BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT SILL APACHE TRIBE OF THE STATE OF OKLAHOMA,	)	
THE WARM SPRING BAND OF APACHES, EX REL. SAM HAOZOUS,	)	
THE CHIRICAHUA BAND OF APACHES, EX REL. JAMES KAYWAYKLA, SR.,	)	Docket No. 49
THE FORT SILL APACHES, EX REL. BENEDICT JOHZE,	)	
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: September 24, 1971

Appearances:

I. S. Weissbrodt and Abe W. Weissbrodt, Attorneys for the Plaintiffs; Richmond F. Allan and Ruth W. Duhl were on the briefs.

Richard L. Beal, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION ON DEFENDANT'S MOTION TO DISMISS

Pierce, Commissioner, delivered the opinion of the Commission.

On May 17, 1971, the defendant, United States of America, filed a motion before the Commission pursuant to Rules 11(b)(1) and (4) of the Commission's General Rules of Procedure, 25 CFR §503.11 (b)(1) and

(4) (1968), seeking dismissal of the plaintiffs' claims herein on the grounds that the Commission lacks jurisdiction over the subject matter of said claims and that the petition herein fails to state a claim upon which relief can be granted under Section 2, Clause (5) of the Indian Claims Commission Act (60 Stat. 1049, 1050).

The plaintiffs are claiming relief under clauses (2) and (5) of section 2 of the Act, alleging damages for injuries inflicted upon the ancestral bands by the United States as a result of wrongful acts of officials and troops of the Government (1) in arresting and imprisoning the bands and continuing such imprisonment for a period of 27 years and (2) in evicting the bands from their homelands in violation of treaty pledges made by the United States to protect and provide for the bands in said lands, as a result of which acts the bands were thwarted in the advancement of the common purposes of their formation. Plaintiffs have stated in their brief in opposition to the motion that they are not, in this docket, seeking payment for their lands.

Plaintiffs have based their claims upon alleged obligations undertaken by the United States by virtue of the Indian Trade and Intercourse Act of June 30, 1834 (4 Stat. 729), made applicable to the Territory of New Mexico by Section 7 of the Act of February 27, 1851 (9 Stat. 574, 587), and by virtue of the Treaty of July 1, 1852, between the United States and the Apache Nation of Indians (10 Stat. 979), ratified March 23, 1853, and proclaimed March 25, 1853. Plaintiffs assert that

under the act and treaty, defendant undertook to protect the bands in the peaceful occupation of their ancestral lands and that in violating said undertaking the defendant incurred liability under the Indian Claims Commission Act.

The Fort Sill Apache Tribe, as sole plaintiff, originally pleaded a claim for arrest and imprisonment, together with certain land claims, under Docket No. 30 before the Commission. On May 6, 1949, the Commission dismissed the claim for arrest and imprisonment on the ground that it was an individual rather than a tribal claim, and stated as follows:

> We consider arrest and imprisonment a violation of personal rights of individual Indians. It is a personal wrong committed against each individual Indian concerned and not against the tribe or band of which the individual is a member. Any right to a claim for resultant damage suffered by such wrongful act is individual in nature and remains in the individual Indian and is not a right accruing to the tribe or band that can be asserted under the provisions of the Act as a tribal or common group claim against the United States as the alleged wrongdoer. (Ft. Sill Apaches v. United States, Docket 30, 1 Ind. Cl. Comm. 137, 143 (1949).)

On September 14, 1949, the instant suit was filed with the following-named as party-plaintiffs: the Fort Sill Apache Tribe of the State of Oklahoma; the Warm Spring Band of Apaches, on the relation of Sam Haozous; the Chiricahua Band of Apaches, on the relation of James Kaywaykla, Sr.; and the Fort Sill Apaches, on the relation of Benedict Johze. In Paragraph 20 of the petition herein, the plaintiffs alleged, as an element of their claims that "[a]s a

direct consequence of the *** unlawful and wrongful acts of the Respondent, the Warm Spring and Chiricahua Bands and their successors in interest suffered injuries in that, for a period of 27 years, they were thwarted in the advancement of their common purposes of their formation." Defendant, on December 12, 1949, moved for summary judgment on the ground that the claim hereunder was res judicata by virtue of the Commission's dismissal of the claim under Docket No. 30. On December 29, 1950, the Commission denied the defendant's motion without prejudice to the defendant's right to raise the same question by answer. In the motion now before the Commission, the defense of res judicata is not raised by the defendant.

In Docket Nos. 30, 48, 30-A, and 48-A, the Commission, on August 8, 1951, permitted the filing of an amended petition which named as plaintiffs the same parties named as plaintiffs in the instant Docket No. 49. Under Docket Nos. 30, 48, 30-A and 48-A, the plaintiffs have been awarded, under clause (4) of section 2 of the Act, the value of their ancestral lands which the defendant took without payment of any compensation. In those cases the Commission determined that the defendant extinguished the plaintiffs' Indian title on September 4, 1886; that on said date the lands had an aggregate fair market value of $16,496,797; that the defendant was entitled to deduct from this amount the sum of $7,700.00 as gratuitous offsets expended for the benefit of the plaintiffs; and that the plaintiffs were, therefore,

entitled to an award of $16,489,097. See Fort Sill Apache Tribe v. United States, 26 Ind. Cl. Comm. 198 (1971).

In Docket No. 182 which is pending before the Commission, the same plaintiffs are seeking damages on the basis of trespass for white incursions onto their lands and the removal of minerals and timber therefrom prior to the date of taking.

The plaintiffs' claims as pleaded herein may be divided into two separate elements, the first arising under clause (2) of section 2 of the Act and based upon liability in tort for the arrest and imprisonment of the bands' members and their being thereby thwarted in the advancement of the common purposes of their formation, and the second based upon "fair and honorable dealings" under clause (5) of section 2 of the Act. The clause (5) claim is said to have arisen out of the "special relationship" 1/ between the bands and the United States created by the Treaty of July 1, 1852, supra, and the circumstances attendant upon that treaty. The plaintiffs assert that the basic features of the special relationship were (1) the acknowledgment by the United States that the bands held the right of occupancy of their ancestral lands; (2) a commitment by the Government that the bands would be permitted to retain such right of occupancy; and (3) the undertaking by the Government of the duty not only to refrain itself from any acts which might interfere with, disturb or disrupt the bands'

1/ Oneida Tribe v. United States, 165 Ct. Cl. 487, cert. denied, 379 U. S. 946 (1964) (aff'g Docket 159, 12 Ind. Cl. Comm. 1 (1962)).

possession of their homelands but also so to act as to protect the bands and remove every cause that might disturb such possession. It is also urged that the Indian Trade and Intercourse Act of June 30, 1834, supra, created a guardianship obligation requiring the United States to protect the bands in the peaceful occupation of their ancestral lands. Violation of these undertakings is likewise said to have resulted in thwarting the advancement of the common purposes of the bands' formation.

We turn first to consideration of the claim put forward by the plaintiffs under clause (2) of section 2 of the Act for arrest and imprisonment of the bands' members with the result that, for a period of 27 years, the bands were thwarted in the advancement of the common purposes of their formation. After carefully considering this claim, we can only conclude that, as a matter of law, this claim is not one which is within the jurisdiction of this Commission to hear. We are not, in so deciding, relying upon the doctrine of res judicata which was urged by defendant as a ground for dismissal in its motion for summary judgment in 1951, nor are we relying upon the narrower, related doctrine of collateral estoppel.[2/] We have assumed, for purposes of passing upon the defendant's motion here, that the parties herein are not identical with the parties in Docket No. 30, dismissed by the

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2/ See the Court of Claims' discussion of res judicata and collateral estoppel in Creek Nation v. United States, 168 Ct. Cl. 483, 488 n.2 (1964) (rev'g Docket 167, 12 Ind. Cl. Comm. 54 (1963)) and Chapter 3 ("Former Adjudications") in RESTATEMENT OF JUDGMENTS §§61-72 (1942).

Commission on May 6, 1949, supra, and that the cause of action pleaded is not identical with that pleaded in the prior suit.

Our decision herein is predicated, rather, upon the doctrine of stare decisis and is based upon the precedent established early in the life of this Commission by the dismissal of the arrest and imprisonment claim of the Fort Sill Apaches in Docket No. 30, supra. That case stands for the proposition that any claim for damages suffered as a result of the wrongful acts of the United States in arresting and imprisoning members of an Indian tribe (or the whole tribe) is individual in nature and remains in the individual Indian and is not a right accruing to the tribe or band that can be asserted under the Indian Claims Commission Act as a tribal or common group claim against the United States as the alleged wrongdoer. It is irrelevent, then, that each and every member of the bands was imprisoned with the obvious result that the bands, with their entire membership imprisoned, were unable to advance the common purposes of their formation. Since such a claim is individual in nature, this Commission is unable to entertain it under the grant of jurisdiction in Section 2 of the Indian Claims Commission Act (60 Stat. 1050). Accordingly, the plaintiffs' claim under clause (2) of section 2 of the Act must be dismissed on the ground that this Commission lacks jurisdiction of the subject matter thereof.

The plaintiffs' claim under clause (5) of the Act (the "fair and honorable dealings" clause) may clearly be considered tribal in

nature alleging, as it does, the failure by the United States to protect the bands as it is said to have promised to do in the Treaty of 1852 and the Indian Trade and Intercourse Act of 1834. If the United States did, by virtue of the treaty and/or the act, enter into a "special relationship" with the bands, then the plaintiffs may proceed to show what specific acts of the United States were in breach of its "special relationship". As the Court of Claims stated in Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790, 800, 427 F. 2d 1194, cert. denied, 400 U. S. 819 (1970) (aff'g. Docket 236-K, et al., 20 Ind. Cl. Comm. 131 (1968)):

> * * * Affirmative acts such as those allegedly undertaken in our case may lead to liability if they are indeed less than "fair and honorable," and if there is a duty owed; they do not, in and of themselves, create that duty.

However, the threshold question here is one of law; namely, was such a "special relationship" created by either the Treaty of July 1, 1852, or by the Indian Trade and Intercourse Act of June 30, 1834. To make such a determination involves judicial interpretation of the treaty and act and such determination is a matter of law and not an issue of fact. See Citizen Band of Potawatomi Indians v. United States, 179 Ct. Cl. 473, 482, 391 F. 2d 614, 618 (1967), cert. denied, 389 U. S. 1046 (1968) (aff'g in part, rev'g in part Docket 217, et al. 15 Ind. Cl. Comm. 232 (1965)), and Seneca Nation of Indians v. United States, 173 Ct. Cl. 917, 924-25 (1965) (aff'g in part, rev'g in part Docket 342-A, et al. 12 Ind. Cl. Comm. 755 (1963)).

The line of decisions in the Court of Claims and in this Commission have established that a special relationship may exist (1) where the United States assumed the capacity of guardian, trustee, or fiduciary or (2) where the United States supervised the affairs and transactions of the Indians. In the former case, it has been held that general supervision of an Indian tribe by the United States does not suffice to put the United States in the capacity of guardian, trustee or fiduciary. Language in a treaty, agreement or statute is necessary to place the United States in such a capacity. See Gila River Pima-Maricopa Indian Community v. United States, 135 Ct. Cl. 180, 189, 140 F. Supp. 776, 780-81 (1956), dismissed on rule to show cause, 157 Ct. Cl. 941 (1962). In the second situation described above, the creation of a special relationship has consistently been attached to the supervision by the United States of specific Indian property and not to the intangible factors of tribal well-being and cultural advancement. See Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790, supra; Seneca Nation of Indians v. United States, supra; Oneida Tribe of Indians v. United States, supra at 492-94; and Confederated Tribes of the Colville Reservation v. United States, Docket 186, 25 Ind. Cl. Comm. 99, 107-08 (1971).

Both the Court of Claims and this Commission have previously interpreted the Treaty of July 1, 1852, supra, and have found the treaty to be a treaty of peace. In Lipan Apache Tribe v. United States,

180 Ct. Cl. 487, 501 (1967) (rev'g Docket 22-C, 15 Ind. Cl. Comm. 532 (1965)), the Court of Claims discussed the treaty as follows:

> * * * In 1852, the Apache Indians, ***, entered into a treaty of "perpetual peace and amity" with the United States, by which the Indians declared that "they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit." (Treaty of July 1, 1852, ratified March 25, 1853, 10 Stat. 979). See Mescalero Apache Tribe v. United States, 17 Ind. Cl. Comm. 100, 114 (1966). While such treaty statements are insufficient to hold the Federal Government liable as a fiduciary for abridgement of the Indians' rights by a third party, they suffice to protect claimants from the compulsory acquisition of their property by or through the United States. *** "Protection does not imply the destruction of the protected." Worcester v. State of Georgia, supra, 31 U. S. (6 Pet.) at 433.

Under Docket Nos. 30-A and 48-A before the Commission, Ft. Sill Apache Tribe v. United States, 19 Ind. Cl. Comm. 212, 238 (1968), the Commission said of the 1852 Treaty:

> * * * Thereby the United States in effect acknowledged that these Indians claimed rights to occupancy of or control of some areas of land, but indicated that some time in the future an attempt would be made to ascertain the validity of the claims and the territory involved. This negotiation was intended primarily as a treaty of peace, not a settlement of conflicting claims. Subsequently, all parties violated the terms of the Treaty of Santa Fe and no one is in position to assert any benefits or rights thereunder.

We adhere to the interpretations previously placed upon the 1852 Treaty by the Court of Claims and this Commission to the effect that this treaty was a treaty of peace in which the United States did not assume towards the bands the duties of a trustee, guardian or fiduciary.

Thus, we conclude that the Treaty of 1852 created no "special relationship" between the bands and the United States upon which may be predicated, under clause (5) of our Act, a claim such as that pleaded here. See Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790, supra, at 801, and Confederated Tribes of the Colville Reservation v. United States, supra, at 103-08.

Nor can we assent to plaintiffs' contention that the Indian Trade and Intercourse Act of June 30, 1832, created a "special relationship" between the parties. The Indian Trade and Intercourse Acts have consistently been interpreted as creating obligations on the part of the United States to protect the Indian tribes in dealings involving the disposition of their lands. This interpretation is clearly set forth in Seneca Nation of Indians v. United States, supra, at 925, where the Court of Claims held:

> * * * [T]he Trade and Intercourse Act created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and *** the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions. Cf. The Oneida Tribe of Indians v. United States, 165 Ct. Cl. 487 (1964), cert. denied, 379 U. S. 946.

To the same effect are Oneida Nation v. United States, Docket 301, 26 Ind. Cl. Comm. 138, 141-42 (1971) and Stockbridge Munsee Community v. United States, Docket 300-A, 25 Ind. Cl. Comm. 281 (1971).

In separate suits before this Commission which are described earlier in this opinion, the plaintiffs have asserted their claims

against the United States for the latter's part in depriving them of their lands and the bounty thereof. Absent a "special relationship" which was breached by the United States, the instant claim under the "fair and honorable dealings" clause, based as it is upon the intangible right of the bands to pursue the common purposes of their formation, must be held to be beyond the scope of those types of claims justiciable under the Indian Claims Commission Act. Apropos of the claim here is our recent statement in Confederated Tribes of the Colville Reservation v. United States, supra, at 104:

> * * * The facts of the history of the Joseph's Band were of course well known at the time [of enactment of the Indian Claims Commission Act]. But although they would obviously constitute a grievance or complaint, the effects of history on Joseph's Band (to characterize the present claim) were not considered to be a claim as Congress understood that term in passing the Indian Claims Commission Act.

See also the concurring opinion of Judge Davis in Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790, supra, at 801-03.

Accordingly, for the reasons set forth in this opinion, the Commission has concluded that an order dismissing plaintiffs' claims should be entered herein.

Margaret H. Pierce

Margaret H. Pierce, Commissioner

I concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner, concurring with a separate opinion

Commissioners Vance and Blue dissent.

Yarborough, Commissioner, concurring:

It has been suggested that the Indian Claims Commission Act is designed to provide recompense for tribal property losses only. Such a limitation finds no specific support in the legislative history of the Indian Claims Commission Act. However, that a fact situation has yet to be presented in such a fashion as to persuade the Commission to allow liability for wrongs not linked to property loss gives vitality to the above assertion of limitation, at least as a working hypothesis. See Gila River Pima-Maricopa Indian Community v. United States, 190 Ct. Cl. 790, 427 F.2d 1194, cert. denied, 400 U.S. 819 (1970) (aff'g. Docket 236-K, et al., 20 Ind. Cl. Comm. 131 (1968)); Confederated Tribes of the Colville Reservation v. United States, Docket 186, 25 Ind. Cl. Comm. 99 (1971).

It may be that the time has come for the Commission to make an unequivocal assertion of the conclusion implicit in its decisions, that the Act limits its jurisdiction to cases of tribal property loss, so that some statutory redefinition of its jurisdiction could be sought if deemed desirable.

Certainly the events here pleaded as the basis for the claim are facts that demand the utmost compassion and sympathy from the Commission. "There is no more disgraceful page in the history of our relations with the American Indians than that which conceals the treachery visited upon the Chiricahuas who remained faithful in their allegiance to our people."[1/]

1/ J. Bourke, On the Border with Crook 485 (1891).

An inspection of the petition in this case indicates that plaintiffs have carefully excluded claims for property loss from this petition, the plaintiffs having recovered a substantial sum for the loss of their aboriginal title lands in Dockets 30 and 48, 30-A and 48-A. If I could find within the petition any allegation of tribal property loss not presented in another docket, I would wish the case to proceed to trial. As the pleadings stand, I concur in the reasoning of the majority opinion.

Richard W. Yarborough

Richard W. Yarborough, Commissioner

Commissioners Blue and Vance dissenting:

The language of the Indian Claims Commission Act (section 2, clause (5)) clearly states that the Commission has broad jurisdiction to right wrongs of all types "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Either these words mean what they say or we get into a thicket of legalistic interpretation leading to abounding confusion. To our knowledge this Commission has never made an award for any wrongs other than those based upon property rights. We are directly faced, in this case, with alleged tribal wrongs not involving property, but involving such alleged wrongs as: (1) the defendant by force and violence evicting the bands from their homelands, (2) the defendant arresting the members of the bands, and (3) the defendant imprisoning the bands' members for 27 years, all in violation of treaty obligations.

In considering such claims in the past this Commission has held that in the absence of a special relationship created by treaty, statute or agreement, the United States cannot be held responsible for such wrongs. No clear guidelines have been set forth as to just what essential elements would establish such a special relationship.

We consider the facts alleged in this case to be such as to create such a special relationship.

It is alleged that: (1) Following the war between Mexico and the United States the aboriginal lands of the Chiricahua and Warm Spring

Apache Bands covered an area in excess of 15 million acres located within what is now the States of New Mexico and Arizona. This was, and for a long time had been, their ancestral homeland. Their rights in this land were recognized by the United States.

(2) They were a hunting and food gathering people, requiring this vast space in order to sustain their traditional manner of life.

(3) These Apaches were powerful and aggressive.

(4) The United States was most anxious to promote and preserve peaceful relations with these bands.

(5) It was in the distinct interests of the United States, at that time, to avoid conflict with these strong and warlike bands.

(6) The United States sought to and did negotiate a treaty in 1852 with these bands.

(7) Relying upon certain terms of the treaty (hereinafter noted) the bands voluntarily agreed and acknowledged that they were lawfully and exclusively under the laws, jurisdiction and government of the United States and they were submitting themselves to them.

(8) On the other hand, the United States promised that "*** peace and amity shall forever exist between said Indians and the government and people of the United States ***" (emphasis added) and that the Government would protect the Indians against all intruders even by using military posts.

Relying upon the justice and the liberality of the Government, and anxious to remove every possible cause that might disturb their

peace and quiet, the bands agreed that the Government would have authority to settle boundaries. Article 11 of the treaty stated that it would be construed liberally, at all times, and the Government should legislate and act as to secure the permanent prosperity and happiness of the Indians.

It is our position that when these strong and warlike people, occupying a vast area of land, at the time and place involved, voluntarily agreed to submit to the laws and jurisdiction of the United States, confidently believing they would be treated with justice and afforded full protection, and further, in view of the promises made by the United States, cited above, there was indeed a very special relationship established.

It is also our opinion that the relationship which was established was unique and substantially different from that existing between the parties in any of the precedent-setting cases cited in the majority opinion.

That being true, when we look at the plaintiffs' allegations that the United States violated its duties in not protecting the bands against intruders, in not permitting the Indians to even defend themselves against the intruders, in not providing them peace and quiet, in engaging in combat with them, and in arresting and imprisoning them, then we think that in the face of these grave allegations they should be heard.

It is difficult to conceive of a situation wherein a strong, powerful and warlike group of Indians could more completely strip

themselves or more completely and utterly depend upon the words, good faith and good intentions of the United States Government. If such does not constitute a special relationship, placing upon the Government a duty to protect, defend and preserve their safety, freedom and way of life, then it is hardly conceivable how any special relationship, placing a duty and responsibility upon the Government, could ever exist.

Is this not a claim provided for in clause (1), section 2 of the Act? That clause deals with "claims in law or equity arising under the Constitution, laws, treaties ***."

Is it not a claim under clause (2), section 2 of the Act? That clause deals with "all other claims in law or equity, including those sounding in tort, * * *." (Emphasis supplied)

Is it not a claim "based upon fair and honorable dealings that are not recognized by any existing rule of law or equity ***"? (Emphasis supplied)

If this is not a claim that can fall within one of the above categories, then, in our view, the words in the Act do not really mean what they seem to say.

Perhaps it should be noted that a majority in the Court of Claims has never ruled, so far as we can find, that a claim of this nature is not cognizable by the Commission.

It is our opinion that the motion to dismiss should be denied. It is our opinion that the allegations made by the plaintiffs

establish a prima facie case for relief under the language of the Act and under existing precedents.

This case should proceed to a hearing.

Brantley Blue, Commissioner

John T. Vance, Commissioner