BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 8, 1976

Appearances:

Arthur J. Gajarsa, Attorney for the Plaintiff, San Pasqual Band of Mission Indians.

Ronald C. Peterson of Tuttle and Taylor, Incorporated, Attorney for the Plaintiffs, the La Jolla, Pauma, and Rincon Bands of Mission Indians. Raymond C. Fisher was on the brief.

A. Donald Mileur, M. Edward Bander, James M. Upton, and Julia Hook, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION ON ADMISSIBILITY OF PLAINTIFFS' ADDITIONAL EXHIBITS ON LIABILITY

Blue, Commissioner, delivered the opinion of the Commission.

The Basic Issue

The Commission has before it the question of whether the additional exhibits on liability sought to be introduced by the above listed plaintiffs, are admissible. The Commission customarily admits any evidence which is not clearly inadmissible under Section 14 of the

Indian Claims Commission Act, 25 U.S.C. § 70 m, and under Sections 21 and 23 of the Commission's General Rules of Procedure. Section 14 of the act and Section 21 of the rules provide in part that at any hearing thereunder, any official letter, paper, document, map, or record in possession of any officer or department, or court of the United States, may be used in evidence insofar as relevant and material. Section 23 provides, inter alia, that all evidence shall be admitted which is admissible under statutes of the United States on the hearing of suits in equity, or under the rules of evidence at common law, and that the statute or rule which favors the reception of evidence governs. 1/

Background

The background of the tribes and water rights claims involved in this proceeding is set forth in our previous opinions of June 13, 1973 (30 Ind. Cl. Comm. 420), and June 21, 1973 (30 Ind. Cl. Comm. 452).

On June 13, 1973, we granted a motion of the La Jolla and Rincon Bands of Mission Indians that the record be reopened for the receipt of additional evidence on liability. Pursuant to Commission order, a hearing was held on January 15, 1974, before Commissioner Brantley Blue, for that purpose. During the course of that hearing, and in a 199 page brief filed on June 26, 1974, the defendant voiced general and specific objections to thousands of pages of the exhibits which the plaintiffs seek to introduce.

1/ The weight to be given to the evidence is a matter for the Commission to determine in view of all of the circumstances, facts, and law involved.

The San Pasqual band filed a reply brief on September 20, 1974, and the La Jolla, Pauma, and Rincon bands filed their joint reply brief on September 24, 1974. 2/

We have examined all of the plaintiffs' additional exhibits which have been filed to date.

The following discussion reflects our initial understanding of certain facts, based on our preliminary review of the evidence. Nothing in this opinion however constitutes a final finding of fact. Our Findings of Fact and Conclusions of Law will be made after the record is complete and we have reviewed all of the evidence admitted to the record.

The Defendant's General Objections, The Responses of the Plaintiffs, and the Commission's Ruling Thereon

The defendant's general objections to the plaintiffs' additional exhibits relate to the following eight categories of evidence.

1. Defendant's Objections to Post-August 13, 1946 Evidence. The defendant objects to all exhibits relating to facts, circumstances, and conditions in existence after August 13, 1946. The defendant contends that such evidence is incompetent because it can relate only to claims arising after that date, and that all such claims are beyond the jurisdiction of the Commission. The defendant bases its contention on the

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2/ The Pala Band of Mission Indians is also involved in this proceeding. However, it appears that Pala's attorney contract expired on April 10, 1972. The band was not represented at the January 15, 1974, hearing and has filed no brief on this matter.

provision of Section 2 of the Indian Claims Commission Act that no claim accruing after the approval of the act on August 13, 1946, shall be considered by the Commission (25 U.S.C. § 70a).

The defendant also contends that, "Plaintiffs' additional exhibits, to the extent they are pertinent at all, relate primarily to plaintiffs' rights under the 1894, 1914 and 1922 contracts."[3/] The defendant argues that continuing contract obligations give rise to separate causes of action which are severable annually, and that it therefore would not do any injustice to the plaintiffs to cut-off any causes of action arising after August 13, 1946.

The defendant has voiced similar contentions in its response of November 17, 1970, in opposition to the motion of the La Jolla and Rincon Bands to reopen the record, and in connection with its motion of July 10, 1973, for a rehearing. In our prior denials of these contentions, we have twice pointed out the errors inherent therein. Thus at 30 Ind. Cl. Comm. 426 and 459 we stated that defendant's post-August 13, 1946, argument was inapposite because it appeared that the plaintiffs' claims involved continuing causes of action for damages for injuries which had begun prior to August 13, 1946, and had continued thereafter.

At 30 Ind. Cl. Comm. 426, we also pointed out that the plaintiffs' claims are much broader than mere contract rights.

3/ Def. Br. p. 20.

The plaintiffs charge that the defendant, by its actions and inaction, has breached its fiduciary duty and its duty to deal fairly and honorably with them, by depriving them of water and water rights. Their basic cause of action in this proceeding is not for breach of contract but for breach of that fiduciary responsibility. In particular, plaintiffs charge the defendant with failure to prevent usurpation of their aboriginal and other water rights, and with negotiating water appropriation and other contracts and agreements which infringed their water rights and are inimical to the purposes for which their reservations were established. They charge the defendant with failure to obtain adequate consideration for entering into the contracts and agreements on their behalf; with failure to oppose the granting of a Federal Power Commission license, or to safeguard their rights thereunder; and with failure to enforce even the limited benefits due them under the aforesaid contracts, agreements, and license, and with allowing the contracts to be enforced against bands which were not party thereto.

The plaintiffs' claims are also based on violation of water rights under the Mission Indian Relief Act (26 Stat. 712, 1891); under the California law of riparian and appropriative rights; and under the Winters Doctrine. Winters Doctrine water rights extend to future needs which of course extend to the post-August 13, 1946, period. The additional exhibits relate to all of these claims.

In an effort to traverse the continuing wrong rule, the defendant cites Western Oil Fields v. Penzoil United, 421 F. 2d 387, 390 (5th Cir. 1970), for the proposition that continuing contract obligations give rise to separate causes of action which are severable

annually. That case involved an action by the owner of a mineral lease against an adjoining owner to recover a portion of monthly overhead charges under a net profit agreement. The court held that, where a contract provided for monthly payments and not a present sale of gas or oil, a cause of action accrued when a given monthly payment was due, and only those payments due more than four years before the suit was filed were barred.

It appears that the case may be distinguished on the facts and law from this proceeding.

The aforementioned contract or agreement of June 4, 1894, was between the United States and the Escondido Irrigation District. Under the agreement the Government granted Escondido the right to build water diversion works and a flume on the then Potrero (La Jolla and Rincon) reservation. Escondido agreed to furnish the La Jolla and Rincon Indians with an ample supply of water at and during such times and periods of time as the Indians on the reservations might desire. Paragraph (3) of the agreement provided that the Indians' right to free and sufficient water would continue so long as Indians resided on the reservations. No monthly or other payments were provided for.

The 1894 agreement was modified by the agreement of February 2, 1914, between the United States, for and on behalf of the Rincon Indians, and the Escondido Mutual Water Company, successor in interest to the Escondido Irrigation District. This agreement granted Escondido the right to build a power plant and various rights of way across the Rincon and San Pasqual reservations. It also established the amount of water

and power that Rincon was entitled to. Rincon was the only tribe to receive any benefits under the terms of the agreement. The agreement provided that the United States should pay for power for and on behalf of the Indians, for quarterly periods. No other payments were provided for.

The aforementioned 1922 contract was between William Henshaw and the United States, for and on behalf of the Rincon and Pala reservations. Thereunder, the United States granted various rights of way across the reservations, and agreed not to object to construction of a dam and diversion of water by Henshaw. In turn, Henshaw recognized certain prior Indian water rights, and agreed to furnish the Indians with certain quantities of water and electricity, and, if needed, to install wells and pumps for the Pala reservation, without cost to the Indians.

The contract in the Western Oil Fields case thus differs from the 1894, 1914, and 1922 contracts in this proceeding in that it was a profit sharing agreement with monthly payment provisions, whereas the contracts in this proceeding provided for rights of way, and water and power distribution. Two of the contracts in this proceeding appear to have no cash payment provisions whatsoever. Only two of the five plaintiffs in this proceeding were named as beneficiaries under the contracts, although all five allege infringement of their rights thereunder. The Western Oil Fields case did not involve Indian claims against the Government for breach of fiduciary responsibility. Perforce it was not tried under the broad equity provisions of the Indian Claims Commission Act, designed to equitably resolve complaints of long standing and continuing wrongs by the Government against a special class of people.

For all these reasons, we hold that the Western Oil Fields case is inapplicable in this situation.

The plaintiffs appropriately cite four cases supporting the continuing wrong theory of Commission jurisdiction. They are Blackfeet and Gros Ventre Tribes of Indians v. United States, Dockets 279-C and 250-A, 32 Ind. Cl. Comm. 65, 71 ff. (1973); Kiowa, Comanche, and Apache Tribes of Indians v. United States, Docket 259-A, 29 Ind. Cl. Comm. 476 (1973); United States v. Southern Ute Tribe or Band of Indians, 191 Ct. Cl. 1, 31, 423 F. 2d. 346, 362-363 (1970), aff'g Docket 328, 17 Ind. Cl. Comm. 28 (1966), 21 Ind. Cl. Comm. 268 (1969) (rev'd on other grounds, 402 U.S. 159 (1971)); and Gila River Pima-Maricopa Indians v. United States, 135 Ct. Cl. 180, 186, 140 F. Supp. 781 (1956). Blackfeet contains a thorough discussion of the Commission's continuing wrong jurisdiction. In Kiowa, Comanche and Apache, a continuing wrong was found where plaintiff received no rentals from June 24, 1946, to December 31, 1946, under a continuing lease agreement. The defendant was ordered to furnish an accounting of rentals received from August 13, 1946, to the present time. In Southern Ute the Government's initial wrong was allowing free homesteading of lands which should have been sold, with the proceeds held in trust under the terms of an 1895 cession treaty. The court found jurisdiction to require accounting by the Government for the period after 1946. In Gila River the pre- 1946 wrong was failure by the Government to stop non-Indian diversions of water and failure to deliver riparian entitlements to the tribe. The court upheld the Commission's jurisdiction

to consider claims arising out of this initial wrongdoing but continuing past 1946.

The court stated:

> Where a tribe is suing on a claim involving the recovery of periodic installments of compensation such as rent under a lease, and several of the installments fell due and were unpaid prior to the passage of the Indian Claims Commission Act while others fell due and were unpaid subsequent to that date, the question arises as to whether or not, on a claim therefor filed in the Commission, that body has authority to render judgment for all such installments of unpaid rent up to the date of its final judgment, or whether its jurisdiction is or should be held to be cut off and limited to rendering judgment for only those installments due prior to August 13, 1946, so that suit for the remaining installments must be brought in the Court of Claims. . . . It is the usual rule that a court once having obtained jurisdiction of the persons and subject matter of a suit, retains such jurisdiction for all purposes including the awarding of all damages accruing up to the date of judgment. This is a good rule and we find nothing that would prevent its application here. [135 Ct. Cl. 180 at 186.]

The defendant argues that the Commission must be consistent in the way it uses the continuing wrong rule. The defendant cites the Commission in Hopi Tribe v. United States, Docket 196, 33 Ind. Cl. Comm. 74, 80 (1974), where we stated:

> The burden of proof remains with the plaintiff to assemble and present evidence to warrant an examination by us to determine whether wrongdoing occurred, when it occurred, and whether it may be found to be a continuing wrong which accrued within the statutory limits circumscribed by the Congress for the jurisdiction of this Commission.

However, the defendant would have us deny the plaintiffs the opportunity of meeting their burden of proof by excluding the additional evidence which they here seek to introduce. We think consistency requires admission of all relevant and material evidence here offered.

The plaintiffs cite 2 Wigmore, Evidence, § 437, pp. 413-18 (1940), for the precept that evidence of facts and circumstances after August 13, 1946, is admissible to establish facts and circumstances in existence prior thereto, where it is demonstrated that there is little likelihood of changes therein during the interim. The general rule is that certain facts may be proven by subsequent observations, although the opposing party may attempt to explain away the effect of the evidence by showing that circumstances have changed. The plaintiffs contend that post- 1946 evidence relating to such things as geological formations in the vicinity of the reservations, and the number of irrigable acres on the reservations, is admissible on this basis. The point is well taken. The defendant's counter argument, that standards and techniques involved in determining irrigable acres and soil conditions have vastly changed in the past 25 years, is unproven and immaterial, and overlooks the fact that Winters Doctrine water rights extend to future needs, which may very well be established by the technology of the future.

For the foregoing reasons, the defendant's first objection, to post- August 13, 1946 evidence, is held to be invalid.

2. Defendant's Objections To All Exhibits Pertaining To Noncontractual Water Rights Claims.[4/] The defendant argues that the plaintiffs' water rights, vis-a-vis other appropriators, can be established only by a court of general jurisdiction; that no such quantification has taken place; that this Commission is without jurisdiction to render such a determination or to enter an order purporting to be based on failure to so quantify; and therefore no evidence relating to noncontractual water rights claims may be introduced for any purpose.

We are not pursuaded by this argument.

The defendant first voiced this argument in its Requested Findings of Fact, Objections to Petitioners' Proposed Findings of Fact and Brief, filed in this proceeding on August 29, 1968. Therein the defendant argued at pages 126, 184, 198, and 199, that the bands' claims for damages were "premature" and that their water rights, vis-a-vis other stream users, must first be determined in state court proceedings.[5/]

4/ Defendant uses the term "non-contractual" water rights to refer to reserved, riparian, or any other type of water rights which exist entirely separate and apart from any rights under a contract. Defendant's General Objections of June 26, 1974, p. 9, n. 1.

5/ See our discussion in this proceeding at 30 Ind. Cl. Comm. 420-422.

In consequence, the La Jolla and Rincon bands asserted their rights in two separate but related proceedings from which they now seek to introduce additional evidence in this proceeding. In the first[6/] of these, they filed a district court action 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.[7/] The suit sought to determine the validity of water contracts with the Escondido Mutual Water Company. The same contracts are involved in Docket 80-A. During the district court action, defendant's counsel abandoned the defense raised in Docket 80-A, that La Jolla and Rincon water rights must first be determined in state court proceedings, vis-a-vis other users.

In the motion of the La Jolla and Rincon plaintiffs to reopen the record in this case, filed on August 31, 1970, the movants pointed out,

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6/ Rincon Band of Mission Indians v. Escondido Mutual Water Company, (Civ. No. 69-217-S, S. D. Cal.), consolidated with Rincon Band of Mission Indians v. Vista Irrigation Dist., (Civ. No. 72-276-S, S.D. Cal.) and United States v. Escondido Mutual Water Company, (Civ. No. 72-271-S, S. D. Cal.).

7/ The second proceeding involved a complaint filed on September 25, 1970, by the Secretary of the Interior, with the Federal Power Commission, to revoke the license of the Escondido Mutual Water Company. That proceeding is captioned 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. Docket Nos. E-7562 and E-7655.

at p. 8, that the defendant had formally waived its "prematurity" defense. In its response, filed on November 17, 1970, the defendant did not withdraw its waiver of the "prematurity" defense, but, on the contrary, strongly argued that this case can proceed to judgment without awaiting the outcome of the district court case (Civil Docket 69-217-K) or any other litigation.

The La Jolla, Pauma, and Rincon plaintiffs cogently argue that the defendant is estopped from withdrawing at this late date its waiver of its defense that the plaintiffs' water rights, vis-a-vis other appropriators, can be established only by a court of general jurisdiction.[8/] Estoppel is not necessary to dispose of the defendant's argument.

The defendant is correct in its contention that this Commission has no jurisdiction to determine water rights of parties who are not before the Commission. However, the defendant errs in implying that such a determination is necessary in this proceeding, and that this Commission lacks jurisdiction to adjudicate the plaintiffs' claims. The defendant's conclusion that therefore no evidence relating to non-contractual water rights claims may be introduced for any purpose is a non sequitur.

8/ La Jolla, et al. Response of Sep. 24, 1974, p. 30, n. 26. See 2 Davis, Administrative Law Treatise § 17.02, 17.03 for authority for government estoppel.

The plaintiffs do not seek a determination of their noncontractual water rights as against other appropriators. Instead, they seek damages for various alleged breaches of the defendant's alleged fiduciary responsibility resulting in alleged infringement of their water rights as discussed, supra, at p.351. As the La Jolla, et al., plaintiffs point out, [9] the Commission need not quantify the plaintiffs' water rights to reach a determination that the defendant is liable. A substantial portion of the liability phase of their case may be established by showing government liability for (1) loss of aboriginal water or water rights, (2) violation of Mission Indian Relief Act water rights, and (3) loss of Winters Doctrine waters below the level requisite to meet their needs at any time subsequent to the establishment of their reservations, provided that such loss commenced prior to August 13, 1946, and that any loss after August 13, 1946, was continuous with the loss prior thereto.

Quantification of plaintiffs' water rights need not be determined until and if this case reaches the damage phase. The defendant errs in its contention that this Commission is without jurisdiction to determine such matters and that the Commission has no equitable jurisdiction whatsoever. [10] We commend to the defendant's attention, the Commission's extremely broad equity jurisdiction under Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1970). The Commission has exercised that jurisdiction to resolve water rights liability and damage problems in other cases.

9/ La Jolla, et al. Response of Sep. 24, 1974, p. 30.

10/ Defendant's General Objections of June 26, 1974, p. 28.

Thus, in Northern Paiute Nation v. United States, Docket 87-A, 30 Ind. Cl. Comm. 210 (1973), we found that the Winters Doctrine imposed an obligation upon the Government, in behalf of the plaintiffs, to preserve the Pyramid Lake waters and fisheries. However, we left for further determination the amount of water reserved under the Winters Doctrine (and the defendant's liability, if any, for the loss thereof). The claim was settled for $8,000,000. 36 Ind. Cl. Comm. 254, 256, 270 (1975).

In Gila River Pima-Maricopa Indian Community v. United States, Docket 236-C, 29 Ind. Cl. Comm. 144, 147, 149 (1972), the defendant erroneously alleged that the plaintiff therein requested that the Commission reapportion the waters of the Gila River between itself and non-Indian water users. We agreed that we lacked jurisdiction for such determination. However, we found ample jurisdiction in clauses 1 through 5 of Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1970), to determine the plaintiff's actual claim that because of action and inaction on the part of the defendant it was deprived of the use of Gila River water which it had the right to use and could have used. We pointed out that, because non-Indian water users were not a party to the claim, our determination could have no direct effect on the actual distribution of Gila River water, nor could it alter correlative rights of the various Gila River water users. The defendant's objection posed no legal impediment to an award for monetary damages.

The same holds true in this proceeding in respect to the plaintiffs' claims herein.

For these reasons the defendant's second objection, to all exhibits pertaining to noncontractual water rights claims, is held to be invalid.

3. Defendant's Objections To All Reports Relating To Soil Conditions And Irrigable Acres (And Other Conditions) On The Plaintiffs' Reservations, Which Were Made After August 13, 1946.

This objection has already been discussed and negated at p. 356, supra, in connection with the defendant's first objection, to all post-August 13, 1946, evidence.

For the reasons there given, the defendant's third objection is held to be invalid.

4. Defendant's Objections To All Exhibits Related To Non-Water Rights Claims. The defendant contends that all such exhibits should be excluded because all non-water rights claims are barred by the doctrine of res judicata and because they are new claims not previously asserted. The defendant maintains that the barred claims relate to: (1) alleged deviations from rights-of-way granted to the Escondido Mutual Water Company, (2) loss of animals in the Escondido Mutual Canal, and (3) hazards posed by the Escondido Mutual Canal to residents of the San Pasqual Reservation.

The defendant argues that all such claims were encompassed by the settlement in Thompson ex rel. Indians of California v. United States, Dockets 31 and 37, 13 Ind. Cl. Comm. 369, 386 (1964). That case was the parent to this. Therein the Mission Indians asserted five claims,

including the water rights claims which subsequently were deleted therefrom and redesignated as Docket 80-A.[11/] The stipulated settlement in Thompson disposed of all claims which the plaintiffs asserted or could have asserted concerning Indian title, Mexican and Spanish grants, and reservation lands, except for the water rights claims in this proceeding, and the separated claims in Dockets 80-B, and 80-C.[12/]

The San Pasqual plaintiff contends that the "rights of way" exhibits across the San Pasqual reservations are relevant in two respects.[13/]

A. San Pasqual contends that the exhibits establish (1) a course of conduct by the defendant in failing to secure and protect all of the band's rights arising from the grant of reservation land, including Indian water rights; and (2) wrongful acquiescence by the defendant to acts of third parties resulting in deprivations of Indian water rights. Alleged construction of the Escondido Canal across reservation land, and continued use of the canal to conduct water out of the San Luis Rey Basin without delivering a portion of the water to the bands, are the operative acts on which several of the plaintiff's claims are based. The canal allegedly

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11/ 13 Ind. Cl. Comm. 369, 378-379.

12/ Id., 386. The claims in Docket 80-D were also concluded with Dockets 31 and 37.

13/ The other plaintiffs adopt San Pasqual's arguments insofar as they are applicable to their exhibits. La Jolla, et al. Response, pp. 45, 46.

was built on a right of way across the reservations. Concomitant rights of way for service roads, and deviations therefrom, allegedly have truncated the reservations so as to prevent any viable agricultural activity.

B. San Pasqual alleges that the canal, the rights of way, and the flow of water through the canal are trespasses for which the defendant is liable. The plaintiff contends that such claims are not barred by res judicata, that notice thereof was contained in the original petition, and that the claims therefore "relate back" to the original petition. In an effort to avoid the res judicata charge, the plaintiff argues that Dockets 80 and 80-D claims were predicated on lost ancestral lands whereas the alleged trespasses are within the present reservation.

The defendant's objections to the "rights of way" exhibits will be denied. Those exhibits will be admitted for the limited purpose of establishing the plaintiffs' water right claims, where relevant. In this respect they may be used in an effort to show establishment and location of the canals, roads, etc., and deviations therefrom, and resultant truncation of the reservations resulting in fewer practicably irrigable acres. This is material to the extent that irrigable acreage is the starting point for measuring the amount of water needed for

agriculture and hence is one criterion for measuring Indian water rights. The "rights-of-way" exhibits thus are relevant and material to plaintiffs' water right claims, which are neither new claims nor res judicata.

Claims relating to trespass per se, to loss of animals in the canals, and to other hazards posed by the canals to residents of the reservations, are res judicata, having been encompassed in the stipulated settlement in Thompson, supra. Contrary to the plaintiffs' contention, the claims in Docket 80 were not limited to ancestral, i.e., "Indian Title," lands. The second count in the amended petition in Docket 80 concerned trespasses on, and taking of, plaintiffs' reservation lands. This count was not separated as a lettered sub-docket but rather was retained as part of Docket 80, and concluded in the stipulated settlement thereof.[14/]

Accordingly, the defendant's fourth general objection will be sustained to the extent that portions of exhibits relating to loss of animals in the Escondido Mutual Canal and to hazards posed by the canal to reservation residents will be held to be inadmissible.[15/]

14/ Thompson, at 13 Ind. Cl. Comm. 379, 386.

15/ As a practical matter, the objectionable exhibits will not be excluded, since they also contain information relating to water rights. The plaintiffs' use thereof, however, will be limited to establishing loss of water and/or water rights.

5. Defendant's Objections To All Exhibits Indicating A Claim For A Larger Or Different Reservation. The defendant objects to San Pasqual exhibits concerning reservation boundaries delineated by 1870 and 1891 Executive orders, which are not the present reservation boundaries. The defendant argues that all claims relating to different or larger reservations are encompassed within the claims which were settled in Thompson ex rel. Indians of California, supra, and hence are res judicata. The defendant also asserts that such claims are a new cause of action which should have been presented prior to August 13, 1951, and which accordingly are barred by § 12 of the Indian Claims Commission Act, 25 U.S.C. § 70 k.

The San Pasqual plaintiff states that the defendant errs in construing its proffered exhibits as an attempt to broaden its claims to include new claims for larger or different reservations. San Pasqual disclaims any such claim.

Rather, San Pasqual alleges that it held aboriginal title to lands in the San Pasqual Valley, that a portion of said lands were reserved for it by Executive order in 1870, that the order was revoked permitting settlement of the lands by non-Indians to the exclusion of the band, that the proffered evidence is relevant and material to its claim of denial of water rights appurtenant to its aboriginal lands, and that such claim was not subsumed by Thompson.

The San Pasqual plaintiff further alleges that the amount of water to which it was entitled for its aboriginal title lands, and to which it is entitled under the Winters Doctrine and under the Mission Indian

Relief Act, is all determinable by the amount of water sufficient to irrigate its irrigable acres.

The La Jolla, Pauma, and Rincon plaintiffs adopt San Pasqual's arguments insofar as they are applicable to their own exhibits. They claim that their own aboriginal water rights should be measured by their aboriginal lands, not by the reservations which were patented to them.

The defendant's fifth general objection will be denied and the exhibits thus objected to will be admitted for the purpose of establishing the plaintiff's aboriginal water rights claims. Such claims were not subsumed in Thompson, but were specifically excepted therefrom. Thompson, Dockets 31 and 37, 13 Ind. Cl. Comm. 369, at 378, 379.

6. Defendant's Objections To Statements By Counsel And The Administrative Law Judge In The F.P.C. Proceeding. The defendant's objections under this heading appear to us to be without merit.

The defendant objects to admission of statements by one of the defendant's counsel in the Federal Power Commission proceeding concerning what he hoped to prove in that proceeding. The defendant goes to great length to show that such statements are not "judicial admissions," "as plaintiffs appear to believe." However, we do not find that plaintiffs assert that such statements are "judicial admissions." In fact, the plaintiffs point out that a statement can be a

"judicial admission" only in the proceeding in which it is made, and that since the proffered statements of defendant's attorneys were made in other proceedings the doctrine of "judicial admissions" is not directly applicable.[16/]

The plaintiffs contend that such statements of defendant's counsel are admissible in this proceeding as "quasi admissions" or "evidentiary admissions" in contradiction and impeachment of the defendant's present claims,[17/] or as "representative admissions."[18/] The provisions of Wigmore, relied on by the plaintiffs, state the principle as authorizing the receipt of any statement made by an opponent as evidence in contradiction and impeachment of his present claim. The weight of authority appears to also sanction admission of authorized statements of opponent's counsel

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16/ La Jolla, et al. Response, p. 11, n. 12, citing IV Wigmore, Evidence, § 1065, pp. 71-72 (Chadbourn rev. 1972).

17/ Id., pp. 10-11, citing IV Wigmore, Evidence, § 1058, pp. 26-27 (Chadbourn rev. 1972) and 9 Wigmore, Evidence, § 2588, pp. 586-83 (3d ed. 1940).

18/ San Pasqual Response, p. 37, citing McCormick, Evidence, § 267 (2d ed. 1972).

made during the course of prior litigation involving the same parties and subject.[19] A quasi admission is not final or conclusive in any sense; it is merely an inconsistency which discredits, in a greater or less degree, the opponent's present claim and his other evidence. The opponent, whose utterence it is, may proceed with his proof in denial of its correctness.[20]

The defendant cites only one case as authority for the proposition that a statement by an attorney of what he hopes to prove is inadmissible in another proceeding. Dubray v. Chicago & A.R. Co., 182 S.W. 1092, 1095 (St. Louis Ct. of App., Mo. 1916), cited in defendant's Objections, p. 39. As the plaintiffs point out, the Dubray court did not hold that the statement was inadmissible, but rather that it was not reversible error to exclude it.[21] The court gave no reason for its holding and cited no authority in support thereof. In Missouri & K. Telephone Co. v. Vandervort, 72 Pac. 771 (Kan. 1903), it was held that an admission in the opening statement of a party is admissible in a subsequent proceeding. The court stated, as obitur dictum, that an incidental remark of counsel as to the facts he expected to prove, and which didn't amount to a distinct and formal admission, would ordinarily not be binding on him nor relieve the other party of the burden of proving the fact. There was no indication that such statement was not admissible, however.

19/ IV Wigmore, Evidence, §§ 1063, 1078 (Chadbourn rev. 1972).

20/ Id., § 1059, p. 27.

21/ La Jolla, et al. Response, p. 22.

Furthermore, there is an overshadowing reason why the defendant's sixth objection must be denied. The Commission's enabling statute and General Rules of Procedure require free admission of all transcript and documentary evidence, including statements of attorneys and judges.[22/] Reference the liberal provisions of Commission Rules of Procedure, §§ 21 and 23, summarized at p. 348, supra, and § 14 of the Indian Claims Commission Act which, in fuller part, reads:

> At any hearing held hereunder, any official letter, paper, document, map, or record in the possession of any officer or department, or court of the United States or committee of Congress (or a certified copy thereof), may be used in evidence insofar as relevant and material, including any deposition or other testimony of record in any suit or proceeding in any court of the United States to which an Indian or Indian tribe or group was a party . . . . [25 U.S.C. § 70m]

22/ In this respect the Indian Claims Commission Act and General Rules of Procedure reflect the present judicial and legislative trend toward liberalized admission of evidence. See for example the Administrative Procedure Act, 5 U.S.C. § 556 (d), providing that "[A]ny oral or documentary evidence may be received" in an administrative hearing. See also Whitfield v. Simpson, 312 F. Supp. 889 (N.D. Ill. 1970); Whaley v. Gardner, 374 F.2d 9 (6th Cir. 1967); Swift & Co. v. United States, 308 F. 2d 849 (7th Cir. 1962); and F.T.C. v. Cement Institute, 333 U.S. 683 (1948), to the effect that administrative agencies are not restricted by rigid rules of evidence.

Since the statements by counsel and the administrative law judge in the Federal Power Commission proceeding fall within the scope of §§ 21 and 23 of our rules and of § 14 of our act, they are admissible in this proceeding.

We will nevertheless comment on the defendant's other arguments concerning the admissibility of statements by counsel and the judge in the F.P.C. proceeding.

A. Representative v. Personal Capacity.

The defendant argues that none of the statements by its counsel in the Federal Power Commission proceeding are admissible because in that proceeding the Government sued in a representative capacity on behalf of the La Jolla, Rincon and San Pasqual bands, whereas in this proceeding it is being sued in its personal capacity for alleged breach of its duty to protect plaintiffs' water rights, i.e., for failure to act in a representative capacity.[23] The defendant contends that it is a well-established rule that where a trustee brings suit on behalf of his beneficiary his admissions as a representative are not receivable against him as a party in his personal capacity.[24]

The plaintiffs point out that the defendant's argument is inapplicable because in the F.P.C. proceeding the Government was acting in its own behalf, as well as in a representative capacity. Therein the Government asserted its own prayer for relief, to wit, the recapture of

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23/ Defendant's objections, pp. 39-40.

24/ Id., citing IV Wigmore, Evidence, § 1076 (Chadburn, rev. 1972).

the Project 176 license. The plaintiffs have no right to maintain such action.

Furthermore, logic and equity dictate that an exception to any such rule exists where, as in this case, the second suit is for failure to act in a representative capacity.

Wigmore, relied on as authority by the defendant, does not hold that statements by a person in his representative capacity are inadmissible in an action for breach of trust against that person. In fact, Wigmore notes a number of jurisdictions which have discarded the distinction between "representative" and "individual" capacities for evidentiary purposes. Wigmore also notes that the California Evidence Code, Section 1220 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity. 25/ [Emphasis added.]

The rationale underlying this exception is that the party cannot object to the lack of right to cross-examine the declarant since the party itself made the statement.

Further, at the time the proffered statements were being made by defendant's counsel in the F.P.C. proceeding, defendant and its counsel

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25/ IV Wigmore, Evidence, § 1076, pp. 154-55, n. 6 (Chadburn rev. 1972). Wigmore further notes that the proposed Federal Rules of Evidence (Rule 801 of the most recent draft) and the State of New Jersey (N.J.R. Evid. § 63 (7)) follow the California approach.

were chargeable with the knowledge that this suit in Docket 80-A was in progress; that herein the defendant had in effect invited the plaintiffs to determine their water rights in other proceedings 26/ ; and that the plaintiffs would likely seek to introduce evidence from such proceedings into Docket 80-A. It is only just and right that such evidence be admitted where relevant and material.

B. Different Issues.

The defendant argues that statements of counsel in a prior proceeding are not admissible in a subsequent proceeding if the issues are different. Defendant contends that the issue in the F.P.C. proceeding is whether Mutual's license for Project 176 should be renewed, an issue that this Commission has no authority to decide, whereas in Docket 80-A the issue is whether the United States has breached its alleged duty to protect the plaintiffs' water rights.

The argument does not fully reflect either the facts or the law. An underlying issue in both cases is whether the defendant has a fiduciary obligation to protect the plaintiffs' water rights, and whether the license is in derogation of those rights. The fact that the two proceedings involve other issues which are not common to both proceedings does not bar the proffered statements.

26/ See pp. 357-358, supra.

The several cases relied on by the defendant may be distinguished. Thus, Miller v. United States, 133 F. 337 (8th Cir. 1904), cited by defendant, was based on a federal statute expressly prohibiting any pleading in a former action as evidence in a criminal proceeding. The case is inapposite.

Similarly inapposite is Kennedy v. Emerald Coal & Coke Co., 42 A. 2d 398 (Del. 1944), cited by the defendant at p. 40 of its objections. The respondent therein was not allowed to open the case for retrial on the basis of new evidence including testimony of respondent's counsel in a hearing before a government agency. The "new" evidence was rejected, not on the basis that the issues were different, but on the grounds that it could have been produced at the trial, it was not inconsistent with evidence which was produced at the trial, and the witness was not an authorized agent of the respondent. None of these factors are present in this proceeding.

The third case relied on by the defendant in support of its "different issues" argument is Greer v. Glenn, 64 F. Supp. 1002 (E.D. Ky. 1946). The issue was whether gifts had been made in contemplation of death so as to be subject to estate tax. The court excluded statements by the party's attorney before tax authorities during his life that the gifts were in contemplation of death (so as to warrant deduction of interest on his returns during his life). We fail to see the court's logic in excluding the statements on the ground that they involved a collateral issue prior to the party's death. However, the decison was also based on the fact that the excluded statements were not made in the course of a

court proceeding, thus implying a different result if it had been otherwise. Furthermore, the excluded statements were contained in a brief written by the party's attorney and submitted to the Internal Revenue Service. Assuming that the brief was written in the scope of the attorney's authority, the holding is contrary to the weight of authority concerning admissibility of admissions, and would have been admissible under Section 14 of the Indian Claims Commission Act and under Sections 21 and 23 of our General Rules of Procedure.

C. Different Parties.

The defendant also argues that statements by counsel in a prior proceeding are not admissible in a subsequent proceeding if the parties are different. This argument overlooks the fact that the defendant and the plaintiffs in this proceeding were also parties in the F.P.C. proceeding, so that they are not different parties, but the same, identical parties. The facts that the F.P.C. proceedings involved an additional party, and that the defendant herein was a plaintiff in the F.P.C. proceeding, are immaterial. The important fact is that the party charged in this proceeding, (i.e., the defendant) was also a party in the F.P.C. proceeding.

D. Statements By Plaintiffs' Counsel And The Judge.

The defendant objects to admission of statements by the Indians'

own counsel in the F.P.C. proceeding.[27] The defendant argues at great length that such statements do not constitute admissions by the defendant, and may not be so used against the defendant. The plaintiffs have not offered these exhibits for that purpose. Rather, the exhibits are offered by the La Jolla, et al., plaintiffs as their counsels' interrogation of various witnesses, and as colloquay between counsel and the judge, relevant to damages from water deprivation which plaintiffs allegedly have suffered.[28] Plaintiffs have withdrawn certain of the objected-to exhibits, and others appear not to have been submitted.[29] The balance appear to be admissible under Section 14 of our act and under Sections 21 and 23 of our General Rules of Procedure.

For the foregoing reasons, defendant's sixth objections are held to be invalid and will be denied.

27/ It appears from the defendant's brief at pp. 113-114, 125-126, 128, 131, 137, and 138-139, that the defendant's objections are to excerpts of Bands Ex. 215, particularly to Excerpt 16, pp. 3342-45; Excerpt 28, pp. 5356-67 (these pages were withdrawn by La Jolla, et al.); Excerpt 28, pp. 5447-56; Excerpt 29, pp. 5509-13, 5522 (we find no such proffered pages); Excerpt 30, pp. 7055-7062; and Excerpt 31, pp. 7118-7121.

28/ La Jolla, et al. Response, pp. 71, 76, and 79.

29/ See n. 27, supra.

7. Defendant's Objections To All Pleadings By Its Counsel In The F.P.C. Proceeding [30] And In The Suit Before The District Court For The Southern District Of California [31]. The defendant objects to admission of any of the subject pleadings, and in particular to admission of its complaint [32] in the district court proceeding, and to admission of a stipulation [33] entered into by the Government, in the F.P.C. case. The complaint concerns the several contracts involved in this proceeding; alleged unauthorized construction of the Henshaw diversion dam; alleged unauthorized increase of diversion conduits across the La Jolla, Rincon, and San Pasqual reservations; alleged failure to release waters reserved for the Indians; various alleged trespasses; and other practices; for which the complaint seeks damages and reformation of the contracts. The stipulation concerns, inter alia, facts relating to the several contracts; the Henshaw diversion dam; rights of way across the reservations; filings on and usage of water from the San Luis Rey River and watershed; and description and operation of Indian irrigation facilities.

In support of these objections, the defendant reiterates several arguments which we have already found to be without merit in relation

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30/ See n. 6, supra, p. 358.

31/ See n. 7, supra, p. 358.

32/ Bands Ex. 222.

33/ Bands Ex. 210.

to its other objections. In this category are its arguments that (1) admissions in a representative capacity are not receivable in a suit against a party in its individual capacity[34]; and (2) pleadings in the F.P.C. and district court proceedings are inadmissible because they bear on issues which are outside the scope of the Commission's power to adjudicate.[35] The defendant also argues that the pleadings in the district court action are irrelevant and immaterial to the issues in Docket 80-A. The defendant bases the latter argument on its contention that the Government's suit in the district court was occasioned by post- 1946 changes in circumstances including pumping operations at Lake Henshaw in 1951, whereas in Docket 80-A the focus can only be on pre- 1946 facts and circumstances. The argument in fact is but a continuation of those made in conjunction with the defendant's Objection No. 1, supra, the fallacies of which we have explored at pages 349 through 356, supra. It is clear that the complaint involves matters which are both relevant and material to the issues in this proceeding.

Lastly, the defendant argues that the complaint in the district court case merely states what its counsel hopes to prove and is not binding on the United States even if admissible. It is not necessary

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34/ See objection 6. A., supra at p. 371.

35/ See objection 6. B., supra at p. 373.

at this point for us to determine whether the complaint merely states what defendant's counsel hoped to prove, or whether it contains admissions. The complaint is admissible in either event and the fact that it may not be binding on the defendant is no bar to its admission. 36/

The pleadings objected to are admissible under § 14 of our act and under §§ 21 and 23 of our General Rules of Procedure.

We have not hesitated to admit such pleadings in other cases. Witness Northern Paiute Nation v. United States, Docket 87-A, 30 Ind. Cl. Comm. 210, 215 (1953). Therein after the plaintiff filed a motion for an interlocutory order on liability on a claim of depriving Pyramid Lake of water, the defendant filed a complaint in the United States Supreme Court on behalf of the tribe in a suit against Nevada and California. We took judicial notice of the complaint, which asserted substantially the same facts as in the tribe's case before the Commission. We assumed that the defendant conceded what was in the complaint, since it was in the defendant's own words. See also Delaware Tribe of Indians v. United States, Dockets 27-A, and 241, 2 Ind. Cl. Comm. 549 at 552-554 (1954), wherein we permitted the defendant to

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36/ See discussion at pp. 367-368, supra.

introduce prior statements of the plaintiff in unrelated litigation before the Court of Claims. In the earlier case the Delawares took a position which was entirely contrary to their position before the Commission. We held that the relationship was too plain for doubt, and that the evidence was relevant and material and admissible under § 14 of our act. In Delaware, we cited Kungling v. Dexter, 32 F. 2d. 195 (2d cir. 1929). Therein objection to admission of an original complaint as evidence of agency, on the ground that the attorney had no authority to bind his client by averments in pleading, was held to be without force, a pleading prepared by an attorney being an admission by one presumptively authorized to speak for his principal.

For the foregoing reasons defendant's seventh objections are held to be invalid and will be denied.

8. Defendant's Objection To Exhibits Pertaining To Steps The Government Might Have Taken To Develop Water Resources Of The Mission Bands' Reservations, But Which It Was Not Required To Take Under The 1914 And 1922 Contracts. The defendant argues that all such exhibits are irrelevant and immaterial.

The objection is based on an incorrect assumption of what the evidence was offered to prove.

The defendant cites Bands Exhibit 105 as an example of exhibits evidencing speculation by the plaintiffs as to measures which the defendant might have taken to develop water resources on the reservations. The defendant mistakenly alleges that the exhibit shows which crops can be grown on the reservations. In fact, the exhibit

purports to be a United States Bureau of Reclamation, Land Classification tabulation showing the number of irrigable acres of various classes on the several reservations. The defendant alleges without any apparent basis in fact that: "Implicit in the rampant speculation contained in such exhibits is the assumption that if the Government (apart from any contract obligations) had acted to further develop water resources on the various Mission Band reservations, the Mission Indians might have attained certain benefits (e.g., increased production of certain crops)."

In fact, the defendant has shown no evidence in this or any other proffered exhibit, that the plaintiffs have speculated over such measures or made such contention or assumption, or that any such assumption or contention is implicit in this or any other proffered exhibit.

The defendant demolishes its objection by arguing that Congress would have had to enact legislation for special appropriations for such additional development; that the executive branch was not obliged to importune Congress to enact such legislation and is not liable for its failure to do so; that the executive branch had no duty to importune Congress to condemn by eminent domain any private water rights which further development of Indian water rights might have interfered with; and therefore any such exhibits are irrelevant and immaterial.

The plaintiffs answer the defendant's objection by stating that their proffered exhibits are not directed at hypothetical congressional activities which would aid in the development of Indian water resources, or at establishing that the defendant should have proposed legislation therefor, but to prove that they were and are prevented from developing such potential because of lack of water and that they have been damaged in consequence.[37/] Among the exhibits in this category are SP Ex. 3, testimony concerning a water management plan to supply the bands with their alleged water entitlement; SP Exs. 4 and 5, calculations of the amount of water which allegedly would have been used if available; SP Exs. 37 and 38, soil classification and irrigation data as a basis for determining the quantity of water reserved under the Winters Doctrine and usable under the Mission Indian Relief Act[38/]; and SP Exs. 63-65, concerning the measure of economic loss sustained from non-availability of water.

37/ Plaintiffs allege that governmental aid has long been available under the Reclamation and Irrigation Act (43 U.S.C. § 421a et seq.) and the Leavitt Act (25 U.S.C. § 386a), but for the lack of water.

38/ Plaintiffs stress that Winters Doctrine, and Mission Indian Relief Act water rights are in no way limited by the 1914 and 1922 contracts, notwithstanding any implications of the defendant to the contrary.

The proffered exhibits appear to be both relevant and material to the plaintiffs' case.

For these reasons the defendant's eighth objection will be denied as being without merit.

The Defendant's Specific Objections, The Responses Of The Plaintiffs, And The Commission's Ruling Thereon.

The defendant's objections to specific exhibits or to portions thereof, for the most part are reiterations of the defendant's above-stated general objections. Accordingly, except as otherwise stated herein, the defendant's specific objections will be denied or sustained to the same extent and on the same basis as the defendant's general objections.

For example, defendant's objections that the references to rights of way in stipulation 168 of Bands Ex. 210; in excerpts 16 and 25 of Bands Ex. 215; in Bands Ex. 2162; and in SP Exs. 23, 30, 70, 71, 73 and 74 will be denied for the same reasons that same objections were held to be invalid, supra, under the fourth general category of defendant's objections. The rights of way exhibits will be admitted for the limited purpose of showing, where relevant, a truncation of the practicably irrigable acres of the plaintiffs' reservations, resulting in a decreased measure of their water rights. The defendant's objection to Bands Ex. 2135 as a non-water rights claim will similarly be denied. The exhibit is a letter from the Rincon band complaining of Escondido Mutual Water Company trespasses in the form of a road and a refuse dump. The evidence is admissible for the limited purpose of showing,

if probative, a similar truncation of irrigable acres.

On the other hand the defendant's objections to the discussion of hazards passed by the Mutual Canal to the residents of the San Pasqual reservation, at p. 3325 of excerpt 16 of Bands Ex. 215; and the discussion of losses of animals in the canal on lines 25-28 of page 11 and lines 1-10 of page 12 of SP Ex. 75, will be sustained. As we stated at p. 365, supra, in our discussion of the defendant's fourth general objection, such claims are res judicata, having been encompassed in the stipulated settlement in Thompson ex rel. Indians of California.[39/]

In the face of the defendant's objections, the plaintiffs have withdrawn the following exhibits or portions thereof: Bands Ex. 169; pages 5338-5367 of excerpt 28 of Bands Ex. 210; and Bands Ex. 2138.

The defendant objects to a number of exhibits as illegible. The plaintiffs have withdrawn or furnished legible facsimilies of all but two of those exhibits. Bands Ex. 1313 and SP Ex. 68 remain illegible, unwithdrawn and unreplaced, and for that reason will be held to be inadmissible.

The defendant objects to a number of exhibits on the ground that they are undated or otherwise unidentified or without proper foundation. The plaintiffs have pointed to dates or witnesses' names on certain of

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39/ As a practical matter, the objectionable exhibits will not be excluded, since they also contain information relating to water rights. The plaintiffs' use thereof, however, will be limited to establishing loss of water and/or water rights.

these exhibits or have keyed them to certain witnesses, or have explained that proper foundation will be laid during the contemplated evidentiary hearings. For these reasons the defendant's objections on this ground will be denied.

The defendant objects to Bands Exs. 116 and 150, consisting of pre-trial testimony of Bureau of Indian Affairs Engineer, Paul F. Henderson, in the F.P.C. proceeding. The objection is on the ground that the witness is deceased, precluding cross-examination. The defendant was a party to the F.P.C. proceeding and had ample opportunity to cross-examine there. The testimony is relevant and material. The objection accordingly will be denied.

The defendant objects to stipulations 115-122 of Bands Ex. 210, as pertaining to locations and other unrelated details that are inconsequential or inapplicable to the issues in Docket 80-A. In fact, it appears that these stipulations relate to the location of the caretakers cottage, enlargement of conduits and of storage capacity in Lake Wohlford, and to canal operation, all of which conceivably are relevant and material to plaintiffs' case. The objection will therefore be denied.

The balance of the defendant's specific objections similarly appear to be unfounded and will be denied.

Late Filed And Missing Exhibits

San Pasqual Exhibits 1, 2, 11, 12, 13, 22, 49, 76, 77, 91, 99, and 100 were not filed with this Commission nor submitted to the defendant until June 19, 1975. Selected pages of volumes 3-13 of the transcript from the F.P.C. proceedings also were not filed with the Commission until June 19, 1975.

The following exhibits have not yet been received by the Commission, nor to our knowledge by the defendant: SP Exhibits 17, 24, 25, 40, 41, 74, 75, and 93. These exhibits will not be admitted unless they are filed with an adequate justification for the delay in submission.

Brantley Blue
Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance
John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Margaret H. Pierce
Margaret H. Pierce, Commissioner