

BEFORE THE INDIAN CLAIMS COMMISSION

THE NAVAJO TRIBE,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 229
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: November 23, 1977

Appearances:

William C. Schaab, Attorney for Plaintiff.

Dean K. Dunsmore, with whom was Assistant Attorney General James W. Moorman, Attorneys for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

On October 17, 1977, the plaintiff tribe filed a motion captioned "Plaintiff's Motion To Amend Petition And For Severance," wherein leave of the Commission is sought to amend the original petition of August 8, 1951, to include a "Fifth Amendment" claim for the 1868 taking of an alleged Navajo tribal interest in the Bosque Redondo reservation at Fort Sumner, New Mexico.

As we know from the record and prior proceedings in the case, beginning in 1863, the United States Army under the aggressive leadership of Colonel "Kit" Carson rounded up a major number of the Navajo Tribe,

removed them from their aboriginal lands, and forcibly marched them to Fort Sumner, New Mexico. There these Indians spent the next four years under military restraint at the Bosque Redondo until the conclusion of the July 1, 1868, Navajo treaty of cession.^{1/}

According to the plaintiff, the United States did in fact establish a reservation for the benefit of the Navajo Tribe at the Bosque Redondo pursuant to the Act of June 30, 1864, 13 Stat. 323, and, thereafter, by virtue of Article 9 of the aforementioned 1868 treaty, the United States took back the 1864 Bosque Redondo reservation when the plaintiff agreed to ". . . relinquish all rights to occupy any territory outside of their reservation."^{2/} Plaintiff further contends that under Rule 13(b) of the Commission's General Rules of Procedure it may amend the original petition to conform to the evidence relative to the claim it now asserts, and, since this "new" claim arises out of the "event, transaction, or occurrence" set forth in the original petition, under Commission rule 13(c) it relates back to the original petition and is not barred by the limitation on filing claims imposed under section 70k of our act.^{3/}

^{1/} 15 Stat. 667.

^{2/} Ibid. This is the reservation established pursuant to article 2 of the 1868 treaty.

^{3/} "§ 70k. Limitation of time for presenting claims. The Commission shall receive claims for a period of five years after August 13, 1946, and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress. Aug. 13, 1946, c. 959, § 12, 60 Stat. 1052."

While the plaintiff admits that there is no explicit claim for the Bosque Redondo reservation in the original petition, it nevertheless cites Snoqualmie Tribe v. United States^{4/} as authority for the contention that the defendant had "adequate notice" of this potential claim because the 1868 Navajo treaty and the fact of Navajo confinement at Fort Sumner were pleaded in the 1951 petition, and evidence of the same was subsequently adduced at trial.

Defendant responded to plaintiff's motion on October 27, 1977, by citing the jurisdictional bar governing the filing of new claims after August 13, 1951, and arguing that nowhere in the original petition was it ever given any "adequate notice" of a claim for the Bosque Redondo reservation.

Plaintiff's further response of November 7, 1977, for the most part, reiterates its initial position as stated in the motion to amend.

After careful consideration of the pleadings and record herein, the Commission has concluded that the plaintiff's motion to amend the original petition should be denied. In so doing, we credit the plaintiff with constructing a narrow argument that would be more persuasive if the Commission could ignore many of the facts of record.

The Commission simply cannot ignore the fact that the Navajo litigation in this docket has been with us for the past 26 years, and that the accumulated record, including all the documents and testimony,

^{4/} 178 Ct. Cl. 570 (1967), aff'g in part, rev'g in part and remanding Docket 93, 9 Ind. Cl. Comm. 25 (1960), 15 Ind. Cl. Comm. 267 (1965).

has reached monstrous proportions, incorporating virtually all known historical, anthropological, archaeological, and ethnological data that could possibly bear upon the life and times of the Navajo Indians from time immemorial.

We also are cognizant of the fact that, during this same period, but prior to appearance of plaintiff's present counsel, the Navajo Tribe had utilized the services of several sets of experienced claims attorneys in this litigation, all of whose collective legal talent and efforts were focused on one objective--to prove to the Commission's satisfaction that the Navajo Tribe had aboriginal title to some forty-three or forty-four million acres of land in Arizona and New Mexico that it ceded under the 1868 treaty to the United States for an unconscionable consideration.

Now, in the twilight of the Commission's existence, plaintiff's present counsel says that the original pleaders, apart from the highly visible aboriginal title claim, also intended to "present" in the original petition a claim for the 1868 taking by the United States of Navajo tribal rights to the 1864 Bosque Redondo reservation.

However, when the original petition and the 1954 amended petition are given a fair reading in light of the extensive record and background of the instant litigation, a different result is clearly indicated. In the original petition and in the 1954 amended petition, the pleaders recited in some detail the history of the Navajo Tribe during the period of American sovereignty up until the 1868 Navajo treaty. One of the most

vivid descriptions covers the period following the capture of a portion of the Navajo Tribe in 1864:

10. . . . Those who were captured or who surrendered to respondent's forces, together with their women and children and aged and infirm, were mercilessly herded and driven on foot in a southeasterly direction a distance of 300 miles out of their homeland to Fort Sumner, New Mexico, where those who had survived the cruelties and ordeals of the full-scale military campaign and the "Long March" were imprisoned under military guard.

11. For a period of four years thereafter, those of petitioner's members who had been captured or who had surrendered, were held by armed forces of the defendant in a state of imprisonment and involuntary servitude at Fort Sumner, disarmed, exposed to their enemies, crowded into a small area of desert country incapable of producing crops, inadequately clothed, badly housed and fed, ravaged by disease, and reduced by close confinement and complete disruption of all their normal and historic ways of living to a destitute and desperate condition.

12. While a portion of the Tribe was thus imprisoned, a treaty was procured from it by the defendant. The parties were not on equal footing. The Navajos were in such condition that they were willing to sign anything to get away from Fort Sumner and return even to a fraction of their former homeland. The members and chiefs of the Tribe were illiterate, uneducated, ignorant of the relative value of land and money and in no position to bargain or to demand fulfillment of their rights. They had no outside advice and were wholly dependent on the defendant and its agents. Their rights were misrepresented to them and they were subjected to threats, fraud and duress. As a consequence thereof, the execution of the treaty on behalf of the Tribe was procured on June 1, 1868. The treaty was thereafter ratified and proclaimed. (15 Stat. 667, 2 Kappler 1015). 5/

It is obvious from this description of the situation at Fort Sumner that the conditions and way of life imposed upon the Navajos were totally unacceptable to them, and the fact that the defendant in 1864, at the

5/ Pages 6 and 7 Amended Petition, September 1, 1954.

behest of the military commander at Fort Sumner established a reservation on the Bosque Redondo is of no consequence--it didn't change a thing, the Navajos still wanted out. Certainly, if the Navajo Tribe had in fact accepted the Bosque Redondo area as its new permanent residence, then it would have acquired an interest in it. United States v. Santa Fe Pacific Railroad Co., 314 U. S. 339 (1941). The Commission can only surmise that, rightly or wrongly, the original pleaders felt that the Navajo Tribe never acquired any compensable interest in the Bosque Redondo area. This is made clear by the fact that nowhere in the original petition do we find any mention of a Bosque Redondo reservation or the Act of June 30, 1864, supra, creating the same.

Furthermore, we do not agree with plaintiff's contention that the conclusion reached by the Court of Claims in the Snoqualmie case, wherein the court approved the granting of plaintiff's post-1951 amendment to the original petition, applies in the instant case. As the court properly noted in the Snoqualmie case:

Each case must be tested by the "conduct, transaction, or occurrence" standard to determine whether adequate notice has been given. 6/

In Snoqualmie the court found the issue of allowing the post-1951 amendment to the original petition to be a close one. Yet we believe the facts in Snoqualmie are much more favorable to the Snoqualmie plaintiff than those confronting us in the instant matter insofar as the plaintiff is concerned.

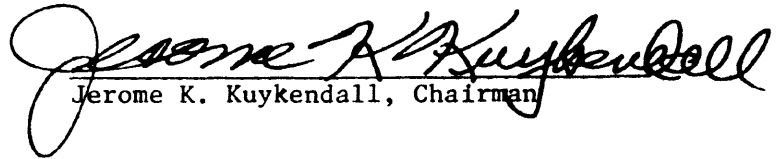
6/ 178 Ct. Cl. at 588. The Commission does not wish to leave the impression that formal or express acceptance of a statutory reservation by an Indian tribe is the rule before tribal rights vest. Undoubtedly, in the vast majority of the cases tribal consent is simply implied by the mere presence of the Indians on the reservation.

In Snoqualmie the "transaction" giving rise to the amended claim was the 1855 Point Elliot Treaty, where the party sought to be added by amendment to the original petition was specifically included by name in the treaty and the area for which recovery was sought was included within the general description of the overall land area that was ceded under the treaty. The amended claim was substantially related in character and substance to the principal claim spelled out in the original petition. What's more, during the 1959 trial of the principal claim, the plaintiff announced its intention to prosecute the amended claim, evidence in support of the amended claim was subsequently developed, the government defended against the amended claim, and the Commission even granted the plaintiff's motion to amend the original petition and conform the amended claim to the evidence, although it subsequently changed its mind.

In the matter before us we have (1) only the 1868 Navajo treaty wherein the ceded area does not include the Bosque Redondo reservation, (2) an unrelated reservation title claim which plaintiff wants tried separately from the principal aboriginal title claim, and, finally, (3) insofar as the record shows to date, no trial of any issue relative to a determination of Navajo title to the Bosque Redondo area. In all candor, it was not until plaintiff filed the instant motion that the Commission was aware from the present record in this case that at some future date a Navajo claim would be asserted for the Bosque Redondo area.

The Commission will enter an order denying plaintiff's motion of October 17, 1977, to amend the petition.^{7/}

We also note that on October 27, 1977, the defendant filed a motion to vacate the impending trial date of December 12, 1977, and to stay or void all future and prior proceedings in this case. Essentially, the thrust of the defendant's motion depends upon the plaintiff obtaining a favorable ruling on its motion to amend. Since we have this day denied the plaintiff's motion to amend the original petition, there is no need to pass upon the defendant's motion to vacate. Needless to say, the Commission is most anxious that the parties meet the scheduled trial date of December 12, 1977.


Jerome K. Kuykendall, Chairman

We concur:


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner

^{7/} Our decision in this case does not conflict with the line of accounting cases wherein "land claims" are frequently included in accounting petitions. See United States v. Lower Sioux Indian Community, et al., 207 Ct. Cl. 492 (1975), affirming Docket 363, 33 Ind. Cl. Comm. 389 (1974).

The accounting cases filed by the Navajo Tribe have been transferred to the jurisdiction of the United States Court of Claims and we express no opinion concerning the issues therein.