

BEFORE THE INDIAN CLAIMS COMMISSION

THE CADDO TRIBE OF OKLAHOMA, IN ITS OWN)
RIGHT AND DAN MADRANO, LLOYD TOUNWIN AND)
ANDREW DUNLAP ON RELATION OF THE CADDO)
TRIBE OF INDIANS AND THE CADDO TRIBE OF)
OKLAHOMA EACH ON BEHALF OF OTHERS)
SIMILARLY SITUATED AND ON BEHALF OF THE)
CADDO TRIBE AND VARIOUS BANDS AND GROUPS)
OF EACH OF THEM COMPRISING THE CADDO)
TRIBE AND NATION,)

Plaintiffs,)

THE ALABAMA-COUSHATTA TRIBES OF TEXAS AND)
THE COUSHATTA INDIANS OF LOUISIANA,)

Intervenors,)

Docket No. 226

THE WICHITA INDIAN TRIBE OF OKLAHOMA AND)
BANDS AND GROUPS OF INDIANS WHICH HAVE)
BEEN OR WHICH ARE AFFILIATED WITH THE)
WICHITA INDIAN TRIBE OF OKLAHOMA,)
INCLUDING BUT NOT LIMITED TO THE)
WICHITA, WACOS, KEECHIS AND TOWACONIES,)

Second Intervenors,)

THE TONKAWA TRIBE OF INDIANS OF OKLAHOMA)
AMALGAMATED WITH AND SUCCESSORS IN)
INTEREST TO THE TEXAS TONKAWA TRIBE AND)
THE TEXAS LIPAN TRIBE AND THE TEXAS)
KARANKAWA TRIBE,)

Third Intervenors,)

v.)

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: January 24, 1975

Appearances:

Rodney J. Edwards, Attorney for the Plaintiffs.

Tom Diamond and Alan Minter, Attorneys for the Alabama-Coushatta Tribes of Texas, Intervenors, and for the Third Intervenors.

Jim D. Bowmer, Attorney for the Coushatta Indians of Louisiana, Intervenors.

Omer Luellen, Attorney for the Second Intervenors. Paul M. Niebell was on the brief.

Bernard M. Sisson, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This suit was brought by the Caddo Tribe of Oklahoma, et al., under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, seeking compensation for the alleged taking by the United States of lands located in the present States of Arkansas, Louisiana, Oklahoma, and Texas, which lands the plaintiffs claim their predecessors held under aboriginal title.

The plaintiffs filed their original complaint in this docket on August 8, 1951, claiming compensation for lands in the present States of Arkansas and Louisiana that were ceded to the United States under the Treaty of July 1, 1835, 7 Stat. 470. The original complaint also sought compensation, under Count II, for lands in the present State of Texas from which it was alleged the Caddo Tribe was evicted and, under Count

IV, for lands allegedly aboriginally owned by the Caddo Tribe in Arkansas, Louisiana, and Oklahoma outside the territory ceded under the 1835 treaty.

Trial on the issue of title to the claims in the original complaint was held before the Commission commencing March 1, 1955. By the Commission's order of that date, Counts II and IV of the complaint were dismissed after the plaintiffs informed the Commission that they had no evidence to offer in support of the allegations contained in these two counts.

On March 8, 1956, the Commission entered its decision that the Caddo Tribe had held aboriginal title to a tract of slightly more than 600,000 acres located in what is now southwestern Arkansas and northwestern Louisiana, which tract was a portion of the lands ceded by the Caddo to the United States under the 1835 treaty.^{1/} The lands the Commission held to have been so owned by the Caddo Tribe were described in finding of fact No. 12 of the Commission's decision. See 4 Ind. Cl. Comm. 201, at 212-13 (1956). By separate orders entered January 2, 1957, the Commission amended said finding of fact No. 12 and also amended its interlocutory order entered in conjunction with its decision of March 8, 1956, to specify with more particularity the boundaries of the tract found by the Commission to have been

^{1/} The entire tract ceded at the 1835 treaty is identified as Area 202 on Royce's Maps Arkansas 1 and Louisiana in Part 2 of the Eighteenth Annual Report of the Bureau of American Ethnology, 1896-97.

owned aboriginally by the Caddo Tribe. Plaintiffs' appeal of the Commission's decision was dismissed by the Court of Claims as premature. See 140 Ct. Cl. 63 (1957). The Commission then proceeded to make determinations on the value of the tract and on the proper classification of one of the items claimed by the defendant as a gratuitous offset. See 19 Ind. Cl. Comm. 385 (1968); 9 Ind. Cl. Comm. 557 (1961); and 8 Ind. Cl. Comm. 354 (1960).

On February 12, 1969, the plaintiffs filed a motion seeking to vacate the Commission's order of March 1, 1955, which had dismissed Counts II and IV of the original complaint. By order of the Commission dated December 5, 1969, 22 Ind. Cl. Comm. 181, 185, the Commission's order of March 1, 1955 was vacated, and the plaintiffs were given 30 days to file an amended complaint.

On January 6, 1970, the plaintiffs filed their amended complaint in which they claimed compensation under Count II, on the basis of aboriginal title, for all of the present State of Texas east of Area 478 as delineated on Royce's "Map of Texas and Portions of Adjoining States" and, on the basis of recognized title, for Areas 512 and 513 shown on said map to be located in the region of the Upper Brazos River. Count IV of the amended complaint claimed compensation for territory in the present states of Arkansas, Louisiana and Oklahoma, which territory was alleged to have been aboriginally owned by the plaintiffs and taken by the United States without the payment of any compensation at some time after the United States acquired sovereignty over said

territory and before the 1835 treaty between the Caddo and the United States. The territory so claimed is described in the amended complaint as follows:

Commencing at a point where the Red River boundary line of the states of Oklahoma and Texas intersects the Meridian of 98° West Longitude; thence due north on said Meridian to the north boundary line of the state of Oklahoma; thence east along the north boundary line of the state of Oklahoma to a point where the Arkansas River intersects said boundary; thence down the Arkansas River to the Mississippi River; thence down the Mississippi River to the mouth of the Red River at 31° north latitude; thence west on said latitude to the boundary line between the states of Louisiana and Texas; thence north and west along the boundary line of the state of Texas to point of beginning.

The tract ceded to the United States under the Treaty of July 1, 1835, supra, is located entirely within the boundaries of the territory described above.

On April 9, 1971, the defendant moved to consolidate this docket for trial with Docket 257, Kiowa, Comanche and Apache Tribes v. United States, and Docket 22-C, Lipan Apache Tribe v. United States, on the ground that the claims in the three dockets overlapped. However, the Commission's decisions in the Kiowa case, supra, were appealed to the Court of Claims, and the Commission was without jurisdiction to rule on the motion for consolidation during the pendency of the appeal. It was not until April 15, 1974, when the Supreme Court denied a petition for certiorari, that the Commission regained jurisdiction over Docket 257. See United States v. Kiowa, Comanche and Apache Tribes, 202 Ct. Cl. 29 (1973), cert. denied, 416 U. S. 936 (1974) (rev'g Docket 257, 24 Ind. Cl. Comm. 405 (1971); 26 Ind. Cl. Comm. 101 (1971)).

By Commission order of July 17, 1974, the defendant's motion was denied insofar as it sought consolidation of Docket 257 with Dockets 22-C and 226. See 34 Ind. Cl. Comm. 287. Our action today in connection with the claims in intervention herein, and the action of the Caddo plaintiffs at trial in limiting their proofs of aboriginal title to an area smaller than that claimed in the amended complaint have eliminated any overlap of claims under Dockets 22-C and 226 and thus made moot that portion of defendant's motion which has remained pending seeking consolidation of Dockets 22-C and 226. We will therefore enter an order today in conjunction with our decision herein, denying the defendant's motion to consolidate Dockets 22-C and 226.

By Commission orders dated January 12, 1972, 27 Ind. Cl. Comm. 8, February 2, 1972, 27 Ind. Cl. Comm. 35, and March 1, 1972, 27 Ind. Cl. Comm. 74, the Alabama-Coushatta Tribes of Texas and the Coushatta Indians of Louisiana, the Wichita Indian Tribe of Oklahoma and Affiliated Bands, and the Tonkawa Tribe of Indians of Oklahoma, respectively, were permitted to intervene herein for the purpose of asserting claims of compensation for the taking by the United States of lands partially overlapping the area claimed by the Caddo in their amended complaint, which lands these intervenors claimed were held by their predecessors under aboriginal title.

The trial on the issue of title to the areas so claimed was held before the Commission on March 27, 28, and 29, 1972.

Intervention herein by the Alabama-Coushatta Tribes of Texas and the Coushatta Indians of Louisiana, by the Wichita Indian Tribe of

Oklahoma and Affiliated Bands, and by the Tonkawa Tribe of Indians of Oklahoma, was permitted by the Commission on the basis of the Commission's rationale in its prior decision permitting the Tigua Indians to intervene under the claim of the Lipan Apache Tribe in Docket 22-C, supra, at 22 Ind. Cl. Comm. 1 (1969). There the Commission held that a common alleged source of injury, namely transfer of public lands by the United States to the State of Texas without requiring the state to protect aboriginal property rights of the Indian occupants, was sufficient to permit intervention, and that the filing of the original claim therein had the effect of putting the Government on notice that it might be required to litigate the question of title to all the land in Texas in the original claim, which land included that claimed by the Tigua applicants for intervention. The Commission followed its Lipan decision in Kiowa, Comanche and Apache Tribes v. United States, Docket 257, 24 Ind. Cl. Comm. 405, supra, in permitting intervention therein by the Wichita Indian Tribe of Oklahoma. However, the Commission's decision to permit the Wichita to intervene under Docket 257 was reversed by the Court of Claims. See 202 Ct. Cl. 29, at 43-45, supra. Following the Court of Claims' Kiowa, Comanche decision, the Commission has recently dismissed the claim in intervention of the Tigua Indians under Docket 22-C. See 35 Ind. Cl. Comm. 302 (1975).

On May 10, 1974, the defendant filed a motion in this docket to dismiss all complaints in intervention. Defendant cited the decision of the Court of Claims dismissing the claim in intervention of the Wichita Tribe in the Kiowa, Comanche case, supra. In the latter case it was held that the Indian Claims Commission is without jurisdiction to permit an

intervention after August 13, 1951, in a timely filed claim by a party claiming aboriginal title adversely to the plaintiffs. The separate intervenors each filed a response in opposition seeking to distinguish the Kiowa, Comanche case, supra, and raising other arguments against dismissal.

It is our opinion that the rule enunciated in the Kiowa, Comanche case is dispositive here and that the claims in intervention must be dismissed. Each of these claims in intervention was, at the time of filing, adverse to the claim of the plaintiffs, who opposed each claim. That the plaintiffs may have subsequently contracted the boundaries of their claim is irrelevant. Furthermore, the plaintiffs have never asserted that they were representing the interests of any other tribes than themselves or that they held joint aboriginal title with any other tribes. The reference in the plaintiffs' original complaint to possible joint occupancy of certain lands with other tribes was simply a factual allegation. It was certainly not a claim of joint aboriginal title. Assertions by certain of the intervenors that they failed to receive notice of the Indian Claims Commission Act are not proved. See Commission Exhibit Nos. 1 and 2, admitted in evidence by the accompanying order. Even if lack of notice were proved, we do not feel the Commission could thereby find a cure for the jurisdictional defect determined by the Court of Claims. Finally, in the light of that court's ruling, we cannot accept the argument that this Commission may adopt a procedural rule and thereby circumvent the express limitation on the Commission's jurisdiction contained in section 12 of our act, 60 Stat. 1049, 1052. We therefore hold that we must deny the motions to intervene and must dismiss the complaints in intervention. We will enter such an

order today and will proceed to the disposition of the title phase of this docket with only the Caddo Tribe and the United States remaining as parties.

At the trial of their claims under Counts II and IV of their amended complaint the Caddo plaintiffs submitted evidence seeking to establish aboriginal title to a large contiguous area located in southwestern Arkansas, northwestern Louisiana, northeastern Texas, and southeastern Oklahoma. The area so claimed is described in the plaintiffs' proposed finding of fact No. 56, filed with the Commission on September 28, 1972. The boundaries of this area are those which the plaintiffs' expert witness, Dr. Helen Hornbeck Tanner, offered as her opinion of the boundaries of the Caddo aboriginal territory as of 1804. See Pl. Ex. T-216, Helen Tanner, The Territory of the Caddo Tribe of Oklahoma, at 48-66, and Appendix A.

Generally described, the area so claimed, on the basis of Dr. Tanner's opinion, includes all of the present States of Arkansas, Louisiana, Oklahoma, and Texas circumscribed by a line beginning near the headwaters of the Saline River in Garland County, Arkansas, and running directly south to the Louisiana line in southwestern Union County, Arkansas, and then proceeding south in Louisiana as far as the town of Colfax, in Grant Parish. The line then turns west and proceeds along the entire length of the ridge of the Kisatchie Wold from the Red River west to the watershed between the Trinity and Navasota Rivers, passing into Texas just below the Toledo Bend Reservoir on the Sabine River and continuing as far west

in Texas as the town of Bedias in northeastern Grimes County. It then turns north and proceeds by north and northwest meanders to the Texas-Oklahoma border on Red River at Sivell's Bend near Marietta, in Love County, Oklahoma. In Oklahoma the line continues north to the Washita River at the mouth of Cherokee and Sandy Creeks east of Paul's Valley in Garvin County, Oklahoma, where it turns east following the divide between the waters of the Arkansas and Red Rivers into Arkansas and to the place of beginning.

Much of the history of the ancestors of the Caddo Tribe of Oklahoma has been set out in prior proceedings in this docket dealing with the plaintiffs' claim arising out of the cession of lands under the 1835 treaty. The present Caddo claim involves consideration of the use and occupancy of a much larger area than that ceded under the 1835 treaty, which larger area completely surrounds the area so ceded at that treaty. To insure a coherent chronological and geographical analysis of the history of Indian use and occupancy of the entire area claimed by the Caddo in this proceeding we have incorporated and reiterated considerable portions of the Commission's previous findings in our present findings of fact and in the summary of the history of the Caddo people which appears in this opinion. We have made new findings here in connection with the history of the Caddo in areas (particularly Texas) now at issue but outside the scope of the previous proceedings under this docket.

The Caddo Tribe of Oklahoma constitutes the remnants of three confederacies of Caddoan Indians who once held dominion over an immense

territory comprising what is now eastern Texas, southeastern Oklahoma, southwestern Arkansas, and northwestern Louisiana. White men first encountered the Caddo in this region in the mid-16th century. Subsequent and more frequent encounters by Spanish and French explorers and traders during the period up to the early 18th century indicate continued and exclusive Caddo use and occupancy of this region.

The Kadohadacho Confederacy of Caddo tribes lived in the area of the big bend of the Red River in present southwestern Arkansas. These tribes also utilized the area north and south of the Red River in southeastern Oklahoma, southwestern Arkansas, and northeastern Texas without any known competition from other Indians. Farther down Red River several Caddo tribes comprising the Natchitoches Confederacy lived in the area from present Shreveport, Louisiana, down-river to beyond present Natchitoches. West of the Natchitoches Caddo lived a Caddo tribe, the Aidai, between the Red and Sabine Rivers, while west of the Sabine another Caddo tribe, the Ais, or Eyeish, lived along the present Texas side of the middle Sabine River. In east Texas between the Trinity River and the Attoyac Bayou in present Nacogdoches, Cherokee, Rusk, and Houston Counties, lived the largest Caddo confederacy--the Hasinai, whose population may have been as high as 4,000 or 5,000 in the early 18th century.

The evidence presented in this proceeding establishes that from time immemorial until the latter half of the 18th century, the Caddo, comprised of those subdivisions of the Caddo people described above, had

continuously and exclusively used and occupied an area of the present States of Arkansas, Louisiana, Oklahoma, and Texas approximately bounded on the east by a line generally following the 93rd Meridian of West Longitude from Hot Springs, Arkansas, south to Colfax, Louisiana; on the south by a line generally following the 31st Parallel of North Latitude from Colfax, Louisiana, westward to the Trinity River in Texas; on the west by a line generally following the course of the Trinity River northward to its intersection with the 96th Meridian and then northward along said longitudinal line to a point near Ashland, in Pittsburg County, Oklahoma, where it meets the divide between the waters of the Arkansas and Red Rivers; and on the north by a line following said divide eastward to the place of beginning at Hot Springs, Arkansas.

In the year 1777 a severe epidemic ravaged the area west of the Mississippi River. This epidemic reached the entire Caddo population and had catastrophic results for the Caddo over the long range. It was the loss of population caused by the epidemic, coupled with the appearance within the Caddo territory at about the same time of several aggressive Indian tribes, which, over the remaining years of the 18th century and the early years of the 19th century, resulted in an irreversible decline in the fortunes of the Caddo and the consequent loss of a large portion of their aboriginal territory.

During the 18th century the Osage Indians had been steadily advancing in a generally south and southwesterly direction across Kansas and Oklahoma. During the first half of the century the Osage had forced

the Wichita out of Kansas and northern Oklahoma, pushing them into southwestern Oklahoma and northcentral Texas in the vicinity of the Red River. By the late 18th century the Osage had begun to attack the Kadohadacho. The success of these attacks, together with the Kadohadacho population losses caused by the 1777 epidemic, ultimately caused the Kadohadacho, about the year 1790, to abandon their village near the big bend of the Red River and to move southward to another previously existing Kadohadacho village at Lake Caddo on the present Texas-Louisiana border.

At about the same time, the Caddo tribes of the Natchitoches Confederacy, also depleted after the 1777 epidemic, were beset by the arrival on their borders of several tribes who had migrated from east of the Mississippi River. The Alabama Tribe arrived first near the western banks of the Mississippi in the 1760's, and was joined late in the century by a closely related tribe, the Coushattas. By the first decade of the 19th century these Alabamas and Coushattas had moved into western Louisiana as far as the Sabine River and beyond into Texas and also had a village very near the Caddo at Caddo Lake. During the first decade of the 19th century the Alabama and Coushatta population in Louisiana had surpassed that of the Caddo, who, according to John Sibley, the first United States Indian agent in Louisiana, were severely declining in population at the time.

The Alabamas and Coushattas were on friendly terms with the Caddo but another of the migrant tribes, the Choctaw, were hostile. From

the time the Choctaw arrived in Louisiana in 1792 until 1807 they waged war upon the Caddo. In the early years of the 19th century the Choctaw are known to have been settled on the Red River near Alexandria, which is below the Caddo territory, and at various points west of the Red River above and below Natchitoches within the claimed Caddo territory. And there were groups from several other tribes settled along the Red River between Natchitoches and Alexandria in the very early 19th century, some of whom, according to Sibley, had been there for several years.

As a result of all this, the Louisiana Caddo, at the time of the Louisiana Purchase in 1803 or very shortly thereafter, were all living within the area subsequently ceded by them to the United States in 1835 and were, in fact, by the year 1825 all living near Caddo Lake. See finding of fact No. 57, infra. After 1805, there are no references to the Caddo using or occupying any lands in Louisiana outside the area ceded by them in 1835, other than to attend councils with the Americans at Natchitoches. It was not until the 1820's and 30's, many years after the Caddo had so located themselves, that there was any significant white settlement in the regions of southeastern Oklahoma, southwestern Arkansas, and northwestern Louisiana aboriginally claimed here by the Caddo. Shortly after the cession of their lands to the United States in 1835, the remnants of the Kadohadacho and Natchitoches Caddo went to Texas where they amalgamated with the Hasinai Caddo.

The breakdown of Hasinai ascendancy in east Texas occurred later, between the years 1810 and 1838, and was caused by a combination of white settlement in Texas and the arrival there of several Indian

tribes migrating westward to escape white settlement in the then adjacent United States. The Hasinai Caddo remained within their aboriginal territory until 1838 or 1839 when they were driven off their lands by militiamen of the Texas Republic. However, during the quarter-century preceding their departure east Texas had ceased to be theirs. By the late 1820's observers were reporting the presence of migrant Indians all over east Texas, particularly near the town of Nacogdoches which was in the heart of the claimed Caddo territory. South of the Caddo territory the Alabama and Coushatta Tribes had completely taken over a portion of what is known as the Big Thicket, with settlements across the present Texas Counties of Polk, Tyler, San Jacinto, Trinity, and Angelina. The record presented in this proceeding demonstrates that by 1830, the Hasinai had been relegated to the status of one group among the many competing tribes who occupied east Texas.

The early 19th century also saw the arrival in east Texas of significant numbers of white settlers from the United States. By the early 1830's there were more than 10,000 whites settled east of the Brazos River. Nacogdoches and San Augustine had become large towns. Indians of the several tribes then living in east Texas carried on extensive trading with the whites at these towns. With the white settlers came an extended period of civil strife which did not finally end until the United States annexed Texas in 1845. During much of the first quarter of the century, Mexico had been engaged in its War of Independence from Spain. When independence was won in 1821, the new Mexican Government actively encouraged immigration by Anglo settlers

into Texas. It soon became apparent that the large number of settlers who had entered Texas during the 1820's favored rule over Texas by the United States, rather than by Mexico. In 1830, therefore, Mexico forbade further immigration from the United States. However, the Anglo population of Texas had become sufficiently large and powerful to revolt, and they achieved independence from Mexico in 1836. Texas remained a sovereign republic until December 29, 1845, when it was annexed by the United States.

During the period of the Texas War for Independence and in the years immediately following, tensions increased to the breaking point between Indians and whites. Mexican agents attempted to organize the Indians against the Texans. Indian raids on white settlements became more common and widespread, with the Caddo and several of the migrant east Texas tribes raiding as far as west of the Brazos River. In 1838, the Republic of Texas began a campaign to rid east Texas of its Indian population. In the face of Texas militiamen the Indians of east Texas were scattered far and wide into northwestern Texas, Oklahoma, and Mexico. A large portion of the Caddo were driven into Louisiana. For the next several years the Caddo were dispersed. Some were reported in Arkansas and Texas, others in Oklahoma. Traditional accounts indicate that part of the Caddo went to Cross Timbers, then to Mexico, and finally returned to Cross Timbers. The last reference to Caddo in the claimed area of east Texas is in the year 1839.

In 1843 and 1844, the Caddo, and several other tribes, were parties to two separate treaties with the Texas Republic, which treaties together

with the proceedings of the second treaty demonstrate that the Republic considered east Texas no longer open to Indian occupancy and that the Indians were only to occupy lands in Texas west of the line of trading posts to be established on a line running south from Red River along the Cross Timbers then west of Austin and San Antonio to the Rio Grande River. See finding of fact No. 60, infra. At the time of the annexation of Texas by the United States in 1845, the Caddo, together with the Wichita and several other tribes, were gathered along the middle and upper Brazos River far to the west of their aboriginal lands in east Texas.

On February 6, 1854, the Texas State Legislature passed an act providing for reservations for the Texas Indians and authorizing the United States to select and survey twelve leagues of land for these reservations. As soon as the land was surveyed and marked, the Federal Government was to settle thereon Indians of Texas and to have control of them, and establish such agencies and military posts as were necessary. The act provided for the reversion of the land to the state when it was no longer used for the Indians. Later that year and early in the next the Federal Government selected and surveyed two reservation sites on the Brazos River above Waco. On one, a number of southern Comanches were settled. On the other, called the Brazos Agency, several tribes were settled, including the Caddo, Waco, Towakoni, Kichai, and Tonkawa. The Brazos Agency consisted of 37,152 acres. The Indians remained on these reservations until 1859, when the United States was forced to relocate them to the Indian Territory to prevent their massacre at the hands of

the Texas settlers. The lands comprising the Brazos reserves then reverted to the State of Texas.

The plaintiffs have presented an uncomplicated, straight-forward argument in seeking to establish the validity of their claims for compensation. They assert that the Caddo had used and occupied the area claimed by them here from time immemorial, that they continued in such use and occupancy after the assumption of sovereignty by the United States over these lands and that, at specific times after United States sovereignty had so attached, action by, and inaction on the part of, the United States caused the plaintiffs to lose their aboriginal title rights to these lands.^{2/} Our resolution of the merits of the plaintiffs' claims here is equally uncomplicated. We believe that when the United States acquired sovereignty over the lands claimed by the plaintiffs, the Caddo had already lost whatever aboriginal title rights they may previously have held in such lands and, consequently, that the plaintiffs do not now have a compensable claim against the United States for the taking of these lands.

^{2/} The plaintiffs' expert, Dr. Tanner, has drawn boundaries for the Caddo which, in our opinion, represent the boundaries of Caddo aboriginal title at a time much earlier than the 19th century. Dr. Tanner's hypothesis in drawing her boundaries appears to have been that instances of Caddo use and occupancy at any time in history establish title at the advent of American sovereignty. Thus Dr. Tanner's boundaries are drawn by reference to instances of Caddo use and occupancy at different times, and these boundaries, in our opinion, represent maximum boundaries of the Caddo over the entire historical period rather than Caddo boundaries at the beginning of American sovereignty.

Aboriginal title rights extinguished prior to the inception of United States sovereignty are not compensable claims against the United States. See Sac and Fox Tribe v. United States, 179 Ct. Cl. 8, 22 (1967), cert. denied, 389 U. S. 900 (1967) (aff'g in part, rev'g in part Docket 135, 15 Ind. Cl. Comm. 248 (1965), 12 Ind. Cl. Comm. 487 (1963), 6 Ind. Cl. Comm. 464 (1958)).

With respect to the portion of the claimed area presently included within the States of Louisiana, Arkansas and Oklahoma, the evidence now in the record, together with the findings of fact previously made by the Commission under this docket, establish to our satisfaction that the Caddo, at the time of the commencement of United States sovereignty over this territory, possessed no aboriginal title rights to any territory outside that area ceded to the United States under the Treaty of July 1, 1835, supra.

The northern extremity of Caddo exclusive use and occupancy in 1803 was at Caddo Lake which is well south of the northern boundary of the 1835 cession. The Commission has previously determined, at 4 Ind. Cl. Comm. 216-18, and reiterated said determination, at 8 Ind. Cl. Comm. 374, that, due to diminishing population and pressure from the Osage, the Caddo had by 1800 abandoned all territory in Arkansas north

of the Sulphur River, which is within the area subsequently ceded, and that they never attempted to return to these lands thereafter.

In the late 18th and early 19th centuries the Caddo apparently hunted periodically in southeastern Oklahoma, but other tribes also hunted and raided in this same area. See 2nd Int. Ex. 1 at 49; Caddo Tribe v. United States, 4 Ind. Cl. Comm. at 218-19; 8 Ind. Cl. Comm. at 376. We have found no references to Caddo hunting in southeastern Oklahoma between 1790 when the Caddo abandoned the Big Bend on Red River and the beginning of the second quarter of the 19th century. By the 1830's southeastern Oklahoma was a common hunting ground. (Pl. Ex. T-46, at 98.)

The evidence presented here and the previous Commission findings likewise establish that the lands in present Louisiana surrounding the areas ceded by the Caddo in 1835 on the east, south, and west, were not aboriginally owned by the Caddo when United States sovereignty attached to these lands. By the year 1805 there remained but two pockets of Caddo settlement on the Red River; each, according to John Sibley, containing very small and continually decreasing numbers of Caddo. There were no known Caddo settlements east of Red River, nor any evidence that the Caddo were using this area at all. Along the

Red River from Alexandria on the south to Caddo Lake on the north there were several settlements of migrant eastern tribes, some of whom had been in Louisiana for many years. In the region of disputed sovereignty between the Sabine and Red Rivers there are no references to Caddo presence after 1805, while it is known that other tribes, notably the Coushattas and Choctaw, were using and occupying this area at the time. By 1819, when the United States and Spain settled the boundary question, the region was empty of Caddo. Finally, available population estimates show that at the time United States sovereignty attached to these lands in Louisiana, the Caddo there were significantly outnumbered by other Indians.

The plaintiffs have urged that the Alabamas, the Coushattas, and the Choctaws, all of whom migrated to western Louisiana before the end of the 18th century, and those other tribes--the Apalachees, Biloxis, Boluscos, Pascagoulas, and Taensas--who migrated during the first decade of the 19th century were all, to the extent they may have used and occupied lands claimed by the plaintiffs, using and occupying said lands as guests, or permissive users, of the Caddo.

The doctrine of permissive use is one which is narrowly applied to situations where one dominant tribe permits another tribe to use the

former's lands with the express understanding by both that the latter is the guest of the former. Iowa Tribe v. United States, Docket 135, 22 Ind. Cl. Comm. 232, 278-79 (1969). Such a doctrine may not, however, be used to buttress a crumbling empire as plaintiffs have attempted to do here. Plaintiffs' argument for permissive use is based upon scattered statements in the evidence whereby Caddo chiefs voiced claims to large areas long after the Caddo had evacuated these areas. See, e.g., Pl. Ex. T-91, at 257, W. A. Trimble, Report to the Secretary of War, 1822. Nowhere, however, is there a contemporaneous acknowledgement by any member of the immigrant tribes that their use and occupancy was at the pleasure of the Caddo. In 1805, John Sibley, the Indian Agent at Natchitoches, reported (finding of fact No. 57, infra) that the Natchitoches Confederacy of Caddo were in desperate straits and that the southernmost unit of the confederacy in 1805 was living 25 miles north of Natchitoches. This was within the 1835 cession area.^{3/}

We believe that the status of the Louisiana Caddo in 1800 has been well summarized by an historian of the Caddo, as follows:

^{3/} Plaintiffs' expert, Dr. Helen Tanner, has written of Sibley in her report as follows:

. . . Sibley's historic sketches of the Indian Tribes, written in 1805, is probably the basic document for understanding the location of the tribes and the relation between the tribes at the beginning of the American period. (Pl. Ex. T-216, at 49.)

By the beginning of the nineteenth century the importance of the Cadodacho as a distinct tribe was at an end, the people became merged with the other tribes of the confederacy and shared their misfortune. In 1776 De Mezieres recommended that presents no longer be given to the Natchitoches and Yatasi tribes, since they had disbanded and scattered among other bands. In 1805 the Natchitoches numbered fifty. Shortly afterwards, they ceased to exist as a distinct tribe, having been completely amalgamated with the other tribes of the Caddo Confederacy. The Yatasi tribe was practically destroyed by the wars and new diseases of the eighteenth century. These had such an effect on the Yatasi that by 1805, according to Sibley, they had been reduced to eight men and twenty women and children. They, too, merged with the other members of the Caddo Confederacy. All of the Adai, Natsoos, and Nasonnites disappeared as distinct tribes by the close of the eighteenth century. The Adai were absorbed by the Caddo, and it is thought the Natsoos, and Nasonnites were also merged with their kindred. By the close of the eighteenth century with the exception of a few scattered bands, the Caddo villages in the vicinity of the present Caddo Parish, Louisiana, represented the remnants of the old Caddo Confederacy. Tribal wars and diseases had spread havoc among them, and they, who were once a thrifty and numerous people, had become demoralized and were more or less wanderers in their native land. [Pl. Ex. T-53, at 898, William Glover, A History of the Caddo Indians, La. Hist. Q., Vol. XVIII, No. 4, Oct. 1935.]

It can be readily seen that at the beginning of the nineteenth century the Caddo in Louisiana were not powerful enough to deny entry to other tribes even if those other tribes had asked. The immigrant tribe outnumbered the Caddo. They roamed as they pleased in western Louisiana. Thus the doctrine of permissive use is wholly inapposite.

Turning to the State of Texas, we have been guided in our analysis of the state of Caddo aboriginal title rights as of December 29, 1845, the date United States sovereignty attached to Texas, by the criteria set out by the Court of Claims in the case of Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967) (rev'g Docket 22-C, 15 Ind. Cl. Comm. 532 (1965)). In that case, the court described the proper analysis as follows:

... Indian title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned. United States v. Santa Fe Pac. R.R., supra, 314 U.S. at 345, 347. It is "entitled to the respect of all courts until it should be legitimately extinguished" Johnson v. M'Intosh, supra, 21 U.S. (8 Wheat.) at 592. . . .

The current inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights. Extinguishment can take several forms; it can be effected "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise" United States v. Santa Fe Pac. R.R., supra, 314 U.S. at 347. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues. (180 Ct. Cl. at 492)

In the Lipan Apache case, the Court of Claims decided that the " ... required clear and plain indication that the Republic [of Texas] ended claimants' rights in their ancient lands ... " had not been demonstrated. However, in the case before us now we believe that the historical record of the actions taken by the Texas Republic toward the Caddo demonstrates an unambiguous intention on the part of the Republic to extinguish Caddo aboriginal title to the east Texas area claimed in this proceeding. The clear and plain indication of such intention was the successful eviction of the Caddo from their lands in east Texas in 1838 and 1839. It would be difficult to find a clearer intention to extinguish Caddo rights in their lands than the course of forcible eviction followed

by the Texans. Further, the 1843 and 1844 treaties between the Texas Republic and several of the Texas Indian tribes, including the Caddo, together with the record of proceedings under the second of these treaties, reveal unmistakably that the Texas Republic considered all Indian rights of use and occupancy to the whole of east Texas to have been previously terminated. The treaty proceedings also show that the Indians understood this to be so.^{4/} Thus Caddo aboriginal title to the Texas lands claimed here had been extinguished several years before Texas came under United States sovereignty, and the Caddo claim against the United States for these lands is without merit.

There remains the plaintiffs' claim that they held recognized title to Royce Areas 512 and 513 in Texas. In the findings of fact accompanying this opinion, we have set out the circumstances relating to the presence of the Caddo from 1854 to 1859 on one of the two reserves set aside for the Texas tribes on the upper Brazos River. On May 15, 1846, the United States and several Texas tribes, including the Caddo, Wichita and affiliated tribes, Comanche, Kichai, and Tonkawa, concluded a general peace treaty (9 Stat. 844) under which the tribes acknowledged themselves thereafter to be under the protection of the United States. The treaty made no land cessions and granted no reservations. Subsequently the Texas

^{4/} Even plaintiffs' expert, Dr. Tanner, does not assert that the Caddo were using and occupying east Texas after 1839 but only that they continued to possess aboriginal title rights to lands in east Texas after 1839 based upon use and occupancy prior to 1839. (Pl. Ex. T-216, at 84-85.)

State Legislature in 1854 authorized the United States to locate the various Texas tribes on state public land. Under this legislation Texas agreed to relinquish to the Federal Government its jurisdiction over all Indians residing on such land. The Texas statute also provided for reversion of the land to the state when no longer used for the Indians. Later in 1854, the Federal Government selected two reservation sites on the Brazos River above Waco and on one of these, a tract of 37,152 acres, persuaded the Caddo, the Wichita and affiliated tribes, the Tonkawa, and other smaller groups to settle under the protection and supervision of the United States. On the other reservation a number of southern Comanches settled. Congress appropriated funds for surveying these reservations and settling the Indians thereon (10 Stat. 315, 331 (1854)).

These tribes remained on the Brazos River reserves until 1859 when they agreed, on the recommendation of the United States, to leave Texas for their own protection. The United States supervised their removal and placed them upon a three-quarter million acre tract of land in Oklahoma which became known as the Wichita Reservation. In 1891 (at which time they were still living there) these tribes concluded an agreement with the United States under which they relinquished whatever rights they may have had in the Wichita Reservation in return for allotment by the United States of 160 acres out of the Wichita Reservation to each Indian. This 1891 agreement was subsequently ratified by the Indian Appropriation Act of March 2, 1895, 28 Stat. 876.

In prior proceedings under this docket relating to the determination of gratuities to be offset against the award to the plaintiffs arising out of the cession of their lands in Arkansas and Louisiana under the 1835 treaty, supra, the Commission held that the 1895 act, supra, vested title in the Caddo^{5/} to the Wichita Reservation in Oklahoma upon which they had been placed in 1859 " ... by the United States in substitution for their reservation lands in Texas, from which they were removed by agreement with the United States." The Commission further held that " ... Caddo possession of an interest in the Wichita Reservation was in satisfaction of the obligation of the United States under the Treaty of 1846." See 19 Ind. Cl. Comm. 385, and accompanying order dated August 30, 1968.

The standards for determining recognized or reservation title have been set forth in numerous decisions of this Commission, the Court of Claims, and the Supreme Court. In the case of Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 439 (1959), the Court of Claims summarized these standards as follows:

. . . .

Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title," "reservation title," "recognized title," and "acknowledged title." As noted by

^{5/} Although not so stated, the Caddo title so vested was obviously not exclusive but vested jointly in the Caddo and other tribes then residing upon the reservation.

the Commission, there exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently land and that right may be established in a variety of ways. Tee-Hit-Ton v. United States, 348 U.S. 272; Hynes v. Grimes Packing Co., 337 U.S. 86; Minnesota v. Hitchcock, 185 U.S. 373.

See also Minnesota Chippewa Tribe v. United States, 161 Ct. Cl. 258, 267 (1963) (rev'g in part Docket 18-B, 8 Ind. Cl. Comm. 781 (1960)); Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 192-93, cert. denied, 375 U. S. 921 (1963) (aff'g Docket 83, 7 Ind. Cl. Comm. 675 (1959)); Crow Tribe of Indians v. United States, 151 Ct. Cl. 281, cert. denied, 366 U. S. 924 (1961) (aff'g and modifying Docket 54, 3 Ind. Cl. Comm. 147 (1954) and 6 Ind. Cl. Comm. 98 (1958)). At the least, it is stated, there must be some affirmative grant of more than permissive rights.

A barrier we find here to a finding of recognized title is the absence of any explicit Congressional action by treaty or statute granting any tenure in these tracts to any identified tribes. It is arguable that the obligations assumed by the United States under the 1846 treaty, supra, to protect the Texas Indians, together with the actions of the United States in administering the reserves granted for that purpose by the State of Texas, may have constituted acknowledgment in the Texas tribes of a beneficial interest in the

two reservations. But while that interest might in certain circumstances be compensable, see Seminole Nation v. United States, Docket 73-A, 25 Ind. Cl. Comm. 25 (1971), it plainly falls outside those heretofore categorized as recognized title.

Here we cannot conclude that there was a compensable wrong in the substitution of the three-quarter million acre Wichita Reservation in Oklahoma for the 37,152 acre tract in Texas. By the Indians' agreement they were given undisturbed possession of the large Oklahoma tract in 1859, and were granted title in 1895. This substitution would seem to fulfill any possible obligation arising under the 1846 treaty to provide the Caddo a home and protect them in possession of it.

The elimination of the claims in intervention from consideration under this docket has obviated the need to make detailed findings as to use and occupancy of lands by the predecessors of the intervenors. However, we believe it proper to point out that prior litigation involving the Wichita and affiliated tribes has established that Wichita presence in Texas and Oklahoma was principally west of Cross Timbers (at about the 98th Meridian of West Longitude) where the Wichita and affiliated tribes, together with other tribes, used and occupied territory at the same time. See Wichita and Affiliated Bands v. United States, 89 Ct. Cl. 378, 381

(1939). The evidence in this proceeding shows only sporadic, nonexclusive Wichita use and occupancy of east Texas.

The evidence with regard to the Tonkawa indicates that while these Indians may have controlled the Edwards Plateau area of southcentral Texas during the Spanish period, they were a weak, impoverished, and nomadic people by the time Texas became an independent republic. Beginning in the 1820's and continuing until the early 1840's they tended to live close to white settlements in the area adjoining the Camino Real between the Brazos and Colorado Rivers. In early 1845, the Republic of Texas decided that they should be removed from the settlements. They were assembled and moved west to the area of the San Marcos River in the spring of 1845. When Texas was annexed to the United States at the end of the year 1845, whatever aboriginal title rights the Tonkawa Tribe may once have possessed in Texas had already been extinguished.

It is our opinion, however, that the situation with regard to the Alabama and Coushatta Indians was considerably different. By the early 19th century in Louisiana and by 1845 in Texas the Alabamas and Coushattas had established extensive areas of use and occupancy which they continued to inhabit for a long time thereafter. They are, in fact, still present in portions of these areas. These areas were generally located in Louisiana between the 30th and 31st Parallels of North Latitude and the Sabine and

Atchafalaya Rivers and, in Texas, in portions of the area called the Big Thicket, principally in Polk, Tyler, San Jacinto, Trinity, and Angelina Counties. The relative inaccessibility of these areas discouraged use and occupancy by other Indians migrating from the north and deferred white settlement until many years after the United States had acquired these lands. The evidence here indicates that for a long time beginning before and ending after the United States acquired these areas the Alabamas and Coushattas effectively exercised control over these areas and over other Indians who may have ventured therein. Unfortunately, such proof does not admit of recovery herein because the holding of the Court of Claims in the Kiowa, Comanche case, supra, has necessitated dismissal of the petition in intervention filed by the Alabamas and Coushattas.

On the basis of the accompanying findings of fact, and for the reasons we have set forth in this opinion, we are taking the following actions today under this docket. The Commission will enter an order under Dockets 22-C and 226 denying the defendant's motion to consolidate these dockets. We will enter an order under Docket 226 vacating the previous Commission orders of January 12, 1972, 27 Ind. Cl. Comm. 8; February 2, 1972, 27 Ind. Cl. Comm. 35; and March 1, 1972, 27 Ind. Cl. Comm. 74; granting intervention under said docket to the Alabama-Coushatta Tribes of Texas and the Coushatta Indians of Louisiana, to the Wichita Indian Tribe of Oklahoma and Affiliated Bands and Groups, and to the Tonkawa Tribe of

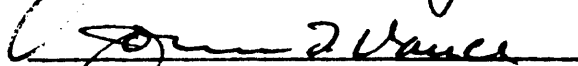
Indians of Oklahoma, denying their motions to intervene and dismissing their complaints in intervention. Finally, we will enter an order dismissing Counts II and IV of the plaintiffs' amended complaint of January 6, 1970.


Those matters still pending under this docket will now revert to the status which existed immediately prior to the filing of the plaintiffs' amended complaint on January 6, 1970. The trial of offsets had been held on October 7 and 8, 1969, and an order had been entered on the latter date setting the post-trial procedure. The defendant had complied with this order. The plaintiff had yet to file proposed findings of fact and brief on offsets as directed in the order. In the order accompanying this opinion we will grant the plaintiffs forty days to comply with the order of October 8, 1969. The case will then stand submitted as to offsets.


Richard W. Yarborough, Commissioner

We concur:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner