BEFORE THE INDIAN CLAIMS COMMISSION

GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ET AL., Petitioner,	)	
v.	)	Docket Nos. 236-K, L, and M
UNITED STATES OF AMERICA. Defendant.	)	

Decided: December 12, 1968

Appearances:
Z. Simpson Cox, Esq. Attorney for Petitioner.

David M. Marshall, Esq., with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for the Defendant.

OPINION

Yarborough, Commissioner, delivered the Opinion of the Commission:

The defendant has moved for a summary judgment dismissing the claims in Docket Nos. 236-K, L and M. Inasmuch as the defendant has not presented matters outside the pleadings, we shall treat them as motions to dismiss.

Those petitions assert claims based on damages to the tribal petitioner resulting from defendant's breach of its obligation as guardian of Indians generally and an obligation created by affirmative acts of providing Indian education, health services and administration. Damage is alleged based on defendant's failure to provide adequate educational facilities and instructors and instruction in particular

subjects (Docket No. 236-K). Damage is alleged for defendant's failure to provide adequate medical facilities and personnel to care for the health and safety of the petitioner (Docket No. 236-L). And damage is alleged because defendant "undertook to, and did, subjugate petitioner under wardship to a stagnation of self-expression...[and] bridled petitioner into cultural impotency." (Docket No. 236-M)

Defendant's motion for summary judgment is directed to the three petitions as failing to state claims which are tribal rather than individual (over which the Indian Claims Commission has no jurisdiction), and failing to state claims on which relief can be granted. It seems agreed that the same principles are applicable in testing each of these claims.

If there has been damage to the tribe as a result of failures in performance of some of defendant's activities, there would be responsibility under the Indian Claims Commission Act only under that clause giving the Commission jurisdiction over "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." [25 U.S.C. §70a(5)]

The short answer to petitioner's suit is that we can find nothing in the legislative history of the Indian Claims Commission Act to suggest that claims this broad were intended to be embraced in the designedly broad grant of jurisdiction to the Indian Claims Commission. We conceive that the Act is designed to provide corrections for specific acts of less than fair and honorable

dealings with the Indian tribes, not provide for an assessment of the possible damaging consequences of the whole history of United States Indian policy, which is the essence of petitioner's claim. 1/

Accepting petitioner's allegation that the United States did undertake to provide some educational and health services to petitioners, and assumed administrative direction of the petitioner's reservation, it is not alleged that the United States violated any statute, treaty or other agreement or obligation in its manner of furnishing those services. The Government's duty is alleged to arise from its affirmative action in providing the services, and a subsequent failure of performance that resulted in damage to the tribe. The petitions do not allege specific acts that caused specific damage to the tribe, but seem grounded on defendant's whole conduct over an extended period of time.

Of course, any such detriment as visited on or shown by an individual would not give rise to a claim within the Commission's jurisdiction (see Cherokee Freedmen v. United States, 10 Ind. Cl. Comm. 109 (1961) affirmed in part; remanded in part for further proceedings, 161 Ct. Cls. 787 (1963)).

1/ Exclusion of health, education, and agency administrative expenses from consideration as possible offsets under our Act provides some support for asserting that any actions taken by the Government in those areas were intended to be outside the purview of the Commission.

For the purpose of testing the petition, we shall entertain the concept that damage to the tribe as an entity could be shown, giving rise to a truly tribal claim as opposed to the collective claims of individuals.

Even going so far to accept the theory of the petitions, we cannot find in the pleadings any setting out of a duty on the part of the defendant that is subject to judicial definition. Generally speaking we would assume that when defendant undertook to provide the various services it undertook to do no harm by them; the petitions do not allege an intent of the defendant to cause harm to the petitioner. But a government cannot be a guarantor that beneficial results will always flow to a group from its furnishing of educational and health services and administration. Whether its obligation to the petitioner requires the exercise of "due care," or the "highest standard of care,"[2/] we hold that there can be no judicial establishment of a standard of care in providing these services.

2/ See the discussion by the Court of Claims in the Oneida case:

> "We think, similarly, that in this suit under the Indian Claims Commission Act we must hold that the United States had an obligation to the Oneidas greater than that of a non-participating bystander, or of a sovereign toward its ordinary citizens, or of a landowner toward his tenant. The relationship was special and from it there stemmed a special responsibility."
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> "It is unimportant, in this case, to characterize that obligation precisely. Whether the responsibility

In education, for example, what standard should be used to define the extent of defendant's duty? Should schools have been provided as good as any others in the immediate area, or Arizona, or the Southwest, or the United States? Should they be tested by the educational standards of that year, or the decade past, or the decade to come? Should more "Indian culture" as opposed to "white culture" have been taught, and in day schools or boarding schools? Considering petitioner's situation, what type of education was most appropriate, college—preparatory or vocational, or some reasonable mixture, as now to be determined by the Commission? Stating the problems that would arise in attempting to define the defendant's duty makes it plain that there is not here the type of obligation whose scope can be defined with satisfactory exactness to find a breach giving rise to a cause of action for damages by the tribe, even under the broad jurisdiction of the Indian Claims Commission Act.

The result reached here is not to ignore that the petitions state complaints that may well reflect a valid criticism of one-time governmental policies. As such the complaints would presumably

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2/ be termed that of a guardian, a fiduciary, a trustee, a protector, or of a superior sovereign to a dependent people, the duty of care imposed upon the defendant would be the same. It would not reach the insurer's level nor fall to that of an outsider. The measure of accountability depends, whatever the label, upon the whole complex of factors and elements which should be taken into consideration." Oneida Tribe of Indians v. U.S., 165 Ct. Cls. 487, 493-494 (1964).

be common to many Indian tribes, and may be redressed through the political process, if indeed they have not already been redressed by more generous and enlightened governmental Indian policies. However, we do not think the petitions state causes of action cognizable as claims under the standards of jurisdiction set forth in the Indian Claims Commission Act.

Richard W. Yarborough, Commissioner

We Concur:

John T. Vance, Chairman

Jerome K. Kuykendall, Commissioner

Margaret H. Pierce, Commissioner

Theo. R. McKeldin, Commissioner