BEFORE THE INDIAN CLAIMS COMMISSION

THE JICARILLA APACHE TRIBE OF THE JICARILLA APACHE RESERVATION, NEW MEXICO, Petitioner, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 22-A
THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS, Petitioners, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 257

Decided: August 26, 1963

Appearances:

Guy Martin, Roy T. Mobley, Robert J. Nordhaus, James L. Kunen, Richard M. Davis, Robert H. Harry, and Walter B. Ash, Attorneys for Petitioner in Docket No. 22-A

J. Roy Thompson, Jr., W. C. Lewis, and Frank Miskovsky, Attorneys for Petitioners in Docket No. 257

Bernard M. Newburg and Clifford R. Stearns, with whom was Mr. Assistant Attorney General Ramsey Clark, Attorneys for Defendant.

OPINION OF THE COMMISSION

Scott, Associate Commissioner, delivered the opinion of the Commission.

The original petition in this cause was timely filed on February 3, 1948, with the Indian Claims Commission, on behalf of some thirteen tribes

and bands alleged to constitute the component tribal elements of "The Apache Nation." [1]

On January 3, 1958, this petitioner, "The Jicarilla Apache Tribe of the Jicarilla Apache Reservation, New Mexico," filed its motion to sever that part of the original claim of "The Apache Nation," alleged on behalf of the Jicarilla Apache, in order that the Jicarilla's claim should be separately heard and decided by this Commission. The Commission granted the severance and permitted an amended petition, Docket No. 22-A, to be filed by said Jicarilla Apache Tribe. [2]

Defendant admits that the Jicarilla Apache Tribe of the Jicarilla Apache Reservation is a duly formed corporation under provisions of the Wheeler-Howard Act of 1934 [3] and that it possesses the exclusive privilege of representing the Jicarilla Apache Indians [4] under provisions of Section 10, the Indian Claims Commission Act. [5] However, defendant asserts that under petitioner's charter it has no authority to bring this or any cause of action upon behalf of all the descendants of the aboriginal Jicarilla Apache Indians since such charter limits petitioner's tribal membership by confining its members to a certain group or class of Jicarilla Apache Indians, namely, only those Jicarillas who are eligible to membership as may be determined from the official census roll of the Jicarilla Apache

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1/ Original Petition, Docket No. 22, styled "The Apache Nation, ex rel Fred Pelman, et al., v. The United States of America."
2/ Commission Order, Jan. 8, 1958, J-606.
3/ 25 U.S.C. 476
4/ See pages 246-247, Defendant's Brief; 48 Stat. 984
5/ Indian Claims Commission Act, 25 U.S.C.A. Sec. 70(a).

Reservation taken in 1937. Therefore, defendant urges the filing of this petition alleging a claim which is owned by all descendants of Jicarilla Apache Indians without any qualification of such 1937 tribal enrollment, constitutes a claim filed ultra vires of the petitioner's charter 6/ and petitioner lacks legal capacity to bring this action.

The legal capacity of the petitioner to bring this action is not dependent upon whether its membership embraces every known living descendant of the aboriginal Jicarilla Apache Tribe. The Indian Claims Commission Act provides:

> * * * wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission. 7/

Therefore, we find it unnecessary in the adjudication of the petitioner's legal capacity herein to pass upon the questions of whether or not the petitioner's membership roll, or the 1937 census roll upon which it is purported to be based, includes the names of all persons entitled to be enrolled in the tribe and to participate in the distribution of any prospective award that may or may not ultimately be recovered in this cause of action. Moreover, as the Court of Claims recently pointed out,

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6/ Petitioner's Exs. P and Q

7/ Sec. 10, Indian Claims Commission Act, 25 U.S.C.A. Sec. 70(a).

our jurisdiction is limited to claims that are tribal in nature and not of individuals. 8/

Subject claims of the Jicarilla Apaches, as amended and separately filed herein on January 9, 1958, included within its allegations of

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8/ Red Lake Indians v. U. S., 1 Ind. Cl. Comm. 474, 490; also see recent Court of Claims decision upholding the view of a class action in Minnesota Chippewa, et al v. U. S., C. Cls. slip opinion, Appeal No. 11-61 (decided April 5, 1963), pp. 10-12 and 14. The Court of Claims unanimously construed the Indian Claims Commission Act upon this question, stating as follows:

> * * * The purpose and structure of the (Indian Claims Commission) Act, which specifically demands that the claim be on behalf of the entity not individuals (25 U.S.C.A. § 70(a); 25 U.S.C.A. § 70(i), show that the unit is entitled to the award. (Fn. 11: Congress has full power, of course, to determine that an award to a tribal entity should be expended or paid in a specified manner). The dictum in McGhee v. United States, 122 Ct. Cl. 380, 388, 396 (1952), cert. denied, 344 U.S. 856, that that particular claim "belonged" to "descendants" of the whole Creek Nation as it existed in 1814, is inapplicable to a case, like this, in which suit is brought on behalf of all interested groups, bands, or entities. At least in such proceedings the Indian Claims Commission Act requires that the awards be made, not to individual descendants of tribal members at the time of taking, but to the tribal entity or entities today. In this case, the tribal entity is the Minnesota Chippewa Tribe on behalf of the Mississippi, Pillager, and Lake Winnibigoshish bands. (Fn. 13: For the same reason we disapprove, as erroneous in law, the Commission's finding that the individual Indians named as petitioners are entitled to maintain the action "on behalf of themselves and in a representative capacity for all descendants of the former bands similarly situated."
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> As we understand appellants' presentation to this court, they do not ask us to decide that the award should run to the Minnesota Chippewa Tribe without any reference to the bands, so long as the references to "descendants" and to individual entitlement are omitted.) * * *

aboriginal Indian title a boundary description circumscribing an area of land of approximately 46,000,000 acres (Par. 4). Said claimed boundaries overlapped in whole or in part certain claims asserted by other tribes. The defendant, cognizant of such overlapping claims, filed separate motions on February 27, 1959, and on March 2, 1959, respectively. The substance of defendant's motions was that joint hearings should be held herein of such overlapping and conflicting claims. For grounds of its motions defendant urged that separate trials of these overlapping claims would expose the government to the contingency of double liability for the same lands.

On April 1, 1959, the Commission ordered consolidated with the Jicarilla claim, for the purpose of hearings only, the overlapping portion only of the claims in:

(1) Dkt. 257, Kiowa, Comanche and Apache Tribes

(2) Dkt. 354, Pueblo of San Ildefonso, et al

(3) Dkt. 355, Pueblo of Santo Domingo

(4) Dkt. 356, Pueblo of Santa Clara

(5) Dkt. 357, Pueblo of Taos, and

(6) Dkt. 358, Pueblo of Nambe [9/]

The Commission's order for such joint hearings of the overlapping claims further provided that such order should not apply to any petitioner who filed legal disclaimers (a) disclaiming any right, title or interest in any of the lands claimed by the Jicarilla Apache Tribe in Docket No. 22-A,

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9/ Commission's Order, April 1, 1959, J. 689-690

and (b) acknowledging that no cause of action or claim exists against the defendant (United States) based in whole or in part upon such right, title or interest in and to such lands.

On May 4, 1959, the petitioner, Jicarilla Apache Tribe, Docket No. 22-A herein, filed five separate "Stipulations", each signed by counsel of record for petitioner, Jicarilla Tribe, and by counsel of record who represents each of the above five numbered and styled Pueblo claims. Each "Stipulation" is of the same general form, and in each the Jicarilla Tribe disclaims any right, title or interest to lands therein described as within defined boundaries claimed by the respective Pueblo Indians.

The Commission, upon consideration of said five "Stipulations", approved and allowed same to be filed herein, thus releasing the five named Pueblo tribes from the effect of the prior order of consolidation, or joint hearing, in the Jicarilla Apache claim. 10/ The defendant strenuously contends "this procedure adopted by the Commission (in permitting the Indian parties to thus reconcile such overlaps and conflicts in their respective claims) is harmful error." 11/

10/ Commission's Order, July 21, 1959, J. 702-703

11/ Defendant charges the Commission, in releasing subject Pueblo claimants from joinder with Jicarilla claim, committed "substantial procedural error" because this procedure (1) avoids "a legitimate government defense", (2) "is often done without the approval of the Commissioner of Indian Affairs", and (3) "sometimes possible without regard to the best interests of the tribes", and (4) that the Commission "should re-examine and reverse such practices developed before it." (Page 244, Defendant's Brief)

The government asserted its rights to the joint hearings because it maintained inter alia that such procedure of joint hearings would avoid the vice of twice defending the government against separate trials of the claims for the same lands as were situated within the overlapping claimed areas, and more importantly such joint hearings would avoid the contingency of double exposure of the liability of the government for same.

Of course, by virtue of the disclaimers contained in these "Stipulations" filed herein, the respective Indian petitioners no longer allege claims to the same lands. Thus the contingency that this Commission should fall into error and find the government twice liable for the same land is removed. Likewise, any obligations of the government to twice present its defenses in separate trials of claims for the same lands also are removed.

The government complains that subject disclaimers filed by "Stipulation" of counsel of the respective petitioners lack the confirmation by resolutions passed by the respective tribes and may be ineffectual to legally disclaim the respective overlaps.

In some prior cases this Commission has required disclaimers to land areas should be accompanied with a resolution by the tribe approving such disclaimer before it be filed with the Commission. The reasons supporting such requirement of tribal consent are obvious. An Indian claim usually represents a substantial and common interest of the tribe. Frequently it constitutes a principal, if not sole, property or inchoate

type interest of the tribe.[12] As in requirements of Indian contracts such resolutions are considered to act as a safeguard against capricious, arbitrary or frivolous alterations of claims before us by amendment of pleadings which would reduce the quantity of lands for which the tribe seeks compensation. The requirements of such tribal resolutions are to protect tribal interests, not to encumber the prosecution of its claims with needless expense and delays.

A claim of aboriginal Indian title is a chose in action and becomes established not alone by proof of exclusive use and occupancy, but that such use and occupancy existed at and for a long time prior to the period when the sovereignty of the United States attached to such lands so claimed.[13] While the remedies that were created by Congress in the Indian Claims Commission Act and are now sought by the petitions filed with this Commission are of modern origin, the Indian rights in land are of ancient and historic origin or from time immemorial. In the questions of the respective overlaps and conflicts of pleading no evidence has been tendered by any party to this cause to show such overlaps were of an early or historic origin. To the contrary, such overlaps and conflicts are represented by Jicarilla's counsel herein to have arisen by mistake and oversight of the pleader of the Jicarilla

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12/ 25 U.S.C. Sec. 81, Contracts with Indian Tribes or Indians.

13/ Iowa Tribe, et al., v. U. S., 6 Ind. Cl. Comm. 464, 503.

Apache claim in the description of the boundaries to an estimated forty-six million acres of land.[14/] This correction of an error in pleading made by counsel's inadvertence in failing to exclude lands claimed by subject Pueblos is not difficult to distinguish from a situation where a historic boundary dispute between adverse Indian groups or tribes is sought to be settled by arbitration and compromise. Here there was a mistake in the pleading of the description of Jicarilla Apache's claimed lands and its correction. Although this correction was accomplished by means of five joint "Stipulations" or disclaimers made with counsel of the five separate Pueblos, in our judgment this does not constitute an arbitration or compromise of a controversy between them since none in fact ever existed and there was only a mistake of pleading.

The Commission's approval of the "Stipulations" in no way constitutes our affirmance that any statement therein contained is true or correctly

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14/ Pueblo Land Grants, Act of Congress of June 21, 1860, 12 Stat. 71; Public Domain by Thos. Donaldson (1884), pp. 405 and 1151; Ltr. of Hon. Thos. M. Reid, Assistant Commissioner, Bureau of Indian Affairs, filed in Dkt. 22-A, et al, July 14, 1959, addressed to and filed by counsel for Jicarilla Apache herein, reads as follows (p. 2):

> * * * In your letter of June 23 and at a conference of the same date in the office of the Deputy Solicitor for this Department, you indicated the substantive reasons why you have concluded that the boundaries of the Jicarilla's claim should be redefined in accordance with the stipulations. Basically, these are that research made after filing the petition in Dkt. 22-A disclosed that the Jicarillas have no evidence which can reasonably be expected to prevail over the evidence of use and occupancy which the Pueblos can show * * *."

stated. Our approval of each of the "Stipulations" is only that it constitutes a proper amendment of boundary description pleadings and thereby removed the necessity for joinder of such Pueblo Indian parties to the hearings of the Jicarilla Apache claim.

Finally, we know of no rule of law, equity, or pleading that supports a legal conclusion in the nature of an admission against interest, that is, where separate parties claim the same land they should therefore be held to have admitted such overlap area was non-exclusively owned by such claimants.

The date of taking has been postponed to a subsequent hearing by agreement of the parties in the Jicarilla case. On this issue the Commission was confronted with a similar fact situation in fixing the date of taking in that part of the aboriginal title claim of the Northern Paiute Tribe v. U. S., 7 Ind. Cls. Comm. 322, 378, 379, as was situated outside the present boundaries of California. The taking of lands within California was fixed by Act of Congress to be 1853, but as to Northern Paiute lands outside California's boundaries the problem was more difficult. After the Mexican Cession of 1848 this Commission found the conduct of settlers, ranchers, travelers and United States military forces had deprived the Northern Paiutes of the use of their lands. The United States had thereby acquired possession and use of same to the exclusion of the prior Indian owners or users. However, the Commission postponed determination of the dates of taking and left it to the parties either to agree upon the take of taking or to further brief the question for a decision by the Commission on this

issue. The same prerogatives have been and will be given the parties on this date of taking issue at the future hearing as was done in the Northern Paiute case.

During Spanish sovereignty and also during the Mexican sovereignty large areas of subject lands were granted to individuals and communities, or pueblos, by the Spanish and Mexican governments prior to United States sovereignty in 1848. Congress confirmed some of these land grants, others were confirmed by the courts and are to be the subject of a subsequent hearing.

The Indians were gradually and continuously deprived of possession of the lands which had been their ancestral homeland. As the pressure of white settlers increased, theft, robbery, and other depredations and pillaging became a way of life with them at least until interrupted by force of arms. Government men and Indians sometimes sought peaceful relations by means of treaties of peace that remained unconfirmed, and by a system of rationing that was often inadequate and sometimes even putrid, while the military herded or attempted to herd them about from one reservation to another as recounted in the findings made.

Obviously such gradual encroachment of the whites renders it difficult to determine a precise date of taking of subject lands. (See Finding 60) The Commission finds that white settlers acting largely in concert with the United States military forces, acting under the practices, concepts and policies of the times, effectively deprived petitioner tribe of all its ancestral lands as have been determined and defined in Finding No. 60.

The land areas to which the Jicarilla Apaches claim aboriginal Indian title were held by Spanish sovereignty for over two and one-half centuries before United States sovereignty attached to it. 15/

Defendant maintains the sovereignty and occupancy by the Spanish antedated any occupancy by the Jicarilla Tribe as now constituted and that such prior Spanish possession prevented the Jicarillas from acquiring any occupancy rights to the claimed lands because Spanish settlers actively prevented any such Jicarilla occupancy or permanent use of the land and ejected Indian users from it. The defendant cites the Washoe and Northern Paiute decisions of this Commission in support of these contentions. 16/ The legal hypotheses propounded are that where settlers occupy land prior in time to any Indian occupancy, or where settlers subsequently come in and eject and dispossess the Indians of their tribal lands, that either of these events operate in law to deprive the Indians of any possessory rights in the land. Neither of the fact situations upon which defendant bases its hypotheses is sufficiently supported by the record of evidence.

To the contrary, Jicarilla Apaches were in the general region of the claimed area and their presence was reported by the earliest of Spanish chroniclers, Castenada, who accompanied Coronado's expedition into present

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15/ Finding No. 21

16/ The Washoe Tribe, et al., v. U. S., Dkt. 288, 7 Ind. Cl. Comm., 260, 280; The Northern Paiute Nation, et al., v. U. S., Dkt. 87, 7 Ind. Cl. Comm. 322, 378.

New Mexico in 1541.[17] The Spanish Conquest of New Mexico does not appear to have been a displacement of the Jicarilla Apache from their use and occupancy of lands. Some Jicarillas supported their ancient friends and tradesmen, the Pueblos, in their rebellion of 1680 and some of the Jicarilla Apaches accompanied the Pueblo Indians who fled to the eastern plains to escape the wrath of the Spaniards.[18] A number of these refugee Pueblo and Jicarilla Apache Indians settled for several years after the rebellion along the upper Arkansas. However, we conclude that such removal from the Taos-Picuries areas west of the Sangre de Cristo Mountains to the eastern plains was remote in time, transitory in nature, since many of the refugees returned in a few years, and this displacement does not appear to have included the whole or even a substantial portion of the Jicarilla tribe. An abandonment or ejectment by the Spanish of the Jicarilla Apaches from their ancient habitats in northeastern New Mexico cannot be hinged upon such passing events in history.

The first permanent occupancy of areas west of the Rio Grande by Jicarilla Apaches did not begin until the Indian removal policies of Territorial Governor William Carr Lane were instituted and Chacon and his band were induced to settle on the Puerco, a branch of the Chama River. Prior to the Treaty of Guadalupe Hidalgo in 1848[19] there was no

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17/ Findings No. 21 and 27

18/ Findings No. 14-b; also see pp. 3-4, Pet. Ex. L-1, a manuscript (1958) by Dr. Alfred B. Thomas, entitled "The Jicarilla Apache Indians-A History, 1598-1888."

19/ Findings No. 46 and 47

Jicarilla Apache use and occupancy of lands west of the Rio Grande, except as some friendly Ute band may have invited Jicarilla Apaches to join them in hunting there.

The decade following the conquest by the United States from Mexico of historic "Nueva Espana", in 1846-1856, was a period of friction and strife between the United States troops and "the wild tribes" of New Mexico, of which the Jicarilla Apache and certain Ute bands allied with the Jicarilla were most prominently mentioned. Whatever causal factors, moral judgments, or policy errors might be assessed for or against either the government or the Indians, a most important consideration of this historic period in the adjudication of boundary issues is that this relationship with the United States caused conflict and upheaval of the Indians. The Jicarilla Apaches, when not actively engaged in combat with the military, were frequently confronted with the alternatives "to steal or starve." A principal supplement to the rapidly diminishing game, if not the primary means of their sustenance, was the theft of settlers' livestock. Elements of the Jicarilla Apaches alternately raided and fought settlers and troops in these early years of United States sovereignty from Palo Duro Canyon on the east to the Chama River-Abiquiu area west of the Rio Grande to Pueblo, Colorado (a white settlement to the north that was destroyed by elements of Utes and Jicarillas), to the Pecos River on the south. The numerous sites of such conflicts and raids are extensively exhibited in the record by the testimony of historians, reports of the army, correspondence of Indian agents, public petitions, old newspapers, and other such data.

such data.[20] Of course, evidence of a single Indian raid upon a settler's livestock herd, or a single episode recorded in the annals of the U. S. Army's numerous encounters with the Jicarilla Apaches, standing alone, unless supported by other evidence of occupancy cumulative in nature, cannot reasonably establish proof of permanent occupancy of such site or area by the Jicarilla Apache Tribe.[21]

The Jicarilla Apache Indians, from the outset of United States occupancy, were substantially disrupted by numerous attacks of military forces dispatched to suppress them. More often than not such encounters did occur upon lands long occupied by Jicarillas, such as the southern part of the Sangre de Cristo Mountains and its component ridges of Taos, Mora, Picuries and Las Vegas. The probative value of these events when considered in perspective with the whole record, and especially with historical and ethnological evidence of Jicarilla use and occupancy in earlier periods, does reasonably support the conclusion that the Jicarilla Apaches used and occupied such areas at and before United States sovereignty attached to it.

Mention of the Apaches and of the Jicarillas has been consistently recorded from the beginning of recorded history in the southwest chronicled by early Spanish explorers, missionaries, colonizers and soldiers. These have been recounted in our findings and include Coronado in 1541,

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20/ Findings No. 32 through 57.

21/ Santa Fe R. R. v. U. S., 314 U. S. 339

Onate and Mendoza in 1598, Father Posados in 1686, Don Diego de Vargas in 1696, Ulibarri in 1706, Valverde in 1719 situated at Taos, Villasur's expedition in 1720 into present Kansas (Cuartelejo), records of Governor Bustamente in 1723, Governor Cachupin in 1754, Marquis de Rubi and La Flora in 1768, Governor Croix's records of New Mexico from 1771 to 1781, Governor Anza's defeat of Comanches from New Mexico in 1777, and other Anza records extending to Governor Concha's records in 1794. Concha reported the home of the Jicarillas between Pecos to Taos, hunting buffalo to the east, sowing their lands, harvesting their crops and at the same time Cordero located Jicarillas north of the 38th parallel. Cortez in 1799 reported Jicarillas between Pecos and the Rio Grande. Thus the historical accounts of the Spanish compiled by Dr. A. B. Thomas, and Frederick Webb Hodge in his monumental works, the Handbook of American Indians, all confirm that northeastern New Mexico has been the ancestral home of the Jicarillas for generations. Mr. A. H. Schroeder's testimony of his research of the Jicarillas did not alter but rather confirmed this conclusion as the consensus of expert opinion, which has been corroborated by the documentary evidence herein of record. Our problem is determining specifically the area which the Jicarilla Apache Tribe held under original Indian title when taken by the defendant, and our conclusion as set out in Finding 60 is drawn from our best judgment based upon all the evidence before us.

This case will now proceed to a determination of the further issues, including all relevant matters concerning Spanish and Mexican land grants, both of law and fact, the amount of acreages contained in said grants and

within the boundaries described in our Finding No. 60, and the date of valuation of the lands awarded to the Jicarilla Apache Tribe.

T. Harold Scott
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner