

BEFORE THE INDIAN CLAIMS COMMISSION

SAN PASQUAL BAND OF MISSION INDIANS)
 OF CALIFORNIA, ET AL.,)
)
 Plaintiffs,)
)
 v.) Docket No. 80-A
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Decided: June 21, 1973

Appearances:

Ferris, Weatherford, Brennan & Lerg, and Arthur J. Gajarsa, Attorneys for the Plaintiff, San Pasqual Band of Mission Indians.

Milton E. Bander, with whom was Assistant Attorney General Clyde O. Martz. Wilma C. Martin and Bernard M. Newburg were on the Brief.

OPINION OF THE COMMISSION ON PLAINTIFF'S MOTION TO FILE AMENDED PETITION OR TO INTERVENE

Blue, Commissioner, delivered the opinion of the Commission.

The Motion

The Commission has before it a motion filed on April 5, 1971, by the San Pasqual Band of Mission Indians of California, through its attorneys, Ferris, Weatherford, Brennan and Lerg. The motion is for leave to file an amended petition, or alternatively, to file a petition of intervention, and to intervene.

For the reasons stated herein, the motion to file an amended petition is granted by the accompanying order, and the alternative motion to intervene is denied.

Background

This proceeding arises from a petition timely filed on November 6, 1950, by forty-six bands of mission Indians, under Docket 80, Baron Long, et al. v. United States. The San Pasqual Band was one of the original plaintiffs. An amended petition, filed on August 10, 1951, also named the San Pasqual Band as a party plaintiff.

By Commission order of January 11, 1955, the second and third counts of the amended petition of August 10, 1951, relating to certain land and water rights claims, were ordered to be severed from the other claims, and set forth in a separate petition under Docket No. 80-A.^{1/} On April 4, 1960, the water rights claims of the third count of the 1951 petition, were refiled as Docket 80-A, through an amended and supplemental petition in the name of the forty-six bands.

San Pasqual's attorney contract expired on August 31, 1961. Throughout the liability hearings, which were held in 1965 and 1966, the San Pasqual Band was without legal representation.

During those hearings, the water rights claims of only the La Jolla, Rincon, Pauma, Pala, and Soboba bands were presented, by the attorneys for

^{1/} A second, amended and supplemental petition, in the name of the forty-six bands, was filed in Docket 80, on January 1, 1960.

those five bands. Their proposed findings of fact and brief were filed on January 18, 1968, in the captioned name of the forty-six bands, although only those five bands were identified therein as claimants. Oral argument was heard in February, 1969.

The San Pasqual Band was not again officially represented by attorneys in this matter, until March 17, 1971, when its contract with Ferris, Weatherford, Brennan & Lerg was approved by the Secretary of the Interior.^{2/} The San Pasqual Band alleges that it was not informed or aware of its statutory right to be supplied with water, or that it had a valid claim against the United States for loss of water, until 1970, when its attorneys discovered the legal grounds for its claims while researching reservation right of way disputes.

The defendant responded in opposition to the subject motion, on April 28, 1971. The San Pasqual Band filed a sur-response on June 1, 1971. On January 1, 1973, San Pasqual's new counsel, Arthur J. Gajarsa,^{3/} filed a supplemental memorandum in support of the motion. The defendant responded in opposition, on January 23, 1973.

The San Pasqual Claims

The San Pasqual Band bases its claims on the breadth of the petitions herein, upon the implied reservation of water rights under the Winters

^{2/} The assignment of that contract, to Arthur J. Gajarsa, Esq., was approved by the Secretary of the Interior on July 9, 1972.

^{3/} See n.2, supra.

Doctrine,^{4/} and upon § 8 of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, 714.

The latter Act provides in pertinent part that prior to the issuance of a patent for any Indian reservation under the Act, the Secretary of the Interior may authorize any citizen to construct a flume, ditch, canal, pipe, or other appliances for conveyance of water across such reservation, upon the condition that the Indians shall at all times be supplied with sufficient water for irrigation and domestic purposes. Although the Act does not specify the source of the water to be supplied to the Indians, the obvious source would seem to be the water thus conducted across the reservation.

San Pasqual alleges that the defendant was a party to an 1894 contract providing for a canal diverting water from the San Luis Rey River, across the Potrero (now La Jolla) and Rincon reservations, and that as a direct result, the diversion extended across the unpatented San Pasqual lands in 1895. No water was provided for San Pasqual as required by the Mission Indian Relief Act. San Pasqual alleges that under the Act, it is entitled to water thus diverted from the San Luis Rey River by the Escondido Canal, and that the defendant is liable for damages, inter alia, for failure to assert and enforce said right.

Notice of the San Pasqual Claims

In our opinion the defendant has been given sufficient information

^{4/} Winters v. United States, 207 U.S. 564 (1908).

by the prior petitions in this proceeding to put it on notice that claims were being made, or might be made for damages to the San Pasqual Band's water rights.

As stated previously herein, the San Pasqual Band was specifically named as a party plaintiff in the caption of each of the prior petitions in Docket Nos. 80 and 80-A. The amended petitions of August 10, 1951, and April 4, 1960, both allege, inter alia, that throughout the lands taken from the plaintiffs were numerous streams, rivers, lakes and other sources of water to which plaintiffs were entitled by reason of aboriginal occupancy, title and ownership, and in respect to reservation lands, by reason of equitable or beneficial title, and that the defendant has failed and refused to protect their rights therein, and has permitted persons to drill wells or divert water from sources which plaintiffs were legally entitled to have secured and maintained for themselves. The emphasized portions of the petitions are broad enough to encompass San Pasqual's claims.

Furthermore, the Government can be charged with notice of the possibility of San Pasqual's claims through its authority as administrator of Indian Affairs, through its enactment of the Mission Indian Relief Act, and through its whole course of action condoning and administering the diversion of San Luis Rey River waters in apparent derogation of the plaintiffs' water rights. ^{5/} Defendant's Exhibit 1 evidences that

^{5/} See Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570, 588; 372 F.2d 951 (1967), rev'g Docket 93, 9 Ind. Cl. Comm. 25 (1960), 15 Ind. Cl. Comm. 267 (1965).

the defendant was aware of the provisions of the Mission Indian Relief Act. The exhibit contains a copy of the 1894 contract between the Escondido Irrigation District and the defendant for construction of the diversion canal from the San Luis Rey River across the Potrero and Rincon Reservations. The surety resolution attached thereto, makes specific reference to the provisions of section 8 of the Mission Indian Relief Act. The contract provided for supplying the Potrero and Rincon Indians with water from the canal. Although the canal also crossed the San Pasqual reservation, no similar provision was made for supplying water to the San Pasqual Band, as required by the Mission Indian Relief Act.

The San Pasqual claims are thus seen to arise from, and to "relate back" to, the original pleading herein, within the meaning of the Indian Claims Commission General Rules of Procedure, Rule 13(c).

The Defendant's Contentions

In its responses in opposition to the subject motion, and to the movant's supplemental memorandum in support thereof, the defendant has raised a number of objections which in our opinion form an insufficient basis for denial of the motion.

The defendant contends that by failing to appear at the 1968 calendar conference, scheduled in accordance with 25 U.S.C. 70v-1(a), the San Pasqual Band voluntarily submitted itself to the prohibition clause of 25 U.S.C. 70v-1(b). The defendant further contends that this Commission is without jurisdiction to hear cases not calendared

prior to December 31, 1970, as required by 25 U.S.C. 70v-1(a)^{6/}. The contentions are without merit.

25 U.S.C. 70v-1(a) provides that not later than one year after April 10, 1967, the Commission shall prepare a trial calendar which will set a date, not later than December 31, 1970, for the trial of each claim pending before the Commission. 25 U.S.C. 70v-1(b) provides in pertinent part:

If a claimant fails to proceed with the trial of its claim on the date set for that purpose, the Commission shall enter an order dismissing the claim with prejudice unless for good cause the Commission grants a continuance, which continuance shall be for a period of not more than six months. No further continuances shall be granted upon motion of the same party except upon a showing that unforeseeable events beyond the control of the party have occurred which make it imperative that such further continuances be granted, and in no event shall such further continuances exceed an aggregate of six months.

The statute does not preclude the hearing of evidence in this situation. Neither the Commission nor the San Pasqual Band was aware of the latter's claim at the time of the 1968 calendar conference. Furthermore, at the time of the conference, the San Pasqual Band was without legal counsel, had no knowledge of the statute, and had no notice of the conference. Thus, through no fault of the Commission or of the plaintiff, no date was set for trial of the San Pasqual claims. The plaintiff's claims may not be dismissed for failure to

^{6/} The statutory provisions here referred to were in effect when the subject motion was filed, having been added as sections 27(a) and (b) of the Indian Claims Commission Act by the Act of April 10, 1967, P.L. 90-9 (81 Stat. 11). These provisions are no longer in effect, having been superseded by section 3 of the Act of March 30, 1972, P.L. 92-265, not yet printed in the code, which contains new requirements in sections 27(a) and (b) governing the preparation of trial calendars and the failure of a claimant to proceed with trial.

comply with a trial date which was never set. Under such circumstances 25 U.S.C. 70v-1(b) is inapplicable.

It is manifest that the San Pasqual Band has not had its day in court. The broad mandate of this Commission to decide all timely filed claims, requires that these claims be heard. We are fully mindful of the limited life span of this Commission and of the exigency for speedy completion of all pending cases. However, as we stated under related circumstances in S'Kallam Tribe of Indians v. United States:^{7/}

...[It] is the opinion of the Commission that while the disposition of all pending Indian claims must be expedited, we must at the same time be constrained by the necessity of deciding such claims on the fullest possible record and in justice to the Indian claimants. *** We, therefore, cannot allow a desire for expedition in effect to deny a petitioning Indian tribe its day in court.

The defendant argues that if the San Pasqual Band has not had its day in court, it has at least had an opportunity to have its day in court during the many years since the original petition was filed herein. We are not so persuaded. There is no evidence that the band's attorneys at the outset of these proceedings ever informed the band of the claims it now seeks to assert, or ever actively asserted those claims. From 1961 to 1971 the band was without legal representation in these proceedings. Under the circumstances we cannot agree that the band has heretofore had an opportunity to have its day in court.

^{7/} Docket 134, Order of May 15, 1968, reopening the record to permit additional evidence on valuation (1968).

The defendant also contends that the subject motion should be denied on the theory that the proposed amended petition sets forth a new cause of action which is barred by 25 U.S.C. § 70k. We disagree. That statute provides that no claim accruing after August 13, 1946, shall be considered by the Commission. We have pointed out in our discussion of "Notice," supra, that the claims set forth in the proposed amended petition do not constitute a new cause of action but rather relate back to the earlier petitions herein.

The defendant further contends that the same statute bars the plaintiff from developing evidence of conditions subsequent to 1946. Again we disagree. It appears that the San Pasqual claims involve a continuing cause of action which, while accruing prior to 1946, has continued thereafter. United States v. Southern Ute Tribe, 191 Ct. Cl. 1 at 31, 423 F.2d 346, at 362-363 (1970) on appeal of Ind. Cl. Comm. Docket No. 328 (17 Ind. Cl. Comm. 28 (1966), 21 Ind. Cl. Comm. 268 (1969)), rev'd on other grounds, 402 U.S. 159 (1971).

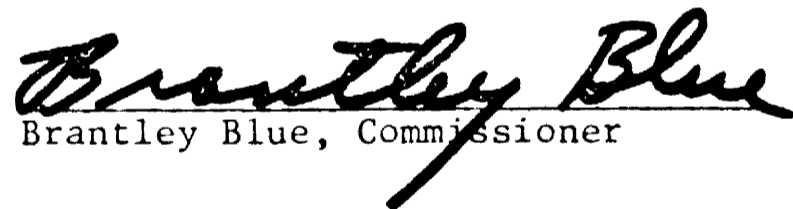
Finally, the defendant contends that the San Pasqual Band alleges no special interest in the San Luis Rey River waters claimed by the other plaintiffs. The defendant argues that the San Pasqual claims should therefore be denied because they do "not lie in the same subject matter as the other plaintiffs, namely, the San Luis Rey River waters." There are two fallacies in this argument. First, as we have shown in our discussion of "Notice," supra, the subject matter is not limited

to San Luis Rey River water. Rather the 1951 and 1960 petitions refer to numerous streams, rivers, lakes and other sources of water to which the plaintiffs were entitled, and to diversions of water from sources which plaintiffs were legally entitled to have secured and maintained for themselves. Secondly, the San Pasqual Band does in fact allege a right to the San Luis Rey River water both under the Winters Doctrine and under the Mission Indian Relief Act.

Amended Petition v. Intervention

Since the San Pasqual Band has been a party plaintiff to these proceedings from their inception, it follows that an amended petition, rather than intervention is the proper procedure.

For these reasons, by the accompanying order, the subject motion to file an amended petition is granted, and the alternative motion to intervene is denied.


Brantley Blue, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman



John T. Vance, Commissioner



Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner