provision, what you would
7 be doing, Congress, is surrendering your prerogative to
8 review all the claims coming against the United States.

9 Unfortunately, this happens every once in a
10 while. Congress did not pay attention to our advice,
11 and specifically kept 22(a) in the statute for the
12 express purpose of providing the finality that they
13 desired.

14 And I also would add that the respondents have
15 made an argument that they had not been accorded due
16 process under the Indian Claims Commission activities,
17 and the hearings there.

18 The respondent is wrong. That is absolutely
19 incorrect on two grounds. First of all, respondents did
20 not raise a due process argument at the Court of Appeals
21 level, so it is not really properly before this Court.
22 But secondly, due process was provided. It was provided
23 by the whole procedure that was established by Congress
24 under the Indian Claims Commission Act.

25 The Indians could come forward and present

1 claims.

2 QUESTION: Did they make their due process
3 argument at all in the Court of Claims as intervenors?

4 MR. MC CONNELL: Yes, they did.

5 QUESTION: Why do you get to the merits of it
6 at all? Aren't they concluded by the decision --

7 MR. MC CONNELL: We feel that they are, yes.
8 Yes, Mr. Justice Rehnquist. We feel that they are
9 precluded. They had their adversarial hearing. They
10 had all the appeals. They used the appeals. And it is
11 not a lack of due process if you have not timely used
12 the processes that have been provided.

13 And finally, I would need to make the point
14 that if the Court of Appeals is reversed, the only
15 effect and impact on the respondents, the individual
16 respondents here would be that they will need to get a
17 Bureau of Land Management grazing permit to put their
18 cattle on the lands contiguous to their homestead,
19 homestead lands in Nevada.

20 I will reserve further --

21 CHIEF JUSTICE BURGER: Mr. O'Connell.

22 ORAL ARGUMENT OF JOHN D. O'CONNELL, ESQ.,

23 ON BEHALF OF THE RESPONDENTS

24 MR. O'CONNELL: Mr. Chief Justice, and may it
25 please the Court, Mary and Carrie Dann were born on the

1 very lands that are the subject of this case over a
2 half-century ago, and all their lives they have used
3 these lands to support themselves by their own labors.

4 The Dann family has been ranching this area
5 for three generations, and using and occupying it for
6 countless generations before that.

7 The government now seeks to eject the Danns
8 from their property without regard for the lawfulness of
9 their occupancy or the validity of their title on the
10 merits because of a ruling in a collateral proceeding
11 where the extinguishment issue was never in contention
12 nor actually litigated, and where the interests of the
13 Danns were not represented.

14 QUESTION: You don't agree that they can get a
15 grazing permit now, as your friend just suggested?

16 MR. O'CONNELL: They could get a grazing
17 permit, Your Honor, but they do not need a grazing
18 permit to graze on lands that do not belong to the
19 government, and the government does not want to litigate
20 whether or not these lands belong to the government.

21 The government has evaded that issue
22 throughout these proceedings. They will not allow the
23 issue to be tried on the merits. They lost on the
24 merits in the --

25 QUESTION: Well, isn't it their impression

1 that they have already tried that issue?

2 MR. O'CONNELL: In another form with what we
3 believe are different parties on a different claim. We
4 believe that the drastic remedy, this remedy of
5 ejection of people from property which is conceded by
6 everybody in the area to be theirs, this drastic remedy
7 turns the Indian Claims Commission Act, the Act they
8 rely on in this Court, it turns it on its head.

9 The purpose of that Act was to provide relief
10 for ancient wrongs, not to provide a vehicle for the
11 government to seize property today in the first
12 instance. This is property that the government never
13 had in its possession, never owned.

14 The trial court found that the government
15 acquired this land as of December 6th, 1979, by the
16 paper coming over from the Court of Claims to the
17 Treasury, that the real estate transaction occurred in
18 1979.

19 QUESTION: Well, did the District Court make
20 any finding as to whether this was land acquired by the
21 Treaty of Guadalupe Hidalgo?

22 MR. O'CONNELL: I don't know whether the Court
23 made that finding, but I believe both parties -- that
24 was in the pretrial order. Yes, Your Honor.

25 QUESTION: They agreed that it was? So I

1 suppose it originally became the property of the
2 government upon execution of the treaty.

3 MR. O'CONNELL: Under the decisions of this
4 Court, Your Honor, the fee would be in the United
5 States, but the beneficial title was in the Western
6 Shoshone, quite clearly, and the trial court found that
7 it was up until December, 1979. That is why the trial
8 court denied damages to the government.

9 QUESTION: How did the District Court find
10 that the beneficial title had gotten into the Shoshone?

11 MR. O'CONNELL: The government conceded that
12 the Shoshone had beneficial title at the time of the
13 Treaty of Guadalupe Hidalgo, Your Honor, and that was in
14 the pretrial order, too. It was uncontested -- it was
15 uncontested that the Western Shoshone had title to start
16 with.

17 QUESTION: Not legal title.

18 MR. O'CONNELL: Beneficial title, aboriginal
19 title.

20 QUESTION: Aboriginal. That is what you are
21 talking about.

22 MR. O'CONNELL: Yes.

23 QUESTION: Possessory.

24 MR. O'CONNELL: Yes, possessory title.

25 QUESTION: The right of possession.

1 MR. O'CONNELL: Yes, and it was conceded that
2 the Indians have title. The problem was that the
3 government had to prove that it had acquired title, and
4 of course it tried to evade that. We went to the Court
5 of Appeals once, and the Court of Appeals ruled that the
6 court had to rule.

7 The court couldn't find that the government
8 had ever acquired title, so the court at the request of
9 the government and over our demands for a trial waited
10 for years for the government to come up with this piece
11 of paper that gave it a preclusive effect about a
12 trespass case that happened years before, and the reason
13 it did that is because the government could not prove
14 any lawful right it had to move these Indians off their
15 land.

16 We would like to make three major arguments in
17 this regard. First, the Danns are not precluded in this
18 action by the judgment in a statutory claims proceeding
19 because the statute states that discharge does not occur
20 until payment, and payment cannot be made until Congress
21 legislates the necessary direction to effectuate that
22 payment.

23 Second, even if payment is made, the
24 preclusive effect on this action is limited because the
25 interests of the property owner, the interests of the

1 property owner was not represented, and because the
2 issues involved in those proceedings were entirely
3 different and based on entirely different premises and
4 concepts of law from those involved in this case here.

5 And third, in the alternative, the Danns have
6 asserted throughout the proceedings, starting with in
7 the answer, very specifically that they have individual
8 Indian title to the lands involved in this case, and
9 this Court has held such individual rights are different
10 from and survive, individual Indian title survives a
11 relinquishment of tribal title.

12 Now, the judgment in the -- addressing my
13 affirmative argument, the judgment in the claims
14 proceeding was obtained by the "Western Shoshone
15 identifiable group." Western Shoshone identifiable
16 group. The government contends the judgment funds are
17 tribal funds, and in answering the question, said, well,
18 they are being held for the benefit of the tribe.

19 However, the Western Shoshone identifiable
20 group is not a tribal entity in any real sense or in the
21 sense that it has a political structure or even that it
22 is a definable class. It right now is just a name. The
23 Indian Claims Commission specifically found that the
24 Western Shoshone had no political structure at that
25 time, and designated the claimholder to be an

1 identifiable group.

2 Now, this is one of the very peculiar things
3 about the way the Indian Claims Commission Act worked.
4 You could have a lawsuit with the plaintiff, the
5 identity of the plaintiff being held in suspension.

6 The Court of Claims and this Court have held,
7 in fact, in the case that counsel relies on so heavily,
8 Delaware Tribal Business Committee versus Weeks, the
9 Court of Claims and this Court have held that the
10 designation of the existing entity, entities, or class
11 of persons entitled to share in that award is an
12 exercise of the plenary power of Congress.

13 Congress exercises that power in the
14 distribution legislation. Until Congress legislations a
15 distribution plan, no person, class of persons, or
16 entity, no tribe, no tribe has any sort of enforceable
17 interest in the judgment funds. The only thing that has
18 an interest in the judgment funds is an identifiable
19 group.

20 But nobody can claim to be that identifiable
21 group until Congress acts. And this Court has held that
22 Constitutionally, using its plenary power, Congress can
23 designate anybody it wants to be that entity, as long as
24 there is just some connection with Congress's concern
25 for Indians.

1 So, it is not, it is not as if the Navajo
2 nation or the Western Shoshone nation, which now has a
3 political entity, and that is the Western Shoshone
4 National Council, it is not as if the Western Shoshone
5 National Council has a beneficial interest in those
6 funds.

7 The Western Shoshone identifiable group may be
8 all persons of Western Shoshone descent, like all
9 persons of Irish descent, and we litigate all persons of
10 Irish descent, and then try to use a preclusive effect
11 against the Republic of Ireland, say, in regard to their
12 embassy, and say, well, we brought an action on the part
13 of all people of Irish descent without anybody who can
14 come in and speak for them.

15 QUESTION: Mr. O'Connell, can I just ask you
16 one question, going back to what the Chief Justice asked
17 earlier? How much of a burden is it to get a grazing
18 permit on your -- I mean, it seems to me the issue
19 really is when you have to get the permit.

20 MR. O'CONNELL: Well, Your Honor, it would be
21 a financial burden -- this area is so marginal that the
22 people who operate in it are mostly hobby farmers and
23 these Indians, who are willing to do the hard work and
24 work the long hours, and I believe that is in some of
25 the material you furnished the Court.

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QUESTION: How serious --

MR. O'CONNELL: But the offensiveness of getting a permit, Your Honor, is to get a permit for your own home.

QUESTION: Don't you -- you are going to have to get the permit sooner or later.

MR. O'CONNELL: No, Your Honor, I do not recognize that.

QUESTION: Even after payment you would say, even after what you would agree was payment.

MR. O'CONNELL: In regard to the Danns, I don't believe the Danns will have to get a permit.

QUESTION: In other words, I thought the question was just when --

MR. O'CONNELL: For several reasons, Your Honor, which I would be willing to go into.

QUESTION: I don't want to -- just tell me, how serious is this financial burden of getting a permit? I just don't happen to know.

MR. O'CONNELL: Your Honor, the Danns contend that they would be unable to maintain their operation and pay \$16,000 a year, and that is what the government wants.

QUESTION: Well, is the fee for a BLN permit based on the number of head of livestock that are run?

1 Doesn't it --

2 MR. O'CONNELL: Yes.

3 QUESTION: Isn't it just an annual fee per
4 head of livestock actually being run?

5 MR. O'CONNELL: Yes, Your Honor. But when you
6 get down to spreading the livestock over such a vast
7 area, it becomes marginal whether you can afford to do
8 it. Cattle on the range is somewhat of a dying industry
9 in this country.

10 But there are people who still want to do it.
11 And they have the right to do it. And they have the
12 right to do it on their own land, without requesting the
13 government's permission.

14 The Taylor Grazing Act does not apply to
15 Indian lands, and that is perfectly clear, and was held
16 below, I believe, by both courts.

17 I would like to make it clear that the
18 District Court did not say that the Darms should stop
19 grazing their cattle because the land had not been
20 Indian land. He held it had been Indian land, and
21 refused the government damages, and I don't understand
22 whether the government now is still seeking damages for
23 what happened back in 1973.

24 But they didn't get damages because it was
25 clearly Indian land up until this paper transferred in

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Washington. I think it is very important that this distribution which counsel says is just a ministerial act has been held by this Court to be an exercise of the plenary power of Congress, and although this --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m. of the same day.)

1 whether all lands had actually been taken in the Western
2 Shoshone claims proceeding, commented on both occasions
3 that the Danns or that the Indians who wanted to
4 continue collateral litigation could do so, could
5 continue their collateral litigation by delaying
6 appropriation and "the direction necessary to pay."

7 The Court of Claims is intimately familiar
8 with how the Indian Claims Commission judgments are
9 paid. The Court of Claims did not say that upon
10 appropriation we were stopped, we could stop the
11 direction necessary to pay. And I don't see how you can
12 construe the direction necessary to pay to be anything
13 other than this legislation which is yet to come.

14 I believe in Appendix M we have the copy of
15 the letter from the Senate Committee to the Interior
16 Department informing them that legislation would be
17 required.

18 QUESTION: In the Congress that just
19 adjourned?

20 MR. O'CONNELL: No, Your Honor, it was -- I'm
21 sorry. It was the Congress three years ago, I believe.
22 I don't have that accurate. I would have to look at it.

23 Under these circumstances, payment and
24 discharge cannot have occurred. We cannot discharge the
25 liability of the United States when there is nobody to

1 pick up the judgment, there is nobody who could enforce
2 anything. It is sort of, there's a judgment but nobody
3 owns it.

4 QUESTION: Of course, I take it part of your
5 position is that even if there had been an Act saying,
6 telling Interior to whom to distribute the money, and
7 they had distributed it, that your clients would not --

8 MR. O'CONNELL: Yes, for the two reasons --

9 QUESTION: -- would not be bound at all.

10 MR. O'CONNELL: Yes, for the two reasons that
11 I now am going to raise. We do not think payment has
12 occurred, but in the second argument, the Danns cannot
13 be ejected from their property by the preclusive effect
14 of the Indian Claims Commission award without violating
15 fundamental due process considerations.

16 QUESTION: Was that presented to the Court of
17 Appeals?

18 MR. O'CONNELL: Yes, Your Honor. I raised it
19 -- I raised it in my brief.

20 QUESTION: They didn't need to reach it, I
21 take it.

22 MR. O'CONNELL: They just did not -- they
23 declined to reach it. They characterize it -- they
24 never used the magic words, "due process of law," and I
25 guess that is what counsel is referring to, but they

1 used the privity of parties question, which is a
2 fundamental due process consideration.

3 QUESTION: What is your other point? You say
4 two other reasons.

5 MR. O'CONNELL: Oh, then our individual use
6 and occupancy rights, which are entirely separate from
7 the tribal rights, and survive tribal rights.

8 QUESTION: Now, did you present that to the
9 Court of Appeals?

10 MR. O'CONNELL: I presented it, Your Honor.
11 They never even mentioned it.

12 QUESTION: All right.

13 MR. O'CONNELL: Because they were going to --
14 they said that the Western Shoshone tribal title was not
15 extinguished. They did not need to get to that.

16 But if we do -- if this Court should hold that
17 payment has occurred, or if down the road Congress does
18 act -- Congress has asked for legislation and the
19 executive has not responded. If Congress does act, or
20 if this Court finds that Congress has acted or there is
21 payment, then this privity problem which was avoided by
22 the court below and actually avoided by the Court of
23 Claims would then have to be confronted.

24 Now, the Indian Claims Commission concluded
25 that the Temoak bands, which was the representative

1 entity, "had the right to maintain this action" -- I am
2 quoting here -- "for and on behalf of the descendants of
3 the Western Shoshone identifiable group."

4 Now, that raises two problems having to do
5 with privity. First, the Commission made no inquiry or
6 finding as to the adequacy of the representation, and
7 avoided that issue when it came up again later, but in
8 its initial determination, there is no findings, they
9 don't say anything at all about the adequacy. They just
10 said they have the right to represent.

11 The Danns are not members of the Temoak
12 bands. The relationship between the Danns and the
13 Temcak bands would be the relationship between a citizen
14 of the State of Oregon and the State of New York. The
15 Danns belong to the Dann band of Western Shoshone
16 Indians, which is a separate entity, a coequal member of
17 the Western Shoshone National Council with the Temoak
18 bands.

19 QUESTION: Why isn't this fund something like,
20 not precisely like, but something like a deposit the
21 government makes with the District Court when they
22 condemn land? Isn't it much the same, except that --

23 MR. O'CONNELL: I am not intimately familiar
24 with how such deposits are made, Your Honor.

25 QUESTION: Well, title passes to the

1 government when they make the deposit. It may be -- the
2 amount may be adjusted later by the litigation. Title
3 to the land passes when they move.

4 MR. O'CONNELL: But in that sort of situation,
5 at some point somebody could go into a court and say, we
6 are entitled to that money. In this situation, nobody
7 can go into court and say they are entitled to this
8 money until Congress -- see, because no court can make
9 that decision.

10 This Court has held that this Court cannot
11 make the decision as to who that money belongs to. This
12 Court --

13 QUESTION: It is in trust, is it not, for
14 these Indians?

15 MR. O'CONNELL: It is in trust for the Western
16 Shoshone identifiable group, and at some later time, I
17 think -- I could concede that at some later time
18 somebody could bring an action for breach of trust, but
19 at this time there is nobody who could bring such an
20 action because constitutionally it is in the Congress's
21 power to define who has a right to those funds.

22 And until Congress does that, nobody has a
23 right. I believe in their brief, the government
24 concedes --

25 QUESTION: Isn't your quarrel there with

1 Congress, with the law as it is?

2 MR. O'CONNELL: No, I don't have a quarrel
3 with that, because I am the one -- certainly I don't
4 want anybody to have a right to those funds, so I have
5 no quarrel. I think the government has a quarrel with
6 that. The government wants to say, well, Congress
7 wasn't doing anything but reserving some ministerial
8 approval.

9 It is the government's problem, because until
10 Congress exercises its plenary jurisdiction, plenary
11 power and designates who the people are, nobody -- they
12 make in their brief --

13 QUESTION: I think you understate that a
14 little. Isn't that \$26 million drawing interest?

15 MR. O'CONNELL: It is drawing interest. It is
16 drawing. It is now much more than that.

17 QUESTION: The government couldn't take it
18 back.

19 MR. O'CONNELL: No, no. I would say that it
20 is committed. But this, I think, is like an escrow
21 situation where the debtor has parted with the money but
22 it has not yet gotten to the other side.

23 If you allow a discharge under those
24 circumstances, you now have this Western Shoshone
25 identifiable group which cannot act because it doesn't

1 have any structure or any defined membership. You have
2 a situation where you have a discharge of claim but
3 nobody owns the judgment.

4 Then Congress steps in. See, nobody can go
5 into court until -- and this Court has held that, and it
6 is a division of powers problem. So no court could say,
7 well, this property belongs to the Temoak bands, or this
8 property belongs to all persons of Western Shoshone
9 descent, or this property does or does not belong to the
10 Danns.

11 And the government answers that by saying,
12 well, that's because it's tribal property, but there's
13 no tribe. There is just this Western Shoshone
14 identifiable group, and no court can say whose that is
15 until after Congress acts.

16 Getting back to the due process problem,
17 unless the Temcak bands, which has no political
18 connection -- the defendants have no political access to
19 the Temcak bands. And unless the Commission found or
20 there was something in the record that shows that there
21 is an identity of interest, there is some reason to
22 believe that the Temcak bands would assert the interests
23 of the rest of the property holders, I do not believe
24 that you can say that there is some sort of privity or
25 there is some sort of -- basic fairness applies, which

1 is necessary, I believe, fundamentally to preclusion.

2 QUESTION: Well, did the Danns move to
3 intervene in the Indian Claims Commission?

4 MR. O'CONNELL: They did not directly, but I
5 think that we could concede it would be the same as if
6 they did. A group that they were associated with did.

7 QUESTION: And was that motion granted or
8 denied?

9 MR. O'CONNELL: It was denied.

10 QUESTION: How about in the Court of Claims?
11 Did they raise it again?

12 MR. O'CONNELL: It was denied on a
13 discretionary basis because it was late and because of
14 this -- what they viewed as this Congressional remedy.

15 QUESTION: I see.

16 QUESTION: But if the denial was based in part
17 on the merits of the claim, aren't you precluded by res
18 judicata?

19 MR. O'CONNELL: No, Your Honor, because it was
20 not litigated, and -- it was not litigated. We made the
21 claim, but they would not -- they would not let us put
22 on evidence in the Indian Claims Commission. In fact,
23 they refused to let us put on evidence.

24 QUESTION: Well, the fact that they didn't let
25 you put on evidence doesn't mean that res judicata

1 doesn't apply.

2 MR. O'CONNELL: Well, if it is not litigated
3 -- ch, res -- I am sorry. I misunderstood the
4 question.

5 This is a different claim on that issue. I am
6 sorry. I thought you were talking about issue -- I
7 think that this is a separate claim, particularly with
8 -- I do not believe that in an entirely different claim
9 you can be held to a determination by the court that you
10 are complaining about.

11 QUESTION: Well, what was the theory of your
12 motion to intervene before the Indian Claims
13 Commission?

14 MR. O'CONNELL: That we had a right to
15 intervene because they were giving up title to land that
16 we wanted -- that we said was not taken. We said there
17 was collusion, because land that was not taken was --
18 that the parties were stipulating that lands were taken
19 which were not taken.

20 QUESTION: Was the same theory used in your
21 motion to intervene in the Court of Claims?

22 MR. O'CONNELL: That there was collusion,
23 yes.

24 QUESTION: You are precluded, at least on the
25 issues on which you sought to intervene, are you not?

1 MR. O'CONNELL: I do not believe that we are
2 precluded on the matters asserted by the association
3 that we were connected with. I believe that we are not
4 precluded in this separate claim that is before this
5 Court, this trespass case.

6 QUESTION: Even as to the same issues which
7 you litigated with the government before the Court of
8 Claims?

9 MR. O'CONNELL: As I stated, I do not feel
10 that we were allowed to litigate them in a real sense,
11 but even if we were, this is a separate claim, Your
12 Honor, and I am asserting that.

13 QUESTION: Distinct from the one that you
14 asserted in the Court of Claims?

15 MR. O'CONNELL: Yes. And I think I can
16 explain that a little bit better as I go along. The
17 second problem with the finding of the Commission
18 regarding the representative is that the representative
19 was to represent the interests of, and I quote here,
20 "the descendants of the Western Shoshone identifiable
21 group," not the interests of the property holder which
22 the Indian Claims Commission said was this identifiable
23 group back in the past was the property holder.

24 Then the only parties who are represented are
25 the descendants, people who have an interest in

1 establishing that the property holder is dead, if you
2 will. It is like a probate hearing where a person --
3 the deceased comes in and says, I am alive, and only the
4 heirs are represented.

5 Only descendants of the property owner are
6 represented. They draw the analogy to a corporation.
7 It would be a fight over the corporation assets where
8 only remainder interests, say, creditors, or your
9 special type of stockholders, and the board of directors
10 was not before them, just the descendants of the
11 property holder.

12 This is because of the nature of the Indian
13 Claims Commission. As the associate solicitor of the
14 Interior Department reported in a report about this
15 claim, the assumption was that the lands were taken and
16 there was no accommodation for people who asserted
17 property interests.

18 There is a profound difference, and several
19 members of this Court in various cases have noted this,
20 between the sort of litigation that is going on in the
21 Claims Commission, where they are dealing in windfall,
22 really, for something that happened to somebody's
23 ancestors, or reparation for something that happened
24 long ago, and fundamental possessory property rights,
25 which we are litigating in this case, and that gets me

1 to our third argument, and it is in the alternative, our
2 individual property rights, regardless of Western
3 Shoshone title.

4 The Danns have asserted individual title and
5 this Court has held in the Cramer case and in Santa Fe
6 versus Pacific those survive the tribal claim.

7 QUESTION: Those were all cases, though, where
8 the fight was between the Indian claimants and a grantee
9 of the government under the Railroad Act. They weren't
10 cases in which the United States squarely opposed the
11 Indian claim.

12 MR. O'CONNELL: But that would make no
13 difference, Your Honor, because I believe what Your
14 Honor is going to do is this idea that there is some
15 language in some cases that it is -- aboriginal title is
16 good against everyone but the government. Is that --

17 QUESTION: Right.

18 MR. O'CONNELL: I would like to address that,
19 because that is a very important problem. In Lane
20 versus Pueblo Santa Rosa, Your Honor, the Secretary --
21 now, that is a tribal aboriginal title question. All
22 right?

23 In that case, the Secretary of the Interior
24 was restrained, an injunction was issued against him
25 from interfering or using Indian title lands as if they

1 were not. Here is the confusion. It is, the executive
2 branch cannot, has to respect Western Shoshone
3 aboriginal title or individual title. This is the
4 distinction.

5 This Court has held in past decisions, and I
6 hope it is not currently the law, but it has held in
7 past decisions that Congress can do anything it wants
8 with aboriginal title. It can confiscate it. But it is
9 only Congress. This is a division of powers question
10 again.

11 The executive branch has to respect Indian
12 title as if it were fee simple, almost. They hold the
13 fee, but they do. So, you can assert aboriginal title
14 against the government, and that is quite clear, and
15 this Court so held in the Lane case.

16 In the Santa Fe case, they held, the Court
17 held, this Court held that the aboriginal tribal title
18 had been relinquished, but noted that that would have no
19 preclusive effect on the assertion of individual Indian
20 title, and individual Indian title is that which -- in
21 that case they were referring to is any Indians who
22 stayed on the land and used it.

23 Now, in the Cramer case, they were talking
24 about a farm, but these fields, and they are used
25 year-round -- this is year-round pasturage. We are not

1 using it like most permittees use Bureau of Land
2 Management lands. The cattle are on this land
3 year-round.

4 If they cannot use that land, the cattle will
5 have to go. This little homestead would -- they
6 couldn't put all the cattle on that homestead and even
7 feed them hay. It couldn't be physically done.

8 These lands are as important to this ranching
9 operation, this three-generation old business as the
10 farmer's fields which were enclosed in a fence in the
11 farmlands of California.

12 CHIEF JUSTICE BURGER: Your time has expired.

13 MR. O'CONNELL: Thank you.

14 CHIEF JUSTICE BURGER: Do you have anything
15 further, Mr. McConnell?

16 ORAL ARGUMENT OF ROBERT A. MC CONNELL, ESC.,

17 ON BEHALF OF THE PETITIONER

18 MR. MC CONNELL: Mr. Chief Justice, and may it
19 please the Court, respondent raised issued of damages in
20 his argument before lunch, and it has been determined,
21 and I wanted to inform this Court -- I have been
22 authorized to do so -- that the government will not try
23 to collect damages for trespass prior to the
24 determination of this case.

25 Also, Justice Stevens raised the question of

1 the permits, grazing permits, and Justice O'Connor
2 properly noted that the fee is based upon the head of
3 cattle on the land, and for the Court's information, as
4 of January, 1984, the fee was \$1.37 per animal unit per
5 month.

6 I would also point out that under the
7 regulations of the Department of Interior, that if the
8 cattle grazing is for subsistence purposes only, of
9 people living on contiguous lands, as here, there are
10 provisions for application for a free permit for that
11 grazing.

12 And finally, in an exchange with Justice
13 Rehnquist -- I want to reference back to that exchange.
14 I want to clarify that one aspect of the government's
15 position, our submission really does not depend on the
16 proposition that the mere filing of the ejection action
17 extinguished aboriginal title.

18 QUESTION: Well, certainly no one would
19 suggest that the mere filing of an ejection complaint
20 would extinguish any title at all. My point was that
21 when the government is up against aboriginal, at least
22 aboriginal Indian title, that unless you claim under a
23 deed from the government, your claim is no good against
24 the government.

25 MR. MC CONNELL: Well, we would feel that in

1 this case just filing the ejection action, of course,
2 was us, the government acting in its litigative
3 capacity, and anything else is really not before us here
4 in this case, and that we feel that you need to -- the
5 government should properly, as I indicated when we had
6 the exchange, try to deal in fairness, and that was what
7 actually took place here, and title had already been
8 extinguished.

9 QUESTION: Well, respondents obviously don't
10 think the government has been fair, and I think the
11 government may have kind of spoken out of both sides of
12 its mouth in the District Court, but it seems to me when
13 you come up here and you get a question as to what is
14 the nature of aboriginal title, can it stand against the
15 government, a member of the Court is entitled to a frank
16 answer. And what is that answer?

17 MR. MC CONNELL: I think that aboriginal title
18 can be taken by the government, and can be taken without
19 compensation.

20 QUESTION: Can the executive branch do that
21 without going to court at all?

22 MR. MC CONNELL: No, we believe there needs to
23 be action by the Congress to take without any
24 compensation.

25 QUESTION: Right. That's what I thought.

1 That action has not taken place.

2 MR. MC CONNELL: That is correct. We don't
3 have that here.

4 QUESTION: May I ask one other question, Mr.
5 McConnell? If we analogize this case to a condemnation,
6 and I realize there are all sorts of reasons why you
7 don't, and just focus on the payment issue for a moment,
8 is it not correct that in that context, a payment
9 wouldn't occur until the former owner of the land
10 actually received some beneficial use of the money?

11 MR. MC CONNELL: Justice Stevens, I am going
12 to have to apologize. I am not sure in the analogy
13 whether it would, but I can come back to this situation
14 where we have the judgment paid and it is in the trust
15 fund and being held by the government as trustee for the
16 Western Shoshone identifiable group.

17 In the exchange that took place in the
18 respondent's argument, we would adopt, as we said
19 before, we adopt the position that we certainly are no
20 longer debtors. We have paid it. The vested right is
21 in that group, and any person that falls within the
22 category of the Western Shoshone identifiable group
23 could in fact bring a case and charge trying to have
24 distribution or any other action, if it was mismanaged,
25 if the government mismanaged it.

1 The Chief Justice made the point correctly
2 that funds in a trust account cannot be under any
3 circumstances taken back by the government. It is now
4 the --

5 QUESTION: They make the argument -- I am not
6 sure it carries the day by any means, but they say, in
7 effect, well, that is all well and good. As far as we
8 are concerned, it is as though it were in escrow. In
9 the meantime, we have got to get funds somewhere to
10 either pay fees or get off the land, and we shouldn't
11 have to do that until we have got some benefit that we
12 can lay our hands on.

13 MR. MC CONNELL: But the payment, the claim
14 submitted, the judgment, and then the payment was for a
15 wrong, if you will, an action that affected the tribal
16 entity, the Western Shoshone identifiable group, not
17 individual members as such.

18 CHIEF JUSTICE BURGER: Thank you, gentlemen.
19 The case is submitted.

20 (Whereupon, at 1:21 o'clock p.m., the case in
21 the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1476 - UNITED STATES, Petitioner v. MARY DANN AND CARRIE DANN

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BY Paul A. Richardson

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