BEFORE THE INDIAN CLAIMS COMMISSION

THE TLINGIT AND HAIDA INDIANS OF ALASKA, in its own right and as the representatives of, or successor to, the tribes, clans and groups of Tlingit and Haida Indians of Alaska, and The tribes, clans and groups of Tlingit and Haida Indians of Alaska, in their own right, jointly and severally, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 278-A

Decided: May 14, 1969

Appearances:
I. S. Weissbrodt, Attorney for Plaintiff, Abe W. Weissbrodt and Ruth W. Duhl on the brief.

Ralph A. Barney, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorney for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Defendant has moved to dismiss the First Supplemental and Amended Petition filed September 13, 1968 on grounds of res judicata and for failure to state a claim within the jurisdiction of the Commission. Memoranda have been filed by the parties and the Commission has heard argument on the questions involved.

As a preface to a discussion of the contentions, a statement of the procedural history of the case is necessary. The Act of June 19, 1935 (49 Stat. 388) authorized the Tlingit and Haida Indians of Alaska to file suit in the Court of Claims for all then-accrued claims, legal and equitable, for property rights of the Indians lost to them by action of the United States. Plaintiffs' petition was filed in that Court October 1, 1947 (No. 47900) and proceedings there were concluded January 19, 1968. The opinions of the Court and findings of fact are reported at 147 Ct. Cl. 315 (1959) and 182 Ct. Cl. 130 (1968).

Meanwhile, the Indian Claims Commission Act was enacted August 13, 1946. Plaintiffs filed a timely petition on August 9, 1951 with the Indian Claims Commission. On October 11, 1951, defendant filed the first of a series of motions requesting an extension of time in which to answer, and, on November 17, 1960, moved to dismiss the petition on grounds of the pendency of the Court of Claims suit. On December 7, 1960, the parties stipulated that the Commission proceedings should be stayed pending disposition of the Court of Claims suit. After such disposition in 1968, defendant's motion to dismiss was withdrawn, and petitioners filed amended petitions severing and restating their causes of action. This petition, Docket No. 278-A, stating petitioners' fishing rights claim, was filed September 13, 1968; defendant moved dismissal October 29, 1968.

Reserving for the moment the question of res judicata, we examine defendant's contention that the Court of Claims decision in the Tlingit and Haida case No. 47900 forecloses the validity of the claim asserted here. The claim in the amended petition of our case No. 278-A is stated as follows:

> "In breach of 'fair and honorable dealings that are not recognized by any existing rule of law or equity', the United States, to the great damage of, and loss to, the Tlingit and Haida,
>
> (a) encouraged, assisted and permitted citizens of the United States to invade and exploit the fisheries to which the Tlingit and Haida, under their property concepts and in accordance with their way of life, had exclusive rights; and
>
> (b) prevented the Tlingit and Haida from exercising their exclusive rights and dominion over the use of their fisheries in accordance with the Tlingit and Haida property concepts and way of life; and
>
> (c) took from the Tlingit and Haida fisheries to which the Tlingit and Haida, under their property concepts and in accordance with their way of life, had exclusive rights."

In its decision analyzing the existing precedents of law and equity, the Court of Claims has expressly denied the petitioners any exclusive right to the fish of navigable waters based on their aboriginal occupancy of the area. Tlingit and Haida Indians v. United States, 182 Ct. Cls. 130. There is no need to repeat that discussion here; we regard it as conclusive that petitioners had no property right in the uncaught fish.

In the Indian's concept, however, they did have such an exclusive right. Could the obligation of fair and honorable dealings by the Government with the Indians extend to finding a breach if the Government failed to recognize or confirm such an Indian claim of right in some way? Stated this generally, we feel the answer must be no. The public policy of the United States, that a right of capture extends to all alike in pursuing the fish of navigable waters, is so rooted in precedent and endowed with merit that we could not find a breach of any obligation by the Government if it did not derogate this right of all for the benefit of Indian petitioners by some way ratifying their assertion of exclusive rights. See Hynes v. Grimes Packing Co., 337 U.S. 86 (1949).

On the other hand, the Government at the least had an obligation to protect the petitioners in their exercise of their right of capture. From the findings of the Court of Claims, we know that Tlingit and Haida subsistence depended on their catch from the sea. We can conceive of acts that might be done by the Government that would amount to a breach of fair and honorable dealings in interfering with the petitioners' right of capture of the fish on which their subsistence depended. Some statements by the Court of Claims indicate the existence of such facts:

> "***However, the manner in which the Government officials administered the Organic Act of 1884, and the actual provisions of subsequent legislation relative to land in Alaska, made it possible for white settlers, miners, traders and businessmen to legally deprive the Tlingit and Haida Indians of their use of the fishing areas, their hunting and gathering grounds and their timber lands and that is precisely what was done.***" 147 Ct. Cls. at 339-40. See Findings 101 and 102, 147 Ct. Cls. 435-6.

There are also findings with a contrary thrust, but also not determinative of the issue. The Court of Claims was concerned with takings of a property right, not possible interference with the right of capture.

The extent of the Government's obligation of fair and honorable dealings with a tribe cannot be set out abstractly, but must be determined in the context of all the facts of the transactions between the Government and the Indians. "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. United States, 165 Ct. Cls. 487,494 (1964). We feel the petition in Docket No. 278-A contains within it a claim not foreclosed by the Court of Claims in its Tlingit and Haida case: whether there was a lack of fair and honorable dealings with respect to the petitioners' right of capture of fish.

Defendant urges that petitioners' claim here could have been asserted in the Court of Claims suit, and that Court's decision on petitioners' fishing rights is *res judicata* as to the fishing rights claim asserted here.

"When a claim is presented under either clause 3 or 5, section 2 of the act, and the defense of res judicata is interposed by the Government, the Indian Claims Commission must compare the pleadings in the case with the prior decision and its jurisdictional act. Disregarding for the

moment the question of identity of facts or issues, if it appears that the claim presented is one which could not have been reached by the court in the prior case, res judicata does not apply. This is so even though recovery could have been had for the Indians on some theory cognizable by the court at that time." The Creek Nation v. United States, 168 Ct. Cls. 483, at 490 (1964).

The claim here is based on a breach falling under Sec. 2(5) of our Act: "Claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." On the other hand, the suit before the Court of Claims concerned alleged violation of petitioner's legal and equitable property rights, so limited by the jurisdictional act. Unquestionably the Court of Claims decision is based solely on petitioner's legal and equitable property rights, and no actual consideration of a "fair and honorable dealings" claim occurred, Tlingit and Haida Indians v. United States, supra.

The authorization for "fair and honorable dealings" claims of our 1946 Act created a new cause of action that before had not been authorized in Indian claims jurisdictional acts. At the time of enactment of the Indian Claims Commission Act, special jurisdictional acts had authorized some Indian claims suits before the Court of Claims; some had been filed and were pending there, some had not yet been filed. Section 11 of the Indian Claims Commission Act contains the Congressional directive for reconciling the jurisdictions of the Court and the Commission:

> "Any suit pending in the Court of Claims or the Supreme Court of the United States or which shall be filed in the Court of Claims under existing legislation, shall not be transferred to the Commission: Provided, That the provisions of section 2 of this Act, with respect to the deduction of payments, offsets, counterclaims and demands, shall supersede the provisions of the particular jurisdictional Act under which any pending or authorized suit in the Court of Claims has been or will be authorized: Provided further, That the Court of Claims in any suit pending before it at the time of the approval of this Act shall have exclusive jurisdiction to hear and determine any claim based upon fair and honorable dealings arising out of the subject matter of any such suit. Aug. 13, 1946, 60 Stat. 1052.

Defendant argues that the last clause of Section 11 gave to the Court of Claims exclusive jurisdiction to hear the fair and honorable dealings claim pled here. Petitioners point out that this suit was not yet "pending" before the Court of Claims, only authorized, at the date of the Act.

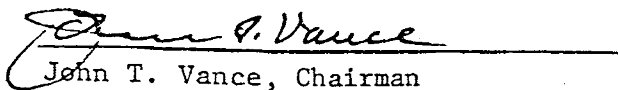
We think that a proper construction of this section of the statute leads to a result in harmony with the plain meaning of its words. The first clause of Section 11 states the two classes of cases, "pending" and "authorized;" the second clause again refers to the two classes, but the third by its terms applies only to "pending" suits. This reflects a plan that is in accord with the Congressional intent as reflected in the materials of the legislative history of the Act. All authorized and pending cases would be left before the Court of Claims for litigation there, so that preparation directed to that tribunal would not be wasted. The new uniform "offset" provisions of the Indian

Claims Commission Act would be applied to all pending and authorized cases before the Court of Claims. On cases already pending before the Court, "fair and honorable dealings" claims would be adjudicated there exclusively, without a separate proceeding before the Indian Claims Commission. But on cases not yet filed, "fair and honorable dealings" claims should be tried before the new Commission, set up to hear this new cause of action (and, of course, others). That the Congressional intent was that wherever possible the "fair and honorable dealing" cases would be a special subject matter to be heard mostly before the Commission is reinforced by Section 24 of the Act, whereby the continuing jurisdiction of the Court of Claims to hear newly accruing Indian claims did not include the grant of jurisdiction of "fair and honorable dealings" claims.

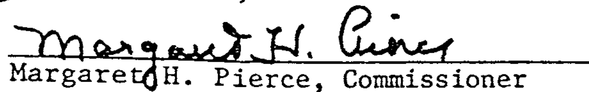
It is our conclusion that petitioners properly preserved their Sec. 2(5) cause of action by a separate filing before the Indian Claims Commission. The Court of Claims did not have jurisdiction to hear that claim in its suit and the claim is not barred by res judicata from being heard here. Summary dismissal at this stage is not appropriate and the claim should proceed to trial on the merits.

Richard W. Yarborough, Commissioner

We concur:



John T. Vance, Chairman



Margaret H. Pierce, Commissioner

*Brantley Blue, Commissioner

*Commissioner Blue did not participate in the consideration or decision in this case.

uykendall, Commissioner, dissenting:

I agree with the majority that the Tlingit and Haida suit in the Court of Claims, though authorized, was not pending at the time of the approval of the Indian Claims Commission Act, and therefore the second proviso of Section 11 was not applicable to plaintiff's action in the Court of Claims. I believe, nevertheless, that res adjudicata applies.

Let us now turn to the rather inscrutable cause of action which the majority finds to be extant. It is, as I understand it, based on the failure of the United States to protect the petitioners in their right to capture fish and exists by virtue of the "fair and honorable dealings clause contained in Section 2 of the Act. I understand the majority to say that it did not exist under the Act which authorized the Tlingits and Haidas to bring suit in the Court of Claims. (Act of June 19, 1925, 49 Stat. 388, Ch. 275.)

I assume that this cause of action is based on a property right or interest (the right to capture fish) and is not simply a personal tort action with no property rights or interests as its basis. This must be so, as I know of no claim before this Commission which has been successfully prosecuted which did not involve some kind of property interest, and have doubt as to whether actions for personal torts can be maintained here. Such causes of action ordinarily do not survive the death of the injured or wronged person and therefore could not now be deemed to be owned by any tribe, band or identifiable group. More importantly, it was the deprivation of the property of Indian tribes, not the personal wrongs of various kinds which the members thereof may have suffered which has damaged the living descendants of those Indians. And it is this material damage which the Indian

Claims Commission Act attempts to rectify.

The legislative history of the Indian Claims Commission Act clearly shows that the purpose of the "fair and honorable dealings" clause was to give the same basis for suits before the Indian Claims Commission as that which was given to the Tlingits and Haidas in the Act above mentioned. 1/

1/ Report No. 1466 from the House Committee on Indian Affairs, dated December 20, 1945, which accompanied H. R. 4497, the bill which, with amendments, ultimately became the Indian Claims Commission Act, contains the following language on page 12 thereof:

> "The sixth classification, supra, permits Indian tribes to assert any claim which would arise on a basis of fair and honorable dealings, even though not recognized by any existing rule of law or equity. This extension of jurisdiction is believed to be justified by reason of the fact that we have always treated the Indian tribes as non sui juris and have set ourselves up as their guardians. In this relationship many claims, not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts (e.g., Tlingit and Haida Claims Act of 1935 (49 Stat. 388), as amended by the acts of June 5, 1942 (56 Stat. 543), and June 4, 1945 (Public, No. 70, 79th Cong., 1st sess.)). * * *"

During the debate of H. R. 4497 on the floor of the House, Congressman Henry M. Jackson, the author and manager of the bill stated the following which appears on pages 5312 and 5313 of the Congressional Record for May 20, 1946:

> "In order to make sure that we have included all possible claims within the jurisdiction of the Commission, we have gone over the various special Indian jurisdictional acts that Congress has passed in recent years and put together the various phrases that are used in these different acts. We might have condensed this language but we thought it best even at the risk of some duplication or overlapping to make sure that we had covered every sort of case which Congress has in recent years considered worthy of a hearing. It will be noted that some of the categories refer to purely legal claims, while others refer to claims based on equity and fair dealing, such as Congress permitted to be heard in the California Claims Act of 1928, and the Alaskan Tlingit and Haida Claims Act of 1935. * * *"

It appears to me that the Tlingit and Haida Act authorized suit on every conceivable kind of property right, and did not limit those Indians to purely legal and equitable property rights. The title of the Act speaks of "*** any and all claims which said Indians may have or claim to have ***." Although Section 2 commences with the words: "All claims of whatever nature, legal or equitable ***", the entire Act, plus the legislative history above cited, forces the conclusion that the words "legal or equitable" are descriptive and not restrictive. In any event they could not possibly restrict or modify in any way the cause of action created in Section 2 "*** for the failure or refusal of the United States to protect their interests in lands or other tribal or community property in Alaska or for loss of use of the same.***" A fortiori, the cause of action the majority describe was authorized by the Tlingit and Haida Act, supra. It also was considered and passed upon by the Court of Claims in its 1968 decision, 182 Ct. Cl. 130 at page 145, where the Court said:

> "*** The land taken prevented access to the fishing site and denied the Indian his opportunity to fish as easily as had been previously possible. The value of the land and the resources on that land which enhanced its value, and to which they had title, are the only bases for compensation."

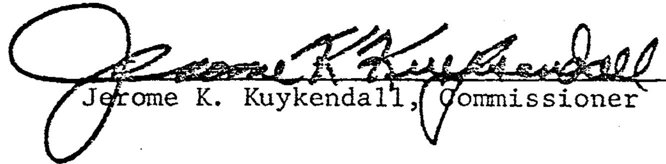
The cause of action the majority see as remaining unlitigated is and can only be the same as that which has already been adjudicated; namely, a property interest in fish. "That which we call a rose, By any other name would smell as sweet."

Furthermore, the action of the Commission leaves the parties in a most unsatisfactory state. We say that petitioners' claim as now presented

should be dismissed, but we do not dismiss it. Petitioners may not wish to accept the views of the majority and proceed on the basis they authorize, and instead, may wish to appeal. We should not now deprive them of that right. On the other hand, the defendant has been told that the petition should be dismissed, but we don't dismiss it. It is doubtful if the defendant can appeal at this time.

Under the circumstances, I would favor certifying this matter to the Court of Claims pursuant to Section 20(a) of the Act.

I would grant the motion to dismiss.



Jerome K. Kuykendall, Commissioner