

BEFORE THE INDIAN CLAIMS COMMISSION

THE LIPAN APACHE TRIBE and bands)
thereof, ex rel. Pedro Mendez and)
Philemon Venego;)

THE MESCALERO APACHE TRIBE and)
bands thereof, ex rel. Solon)
Sombbrero, Fred Pellman, Eric)
Tortilla and Victor Dolan;)

THE APACHE TRIBE OF THE MESCALERO)
RESERVATION on behalf of, or as)
successor to, the Lipan Apache)
Tribe and bands thereof, and the)
Mescalero Apache Tribe and Bands)
thereof,)

Plaintiffs,)

v.)

Docket No. 22-C

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: August 6, 1965

Appearances:

Weissbrodt, Weissbrodt and Lifton
Attorneys for Plaintiffs.

Frank DeNunzio, with whom was
Mr. Assistant Attorney General
Edwin L. Weisl, Jr.,
Attorneys for Defendant.

OPINION OF THE COMMISSION

PER CURIAM. Pursuant to the Commission's order of May 25, 1959,
in Apache Nation, et al v. United States, Docket No. 22, plaintiffs
were permitted to separate their claims and filed a second amended
petition which is the subject of this opinion.

To this amended petition defendant filed a motion to dismiss on the grounds that:

1. The petition states conclusions which are unsupported by facts;
2. The petition makes claims against the defendant for the loss of lands in the State of Texas which were never owned or controlled by the defendant.

Thus, the question to be decided is, do the allegations in the petition contain facts which state a cause of action against the United States upon which relief can be granted under the provisions of the Indian Claims Commission Act?

It is alleged in the petition that on the date that Texas was admitted to the United States, December 29, 1845, and continuously prior thereto for more than a hundred years, the claimant tribes used and occupied, to the exclusion of other people, certain lands now in the State of Texas.

Petitioners state that Texas being admitted to the United States upon an "equal footing with the original states in all respects whatever" thereby relinquished its right and vested in the United States the sole and exclusive authority of treating with the Indians in all respects whatever, including the extinguishment of Indian occupancy or title.

Petitioners allege that pursuant to the Treaty of May 15, 1846 (9 Stat. 844), the claimants acknowledged "themselves to be under the protection of the United States, and of no other power, state or sovereignty whatever"; that the United States represented that for

the protection of the Indians and for the purpose of carrying out the stipulations of the treaty more effectually, the President shall, at his discretion, locate upon their borders trading houses, agencies and posts; that the lands of claimants were accounted among the public lands of the State of Texas and were being disposed of by this State and that the United States took no measure to protect the Indian tribes in Texas against the disposal of Indian lands; that serious conflicts between the white settlers and the Indians developed and that in 1858 and 1859 these conflicts climaxed in warfare in which the United States officers, agents and troops joined with Texas troops to drive the Indians off the Texas lands and out of the State of Texas; and that the claimant tribes have never been compensated for their lands in Texas and that the United States is liable therefor in accordance with the Act of August 13, 1946 (60 Stat. 1049), Sec. 2, Clauses (2), (4) and (5) thereof.

Hereinafter, we will sometimes refer to the various bands or tribes of Indians involved in the past in Indian claims litigation relating to lands in Texas as "Texas Indians" or "Indians of Texas."

The Indians of Texas have never yet been able to recover for the alleged taking of their lands in the State of Texas.

The first case in which the Texas Indians sought to recover and failed was the Wichita Indians, et al., v. United States, 89 C. Cls. 378, decided November 6, 1939. This case was brought by the Indians pursuant to a Jurisdictional Act. In dismissing the petition the Court held at page 421:

* * *

The record shows that with the exception of a portion of the Wichita tribe proper, its affiliated bands, the Towaconies, Wacos, Keechis, Ionies, and Delawares were at the time of the admission of Texas as a state in 1845, and for many years prior thereto, inhabitants of territories which at various times in the past had been under the dominion of France, Spain, and Mexico, and the republic of Texas. It is upon this residence of the affiliated bands that plaintiffs base their claim to the 5,200,000 acres of land in Texas. We think it is clear that this claim cannot be sustained. All public lands within the borders of Texas remained, upon its admission as a state, property of the State of Texas and the government of the United States has never at any time had title to or claimed any public lands in that state. Texas had made certain treaties with the Indian tribes within its borders, but we need not discuss those treaties here. When the Indians were removed by the United States from Texas for their own protection and safety, the reservation in that state formerly occupied by them became the property of the State of Texas and the lands within those reservations were added by Texas to its public domain. The citizens of Texas were responsible for the removal of the affiliated bands to Oklahoma, as shown by the annual report of the Commissioner of Indian Affairs, 1859. In these circumstances the United States cannot be held liable to compensate these Indians for the loss of their lands in the State of Texas, in and to which the United States had no right, title or interest before or after the Indians were compelled to abandon them.

* * *

The next case concerning the rights of Indians in Texas was the case of Texas Cherokees, et al v. United States, 2 Ind. Cl. Comm. 516, decided December 28, 1953. In this case, before this Commission, the evidence submitted established that plaintiffs had for a period of approximately twenty years inhabited lands under the dominion of Spain, Mexico, and the Republic of Texas. In 1840 and before Texas was admitted into the Union, all of the ancestors of the plaintiffs had been forcibly expelled from Texas by the authorities of Texas. One of the contentions of

plaintiffs in this case was that the United States had a duty to prosecute their claim on the basis of the fiduciary relationship which exists between the United States and Indians and, since it failed to do so, the United States was liable to the plaintiffs for such failure.

In dismissing the complaint the Commission held at page 530:

* * *

We will not review the evidence concerning plaintiffs' right to land in the State of Texas for, as we look at the claim, plaintiffs cannot recover even if they proved and we found they had valid rights to the land described in the petition.

* * *

The Commission in making its decision cited with approval the holding in the Wichita case, supra. At page 531 the Commission stated:

* * *

The basis for this decision (Wichita case) was that the United States never had or claimed title to the Texas lands occupied by the Wichita; that those lands belonged to Texas at the time of its admission as a state, and so remained after its admission. The same situation exists in the case before us. The plaintiffs do not claim the United States ever owned the area in question. The Wichita case is much stronger than the one before us because, according to the opinion, the Wichita were removed from Texas by the United States. No such factual situation is shown here, in fact, the evidence is that the United States had no part in the removal of the plaintiffs except to permit their return to this country, the country they voluntarily left in 1819-20.

* * *

The Commission also held that the United States had not breached any fiduciary duty to the Indians and that clause (5) of section (2) of the Indian Claims Commission Act, which provides for "claims based upon fair and honorable dealings that are not recognized by any existing

rule of law or equity", would be of no avail to the plaintiffs in this instance.

The last and most recent case of Caddo Tribe of Oklahoma, et al v. United States, 9 Ind. Cl. Comm. 557, in which the Commission entered an interlocutory order on October 27, 1961, addressed itself to the issue of whether or not the grant made to the Caddo Tribe by the United States in the Wichita reservation was a gratuity or a grant as compensation for the loss of lands which the Caddo Tribe previously inhabited in the State of Texas. The Caddo Tribe, after ceding its lands in Louisiana to the United States in 1835, moved into the Territory of Mexico. Some time later, after Texas became a State, the Caddo Tribe was placed on a reservation, pursuant to the Act by the Texas Legislature of February 6, 1854, and thereafter in 1859 removed from the reservation in Texas. The plaintiffs, in essence, contended that by their removal from Texas they abandoned or lost possessory rights in lands in Texas and therefore the grant in the Wichita reservation was compensation for the lands lost in Texas. This Commission held that the grant was a gratuity and not compensation because the plaintiff never held any title or rights in lands of Texas. The Commission stated at page 567:

* * *

* * * Under the public laws of the Republic of Texas the Indians residing within its territorial limits were not accorded possessory rights to lands upon which they resided. Since there was no respect from (for) any alleged Indian title, the white settlers took full advantage of the situation to the detriment of the Indians. When Texas attained statehood, the United States conceded the right of Texas to an exclusive proprietary

interest in all its public lands. During the years that followed, the United States never owned or claimed to have owned any public lands in Texas.

* * *

At page 570:

* * *

The Caddo Tribe's tenure in Mexico, later the State of Texas, was at the sufferance of the respective territorial and state governments. They never acquired rights in one acre of Texas lands. When in 1895 the Caddos and the other Texas tribes were compelled to flee for their lives into the Indian territory, they neither abandoned nor lost possessory rights to lands in Texas. Indeed the only property they actually possessed was what they could carry on their backs.

* * *

The plaintiffs in the instant case assert that these three precedents are not controlling herein and distinguish them on various grounds.

As to Wichita Indians, et al v. United States, 89 C. Cls. 378 (1939), they first contend that the case was decided pursuant to a Jurisdictional Act and the Court therefore did not have before it issues which might be presented under the Indian Claims Commission Act, more specifically fair and honorable dealings, which might have required a different result.

To surmise what a Court would have done if it had jurisdiction over a question is not only inappropriate, but it cannot change the rulings of that Court over those matters over which it did have jurisdiction. In the Wichita case the absence of a provision in the Jurisdictional Act covering fair and honorable dealings did not deprive the Court of its right to make a full and complete inquiry into all aspects of the

case over which it did have jurisdiction and to base its conclusion on more than one ground, any one of which would be binding upon the Commission under the Indian Claims Commission Act in any matter arising or involving the same issues of law and/or fact and in which the jurisdiction of the Court and the Commission are coincidental. For this reason it cannot be said that the Wichita case might not be controlling even though the Court lacked jurisdiction to try the case based upon fair and honorable dealings.

Petitioners also contend that the second holding of the Court, i.e., "the United States cannot be held liable to compensate these Indians for the loss of their lands in the State of Texas, in and to which the United States had no right, title or interest before or after the Indians were compelled to abandon them", was dictum and not controlling.

Numerous decisions have held that where two grounds are given for a decision, neither is to be considered mere dictum. Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949); United States v. Title Ins. Co., 265 U.S. 472, 486 (1924); Union Pacific Co., v. Mason City Co., 199 U.S. 160, 166 (1905). Hence this part of the holding cannot be considered mere dictum.

Plaintiffs assert that in neither of the cases of Texas Cherokees, et al v. United States, 2 Ind. Cl. Comm. 516 (1953) and Caddo Tribe of Oklahoma, et al v. United States, 9 Ind. Cl. Comm. 557 (1961), did the plaintiff tribes establish a right of occupancy to any part of the public lands of Texas; that in the Texas Cherokee case the Indians were expelled from Texas prior to the admission of Texas to

the Union; and that any rights of occupancy which the Cherokee had to lands in Texas were extinguished by the Republic of Texas and prior to the acquisition of sovereignty by the United States.

In the Caddo case it is pointed out that those Indians were not in Texas long enough to establish immemorial possession.

It is acknowledged by the Commission that a precedent may be distinguished on many grounds and that there are differences in the three cases cited above from the case at hand. However, the law remains as stated in the Wichita case, that the United States cannot be held liable for the loss of lands in and to which the United States had no right, title or interest before or after the Indians were compelled to abandon them. This was the underlying reason for the holdings in both the Texas Cherokees, et al v. United States and in the Caddo Tribe of Oklahoma v. United States, supra.

In the instant case it is essential for plaintiffs to show that they had the right of occupancy in Texas. It is asserted that this right of occupancy existed and is admitted by defendant's motion to dismiss. But whether or not this admitted occupancy was a compensable right under the Indian Claims Commission Act is a question of law. Therefore, plaintiffs' allegation that claimants had a compensable right of occupancy in Texas becomes in this instance a conclusion of law and as a conclusion of law it is not admitted by defendant's motion to dismiss.

"While the demurrer admits all the allegations of the petition that are well pleaded, it does not admit allegations which are conclusions of law". The Creek Nation v. United States, 92 C. Cls. 346, 351.

The Republic of Texas, established in 1836, was a sovereign nation and was recognized as such by the United States and other foreign countries.

Texas negotiated with the United States in regard to how and under what circumstances it would enter the Union.

By Joint Resolution approved March 1, 1845 (5 Stat. 797) the United States annexed Texas. This Resolution provided, in part, as follows:

* * * said State, (Texas) when admitted into the Union, after ceding to the U. S. all public edifices, fortifications, barracks, ports and harbors, navy and navy yards, docks, magazines, arms, ornaments, and all other property and means pertaining to public defense belonging to said Republic of Texas, shall retain all public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liability to be disposed of as said state may direct; but in no event are said debts and liabilities to become a charge upon the Government of the U. S. * * *

Texas was admitted into the Union by Joint Resolution (9 Stat. 108), approved December 29, 1845, which provided, in part, as follows:

* * *

Whereas, the Congress of the U. S., by a joint resolution approved March the first, eighteen hundred and forty five, did consent that the territory properly included within, and rightfully belonging to, the Republic of Texas, might be erected into a new State, to be called the State of Texas, * * * and declare that they assented to and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution * * *.

* * * That the State of Texas shall be one, and is hereby declared to be one, of the U. S. of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

* * *

It is observed first, that the United States did not acquire an interest in Texas lands. This has been stated in numerous cases and is admitted by plaintiffs.

Secondly, it is observed that Texas was admitted upon an "equal footing" with the original states.

It is therefore necessary to determine whether the "equal footing" clause in the Joint Resolution admitting Texas to the Union required Texas to surrender the same powers to the United States as were surrendered by the original states.

The case of United States v. Texas, 339 U. S. 707, held that the "equal footing" clause prevents extension of the sovereignty of a state into a domain of political and sovereign power of the United States from which other states have been excluded, just as it prevents a contraction of sovereignty which would produce inequality among the states. For equality of states means that they are not "less or greater, or different in dignity or power". In order to avoid placing Texas on a greater or different footing than the original states it must be held that upon the admission of Texas to the Union it surrendered to the United States the same powers that the original states surrendered to the United States.

Hence, it is not questioned that the United States has the same rights and powers in Texas as it has in the original thirteen States. However, the crucial question is whether or not the Indians of Texas had a compensable right of occupancy in Texas under the Indian Claims Commission Act.

The ultimate result of plaintiffs' contentions is that the "equal footing" clause not only requires Texas to surrender the same powers as the original states relinquished, but it also has the effect of imposing upon Texas lands the same rights of Indian occupancy that existed in the original States.

By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the "propriety and territorial rights of the United States" whose boundaries were fixed in the second article. By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain, passed definitely to these states. We had before taken possession of them by declaring independence, but neither the Declaration of Independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted that either the United States, or the several states, has a clear title to all of the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it. Johnson v. M'Intosh, 8 Wheat 543, 5 L. Ed. 681 (1823).

It is therefore noted that the lands in the original states were held subject to the Indian right of occupancy because these states received only that title that Great Britain had to convey.

This was not true in Texas. In the case of Caddo Tribe of Oklahoma, et al v. United States, supra, this Commission held:

* * *

Under the public laws of the Republic of Texas the Indians residing within its Territorial limits were not accorded possessory rights to lands upon which they resided. Since there was no respect for any alleged Indian title, the white settlers took full advantage of the situation to the detriment of the Indians. When Texas attained statehood, the United States conceded the right of Texas to an exclusive proprietary interest in all its public lands. During the years that followed the United States never owned or claimed to have owned any public lands in Texas.

* * *

If Texas did not accord the Indian the right of occupancy and the United States did not acquire any proprietary interests in Texas lands then the "equal footing" clause will not have the effect of vesting the Indian with the right of occupancy that did not exist in Texas. No case is found wherein it has been held that the powers granted to the government under the Consitution operated to vest the Indians with rights in land which they did not have before sovereignty of the United States attached.

Plaintiffs' last contention is that the United States recognized that the Indians had the right of occupancy in Texas because of numerous treaties entered into between the United States and the Indians of Texas. The treaties cited by plaintiffs are the Treaty of May 15, 1846 (9 Stat. 844), the Treaty of Guadalupe Hidalgo of February 2, 1848 (9 Stat. 922), the Act of September 9, 1850 (9 Stat. 446), and the

Treaty of July 1, 1852 (10 Stat. 979). None of these treaties acknowledged that the Indians of Texas had possessory rights in Texas lands. Furthermore, there is only one treaty entered into by the Indians herein and the United States. That was the Treaty of May 15, 1846 (9 Stat. 844). This treaty has been held to have been only a treaty of peace and that no Indian rights to lands in Texas were granted or confirmed by it. Wichita v. United States, supra, and Caddo Indians of Oklahoma, et al v. United States, supra. It should be noted that even in this treaty only the Lipan Indians are signatories. The Mescalero Indians do not appear by name anywhere in the treaty.

It is therefore concluded that the Indians herein did not have the right of occupancy to lands in Texas; that the Commerce Clause of the United States Constitution did not vest them with rights to lands in Texas; and that no treaty granted them rights to lands in Texas. Hence, it must be held that even though the United States joined Texas troops in removing the Indians herein from Texas lands they were not deprived of possessory or compensable rights.

Having so concluded, it must be held that plaintiffs' petition fails to state a cause of action against the United States upon which relief can be granted and defendant's motion to dismiss will be granted.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner