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 Sombrero, 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,

THE PUEBLO DE SAN ANTONIO DE LA YSLETA DEL SUR, AND THE PIROS, MANSOS AND SUMAS TRIBES, AND THE PUEBLO OF THE TIGUA INDIAN COMMUNITY,

Intervenors,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 22-C

Decided: November 5, 1969.

Appearances:
Abe W. Weissbrodt, Attorney for Plaintiffs
Tom Diamond, Attorney for Intervenors
Edwin B. Hatch, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The Pueblo De San Antonio De La Ysleta Del Sur Tribe, also known as the Tigua Indian Community, has moved for leave to intervene in

the claim of The Lipan Apache Tribes, et al v. United States, Docket No. 22-C, presently before the Commission upon remand from the United States Court of Claims, 180 Ct. Cl. 487 (1967). Intervenors claim, in addition to representing the Tigua Pueblo, to be entitled to present the claims of the Senecu Piros, the Mansos and the Sumas, which tribes are alleged to be amalgamated into the Pueblo De San Antonio De La Ysleta Del Sur. In the alternative, intervenors have asked that their petition be permitted to stand as an original petition and a new cause of action before the Commission or on appeal in the Court of Claims. They claim damages and ask for other relief for the taking of certain lands, hunting and fishing rights, mineral rights and water rights in Texas. The lands claimed by intervenors are lands which plaintiffs claim were continuously used and occupied for several hundred years prior to the admission of Texas into the Union, to the exclusion of other people, by the Mescalero Apache Tribe and bands thereof.

Initially it should be noted that the amount of plaintiffs' recovery will be the same whether or not the Tiguas intervene because any lands exclusively used and occupied by ancestors of the Tiguas could not be the subject of an award to plaintiffs. On the other hand, the Government could be subjected to additional liability by reason of the Tiguas' intervention. However, the Government does not object to such intervention if the Commission finds that certain statutes cited by the Government do not bar the claim. In addition, no delay is likely in the case if intervenors' petition is granted,

since the extent of Tigua use and occupation is likely to be at issue in any event in order to show the extent of use and occupation by the Mescalero Apache.

However certain jurisdictional objections which have been raised must be resolved since even consent of all the parties is not sufficient to overcome the absence of jurisdiction over the subject matter of the claim. The first jurisdictional problem is that of the limitation period in Section 12 of the Indian Claims Commission Act. If, though, the claim of the Tiguas is part of the same cause of action as the claim in Docket 22-C, it relates back to the timely filing of Docket 22. Thus the questions of intervention and of timeliness turn upon the same issue: Is the claim of the Tiguas the same cause of action as is presently stated in Docket 22-C?

A cause of action is defined in scope by the conduct, transaction or occurrence out of which it arose. In the present case both plaintiffs and intervenors point to the same conduct by the United States as the basis for their claims. They allege that the United States transferred public lands to Texas without requiring the State to protect aboriginal occupancy rights. This, they contend, was a breach of a duty assumed by the United States toward the Indian occupants of the area. We feel that this common alleged source of injury is sufficient to permit intervention. The question of the existence and scope of the government's duty to the Texas

Indians is before the Commission in this case on remand from the Court of Claims.

Our conclusion to permit intervention is supported by two cases decided by the Court of Claims. In The Blackfeet and Gros Ventre Tribes, et al v. United States, 162 Ct. Cl. 136 (1963), the Court allowed the Assiniboine Tribe to intervene when its claim arose out of the same cession agreement as did the claim of plaintiffs in the action. In Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570 (1967), the Court permitted the Snoqualmie Tribe to maintain an action on behalf of the Skykomish Tribe as well as on its own behalf, even though the claim for the Skykomish was inserted into the pleadings after the limitations date. The Court reasoned that the pleading of the Point Elliott Treaty, from which both claims arose, sufficiently put the Government on notice of the possibility of a claim on behalf of the Skykomish.

In the same way, we feel that the filing of the present action put the Government on notice that it would be required to litigate the question of title to all the land in Texas included in the claim in Docket No. 22-C. Reference even to the most basic sources would have informed the Government that the Tiguas might have had a claim to part of this land. Thus the Handbook of American Indians, Bureau of American Ethnology, Bul. 30, pt. 2 (1912), includes a history of the Tiguas and indicates that a portion of them lived at Isleta del Sur, Texas, Id. at 747-749.

Assuming that the Tiguas would normally be able to intervene under these circumstances, we are faced with the question of whether a different result is dictated by the Act of April 12, 1968, 82 Stat. 93, which formally recognized the Tiguas and provided:

> Responsibility, if any for the Tiwa Indians of Ysleta del Sur is herewith transferred to the State of Texas. Nothing in this Act shall make such tribe or its members eligible for any services performed by the United States for Indians because of their status as Indians nor subject the United States to any responsibility, liability, claim, or demand of any nature to or by such tribe or its members arising out of their status as Indians, and none of the statutes of the United States which affect Indians because of their status as Indians, shall be applicable to the Tiwa Indians of Ysleta del Sur.

This Act was intended to effectuate a specific limited result. As stated in the Senate Report on the measure:

> The Texas constitution contains no express authority for the recognition of or assistance to Indian tribes. The Legislature of the State of Texas has enacted legislation for the benefit of the Tiwa Indians. In order to overcome the lack of authorization in the State constitution to treat Indians differently than other citizens, the enactment of H.R. 10599 is necessary. (S. Rep. 1070, 90th Cong., 2d Sess., reprinted at 114 Cong. Rec. 8436 (April 1, 1968)).

Thus Congress was attempting to allow Texas to aid the Tiguas without changing their relationship to the Federal government. The Bureau of Indian Affairs had never recognized responsibility for the Tiguas. The disclaimer in the Act was necessary to prevent its being interpreted as making the Tiguas eligible for Federal services which they formerly had not received, and to prevent any future claims that the Government breached some duty to the Tiguas by transferring

responsibility for them to the State of Texas. Nothing in the Act however indicates that Congress intended to remove from the Tiguas any preexisting rights. In particular, there is no indication that this Act intended to preclude the Tiguas from asserting a claim under the Indian Claims Commission Act which was so painstakingly drafted to allow the assertion of every kind of claim by a broadly defined class of claimants. If anything, the indication is directly to the contrary. In debate on the bill, its sponsor in the Senate stated:

> This recognition by the Congress of the United States will give them [the Tiguas] the juridical status that is their just due. (114 Cong. Rec. 8436 (April 1, 1968)).

We therefore hold that the Act of April 12, 1968 does not preclude the filing of a claim by the Tigua Indians before the Indian Claims Commission.

The Tiguas are entitled to maintain a claim before this Commission only if they are a tribe, band or other identifiable group of Indians. The articles reprinted in the Congressional Record during the debate on the Act of April 12, 1968, 114 Cong. Rec. 8428-8435 (April 1, 1968), and the references to the Tiguas in standard reference works, Handbook of American Indians, supra.; Swanton, The Indian Tribes of North America, Bureau of American Ethnology, Bul. 145 (1952, republished 1968) 344-346, leave no doubt that the Tiguas are an identifiable group of Indians as that term is used in Section 2 of the Indian Claims Commission Act. No determination of the intervenor's claim to be entitled to maintain an action on behalf of the

Senecu Piros, the Mansos, and the Sumas can be made without the taking of further evidence on the question.

Finally we are faced with the contention that no attorney's contract has been approved by the Secretary of the Interior, pursuant to 25 U.S.C. Secs. 81, 82-84. A contract submitted for approval has been returned to intervenors' attorney without comment by the Commissioner of Indian Affairs on the ground that the Bureau of Indian Affairs is without authority to act on the contract, at least until this Commission determines that intervenors are a tribe, band, or identifiable group of Indians entitled to maintain a claim. It is our conclusion that approval of the contract between intervenors and their attorney is not required. Section 15 of the Indian Claims Commission Act provides that employment of attorneys by claimants other than tribes organized pursuant to 25 U.S.C. §476 "shall be subject to the provisions of" 25 U.S.C. §§81, 82-84. Thus the right to counsel guaranteed by Section 15 of the Indian Claims Commission Act was not to be read as a pro tanto repeal of the requirements for approval of attorneys' contracts for tribes under Federal jurisdiction. Section 15, however, does not add any new requirement of approval for attorneys' contracts beyond those existing in 25 U.S.C. §§81, 82-84. The Act of April 12, 1968 transferred to the State of Texas all Federal responsibility, if any, for the Tiguas. Even prior to this legislation the Bureau of Indian Affairs took the position that the tribe was not entitled to any special Federal services. Since the Federal government now

clearly has no special responsibility to the Tiguas, the special protective provisions of 25 U.S.C. §§81, 82-84 do not apply to them. Contract approval being unnecessary under these provisions, the Tiguas' right to retain counsel pursuant to Section 15 of the Indian Claims Commission Act is unconditional. It should be noted that Section 15 of the Indian Claims Commission Act provides:

> The fees of such attorney ... shall, unless the amount of such fees is stipulated in the approved contract between the attorney ... and the claimant, be fixed by the Commission .... (emphasis added)

Since no approved contract exists, the attorneys' fees remain subject to determination by the Commission under the standards set out in Section 15.

For the above reasons, the Motion for Leave to Intervene filed by the Pueblo De San Antonio De La Ysleta Del Sur is granted.

Brantley Blue
Brantley Blue, Commissioner

Concurring:

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance
John T. Vance, Commissioner

Margaret H. Pierce
Margaret H. Pierce, Commissioner

Commissioner Yarborough took no part in the consideration of or decision on the motion.