

BEFORE THE INDIAN CLAIMS COMMISSION

BARON LONG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 80-A
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: June 13, 1973

Appearances:

Charles E. Burch, Jr., and Franz R. Sachse, Attorneys for Plaintiffs, Pala and Pauma Bands of Mission Indians.

Tuttle & Taylor, Incorporated, Attorneys for Plaintiffs, La Jolla and Rincon Bands of Mission Indians.

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

OPINION OF THE COMMISSION ON PLAINTIFFS' MOTION TO REOPEN THE RECORD, AND FOR OTHER PURPOSES

Blue, Commissioner, delivered the opinion of the Commission.

The Motion

The Commission has before it a motion filed on August 31, 1970, by two of the plaintiffs herein, the La Jolla and Rincon Bands of Mission Indians. These bands moved:

- (1) that our order of September 29, 1969, postponing a decision on liability, be extended;
- (2) that the record be reopened and that a hearing be scheduled for the presentation of additional evidence on liability;

- (3) that after such hearing, the bands be permitted to file supplemental proposed findings of fact and argument in support thereof; and
- (4) that the scheduled trial on value be rescheduled in respect to the La Jolla and Rincon Bands, following such further liability proceedings. 1/

For the reasons stated herein, the subject motion is granted by the accompanying order.

Background of this Proceeding

This proceeding arises from a petition timely filed on November 6, 1950, by forty-six bands of mission Indians, under Docket 80, Baron Long v. United States. An amended petition was filed on August 10, 1951. By Commission order of January 11, 1955, the second and third counts of the amended petition of August 10, 1951, relating to certain land and water rights, were ordered to be severed from the rest. On April 4, 1960, the water rights claims of the third count of the 1951 petition were refiled through an amended and supplemental petition, as Docket 80-A, Baron Long, et al., v. United States.

Although all forty-six bands were still listed in the caption of the amended and supplemental petition, the water rights claims of only the La Jolla, Rincon, Pauma, Pala, and Soboba bands were presented during the liability hearings, which were held in 1965 and 1966. The record was closed on February 3, 1967. Argument on the briefs was heard in February 1969.

On September 29, 1969, upon a letter request of one of the parties, we issued an order postponing our decision in this case for six months,

1/ By Commission order of October 14, 1970, Docket 80-A was removed from the trial calendar, to be reset for further hearing after determination of the balance of the motion.

pending the outcome of proceedings before the United States District Court in San Diego, California. Those proceedings involved a suit brought by the Rincon and La Jolla bands on July 25, 1969, against the Escondido Mutual Water Company, the Secretary of the Interior, the United States Attorney General, and the City of Escondido.^{2/} The suit sought to determine the validity of water contracts with the Escondido Mutual Water Company. Since the contracts were also involved in this proceeding, it appeared that the interests of most of the parties might be affected by the California suit.^{3/}

This was the posture of the case when the subject motion was filed on August 31, 1970.

In support of their motion, the La Jolla and Rincon bands pointed out that in its brief before the Commission, the defendant had argued that the bands' claims for damages were "premature". The defendant had urged that the bands' water rights, vis a vis other stream users, must first be determined in state court proceedings. In consequence the La Jolla and Rincon bands began to assert their rights in state and federal proceedings.

In February 1969 they intervened in a state court action in which the City of Escondido sought to condemn the assets of the

^{2/} Rincon v. Escondido Mutual Water Co., Civil No. 69-217-S, formerly 69-217-K, U. S. Dist. Ct., S. Dist. of Calif.

^{3/} On May 13, 1970, upon motion of the Soboba Band of Mission Indians, its claims, which pertained to a separate watershed, were separated from the rest. The Soboba claims were not related to the contracts involved in the California suit.

Escondido Mutual Water Company.^{4/} The assets included the water company's rights under the contracts involved herein, to the waters of the San Luis Rey River watershed, which are also claimed by the plaintiffs herein.

The two bands also filed the aforementioned action in the United States District Court, against the Escondido Mutual Water Company, et al. See note 3, supra.

In addition, on May 18, 1970, they intervened in a proceeding before the Federal Power Commission, wherein the City of Escondido sought the transfer to it, of Escondido Mutual Water Company's license to appropriate water from the San Luis Rey River watershed.

The movants explained that in Rincon v. Escondido Mutual Water Co. (see note 2, supra), the defendant had waived its prematurity argument in respect to the La Jolla and Rincon Bands.

A deferment of this Commission's decision on liability was sought to allow the plaintiff's new counsel to become familiar with the cases and to make certain that the bands' positions therein were not in conflict. The plaintiffs also averred that their pending litigation in the federal district court and before the Federal Power Commission, had raised new issues and generated new evidence which required further study and might require modification of their position herein.

The movants also averred that two of the witnesses herein, Mrs. Florence Shipek for the plaintiffs, and Mr. Fred Kunkle for the

^{4/} Escondido v. Escondido Mutual Water Company, No. 306259.

defendant, had conducted further research which would enable them to supplement their testimony significantly.

In addition, in July, 1970, the movants had obtained financing from the Bureau of Indian Affairs, for irrigable acreage and other studies, including an appraisal of property rights affected by the water companies' rights of way over the reservations. They sought an opportunity to develop this evidence and to introduce it in this proceeding.

The other two plaintiffs then active in this proceeding, the Pala and Pauma Bands of Mission Indians, filed a response to the subject motion, on September 25, 1970. They requested that the question of reopening be held in abeyance until they had an opportunity to consider and evaluate the evidence sought to be introduced, and that in the event of reopening, that all parties be allowed to file additional proposed findings of fact and argument.

On November 17, 1970, the defendant filed a response in opposition to the motion.

Thereafter the La Jolla and Rincon plaintiffs filed joint supplemental memorandums in support of their motion, on December 23, 1970; June 23 and 28, 1971; and July 20, 1972. The defendant responded in opposition on August 23, 1972, and the plaintiffs filed a sur-response on September 9, 1972.

The plaintiffs' supplemental memorandums and sur-response outline in greater detail the additional information which they seek to introduce and the materiality thereof. An affidavit was submitted by

Mr. Paul Henderson concerning his irrigable acreage studies of the La Jolla and Rincon reservations, showing the water requirement for each. Said requirement is substantially greater than the supply to those reservations under the contracts involved herein. An affidavit was also submitted by Florence Shipek concerning her latest studies of the farming practices and the history of the defendant's failure to protect the water supply of the Luiseno Indians, including the Rincon Band.

In addition, the movants seek to introduce evidence from two new court actions. On September 25, 1970, the Department of the Interior petitioned the Federal Power Commission to revoke the license of the Escondido Mutual Water Company.^{5/} On July 17, 1972, the Department of Justice, on behalf of the La Jolla, Rincon, Pala, and San Pasqual Bands, brought an action against Escondido Mutual Water Company, et al., in the United States District Court for the Southern District of California.^{6/} The action seeks to reform the same contracts which are involved herein. The movants seek to introduce in this proceeding, the government's complaint in the latter proceeding. The complaint

5/ In the Matter of: Project No. 176, Secretary of the Interior, Acting in His Capacity as Trustee of the Rincon, La Jolla and San Pasqual Mission Indians v. Escondido Mutual Water Company and the City of Escondido, California.

6/ Rincon Band of Mission Indians, La Jolla Band of Mission Indians v. Escondido Mutual Water Company, Walter J. Hickel, U. S. Secretary of the Interior; John N. Mitchell, United States Attorney General; City of Escondido.

alleges, inter alia, that various practices of the licensee have been detrimental to the movants, have impaired their water rights, are in conflict with the purposes for which the reservations were created, and that the movants have been inadequately compensated. The movants also seek to introduce in this proceeding, pleadings and testimony to the same effect, by government witnesses in the Federal Power Commission proceeding.

The proffered evidence appears to be material in evidencing injury suffered by the plaintiffs and in refuting and impeaching the credibility of the defendant's prior assertions in this proceeding.

The Defendant's Contentions

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

Initially the defendant argued that the motion should be denied on the grounds that the plaintiffs had failed to fully describe the evidence or to show its materiality. This objection has been met by the plaintiffs' supplemental memorandums and response.

The defendant contends that this Commission is without jurisdiction to hear the additional evidence because 25 U.S.C. § 70a provides that no claim accruing after August 13, 1946, shall be considered by the Commission. The defendant misconstrues the plaintiffs' claims as being based exclusively on establishing continuing contract rights

to water. The defendant argues that such contract rights are severable annually and that the Commission has no jurisdiction to award damages for depletion of water after 1951.^{7/}

In fact the plaintiffs' claims are much broader than mere contract rights. They are based upon Winters Doctrine rights and upon the California law of riparian rights, and upon various violations of those rights. It appears that theirs is a continuing cause of action which, while accruing prior to 1946, has continued thereafter. United States v. Southern Ute Tribe or Band, 191 Ct. Cl. 1 at 31; 423 F. 2d 346, at 362-363 (1970); on appeal of Ind. Cl. Comm. Docket No. 328; rev'd on other grounds, 402 U. S. 159 (1971).

The defendant also contends that the Commission is without jurisdiction to hear the additional evidence because it was not calendared for trial by December 31, 1970 within the requirements of 25 U.S.C. § 70v-1. The cited statute does not preclude the hearing of evidence in this situation. The Commission has fully complied with the statute. This case was not only calendared, and heard prior to December 31, 1970, but prior to the passage of 25 U.S.C. § 70v.

We are fully mindful of the limited lifespan of this Commission and of the exigency for speedy completion of all pending cases. However

^{7/} Choctaw Nation v. United States, 127 Ct. Cl. 475, 476 (1959), cited by the defendant, is inapposite. The record therein did not show when the cause of action accrued. The case was remanded for determination of that fact.

justice will not be served by denying plaintiffs an opportunity to present material evidence. Much of the evidence sought to be introduced, was presented by the defendant in other cases, subsequent to December 31, 1970. To deny the admission of that evidence would be to unfairly deprive the plaintiffs of the defendant's belated efforts to fulfill its obligations to protect their rights, and to allow the defendant to benefit from its laches in that respect by leaving the defendant's prior evidence in this proceeding unimpeached.

The defendant also argues that the motion should be denied because the plaintiffs have had ample opportunity to present their claims. This contention is patently unsound. Heretofore the defendant has maintained that plaintiffs' claims must fail for lack of proof. Much of the evidence sought to be introduced as proof has only recently been made available through research grants by the defendant and through the defendant's own pleadings and testimony in other proceedings.

The defendant's contention that the motion should be denied because the Commission is fully apprised of all facts necessary to decide the case, is also unsound. In support of this contention, and as a basis for denying admission of the testimony of Mr. Kunkle,^{8/} a Government witness in the Federal Power Commission proceeding, the defendant points out that Mr. Kunkle has already testified for the Government in this proceeding, as late as 1965. What the defendant fails to point out, is that Mr. Kunkle's testimony in the Federal

^{8/} Asst. Dist. Chief, U. S. Dept. of the Interior, Geological Survey, Water Resources Division.

Power Commission proceeding appears to contradict the defendant's assertions herein, that the water contracts are beneficial to the plaintiffs and that the plaintiffs have suffered no demonstrable injury from the contracts or the operations of the water companies. The same appears to be true of the testimony of other witnesses in the Federal Power Commission proceeding.

Lastly the defendant argues that the evidence sought to be introduced sheds no light on conditions prior to 1946. As support for this contention, the defendant cites several statements from testimony in the Federal Power Commission proceedings, which relate to post 1946 events. The fallacy of the argument, however, is two-fold. It overlooks the continuing nature of the plaintiffs' cause of action. It also overlooks numerous references in the testimony of the several witnesses in the Federal Power Commission proceedings, to events and conditions going back as far as 1913.

For these reasons, the subject motion is granted by the accompanying order.


Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall, Chairman



John T. Vance, Commissioner



Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner