UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

KAREN SUE LOWRY,

Defendant/Appellant.

/

NO. CR. S-05-399 LKK

O R D E R

Karen Lowry, defendant, appeals her criminal conviction of occupying National Forest System land for residential purposes without authorization. Defendant was convicted after a two-day trial before a magistrate judge. Defendant contends that the government failed to prove beyond a reasonable doubt that defendant's occupancy was not authorized under the doctrine of individual aboriginal title. Defendant also claims that the trial court erred in precluding her from introducing evidence that she was denied due process with respect to her application for an allotment (which would have authorized her use of the land). The

Karuk Tribe of California filed an amicus brief in the case. Defendant is a member of the Karuk tribe.

I.

BACKGROUND & FACTS

A. PROCEDURAL HISTORY[1]

On August 8, 2003, the government filed an Information charging defendant with twenty-three separate counts, including:

> COUNT ONE: [16 U.S.C. § 551 and 36 C.F.R. § 261.10(k) - Using and Occupying National Forest System Land Without Special-use Authorization]
>
> The United States Attorney charges: THAT
>
> KAREN SUE LOWRY,
>
> defendant herein, beginning no later than on or about November 20, 1997, and continuing through the date of the filing of this Information, in the County of Siskiyou, State and Eastern District of California, did possess, use, and occupy National Forest System Land without a special-use authorization, when such authorization is required, to wit: establishing and maintaining a residential area in Township 11 North, Range 6 East, on the Klamath National Forest, in violation fo Title 16, United States Code, Section 551, and Title 36, Code of Federal Regulations, Section 261.10(k), a misdemeanor.
>
> COUNT TWO: [16 U.S.C. § 551 and 36 C.F.R. § 261.10(b) - Possessing, Occupying, and Using National Forest System Lands for Residential Purposes]
>
> The United States Attorney further charges: THAT
>
> KAREN SUE LOWRY
>
> defendant herein, beginning no later than on or about November 20, 1997, and continuing through the date of the filing of this Information, in the County of

[1] Adopted from the parties' papers.

> Siskiyou, State and Eastern District of California, did take possession of, occupy, and otherwise use National Forest System Land without a special-use authorization and without being otherwise authorized by federal law and regulation, to wit: establishing and maintaining a residential area in Township 11 North, Range 6 East, on the Klamath National Forest, in violation of Title 16, United States Code, Section 551, and Title 36, Code of Federal Regulations, Section 261.10(b), a misdemeanor.

Excerpts of Record ("ER") Tab 1, (Information filed August 8, 2003). Defendant pleaded not guilty to all charges.

Prior to trial, the parties agreed that the government would pursue only the first two counts of the Information and that if defendant were convicted of either count the punishment would not exceed probation with abatement (leaving the property) and that the government would be entitled to seek restitution if abatement did not occur within a defined period of time. ER Tab 2, Reporters' Transcript ("RT") of Jan. 27, 2005 Status Conference, at 7.

On May 18, 2005, the court granted the government's motion in limine to exclude evidence that the government's denial of her application for an Indian Allotment was arbitrary and capricious. RT of May 18, 2005 Hearing, at 11. A bench trial was held on May 23rd and 24th, 2005.

On August 30, 2005, the magistrate judge issued a 23-page "Decision and [Proposed] Judgment" ("Decision"), in which he found the defendant guilty. ER Tab 25, Decision. On September 27, 2005, the magistrate judge held a sentencing hearing and issued a sentence that required defendant to leave the land in question by April 30, 2006. ER Tab 26, RT of Sept. 27, 2005 Sentencing Hearing, at 27. Defendant timely filed a Notice of Appeal on

September 29, 2005. ER Tab 27, Clerk's Record ("CR") 1 (Appeal of Magistrate Judge's Decision). Pursuant to this Court's July 21, 2006 order, defendant's sentence is stayed pending a ruling on the merits of the appeal.

B. EVIDENCE PRESENTED AT TRIAL

1. The Property at Issue

This matter relates to an area of land in the Klamath National Forest. This area is known as the Oak Bottom area and is located along the Salmon River in Northern California. The magistrate judge defined the following terms that this court hereby adopts:

- Oak Bottom: A recognized general geographical area within the Klamath National Forest. Oak Bottom encompasses a Forest Service Campground and work center ("Forest Service Compound"). Allotment 280 and the area around defendant's current residence are also within Oak Bottom.
- Indian Allotment 280: Private property located within Oak Bottom, consists of approximately 6.5 acres and the site of Bessie Tripp's residence.
- Defendant's residence: The defendant's residence and curtilage. Defined in Counts One and Two of the information filed by the government. The residence is approximately fifty yards from Allotment 280.

The court notes at the outset that there is a certain amount of confusion as to which exact piece of property is at issue in the case. Counts one and two of the Information filed by the government allege that the defendant established and maintained a

"residential area in Township 11 . . . ." ER Tab 1, Information filed August 8, 2003, at 2. Thus, the only land at issue is the residential area, i.e., the plot of land where defendant's residence is currently located and the curtilage. Interestingly, neither party discusses the exact extent of defendant's curtilage, a fact the court considers important. For example, it is not clear if the curtilage of defendant's home extends into the area of the allotment. For the reasons discussed, however, this factual issue does not preclude the court from reaching a decision in this case.

2. Defendant's Occupancy of the Property at Issue[2]

The facts of the case are, for the most part, agreed upon by the parties. Defendant's grandmother, Bessie Tripp, and Bessie's parents and grandparents were all born in the Oak Bottom area in which defendant now lives. ER Tab 14, Def.'s Ex. Q, at 3-4; ER Tab 21, Def.'s Ex. BB, at 1; ER Tab 5, RT of May 23, 2005 trial proceedings, at 54:22-24, 101:16-17, 121:1-6.

Defendant's great-great grandmother, Mahkhawa'da, lived in a two-story log cabin on the site where defendant now lives. ER Tab 15, Def.'s Ex. R, at 1. Mahkhawa'da was driven off the land by miners in the early 1900s and the site was used as a post office. ER Tab 15, Def.'s Ex. R, at 2; ER Tab 20, Def.'s Ex. AA. Mahkhawa'da later returned to the site of her original home, which is the area where defendant now lives. ER Tab 5, RT of May 23, 2005 trial proceedings, at 121:6. Defendant's great grandfather, Nupas

[2] Adopted from the parties' papers.

also lived on the Oak Bottom area. ER Tab 21, Def.'s Ex. BB.

Bessie Tripp, defendant's paternal grandmother, was born some time in the 1860s or 1870s on the piece of land that would later become Allotment 280. ER Tab 5, RT of May 23, 2005 trial, at 101:15-102:11; ER Tab 21, Def.'s Ex. BB. She considered it her home throughout her life. ER Tab 21, Def.'s Ex. BB. Bessie Tripp lived on the Oak Bottom property exclusively until 1899, when she went to school in Hoopa. ER Tab 5, RT of May 23, 2005 trial proceedings, at 55:6-7. She would still, however, come home on the weekends and during the summer to dry fruit from the trees her grandfather Nupas had planted in the area. Id. at 55:9-13. Bessie married William Tripp around 1901. Id. at 56:9-10. While Bessie joined William at the mines for periods of time, in the summers she would return to the Oak Bottom area to gather fruit and can or dry it and tend to her garden. Id. at 140:20-24. Bessie always viewed the Oak Bottom area as her home. Id. at 161:12-13.

In 1926, Bessie Tripp began to permanently reside in a house located on property that later become Indian Allotment 280. Bessie and her family did not regard the boundaries of Allotment 280 as the boundaries of their home; instead, they treated the larger Oak Bottom area, including the land on which defendant now resides, as their home. As Rhonda Tripp, defendant's sister-in-law, testified, the family "just did everything that had to do with life, cut wood, cut poles for use in construction, gathered tea, mushrooms, acorns, roots and basket-making materials" in the area surrounding Bessie's home. Id. at 107:14-19; see also id. at 64:16-65:11, 109:8-17.

This area included the area where defendant now lives.

On or near the land where defendant now lives, Bessie and her family maintained a garden and raised livestock, as well as gathered grass and acorns. ER Tab 15, Def.'s Ex. R, Bates at 2; ER Tab 5, RT of May 23, 2005 trial proceedings, at 65:4-66:19. The family also harvested grapes and picked apples that grew near where defendant currently resides. ER Tab 5, RT of May 23, 2005 trial proceedings, at 108:11-18; 110:23-111:8.

Bessie and her family treated the area around allotment 280, which included defendant's current residence, as if it were their own property. Strangers needed Bessie's permission to enter the land. Id. at 112:10-21, 167:18-20. Bessie Tripp and her family would run outsiders who did not have her permission to be on the land off of the property. Id. at 68:11-13. Bessie Tripp remained in the Oak Bottom area until her death in December of 1982. Id. at 34:14.

Defendant spent her childhood with Bessie on the property that would later become Allotment 280. When she was 12, defendant was placed in foster care. Id. at 7:8-10; 58:3-5; ER Tab 24, RT of May 24, 2005 trial proceedings, at 4:12-14. As a young woman, defendant lived away from Oak Bottom but would return to visit often. Decision at 9. By April of 1983 at the latest, defendant moved to her present location, approximately fifty yards to the north of Bessie's home located on Allotment 280. Decision at 9; ER Tab 5, RT of May 23, 2005 trial proceedings, at 36:24-37:11.

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C. THE MAGISTRATE JUDGE'S DECISION

The magistrate judge concluded that there was not sufficient continuous occupancy by defendant and her lineal ancestors to establish title. Continuous occupancy could not be established for several reasons.

First, the magistrate judge concluded that Bessie only lived in the Oak Bottom areas "intermittently" until 1926. Decision at 7. The magistrate judge found that Bessie lived in Hoopa while attending school and worked in Forks of Salmon, Orleans and other locations during her adulthood and prior to 1926. "Bessie was also displaced for an unknown period of time from the Oak Bottom area as a result of mining activity in the 1900s, but she apparently returned to Oak Bottom on a full time basis in approximately 1926." Decision at 7:12-18. The magistrate judge stated that he was "unable to determine if Bessie's absences before 1926 were inconsequential." Id. at 8. "Certainly Bessie's schooling, employment and involuntary displacement by the miners were not events of short duration or degree." Id. Indeed, "little information was offered concerning the duration and degree of her occupancy prior to 1926." Id. at 7, n. 7.

Second, the magistrate judge found that defendant herself did not continuously live on the property at issue. The magistrate judge concluded that defendant's occupancy "can be traced to three separate locations. During her childhood, she resided on Allotment 280 with Bessie in her home....between 1981 and April 1983, she camped infrequently in a camp trailer near the river, and in April

1983, she moved to her present location approximately fifty yards above, or to the north of Bessie's home." Decision at 9:4-11.

The present site where defendant now lives was the former location of her great-great grandmother's (Mahkhawa'da) home. The magistrate judge found that Mahkhawa'da's "occupancy was broken when she was expelled by white miners which may have occurred early in the 1900's since Joe Wilson [a miner] was already occupying her home prior to 1915. Ellen Goodwin's [a Karuk tribe member] occupancy terminated when she moved at the age of 15 in 1929. The defendant did not move onto the property until 1983. A period of fifty-three years remains unaccounted for." Decision at 13, n 18.

Third, the magistrate judge explained that the evidence indicated that "only nominal agriculture, husbandry or gardening activity occurred at the Defendant's residence during her occupancy" and that the area in question was never enclosed. Decision at 11. "No fence or enclosure was ever constructed to serve as a boundary either at, or near the defendant's residence." Id.

Finally, the magistrate judge found that the land where defendant now resides was not occupied by Bessie. The magistrate judge explained:

> Although there is no reason to disbelieve that Bessie freely used and had access to the land surrounding her home . . . such uses could not be considered inconsistent with any other individual's right to use National Forest System land. To adopt defendant's argument that her occupancy was simply an extension of Bessie's would translate into individual aboriginal claims being created by "spin-off" or "sprouting." Certainly no case law supports this notion, but more

> important, common sense would not permit such an expansion of Cramer or Dann III. Otherwise, entire villages or communities could be created by simply occupying an area exterior to an existing Native American allotment.
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> Decision at 14:3-12.

The magistrate judge also held that any aboriginal right the Tripp family has in the land at issue was extinguished by the following events:

> (1) the failure of anyone in the Karuk Tribe to file a claim for land under the California Land Claims Act of 1851; (2) designation of the land in question as the Klamath National Forest; (3) payment of compensation to the Karuks for their loss of land; or (4) inclusion of the area within the Wild and Scenic River corridor. [16 U.S.C. § 1271].

Decision at 14.

II.

STANDARD OF REVIEW

A. CLEAR ERROR & DE NOVO REVIEW

Where a district court reviews a conviction by a magistrate judge, the standard of review is the same as when a court of appeals reviews the judgment of a district court. See Fed. R. Crim. P. 58(g)(2)(D). The reviewing court reviews the trial court's findings of fact for clear error. Burlington Northern, Inc. v. Weyerhaeuser Co., 719 F.2d 304, 307 (9th Cir. 1983). "A finding of fact is deemed clearly erroneous when although there is evidence to support it, the reviewing court is left with a definite

and firm conviction that a mistake has been made." Id. Conclusions of law are reviewed de novo. Id. Unless a mixed question of fact and law is primarily factual, mixed questions are reviewed de novo. United States v. McConney, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc), abrogated on other grounds by Pierce v. Underwood, 487 U.S. 552 (1988); Wilcott v. Matlack, Inc., 64 F.3d 1458, 1460 (10th Cir. 1995). See also United States v. Lex, 300 F.Supp.2d 951, 956 (E.D. Cal. 2003)(Karlton, J.).

In the pending case, the court must determine if the questions presented on appeal are primarily factual or legal in nature. As the Circuit explained:

> If application of the rule of law to the facts requires an inquiry that is essentially factual, -one that is founded on the application of the fact-finding tribunal's experience with the mainsprings of human conduct -the concerns of judicial administration will favor the district court, and the district court's determination should be classified as one of fact reviewable under the clearly erroneous standard. If, on the other hand, the question requires [the appeals court] to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo . . . . This is so because usually the application of law to fact will require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles.

McConney, 728 F.2d at 1202 (internal citations omitted); see also United States v. Marbella, 73 F.3d 1508, 1515 (9th Cir. 1996) ("'When a mixed question of law and fact is presented, the standard of review turns on whether factual matters or legal matters predominate.'" (citation omitted)).

In the case at bar, the court is presented with mixed questions of law and fact. As will be discussed at greater length, the court must address how the magistrate judge interpreted the doctrine of individual aboriginal title and how he applied the doctrine to the facts in the record. It is clear that these questions require the analysis of "legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles." Id. For this reason, the court reviews de novo the questions involving individual aboriginal title.

B. HARMLESS ERROR

If it is determined that the judge in a bench trial has made a legal error in the course of convicting a defendant, the error is reviewed using the same harmless error standard that would apply to an erroneous jury instruction. See Wilson v. United States, 250 F.2d 312, 324 (9th Cir. 1957). When a jury has been given an incorrect instruction of the law, it "requires reversal unless there is no reasonable possibility that the error materially affected the verdict or, in other words, that the error was harmless beyond a reasonable doubt." United States v. Romo-Romo, 246 F.3d 1272, 1274 (9th Cir. 2001). Thus, in a bench trial where the legal error goes to an element of the offense, the reviewing court does not "become in effect a second jury to determine whether the defendant is guilty." Neder v. United States, 527 U.S. 1, 19 (1999). Rather, only "where the reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict

would have been the same absent the error," id. at 17, is the error harmless. Lex, 300 F.Supp.2d at 963.

III.

ANALYSIS

The offense for which defendant was convicted had three elements: (1) occupying or using Forest Service land; (2) for residential purposes; (3) without a special-use authorization or as otherwise authorized by federal law. Lex, 300 F.Supp. 2d at 256. Defendant maintains that the government failed to prove that she is not "otherwise authorized by Federal law" to inhabit the land. More specifically, defendant claims that the government failed to establish that she was not entitled to individual aboriginal title. Defendant also maintains that the magistrate judge erred in refusing to allow her to present evidence that the administrative proceeding which was used to deny her an Indian allotment was unfair and deprived her of her appellate rights. The court addresses each contention in turn.

A. DEFENDANT'S CLAIM TO INDIVIDUAL ABORIGINAL TITLE

Before reaching the merits of defendant's claim, the court must address, as a threshold matter, the burden of proof at trial. The magistrate judge concluded that establishing individual title was an affirmative defense and not an element of the crime.[3] The

[3] See, e.g., "[t]he remaining portion of the trial essentially centered on Defendant's affirmative defense that her occupancy was 'otherwise authorized by federal law or regulation.'" Decision at 3:22-13 (emphasis added); "[t]he Defendant had the burden of going forward with these affirmative defenses since they were not elements of the case in chief." Decision at 4:2 (emphasis

court cannot agree.

As defendant properly points out, on a prior occasion the court has established that "without a special-use authorization or as otherwise authorized by federal law" is an element of the crime charged. Lex, 300 F.Supp.2d at 956. As an element of the crime, it was not defendant's burden to establish this element, rather the burden was upon the government. In re Winship, 397 U.S. 358, 364 (1970). The burden was on the government to prove beyond a reasonable doubt that defendant was not authorized by federal law to use the land in question.

That said, the court determines that this mistake constitutes harmless error, as the outcome would have been the same even absent the error. Even if individual title is construed as an affirmative defense, the final burden of proof is with the government. It is well-established that when a defendant raises an affirmative defense, the burden shifts back to the prosecution to "disprove every element of the affirmative defense beyond a reasonable doubt." United States v. Gonsalves, 675 F.2d 1050, 1054 (9th Cir. 1982). Here, it is clear that defendant did in fact raise the affirmative defense of individual title, and thus, the burden shifted back to the government to disprove defendant's entitlement to individual title. Therefore, whether viewing individual title as an element of the crime or as an affirmative defense, the government ultimately bore the burden of proving that defendant did

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added).

not have individual title. In the case at bar, the magistrate judge concluded that there was proof beyond a reasonable doubt that the defendant did not have authorization to live on the land. Therefore, the magistrate judge's mischaracterization of the burden was harmless. The court now turns to the merits of the appeal.

1. The Doctrine of Individual Aboriginal Title

The doctrine of individual aboriginal title grew out of the doctrine of tribal aboriginal title. "Aboriginal title is a term of art used to describe an Indian possessory interest in land which Indians have inhabited since time immemorial." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 (1985)(internal citations omitted). Aboriginal title may be extinguished by the federal government at any time. United States v. Gemmill, 535 F.2d 1145, 1147 (9th Cir. 1976), cert. denied, 429 U.S. 982 (1976). "Congress' power to extinguish aboriginal title is supreme, 'whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise. . . .'" United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339, 347 (1941).

Title to property of a tribe usually vested in the tribe and not the individual tribal member. See Felix Cohen, Handbook of Federal Indian Law, 1038-39 (2005). However, in 1923, the Supreme Court discussed the federal government's policy of respecting the Indian right of occupancy, noting that the policy "applies to individual Indian occupancy as well." Cramer v. United States, 261 U.S. 219, 227 (1923). In Cramer, the Court held that three

individual Native Americans who had occupied 175 acres of public land continuously since 1850 had individual title to the land they had actually occupied and used. The court explained that the right was confined to the "lands actually enclosed . . . or having been improved." Id. at 228.

In 1985, the Supreme Court again recognized that individual aboriginal title may survive even when tribal title has been extinguished. United States v. Dann, 470 U.S. 39 (1985)("Dann II"). The Supreme Court, however, left it to the district courts and courts of appeals to define the meaning of individual aboriginal title.

On remand, the Ninth Circuit explained that "there is no theoretical reason why individuals could not establish aboriginal title in much the same manner that a tribe does." United States v. Dann, 873 F. 2d 1189, 1196 (9th Cir. 1989) ("Dann III"). The court established a standard by which to determine if individual aboriginal title exists:

> An individual might be able to show that his or her lineal ancestors held and occupied, as individuals, a particular tract of land, to the exclusion of all others, from time immemorial, and that this title had never been extinguished.

Dann III, 873 F.2d at 1196. The Dann III court explained that the plaintiffs, the Dann sisters, "must show actual possession by occupancy, inclosure, or other actions establishing a right to the lands to the exclusion of adverse claimants." Id. at 1199. The court concluded that the Dann sisters had acquired individual aboriginal use rights to graze cattle and horses on open range

lands later incorporated into grazing district. The court determined that these individual aboriginal rights had been acquired and continuously exercised by the Danns' lineal ancestors before the withdrawal of the lands from open grazing under the Taylor Grazing Act. Id.

The Dann III standard has been directly applied in only two cases and in both, the courts determined that individual title did not exist. In United States v. Kent, a case very similar to the case at bar, Kent, a Native American, was convicted of unauthorized residential occupation of land in the Klamath National Forest. The District Court concluded, and the Ninth Circuit agreed, that even though Kent had ancestral ties to the particular site, no ancestors had occupied the land between 1870 and 1984, when Kent established occupancy. United States v. Kent, 679 F.Supp. 985, 987 (E.D. Cal. 1987)(Schwartz, J.); see also 945 F.2d 1441, 1444 (9th Cir. 1991). The Circuit, did, however, affirm that a Native American could establish individual aboriginal title if she can show that "she or her lineal ancestors continuously occupied a parcel of land, *as individuals*, and that the period of continuous occupancy commenced before the land was withdrawn for purposes of settlement." Id.

The one other case to directly address the applicability of individual aboriginal title was a district court case. In Pai'Ohana v. United States, a family of native Hawaiians brought action under the Quiet Title Act asserting rights to use and occupy property within the Kaloko-Honokohau National Historic Park.

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Unlike Kent, the Pai family had resided on and utilized the land for generations prior to the creation of the historic park. The District Court, however, found that the family did not establish exclusive possession as the Pai family had not yet acted to exclude others from the area. Pai'Ohana v. United States, 875 F.Supp. 680, 697 (D. Haw. 1995). The district court also concluded that the establishment of the park, by Congress, accompanied by compensatory options and disclaimers, clearly and effectively extinguished any individual aboriginal title the Pai family may have had. Id. at 698.

2. The Nature of Defendant's Occupancy & Individual Title

The court must determine if the magistrate judge erred in concluding that defendant did not establish individual aboriginal title to the land in question. The court first addresses the question of continuous occupancy, one of the key elements of the Dann III test.

For the reasons explained herein, the court concludes that the magistrate judge carefully considered the facts before him when he found that defendant failed to establish continuous occupancy. The facts presented demonstrate that there was some form of continuous contact with the land in question over time. However, without more, it is impossible for the court to conclude that this contact constituted the type of "occupancy" envisioned by the Dann III, Kent and Cramer courts.

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a. The Meaning of "Occupancy" within the Context of Individual Title

Unlike the doctrine of tribal title, the concept of individual title is not well-developed. As the Circuit stated in Dann III, "[i]ndividual aboriginal title is by no means a well-defined concept." Dann III, 873 F.2d at 1195. Indeed, one term left undefined is the meaning of "occupancy" within the context of individual title. While there is a small body of case law explaining the definition of occupancy in the context of tribal title, there is little guidance as to what constitutes "occupancy" in the context of individual title.

The Dann III test, as articulated now, sets forth no clear parameters as to what type of contact with a piece of land is sufficient to constitute "occupancy." To determine the meaning of "occupancy," the court looks to the language and reasoning of the very few cases that address individual title.

Beginning with Cramer, the Supreme Court recognized that there has always been a governmental policy favoring the settlement of Native Americans:

> It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well; and the reasons for maintaining it in the latter case would seem to be no less cogent, since such occupancy being of a fixed character lends support to another well understood policy, namely, that of inducing the Indian to forsake his wandering habits and adopt those of civilized life.

Cramer, 261 U.S. at 227. As one scholar noted, "Cramer reflects the policies of individualism and assimilation."

John W. Ragsdale, Jr., Individual Aboriginal Rights, 9 Mich. J. Race & L. 323, 348 (2004). The Cramer court clearly limited title to land actually used. "[T]heir [Indians] rights are confined to the limits of actual occupancy and cannot be extended constructively to other lands never possessed or claimed, simply because they form part of the same legal subdivisions." Cramer, 261 U.S. at 234. "The claim for Indians is based on occupancy alone, and the extent of it is clearly fixed by the inclosure, cultivation and improvements." Id. The court went on to cite the following passage from Garrison v. Sampson, in support of its holding:

> There was a house and corral on the land. Of these he may be said to have been in the actual occupancy. But we cannot see from the proofs any right of possession to the whole of the quarter section, or even any claim to it. We do not understand that the mere fact that a man enters upon a portion of the public land, and builds or occupies a house or corral on a small part of it, gives him any claim to the whole subdivision, even as against one entering upon it without title . . . . But merely going on waste and unenclosed land, and building a house and corral, and even subsequently cutting hay on a part, did not extend his possession to the whole of the 160 acres.

Garrison v. Sampson, 15 Cal. 93, 95 (Cal. 1860).

Almost sixty years later, the Dann III court recognized that Cramer "carefully restricted" individual rights to land that was "actually enclosed and occupied by the individual Indians." Dann III, 873 F.2d at 1199 (citing Cramer, 261 U.S. at 234-36). The Dann III court then held that "to establish such an individual right of occupancy, the Danns must show actual possession by occupancy, inclosure, or other actions establishing a right to the

lands to the exclusion of adverse claimants." Id.

In Kent, the District Court again recognized that in Cramer, title had been limited to "the 175 acres . . . enclosed by fencing, improved with various permanent structures and cultivated." Kent, 679 F.Supp. at 987. The District Court went on to conclude that even though Kent "lives in a trailer on the site and has planted a garden, she has not enclosed the area she claims with fencing or erected permanent structures. Thus both the degree and duration of the occupancy in this case is much less than in Cramer." Kent, 679 F.Supp. at 987. The Court of Appeals affirmed the conviction and again reiterated that title is applicable "only for those Indians who have maintained a presence on that land." Kent, 945 F.2d at 1444 (emphasis in original).

The Kent, Dann III, and Cramer decisions suggest that occupancy in the context of the individual is fixed in nature, and is "carefully restricted" to the land "actually enclosed and occupied by the individual Indians." Dann III, 837 F.2d at 1199. Moreover, it is appropriate for the court to examine the "degree and duration" of the occupancy. Kent, 679 F.Supp. at 987. In short, the language of these cases, especially when viewed in light of the policies behind individual title, establish that occupancy has a restricted meaning in the context of individual title.

Defendant argues that the meaning of occupancy should be viewed in light of Native American culture and tradition. Defendant maintains that her "ancestors' use of the land for activities that are part of traditional Native American rather than

European culture are valid ways of demonstrating aboriginal title." Def.'s Reply at 8. Indeed, in Mitchel v. United States, the Supreme Court remarked:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

Mitchel, 34 U.S. (9 Pet.) 711, 746 (1835).[4]

The court is sympathetic to the argument that the meaning of "occupancy" should reflect Native American culture and tradition. That said, the cases which recognized this consideration are cases in which tribal title was at issue, and not individual title. Tribal title is a distinct and separate doctrine pertaining to entire tribes of Native Americans. See Cohen, Handbook on Federal Indian Law, at 966 (2005) ("Tribal property may be formally defined as property in which an Indian tribe has a legally enforceable

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[4] See also Sac & Fox Tribe of Indians v. United States, 383 F.2d 991, 998, 179 Ct. Cl. 8 (Ct. Cl.), cert. denied, 389 U.S. 900 (1967) (for the purposes of aboriginal title, "[t]he courts have construed the terms 'use and occupancy' requirement of Indian title to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers."); Spokane Tribe of Indians v. United States, 163 Ct. Cl. 58, 66-67 (Ct. Cl. 1963) (tribe had aboriginal title not only to areas in which there were permanent homes but also areas that were traditionally used on a seasonal basis); United States v. Seminole Indians of the State of Florida, 180 Ct. Cl. 375, 385 (1967)("use and occupancy" for purposes of aboriginal title can include intermittent use of the land for hunting and gathering where that is consistent with traditional Native American use of the land).

interest. It must be distinguished, on the one hand, from property of individual Indians."). The individual title cases suggest that "occupancy" means something different than in the context of tribal title. Therefore, the court cannot freely borrow terms and definitions from tribal title cases.

b. Occupancy of the Land at Issue

In reviewing the record, it is clear that defendant's ancestors had some form of contact with the property at issue. This contact, however, shifted and changed over time and the nature of the contact, at times, was unknown and unclear. While there is certainly no requirement in the Dann III test that the use of the land remain the same over time, in the case at bar, it is not clear if there was ever sufficient continuous occupancy to establish title. A review of the facts illustrate the court's position.

Defendant's great-great-grandmother (Mahkhawa'da) lived in a cabin on the home site where defendant now lives. ER Tab 15, Def.'s Ex. R, at 1. Some time in the early 1900's, Mahkhawa'da was driven off the land by miners. Mahkhawa'da returned to her home site, however, some unspecified number of years later. RT at 121:5-6.[5]

[5] The court notes that the magistrate judge erred in concluding that continuous occupancy was "broken when [Mahkhawa'da] was expelled by the white miners." As defendant correctly notes, in the context of both tribal and individual aboriginal title, title to a piece of land may only be extinguished by Congress and not by actions of third parties, such as miners. See Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 945 (Ct. Cl. 1974)("the Constitution vests the power to deal with Indian tribes in Congress, and included in that power is the exclusive right to extinguish Indian title. The sole and plenary

The facts are not clear as to the occupancy of defendant's current home site after Mahkhawa'da passed away. It is apparent that Bessie lived near by (on what is now Allotment 280), ER Tab 5, Def.'s Ex. R, at 2, and used much of the area around her home to "cut wood, cut poles for use in construction, gathered tea, mushrooms, acorns, roots and basket-making materials." ER Tab 5, RT of May 23, 2005 trial proceedings, at 107, 109. It is also clear that at various points in time, Bessie and other members of the family would garden, raise livestock and gather fruit from the land which is now defendant's residence. Id. at 65-66, 109. Bessie and her family viewed defendant's current residence as their family property and were successful at keeping strangers off the land they viewed as theirs. Id. at 68, 124.

What remains unclear is the extent to which the land that is now defendant's residence was actually used by her ancestors. The facts are not clear as to whether Bessie and her family used the land on a daily basis, weekly basis or yearly basis. Much of the testimony at trial revealed that Bessie and her family consistently and continuously occupied various parts of land in the Oak Bottom

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power of Congress to deal with matters of Indian title has long been recognized.")(internal citations omitted); United States v. Santa Fe P. R. Co., 314 U.S. 339, 354 (1941)("[The Walapais'] forcible removal . . . was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited. No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation . . . ."). Nonetheless, this error was harmless. Even if Mahkhawa'da had lived on the defendant's current homesite for her entire life, the facts still do not set forth the type of occupancy envisioned by the Dann and Cramer courts.

area for gardening, gathering, hunting and other daily tasks. That said, the evidence sheds little light onto how Bessie and defendant's other ancestors specifically used the land where defendant now resides.

The facts also leave questions about the extent to which Bessie actually lived in the Oak Bottom area. Between 1899 and 1926, Bessie went to school in Hoopa. S.E.R. Tab 5, at 55, 158-59. She later got married and often join her husband, a miner, at the mines where he worked. Id. at 56; 158. The facts reveal that Bessie sporadically return to Oak Bottom,[6] but it is not clear if she returned to what is now Allotment 280 or if she also returned to the area that is now defendant's claimed home. The magistrate judge was not in error when he concluded that "this court is unable to determine that Bessie's absences before 1926 were inconsequential." Decision at 8.

The degree and duration of defendant's occupancy of her current residence is also not clear. The magistrate judge correctly summarized defendant's occupancy at the Oak Bottom area: "During her childhood, she resided on Allotment 280 with Bessie in her home....between 1981 and April 1983, she camped infrequently in a camp trailer near the river, and in April 1983, she moved to her present location approximately fifty yards above, or to the north of Bessie's home."

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[6] The magistrate judge noted that "evidence was adduced at trial that Bessie's occupation at Oak Bottom prior to 1926 may have been limited to summers." Decision at 7, n. 7.

In short, the facts reveal that the degree and duration of the occupancy of defendant's current residence changed over time. While it may be that this type of occupancy is consistent with tribal title (and Native American traditions and customs), the contact between defendant, her ancestors and her current property is, without more, insufficient to establish individual title. Under the doctrine of individual title, "occupancy" requires something more than what is established in the case at bar.

As the magistrate judge correctly noted, the "historical and aboriginal ties of the Karuk Tribe to Oak Bottom cannot be denied, but Defendant's attempt to weave tribal history into an individual aboriginal claim simply ignores the continued occupancy requirement by lineal ancestors under Cramer and Dann III . . . ." Decision at 13.

As discussed previously, occupancy refers to land "clearly fixed by . . . inclosure, cultivation and improvements." Cramer, 261 U.S. at 234. To establish title, an individual must show "actual possession by occupancy, enclosure other actions." Dann III, 873 F.2d at 1199. In the case at bar, the evidence does not reflect this type of occupancy. There was nothing fixed about defendant's ancestors' use of the land. There were no enclosures or other forms of demarcating the property. There was also no evidence that the property was continuously cultivated or improved. Evidence that Bessie and her family occasionally gardened and collected fruit on the land does not constitute cultivation and improvement as envisioned by the Dann III and Cramer courts. In

short, the nature and extent of defendant's ancestors' contact with the land was insufficient to support title.[7]

Based the facts as presented at trial and the law governing individual title, the court finds that the magistrate judge's decision was not in error. De novo review of the facts support the magistrate judge's finding that the absences in occupancy by defendant and her ancestors were such that "continuous occupancy" could not be established. In short, the magistrate judge carefully considered the entire situation when he determined that the defendant did not have individual title to the land in question.

Given that the magistrate judge did not err in finding that there was no continuous occupancy, the court need not reach the question of whether title was ever extinguished. Since there was no title to begin with, the question of extinguishment becomes irrelevant.

B. EXCLUSION OF EVIDENCE REGARDING ALLOTMENT DENIAL

Defendant contends that the magistrate judge erred in granting the government's motion in limine to exclude evidence of defendant's application and denial of an Indian allotment. Def.'s Opening Br. at 42. Defendant sought to introduce evidence that the denial of her application for an allotment was arbitrary and

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[7] The court is also mindful that to find otherwise would lead to even more ambiguity in the law of individual title. As discussed previously, the individual title cases suggest that title is to be limited in scope to only land that was actually used. To hold that occasional gardening, hunting and animal husbandry constitutes "occupancy" would be to suggest that there is no limit on the meaning of "occupancy" and that the most minimal activity (such as planting one tree) could constitute "occupancy."

capricious.

An order precluding the admission of evidence is an evidentiary ruling and is reviewed for abuse of discretion. United States v. Brooke, 4 F.3d 1480, 1487 (9th Cir. 1993). Under that standard, "a reviewing court cannot reverse the trial court unless it has a definite and firm conviction that the lower court committed a clear error of judgment." Sandpiper Village Condominium Ass'n, Inc. v. Louisiana-Pacific Corp., 428 F.3d 831, 858 (9th Cir. 2005); see also United States v. Plainbull, 957 F.2d 724, 725 (9th Cir. 1992)(court "abuses its discretion" if it commits clear error or does not apply the correct law).

During the May 18, 2005 Status Conference, the government moved to exclude evidence of Ms. Lowry's denial of an Indian allotment by the Forest Service. The government claimed defendant was attempting to have the denial reviewed six years later when her appropriate remedy was to file an appeal in Federal District Court pursuant to 25 U.S.C. § 345. RT May 18, 2005 Status Conf. at 1:23-25.[8] By failing to appeal the denial to the district court, the

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[8] 25 U.S.C. § 345 states:

> All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any

government claimed defendant should not be allowed to raise the issue at trial. Id. at 2:5-8.

In opposition, defendant argued that "but for the arbitrary and capricious activity by the forest service, there would be no trespass." Id. at 5:5-6. The defendant maintained that the Forest Service considered impermissible factors in denying the application and told defendant there was no right to appeal the denial of an allotment, although this was not true. Id. at 3:9-4:20.

The magistrate judge granted the government's in limine motion, finding that any proof defendant could present about living on the land with authorization would have to be because "[she] got an allotment, not because [she] should have gotten an allotment." Id. at 11:24-25. In his written decision, the magistrate judge explained that although he previously ruled to exclude the evidence, "much of this evidence was received anyway by way of stipulation, or otherwise included within the documentation received in evidence, the Court will nevertheless address the

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> action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

arguments." Decision at 17. He went on to conclude that the court did not have jurisdiction to "adjudicate Defendant's claims as to an allotment . . . . To conclude that Defendant is entitled to the land she occupied under any of the theories proffered would result in altering the lands included within the Klamath National Forest . . . . The court is without power under the Constitution to take such action." Id. at 18.

This court finds that the magistrate judge did not abuse his discretion in excluding the evidence. A finding that defendant had been denied due process in the allotment application process would not inevitably lead to the conclusion she was entitled to an allotment and thus would not have been trespassing. The magistrate judge's concern that this was a "quantum leap" is well-taken. Id. at 9:2. The only way for the excluded evidence to establish that defendant did have authorization on the land would be for the magistrate judge to conclude that she was arbitrarily denied due process in the application process and to grant an allotment to defendant. The magistrate judge correctly noted that he did not have the jurisdiction to make that decision.

The court must address a slight wrinkle in this conclusion. As discussed in Section III(A), infra, the magistrate judge viewed individual title as an affirmative defense. If an exclusionary order precludes the presentation of an affirmative defense, it is reviewed de novo. United States v. Biggs, 441 F.3d 1069, 1070 n.1 (9th Cir. 2006)(citing United States v. Ross, 206 F.3d 896, 898-899 (9th Cir. 2000)).

While the magistrate judge at the Status Conference framed the evidence as part of an affirmative defense, this was in error. As discussed previously, proving that defendant lived on the land without authorization was an element of the crime. Thus, the magistrate judge's order precluding the admission of evidence is an evidentiary ruling and is reviewed for abuse of discretion. United States v. Brooke, 4 F.3d 1480, 1487 (9th Cir. 1993).

That said, even if this court were to conclude that individual title was an affirmative defense, were to conduct a de novo review of the magistrate judge's decision and were to conclude that he erred in excluding the evidence, any error would be harmless. As explained earlier, even if title was an affirmative defense, the government had the ultimate burden of proof to demonstrate defendant was not authorized to stay on the land. The government met that burden. Accordingly, the magistrate judge did not commit clear error or apply the wrong law in granting the government's in limine motion.

IV.

ORDERS

For the above stated reasons, the defendant's conviction is AFFIRMED. The sentence is hereby STAYED pending appeal to the U.S. Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

DATED: July 24, 2006.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT