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INDIAN CLAIMS COMMISSION

SEE APPENDIX 2

1968 ANNUAL REPORT

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INDIAN CLAIMS COMMISSION

1968

ANNUAL REPORT

FUNCTION AND DESCRIPTION

The Indian Claims Commission is an independent agency established by Act of Congress on August 13, 1946 [Public Law 79-726]. It is a judicial arm of the Congress created for one special purpose: the hearing and determining of Indian claims against the United States which came into existence prior to the approval of the Claims Commission Act in 1946.

From the earliest days of the Republic, the American Government determined to follow the British example of dealing with indigenous Indian populations, where possible, by bargain rather than by the sword. Thus, beginning with the ratification of the Delaware Treaty by the Continental Congress in September 1778, and continuing after the adoption of the Constitution in 1789, the United States pursued a general policy of extinguishing Indian land title only by treaty. This policy continued until Congress, in March 1871, declared that Indian nations or tribes would not thereafter be dealt with by treaty.

These many Indian land cessions to the United States constitute the prime source of the alleged wrongs for which today's

Indian claimants seek redress. Their chief complaint is that because of their ancestors' illiterate condition, the United States was able to acquire much of its valuable land for an unfair price.

Prior to 1946, Indian tribal claimants sought redress directly from Congress, though most of their efforts ended in failure. To those few who succeeded, Congress granted permission to bring suit in the Court of Claims. The Court, however, lacked authority under the jurisdictional acts to resolve the genuine moral issues that underlay nearly every Indian complaint and, consequently, was unable to consider many of the issues raised by tribal claimants.

Congress removed many of the legal barriers that had thwarted Indian litigants in the Court of Claims with the passage of the Indian Claims Commission Act in 1946. This vital legislation added new causes of action to the Indian's legal arsenal and provided a new forum for the determination of tribal grievances.

JURISDICTION AND GENERAL OPERATION

The jurisdiction of the Commission extends to all claims against the United States on behalf of any "tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States." It includes all claims in law or equity arising under the Constitution, laws or treaties

of the United States, and under the Executive Orders of the President, and all claims with respect to which the claimant would have been entitled to sue if the United States were subject to suit. It also includes all claims which would arise if treaties, contracts, or agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake or other equitable consideration. It further extends to all claims arising from the taking by the United States of land owned by the claimant without the payment of compensation. Finally, the Commission's jurisdiction extends to all claims based upon "fair and honorable dealings that are not recognized by any existing rule of law or equity."

The typical case that makes up the bulk of the Commission's work is one that embodies a claim for additional compensation for lands taken by the United States by treaty or statute and in some instances without the benefit of either. The majority of these land claims fall into the category of "treaty takings." In these situations the Indians received some compensation from the Government for the cession of their lands. This compensation may have taken the form of money, goods, services, or any combination of the three. The gist of the Indian complaint is the alleged gross inadequacy of the consideration paid when compared with the fair market value of the ceded lands at the time

they were taken from the Indians. If the Commission ultimately determines that such a disparity between price paid and actual value does exist, then the United States becomes liable to the Indian claimants for the difference, though this determination is subject to appeal to the United States Court of Claims.

The claims filed by Indian tribes within the time prescribed by the Claims Commission Act were extensive. Virtually every acre of land west of the Mississippi River was subject to at least one claim. In addition, numerous claims were filed covering extensive areas in Alaska and the eastern portion of the nation. Of the 593 claims initially filed, some 245 claimed a stated amount. Those amounts totaled approximately $3,059,153,000. As this total covers less than half of the cases filed, it is apparent that a total of all monies claimed would be far greater still, perhaps in the neighborhood of 7 billion or 8 billion dollars. The staggering size and complexity of the task thus faced by the Commission called for special procedures which were far more extensive and time consuming than those employed by other judicial bodies.

Phases of Adjudication

The typical case is tried before the Commission in three separate phases, each of which requires a full hearing and decision.

(1) Title Phase

Before obtaining compensation, the Indian claimants must

show that the tribe has a compensable interest in the subject matter of the claim. The burden thus rests upon the claimants to prove their title to the lands claimed by them. Such proof may indicate aboriginal or "Indian title" or may involve recognized or "reservation title."

Aboriginal or "Indian title" is that form of title that is based upon proof of actual, exclusive, and continuous tribal use and occupancy for a long period of time of the lands claimed up to the date of the alleged seizure by or cession to the United States. Aboriginal title is strictly a possessory right, the determination of which is always a question of fact. Actual use and occupancy of a given area to the exclusion of other tribes must be shown. Constructive possession of the land will not suffice.

In proving aboriginal title, a tribe must first satisfy the Commission by a preponderance of the evidence that as of the date of the cession to the United States, it had actually used and occupied in "Indian fashion" a specific area of land to the exclusion of other tribes. It thus follows that common usage of a specific area by competing tribes destroys the element of exclusiveness and prevents recovery based on aboriginal title.

Needless to say, the evidence in support of aboriginal claims does not lend itself to the use of eye witnesses. The ultimate fact of aboriginal ownership is usually inferred from

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all the evidence, and ordinarily requires a great deal of proof. This being the case, the Commission during the course of a hearing on this issue will receive in evidence an abundance of documentary material dealing primarily with historical facts. The best sources of such materials are in the reports of early explorations, maps of explorers, military reports, contemporaneous reports and letters of knowledgeable Government officials and representatives writing from the areas in question, the annual reports of the Secretary of War and the Secretary of the Interior, Senate and House documents, contemporary newspaper articles and reports, and any official Government correspondence bearing upon the tribe or area in question. The works of deceased historians, anthropologists and ethnologists have also frequently been received in evidence. Since many facts needed to support an aboriginal claim are not recorded in history, the Commission frequently hears the direct testimony of expert witnesses in the fields of history, anthropology, and ethnology as well. Only where the claimants, by the use of such evidence, can prove to the satisfaction of the Commission an exclusive use and control of a particular area by their ancestors, can a claim based upon a theory of aboriginal ownership be sustained.

Not all claims before the Commission involve aboriginal title issues, however. Where an Indian tribe has a compensable interest in lands by virtue of recognized title, sometimes

referred to as "reservation" or "treaty title," then such issue becomes strictly a question of law. Recognized title is always in the form of a grant that comes about solely through Congressional action. Contrasted with the permissive type of occupancy found in the concept of aboriginal title, recognized title does not depend upon actual exclusive use and occupancy for its vitality. It is based, rather, on an act in which Congress specifically granted to a tribe permanent legal rights of occupancy in a sufficiently defined area.

Since determination of recognized title is a question of law, the Commission considers the Congressional acts alleged to constitute such recognition. Sometimes this can be a difficult task if the treaty or statute is vague or ambiguous. If this be the case, resort is made to the supporting legislative history or background for an insight into the Congressional will.

A determination by the Commission that an Indian tribe has either aboriginal or recognized title to the area under consideration does not of itself, however, adjudicate the question of the liability of the United States to the tribal claimant. This judgment usually comes in a later phase of the proceedings.

(2) Valuation Phase

This term refers generally to the proceedings and decisions which determine the dollar value of the property rights which were ceded by or taken from the Indian petitioners. In

most instances the valuation phase will lead to a determination of any liability of the defendant, and in any event it is this phase which fixes the extent of the defendant's liability.

Value is determined as of the date of taking, which might be the date of Congressional ratification of a treaty with the Indian tribe or the date the tribe was removed from its ancestral homelands if no treaty was involved. Without regard to the nature of the title involved (i.e., whether aboriginal title or recognized title), the measure of value used by the Commission is the "fair market value." Although aboriginal title is a mere possessory right of use and occupancy, it is nevertheless as valuable as a fee simple title. Thus, like recognized title, it includes all the natural resources of the land involved, including vegetation, timber, mineral resources and the like.

In arriving at "fair market value" the Commission must use the standards set in previous decisions of the Court of Claims. These standards require the Commission to consider all of the factors which might be given weight in bargaining between a willing seller and a willing buyer. It must consider what knowledge would have been possessed by a prospective well-informed buyer and a well-informed seller as of the evaluation date. The problem is thus to consider all of the various elements which would have been weighed by the hypothetical well-informed buyer

and seller as of the valuation date had there been a market for the lands in question. In so doing the Commission must weigh many factors, including the acreage of the tract, its location, topography, climate, availability of water, nature of the soil and the value of timber or other natural resources, the existence of transportation facilities, the size of existing population in the area and population movements, and the sales and value of surrounding lands. In addition, the Commission considers expert testimony and determines value of the ceded land in accordance with the highest and best possible use of the land at the time of taking.

Having completed findings which fairly reflect all the factors pertaining to value, the Commission enters its ultimate finding or conclusion of value which is stated in a total dollar amount for the entire tract. Usually this figure is then expressed alternatively in its overall average per acre figure.

In determining the amount of consideration paid under a treaty or agreement, the Government usually presents a detailed report prepared by the General Services Administration listing every appropriation and disbursement, by fiscal years, made in satisfaction of the terms of the treaty of cession for the lands involved in the claim. This total consideration figure is then compared to the fair market value of the tract as previously determined by the Commission. If an unconscionable consideration was paid, the Indians are found to be entitled to recover the disparity.

(3) Gratuitous Offset Phase

The concluding phase of an Indian case requires a determination of the allowable gratuitous offsets which may be credited to the defendant. Under the rules of the Commission the defendant is entitled to amend its answer within sixty days after a determination of its liability to set forth any claimed offsets. The various items claimed by the Government are presented in a detailed GSA report which is usually accompanied by certain representative vouchers in various categories involved. To be allowable each item of claimed offset must have been a gratuitous expenditure made to or for the claimants without any obligation on the part of the Government to make it, and without obligation on the part of the Indians to repay it. The expenditure must have been for the benefit of the entire tribe, and must not come within any of the excepted categories under Section 2 of the Indian Claims Commission Act (i.e., removal expenses, agency or other administrative expenses, education or health expenses, highway improvement expenses, etc.). Finally, the nature of the claim and the whole course of dealing between the claimants and the United States must, in good conscience, warrant the offset.

After Commission determination of the allowable offsets in total dollar terms, that figure is subtracted from the amount of the defendant's liability decided upon by the Commission in the valuation phase of the case. This remainder is then reported to

the Congress as the total extent of the Government's liability to the Indian claimants. It is the responsibility of the Congress to appropriate the money thus determined by the Commission and to direct how it will be distributed among various members of the tribe.

In some cases, at the conclusion of the litigation, the Commission must determine the amount of compensation due the attorneys for the petitioners. Under the terms of the Indian Claims Commission Act, the Commission is required to make such a determination of attorneys' fees in all cases where the amount of compensation was not stipulated in the contract of employment between the attorneys and the claimants approved by the Department of the Interior.

The road from the filing of a claim with the Commission to the final award of damages by act of Congress is a long and difficult one for the average Indian claimant, involving lengthy and often highly technical hearings, the expenditure of substantial amounts of money, and careful and tedious investigative work. The process of recovery is one easily subject to long and frustrating delays, particularly if the claim involves land that is subject to other claims pending before the Commission.

The Commission is well aware of the difficulties encountered by Indian petitioners in prosecuting their claims. For this

reason it has, in recent months, undertaken several policy changes aimed at expediting the handling of the remaining claims in a manner that will be fair to the interests of both the Indian claimants and the American people.

HISTORY

The terms of the Indian Claims Commission Act gave the Indian tribes five years in which to file their claims. This period terminated on August 13, 1951. Under section 12 of the act, any claim not filed within the five-year period was to be forever barred by operation of law. Before the cutoff date 370 claims or docket numbers were filed. Many of these claims, however, contained more than one cause of action. Indeed, some included as many as 15 or more. Consequently, under orders from the Commission, many of the claims were broken down into separate docket numbers, one for each cause of action. With these additional docket numbers the Commission had on file a total of 601 claims. Of these, 133 have been dismissed, 121 have resulted in final money judgments totaling more than $251,000,000, and 347 remain to be fully adjudicated.

Under the 1946 Act, Congress gave the Commission 10 years to complete its task but it soon became evident that more time was needed to adjudicate the many claims filed by August 13, 1951. During the early years of its existence the Commission's work was repeatedly delayed by a combination of problems. Aside from the difficulty and complexity of the cases themselves, trials were

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often delayed because of the inability of Indian claimants to secure the services of expert witnesses. As most of the witnesses in the field are eminent professors of history, anthropology, ethnology and similar disciplines, they have little time to devote during any one year to the preparation of a case. Even when such witnesses were available, however, Indian claimants often found themselves unable to afford the high cost of their services. To remedy this situation, Congress, in November 1963, created a revolving loan fund of $900,000 [Public Law 88-168] for use by the tribes in securing expert witnesses. In September 1966, this fund was increased to $1,800,000 [Public Law 89-592], out of which some $1,597,000 has already been committed for tribal loans or is pending with the Bureau of Indian Affairs.

Other delays in the Commission's work resulted from the willingness of the Commission to grant motions for extensions of time made by attorneys for both the claimants and the Government. The attorneys often made such motions because of the complexity of the claims involved and the substantial amount of research necessary to prepare any phase of an Indian case.

Another cause of the motions was undoubtedly the contingent fee arrangement required for all attorneys of the Indian tribes. Under this system, the attorney's compensation is always contingent upon a recovery for the tribal group. Thus, even if the attorney is successful in obtaining a recovery, there is normally a long

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wait between the time his legal services are performed and the date he is paid for them. Because of this delay, it is necessary for many attorneys to work intermittently on Indian cases as permitted by breaks in the demands of other clients on their time.

Additional delays were caused by the overlapping of separate claims. In many cases filed with the Commission the land claims of one tribe or band overlap those of another. Where this overlap is extensive rulings of the Commission are often delayed, since neither case can be decided until the conflicting claim in the other is settled.

Realizing that the Commission's work would not be completed within the initial 10-year period, Congress, in July 1956, extended the Commission for 5 years [Public Law 84-767]. This was followed in June 1961 by a second 5-year extension [Public Law 87-48] and in April 1967 by a further extension of 5 years [Public Law 90-9]. Thus, the Commission will terminate on April 10, 1972.

The 1967 amendment to the Indian Claims Commission Act did more than merely extend the life of the Commission. It expanded its membership from three Commissioners to five in an effort to expedite the hearing and adjudicating of the remaining claims by 1972. It was, however, January 1968 before the Commission was able to begin operating at the full strength authorized by the amendment.

With the enlargement of the Commission in 1967, the quorum required to transact Commission business was increased from two

Commissioners to three. On October 1, 1967, Chief Commissioner Arthur V. Watkins retired. This left the Commission with only two members, not enough to satisfy the new quorum requirement. Consequently, from October 1 until mid-December, when the new Commissioners took office, the Commission was unable to act on any matter before it.

The Indian Claims Commission has, since January, made every effort to make up for the delay. The expanded Commission has instituted many procedural and organizational changes and has adopted several new policies all aimed at expediting the adjudication of all remaining claims.

The Commission regards its task as a moral obligation or, as President Johnson has put it, the acknowledgement of "the Nation's debt to the first Americans for their land" (President's Message to the Congress on Goals and Programs for the American Indian, March 6, 1968). The Commission is well aware of the urgency of finishing its job as swiftly and justly as possible.

Aside from these vital concerns the work of the Commission is important historically. There is accumulated in the Commission files a valuable collection of information on the tribal locations and activities of the American Indians. Care

is being taken to preserve these important documents and exhibits for the use of future scholars. As various cases are completed, these historical materials are delivered to the National Archives.

CURRENT POLICIES FOR EXPEDITING CLAIMS

Improvement of Judicial Administration

Conscious of the pressing need to expedite the handling of its remaining claims, the Commission, soon after its expansion in the second half of fiscal 1968, undertook a major revision of its procedures. As a result of this effort the Commission issued amended General Rules of Procedure [33 Fed. Reg. 9236 (1968)] which become effective on July 15, 1968. In formulating these rules, the Commissioners were advised by an ad hoc committee of plaintiffs' and United States' attorneys who practice before the Commission.

One major innovation clearly indicated by the new Rules is the increased use of pre-trial conferences. These changes should greatly accelerate the briefing, hearing, and decision-making stages of the remaining cases by narrowing and enumerating the issues in controversy. The new Rules provide that the Commission may direct the attorneys for the parties to appear before a single Commissioner or an Examiner for a conference, at which time the following may be considered:

(1) the simplification of the issues;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) the limitation of the number of expert witnesses;

(5) the manner of submission of testimony;

(6) the schedule for future procedural steps; and

(7) such other matters as may aid in the disposition of the action [Rule §503.22(c)].

At the conclusion of the conference the Commissioner or Examiner issues an order which controls the subsequent course of action throughout the case.

Other changes in the Rules of Procedure designed to facilitate litigation include a new provision which requires expert witnesses to submit their testimony in written form [Rule §503.23(a)]. By reducing expert testimony to exhibit form, many days of valuable hearing time may be saved. Also, by requiring the parties to state specifically the purpose of their motions for extensions, the Commission hopes to eliminate unnecessary delays in pending litigation [Rule §503.6(b)(3)].

It is the belief of the Commission that these procedural reforms will encourage the parties to settle or compromise their claims without the necessity of full-scale adjudicative proceedings which are time-consuming and may be quite expensive to the litigants. The use of the pre-trial conference, with its enumeration and simplification of issues, and the Commissioner's or Examiner's pre-trial order should particularly help to encourage such settlements.

Improvement of Internal Organization and Procedures

Determined to provide for a more efficient handling of the Commission's workload, the Commissioners in January 1968 began an extensive reorganization of the Commission's internal operations and procedures. On January 30, 1968, the Commission established the office of Chief Attorney to supervise and correlate the work of the Commission's professional staff.

The professional staff currently consists of eight full-time attorneys, two of whom are designated as Assistant to Chief Attorney with the special responsibility of giving individual attention to staff problems. The addition of three new attorneys for the staff had been approved for fiscal 1969, which would have enabled the Commission to handle an increased workload during this fiscal year. This authorization, however, was later removed as a result of a Government-wide budget reduction.

In addition to these full-time employees, the Commission, in June 1968, for the first time added to its staff sixteen summer interns. These interns include both administrative personnel and law clerks. The law clerks and other summer interns have been particularly active in improving the internal operation of the Commission's Administrative Office, and in the work of the Investigation Division.

Beginning in September 1968, the Commission, in cooperation with Washington law schools, will initiate a work-study program

enabling law students to participate in the work of the Commission as part of their regular curriculum.

In June 1968 the Commission provided for the publication of its decisions by allocating funds to prepare the headnotes, locator-index and printing layout necessary to publish the Commission's decisions in bound volumes. These volumes will serve as a permanent record of the work of the Commission.

In compliance with Public Law 90-9, as amended April 10, 1967, the Commission has prepared and adopted a trial calendar for its remaining cases. This calendar provides for the completion of Commission hearings by December 30, 1970.

In June 1968 the Commission also began a reorganization of its filing procedures. A survey was made of the entire filing process, and changes have been implemented which will speed research on the remaining cases by insuring rapid access to filed papers and exhibits. At the same time Commission staff members prepared a bibliography of all filed material having historical significance. This list will be used to preserve the most historically valuable material after the dissolution of the Commission. In addition, the Commission is currently investigating the possible use of data processing to provide rapid access to filed materials relating especially to land valuation.

To provide itself with the most complete background information on Indian claimants, the Commission has utilized the services and

resources of the Bureau of Indian Affairs, the Office of Economic Opportunity, and the Department of Health, Education and Welfare. Close liaison has been maintained with these agencies, and information obtained from them has been helpful in preparing for field trips and investigative work. In addition, close contacts have been maintained with the Department of Justice and the General Services Administration concerning Commission activities.

In April 1968 at the request of the Commission, Kline Strong, an office systems specialist, and Ernest Spiekerman, a management analyst, conducted separate studies of the Commission's operations. Many of their recommendations have been adopted by the Commission.

Improvement of Communication with Indian Claimants

In response to the need for better communication with the Indian claimants and more specific information concerning the remaining claims, the Commission, in April 1968, activated the Investigation Division of the Commission. The Congress, in the Indian Claims Commission Act of 1946, provided that the Commission should establish an Investigation Division. In 1953 the Court of Claims noted, in the Pawnee Indian Tribe of Oklahoma Case, that the Commission should be using such a division for certain types of investigative work. Nevertheless, until April 1968 there had been no effective organizational structure within the Commission, as envisioned by Congress and referred to by the Court, to supervise and coordinate investigations. As a result, the instances

of investigative activities were of limited assistance to the Commission in its decision-making process.

Currently operating with a Director and summer staff members, the Investigation Division is responsible directly to the Chairman and the Commissioners and undertakes such assignments as they deem necessary. The Division has been active in the investigation of cases where no attorney of record represents the claimants. Many of these cases have remained on the Commission's dockets for years with little or no attention given to them. In its investigation of such cases, the Division seeks to determine the reasons for the lack of prosecution and the evidence available for substantiating the claim. If it appears in the course of the investigation that the claimants do not have sufficient evidence to sustain a prima facie case, the Division may recommend to the Commission that the claim be dismissed. If it is found, however, that a legitimate basis for a claim does exist, though it has not been pursued by the claimants because of lack of money or lack of professional assistance, the Division may assist the claimants in acquiring the help or advice needed to obtain a fair hearing before the Commission on the merits of their claim.

It is hoped that it will be possible to replace the temporary staff of the Investigation Division at the end of the summer. By continuing and expanding its activities as personnel become available, this Division should be of substantial assistance to the

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Commission in expediting the adjudication of the 347 remaining claims.

Through the Investigation Division, the Commission has made a special effort to acquaint litigants who are not represented by counsel with their legal rights and with the procedures necessary to prosecute their claims. The Commission is also exploring, with the Office of Economic Opportunity, the possibilities of providing free legal services to indigent claimant tribes, and despite some legal difficulties, hopes to be able to provide needy litigants with such services in the near future.

CONCLUSION

The present Commissioners are determined to complete the work of the Commission by the 1972 termination date.

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