

BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT SILL APACHES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Docket No. 30
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

Grady Lewis, with whom was Herbert N. Shenkin,  
Attorneys for Petitioner.

Ralph A. Barney and Leland L. Yost, with whom  
was Mr. Assistant Attorney General A. Devitt  
Vanech, Attorneys for Respondent.

MAY 8 1949

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission:

This claim is presented by the Fort Sill Apache Tribe. It is alleged in the petition that petitioner is a tribe of Indians now known as the Fort Sill Apaches and that members of the tribe, or their predecessors, were formerly known as the Warm Spring and Chiricahua bands of Apache Indians.

The petitioner has set out its claim in one count in the petition but has alleged separately two causes of action. The first cause of action is based on the alleged false arrest and imprisonment of approximately 450 members of the Warm Spring and Chiricahua bands of Indians by the Respondent. This has been designated as "the imprisonment claim." The second cause of action is for the alleged confiscation, without compensation, by the Respondent of certain land in New Mexico claimed to have been owned and possessed by the Warm Spring band of Apaches for many years before the white

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man appeared in the southwest. This has been designated as the "land claim." As both petitioner and respondent have used these designations, we will hereafter in the opinion refer to the first cause of action as "the imprisonment claim" and to the second cause of action as the "land claim."

The Respondent has filed its motion to dismiss the petition on the following grounds:

- (1) Petitioner is not the proper party to maintain this action.
- (2) The Commission is without jurisdiction of the subject matter of the petition in that
  - a. An indispensable party or parties is lacking to prosecute the claim, and
  - b. The claim referred to as the imprisonment claim, based on false arrest and imprisonment, is individual and personal in character and not within the scope of the Indian Claims Commission Act.
- (3) The petition fails to state a claim upon which relief can be granted upon the land claim in that it appears on the face of the petition that the alleged confiscation of lands was a mere revocation of an Executive Order, which did not and could not constitute a taking of land for which respondent is liable.

Petitioner having thus separated its claim into two causes of action, considering the motion to dismiss, we will consider first the imprisonment claim.

#### The Imprisonment Claim

The material allegations in the petition relating to the imprisonment claim are in substance as follows:

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In 1886 Respondent falsely arrested and imprisoned approximately 450 members of the Warm Spring and Chiricahua Apache Indians and confined them and their descendants as prisoners of war in various Forts or Barracks until 1913 when the 275 survivors were released at Fort Sill, Oklahoma, the last place of confinement. The confinement was in such a manner that it was not only injurious to their health but was the cause of the premature death of many of them during the first three years of confinement. When released in 1913 a portion of the survivors returned to the Mescalero Reservation in New Mexico, near their ancestral home, and the rest remained in Oklahoma and became officially recognized by the Respondent as the Fort Sill Apaches. The petition requests an award on the imprisonment claim of \$7,500,000.00 "as damages to compensate it for the harm, suffering and humiliation resulting from the arrest and imprisonment by the Respondent of the Warm Spring and Chiricahua Apache bands."

The Respondent's position is that this imprisonment claim, based as it is on alleged false arrest and imprisonment, is individual and personal in character, and the Indian Claims Commission Act (60 Stat. 1049) does not confer jurisdiction on this Commission to hear and determine individual claims.

An examination of Section 2 of the Act shows that it provides that the Commission shall hear and determine five specified types of claims against the United States, on behalf of, an Indian tribe, band, or other identifiable groups of American Indians residing within the territorial limits of the United States or Alaska. The five types of claims are then set out in the subsequent part of Section 2, but need not be referred to at this time.

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It will thus be seen by the language of the foregoing provision of the Act that jurisdiction is conferred upon this Commission to entertain claims on behalf of three classes of claimants, namely, a "tribe", a "band" or an "identifiable group" other than a tribe or band, which have group rights. There is no grant of jurisdiction to hear claims on behalf of individual Indians.

We do not believe that Congress intended to confer jurisdiction on this Commission to determine individual claims,<sup>1/</sup> for when Congress does intend to so include individuals as claimants in jurisdictional acts it expressly designates individuals as distinct from tribes, bands or groups. cf. Blackfeather v. United States, 190 U.S. 368, 378. This was not done in the Indian Claims Commission Act.

1/ "MR. McCASKILL. Those were individual claims. I think they would not come within the purview of this bill at all. This bill, I think, if I am not mistaken, only relates to tribal claims or claims of bands.

CHAIRMAN JACKSON. That is the wording of both bills.

MR. McCASKILL. It would not cover individual claims of Indians.

CHAIRMAN JACKSON. The language reads:

The Commission shall hear and determine all claims of any nature whatsoever against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians \* \* \*.

MR. McCASKILL. I do not think we have regarded this as applying to individual claims.

CHAIRMAN JACKSON. No; I would not think it was the intention of Congress to do that. That is a good point."

(Hearings on H.R. 1198 and H.R. 1341, p. 77, before Committee on Indian Affairs, House of Representatives, 79th Cong., 1st Sess. This conversation in said hearing was between Mr. J. C. McCaskill, Assistant Commissioner of Indian Affairs, and Chairman Jackson of the House Committee.)

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But the petitioner presents the imprisonment claim as a tribal or band claim on the theory there has been a violation of tribal rights by the imprisonment of all the known members of the two bands. Whether there was such a violation depends on the substance of the cause of action as stated in the petition. For the purposes of the motion to dismiss, the allegations of the petition relative to the imprisonment claim may be taken as true that all these Indians arrested were members of the same band or bands, that they were all arrested and imprisoned at approximately the same time and endured the suffering, all as alleged in the petition. Yet the allegations deal with and concern the rights of and obligations to the individual Indians, members of the two bands, not the rights of the two bands. The rights violated were those of the individuals and who in turn experienced the "harm, suffering and humiliation" as a result of the alleged wrong. Thus it would seem that a personal or individual wrong has been inflicted on each Indian which damaged him individually and even though all the individual members sustained their respective injuries by the same common incident (arrest and imprisonment at the same time and place), the rights of each individual for the injury so sustained would be and remain several and independent of each other.

The Respondent, in support of its contention that claims such as the imprisonment claim are individual claims that cannot be asserted as a tribal or group claim, cites in its brief the case of Blackfeather vs. United States, 37 C. Cls. 233, 239, 190 U.S. 368. In that case it in substance held that claims for the destruction and loss of personal property of individual Shawnee Indians caused by the depredations of white settlers, were claims of individual

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members of the Shawnee tribe of Indians and that jurisdiction over the claim of individual members of the Shawnee tribe was not included in the grant of jurisdiction to the Court of Claims by the Act of 1890 (26 Stat. 636) to hear and determine the rights of the Shawnee Indians to money, lands and rights which may be due to "the said Shawnees" under treaties and agreements, nor was such jurisdiction conferred by the Act of 1892 (27 Stat. 86) which enlarged the scope of the earlier Act so as to include all claims of the Shawnee tribe, or band, of every description whatsoever arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts expressed or implied, under such treaties.

This rule was followed in a later case before the Court of Claims in *Sioux Tribe of Indians v. United States*, 89 Ct. Cls. 31, 38 (1939). This was an action by the tribe to recover for the alleged failure of the United States to fulfill its obligation to furnish seeds and agricultural instruments to heads of families adopting agricultural life, and which was promised in a treaty. The opinion is by Judge Littleton. In the opinion the Court said:

"In addition to the fact that the evidence submitted is not sufficient to justify the conclusion that the United States has violated the provisions of Art. 8, we are of the opinion that the plaintiff tribe cannot maintain suit and recover on this character of claim for the reason that it is not a tribal claim but concerns the rights of and obligations to individual Indians, members of the Sioux tribe. \* \* \* \* *Blackfeather v. United States*, 190 U.S. 363, 374, 375, 378. The Jurisdictional Act of June 3, 1920, 41 Stat. 738, authorizes plaintiff to institute suit in this court only for amounts claimed to be due such tribe or band, or bands thereof, as tribal claims. The jurisdictional act does not give the Court jurisdiction to hear and determine the legal and equitable claims of individual Indians. *Cherokee Nation v. United States*, 80 Ct. Cls. 1, 3, 4. The petition is dismissed."

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Thus the Supreme Court and the Court of Claims in construing such statutes permitting the Government to be sued for tribal claims have refused to consider groupings of individual claims that are filed as tribal claims.

We have examined the case of Baltimore and Potomac Railroad Company vs. Fifth Baptist Church, 108 U.S. 317 (1883), cited by the petitioner in support of its contention that the alleged wrongful imprisonment of the members of the two Apache bands of Indians caused injuries to the bands as entities as well as injuring the members of the bands individually. The difference we see in that case and the imprisonment claim before us is that it deals with rights in property belonging to the Church corporation and the injuries sustained by the Church in the use of its corporate property, while the imprisonment claim, as we have pointed out in this opinion, we are dealing with the rights of and obligations to individual Indians. The injuries that are set out in the petition herein and for which petitioner seeks damages are harm, suffering and humiliation sustained by the individuals imprisoned, not injuries sustained by the tribe.

We consider arrest and imprisonment a violation of personal rights of individual Indians. It is a personal wrong committed against each individual Indian concerned and not against the tribe or band of which the individual is a member. Any right to a claim for resultant damage suffered by such wrongful act is individual in nature and remains in the individual Indian and is not a right accruing to the tribe or band that can be asserted under the provisions of the Act as a tribal or common group claim against the United States as the alleged wrongdoer.

The Land Claim

The second cause of action is the land claim on which the material allegations of the petition are in substance as follows:

From time immemorial the Warm Spring Apaches owned and occupied an area of land around Warm Springs in southwest New Mexico. In a treaty of 1852 (10 Stat. 979) with various Apache tribes, including Warm Spring Apaches, the respondent agreed to "designate, settle and adjust" the territorial boundaries of the Apache tribes. By Executive Order of President Grant on April 9, 1871 a tract of land 750 square miles around Warm Springs in New Mexico was "withdrawn from sale and reserved for use and occupation of such Indians as the Secretary of Interior may see fit to locate thereon." This area was redefined and reduced to 700 square miles by Executive Order of December 21, 1875, and "withdrawn from sale and set apart for use and occupancy of the Southern Apaches and other Indians to be known as the Hot Springs Reservation." The December 21, 1875 order was revoked on August 25, 1877 and the tract of land was restored to public domain.

Petitioner seeks an award on the land claim of \$ 560 ,000, plus an amount in lieu of interest, for damages as a result of the alleged confiscation of the land, without compensation.

The Respondent position is that this claim would have to be asserted by the Warm Spring and Chiricahua Bands of Apaches, if they do exist as bands, or by either or both the Apache Nation and the Apache Tribe of the Mescalero Reservation.

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It appears from the pleadings and supporting exhibits that the survivors of the Chiricahua and Warm Spring bands of Apaches and their descendants were living for many years at Fort Sill, Oklahoma, as prisoners of war, and when released in 1913 one-third remained at Fort Sill and the other two-thirds moved to the Mescalero Apache Reservation in New Mexico. (Respondent Exhibits "A" and "C"). Those who remained at Fort Sill are recognized as the Fort Sill Apaches (Par. 8 Pet.), while those moving to the Mescalero Reservation are enrolled members of "The Apache Tribe of the Mescalero Reservation in New Mexico" (a corporation under 48 Stat. 984, Respondent's Exh. "F").

The Chiricahua and Warm Springs bands were not recognized as such bands at the Mescalero Reservation (Resp't. Ex. "I") but in 1946, the year the Indian Claims Commission law was enacted, the business Committee of the Apache Tribe of the Mescalero Reservation, recognized that claims of the Chiricahua and Warm Springs bands were separate and distinct from those of the balance of the members of the Apache Tribe of the Mescalero Reservation, and refused to present their claims but did authorize them to organize for the purpose of presenting the claims of the Chiricahua and Warm Springs bands to this Commission. A committee was elected to represent the Chiricahua and Warm Spring Apaches at Mescalero (Resp't Exhibit "H") which committee on September 30, 1948 entered into an attorney's contract "by and between the Chiricahua and Warm Spring Tribes of Apache Indians, referred to as the Tribes \* \* \*, and Roy T. Mobley, Attorney \* \* \*." On January 7, 1949 the Acting Commissioner of Indian Affairs executed an endorsement approving this contract, with the statement in the endorsement that in approving said contract "no attempt is

being made to decide whether the contracting Indians represent an identifiable group within the meaning of that term as used in the Indian Claims Commission Act." (Resp't. Exh. "D")

The Respondent calls to the attention of the Commission a proceeding (Case No. 22) now pending before the Commission entitled "The Apache Nation, ex. rel., Fred Pellman et al., and the Apache Tribe of the Mescalero Reservation against the United States", wherein it is alleged in the petition in that case that there is no tribal organization with authority to represent the Apache Nation.

Thus it appears from the pleadings and supporting exhibits submitted that the Apache Nation does not have an authorized tribal organization, the Apache Tribe of the Mescalero Reservation has refused to present claims to this Commission on behalf of the Chiricahua and Warm Spring bands and the members of these two bands at the Mescalero Reservation have set themselves up in 1946 as the Chiricahua and Warm Springs Tribes of Apache Indians. The petitioner herein, on the other hand, has alleged in the petition that it is a tribe of Indians now known as the Fort Sill Apaches and that members of this Tribe, or their predecessors, were formerly known as the Warm Spring and Chiricahua bands of Apache Indians, and maintains a tribal organization officially recognized by Respondent. The Respondent apparently does not dispute the fact that the Petitioner Tribe is composed of members of the Chiricahua and Warm Spring bands who have continued to live at Fort Sill, and are now known as the Fort Sill Apaches, nor that they have an interest in any claim those two named bands may have. Respondent does contend, however, the

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Petitioner is not the successor of the two bands and cannot maintain this action and represent the larger number of the two bands now at Mescalero Reservation or the "Chiricahua and Warm Spring bands of Apache Indians." This contention of the Respondent may be correct in the event the petitioner fails to establish by its proof that it is the legal successor of the two bands, but we believe that it is only after proof of all the relevant facts and circumstances has been received on this issue that the Commission may, in view of the allegations in the petition, determine petitioner's right to maintain this action for the claim of the Warm Spring band of Apache Indians.<sup>2/</sup>

The Respondent further contends that the petition does not state a cause of action for the taking of the Hot Springs Reservation. The petitioner alleges ownership from time immemorial of certain land around Warm Springs, New Mexico by the Warm Spring Apaches and the confiscation thereof by the Respondent, without compensation to the Warm Spring Apaches, of which band the petitioner alleges it is the successor and has succeeded to its claim. The petition refers to the Treaty of July 1, 1852 between the United States and the various Apache chiefs, acting on behalf of Apache Nation, including Warm Spring band, as agreeing to designate, settle and adjust the territorial boundaries of the Apaches which was not carried out, except the action taken under the Executive Order of April 9, 1874 reserving the tract of land of 750 square miles at Warm Springs, New Mexico, the second Executive Order of December 21, 1875 reducing that area to 700 square miles and the third Executive

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<sup>2/</sup> Railway Express Agency vs. Jones, 106 Fed. 2nd 341.

Order of August 25, 1877 revoking the former order of December 21, 1875 and restoring said tract of land to public domain.

The facts alleged in the petition appear to set up rights to certain land based on the immemorial possession of the Warm Spring band of Apaches, which land is alleged to have been confiscated by the United States, without compensation. We cannot say as a matter of law that such rights do not exist because this can only be determined after a hearing of the evidence. Therefore this question of whether the petition states a cause of action for the taking of this land should not be disposed of in a summary manner but should be determined only after a full hearing has been had on that issue.<sup>3/</sup>

We recognize the rule that a motion addressed to the dismissal of an action as a whole and not to each of the separate causes of action is usually denied in its entirety if one of the causes of action is sufficient, but we are of the opinion that it is discretionary for the Commission to regard the motion as addressed separately to each cause.<sup>4/</sup>

The motion of the Respondent to dismiss the first cause of action designated as the imprisonment claim will be sustained.

The motion of the Respondent to dismiss the second cause of action designated as the land claim will be overruled.

Commissioner O'Marr concurs in the above opinion.

May 6, 1949.

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<sup>3/</sup> Jefferson Hotel Co. vs. Jefferson Ins. Co., D.C. 1948, 7 F.R.D. 722 Construing Rule 12 (b)(6) (failure to state a claim) of Federal Rules of Civil Procedure, and which rule is in effect the same as Section 11(b)(4) of the General Rules of this Commission.

<sup>4/</sup> Blucker vs. Drury D.C. N.Y. 1948, 3 F.R.D. 325.