

BOOK REVIEW

MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY

Christian W. McMillen
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304 pages

*Reviewed by Aaron Arnold**

Unquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy

Supreme Court Justice William O. Douglas
*United States v. Santa Fe Pacific Railroad Co.*¹
December 8, 1941

In 1941, the United States Supreme Court decided the landmark case of *United States v. Santa Fe Pacific Railroad Co.*,² which confirmed the right of the Hualapai Indian Tribe to maintain possession of its reservation land.³ Writing for a unanimous Court, Justice William O. Douglas deftly summarized 80 years of complex history, affirmed the doctrine of “Indian title,” and laid the legal foundation for a generation of

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1. 314 U.S. 339, 345 (1941) (quoting *Cramer v. United States*, 261 U.S. 219, 227 (1923)).

2. 314 U.S. 339 (1941).

3. *Id.* at 353-54.

Indian land claims to come.⁴ And yet, his curious assertion that federal policy “from the beginning” has been to “respect the Indian right of occupancy” woefully misrepresented the experience of the Hualapai leaders who fought for decades to win control of their ancestral homeland. This struggle is the subject of Christian W. McMillen’s book, *Making Indian Law: The Hualapai Land Case and the Birth of Ethnohistory*.

The Hualapai reservation was set aside by order of the U.S. military in 1881 and approved by executive order of President Chester A. Arthur two years later.⁵ Even before the reservation was created, the Hualapai were contending with encroachment upon their ancestral lands by the railroad and white ranchers.⁶ Army records from the time include the following assessment:

They [the Hualapai] say that in the country, over which they used to roam free, the white men have appropriated all the water; that large number of cattle have been introduced. . . . They say that the railroad is now coming which will require more water, and will bring more men who will take up all the small springs remaining.⁷

By the early 1900s, the railroad claimed ownership of Peach Springs, an important source of water in the heart of the reservation.⁸ The Peach Springs dispute eventually enveloped the entire reservation, as Hualapai leaders insisted that the tribe be permitted to control its own land.

To demonstrate their historic right of occupancy, the Hualapai had to overcome the dominant view among government and legal authorities that Indian tribes, especially those in the forbidding landscape of the desert Southwest, were itinerant bands of wandering nomads who were not entitled to claim possession of any specific area of land.⁹ The Hualapai, who had no written language, could not counter this narrative with written records and legal documents, the usual currency of the

4. *Id.* at 343-44, 347, 353-56.

5. CHRISTIAN W. McMILLEN, *MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY* 9 (2007).

6. *Id.* at 10.

7. *Santa Fe Pac. R.R. Co.*, 314 U.S. at 356 (quoting Walapai Papers, S. REP. NO. 74-273, at 134-35 (1936)). The Walapai Papers were a Congressional report that compiled historical reports and documents related to the “Walapai Indians of Arizona.”

8. See McMILLEN, *supra* note 5, at 12.

9. See *id.* at 162.

American judicial system.¹⁰ Rather, tribal leaders began a painstaking process of gathering the oral histories of the Hualapai and neighboring tribes and conducting field explorations for physical evidence.¹¹ Using this “ethnographic” approach, the Hualapai hoped to prove that the tribe had occupied the disputed territory since time immemorial, long before the land was claimed by the railroad, white ranchers, or anyone else.¹²

The central figure in this effort, and in McMillen’s account, is Fred Mahone, a Hualapai Indian born on the reservation in 1888.¹³ Like many Indians of his generation, Mahone was educated in segregated, white-operated “Indian schools,” where he learned English and was exposed to the culture and values of the dominant society.¹⁴ In 1917, Mahone volunteered for the U.S. military and served overseas in France.¹⁵ Upon his return to the United States and the Hualapai reservation, Mahone quickly became active in “radical” Indian groups that demanded Indian sovereignty, self-government, and land repatriation.¹⁶ In 1921, Mahone started his own activist organization, immediately drawing the attention and ire of federal authorities, who felt that Mahone was leading a “possible insurgency.”¹⁷

As McMillen tells it, Mahone had an uneasy relationship with his tribe.¹⁸ Although he fought for goals that most Hualapai supported, “he never became a sanctioned Hualapai leader.”¹⁹ Mahone, a young upstart, took it upon himself to lead the tribe’s struggle to oust the railroad and gain control of the reservation.²⁰ He sometimes overstepped his authority and alienated tribal elders.²¹ For his efforts, Mahone earned both the “scorn” and “admiration” of other Hualapai.²² Ultimately, though, Mahone was largely responsible for the success of the

10. *See id.* at 13.

11. *See id.* at 40.

12. *Id.* at 61.

13. *Id.* at 18.

14. *Id.*

15. *Id.* at 17.

16. *Id.* at 23.

17. *Id.* at 28.

18. *Id.* at 18.

19. *Id.*

20. *Id.* (noting that Mahone gave Hualapai concerns a “new urgency”).

21. *See id.*

22. *Id.*

Hualapai's land claim. His efforts to document the tribe's oral history, record interviews with tribal elders, locate physical evidence of the tribe's ancient occupancy, and continually push federal officials to fulfill their obligations to the tribe succeeded in securing the tribe's right to control its land.

Much of McMillen's account is devoted to describing the convoluted path that the Hualapai case followed, first through the halls of government and later through the court system. McMillen succeeds in revealing the federal government's pernicious ambivalence toward the Hualapai's cause. Throughout the book, McMillen illustrates how the two federal departments most responsible for helping the Hualapai protect their land, the U.S. Departments of Interior and Justice, repeatedly undermined each other's efforts, sometimes purposely, and failed to develop a consistent and coordinated approach to the case. In early 1925, for example, the Department of Justice ordered the U.S. Attorney for Arizona to file suit on behalf of the Hualapai against the railroad for control of Peach Springs while, at the same time, the Department of the Interior was pushing Congress for legislation to divide the Hualapai reservation in two, with half to the tribe and half (including Peach Springs) to the railroad.²³

The government's lack of commitment to the Hualapai case was trumped only by its active collusion with the railroad. McMillen describes a succession of treacherous federal officials, including the government attorneys responsible for preparing the Hualapai's case and representing the tribe in court, who passed confidential information to the railroad, colluded with the railroad to delay litigation, and met with railroad officials to plot an end to the litigation in the railroad's favor.²⁴ Throughout the case, Arizona Senator Carl Hayden advocated for the railroad and, while stoking Arizonans' irrational fear of a complete Indian takeover of the state, worked behind the scenes with government officials to secure victory for the railroad.²⁵

The Hualapai case received new life with the election of Franklin Delano Roosevelt as President in 1932 and the subse-

23. *See id.* at 45-46.

24. *Id.* at 52.

25. *See id.* at 156.

quent appointment of John Collier as Commissioner of Indian Affairs. Collier had been a prominent activist for Indian policy reform — McMillen calls him “the single most important and prominent ‘friend of the Indian.’”²⁶ With the BIA under Collier’s lead, “any semblance of a conciliatory attitude toward the railroad vanished.”²⁷ Collier turned the Hualapai case over to a team of three lawyers that included Nathan Margold (the solicitor of the Department of the Interior), Richard Hanna (a private attorney specially appointed by Interior to oversee the Hualapai case), and Felix Cohen (a newly-hired assistant solicitor who would soon become the undisputed leader in the field of federal Indian law).²⁸

Margold, Hanna, and Cohen seized control of the Hualapai case and, basing their arguments on the ethnographic research and fieldwork of Fred Mahone and others, maneuvered the case before the Supreme Court.²⁹ It was there that Justice Douglas reaffirmed the validity of “Indian title,” the doctrine that Indian tribes can have cognizable and enforceable property rights by virtue of their exclusive occupancy of a defined area of land from time immemorial, regardless of whether the tribe’s rights are set forth in any treaty or statute.³⁰ Moreover, the court recognized the legitimacy of anthropological research, oral history, and tribal tradition as evidence of aboriginal possession. As McMillen explains, this decision would later influence the litigation of Indian land claims in the United States, as well as in Canada and Australia.³¹

Making Indian Law is not without flaws. It occasionally loses momentum as it traces the case through the federal bureaucracy in excruciating detail, introducing a seemingly endless succession of government officials whose importance to the case is not always clear. More important, its discussion of how the case impacted the newly-developing field of ethnohistory could have been more fully developed. Ultimately, though, the book is a captivating and compelling account of an important

26. *Id.* at 106.

27. *Id.* at 115.

28. *Id.* at 125.

29. *See id.* at 169.

30. *See United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-47 (1941).

31. *See, e.g.,* McMILLEN, *supra* note 5, at 266.

episode in the development of federal Indian law (and American history). McMillen's treatment of the Hualapai land case succeeds in illuminating a critical period in U.S.-tribal relations, and it reveals that the federal government's "policy" toward "the Indian right of occupancy" has been far messier than Justice Douglas would have us believe.