

BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO de PECOS,

Claimant,

v.

UNITED STATES OF AMERICA,

Defendant.

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Docket No. 174

Decided: December 13, 1955

Appearances:

Dudley Cornell,
Attorney for Claimants,Walter A. Rochow, with
whom was Mr. Assistant
Attorney General
Perry W. Morton,
Attorneys for Defendant.OPINION OF THE COMMISSION

PER CURIAM. On July 25, 1955, claimant moved to change the named claimant to "Pueblo de Jemez, acting for and on behalf of Pueblo de Pecos" and to amend the allegations of the petition by stating in paragraph VII the grounds upon which it bases its claim for additional compensation for land granted the Pecos by defendant on November 1, 1865.

And on September 7, 1955, defendant filed its opposition to claimant's motion and moved to dismiss the petition on the grounds discussed hereafter.

These two motions were submitted to the Commission on the briefs, the last of which was filed on November 3, 1955.

The Act of June 19, 1936, 49 Stat. 1528, sec. 1, "consolidated and merged into one tribe hereafter to be known as the Pueblo de Jemez" the Pueblos de Jemez and de Pecos. And section 2 of the act provided that "all claims and demands of whatsoever kind or nature, now held or claimed by either of said tribes, or communities shall be, and hereby are, vested in the consolidated tribe."

According to the allegations of the petition, the defendant about November 1, 1865, granted the "Pueblo de Pecos" the 18,763.53 acres of land for the value of which this claim is made. These lands were lost to the Pecos by non-Indian settlements thereon and for the purpose of determining losses of land by the Pueblos in New Mexico, of which the Pecos was one, an act was passed by Congress on June 7, 1924, 43 Stat. 636, by which a Pueblo Lands Board was created to determine the Indian rights and losses. This Board determined the Pecos land losses to be all their granted land and recommended an award of compensation at the rate of \$1.50 per acre and the Congress by the Act of February 14, 1931, 46 Stat. 1115, 1121-2, appropriated "in settlement for damages for lands and water rights lost to the Indians of the Pueblos as recommended by the respective reports of the Pueblo Lands Board * *" the sum of \$28,145 for the Pecos, which was paid, in accordance with the 1924 act, to the Bureau of Indian Affairs to be used to purchase lands and water rights to replace those lost, or for the purpose of making permanent improvements on lands held by the Indians.

The above award was apparently intact on December 21, 1933, for on that day separate resolutions of the Jemez and Pecos pueblos (Exhibits A and B) were adopted (Senate Report No. 2175, 74th Congress, 2d Session,

Exhibit C) requesting the Congress by law to merge the two pueblos under the name of "Jemez Pueblo" and to make the Pecos award of "some \$28,000" available "for the benefit of the merged Pueblo as created by Congress." (Ex. B). The two pueblo tribes were, accordingly, concerned about two things, namely, merger and the use of the Pecos award for tribal benefit. It is plain, therefore, the Indians in adopting the resolutions did not have in mind the Pecos claim here asserted, for their claim for the loss of their granted lands had been adjudicated by the Pueblo Lands Board, created by the Act of June 7, 1924, an award made and not appealed from, and paid by the Act of 1931, aforesaid.

Nor can it be said that in passing the merger act of June 19, 1936, 49 Stat. 1528, the Congress had in mind the Pecos claim here asserted, for as stated above, it was not then in existence, and did not arise until the passage of the Indian Claims Commission Act nearly ten years later, which then created the cause of action here brought. *Otoe and Missouri v. United States*, 131 C. Cls. 593, decided May 3, 1955. It cannot be seriously contended that until the passage of the Indian Claims Commission Act either the Jemez or Pecos pueblos could have successfully maintained a claim for additional compensation for their lost lands, so the language of section 2 of the 1936 act is significant in that it is only "claims, or demands * * now held or claimed by either of said tribes or communities shall be * * vested in the consolidated tribe." So it is plain this claim was not intended to vest in the consolidated tribe. Moreover, the legislative history of the act, which is contained in the Senate report cited above and the House Report No. 2447, 74th Congress, referred to and made part of the Senate report (Ex. C) shows

that the 1936 Act passed pursuant to the Indians' resolutions, which made no reference whatever to contemplated claims of the Pecos.

The bill (H. R. 12074) was evidently drafted by the Interior Department, and in his letter to the House Committee (Ex. C), urging the enactment of the bill, the Acting Secretary wrote: "The proposed legislation would make it possible to use the money awarded the Pecos pueblo by the pueblo lands board for the benefit of the consolidated pueblo." So it is plain that Interior, as well as the Indians, was concerned primarily with the merger of the pueblos and the use of the Pecos award and also, as a consequence of the merger, the use of unexpended funds appropriated for or to be appropriated for said pueblos, and their existing claims or demands, but not, certainly, the Pecos claim here asserted which was not then in existence. Had such a claim been contemplated one would expect specific reference to it or language which would make it plain that it was intended to vest it in the Jemez. However, since the conclusion here reached involves matters not discussed or raised by either party, we are not content to rest our disposition of the motions entirely upon what has been said above, in fact, there are other questions raised which must also be disposed of in making a complete disposition of the motion to amend and the motion to dismiss.

At this place it should perhaps be noted that the proposed amendment to substitute, "Pueblo de Jemez, acting for or on behalf of Pueblo de Pecos" for the present claimant, Pueblo de Pecos, would seem to make the Jemez a nominal claimant, while it would seem that if there was a vesting of the present claim in the entity, Pueblo de Jemez,

created by Congress, only that the new entity could assert the claim. The defendant's objection is apparently not directed entirely to the making of Jemez a nominal claimant, but is also directed to making the Jemez the real party, so we will discuss this phase of the controversy accordingly.

The defendant contends that to permit an amendment making the Jemez a party plaintiff must be regarded as commencing a new cause of action and therefore barred by the five-year statute. It will be noted, however, that the proposed change of the claimant from the Pecos to the Jemez does not in any way modify or enlarge the facts upon which the claim is predicated; it would in any event remain a claim for the difference between the value of the land the Pecos lost and the amount the Government paid them for it in 1931. And this, as will be seen, is an important fact in the determination of this contention. But the Government's contention, as we understand it, is based entirely upon the merger act which it says vested this Pecos claim in the Jemez Pueblo, and hence the Pueblo de Jemez had the exclusive right to present the claim as now pleaded. The Pecos at no time transferred or assigned the claim here sued on to the Pueblo de Jemez.

Assuming, merely for the sake of the argument, that the merger act of 1936 vested the pending claim in the Pueblo de Jemez, there would not, under the authorities, be a new cause of action introduced by making the Jemez a claimant, because the Pecos are a part of the Jemez, and as such have a beneficial interest in the claim; they are therefore not strangers to the claim now, as we shall show, nor a non-existent party, as defendant contends. Furthermore, aside from the change in the parties

claimant, there would be no substantial change in the cause of action pleaded; we say this having in mind the proposed amendments to the petition hereafter considered.

A classic statement of the law governing changes in parties, as well as the rationale of the rule, is found in *McDonald v. Nebraska*, 101 Fed. 171, 178 (C. C. of Appeals, 8th Circuit), which we quote:

A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations. (Italics added).

This was a suit against the receiver of a defunct national bank for state funds deposited in the bank. It was brought by the State Treasurer within the statutory period but it was determined that it should have been brought by the State of Nebraska, and after the statutory period of time for bringing such action had run, application was made and allowed to substitute the state for the treasurer as claimant. It was contended before the trial court, and on appeal, that the change in parties constituted a new cause of action and therefore barred. This contention was overruled by both courts and the large judgment affirmed. This case is frequently cited in support of the rule.

The case of Missouri, etc. v. Wulf, 226 U. S. 355, further applies the rule and cites McDonald v. Nebraska, supra. It was a case under the Federal Employers' Liability Act. The suit was brought by the mother of her deceased unmarried son for his death caused by negligence of the railroad, she being a widow and sole beneficiary under the act. After the expiration of the two-year period of limitation under the act, it was discovered that such a suit could only be maintained by the personal representative of deceased, so the mother was appointed administratrix of her son's estate and was allowed, as such, to be added as a party plaintiff, the defendant objecting on the ground that a new and distinct claim was presented, which did not relate back to the commencement of the action by the mother and was therefore barred. In affirming the judgment, the Supreme Court, in denying the defendant's contentions as to the effect of the amendments, said:

It seems to us, however, that, aside from the capacity in which the plaintiff assumed to bring her action, there is no substantial difference between the original and amended petitions. In the former, as in the latter, it was sufficiently averred that the deceased came to his death through injuries suffered while he was employed by the defendant railroad company in interstate commerce; that his death resulted from the negligence of the company and by reason of defects in one of its locomotive engines, due to its negligence; and that since the deceased died unmarried and childless, the plaintiff, as his sole surviving parent, was the sole beneficiary of the action.

And again, referring to the adding of the personal representative as a party plaintiff, the court said:

Nor do we think it was equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by § 6 of the employers' liability act. The change was in form rather than in substance (Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105). It introduced no new or different cause of action, nor did it set up any different state of facts as the ground of action, and therefore it related back to the beginning of the suit. [citing a number of cases].

The Court of Claims has also had occasion to consider the question here presented in these cases discussed in 11 C. Cls. 508, 511;

* * * In Payan's Case, (7 C. Cls. R., 400,) where one supposing himself entitled to sue as assignee for the proceeds of captured property, found before trial that the right of action was not legally in him, he obtained leave, after the expiration of the time for suing, to substitute the assignor as the party, and to prosecute the suit in his name for the use of the assignee. In Green's Case, (7 C. Cls. R., 496,) where a married woman was the claimant, and it was found that, by the law of South Carolina, whatever right she had to the proceeds had vested in her husband absolutely, her husband was joined as claimant after the expiration of the time for bringing suit. In Kidd's Case, (8 C. Cls. R., 259,) where the suit was brought in the name of a guardian of an infant, an amendment of the petition was allowed, so as to permit the guardian to appear also in the character of administrator of the infant's mother; and when, after the time for bringing suit had expired, an application was made for leave to make further amendment, so as to allow him to appear also in the character of administrator of the infant's father, the court considered such an amendment admissible, saying: "No good reason now occurs to us why a single party may not sue in all the capacities in which it is necessary for him to appear, in order to reach a fund which the law intends shall go to the rightful claimant."

In all these cases, it will be observed that the court proceeded upon the idea that a claim preferred in due time ought not to be defeated and lost because of a defect of parties, and that new parties might be introduced to help a recovery in favor of the claimant whose suit was timely brought. This is as far as we have felt authorized to go.

One cannot read the cases (and there are literally scores -- see 8 A. L. R. 2d, 6) without being impressed with the tendency of the courts to liberalize the statutes to the laudable end that proper parties may be admitted after the running of the statutes of limitations. The general purpose of the Indian Claims Commission Act would seem to justify such liberality.

We have already stated that the Pecos are not strangers to the claim. This would seem to answer the contention of the defendant that they are

a non-existent tribe, however, we will discuss that contention specifically. The argument is that by the merger and consolidation of the Pecos and Jemez by the Act of 1936, the Pecos as a tribe passed out of existence and can no longer assert this claim. Aside from the fact that we do not think the claim was transferred to the Jemez, we see nothing in the act that did more than consolidate the two pueblos for improving their position in dealing with the Government. Certainly, there is nothing in the act that can be said to abolish the Pecos pueblo. Had such a purpose been intended, one would expect language plainly indicating such a purpose. We do not believe the 1936 Act, nor its legislative history, shows such a purpose.

The Government is entitled to be confronted with all parties who have or claim to have an interest in this claim, so that an adjudication thereof will bind all parties. To do this, the Jemez Pueblo should be added as a separate party, and if counsel for claimant so desires, it may be added as the nominal claimant as requested, but the Pueblo de Pecos should remain as a party claimant. The suggested changes should make an adjudication of the claim final as to all possible claimants.

The suggested adding of other parties will no doubt require new allegations in the petition but we doubt that the requested amendment to paragraph I will conform to what has been said above, so claimant may submit for consideration of the Commission a substitute amendment.

The second requested amendment concerns paragraph VII of the petition. By this amendment the claimant invokes the fair and honorable dealings clause of our act and makes allegations of fact purporting to show unfair and dishonorable dealings. There are also incorporated in

the requested amendment the same allegations as now appear in paragraph VII, with the added words following "lands": "and the water rights appurtenant thereto."

The objection of the defendant to this amendment is that it sets up additional "grounds for relief" and therefore a new cause of action which is now barred by the statute of limitations.

The claim here asserted is of course for additional compensation for the lands the Pecos lost, and the allegations of paragraph VII so state. Those allegations do not state the ground upon which a recovery is based and would therefore be subject to a motion to make more specific. We do not believe the supplying of grounds, as the amendment does, states a new cause of action, but rather is an amplification of the present pleading. 34 Am. Jur. 217, sec. 264.

As to the alleged failure to obtain an attorney's contract authorizing the prosecution of this claim our records disclose that on July 30, 1951, claimant filed a copy of an attorney's contract between the Pueblo de Pecos and attorneys, Cornell and Mann. This contract is dated March 5, 1951, and according to the Bureau of Indian Affairs was approved on March 21, 1951. It would appear therefore there is no merit to defendant's motion based upon such failure.

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner