Indian Claims Commission, 1978, Final Report. U.S. Government Printing Office. Washington, D.C.

United States Indian Claims Commission
August 13, 1946
September 30, 1978

**Final Report**

Commissioners:
Jerome K. Kuykendall, *Chairman*
John T. Vance
Richard W. Yarborough
Margaret H. Pierce
Brantley Blue

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# Members of the Indian Claims Commission

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|---|---|
| Edgar E. Witt (D-Texas)<br>Appointed Chief Commissioner<br>Apr. 10, 1947 | Apr. 10, 1947 – June 30, 1960 |
| William M. Holt (R-Nebraska) | Apr. 10, 1947 – June 30, 1968 |
| Louis J. O'Marr (D-Wyoming) | Apr. 10, 1947 – July 31, 1959 |
| Arthur V. Watkins (R-Utah)<br>Appointed Chief Commissioner<br>July 1, 1960 | Aug. 15, 1959 – Sep. 30, 1967 |
| T. Harold Scott (D-Colorado) | July 1, 1960 – June 30, 1968 |
| John T. Vance (D-Montana)<br>Appointed Chairman<br>Mar. 19, 1968 | Dec. 19, 1967 – Sep. 30, 1978 |
| Jerome K. Kuykendall (R-Virginia)<br>Appointed Chairman<br>June 11, 1969 | Dec. 19, 1967 – Sep. 30, 1978 |
| Richard W. Yarborough (D-Texas) | Dec. 28, 1967 – Sep. 30, 1978 |
| Margaret H. Pierce (R-Wash., D.C.) | Oct. 16, 1968 – Sep. 30, 1978 |
| Theodore R. McKeldin (R-Maryland) | Nov. 21, 1968 – May 1, 1969<br>(Interim Appointment) |
| Brantley Blue (R-Tennessee) | May 2, 1969 – Sep. 30, 1978 |

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# Preface

This is the Final Report of the Indian Claims Commission. Reports have been issued annually since 1968, but these were for the purpose of showing yearly progress. The Final Report is intended to give an expanded picture of the Commission and its work. In a document limited in extent, a good deal of material has had to be ignored or condensed. The intent is to explore briefly the scope of the problems of Indian claims. To do so we have included a concise history of the Commission. It briefly traces the origin of the Indian claims against the United States Government and the attempt to resolve them in the Federal Courts; discusses the legislative history of the Indian Claims Commission Act; and surveys the growth and work of the Commission from its inception in August 1946 to its termination in September 1978. It is offered as an expanded chronology of legislative and administrative actions and avoids so far as possible discussion of the substance of the Commission's decisions. It does not represent the opinion of the Commission or any Commissioner.

The Commission was a facet in the century and a half old process of Indian claims litigation. It did not create the claims but, in the more than 500 dockets that it decided, it succeeded in mitigating many of the problems which arose as a result of settlement and westward expansion in this country. Hopefully, interested parties will be enlightened with respect to the enormity of the task which faced the Commission from its inception.

To this end, in addition to the historical survey, we have included an alphabetical index and a docket number index to the 617 dockets filed before the Commission. Also, we present a map which delineates the adjudicated land areas of the various Indian tribes. This map is the result of the labor of Commissioner Richard W. Yarborough and is further explained in the Commissioner's own preface to the map.

We wish to thank those who have applied their time and effort to this work. Dr. Harvey D. Rosenthal wrote the historical survey from his larger study of the subject. Ms. Gail Reizenstein and Mr. John B. Yellott, Jr., law clerks, helped Mr. Donald Hyde compile the two indexes. Ms. Mary Ann Glenn, Ms. Jane Otto, and Ms. Judy Femi worked long on the typing and proofing of the index and the history. Lastly, appreciation should be especially expressed to the Chief Counsel of the Commission, Mr. Harry E. Webb, Jr., the man who sponsored and made it a reality.



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# Historical Survey

## *Indian Grievances, the Government, and the Court of Claims, 1831-1946*

The bases of the Indian claims against the American Government were rooted in what has been referred to as the "largest real estate transaction in history." As the Indian's possessions receded, his claim surfaced. This element of American history flowered in the period from the close of the Civil War to the First World War and the "wrongs committed, or at least initiated by our public servants in that period give rise to most of the claims that we are trying to redress today."[1]

Historical precedent and national policy called for the United States to acquire this land by the legal forum of treaty-making and legislation rather than the simpler method of conquest and confiscation. The separate Indian tribes were considered as sovereign nations during the treaty-making period and in 370 treaties they negotiated away nearly two billion acres of North America, leaving themselves 140 million acres at the end of that period in 1868. (The last treaty was made and ratified in 1868, but the process was not formally ended until 1871, after which Congressional and Executive "agreements" continued the procedure.)

Politically, morally, culturally, legally, and philosophically, America had all the tools and rationalizations it needed to remove the human blocks to her manifest destiny. In his first annual message to Congress in 1817, President James Monroe said: "The earth was given to mankind to support the greatest numbers of which it is capable, and no tribe or people have a right to withhold from the wants of others more than is necessary for their own support and comfort." The frontiersmen had sounded this theme for two centuries, and Monroe, in the tradition of Jefferson, was not remiss in sounding it again for the nineteenth century. The period of greatest westward expansion, 1815 to 1860, saw 260 treaties signed. Two hundred and thirty of all the treaties between 1789 and 1868 involved Indian lands, 76 called for removal and resettlement, and nearly 100 dealt with boundaries between Indian and white lands primarily.[2] These treaties and other Government agreements embodied 720 land cessions from 1784 to 1894.

By the 1890's, the contest for America was over and its possession signed, sealed, and delivered. But, though the white man was contented with his record in these dealings, the Indian was not. One Western historian has noted that "it would be difficult, indeed, to find a land cession made by the Indians entirely of their own volition."[3] The American right to buy always superseded the Indian right not to sell. The white man's superior power allowed this policy, and *pro forma* use of the treaty conformed to his Anglo-Saxon tradition and concern for the law. For the Indian the legality of it all was of little comfort.

It was this precise legalistic tradition that necessitated the treaty process, but at the same time harbored the seeds of future redress for inequities in that procedure. Treaties are contracts, and for the land acquired monies and goods were paid or promised. The consequences of this powerful European respect for property are still with us. Thus, the United States, through formal treaty or agreement with the Indian tribes, purchased 95 percent of its public domain for an alleged $800 million.[4] This figure and the treaties mitigate the myth of rude conquest and dispossession. Jefferson observed two centuries ago that the lands of this country were not taken from the Indians by conquest as is so generally supposed. "I find in our historians and records, repeated proofs of purchase, which cover a considerable part of the lower country; and many more would doubtless be found on further search. The upper country, we know, has been acquired altogether by purchase made in the most unexceptional form."[5] Thus the treaties were made and obligations incurred by the United States Government. The fact that these obligations were often not

[1] Felix S. Cohen, *The Legal Conscience* (New Haven: Yale University Press, 1960), 265.

[2] *Federal Indian Law* (New York: Association on American Indian Affairs, 1966), 163.

[3] Walter Hart Blumenthal, *American Indian Dispossessed: Fraud in Land Cessions Forced upon the Tribes* (Philadelphia: G. S. MacManus Co., 1955), 43.

[4] Cohen, *Legal Conscience*, 69.

[5] Thomas Jefferson, "Notes on the State of Virginia, 1781-85," reprinted in Saul K. Padover, *The Complete Jefferson* (New York: Duell, Sloan & Pearce, 1942), 623.



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wholly met did not negate the law of the land. What the white man chose to forget, the Indian chose to remember; and bided his time. When the fever of conquest subsided, that same legal conscience that necessitated the treaties was used to enforce them.

The first important attempt of an Indian tribe to test the theory of the white law in the courts rather than its practice on the battlefield came in 1831. The Cherokee Nation had adopted the white man's culture a generation earlier and had made impressive advances along the road to civilization by 1829. The argument that the hunter must naturally give way to the farmer could no longer be applied to these Indians. But complex historical and political processes and larger issues in the growth of a new nation overwhelmed the Indian cause and the five civilized tribes faced removal to the West. The Indians sought redress in the Supreme Court but lost on a jurisdictional ruling. The Cherokee were declared neither foreign nations nor states of the Union within the meaning of Article III, Section 2 of the Constitution and they could not sue, be sued, or intervene in any case where the original jurisdiction of the Supreme Court was involved.[6]

In the mid-1850's, tribal relations with the Government centered on the 52 treaties negotiated from 1853 to 1857, but some tribes filed their claims with the new Court of Claims. None had come to judgment by 1863 when Congress passed an amendatory law to the Court's enabling act of 1855 which, among other things, expressly excluded the Indian from the new court. Section 9 of this statute declared that jurisdiction of the Court of Claims "shall not extend to or include any claim against the Government not pending in said court on December 1, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."[7] Thus, the oversight that did not exclude the Indians in 1855 was corrected and the Court remained closed to the Indians until 1881, when it was first opened to an individual tribe by a special jurisdictional act of Congress.

In 1871, the treaty-making process was formally ended and the fiction of the tribes' "independent nation" status was terminated, but with the proviso that nothing in that act "shall be construed to invalidate or impair the obligations of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."[8] This provision kept the past alive for the Indian claimant and enabled him to persevere in his quest for judicial recognition of his treaty-based land claims.

With determination, and with the aid of sympathetic white allies, the Indian made some legal advances. In the famous *Standing Bear* v. *Crook* trial of 1879, the United States District Court of Nebraska, for the first time, established Indians as persons under the terms of the Fourteenth Amendment. Out of this case also came an investigation of the South Dakota Poncas' (later of Nebraska) claims and a congressional recognition of the obvious justice of these claims. In January 1881, a presidential commission of investigation expressed its conviction, from the Ponca case, that "it is of the utmost importance to white and red men alike that all Indians should have the opportunity of appealing to the courts for the protection and vindication of their rights of person and property."[9] A door was opened.

The year 1881 was a turning point in the long history of Indian claims frustration. By a special act of March 1881 the tenacious Choctaws were granted access to the Court of Claims for resolution of their 50-year-old claims.[10] In the years of Indian exclusion from this Court the Indians of the West had followed those of the East to military defeat and confinement. As the last of the hostilities and resistance faded, the legal forum was allowed to replace the military arena and the Choctaw precedent broadened this format. It was in this year that a prominent New York attorney, Charles O'Connor, publicly lauded the Court of Claims as the "first-born of a new judicial era." He saw the court as a new principle and as a "practical negative upon that vicious maxim" that the sovereign can do no wrong. "Henceforth our government repudiates the arrogant assumption, and consents to meet at the bar of enlightened justice every rightful claimant, how lowly soever his condition may be."[11] After 1881 this would include even the "lowly" Indians, but *only* by the process of a special jurisdictional act of Congress to open this Court to the petitioning tribes.

The process of securing a jurisdictional act from Congress to grant access to the Court of Claims was an arduous one. From 1881 to 1890 the tribes filed 11

[6]Grant Foreman, *Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (Norman: University of Oklahoma Press, 1932), 229-50. See *Federal Indian Law*, 341. Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality," Stanford *Law Review*, Vol. XXI, No. 3 (February 1969), 500-31. Edwin A. Miles, "After John Marshall's Decision: *Worcester* v. *Georgia* and the Nullification Crises," *The Journal of Southern History*, Vol. 39, No. 4 (November 1973), 519-44. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 1831.

[7]Section 9, 12 Stat. 765, March 3, 1863. 10 Stat. 612, Feb. 24, 1855.

[8]16 Stat. 566, March 3, 1871.

[9]Thomas Henry Tibbles, *The Ponca Chiefs: An Account of the Trial of Standing Bear* (Lincoln: University of Nebraska Press, 1972), 134.

[10]21 Stat. 504, Chapter 139, March 3, 1881.

[11]17 Ct. Cl. 3, "History, Jurisdiction, and Practice of the Court of Claims of the United Stages," by William A. Richardson.



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claims and secured awards on two, but 73 contracts, representing 61 more claims, were approved or pending with the Secretary of Interior. In the years following, to World War I, 20 more claims were filed with the Court and 12 resulted in recoveries totaling $13 million.[12]

The decade following the beginning of World War I was an unprofitable one as far as Indian success in the Court was concerned, but in those years lay the promise of future victories. From 1914 to 1923 only eight claims cases were referred to the Court of Claims, three of which resulted in awards totaling over $1.5 million. But the Indian response to America's involvement in the War had been enthusiastic. Thousands joined the service, though not subject to the draft. This motivated a strong movement in Congress and the Executive for a general law to reward them with American citizenship; it was finally passed in 1924. The removal of this cloud over the Indian's legal status, combined with Congressional goodwill, resulted in an explosion of claims to redress old injustices. In the next 3 years, after passage of the necessary jurisdictional acts, almost as many claims cases were filed in the Court of Claims (37) as were filed in the 42 years before citizenship (39). But it was not the legal enactment of citizenship alone that led to the increase in Indian claims. It was the increase in public awareness of Indian patriotism that heightened the willingness in Congress to pass the jurisdictional acts opening the Court to the Indians. In total, by 1946, almost 200 claims were filed with the Court of Claims; but only 29 received awards, while the bulk of the rest were dismissed on technicalities which led to action for revised jurisdictional acts. Obviously, if something was to be done with these claims, a new procedure was necessary.

## *The Evolution of the Indian Claims Commission, 1928-46*

The Court of Claims, narrowly circumscribed by the acts granting it jurisdiction, tried for 65 years to deal conclusively with Indian claims and failed. The Government, the Indians, and impartial researchers all deemed the machinery related to this process to be inadequate. The result of the almost unanimous dissatisfaction was the establishment of a special commission to handle exclusively Indian cases under a broad new jurisdiction and with the firmly expressed goal of finality.

[12] U.S., Congress. House. Committee on Interior and Insular Affairs. *An Investigation of the Bureau of Indian Affairs*, pursuant to H. Res. 698, 82nd Cong., 2nd sess., December 15, 1952. H. Rept. 2503. 1563-71.

The evolution of the Indian Claims Commission Act of 1946 was a long process in the context of American history. The first influential person to take up this theme in the twentieth century was Francis E. Leupp, Commissioner of Indian Affairs from 1905 to 1908. In his book, *The Indian and His Problem* (1910), Leupp recommended "the creation of a special court, or the addition of a branch to the present United States Court of Claims, to be charged with the adjudication of Indian claims exclusively."[13]

In 1913, in hearings before a subcommittee of the House Committee on Indian Affairs, Assistant Commissioner of Indian Affairs Edgar B. Meritt came to the conclusion that an investigatory commission should be established to sort out the Indian claims and prepare reports upon which basis Congress could dispose of the cases for all time.[14]

In 1928, with the publication of *The Problems of Indian Administration* (the *Meriam Report*), the concept of an Indian Claims Commission received the endorsement that was to carry it into law some 18 years later. This work was done under the general direction of Lewis Meriam of the Institute for Government Research in Washington, D.C. at the request of the Secretary of the Interior, Hubert Work. The *Report* called for a "special commission" to study the existing claims still without a jurisdictional act. It proposed that this commission should submit recommendations to the Secretary of Interior "so that those claims which are meritorious may be submitted to Congress with a draft of a suitable bill authorizing their settlement before the Court of Claims."[15]

Congressional Indian Committees had, since 1924, expressed an interest in this concept. In response, the Institute for Government Research, in the fall of 1929, retained Nathan R. Margold, a New York attorney, to study Indian claims problems and to draft a bill for their solution. After a thorough study of the issues and people involved, Margold reported to the Senate Subcommittee on Indian Affairs in December 1930. He proposed that Congress create an Indian Claims *Commission* of six commissioners to hear and finally decide all claims within a 15 year period.[16] Nothing came of the Margold study but, also in 1930, Chairman of the House Committee on Indian Affairs, Scott Leavitt of Montana, had introduced a bill (H.R.

[13] Francis E. Leupp. *The Indian and His Problem* (New York: Charles Scribner's Sons, 1910), 194-6.

[14] U.S., Congress. House. Subcommittee of the Committee on Indian Affairs. *Hearings on Appropriations Bill of 1914*, 64th Cong., 2nd sess., 1913. 99.

[15] Lewis Meriam, *et al.*, *The Problems of Indian Administration* (Baltimore: The Johns Hopkins Press, 1928), 805-11.

[16] U.S., Congress, Senate, Subcommittee of Committee on Indian Affairs, *Hearings on the Survey of Conditions of Indians in the U.S.*, part 25, 70th and 71st Cong., 13670-77.



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7963) to create a United States Court of Indian Claims. This *court* was to consist of three judges, have a 5-year filing period for all claims founded upon the Constitution, laws of Congress, treaties, and contracts, and render final decisions within a 10-year life span. Thus, by 1930, the resolution of the Indian claims was proposed under two forms of tribunal.

In 1934 and early 1935, the proponents of an Indian court submitted two more bills to establish an Indian Claims Court. Both bills were ignored, largely because they were not, by this time, considered practical answers to the claims situation. In a report to the Senate Committee on Indian Affairs, Secretary of the Interior Harold Ickes argued against them and directed the Seantors' attention to a bill recently introduced in the House to create an Indian Claims *Commission* instead of a court, which he considered preferable.

With the introduction, in March 1935, of H.R. 6655, an act to create an Indian Claims Commission, the legislative movement to expedite Indian claims shifted irreversibly from the consideration of a judicial to a commission format. Both Congress and the Secretary of Interior now felt that a commission rather than an adversary proceeding could better "cut through" the red tape of Government agencies charged with the preparation of Indian cases. An investigatory commission appeared to be a better vehicle for "claims involving history and anthropology as much as law."[17] This bill, and three similar ones, aroused a good deal of debate throughout the 1930's, but no legislation resulted.

The final phase of the quest for claims legislation began on August 1, 1940, with the introduction of S. 4234. Unlike all previous bills it gave the commission authority to make *final* determinations of the claims on matters of fact and law. Review on questions of law was allowed by certiorari to the Court of Claims. Its jurisdiction was to embrace all outstanding tribal claims of a legal, equitable, or moral nature presented within a 5 year limit. The commission had thus matured from a fact-finding advisory body to a self-contained agency able to conduct its own investigations, determine the facts, adjudicate the legal issues, and make a final determination. Congress, of course, still had final review when it received the complete report on each case.

This bill met many of the problems of Indian claims but it still did not grant the commission the power to deal finally with the claims in its own right. The Interior Department then presented its own bill (S. 4349) to close this gap. Commissioner of Indian Affairs John Collier correctly saw *finality* as the key to Government acceptance of any claims format. He also stressed this need in order to give "meaning" to the 1940 platform declarations of the two major parties, both of which called for final settlement.[18]

The intervention of World War II silenced most of the debate on Indian claims temporarily but in 1944 the final push for the establishment of a commission began. Reworked versions of the earlier bills were presented and the Congress showed a revived interest in dealing with this issue.

The most extensive hearings of these bills to date were held in five sessions over a 4 month period in 1945. Representative Henry M. Jackson of Washington, Chairman of the House Committee on Indian Affairs, was determined to act favorably upon H.R. 1198 or one similar in purpose. Chairman Jackson's perception of that purpose was clear: "We are being harassed constantly by various pieces of legislation," he said, "and we plan to dispose of all those routine claims and let the Commission decide what the obligation is of this Government to the Indians . . . and appropriate the money . . . . I think that is our congressional intent."[19] On this there was near unanimous agreement among the witnesses at the hearings.

On October 25, 1945, Chairman Jackson introduced H.R. 4497, the embodiment of many of the ideas contained in the several bills since 1935. The bill's jurisdiction was to include moral claims based on "unconscionable consideration" and "fair and honorable dealings" as well as those over which the Court of Claims then had jurisdiction. In its report, the Committee on Indian Affairs stated that the bill was "primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted." The report noted that Indians were rewarded with citizenship for patriotism following World War I and that it was "only fitting" that this same quality was again rewarded by the removal of the "last serious discrimination with which they are burdened in their dealings with the federal Government." Hereafter, the Court of Claims would be open to Indians and end the need to accord special treatment to their claims. But it was thought advisable, concluded the report, to

[17] Vine Deloria, Jr., (ed.), *Behind the Trail of Broken Treaties* (New York: Delacorte Press, 1974), 221.

[18] Virgil J. Vogel, *This Country Was Ours; A Documentary History of the American Indian* (New York: Harper & Row, 1972), 270-77.

[19] U.S., Congress, House, Committee on Indian Affairs, *Hearings on H. R. 1198 and H. R. 1341 to Create an Indian Claims Commission*, 79th Cong., 1st sess., March 2, 3, 28, and June 11, 14, 1945, 68.



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establish the commission to deal with the backlog of cases accumulated over the 82 years Indians had been denied equal access to the courts. The bill easily passed the House and, after a conference and minor alterations, the Senate on August 2, 1946.

There was yet the hurdle of presidential approval but little trouble was expected and none materialized. Secretary of Interior Julius A. Krug wrote that H.R. 4497 was "certainly the most important Indian legislation enacted in more than a decade," and that it would "strengthen our moral position in the eyes of many other minority peoples" in little nations abroad. His prepared statement for President Truman read, in part, as follows:

> The bill makes perfectly clear what many men and women, here and abroad, have failed to recognize, that in our transactions with the Indian tribes we have at least since the Northwest Ordinance of 1787 set for ourselves the standard of fair and honorable dealings, pledging respect for all Indian property rights. Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90 percent of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings—the largest real estate transaction in history—we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made.[20]

The passage of the Indian Claims Commission Act capped 16 years of intensive campaigning for an idea almost half a century old. This struggle involved ardent friends of the Indian on one side, vigorous defenders of the Government on the other, and many sincere middlemen who tried to serve justice as they saw it. To the credit of Congress, the moral issues were openly faced and debated. This debate engendered much divisiveness but the substantial problems were finally overcome or compromised and the moral issues recognized by the Act along with the purely legal and financial considerations. The final and just resolution of the tribal claims was a projected hope and, though the legislators planned that one decade would bring results rather than three, their ideal, in context, was not unrealistic.

## *The Indian Claims Commission: The Formative Decade, 1947-1957*

The Indian Claims Commission, created on August 13, 1946, was finally constituted when its three appointed members were sworn in on April 10, 1947. President Truman named as assistant Commissioners Louis J. O'Marr, an ex-Attorney General of Wyoming and William M. Holt, a Nebraska lawyer. As Chief Commissioner he appointed Edgar E. Witt, a former Lieutenant Governor of Texas. Witt had been appointed chairman of two Mexican Claims Commissioners by President Roosevelt and the second had ended its work in 1947.

The Commission began its first full fiscal year of operation in July 1947. It was authorized 23 employees but employed only 12 that first year. It had already adopted its rules of procedure and had sent notice to most Indian groups in June. By the end of the calendar year, 17 claims were filed for an aggregate amount of $253 million.[21]

In 1948 the Commissioners estimated that anywhere from 200 to 500 claims would be filed.[22] The cases came in slowly over most of the 5-year filing period and, with 200 in by early 1951, the Commissioners thought that 300 would be the total. Also, by this time, 25 cases had been decided. (Two claims won an award total of $3.5 million, nine were dismissed and 14 withdrawn).

In the summer of 1951, there occurred a dramatic change which destroyed the predictions made for the size of the final claims docket. It appears now that many of the Indian attorneys held off on filing to await the outcome of the early decisions. Also, many tribes had difficulty securing legal representation. And, as always in these claims, the case work-up was tedious and time consuming. The result was that in the last weeks of the 5 year filing period the activity increased tremendously. As this rush developed, congressional friends of the Indian made an attempt to extend the filing period for 1 year but failed. The flurry of claims filing intensified in the last month and a half of the filing period, which saw double the number filed in the 4½ years before. With all the claims in, the total came to 370 petitions that were divided eventually into more than 600 dockets.

The Commission was confronted with a massive job. Almost all the 176 known tribes or bands filed one or more claims on old grievances. Only 17 tribes (as of July 1951) were undecided as to their desire to file claims and several said they had none.[23] The Commission had some 600 claims before it, only 26 of which had been adjudicated by the end of 1951.

[20] *Public Papers of the President of the United States*, Harry S. Truman, 1946 (Washington, D. C., 1962), 414.

[21] U.S., Congress, Subcommittee of the Committee on Appropriations, *Hearings on Independent Offices Appropriations Bills*, 1949-52.

[22] Ibid., House, for 1949.

[23] U.S., Congress, House, *Providing a One Year Extension of the Five Year Limitation on the Time for Presenting Indian Claims to the Indian Claims Commission*, 82nd Cong., 1st sess., Pt. 3, 1953, 593-601.



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Primarily these claims, most of which were concerned with western lands, dealt with the undervaluation of tribal lands transferred to the United States in treaties of purchase. But many concerned the alleged failure of the Government to abide by treaty provisions and called for an historical accounting. It was estimated that the tribes spent one million dollars preparing their early cases for trial.[24]

The Commission was a new concept for the Indians and it embodied unprecedented causes for legal action. The immediate difficulty was to distinguish the role of a commission from that of a court. It will be recalled that the earliest legislation to enact a claims forum was in the form of a court but, after 1935 the commission framework was settled upon. In spite of this titular designation, history proved stronger than semantics. Since 1881 it was the Court of Claims that had handled all Indian tribal cases and it was to this body of precedent that the new Commission looked. These procedures and theories were thus largely adopted by the Commission, in effect making it a court, a reality formally acknowledged early in the life of the Commission.[25]

The Commission evolved a workable procedure to accomplish its task. The great majority of claims, being land cases, were heard in three stages: title, value-liability, and offsets. The title phase was often a difficult one for the Commission. Establishing the "definable territory the Indians occupied exclusively" was a most complex undertaking and required the labor of experts in the field and in the archives. If and when the first stage was decided in favor of the tribe, then the trial proceeded to the next stage. At least 2 years or more were required for preparation. Valuation-liability proceedings were usually lengthy and required the expert testimony of many specialists and diligent research in a mass of governmental records. Many judgments on inclusion of pertinent information distilled from this vast amount of material had to be made along the way. With the liability of the United States Government established, the last stage, that of determination of allowable offsets, took place before a final award could be made. These stages required two interlocutory judgments and a final judgment by the Commission. Each stage almost always received motions for rehearing (and appeal after 1961) and the final judgment was appealable to the Court of Claims and to the Supreme Court through a writ of certiorari. The appeal process took from 8 months to 3 years as a matter of course. Also there were numerous miscellaneous motions for time extensions or the admission of new evidence.

The apparent slow process of the Commission's early work and the probability of the job being a protracted one troubled Congress. Chief Commissioner Witt often explained that the nature of the litigation precluded quick resolutions. Justice Department representative Perry Morton concurred with Witt stating, "there is nothing as complex as these cases."[26] Outside of Government, interested parties were also anxious about the Commission's progress. In late 1954, specialists with extensive experience in Indian claims work gathered at a symposium in Detroit to explore mutually the problem of expert courtroom testimony and propose remedies for the difficulties that had arisen. All groups declared that they wanted quicker action.

As mentioned above, the determination of the tribal boundaries, duration of tribal possession of the land, and the appraisal of its value called for the advice of expert witnesses. Without this material the job of the Commission would have been nearly impossible. But the massive, often technical input of the experts frequently served as much to complicate the litigatory procedure as to clarify it. Anthropologist Julian H. Steward of the University of Illinois noted that "virtually no evidence presented in these cases can properly be called 'primary evidence,' 'first hand knowledge,' or an 'eye witness account' " and "it is therefore ridiculous to proclaim that the facts speak for themselves." The Commissioners learned this reality quite early and asked for more than the "facts" as they were. For their total consideration they asked for theories, interpretations, and the reasoned deductions that led the expert to the formulation of his final opinion. This type of evidence was presented and allowed because the expert witness, unlike the ordinary witness, could offer his opinion. In spite of the deficiencies of the process, attorney Donald C. Gormley, of one of the most prominent firms engaged in Indian law (Wilkinson, Boyden, Cragun & Barker, Law Offices, Washington, D.C.) felt that where expert opinion had been employed "there was no question but that the tasks of the Commission

[24] U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Amending the Indian Claims Commission Act to accomp. S. 751*, 87 Cong., 1st sess., May 1961, Rept. 208.

[25] U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Interior Department and Related Agencies Appropriations bill for 1956*, 84th Cong., 1st sess., 1955, 573-80.

[26] U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H. R. 9390 for the Appropriations for Interior and Related Agencies for 1957*, 84th Cong., 2nd sess., 1956, 552-58. In 1846 the Attorney General of the United States wrote in his report to the President: "There is nothing in the whole compass of our laws so hard to bring within precise definition or logical or scientific arrangement, as the relation in which the Indian stands to the United States."



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and the counsel had been greatly aided, and the cause of justice forwarded."[27]

Another hotly contested issue (and agent of delay) of Indian claims was that of gratuitous offsets. The debate over the justice of offsetting gratuities did not end with the passage of the Commission Act in 1946. Though the Act eliminated for offset purposes about one-fourth of the more than 50 categories of gratuities, the remaining ones brought a debate on every case where claimed. To be allowable as an offset the item claimed must have been a gratuitous expenditure made without obligation on the part of the Government to make it or the Indians to repay it. It also must have been of benefit to the tribe rather than to an individual. Under Section 2 of the Commission Act the limitations with respect to allowable offsets had to be observed. Lastly, the Commission was to determine if the nature of the claim and the whole course of dealing between tribe and Government warranted the offset.

The gratuities issue was made a part of the life of the Commission by Section 2 of the Act, which allowed them as offsets. The Commission, though, allowed relatively lower percentages of offsets pleaded as the years passed. In a case decided in 1957, only $400,000 was allowed of the $2 million pleaded by the Government. But even the $400,000 was eliminated on rehearing.[28] Certainly the allowance of offsets complicated the work of all parties involved in the claims, but their negative impact on the awards probably declined.

The debate on renewal of the life of the Commission began in 1955. In that year the Senate considered a bill granting a 5-year extension, but it died. In 1956 the House passed a bill simply granting 5 more years to the Commission. This was debated and amended by the Senate but finally agreed upon in conference and, in 1956, a brief law was passed that continued the Commission for 5 more years.[29]

The question and problems in law that arose in the first decade of the Commission were equal in complexity to the procedural development. For this reason their parallel elaboration deserves separate consideration.

## *Law and Precedent, 1947-1957*

The most persistent theme of the legislative history of the Indian Claims Commission was that the Indians should have "their day in court." But the forum created for this purpose was a commission. In establishing a temporary Commission of three men, Congress exercised its political function, fashioning new legal "causes of action" and acknowledging the possible liability of the United States. But the Commission was a court in fact and its method was adjudicatory. It functioned largely as did the Court of Claims but dealt only with Indian claims. Its expanded grounds for Government liability gave the Indian a wider scope of claims presentation and the potential for greater success in award recovery.

The Commission Act allowed any identifiable group of Indian claimants residing in the United States or Alaska to sue the Government for (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which 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; (4) 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 such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.[30] Parts (3) and (5) created several new causes of action, allowed the Commission to "go behind" or treat the Indian treaties *as if* revised, and gave cognizance to the broad concept of moral claims. The reaction to these causes of action by the claimants on the one side and the Justice Department on the other, and the theoretically neutral Commission and Court of Claims in the middle, formed the legal history of the Indian Claims Commission.

As a highly specialized court, the Commission had some unique characteristics. The Commission sent, as required, a written explanation of its function to all potential claimants, as garnered from the list furnished by the B.I.A. (Section 13a) and followed this up (Section 17) with a notice for claims presentation. Ultimately it received 370 petitions (a single

[27] "Anthropology and Indian Claims Litigation: Papers presented at a Symposium held at Detroit in December 1954," *Ethnohistory*, Vol. 2, No. 4 (Fall 1955), 336.

[28] *Kiowa, Comanche and Apache Tribes* v. *U.S.*, 5 Ind. Cl. Comm. 297 (1957). Compare *Quapaw Tribe* v. *U.S.*, 1 Ind. Cl. Comm. 644, 128 Ct. Cl. 45.

[29] 70 Stat. 624, July 24, 1956.

[30] Section 2, 60 Stat. 1049, Aug. 13, 1946.



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tribe often having several) that were eventually separated into 617 dockets. It also was authorized (Section 13b) its own Investigation Division to check all claims referred to it, but this provision was rarely used or deemed necessary. The Commission's principal office was in the District of Columbia but its members were free to travel for field hearings, onsite land inspections, and conferences whenever necessary. All of its final decisions were subject to appeal by either party and the Commission itself could ask the Court of Claims for guidance on questions of law. Appeals might result in affirmation, reversal, remand for future proceedings or any combination of the three. Its final report to Congress on a claim ended its duty and forever barred "any further claim or demand against the United States arising out of the matter involved in the controversy."[31]

The Act of 1946 laid out the general framework for the prosecution of the claims. The tribes could secure representation of their choice, subject to the approval of the Secretary of Interior. The Attorney General or his assistants were to represent the United States Government. The Indian Tribal Claims Branch of the General Accounting Office (G.A.O.) garnered the vital fiscal information and data needed by both sides and presented it in a detailed report to all parties (the G.S.A. handled this job after February 27, 1965). If a trial, with appeals, led to a final money award, the only kind allowed the Commission, it was certified and reported to Congress as with the Court of Claims. All awards were automatically referred to the Treasury and the Bureau of the Budget and included in the next appropriation bill. (Separate appropriation was made unnecessary in 1978.) Final payment to the Indians was then deposited in the Treasury until Congress directed how it should be distributed among the various members of the tribes.

The many tribal land cessions to the United States made up the main source of alleged wrongs that the Indian claimants sought to redress. They held that the United States acquired valuable land for unconscionably low prices in bargains struck between unequals. The typical case before the Commission was a claim for additional compensation over the amount originally granted in the "taking" or purchase of the land. Just over 80 percent of these transactions were by treaty and involved some compensation in the form of money, goods, services or a combination of the three. If the Commission recognized Government liability for "grossly inadequate" consideration, the difference between that consideration and the fair market value of the land at the time of the treaty was awarded.[32]

The other type of claim that embodied most of the remaining non-land cases was that for a Government accounting. When the Marshall Court, in *Cherokee Nation* v. *Georgia*, accorded to tribes the status of domestic dependent nations it established a special relationship between the Federal Government and the Indians. The Government, as legal guardian for the tribes, became accountable for its management of tribal funds. The mismanagement, misfeasance, or mishandling of such funds constituted a major source of Indian claims. Again, the General Services Administration (G.A.O. before 1965) provided the detailed accounting reports for all cases, whether to establish offsets for the land cases or to show fiscal irresponsibility in the accounting cases. In most of these cases a long and complex trial was necessary because, as historian Thomas LeDuc has pointed out, "the material facts are not only embarrassingly abundant but buried in a mass of irrelevant government records."[33] The attorney's job was the disinterment of this material.

It was only late in the second decade of the Commission's life that the claimants first pressed the accounting cases, the second most numerous type of claim. These cases required an accounting by the Government of any funds belonging to Indians, how they came into being, how they were expended, and what balances were held in the United States Treasury. Many of these records were quite old and the accounting involved thousands of transactions. The reports were made up by the G.S.A. The Government attorneys filed these reports with the Commission and later answered the exceptions made by the claimants. A trial was then held to determine the degree, if any, of fiduciary culpability on the part of the Government.

The Government was permitted all defenses except statute of limitations or laches. The Justice Department might move for dismissal of the claim on summary judgment if the petition did not, in its opinion, state a claim upon which relief could be granted. Failing this, it stated its defense and moved to trial.

In the first phase of a land claim the consulting

[31] See the Act of 1946, Section 22(b), and the "General Rules of Procedure for the Indian Claims Commission," *Federal Register*, Vol. 21, No. 216, Nov. 6, 1956. These Procedures were revised in 1968, and printed by the Commission.

[32] See the first *Annual Report* of the Indian Claims Commission, 1968, for a good summary of the work of the Commission.

[33] Thomas LeDuc, "The Work of the Indian Claims Commission under the Act of 1946," *Pacific Historical Review*, Vol. 26, No. 1 February 1957, 2. Another useful early survey of the Commission is that of Nancy O. Lurie, "The Indian Claims Commission Act," *The Annals of the American Academy of Political and Social Science*, Vol. 311, May 1957, 56-70.



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experts were likely to be historians and anthropologists. The Attorney General offered in evidence, beside the testimony of his experts, duly certified information and papers from any department or agency of the Government. The Commission considered this material in a very liberal and flexible manner.

In the second, or valuation phase, the Government's and claimant's expert appraisers valued the land as of the treaty date, and the records were combed to determine the compensation received by the Indians as per agreement.[34] The Commission determined the fair market value, compared it with the compensation received to determine the Government's liability, and thus fixed the size of the award, if any.

The final phase was that of offsets. These were, again, the gratuities given by the Government to the claiming tribe after the date the claim arose. The Attorney General, on receipt of the petition, requested an accounting by the General Services Administration. When computed, those gratuities allowed by law were deducted from the total award made in the valuation phase.

Whenever the parties questioned the Commission's conclusion regarding errors of fact or law, or where there was newly discovered evidence, a motion for rehearing might be filed. The parties could also appeal interlocutory decisions after the 1960 amendment to the Act (74 Stat. 829). Determinations of questions of law by the Court of Claims were reviewable by the Supreme Court by writ of certiorari.

The Indian attorney's role in these cases was that of the proponent. No member of or delegate to Congress could practice before the Commission. Upon his employment, subject to approval of the Secretary of the Interior, he filed a certified copy of his contract with the Commission. He was to work with the tribe to formulate its claim and file the claims petition with the Commission. He secured expert witnesses when necessary. The Act provided the attorneys for the Indians with complete access to all Government records.

The case did not end for the Indian attorney on final decision. He had then to make application before the Commission for fees and reimbursable expenses. A detailed petition was filed with the Commission and served on the Attorney General. Payment from the claimant's award was usually approved, but on occasion the Commission determined that a further hearing was necessary. At this hearing the attorney had to justify his fee and expenses in order to receive emolument, but valid challenges sometimes resulted in a reduced figure. In no case could the fee exceed 10 percent of the final award.

The role of the Commission, as noted earlier, was much like that of a court of Indian claims. It molded its rules of procedure after a court and functioned largely as one. Technically it was a quasi-judicial branch of the legislature. In its lifetime there was little opposition to the litigatory interpretation of its function or to this rendering of the intent of Congress. This process continued for the life of the Commission.

Within this procedural-legal context the Commission refereed as the adversaries fell to battling over the interpretation of the complex issues raised by the new act. The great bulk of the early debate surrounded the use of the legal defense of *res judicata* or previous decision, tribal existence as an entity capable of bringing suit and the definition of "identifiable group," the payment of interest, and, most important, the establishment and compensability of Indian title.

The first case of the Commission, that of the *Western (Old Settlers) Cherokee*, involved the legal principle of *res judicata*. *Res judicata* makes a prior judgment binding in a second suit on the same cause of action between the same parties. The first judgment determines every issue in the second suit which was or could have been litigated in the initial suit. This principle is applied to ensure finality of judgment and to protect litigants from a multiplicity of suits. The Western Cherokees alleged that a mistake was made in the writing of their treaty and they claimed damages under the fair and honorable dealing clause. The Commission dismissed the claim on grounds of *res judicata* on motion by defandant. The Government had contended that the same facts and the same parties were involved in this case and a previous one in the Court of Claims (88 Ct. Cl. 452, 1939). Since a large portion of the claims had been submitted to the Court of Claims prior to 1946 by earlier jurisdictional acts this precedent could have voided many of the Indian claims with the Commission. The Court of Claims, however, reversed the Commission. It held that the prior decision on the same subject matter with the same parties did not bar the claim before the Commission because the claim was one of the new causes of action not justiciable in prior cases. That is, not only must there be the

[34] No compilation of the Indian attorneys' expense for experts is available and little of the Government's. The one report of the Justice Department, though, may be a fair sample. The Department spent $2.5 million from 1954 through 1962 for its expert witnesses. $176,000 was spent in 1961 and $411,106 in the peak year of 1960. U.S., Congress, House, *Establishing a Revolving Fund*, 88th Cong., 1st sess., July 1, 1963, Rept. 492, to accomp. H. R. 3306.



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same facts and the same parties, but the same cause of action must be sued on for the defense of *res judicata* to bar the claim. Situations did occur later where *res judicata* was a proper defense, but only rarely, because the Commission Act had greater breadth than most of the prior special jurisdictional acts.[35]

Another early decision of the Commission was that on which particular parties were allowed to bring suit. Some early pressure on behalf of individual claimants necessitated a definitive ruling and affirmation of Section 2 which states that the Commission shall hear and determine claims "on behalf of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska." Acceptance of individual claims, it was stated numerous times, was against the intent of Congress and would have resulted in a docket too huge to manage. Thus the Commission held basically to the claims generated from the 176 groups recognized by the Indian Bureau and notified by the Commission in July 1947. But this ruling did not leave the Commission without problems with this Section.

The expression "tribe" often has been a tricky one for the experts on Indian affairs. The term "nation" was most used in the seventeenth and eighteenth centuries and was a more appropriate designation than tribe because it referred more to a cultural than a political unity. Tribe came to be used generally after the Federal Government began exclusively handling Indian relations. Indians, said anthropologist A. L. Kroeber, were distinguished as they lived in a "tribal condition" or in a settled, "civilized condition." Tribes were treated as sovereign-state-tribes, for it made dealings more convenient and practical. "It was we Caucasians," said Kroeber, "who again and again rolled a number of related obscure bands or minute villages into the larger package of a 'tribe,' which we then putatively endowed with sovereign power and territorial ownership which the native nationality had mostly never even claimed."[36]

The claims were generally presented in the context of this tribal presupposition and were thus potentially as faulty as the notion of the tribe.[37] In cases where tribes appeared not to have existed or failed to fit the white's political construct, they could be excluded from suit and thus penalized when, in fact, their land use and possession was a reality. Under these circumstances Congress recognized the category of "other identifiable group" in 1946 to include all groups that might suffer exclusion by semantics.[38]

The most difficult factual problem facing the Commission was the question of what definable territory the Indians occupied exclusively. The Act allowed claims (Section 2 (4)) arising from the "taking" of lands "owned or occupied" by claimants without proper compensation. The Commission, following the Supreme Court ruling in *U.S.* v. *Santa Fe Pacific R.R. Co.* (1941), held that *exclusive* occupancy had to be shown in a definable territory to establish aboriginal possession. Only when Indian title rested on exclusive tribal use and occupation from "time immemorial" was there a compensable interest. The Indians, thus, had a vested interest in the concept of tribe in the twentieth century as the whites did in the nineteenth and were obliged to prove its existence.[39] Herein rested the role of the anthropologist.

The job of the expert, at this point in a land case, was critical for the claimant. The Court of Claims held that use and occupancy were to be inferred from all the facts and circumstances in each case. If the Government demonstrated that more than one tribe used a particular area, exclusivity was denied and recovery on that area was usually disallowed. The claimant's task to demonstrate this exclusivity was most difficult. Occupancy itself was an arduous matter to prove conclusively. As it pertained to Indian title, exclusivity referred to land-resource use. Most Indians were organized in small, localized, autonomous units ranging in size from the single family to multi-family groups and each unit habitually exploited specific areas in their food quest. Rarely did a group's numbers exceed 500, with only a few reaching 2,000 or more. To qualify for occupancy, land use must have been consistent, either continual or seasonal, and the use must have been of vital importance in the economy of the people constituting the group.[40]

The qualifying term, "exclusive," added immeasurably to the problems presented above. Not thinking of land *per se* in terms of ownership but

[35] *Western Cherokee* v. *U.S.*, 1 Ind. Cl. Comm. 20 (1948), *aff'd*, 116 Ct. Cl. 665; *Blackfeet* v. *U.S.*, 2 Ind. Cl. Comm. 302 (1952); *Assiniboine Indian Tribe* v. *U.S.*, 2 Ind. Cl. Comm. 272 (1952). *Federal Indian Law*, 347; *Chickasaw Nation* v. *U.S.*, 132 F. Supp. 199 (1955); *Choctaw Nation* v. *U.S.*, 121 F. Supp. 206 (1954), *cert. den.*, 348 U.S. 863 and 135 F. Supp. 536 (1955).

[36] A. L. Kroeber, "Nature of the Land-Holding Group," *Ethnohistory*, Vol. 2, No. 4, Fall 1955, 304.

[37] *Federal Indian Law*, 455-63.

[38] See note 42, 314. See *California Indians* v. *U.S.*, 1 Ind. Cl. Comm. 149 (1949), Dockets 31 and 37.

[39] *U.S.* v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941). Morton H. Fried, "The Myth of Tribe," *Natural History*, Vol. 84, No. 4, April 1975, 12-20. See also *Snake Indians* v. *U.S.*, 125 Ct. Cl. 241, 254(1953); and Ralph Barney, "The Indian Claims Commission—the Conscience of the Nation in its Dealings with the Original Americans," *Federal Bar Journal*, Vol. 20, No. 3, Summer 1960, 238.

[40] J. A. Jones, "Problems, Opportunities, and Recommendations," *Ethnohistory*, Vol. 2, No. 4, Fall 1955, 349-50. Also see Peter Farb, *Man's Rise to Civilization as Shown by the Indians of North America from Primeval Times to the Coming of the Industrial State* (New York: Avon Books, 1968), Chapters X and XII.



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e resources on it, tribes claimed use of the land but allowed others access also. Exclusivity was exclusively a white man's concept. But occupation and exclusivity were yet further complicated by the second qualifying term of "time immemorial." Selectively, this term had some meaning, but for many Indian groups it could not be applied. Many in *situ* by 1700 were not there in 1600 and others in *situ* by 1800 were not there in 1700.[41] Obviously the Commission, even with the aid of the experts, could not secure definitive "facts" on these issues and had great latitude for seasoned judgment. Each case, usually ladened with an enormous mass of data, had to a degree to be considered separately. No doubt a trio of Solomons would have been hard put to render judgments satisfactory to all in these cases. Of course, if it was shown that the Government had recognized the rights of a tribe to a specific tract, then it was unnecessary for the tribe to prove its actual use and occupancy of that area.

The recognition by the Government of Indian rights in the land, or "recognized title," presented the Commission, as it did the Court of Claims before it, with a major battle in claims litigation. It was *Indian title* that was established when continuous, clusive occupation was demonstrated. This in isprudence was a question of *fact*. *Recognized title* was always a result of Congressional action, a question of *law*. This took the form of a treaty or Congressional agreement which specifically granted to a tribe permanent legal rights of occupancy in a sufficiently defined area.

Generally, before the Act, only a claim based on recognized title could receive compensation. Out of the 370 petitions filed pursuant to the Act, most involved Indian title with no ratified treaty of recognition.[42] In the *Alcea* case the Supreme Court apparently had decided that the taking of land held under Indian title was compensable under the Fifth Amendment. But in a subsequent *per curiam* decision in the same case, the Court held that its earlier decision had rested on a statutory direction to pay and not on any obligation under the Constitution. Thus, it was still held that compensation in these cases was a political matter for Congress, not a legal one for the courts. In *Tee-Hit-Ton Indians* v. *U.S.*, the Supreme Court ruled that their land was held merely by the grace of the sovereign, so that whatever interest they had in it could be terminated without obligation to compensate under the Fifth Amendment. Only recognized title called for such compensation on taking, and the Tee-Hit-Ton had no such recognition. But the Court indicated that this decision might not affect the claims before the Commission. The Court of Claims, in the same year as the *Tee-Hit-Ton* case (1955), upheld a Commission decision that Indian title was compensable under Section 2 of the Commission Act. This was the landmark *Otoe and Missouria* case.[43]

The case of *Otoe and Missouria Tribe of Indians* v. *U.S.* was a leading one in Indian claims and a critical precedent for the Commission. In the *Otoe* case the Commission ruled that its Act provided a remedy for seizure of lands held under Indian title. It was a momentous trial involving hundreds of documents and exhibits and 1,500 pages of testimony in hearings. And, it was a signal victory for the claimants.

Another key issue of precedent for the Commission was that of interest on the awards. In one of the Commission's earliest decisions, the *Loyal Creek* case, it ruled, and was affirmed by the Court of Claims, that interest not be allowed on the award. The Commission and the Court were guided not so much by the Creek's case as by the firm rulings of previous Supreme Court decisions. Soon after, in the *Osage Nation* case, the Commission confirmed and broadened the denial of interest in the *Creek* case under its provision for "fair and honorable dealings." Interest was also denied in the *Osage* case which was tried under the provision for "unconscionable consideration." Relying on the *Creek* case, the Court of Claims affirmed the Commission and held that no "taking" of the Osage's property occurred in the constitutional sense and hence no interest was allowable.[44]

Behind the precedent, and the most compelling reason for it, as seen in the *Alcea* case, was what has been called "judicial fiscal responsibility." Interest is due only in cases of a Fifth Amendment "taking," a very small portion of the claims. If allowed under other forms of taking, interest alone could have mounted into billions of dollars. This at least was the argument used by the Solicitor General to the Supreme Court in the *Alcea* appeal. The award of $15 million in interest on a $3 million settlement seemed to bear him out and the Court reversed itself.[45] Justice Department officials agreed with this

[41] Ibid., J. A. Jones, 351.

[42] Donald C. Gormley, "The Role of the Expert Witness," *Ethnohistory*, Vol. 2, No. 4, Fall 1955, 12n. Berlin B. Chapman, *Otoe and Missouria. A Study of Indian Removal and the Legal Aftermath* (New York: Times Journal Publishing Company, 1965), 250-1.

[43] For a concise survey of this issue see the *Harvard Law Review*, Vol. 69, 1955, 147-51. *Otoe and Missouria Tribes of Indians* v. *U.S.*, 131 Ct. Cl. 593, 1955, *cert. den.*, 350 U.S. 848 (1955). *U.S.* v. *Tillamooks*, 329 U.S. 40, 1946

[44] *Loyal Creek Indians* v. *U.S.*, 97 F. Supp. 426 (Ct. Cl.), *cert. den.*, 342 U.S. 813 (1951). *Osage Nation* v. *U.S.*, 97 F. Supp. 381 (Ct. Cl.), *cert. den.*, 342 U.S. 896 (1951).

[45] See note 33. The Thomas LeDuc article presents a lengthy discussion on this case.



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"financially judicious" stand and thus the Commission and the Court of Claims adhered to the earlier Supreme Court ruling that "Congress, not this Court or other federal courts, is the custodian of the national purse."[46]

The Commission, as might be expected of any such adjudicatory body that was engaged in resolving ancient and fiercely partisan issues, faced many challenges. Chief Commissioner Witt often tried to convey the complexity of his office. Speaking to the House Appropriations Committee toward the end of the Commission's first decade, he attempted to pinpoint the higher purpose of his agency. "We have tried to keep in mind the interests of the taxpayers but also what is right for the Indians," and "above all be fair." The Indians may have been conquerors themselves but it was a fact

> that the Christian spirit and the human spirit actuate our type of people, requiring us to do justice towards these people, and not just undertake to say that 'to the victor belongs the spoils,' and 'get hither' to the vanquished; that we owed them a moral duty of some compensation for taking away from them the lands where we found them, from which they were then making their livelihood.[47]

The Court of Claims also saw the Commission as a positive agent of good. In the *Otoe and Missouria* opinion the Court wrote of the Commission Act:

> The Indian Claims Commission Act is both remedial legislation and special legislation. It broadens the Government's consent to suit and as such is in derogation of its sovereignty. It confers special privileges upon the Indian claimant apart from the rest of the community, and to some extent is in derogation of the common law. This was, we think, because of the peculiar nature of the dealings between the Government and Indians from very early times. On the other hand, it remedies defects in the common law and in pre-existing statutory law as those laws affected Indians, and it was designed to correct certain evils of long standing and well known to Congress. Fortunately, under these circumstances, rules of interpretation and construction are subordinate to the principle that the object of all construction and interpretation is the just and reasonable operation of the particular statute, and accordingly it should be possible to construe the statute liberally to affect its remedial purpose and intent, and strictly to limit undue abrogation of fundamental rights or to prevent undue extension of extraordinary remedies.[48]

The Commission, the courts, the attorneys, and all the others involved in these claims did their duty as they saw it from 1947 to 1957. The Commission assembled a formidable docket soon after it was constituted. Under its rules of procedure the advocates of both sides vigorously attacked the mountainous legal and material problems presented by the 151 year claim backlog. The Court of Claims strove to add its wisdom, experience, and guidance to this difficult process. The Commission faced and resolved many issues and saw new ones created in this first decade. Precedent directed much of its action, but a growing experience with the claims, more familiarity with the Act's provisions and precedential rulings on them, and the expanding life of the Commission brought some changes in the positions of all parties involved. First of all, of course, the life of the Commission, made unrealistically short by the Act of 1946, had to be extended.

## *The Second Decade; Renewal and Reform, 1957-1967*

The enabling act of the Commission granted it a 10-year life span and did not provide for extension on the contingency that it might not complete its work. This specific limitation was unavoidable at the time to gain enactment. The Act also complied with the legal principle that restricted a too-liberal grant of power and life to "quasi-judicial" agencies. Therefore Congress extended the life of the Commission in 1956, and again in 1961, 1967, 1972, and 1976 because the job was still unfinished. The extension act of 1967 increased the number of Commissioners from three to five, and firmed up the procedures. The fact was that the time span of 20 years (or even 32 as it developed) was not an exorbitant one to resolve the immense and complex backlog of work involved in over 600 claims covering 150 years. The case exhumation and presentation, and the defense in the courtroom context was inherently a lengthy procedure. The Commission could and did tighten its own procedures where lax; but it had to function within the limits set by Congress in its Act, the precedents prescribed by its adversary forum, and the always difficult legal issues of Indian law.

Through the late 1950's and into the 1960's the Commission persisted in its work. Its staff numbered 14 and operated on a budget of $132,000 by 1957.[49] In its first decade the Commission had completed 80 cases and awarded $17.1 million on the 15 claims held to be valid. By the end of 1959, the Commission had dismissed 30 more claims, accorded some attention to over half of the remaining dockets, had a

[46] *U.S.* v. *Standard Oil Co.*, 322 U.S. 301, 314 (1947).

[47] U.S., Congress, House, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for Interior Department and Related Agencies for 1956*, 84th Cong., 1st sess., 1955, 578-80.

[48] *Otoe and Missouria Tribe of Indians* v. *U.S.*, 131 Ct. Cl. 602 (1955).

[49] U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H. R. 5189 making Appropriations for Interior and Related Agencies for 1958*, 85th Cong., 1st sess., 1957, 193-98.



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stable budget for 2 years in a row, and declared that the staff was adequate.

From mid-1959 into 1961 the work of the Commission slowed due to personnel changes. In the summer of 1959 Commissioner Louis J. O'Marr resigned and Senator Arthur V. Watkins was appointed to replace him. The following year Chief Commissioner Witt resigned, and T. Harold Scott, an attorney from Boulder, Colorado, who had worked for the Federal Trade Commission, took his seat on the Commission. Watkins then was appointed Chief Commissioner. Watkins had been elected to the Senate from Utah in 1946 and 1952 and was a member of the Subcommittee on Indian Affairs for that period, being its chairman during his last 4 years in office.

This "period of transition," as Watkins later referred to it, during which the two new Commissioners acclimated themselves, seemed to slow the progress of claims disposition.[50] The increase of work from that of the early and mid-1950's to the completion of 14 dockets per year from 1957 through 1959, with a peak of 20 in 1960, fell off to 10 in 1961 and only six in 1962. It did not surpass 20 again until 1965.[51] But this transition effected a striking change in the management and production of the Commission.

After 1960 the Commission lost little time in initiating changes necessary to increase its output. The Commissioners knew well the feelings of Congress toward their Commission, and its concern about the seemingly slow progress.[52] Chief Commissioner Watkins had observed when first appointed that the Government and Indian lawyers set the hearings by mutual agreement and then notified the Commission. He felt that this leisurely procedure was untenable and planned a regular calendar *controlled by the Commission*. In September 1960 the Commission called the first calendar conference. The participants were told that "justice delayed is often justice denied" and informed that, to end much of the delay, a continuous 3-year schedule of hearings would be followed. By this calendar, the Commission would hear an average of 30 claims per year and limit continuances to extreme emergencies. In addition to tightening the trial schedule, the Commission urged all parties to try to reach compromise settlements. The Commission initiated a procedure to better inform the Indians of the proposed settlement and to insure their understanding and approval. Previously the Commission had no way of knowing to what extent the tribes were involved in the compromise settlements. The Commission firmly established the "Omaha Rule" to obviate future recriminations in cases of compromise settlement.[53]

The Commission entered the final year of its second 5-year extension with a staff, in 1961, 17 strong and with a budget of over $205,000. As of 1960, some 125 cases had been disposed of and $42 million awarded. This represented a small fraction of the billions in payment forseen by some. These low annual award totals began to rise rapidly, though, after 1960. The cumulative total to 1959 of $20 million more than doubled in 1960 and this figure quintupled by 1966. Nineteen sixty-one was a low point in case-disposal over the previous 5 years but the award total was five times that of 1959. The new trial calendar was rigorously enforced. Of the 104 cases set for 1960, 86 were heard and only 18 received continuances for good cause.[54] Five cases, already processed by 1960, matured to awards totaling $15 million. But the Commission still had the bulk of its work ahead of it: 471 of the 596 dockets still remained. An Administration bill calling for another extension was submitted to Congress in 1961.

Congressional consideration of the bill of extension for the Commission mostly took place in May 1961. It was a short, unheated debate and it appeared that 14 years of operation had established the Commission's legitimacy, at least among most of the members of the Indian committees. All the parties involved concurred that the original time period was too short for the unexpected work load the Commission received and they agreed that another extension was necessary to give the claimants their "day in court."[55] The bills submitted to the Indian committees requested a 5-year extension, expansion of the Claims Commission membership from three to five, and the authorization of the use of hearing examiners to accelerate the work.[56] The consensus

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[50] U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H. R. 6345 for Appropriations for Interior and Related Agencies for 1962*, 87th Cong., 1st sess., 1961, 485-96.

[51] All figures of final settlements come from the *Annual Report* of the Indian Claims Commission.

[52] U.S., Congress, House, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on H. R. 2256 and Related Bills to Terminate the Indian Claims Commission and for other purposes*, 90th Cong., 1st sess., March 1967, 64

[53] U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearings on S. 307, A Bill to Amend the Indian Claims Commission Act of 1946 as Amended*, 90th Cong., 1st sess., February 1967, 20. *Omaha Tribe of Nebraska* v. *U.S.*, Dkt. 225-A, 8 Ind. Cl. Comm. 392, 1960.

[54] U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H. R. 10802 for Appropriations for Interior and Related Agencies for 1963*, 87th Cong., 2nd sess., 1962, 773-88.

[55] Ibid., S. Rept. 208, and see U.S., Senate, *Congressional Record*, 87th Cong., 1st sess., Feb. 2, 1961, Vol. 107, Pt. 2, 1618-19.

[56] U.S., Congress, Senate, Committee on Interior and Insular Affairs *Amending the Indian Claims Commission Act*, 87th Cong., 1st sess., May 9, 1961, Rept. 208 to accomp. S. 751. Compare Senate Rept. 208 to House Rept. 2719 on H. R. 5566 of the 84th Cong., 2nd sess., July 16, 1956 for similar rejection of hearing examiners. Also see U.S., Congress, House, Committee on Interior and Insular Affairs, *Amending the Indian Claims Commission Act*, 87th Cong., 1st sess., May 23, 1961, Rept. 424 to accomp. H. R. 4109, and U.S., Senate, *Congressional Record*, 84th Cong., 1st sess., 1955, Vol. 101, Pt. 9, 11019.



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that emerged was that the growing experience of the Commission, its better accomodations, and the new trial calendar offered real hope for completion by 1967. The problem of giving the Indian his due had to be balanced somehow with giving him his walking papers, that is, ending government supervision. And, what was accomplished had to be done with finality, for the spector of the old jurisdictional acts haunted the Commission's work as it had all earlier efforts at claims settlement. A Senate Committee report echoed two generations of claims rhetoric when it recognized these facts and concluded:

> It cannot be stressed too strongly that the Claims Commission Act was passed by Congress to give the Indians their day in court to present their claims of every kind, shape and variety. Until all these claims are heard and settled, we may expect the Indians to resist any effort to terminate federal supervision and control over them.[57]

The Commission extension act of June 1961, like that of 1956 simply provided a five-year extension of the Commission.[58] The other suggested amendments could not be agreed upon and were dropped. It was in 1967 that Congress would radically alter and try more vigorously to force the Commission to realize its goal of extinguishing itself and its claims docket. Before that, the Commission disposed of 106 more cases and awarded another $170 million.

The early 1960's also saw another key change in the claims procedure, that of the establishment of the Revolving Fund for expert assistance loans. This Fund was necessitated by the rulings in the *Crow* and *Northern Paiute* cases of 1961.[59] Prior to these cases expert witnesses were sometimes employed by the Indians on a contingent fee basis. The practice had been allowed as in other courts, but some feared that the testimony might be weighted in the light of the financial interest of the witness in the outcome of the case. Even when the attorneys themselves paid the experts, the fact of the lawyer's own contingent contract disturbed some observers. The Commission recommended that Congress make funds available for this expense, which many an impecunious tribe could not bear.[60] A bill introduced by Representative James A. Haley of Florida became law in late 1963. This new law, not funded until July 1964, provided for a $900,000 fund for interest-bearing loans to be made available to only those tribes without other funds to employ expert witnesses. Repayment was to be out of awards or to be declared nonrepayable at the discretion of the Secretary of Interior in cases of dismissal. This fund was fully subscribed by July 1966 with half again its amount in applications pending. With some 30 tribes having sought loans, Congress doubled the fund total in 1966.[61]

The second decade of the Commission was a busy time. The number of case-disposals, after the "transition period" and a low point of 1962, was almost tripled in 1963. The number of major interlocutory decisions doubled in the same period.[62] These figures are meant only to relate to the Commission's overall progress toward extinguishing its total docket and not as an accurate measure, by comparison, of yearly progress. The 3-year period from 1964 to 1966 saw more awards (48) than in the 17 years previous (45). The $111 million paid out in those 3 years was also greater than the total to 1963. At the same time, the number of dismissals was lower than any previous 3-year period.[63] In 1966 the Commission had heard every case the Indians had readied and said it had the capacity for up to 50 more if the attorneys were prepared.

With the need for an extension agreed upon by all parties, the debate focused on three issues: the length of the extension period, the rigidity of the new trial calendar, and the expansion of the Commission membership.[64] The debate of 1967 occassioned a thorough revival of all the fundamental issues of the Commission's creation and an opportunity to acquaint many in public and private life with its very existence.

The first issue, that of time, was easily resolved. The idea of only a 2-year extension was first considered merely as an emergency measure and rejected in the light of the amount of work that remained to the Commission. Also, the threat of so short a tenure, a Commission report warned, would cause an "immediate exodus of our ablest staff lawyers."[65] Another 5-year extension period was a foregone conclusion but both Watkins and the Indian Law Committee of the Federal Bar Association felt that a 7-year period would be more realistic.[66] By 1967, though,

[57] Ibid., S. Rept. 208.

[58] 75 Stat. 92, June 16, 1961.

[59] *Crow Indians* v. *U.S.*, Ind. Cl. Comm., Docket 54, May 29, 1961; and *Northern Paiute* v. *U.S.*, Ind. Cl. Comm., Docket 87, July 3, 1961.

[60] U.S., Congress, House, Committee on Interior and Insular Affairs, *Establishing A Revolving Fund From Which the Secretary of Interior May Make Loans to Finance the Procurement of Expert Assistance by Indian Tribes in Cases Before the Indian Claims Commission*, 88th Cong., 1st sess., July 1, 1963, Rept. 492 to accomp. H. R. 3306.

[61] 77 Stat. 301, Nov. 4, 1963; 80 Stat. 814, Sept. 19, 1966; and P. L. 93-37, May 24, 1973. The fund was raised to $2.7 million in 1973.

[62] U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for Interior and Related Agencies for 1964*, 88th Cong., 1st sess., 1963, 1217-23.

[63] An analysis of the summary chart giving a breakdown of cases by year from 1947 in the *Annual Report* of the Indian Claims Commission reveals these facts.

[64] U.S., Congress, Senate, Subcommittee on Indian Affairs, *Terminating the Existence of the Indian Claims Commission and for other purposes*, 89th Cong., 2nd sess., Sept. 6, 1966, Rept. 1587 to accomp. S. 3068.

[65] See note 52, 8.

[66] See note 53, 38.



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the 5 year figure had become institutionalized. The other two issues were not so easily disposed of.

Congress thought that the statutory imposition of a firm trial calendar was the most expeditious way to hasten the claims cases to final resolution. A House and a Senate bill called for a 5-year extension and a new section (27) establishing this calendar. This section provided for a trial date for all pending claims no later than January 1, 1970. If a claimant was "unable or unwilling" to proceed, the Commission was to dismiss with prejudice and thus preclude reinstatement. It provided for one 6-month extension for good cause and a stay on this if a compromise was in the process of negotiation. By these measures the Congress expressed its intent to end the life of the Commission in 1972 and to require assurances from the Commission that all claims would be disposed by that date.

The last issue was that of increasing the number of Commissioners, which was yet another attempt to hasten the end. The lawmakers hoped that an increase in personnel, along with the change in the Act, would bring progress. It was reasoned that more Commissioners and a larger staff would result in more work being done.

The bill that finally became law on April 10, 1967, was a compromise agreement.[67] It renewed the Commission for 5 more years and expanded it to five members; the President would designate a "chairman." The seated Commissioners were to continue in office only until June 30, 1968, unless reappointed by the President and confirmed by the Senate prior to that date. The new law established a firm trial calendar and targeted, with exceptions, 1970 as the final year for the trial of all pending claims.

In the period under discussion two main legal problems beset the Commission, and both affected its effort to expedite the workload. One was the confusion over Clause 3 of Section 2 of the Act. This clause, among other things, allowed claims that would result if dealings between the Indians and the United States were revised on the ground of "unconscionable consideration." In one of the Sioux cases, decided in 1956 (146 Fed. Supp. 229), the Court of Claims ruled that unconscionable consideration was that which was "so much less than the actual value of the property sold that the disparity shocks the conscience." The Court acknowledged that no exact formula existed to measure the disparity between payment and value and used "very gross" as its guide until 1961.

[67] 81 Stat. 11, April 10, 1967.

The "very gross" cases were easy for the Commission to handle, but when payment approached 50 percent of the value more precision was required. In the *Miami Tribe* case the Court concurred with the Commission that payment of *less* than half the true value was unconscionable. Then the problems began. When the Commission denied liability of the Government, that is when the compensation was *more* than half the true value, the Court consistently reversed it by finding a smaller figure for the payment or a larger value for the land or claimed the value figure ruled on by the Commission to be a bare minimum.

A missing element that slowed the work of the Commission was the lack of compromise settlements that normally dispose of most private litigation. The original Act allowed for the non-litigatory settlement of claims by the parties with the approval of the Commission. The claimants had long been allowed this right under the jurisdictional acts with approval of the Secretary of Interior. In the political arena, the Republican platform of 1956 had urged "the prompt adjudication or *settlement* of pending Indian claims," and the Indian claims plank of the Democratic platform of 1960 insisted that the claims be "settled promptly whether by *negotiation* or other means, in the best interests of both parties."[68] But the Commission was given no opportunity to approve a compromise settlement until the claims attorneys advanced their strongest cases first and pushed for the maximum award. Also, it was longstanding policy of the Justice Department not to make settlement offers but to await them.

It was only in 1960 that the Justice Department inaugurated a policy of encouraging settlement. One-half the cases which resulted in an award in 1960 were disposed by compromise settlement and 32 of the 51 from 1961 to 1965. Watkins was encouraged by the efficacy of this procedure.[69] He related that government and Indian attorneys advised him that possibly over half of the remaining cases would be settled, and he saw a chance of ending the Commission's work "within a reasonable length of time."[70] Out of the 94 final awards by 1966 for a total of $194 million, settlement was negotiated in 38 for $87 million. Thirty other compromise settlements had been reached on secondary considerations such as offsets.[71] But, though settlements affected some

[68] Virgil Vogel (ed.), *This Country was Ours—A Documentary History of the American Indian* (New York: Harper & Row, 1972), 270-77.

[69] See note 53, chart on 47.

[70] U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on H. R. 6767 for Appropriations for Interior Department for 1966*, 89th Cong., 1st sess., 1966, 631-35.

[71] See note 53, 74.



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savings in time and expenses, the benefits, as later became apparent, proved to be limited because most settlements were reached only after substantial adjudicative work had already been done.[72]

The placing of blame for delay in these cases was as complex as everything else connected with them. Watkins defended his and the Commission's record as laudable and refused to be singled out for censure. Justice, possibly beleagured with its 17 lawyers and 12 clerks arrayed against the formidable legal force of the claimants, also defended its past. And, the Indians' attorneys were proud of their defense of the hapless tribes against a powerful Government. But, it can be safely asserted that most of the delay was caused by other factors such as the original enormous workload, the lack of sufficient personnel, the use of the adversary conception of the Commission, the mass of data involved and generated, the appellate processes, and the complex interaction of all these elements.

Using the word in its broadest sense, the "trials" of Indian claims settlement were many. It had completed only 12 percent of its caseload by 1957. By 1960 some 490 cases still remained on the docket. But, after 1960, the reform program dramatically boosted the performance of the Commission, doubling its annual output. The award total in 1960 stood at $42 million and at $226 million in 1967. The Commission could not, though, speed its work to allow it to complete its task by 1967 and the dissatisfaction of the Congress grew concomitantly with the length of the life of the Commission. All the parties to the Commission's creation and function contributed to its seemingly slow progress, but the prime agents of delay were the wording of the Act of 1946 and the nature of the cases themselves.

## *Expansion, Reorganization, and Final Renewal, 1967-1978*

With the renewal act of 1967, Congress forcibly declared its intent to finalize the Indian claims and end the Commission. To accomplish this goal it expanded the Commission, guaranteed it a fresh change of personnel, and more rigidly directed its work schedule. Nevertheless new problems arose to complicate the Commission's docket and frustrate all the parties involved. However, the Commission did indeed perform in an impressive fashion, accomplishing in 5 years 63 percent of the work total compiled in its 20 years of life. Congress was so struck that in 1972 it agreed that another renewal was a necessity but decreed it to be the last and further tightened the procedural strictures. The Commission, though, did not complete its task, but left a still active docket as a legacy to the courts.

The enlargement of the Commission, and its turnover of membership, dominated its activities for over 2 years after the renewal of April 1967. Chief Commissioner Watkins retired in October 1967, 9 months before the date set for new appointments or reappointment. This left Commissioners William Holt and T. Harold Scott without a Chairman and the Commission without the necessary three members for a quorum. Reorganization, it began to appear, took time as well as legislation. Three new Commissioners were appointed in December 1967, and the year 1968 opened with the full complement of five Commissioners as required by the extension act of 1967. The President designated no chairman until March. One year of the third 5-year renewal thus passed in expansion and reorganization, that is, one-fifth of the period that Congress granted to the Commission to wind up its work. About 40 percent of the task was completed in the previous 20 years; the remaining 60 percent was targeted for extinction in the next five. By early 1968 the chances for this seemed as remote as they were in the 1946 projection.

Nevertheless, the congressional mandate for "new blood" had been fulfilled—three-fifths of the expanded Commission was freshly appointed by 1968. These positions were filed by John T. Vance, Richard W. Yarborough, and Jerome K. Kuykendall. Vance had been an attorney in Montana and was on the faculty of the law school at the University of North Dakota when appointed to the Commission. Yarborough had practiced law in Texas before becoming a legislative assistant to his father, Senator Ralph W. Yarborough, in 1958. Kuykendall was an attorney from Washington State. There he practiced law and served in the State Goverment. From 1953 to 1961 he served as Chairman of the Federal Power Commission but returned to private practice in Washington, D.C. until appointed to the Commission.[73] It was January 1968 before the Commission began operating with its full complement and, in March, Commissioner Vance was appointed Chairman. Three months hence, the unrenewed terms of Commissioners Holt and Scott expired leaving the three newcomers with a bare quorum.

[72] *Annual Report* of the Indian Claims Commission, 1973, 2.

[73] U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearing on the Nomination of John T. Vance, Richard W. Yarborough, and Jerome K. Kuykendall to be Commissioners of the Indian Claims Commission*, 90th Cong., 1st sess., Dec. 14, 1967.



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was almost a year before the Commission returned permanently to full strength. Margaret Pierce became a fourth Commissioner in October 1968. Pierce spent most of her legal career with the Federal Government and was the Law Clerk and Court Reporter of Decisions for the Court of Claims from 1948 until her Commission appointment. A five and one-half month "recess appointment" was given to ex-Governor of Maryland Theodore R. McKeldin in November 1968. Then, in May 1969, the President appointed Brantley Blue the fifth permanent Commission member. Blue had practiced law in Kingsport, Tennessee, and had been a city judge there before his appointment. He was, having Lumbee ancestors, the first Indian member of the Commission.[74] Jerome Kuykendall, a Republican, was soon after, in June 1969, appointed Chairman in place of Democrat John Vance by the new administration. This last alteration rounded out the Commission's composition, which remained in effect until the demise of the Commission on September 30, 1978.

The new Commissioners were strongly encouraged by Congress to complete their work. The Chairman of the Senate Committee on Interior and Insular Affairs, anxious that the nominees get the "mood" of Congress, told them that the "job must be finished by 1972 or there is going to be trouble." He offered the aid of his committee to help in any way possible but warned that no further extensions would be considered.

The "new Commission," in the midst of the sweeping personnel changes, reorganized some aspects of its procedure and got "the backlog moved along." It removed, for the fourth time, to larger quarters to accommodate its expanded staff. Five more attorneys were approved, and with the two new Commissioners the budget of $394,000 for 1967 grew to a half a million in 1968 (90 percent of the budget was expended for salary and personnel benefits required by law). This reorganization caused some lag in work according to Commissioner Scott's testimony in early 1968,[75] and case disposal had dropped from an all time annual high of 34 in 1965 to 14 in 1966 and only 9 in 1967. Nevertheless, the preparatory work was still being vigorously prosecuted by the new team and, in 1968, 26 dockets were completed.[76]

The new procedures adopted by the Commission were largely responsible for its increased output. The Commission completed the trial calendar called for in the extension act of 1967 in early 1968. It then established the Office of Chief Counsel to supervise and correlate the work of the increasing staff of attorneys. On July 15, 1968, the amended General Rules of Procedure became effective. The Commissioners were aided in this revision of the procedures by an *ad hoc* committee of the plaintiffs and the Justice Department attorneys who practiced before the Commission. The new rules clamped down on extensions and made several minor changes for efficiency. It also made three important major changes. Prior to 1968, more than one Commissioner was generally present at a trial. Under the new rules only one was required in attendance, which allowed his colleagues to attend to other duties or hear other cases. Another major change was the increased use of pretrial conferences and procedures to shorten the actual trial. Lastly, expert witnesses were required to submit written testimony in advance. At the trial they testified only on cross-examination.[77] This had long been the general practice of other Federal Commissions and did more than any other change to increase the output of the Commission.

Under its new Chairman, Jerome Kuykendall, the Commission moved ahead with its still formidable workload. By July 1, 1969, the Commission had finished 51 percent of its work. In that year the five Commissioners had 11 attorneys on the professional staff and a budget of $619,000. The work output continued to rise from 1968 and the completed dockets for 1969 reached a new single-year high of 49. The next year the awards total finally surpassed that of dismissals, 163 to 159. By 1971, the Commission had doubled its legal staff to continue its increasing work output.[78]

In 1970, the Commission continued the reorganization of procedure. The Commission conducted a study of its accomplishments and future work needs. This had never been done before in an analytical manner. Kuykendall testified that the Commission, as well as the Congress, never before accurately knew the extent of its workload. This analysis was completed and made available to Congress and the Bureau of the Budget. Most important, in 1970, Chairman Kuykendall told a Senate hearing that the

[74] U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearing on the Nomination of Margaret H. Pierce to be a Commissioner of the Indian Claims Commission*, 90th Cong., 2nd sess., Oct. 9, 1968. U.S., Congress, Senate, Committee on Interior and Insular Affairs, *Hearings on the Nomination of Brantley Blue to be a Commissioner of the Indian Claims Commission*, 91st Cong., 1st sess., April 24, 1969

[75] U.S., Congress, House Committee on Appropriations, *Hearing on H. R. 17354 for Appropriations for the Department of Interior and Related Agencies for 1969*, 90th Cong., 2nd sess., 1968, 1803-16.

[76] *Annual Report* of the Indian Claims Commission, 1974.

[77] *General Rules of Procedure* of the Indian Claims Commission, 33 Federal Register 9236, 1968.

[78] U.S., Congress, House, Committee on Appropriations, *Hearings on H. R. 17319 for Appropriations for the Department of Interior and Related Agencies for 1971*, 91st Cong., 2nd sess., 1970, 2209-29.



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Commission could not finish by 1972. But he tentatively told them that with the 1971 budget allowance for 21 lawyers and a firm adherence to the proposed schedule, they could finish by 1976. Five more years were necessary.[79]

The Commission now moved to request a fourth renewal. It had completed 44 more dockets since 1969 and had adjusted its progress "at a rate consistent with completion" by April 1977.[80] Kuykendall told the House Indian Subcommittee that the "new Commission" had attempted a crash program in 1968 to finish by 1972, but staff shortages and unaccountable delays made it impossible. But, said the Chairman, since 1970 productivity was high and the prospect of completion by 1977 was very good.[81] He cautioned that non-renewal would mean that "those tribes who had cases not yet completed would get nothing on those claims;" about 50 tribes would not get their day in court.[82]

As the Commission entered 1972, its last year of operation by the renewal act of 1967, the movement for another extension gained momentum. The record stood at 164 dismissals and 182 awards for $410 million; 264 cases were still pending. The Commission had 42 employees and a budget of $1,045,000 for 1972. Chairman Kuykendall told the Senate Appropriations Committee that he "hoped" they could finish in another 5 years.[83] What had previously been a hope was finally a possibility. The Commission's pace had indeed picked up. More dockets were completed by monetary awards from 1968 to 1972 than were made during the entire prior life of the Commission (102-100). (The number of dismissals also favored the claimants: 44 to 131.)

The debate over the fourth renewal of the Commission was short. The bills of renewal made it clear that the life of the Commission was to finally end in 1977. Two similar bills were introduced in Congress, varying only in minor points. The House Committee on Interior and Insular Affairs considered allowing the Commission to end in 1972 and transferring all cases to the Court of Claims, but it concluded that such action would result in delay and not save any administrative expenses. It was willing to extend because the renewal bill provided for (1) automatic transfer of remaining claims, if any, to the Court of Claims in 1977, (2) dismissal with prejudice of dilatory claims, (3) progress reports to each session of Congress, and (4) yearly authorization hearings before the Indian Affairs Subcommittees as well as the unusual appropriation committees hearings. This bill was an administration measure worked out by the Commission and the Office of Management and Budget. With a few minor amendments to enforce calendar compliance it was accepted. Congressional intent was pointedly expressed that this renewal would be the last. "If delay on the part of the Government threatens to defeat this policy, the Committee on Interior and Insular Affairs expects to be notified at the earliest opportunity." Congress intended to tighten further its scrutiny over the Commission's work.[84]

One source of delay that threatened to slow the Commission's progress more than any other was the accounting cases. These claims, briefly discussed previously, involved some 50 cases that hinged on a Government accounting of the use of Indian trust funds. The record of these funds usually covered many decades and involved thousands of financial transactions. The Justice Department had, as a matter of form to determine offsets, requested accounting reports on all petitions since 1946. This work was completed by September 1971.[85] When the numerous figures were totaled and arrayed in appropriate accounting form, the legal question then became whether the various summary expenditures charged against the Indians were proper. For example, did the Government follow the *Menominee* rule and expend money from noninterest-bearing funds before interest-bearing funds? The amount to make these funds "whole" for funds judged improperly spent was the basis for a money judgment. But these claims had to await the Government's completion of the reports and were pushed by plaintiffs to the end of the docket behind the more familiar land claims and were neglected until the 1960's.

As it stood in 1971, the accountings being completed, the Commission could have dealt with them despite their complexities. But in 1966, a ruling in the *Southern Ute* case expanded the scope of these claims. Until this decision the accountings were required only to 1946 in compliance with the Commission's Act that forbade consideration of any claim accruing after August 13, 1946. Nevertheless, the

[79] Ibid.

[80] U.S. Congress, Senate, Committee on Appropriations, *Hearings on H. R. 9417 for Appropriations for the Department of Interior and Related Agencies for 1972*, 92nd Cong., 1st sess., 1971, 1433-50.

[81] U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 2408 to Authorize the Extension of the Indian Claims Commission*, 92nd Cong., 1st sess., Oct. 21, 1971, 3-15, 40-1.

[82] See note 83.

[83] U.S., Congress, Senate, Committee on Appropriations, *Hearings on Appropriations for the Department of Interior and Related Agencies for 1972*, 92nd Cong., 2nd sess., 1972, 2761-88.

[84] U.S., Congress, House, Committee on Interior and Insular Affairs, *Extending the Life of the Indian Claims Commission*, 92nd Cong., 2nd sess., March 1, 1972, H. Rept. 895 to accomp. H. R. 10390.

[85] See note 81, 35.



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Government had brought its reports up to 1951 because most of the records were located in Washington, D.C., and were completed from 1975 to 1951. The *Southern Ute* decision, affirmed by the Court of Claims, held that the tribe's accounting must be updated from 1951 to be current with the date of trial because of the possible "continuing" nature of some of the claims.[86]

This ruling presented a potentially "insurmountable burden" to the General Services Administration.[87] The records subsequent to 1951 were mostly in federal record centers in the Mid and Far West and in field offices of the Bureau of Indian Affairs. Also, the number of specialized personnel in the General Services Administration needed to handle this burden was "woefully inadequate."[88] When the General Services Administration received this job from the General Accounting Office in 1965 the work had been ongoing for 40 years but was scheduled to end in 6. The General Services Administration met this schedule and finished the 96 remaining petitions plus the 19 added after 1965. It did this with its own personnel and the 37 experts that transferred from the General Accounting Office. On schedule and with a declining workload on a terminal job, the General Services Administration allowed attrition to reduce its staff. Representatives of the General Services Administration did say, though, that they could do the job if funded. Both the Justice Department and the Commission agreed that the Court of Claims could "readily handle" these cases if any remained after 1977.[89] Thus assured, Congress passed the fourth renewal act on March 17, 1972.[90]

The accounting issue was the main one in the debate over the fourth extension act but as an element of delay it was only one factor among many in the long history of items blamed for slowing the Commission's work and prolonging its life. Key legal decisions also contributed to the need for extension past 1972. In select claims the Commission found it necessary, "in good conscience," to set new precedents that led to extended litigation.

The Commission had led a busy existence in its fourth period of renewal. Its Commissioners had changed, and many of its procedures. Its output over 5 years improved over that of the 8-year period from 1960 to 1969: 146 to 126 dispositions. But with 227 pending cases,the Commission still had an arduous charge. To finish its total docket by 1977 it had to increase its annual decisions by 50 percent. This was a possibility but the accounting cases made it unlikely.

Entering its last renewal period in 1972, the Commission in its remaining years set itself to finish as much of its docket as possible. It also pushed for new administrative measures it deemed necessary to hasten or facilitate its work. The Commission had the resources to finish the bulk of its cases, that is the land claims, by 1977, but there were still elements of the claims process that were largely beyond its control. Appeals to the Court of Claims were the right of the two contending parties and once a case was taken to the Court the Commission had to await its ruling. Appeals were always a part of the Commission's litigation delay but their incidence increased slightly after 1972, amounting to one-third of the cases. Several of the accounting cases were on appeal by 1975 and promised to be a form of claim that would necessitate appeal in every case to the Court of Claims and even to the Supreme Court, which had only granted a review on certiorari thrice in the life of the Commission. In total, there had been 206 appeals. The Commission was affirmed in 96 of those, reversed in 79, and partially affirmed and reversed in the remainder.[91] Also, with the accounting cases, as with appeals, the Commission had to wait on the work of another agency—the General Services Administration.

Yet, by 1973, a good deal of activity was taking place upon the Indian claims. The Commissioners testified that they had adequate staff and budget in 1972 and 1973. Congress had moved to eliminate some areas of claims delay. The Expert Assistance Loan Fund established in 1963 and doubled in 1966 was increased again in 1973 to $2.7 million.[92] Funds were appropriated for the General Services Administration in late 1972 to rebuild its accounting staff from a low point of two. This staff had reached only nine by early 1973, but in another 2 years soared to 103.[93] And, Congress streamlined the process of final award distribution.

The Commission's progress through 1975 was good. At the close of 1972, 227 of the 611 dockets were still pending but all of the land cases were in some advanced stage of litigation or on appeal. Early in 1973, the Commission worked out a projection of

[86] *Southern Ute Tribe* v. *U.S.*, Docket No. 328, 17 Ind. Cl. Comm. 28, 63, 1966.

[87] See note 78, 54.

[88] See note 84.

[89] Ibid.

[90] 86 Stat. 114, March 30, 1972.

[91] U.S., Congress, House, Subcommittee on the Committee on Appropriations, *Hearings on Appropriations for the Department of Interior and Related Agencies for 1975*, Pt. 1, 93rd Cong., 2nd sess., 1974, 392-401.

[92] 87 Stat. 73, May 24, 1973.

[93] U.S., Congress, Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Hearing on S. 876 to Authorize Appropriations for the Indian Claims Commission for Fiscal Year 1976*, 94th Cong., 1st sess., April 18, 1975, 78.



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annual output to complete it cases by 1977. From 1973 through 1977 it proposed annually to complete 33, 43, 79, 47, and 25 cases respectively.[94] Through 1974 it was ahead of its schedule but appeals held up its progress. By March 1975, 176 dockets were still pending. The 44 member staff, now operating on a budget of $1,324,000, was deemed adequate by Chairman Kuykendall to handle the work brought to it, but he could not assure the Congress that the work would be completed by 1977. He did say, though, that it was not the Commission's intention to ask for another extension.[95]

Other agencies of Government and the private sector, though, were active in promoting extension past 1977. At the Commission's 1976 authorization hearing, representatives of the Court of Claims and the tribes urged another renewal of at least 3 years. The proponents of more time believed that the remaining cases could best be completed in the Commission rather than the Court of Claims. They saw a transfer of unfinished cases to the Court as inefficient, costly, and counterproductive to all concerned.[96]

Several arguments to give the Commission another lease on life were put forward. The dissolution of the Commission as scheduled, it was claimed, would (1) leave some 120 dockets as a legacy to the Court of Claims, an unmanageable number not contemplated in 1972, (2) saddle the Court with the 51 complex accounting cases, (3) congest an already busy Court, (4) lead to further delay by the very process of transfer, (5) fail to utilize the expertise built up by the Commission, and (6) cause an injustice to the tribes that would not be heard by the same tribunal.

The debate over a renewal of the Commission lasted for 18 months. With little chance of gaining another 5 years, considering the directives of Congress in 1972, the adherents of extension fought for one of 3½ years. Several bills in the House and Senate had varying success but none could gain the assent of both bodies. In general, the bills made their case upon leaving as little work for the Court of Claims as possible, eliminating delay, and keeping Congress closely informed.

The result of the division on the future of the Commission was a Congressional compromise on an administration bill allowing an 18-month extension. Public Law 94-465 was passed on October 8, 1976. This act extended the life of the Commission to September 30, 1978, and provided (1) that, no later than December 31, 1976, the Commission would certify and transfer to the Court of Claims all cases it determined it could not finish by September 30, 1978, (2) that, at any time prior to September 30, 1978, the Commission could transfer other cases, and (3) that all unfinished cases would be transferred to the Court of Claims on September 30, 1978.

With its end firmly in sight, the Commission continued its work and attempted to fulfill its mandate to lighten its remaining caseload. By September 1976 it had disposed of 474 dockets and had 141 pending; 16 of these were on appeal before the Court of Claims. Before the deadline of December 31, 1976, it transferred 20 cases to the Court that it had determined could not be completed before 1978. As of January 1, 1977, the Commission had 21 months left to complete some 120 dockets, though one-quarter of these were accounting cases which would surely be transferred.

The Commission on January 1, 1978, had 102 dockets remaining and a fair chance at leaving a manageable remnant to the Court of Claims. The Court had secured a law in July of 1977 (P.L. 95-69) to define more precisely the transference of claims and increase its staff and was prepared to take over from the Commission. Less than 68 dockets remained undisposed by September 1978, and the prospect for their final resolution by the Court of Claims within the hoped for 5 years seemed good.

## *Conclusion*

The process of Indian claims resolution has been a lengthy one and the Indian Claims Commission was simply an element of that process. Very few of the legal issues of Indian history have progressed to a point where a conclusion can be written to them. The legal history of Indian claims is certainly not one of these few. The Commission may terminate but, in spite of the Congressional mandate that Indian claims arising prior to 1946 also terminate, they will persist.

The future of the debate on *land* claims rests now in a more searching examination of the treaties and the intent of both participants. It also lies in how far the Indians are able to push their claims for land and how far the United States is willing to acknowledge them. Between these contending positions the treaties will be interpreted or reinterpreted, or even revoked, as the ripening climate of American opinion allows it to happen.

[94] See note 73.

[95] U.S., Congress, Senate, Subcommittee of the Committee on Appropriations, *Hearings on Appropriations for the Department of Interior and Related Agencies for 1976*, 94th Cong., 1st sess., March 12, 1975, 203-7.

[96] See note 93.



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Considering its limitations, the Commission had several positive effects. For one, some tribes have used their share of the $800 million in awards wisely and aided their economies. Secondly, others have hired full-time legal counsel to serve their ongoing interests. The Commission, with its extended tenure, has greatly raised the "legal consciousness" of the tribes. Thirdly, large segments of American society, in public and private life, have concomitantly had their own consciousness raised concerning Indians, reservations, and the tribal relation to the American Government via the ancient but active treaties. Fourth, the ethno-historical research findings amassed as a by-product of the Commission Act constitute an unprecedented source for the study of Indian-white relations. The tribes now have the satisfaction that their side of American History has finally been told with voluminous documentation. Lastly, the process of the Commission's work, over 3 decades, has brought the many tribes together in one cause and given them a cause for unity that they have rarely had. These are not minor accomplishments.

The last question that needs an answer is did the Indians gain "their day in court?" The answer is yes. The Commission was a court, complete with appellate review. And it was unique among courts in its jurisdiction over "moral claims" and having no statute of limitations except the requirement that the claims must have accrued prior to 1946. The tribes, represented by some of the best legal talent in the country, litigated more than 500 claims and won awards on over 60 percent of them.

This struggle for perpetuating Indian culture and settling tribal claims has run through American history for almost 150 years. Possibly it will continue for another century or until America finds an accommodation with these internal wards. There is no easy solution to this problem, or maybe no solution at all. For, at best, the existence of a tribal society within the borders of a highly individualistic and technical culture is tenuous. It is not that the tribal society materially threatens the technological way of life, but that it presents a moral threat to settled myths. It keeps an unpleasant past alive and presents challenging questions for the future. Perhaps it is time to appreciate that the triumphs of the frontier period were mitigated by the sordid dealings with the Indians. "To dust off and to pour over these old account books might show us what investments to avoid in the future. That would certainly be one path evening the balance of the future, though the debits of former errors will remain forever old debts beyond reparations, atonement or forgiveness."[97] The Indian Claims Commission went a long step in this direction but could offer only money. Other remedies to the unresolved problems between the Government and the Indians may now be found.

[97] Cecil D. Eby, *The Black Hawk War: That Disgraceful Affair* (New York: Norton, 1973), 24.



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| Tribe | Vol. | Page | Decision | Date | Disposition |
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| Hopi, Dkt. 196 (cont.) | | 81 | Order denying without prejudice defendant's motion to dismiss claim for an accounting beyond 8/13/46; granting defendant's motion for a more definite statement; & directing plaintiff to file a statement alleging with particularity those wrongful acts which occurred prior to 8/13/46 & continued thereafter | 1/23/74 | |
| | 205 C.C. | 828 | Motion to dismiss appeal denied | 9/13/74 | |
| | 36 | 1 | Opinion on plaintiff's motion for leave to file out of time its more definite statement of continuing accounting wrongs | 3/13/75 | |
| | | 6 | Order granting plaintiff's motion for leave to file out of time & for other purposes | 3/13/75 | |
| | 207 C.C. | 968 | Order staying proceedings relating to count 9 of Dkt. 196, general accounting claim | 6/20/75 | |
| | 208 C.C. | 1027 | Affirmed & remanded | 1/30/76 | |
| | 208 C.C. | 1028 | Rehearing denied | 3/26/76 | |
| | 429 U.S. | 1030 | Petition for certiorari dismissed | 12/7/76 | |
| | 39 | 204 | Findings & conclusions of law on compromise settlement | 12/2/76 | |
| | | 223 | Final award | 12/2/76 | |
| Hopi Village of Shungopavi, Dkt. 210 | unnumbered | | Order dismissing petition | 5/31/57 | Dismissed |
| Hualapai, Dkt. 70 | unnumbered | | Order dismissing petition | 4/28/61 | Dismissed |
| Hualapai, Dkt. 90 | 11 | 447 | Findings - Title | 11/19/62 | *see* below |
| | | 458 | Opinion | 11/19/62 | |
| | | | Interlocutory order | 12/21/66 | |
| | 17 | 456 | Findings - Value | 12/21/66 | |
| | | 500 | Opinion | 12/21/66 | |
| | | | Second interlocutory order | 5/11/67 | |
| | 18 | 382 | Opinion | 5/11/67 | |
| | | | Order denying motion for rehearing & modification of findings | 5/11/67 | |
| Hualapai, Dkts. 90 & 122 | 19 | 161 | Additional findings - Compromise settlement | 6/18/68 | $2,950,000.00 for land in Dkt. 90 & trespass damage claims in Dkt. 122 |
| | | 177 | Opinion | 6/18/68 | |
| | | | Final judgment | 6/18/68 | |
| Iowa, Dkt. 79 | 2 | 167 | Opinion on defendant's motion for summary judgment | 5/27/52 | Land claims severed out & assigned Dkt. 179-A. |
| | | | Order denying motion | 5/27/52 | |
| | unnumbered | | Order requiring defendant to render complete accounting | 7/28/52 | $11,394.67 on accounting claims. |
| | 16 | 568 | Order setting out, *inter alia*, findings on stipulated facts; entering interlocutory judgment on claims for fair value of 4,798 acres excluded from the reservation created for the Iowa Nation pursuant to Treaty of September 17, 1836, & for the fair value of an additional 94,451.25 acres of trust lands sold by defendant, severing these land claims from Dkt. 79 & giving them Dkt. No. 79-A; & entering final judgment on the remaining claims in Dkt. 79 | 2/28/66 | |
| Iowa, Dkt. 79-A | 20 | 308 | Opinion - Value & damages | 2/17/69 | $1,377,207.27 for land |
| | | 320 | Findings | 2/17/69 | |
| | | 335 | Interlocutory order | 2/17/69 | |
| | unnumbered | | Order denying defendant's motion to reserve offsets | 5/21/69 | |
| | | | | 5/21/69 | |
| | 21 | 15 | Final award | 7/2/58 | |
| Iowa, Sac and Fox, Dkt. 135 | 6 | 464 | Findings - Title | 7/2/58 | $633,193.77 for Iowa land. |
| | | 496 | Opinion | 7/2/58 | $965,560.39 for Sac and Fox |
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| | | 445 | Order granting partial summary judgment & supplemental accounting in part | 2/17/77 | |
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| | | 483 | Order denying plaintiffs' motion for summary judgment | 2/17/77 | |
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| | | 133 | Opinion | 6/8/54 | |
| | | | Final order dismissing petition | 6/8/54 | |
| | 132 C.C. | 373 | Affirmed | 6/7/55 | |
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| | | 67 | Opinion dissenting in part | 5/3/74 | |
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| | 207 C.C. | 1045 | Reversed on an interest issue; appeal dismissed as premature on two aspects; remanded for further proceedings regarding productivity of tribal funds | 10/30/75 | |
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| Gambell, Native Village of, Dkt. 284 | 27 | 140 | Order granting motion to dismiss claim | 3/22/72 | Dismissed |
| Goshute, *see* Shoshone, Goshute, Dkts. 326-B & J | | | | | |
| Grande Ronde Community, Oregon, *see* Tillamook Band, Dkt. 240 | | | | | |
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| Hannahville Indian Community, *see* Potawatomi, Hannahville | | | | | |
| Havasupai, Dkt. 91 | 20 | 210 | Opinion - Title (Navajo, Dkt. 299, overlap included) | 12/30/68 | $1,240,000.00 for land |
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| | 21 | 324 | Additional findings - Compromise settlement | 8/6/69 | |
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| Hopi, Dkt. 196 | 23 | 277 | Opinion - Title (Navajo, Dkt. 229, overlap included) | 6/29/70 | $5,000,000.00 for settlement of claims for compensation for land, rent, & for a general accounting |
| | | 290 | Findings | 6/29/70 | |
| | | 312 | Interlocutory order | 6/29/70 | |
| | unnumbered | | Order granting rehearing as to dates of taking of aboriginal lands | 4/28/71 | |
| | 31 | 16 | Opinion | 7/9/73 | |
| | | 37 | Order denying Hopi motion to amend findings | 7/9/73 | |
| | 33 | 72 | Order denying Hopi motion that the Commission hear further argument on liability phase of counts 5 through 8, amend findings and orders relating thereto, and dispose of the liability phase of said counts | 1/23/74 | |
| | 33 | 74 | Opinion relating to claims for accounting in count 9 of plaintiff's petition | 1/23/74 | |



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