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CHAPTER FOUR

The Indian Claims Commission


We have had enough experience with the Indian Claims Commission Act to know that it has not benefited most tribes. Approximately $800 million was awarded through the Indian Claims Commission. If you divide the number of acres of land that those particular cases involved, the United States government ended up paying Indian people fifty cents an acre for the United States of America. The title was quieted, but in many cases it is still unsettled.

We need to pursue further the question of how did the Indian Claims Commission Act affect Indian people. We all have some notion that its impact was not good. It did not settle anything. And it certainly did not provide Indians with the capital to do anything about their economic situation. In order to have sovereignty and self-government, you also need to have economic self-determination. We have never been able to achieve that in this country.

Roger Buffalohead, Ponca, project director, MIGIZI Communications
The field of Indian law and policy is rife with ambiguities. I do not know of a pocket of Indian policy that is more profoundly ambiguous than the Indian Claims Commission Act. I want to provide an objective statement of some of the events leading up to the act. In the late eighteenth and nineteenth centuries, Indian tribes lost most of their land to western expansion. Payment was never made to the tribes for tens of millions of acres that were lost. In addition, it is clear that when treaty negotiators sat down, tribes still had their aboriginal land ownership. There is nothing as fundamental in the field of Indian law as the idea that Indians had an ownership interest in their aboriginal territory after the white people arrived, right up to the moment that they sat down at the bargaining table. It was not a full title. They had a shared title with the United States. But they did have an aboriginal ownership, a legal title recognized by Congress and by the United States Supreme Court. It was this title that was the subject of the treaty negotiations, from the United States' point of view. Tribes granted away most of their aboriginal land at the treaty table. They kept a small part of it, between 5 percent and 15 percent, as their reservations.

It is now clear, particularly after the Indian Claims Commission proceedings, that tribes often were not compensated adequately for the land that they granted away. Unfair bargains as well as trust funds that the United States had not administered properly created pressure from Indian people for recompence. The recompence could be a financial payment or a return of land. Throughout the early twentieth century, tribe after tribe sought relief for the lands that they had lost.

Tribes had no court to go into, because the United States is a sovereign and you can not sue a sovereign until it waives the right not to be sued. The United States did not allow itself to be sued until the Court of Claims was set up in 1855. But in 1863, there was an express statutory decision that Indian tribes could not sue in the Court of Claims. In the early twentieth century, more and more tribes began to press for a resolution of their claims. Congress responded by passing a series of 133 special acts that gave the Court of Claims jurisdiction to hear individual tribes' cases. Congress did not rule on these cases. It simply waived sovereign immunity and allowed individual tribes to bring suits.
The Meriam Report, in 1928, recommended that Congress create a more efficient and fair device to resolve old Indian claims. A few years later, several tribes urged some sort of claims resolution under the IRA, but that was not done.

The Indian Claims Commission Act passed on August 13, 1946. There were various reasons for its passage. Some legislators wanted to be fair to the Indians and allow their claims to be adjudicated. All the act did was create a court. It did not lead to a specific result. There are indications that other legislators felt that it would be part of the termination process. Their notion was that you had to wipe the slate clean by resolving these old claims before you could really get on with termination. Another more pragmatic factor was a simple desire to get rid of the cumbersome device of having Congress pass special acts before each tribe could bring a claim.

The Indian Claims Commission Act did several things. First, it only dealt with claims that occurred before August 13, 1946. In other words, the Indian Claims Commission heard no claim for a taking of land or mismanagement of money that occurred after 1946. The act provided that claims that arose after 1946 would go to the Court of Claims, if a money damage claim were brought. Secondly, the act required that all claims and complaints be filed within five years, before August 13, 1951. There was a tremendous frenzy in many lawyers' offices to get those claims led. People also flew to Washington to meet that filing date.

The Indian Claims Commission Act was liberal. It was fairer to Indians than the existing law required in a number of respects. First, it allowed money recovery for all takings of land, no matter what was the source of Indian title. Prior to 1946, the courts had found that Indian tribes were not entitled to compensation when their aboriginal title was taken. This act did grant recovery for takings of aboriginal title.

It also granted a right of recovery for taking of executive order reservations. If an executive order reservation was set up and then partially broken up, as many were, you could go to the Indian Claims Commission and get recovery for that. Under the law of the United States before the Indian Claims Commission Act, a tribe could not get recovery for that taking. The idea was that only treaty reservations set up by statute were constitutionally recognized under the Fifth
Amendment; land title that was aboriginal or established by executive order was not protected by the Fifth Amendment. Only lawyers could explain how you get compensated for title recognized by Congress but not title recognized by the president of the United States. But that had been the law, until the Indian Claims Commission Act made that kind of title compensable.

The act also went beyond existing law in that it allowed for recovery for unconscionable consideration. Often treaties were negotiated unfairly and tribes did not receive enough compensation. Under contract law, the tribe would not be entitled to payment for that. Under the Indian Claims Commission Act, they were allowed to seek recovery for unconscionable dealings.

There are a few other respects in which the act went beyond existing law to allow recovery. By and large, it did away with what were referred to as gratuitous offsets. During the era of the special acts, before the Indian Claims Commission Act, a tribe would go in and get a recovery. Then the United States would come in and say, “Okay, their land taking was $2 million, but we provided blankets, beads, wagons, and educational services. They are worth $1 million. Therefore, the tribal recovery has to be offset.” These gratuitous offsets were extremely important under the special acts. A total of $49 million was awarded under the special acts. Of that amount, $29 million was lost to gratuitous offsets. Tribal recovery was lowered by about 60 percent. This did not happen under the Indian Claims Commission. Generally, gratuitous offsets were not allowed.

The most fundamental problem with the act, from the tribes’ point of view, was that it provided for payment in money and not land. That moral and economic issue was never seriously debated. Perhaps, it should have been. The government could have allowed for money recovery and then transferred to a tribe an equal amount of public domain land near the reservation. But that was not done. It was a straight money payment act. A settlement of $1,800 would buy a nice car in the fifties, but it was not the same as receiving a land payment. Many Indian people would point to that as the essential injustice of the act.

There are over one hundred dockets that have not been completed. These cases were filed between 1946 and 1951, and they still have not
been completed after almost forty years. The old Indian Claims Com‐
mission that had five judges was abolished in 1978. Its cases were
transferred to the Court of Claims. Indian people complain that the
long delays in settling their claims are another injustice. There is no
other area in the judicial system, even antitrust, where you have delays
of that magnitude.

Attorneys' fees are a maximum of 10 percent under the act. Because
of the big awards that were given—$10 to 12 million being
common—the claims attorneys, by any standard, have done well.
Nevertheless, there are some honest ambiguities on this issue: the typical
contingent fee recovery after trial—and remember that claims attorneys
receive nothing if their clients do not prevail—would be 33 percent.
So, the fees under the act are less than the typical attorney-client rela-
tionship. But there are lots of reasons why that is a false point.

Tribes have received approximately $800 million under the Indian
Claims Commission Act. Tribes have raised complaints because that
amount was much smaller than it might have been. When you figure
the amount of a claim by the value of the land at the date of taking,
let's say 1850, that value might be very small in many cases. The key
point then becomes whether you award interest. If you award interest,
even at 6 percent you are going to multiply that old award many times
over. What the courts found was that if aboriginal or executive order
land was taken there would be no interest. For example, in my home
state of Oregon the Siletz Reservation had some of the richest timber
land and scenic coastland in the world, but it was an executive order
reservation. Those tribes on the reservation received a dollar or two an
acre without any interest to bring it up to the present.

Today, the Indian Claims Commission Act is cited as a precedent
for awarding compensation to Japanese-Americans who were detained
during World War II. It also is touted in some foreign countries as a
progressive way to approach aboriginal claims. That is ironic because
many Indian people despise it for some of the problems I have raised.
As a lawyer, I do not like what the act did to my profession. There was
a period when all kinds of attorneys spent time on Indian law, but it was
all on claims. It was terribly important to have lawyers representing
tribes during the termination era of the 1950s and early 1960s. They
were not there, because they were working on claims. And remember,
attorneys could either file with the Indian Claims Commission or Court of Claims for money, or they could go into court and try and get the Indians' land back. Normally, if Indians receive payment in the Court of Claims or Indian Claims Commission, they can not get the land back later. Lawyers had to advise tribes on whether they ought to go into the Indian Claims Commission with 10 percent attorneys' fees and an attorney willing to take that case, or go off and try to get the land. In the latter option, there was no way to pay the attorney fee for a very uncertain case. We went through a long period of time when those decisions were being made repeatedly. Now tribes are in a legal, political, moral, and economic situation of saying we want our land back. The rejoinder is that you have been paid for it under the Indian Claims Commission.

W. ROGER BUFFALOHEAD

On December 13, 1984, my son will receive the benefits from a tribal claim that our tribe started long before I was born. It finally was won in the mid-1970s. He was about five years old when the claim was won. His amount of money was put in a trust fund with a 3 percent annual interest rate, so he will receive about an eighteen hundred dollar check in December. He will probably join the ranks of thousands of other Indians who have received such claims since the Indian Claim Commission Act was passed in 1946 by buying himself a new car. I suspect that the new car will probably be a wreck in two years. His tribal heritage will have gone down the drain.

I have not done a lot of research in the area of the Indian Claims Commission Act, except as it affected the Minnesota Chippewa tribe, with whom I have had a long association as an historical researcher, and also my own tribe. So I feel uncomfortable when talking about the basic principles of the act and how it affected Indian tribes on a much larger scale, but I do know that the idea of granting claims to Indian tribes was something that Indians began to pursue as long ago as the nineteenth century. Some of the earliest attempts were made through the old United States Court of Claims, which required tribes to get a special act from Congress in order to sue the United States.

The Minnesota Chippewa tribal people were robbed out of a tremendous amount of acreage under the Minnesota equivalent of the
Termination

Dawes General Allotment Act. It was called the Nelson Act Agreements of 1889. The Chippewa brought suit, in the 1920s, for the lands that were taken through that agreement. In the mid-1930s, they lost those claims. When the Indian Claims Commission Act was passed in 1946, they were ineligible to refile on those claims. It has been a difficult situation for them. Of course, they could go back and file claims on land lost through earlier treaties, which they did, and they won. But, by and large, claims to the enormous amount of land that passed from their hands into white ownership through the Nelson Act Agreements of 1899 were never settled as far as the Minnesota tribal people were concerned. It is something that is still a problem in many other Indian communities.

E. Richard Hart

There are a lot of problems inherent in claims. They include problems with attorneys and witnesses. There also is the question of making sure that tribes are fairly represented.

In dealing with tribal history, especially in the Great Basin and the Southwest, where I have done most of my work, one thing is very clear: the tribes wanted to have a day in court. They knew that there had been unconscionable transactions or takings of land. They felt they still owned land that was occupied and used by the United States without their consent. It is important to remember that one thing that led to the Indian Claims Commission Act was the tribes’ persistent determination to get their day in court. For example, the Zuni began their claims struggle in the 1880s. Every tribal council, every governor, from that time until the present, was concerned with the Zuni having a day in court and getting some kind of justice.

Another problem is the question of whether the land was taken. That is the question the Western Shoshone are facing today. The Western Shoshone had a treaty that was ratified by Congress in 1863. It seems to say that a lot of what is now federal land is still owned by the Western Shoshone and that it will be owned by the Indians until the federal government provides a reservation large enough for them to make a living in agriculture. That is the way I read the treaty. If that is true, the federal government has been collecting allotment fees and
rent on all that land for a hundred years when they should have been paying it to the Shoshone.

There are all kinds of difficulties involved with the way that attorneys have represented tribes. For instance, in the Northern Paiute claim: the attorneys for the Northern Paiute were told by the federal government that they had to represent the Owens Valley Paiute. The attorneys representing the tribes had not taken the time to find out who all the Northern Paiute were, let alone ever talk to them. They represented people whom they had never met. They never discussed the case with them or gave the Paiute any of their legal alternatives. The attorneys made stipulations with the Justice Department without the tribes having any input. They determined times of taking without ever discussing it with tribal leaders, and they stipulated values of land at the time it was taken without ever discussing that with tribal leaders.

The percentage of money awarded was a problem. Most attorneys pressured tribes to make quick settlements. They did not go through extended court battles, which might have raised the value of the Indians' land, because it required expense on the part of the attorneys. Attorneys also had something to do with getting tribes to take per capita payments, instead of lump payments that encouraged employment or economic development.

Witnesses also have faced problems with the Indian Claims Commission. Expert witnesses came under pressures from the attorneys for the plaintiff and pressures from attorneys from other tribes. If two tribes claimed that same area and if it could be proven in court that there was joint use of an area, nobody got paid for it. That was true for fairly large tracts of land. In the Zuni's case, almost all of the land that the Zuni claimed already had been awarded to the Navajo.

Historians and anthropologists have been susceptible to considerable pressure because they hoped to keep their work going with tribes. They have generally testified favorably for the tribes in court. The Indian Claims Commission has had a major impact on Indian historiography. The same thing can be said about anthropology. Anthropologists and historians who are friends of tribes sometimes have felt that it was in the best interest of the case to testify just a little bit differently, so that it would look better in court. For instance, you had to first prove in court that a tribe was a tribe. In the Indian Claims Commission and the
United States Court of Claims, that required a certain level of group organization. If you did not testify that there was an organization and a cultural people beyond the family unit, the Indians were not entitled to seek a claim.

Another thing that should be taken into account, and this has come up in the Zuni case, is that some lands can not be conscionably taken from tribes. It is unconscionable for the United States government or anyone else to take a church away from Mormons or Catholics or to take a synagogue away from Jews. The courts would not allow that under any circumstances, whatever the justification. In the case of many tribes, portions of their lands were and are their churches. This land has great religious value to them. It is my belief that for some of those lands that title could not have been conscionably taken.

In the Zuni's case, there is a place that Zunis go after death. It is a small lake in southern Arizona. They make annual pilgrimages there every six years. This region has extreme religious value. There is no excuse for the government's refusal to protect or validate their title to that property.

Edward C. Johnson

I can remember many years ago when my great grandmother and grandfather talked about getting their Indian money. They never received it, but some of us did. The Northern Paiute obtained $5,000 a piece for their land. That included the Comstock Lode. In the nineteenth century, they took close to $1 billion in gold and silver out of that mine. Today, with the inflated value of money, it would be worth at least $10 to 20 billion.

And of course, we had anthropologists. The government and the tribe each had their witnesses and attorneys. People were interviewed to determine that the tribe was there and that this was their area. An anthropologist determined that this was our land. We had three sections of land that extended from southern Oregon and southern Idaho through western Nevada and into eastern California. We got $21 million for it. Approximately $18 million came from the area that included the Comstock Lode and $3 million from the other two areas. It was one of the biggest claims case payments. I think we got $1.29 an acre for it.
During this claims case, hearings were held and federal officials came out and talked to us. We had an organization called the United Paiutes, Incorporated. It opposed the claims case and advocated getting the land back. We still have people that advocate getting the land back. Others said that we are a practical people. They concluded that all of that land really did not belong to us. Despite the talk about aboriginal title, our reservation was here. The land out there belonged to someone else. Theoretically, we still own it, but we do not possess it. Since we could not prove that we owned all of the land, we could not get claims payments for it. If we had a treaty, maybe we could have rallied around something and fought for getting the land back.

The two major Northern Paiute reservations are Pyramid Lake and Walker River. They each contain about three thousand acres. In 1906 we lost our lake and part of our reservation because someone thought there was another Comstock Lode there. The government dammed up the river that leads to Pyramid Lake. I guess they wanted the lakes, so they have found ways to get the water.

But we are still here. In fact, we just had a meeting with our claims attorneys over various dockets. The government attorneys and our tribal attorneys have come to an agreement on our fishery for $2.5 million. Of course, the claims lawyers will get 10 percent, which is $250,000. I do not know what we will decide to do with the $2.5 million for the fishery, which we lost.

There are other dockets. We have one for trespass on the reservation and one for mismanagement of our funds. We should have more funds coming in until the dockets run out. We are looking forward to this money, but I do not know what we will do with it. Almost everyone wants a per capita payment. The tribal members want a check to show that they got their Indian money. The tribe might have frittered it away, and the people never would have known that they got their claims money.

We are generally a poor people. Most Northern Paiutes live off the reservation or in small colonies. Our people surely could use more lands, wherever they are located, but it is not in the "Great White Father's" scheme of things to give us more land. We can be thankful that we have already got $21 million in claims and another $2.5 million
coming down the pike. The attorney really does not tell us much about what is going on in these cases.

A new court has been created to replace the Indian Claims Commission. This tribunal will not bring real justice to the Northern Paiute or to any other tribes. The Indian Claims Commission was simply a legal way to quiet aboriginal title. The government wanted to pay as little as possible for legally taking over these lands. Once the aboriginal title has been solved, the government will go on to other kinds of things.