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The Work of the Indian Claims Commission

By Margaret Hunter Pierce

ONLY IN RECENT years has the disastrous plight of American Indians been brought to the attention of the country through a series of well-written books, a few motion pictures departing from the old cowboy-Indian formula, some documentary films, and one or two good plays. Of all minorities, Indians suffer from the greatest poverty, the lowest life expectancy, the worst education, the highest suicide rate, the highest percentage of alcoholism, and, for most, a sense of frustration that is nearly unbearable. They exert practically no political pressure on federal or local governments, and their attempts at self-help are limited by their lack of education and the built-in impotence of the one bureau of the federal government that has the most to do with how they live their lives—the Bureau of Indian Affairs, a relatively minor division in the large Department of the Interior. There are, however, several chinks of light in an otherwise bleak area, and one of them is the Indian Claims Commission, probably the least known of any governmental agency.

The Indian Claims Commission, which was created by Congress in August of 1946, is known only to a few people in and out of government, although it is well known to nearly all native Americans including those in Alaska. The title is a misleading one, but after more than seventeen years of attempts on the part of Indians and their friends to secure the passage of the legislation to permit the adjudication of Indian grievances against the government, no one thought it important to change the name to a more accurate one, such as the "Court of Indian Claims."

Suits by Indian tribes were prohibited specifically by the legislation creating the United States Court of Claims. That court's enabling legislation was enacted during the Civil War, and the prohibition against suits by Indian tribes was occasioned by the fact that some of the more numerous and well-known tribes owned slaves and fought, if at all, on the side of the Confederacy. Once the Civil War was concluded and the Union preserved, former members of the Confederacy were

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able to bring suit against the government in the Court of Claims, but the ban against Indian tribal claims was maintained until August 13, 1946. In the meantime Indian tribes with grievances against the United States were left with only one avenue of relief—petitions to Congress. On the few occasions when Congress was disposed to respond to those petitions, it passed special acts giving the Court of Claims jurisdiction to adjudicate specified Indian tribal claims.

Because obtaining enactment of special jurisdictional acts was extremely difficult, expensive, and time consuming, and because the results were often not worth the time and trouble, Congress finally was persuaded in 1946 by a small group of people dedicated to the interests of the Indians to pass the Indian Claims Commission Act (25 U.S.C. §70ff). That act created a judicial tribunal consisting of three (later five) commissioners or judges to hear and determine the merits

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of claims against the United States brought by tribes, bands, and identifiable groups of American Indians. The act permitted suit on claims identical with those over which the Court of Claims then had jurisdiction in suits by non-Indians, plus a number of other claims of a sort not available to non-Indians. The new claims can best be described as "moral claims" appealing to the conscience of the government to right wrongs occurring in the course of its dealings with the Indian tribes. These claims also extend to alleged mismanagement by the government of the Indians' natural resources and money. Those claims continue to be litigated in the Court of Claims which, under the same 1946 act creating the commission, acquired jurisdiction of tribal claims thereafter accruing and falling within its regular jurisdiction.

Compared to the 142 claims adjudicated by the Court of Claims under special jurisdictional acts prior to 1946, more than six hundred claims were included in petitions filed with the Indian Claims Commission between August 13, 1946, and August 13, 1951—the cut-off date for the filing of claims with the commission. The vast majority were of the "moral" type. In the language of the act, they are claims that would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for those lands of compensation agreed to by the claimant; and claims based on fair and honorable dealings that are not recognized by any existing rule of law or equity.

The jurisdiction of the commission was confined to claims accruing prior to August 13, 1946, but the claims could go back to the time of the founding of the republic in 1783. The old uniquely unjust rule of requiring that final awards to Indian claimants be reduced by deducting money or the value of goods and services gratuitously given to claimants by the government was retained but in a greatly restricted form. Gratuities given to the Indians could be offset from the final award only if the commission found that the nature of the claim and the entire course of dealings between the United States and claimant Indian tribes "in good conscience" warranted the set-off.

The Indian claimants have received awards in excess of eight hundred million dollars, and there are a number of large claims yet to be adjudicated.

Final awards of the commission have the same force and effect as judgments of the Court of Claims. Either party may appeal from a final determination by the commission or from an intermediate determination deciding liability to the Court of Claims, and that court's determinations of questions of law are subject to review by the Supreme Court by writ of certiorari.

The majority of the claims before the commission involve land once owned by Indians and later acquired by the United States. Under the law of nations and the holdings of the Supreme Court, the fee title to lands occupied by Indian tribes when the colonists arrived on this continent became vested in the discovering European nations—Holland, Great Britain, France, Spain, and later in the original states of the United States. In the areas not reserved to those original states, fee title to Indian lands vested in the federal government. This rule that title to native-held land vests in the discovering nation has been followed generally in many places, most notably Canada, New Zealand, and Australia, where the European discoverers found the lands they claimed for their sovereigns populated by relatively primitive native peoples whose concept of land ownership was group or common rather than individual.

In this country the several discovering powers recognized and in the main respected the right of occupancy in the Indian tribes. That right of occupancy, or so-called Indian title, was held by the Supreme Court in *Johnson v. McIntosh*, 8 Wheat. 543 (1823), to be good against all but the sovereign, which alone could terminate that title. Beginning immediately after the peace treaty with Great Britain and continuing until 1871, the United States dealt with the Indian tribes through treaties authorized by Congress and negotiated by appointed treaty commissioners, much as we negotiate treaties with foreign powers.

The principal purposes of the early treaties were, first, to make peace with those tribes, most of whom had fought against us on the side of the British in the Revolutionary War, and, second, to secure from the formerly hostile Indians a cession of part of their lands as indemnity for the damage they had caused us in the war. Later treaties were negotiated to obtain Indian lands for a monetary price or for exchange of land west of our own settlements.

Curiously enough, once independence was secured, the new federal government took the identical position taken earlier by the crown and established an Indian Department to manage the affairs of the Indians and to protect Indian lands from encroachment or acquisition by citizens of the new states. Seven of the original states claimed ownership of land extending from their eastern boundaries at least to the Mississippi River, and it was several years before all of them agreed to relinquish to the federal government their claims to land beyond their present boundaries.

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The Articles of Confederation had contained an ambiguous provision relative to Indians, and the individual states interpreted it as giving each the power to control absolutely the affairs of Indians residing within its borders. Any interference by the federal government was resented and resisted. Once the Constitution was adopted in 1789 and the first Indian Trade and Intercourse Act enacted in 1790, the federal government asserted exclusive control over Indians including those residing within the boundaries of the original states. The 1790 act expressly prohibited the sale of Indian lands to any person or to any state without the express approval of the federal government.

As the United States acquired lands from France (1803), Spain (1819), Mexico (1845 and 1848), England (1846), and Russia (1867), it found each newly acquired territory inhabited by numerous Indian tribes. While those tribes had much in common, they were largely autonomous, frequently at war with one another over boundaries and hunting grounds, separated by language and customs, and united only in their desire to confine the strange non-Indians to the role of trader and to prevent them from trespassing on their sacred lands.

For nearly all of the nineteenth century the federal government was faced with the problem of removing and consolidating Indian tribes in remote areas in order to open the newly acquired lands for settlement and exploitation by the fast-growing citizenry of the United States. To accomplish this the government spent millions fighting Indian wars and negotiated several hundred treaties with individual tribes or with groups of tribes. Some were treaties of peace and friendship following bloody and costly wars with the Indians. Others were treaties negotiating the cession by Indians of large areas of their traditional homelands, usually in exchange for money, annuities, and other lands farther west if, after the cession, not enough of their land remained on which they could exist. Some treaties terminating hostilities between warring tribes and establishing boundaries between those tribes usually contained permission from the Indians for the United States to build military forts on the Indians' lands, ostensibly for the purpose of helping to keep the peace between the formerly warring tribes. Those forts with their small military garrisons actually served to protect the settlers on their way to make homes in areas obtained from the Indians under other treaties.

Whenever possible, the Indians were persuaded to accept relatively large reservations, in return for the cession of their vast aboriginally owned lands with guarantees on the part of the government that the Indians would be allowed to remain on the reserved

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lands "forever," unmolested by other Indians or by non-Indians. As one member of Congress from New England remarked somewhat sardonically, "forever" obviously meant "until the white man needs the land."

Treaty making continued until 1871 when Congress decreed that there would be no more Indian treaties. They were replaced by agreements negotiated in much the same manner as treaties but with the necessity of approval by both houses of Congress and final enactment into statutory law. Under this method the Indians made their last land cessions, and most were finally confined to reservations with little Indian title or aboriginal title land remaining under their control.

In the meantime the Indians had been forced to relinquish most of the land in their large reservations because the government considered those early reserves to contain far more land than the Indians required. Federal agents made no secret of the fact that the government urgently needed those lands for the myriad purposes of a fast-growing nation. Most of the land-grant schools and colleges, many townships, land-grant railroads, public roads, canals, national forests, public grazing lands, and the like, were established on lands ceded to the federal government by Indian tribes.

It would have been strange indeed if land transactions between primitive, nomadic peoples with no tradition of individual ownership of land and people with a long history of individual ownership and commercial exploitation of land and its resources had not produced some cruel and unjust results for the primitive owners. Despite the excessively formal manner in which the treaty proceedings were conducted and the carefully written translations, there was often, in the terms of the Indian Claims Commission Act, "unilateral mistake" since the Indians simply did not understand precisely what they were giving up or what they were getting. The government had the services of expert surveyors; the Indians had only the vaguest notion of what they were granting. Less often, but not unusual, outright fraud and duress were practiced to obtain Indian lands on the most favorable terms. Because most Indians had little idea of the value of money as it related to the value of what they were giving up in the way of land and natural resources, as well as what money they would need for existence on the greatly reduced areas of land to which they would be relegated, they accepted without much protest compensation which time and time again the commission has found to be unconscionable, since the disparity between the price paid and the value of the land was so great as to shock almost anyone's conscience.

In some instances treaties contained terms that left the Indians in only nominal possession of their lands and under circumstances that left them no recourse but to abandon the lands and consent to confinement on small reservations far from their original homes. In claims arising from these treaties, the Indian Claims Commission has awarded the Indians the value of the lands they were forced to abandon and the mineral and timber resources removed from these lands while they were still in nominal possession, on the ground that their losses were occasioned by unfair and dishonorable dealings on the part of the United States.

Until the enactment of the Indian Claims Commission Act, under rulings of the Supreme Court, the taking of Indian lands held by so-called aboriginal use and occupancy title (Indian title), as distinguished from recognized title, was not compensable in a suit in the Court of Claims unless specifically made so by Congress. The Indian Claims Commission Act has been interpreted to permit the Indians to recover on claims involving Indian title land in addition to claims based on recognized title land. Because most of the land acquired by the United States from the Indians in a manner that would give rise to the sort of moral or extralegal claims defined in the act was land held under Indian title, the act would have accomplished little for the Indians if claims concerning Indian title land had not been within the jurisdiction of the commission.

Claims other than those for land deal with the alleged mismanagement by the United States of Indian funds, lands, and natural resources. These claims are the so-called accounting claims in which the government, as trustee for the Indians, is called on to account for its stewardship.

Cases Litigated in an Adversary Manner

Because the Indians wished it and Congress wanted the facts and the law involved in Indian claims against the sovereign to be fully and finally established, the Indian Claims Commission adjudicates claims that are true cases and controversies, and these are litigated in a completely adversary manner. The government is allowed all the normal defenses it would have in a suit against it in the Court of Claims, except laches and the six-year statute of limitations with reference to the accrual of a cause of action. It is represented by experienced attorneys in the Indian section of the Lands Division of the Department of Justice. The Indians are represented by attorneys of their choice under contracts that must be approved by the commissioner of Indian affairs. These contracts are for a period of years and may be renewed only with B.I.A. approval. The fees for legal services are limited to 10 per cent of the net recovery and are contingent on a recovery. Expenses incurred by attorneys in the course of litigation are recoverable only to the extent approved by the commission and are payable only out of the award, if there is one.

Although judgments in Indian claims cases usually are large, it is apparent that attorneys do not take on Indian cases unless they can afford to finance the litigation and to take the risk of receiving nothing for their work or out-of-pocket expenses. Both parties to a case

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Margaret Hunter Pierce is a member of the Indian Claims Commission. She received her B.A. from Mount Holyoke College in 1932 and her J.D. from New York University in 1939.

require the services of expert witnesses, such as historians and anthropologists, to research and report on the location and extent of land ownership of a tribe to the exclusion of other Indian tribes in order to establish compensable title. When the case progresses to the stage at which a value must be put on the land or its resources, expert witnesses on land value, mineral value, lumber value, and water rights are necessary. In the accounting claims both parties used skilled accountants to examine the government's records of its financial dealings with the Indians over the period in question, and often the period of time is a very long one.

Commission's Life Extended Five Times

From this it is apparent that the original period of ten years for the life of the commission was unrealistic, particularly when one considers that five years were allowed for the filing of claims and the majority of claims were not filed until just before the end of the first five years. The commission's life has been extended five times and will terminate on September 30, 1978, when any unfinished work will be transferred to the Court of Claims for completion.

In addition to the large amounts of money that the Indian tribal claimants have received and will get, several other important dividends or advantages to both the Indians and the United States have resulted from the work of the commission. American history has been taught with only a nod to the part played in it by the native inhabitants of our country and the importance of that part in our development. One needs to read only one or two of the commission's decisions concerning land cessions in Ohio in the 1790s and in Indiana in the early 1800s to realize that the Jay Treaty of 1794, which required, among other things, that the British vacate the posts along our northern border with Canada, was the single most important event that finally persuaded some dozen Indian tribes to relinquish to the United States a large portion of their lands in Ohio and to agree to occupy the remainder of their lands peacefully, selling those lands to no one but the United States, which they all did by 1834. But I recall learning in my history courses that John Jay's 1794 treaty efforts were largely a failure; I heard nothing about the resulting acquisition by the United States of desirable and valuable land in the Northwest Territory, with the certainty of soon acquiring the remainder.

I was taught that in 1803 the Louisiana Purchase gave the United States a vast area of land extending from Canada to the Gulf of Mexico, containing regions rich in minerals, oil, forests, grazing lands, and lands adaptable for large and profitable agricultural operations. I did not learn that this acquisition was then viewed primarily as the ideal answer to the growing "Indian problem" in the states east of the Mississippi River and that it made possible the implementation of the Indian removal policy so dear to the heart of that old Indian fighter, Andrew Jackson. In his administration that policy was carried out in a manner that was often cruel and disastrous to the eastern Indians.

As a result of the numerous and voluminous expert witness reports introduced in Indian Claims Commission cases and reports compiled by historians, anthropologists, geographers, and other scholars, the place of the ethnohistorian has become firmly fixed. The painstaking work of these scholars has opened so many closed doors that from now on the teaching of American history most certainly will tell the complete story of our country, including the vital part played in it by the American Indians and our innumerable dealings with them. Not only has the field of history been served and enriched by the work of the commission, but the science of geography and map making has felt its impact, particularly in the growing demand for new maps showing areas of Indian occupation and movement at various times in our history.

What about the effect of the commission's work on American Indians, aside from the money they receive in the judgments? For many Indians, one of the greatest satisfactions comes from knowing that their story is being told—accurately, completely, and without bias. When the work of the commission is completed, it will constitute an "official history" of the Indian tribes of the United States. Much of the expense has been borne by the Indians themselves, since the expert witness reports submitted by the Indian claimants in nearly all cases are paid for as costs of the litigation from the money awarded to the Indians by the commission.

Indians have been largely ignored by history as it is written and taught by the non-Indians who control and administer the affairs of the states in which the Indians live. For Indians who want to know the history of their tribes that history is contained in the commission's decisions and in the many reports which are part of the records.

The present social and political problems of the American Indians must find their solutions in their own efforts and in the concern of an enlightened citizenry and government. But the identity of the American Indian and his important place in American history and in his own history have been firmly established and minutely documented in permanent form and can never again be ignored or forgotten. ▲

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