50 years past the deadline . . .
Why are Indian tribes still suing over ancient treaties?

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A Goal Unrealized

This August 13th marks the 50th anniversary of the deadline set by Congress for Indian tribes to sue the United States for grievances arising prior to 1946. Nevertheless, Indian tribes continue to file claims for loss of their treaty rights, loss of land, and other claimed injustices. The special law that allowed Indian tribes to file all claims and then closed the chapter on this part of America's history is now largely forgotten by the courts and the public.

On August 13th, 1946, President Harry S. Truman signed into law the Indian Claims Commission Act. Perhaps one of the most unique tools for judicial intervention in history, this Act created a special judicial body before which American Indian tribes could file claims of all kinds against the United States government. Any claim that any Indian tribe had against the United States, extending back to the American Revolution, could be brought before the Commission. In order to be valid, however, the claims had to be brought within five years of the passage of the Act. Any claims not brought before August 13th, 1951 would be forever barred by the statute. Despite the passage of the deadline, claims that arose from events prior to 1946 continue to be brought by Indian tribes. Congress passed the ICCA in order to allow Indian tribes the opportunity to "have their day in court," but that day has long since passed. The important goal of the Indian Claims Commission has been largely forgotten or ignored, as courts persist in allowing tribal suits. As Congress itself pointed out, the purpose of the Act was to "bring this practice to an end and to settle once and for all every claim [Indian tribes] could possibly have under the categories set forth in the law."[1] Today, a half-century later, the Act's purpose still stands unrealized.

The Largest Real Estate Transaction in History

In order to fully understand the ICCA, an examination of the shifting relationship between the United States and the American Indian tribes should first be conducted. Even before the Revolution, Indians were under pressure to allow settlers to purchase tracts of land tribes had been using, and at times land was taken from the Indians by force. Back in the eighteenth century, however, huge amounts of available land usually allowed settlers and natives to coexist in relative peace. As the years passed, and the United States continued to expand, Congress realized that this cohabitation would not be able to last forever. The United States made treaties with tribes, at first affording them treatment of a somewhat similar nature to that given

European nations. This soon gave way to the "removal" policy of President Andrew Jackson, which resulted in Indians from the Eastern states being "removed" to west of the Mississippi River. Rapid settlement in the West, fueled by both the railroads and the California gold rush, put an end to removal, however, and the government began to purchase land from the tribes and settle them on reservations. Tribes were eventually concentrated on land designated as "Indian Territory," (now Oklahoma) or moved to reservations on or near the land where they had once lived.

By the 1870s, nearly all tribal land had been acquired from the tribes, with the American government turning a blind eye to many injustices and actively assisting in some of the Indian's oppression. In 1871, Congress ended treaty making, stating that tribes would no longer be recognized as independent nations or powers.[2] Without a doubt, the shifting policies of the federal government played the primary role in the transfer, with varying degrees of consent, of nearly all tribal land, and in the degradation and even destruction of American Indian culture and way of life. As President Harry S. Truman pointed out, the United States had been dealing with Indian land claims since the country's inception:

> Instead of confiscating Indian lands, we have purchased from the tribes that once owned this continent more than 90% of our public domain, paying them approximately 800 million dollars in the process. It would be a miracle if in the course of these dealings – the largest real estate transaction in history – we had not made some mistakes and occasionally failed to live up to the precise terms of our treaties and agreements with some 200 tribes. But we stand ready to submit all such controversies to the judgment of impartial tribunals. We stand ready to correct any mistakes we have made.[3]

Adjudication Of All Tribal Claims

As Truman spoke those words, he was preparing to pen his signature on the Indian Claims Commission Act, signing it into law. The federal government, along with most other Americans, realized that wrongs had been committed in dealings with the Indian people. Until after World War II, however, few attempts were made to right the wrongs that had been done. What had happened between the United States and Indians were considered political, even military, matters over which the courts had no jurisdiction. As a result, tribes could not sue in court for damages, and Congress had to pass special acts for each claim in order to allow courts to hear cases or award any compensation to Indian tribes.[4] This system was extremely complicated and time-consuming, which made it difficult for many tribes to successfully receive compensation.[5] This was unacceptable to everyone involved with the issue and a better solution was sought. During the mid-1930s, the idea of allowing Indian tribes to recover for past wrongs in a specially designed body was put forth by John Collier, then Commissioner of Indian Affairs. It took a decade before Congress was able to agree on a bill that would garner

enough support to pass both houses and be signed into law, but the Indian Claims Commission Act was finalized on August 13th, 1946.

Both the federal government and Indian tribes welcomed the creation of the Commission, realizing that it would be a means by which to decide all claims outstanding. The tribes embraced the Commission because it gave them the right to file all claims and gave much more latitude than the special jurisdictional acts, while the United States government appreciated the Commission as a way to allow all cases to be heard, decided and forever closed by a single judicial body. It was agreed that the Indian Claims Commission would be a positive development in the relationship between the tribes and the government.

The logistics of the Commission were a bit complex, since never before had such sweeping resolution of Indian claims been attempted. Though the Commissioners were required to be lawyers, typical legal concepts were not always applicable in these types of cases. For example, in most legal disputes, a statute of limitations forces claims to be brought within a certain time of the wrong being committed. American Indian claims, however, had been repeatedly thwarted by government action. In order to be fair, any claims originating after 1776 were heard by the Commission, regardless of how long they had been pending.[6]

The cases brought before the Commission also differed from typical legal disputes in the types of arguments that could be made. Generally, lawsuits must be based on purely legalistic principles, but Congress gave the Commission authority to also hear claims that were moral in nature. Therefore, tribes could bring cases claiming that the federal government had coerced them into signing treaties, or misrepresented agreements, or acted in other ways that could be characterized as violating notions of "fair and honorable dealings that are not recognized by any existing rule of law or equity."[7]

Of equal importance was Congress' understanding that no one should be allowed to litigate a claim forever. In return for the elimination of any statute of limitations on claims filed under the Act, tribes understood that the ICCA would provide complete, final closure to their complaints. If a claim existed by an Indian tribe prior to passage of the Act, that claim was forever barred if not filed by August 13, 1951. As long as the claim was filed before that date, however, virtually any interaction between the government and Indian tribes was subject to question before the Indian Claims Commission. In this way Congress "provide[d] for a final adjudication of all tribal claims."[8]

Their Day In Court

Though the Commission was created to deal with the difficult questions arising from nearly 200 years of shifting federal policies and conflicting relationships, no one was quite sure how to go about answering the questions that had arisen. In order to deal with the uncertainties that lay ahead, Congress gave the commissioners only general guidelines, allowing them to set their own standards for dealing with claims. These individuals came from different backgrounds, different

political parties, and different areas of the country. They had a common understanding of the place of the legal world, however, and this allowed them to gradually shape the Commission into a viable judicial body. The commissioners heard evidence from both the tribes and the government, determined which side had the stronger case, and passed judgment. In short, the Indian Claims Commission provided a prolific and effective forum for Indian tribes to have their "day in court."

Of course, the ICCA could not have been considered a success if tribes were unaware of its existence or unable to file claims. This was not a problem, however, as all 176 federally recognized Indian tribes were notified of the Commission and its purpose shortly after its inception in 1946 and 370 different petitions were filed during the first five years of the Commission's existence. [9] Indeed, nearly every existing tribe in the nation filed claims under the ICCA. The tribes were ably represented by very accomplished lawyers, many of whom spent the majority of their professional careers trying cases before the Commission. These attorneys were by and large successful in obtaining awards for their clients - at least as successful, if not more so, as any trial attorney could hope to be. Tribal attorneys filed claims demanding compensation for every wrong they could think of, realizing that Congress had barred all claims after the five year period.

The period during which tribes were permitted to file their claims saw a wide and interesting variety of petitions. Some tribes, such as the Taos, wanted to have sacred land returned to them. This and similar claims proved difficult to grant – after all, much of the land that tribes had lost or sold was now in the hands of private individuals, people who had nothing to do with the original transactions. The Commission recognized that the return of land would only create an entirely new group of people that would be wronged, necessitating more lawsuits, not a closure of these claims. Due to these concerns, the Commission decided early on that monetary awards were highly preferable to the return of land. Though there were rare cases, such as with the Taos, in which the sacred land was still held by the government and thus could be returned, the Commission was understandably reluctant to grant such demands and awarded money instead.[10]

While a few tribes sought the return of land, other tribes wanted to have the government held accountable for the way tribal money was spent. More so than others, these petitions were frequently successful. The relationship between the government and the American Indians often involved the government acting as a trustee for the tribes. As trustee, the Department of the Interior and later the Bureau of Indian Affairs were in charge of overseeing and, in many cases, designing programs on reservations. Earlier courts had agreed that the government needed to account for any expenditures, and that the expenditures had to fulfill the congressional purpose of acting as a trustee for the tribes.[11] The Commission even ordered the government's General Accounting Office to prepare reports listing transactions that involved any Indian funds for a period of almost an entire century.[12] But the cases brought before the Commission went further. The attorneys for the tribes insisted not only that the government must account for all expended funds, but also that they must pay interest on any funds that were not

spent. In 1970, the Commission heard the claim of the Mescalero Apaches and the Te-Moak Bands of Western Shoshone on this issue. [13]

This question of paying interest to Indian tribes on money that was held in trust is one of the most complicated the Commission faced. The government had generated hundreds of millions of dollars for tribes over the years by overseeing the usage by non-Indians of Indian land. This money was deposited in a trust account, and was then used to fund various Indian programs. The United States Government asserted that no interest was due on the funds, since the money was constantly being spent for the benefit of the tribes. Tribal attorneys countered this by pointing to a statute, passed over a century earlier in 1841, that required funds held in trust by the United States to be invested in bonds bearing at least five percent interest. Although the statute had not mentioned any funds belonging to the tribes, the Commission again sided with the Indian tribes.

Then, in an even more radical step, the Commission awarded the tribes the interest not at a simple interest rate, but at a compound rate. This was a huge difference, due to the time that had elapsed between the wrong and the Commission's decision. At simple interest, what is typically awarded in such cases, $1 million dollars would have turned into $5 million after eighty years.[14] The compound interest that the Commission awarded, however, would have turned it into 10 times that much. The Department of Justice, who represented the government before the Commission, appealed the case to the Court of Claims. The Court of Claims reversed the decision, determining that the tribes were not entitled to interest, a decision that has been hotly contested by advocates of increased tribal awards.

Most of the cases brought before the Commission did not deal with the return of land or accounting issues, however. By far the most prevalent of all cases were those dealing with compensation for taken aboriginal lands. Before the arrival of Europeans, the concept of owning land was foreign to most American Indians. As Tecumseh put it, "Sell a country! Why not sell the air, the clouds and the great sea, as well as the earth? Did not the Great Spirit make them all for the use of his children?" Indian tribes did not own the land in the American or European sense, because the land could not be owned.

When the ICCA became law, however, Indian tribes understandably demanded that they be fully compensated for any land that was 'taken' from them. Determining what land could be considered as belonging to tribes was an extremely complicated process. Many tribes had not consistently remained in a single area, making it impossible to draw distinct lines around an inhabited land. Furthermore, many tribes had been dislocated over the previous centuries by the settlement patterns of whites. The Commission had to balance accounts from different anthropological experts, determining the extent to which land had been used by a tribe in order to decide whether they had gained ownership over periods of time.[15] The Commission was very lenient with tribes on this issue, requiring little proof linking the tribes to the land they claimed. For example, the Commission in

1957 determined that the Pawnee tribe had aboriginal title to 23 million acres of land in Nebraska and Kansas, despite the fact that the tribe's own expert witness admitted that number was arbitrary and that many of the 23 million acres were actually "common hunting ground among several tribes."[16] This sort of limited information was enough, however, for many tribes to convince the Commissioners that they deserved compensation for the loss of 'their' land.

Once the Commission had determined that a tribe held title to land that had been taken from them, the only thing that remained was for damages to be awarded. In order to do so, the value of the land needed to be determined. This was often just as difficult, however, as determining the ownership of Indian land. As Edgar Witt, the first Chief Commissioner, remarked to Congress, "it is very difficult to determine what these lands were worth in 1814 or in 1865 before they were really occupied by white citizens of the United States."[17] Should the Commission value the land at what it would be worth with improvements, as the Indians wanted? Or should the land be valued at the use the tribes had for the land, as the Department of Justice wanted? The Commission always chose a number somewhere in between. Tribes seldom recovered all they demanded, which even included claims that they should be compensated for the 'trespass' of miners on their property or the loss of their hunting and fishing rights, in addition to the value of the land for its highest and best use. The Commissioners rejected this approach, finding that payment for highest and best use included compensation for lesser included rights like hunting and fishing privileges. At the same time, tribes always received more than the government's valuation of the land. Overall, the Commission awarded damages in 341 cases, or over 62% of the claims that were adjudicated. At an average of nearly $2.4 million per case, the Indian Claims Commission awarded about $1.3 billion during its 32-year life.

Whether or not these amounts were adequate will be forever debated. These awards were certainly substantial, however, especially when one considers that much of the $1.3 billion awarded represented additional compensation over the $800 million tribes had originally received for their land. Even though the Commission awarded over a billion dollars to hundreds of tribes, broke new legal ground for Indian claims, and was extended six times as long as originally intended in order to ensure that all tribes got their day in court, the ICCA has been beset by criticism since its inception. It is true that the government, through the Department of Justice, fought Indian claims with vigor. That is the way the American adversarial system of justice works. The plaintiffs (Indian tribes) had attorneys advocating for them, and the defendants (the government) had attorneys advocating for them. Indian tribes did not get everything that they wanted. If all the damages that the Indian tribes claimed would have been granted, they would have amounted to over $14 billion, or one-third of the federal budget at the time of the petitions.[18]

The bottom line is that American Indian tribes got their 'day in court,' and the tribes succeeded in winning awards in the majority of claims. The Indian Claims Commission Act was designed to create an atmosphere in which the negative actions of the past could be rectified. The passage of the ICCA was a remarkable

development in a process designed to hear all claims, and then forever close the door on that chapter of history. Even the tribes themselves, for the most part, agree that they received a fair hearing. As the Commission itself wrote at its conclusion in 1978:

> The last question that needs an answer is did the Indians gain their "day in court?" The answer is yes. The Commission was a court, complete with appelate [sic] review. And it was unique among courts in its jurisdiction over "moral claims" and having no statute of limitations except the requirement that the claims must have accrued prior to [August 13th of 1946]. The tribes, represented by some of the best legal talent in the country, litigated more than 500 claims and won awards on over 60 percent of them.[19]

A Final Resolution

When cultures collide, as they have for centuries, problems will inevitably result. Sometimes the resolution of these problems takes on a military form – one culture becomes the conqueror, and the other the conquered. Sometimes the dominant culture overwhelms and assimilates or eliminates its less powerful rival. Words like "fairness" and "just compensation" rarely are addressed in these situations. As historian Imre Sutton points out, "recognition of the right of an indigenous people to sue a government over the misdeeds of its predecessors is a consideration that few conquerors have ever accorded a subjugated people."[20] Instead, the conquered culture is swallowed by the conqueror. Certainly, it would not have been difficult for the United States government to allow the Indian cultures to go this same route. From the infancy of the American republic, however, the government decided to deal with the collision of cultures through treaty making, Congressional action and, in 1946, judicial intervention.

That judicial intervention was the creation of the Indian Claims Commission, which provided a unique judicial forum for what are traditionally military or political issues – one of the few instances in which a "subjugated" people were allowed to sue their "conquerors." Congress waived the statute of limitations, allowed for the consideration of moral claims, and gave the Commission as much time as it needed in order to fully consider the claims. The trade-off for the tribes, however, was that they had five years during which to file their claims. Congress made it quite clear that "all claims arising before 1946 must be filed within five years of the date of the Act. Such claims that were not filed would be barred."[21]

Ever since the Indian Claims Commission ended in 1978, attorneys on behalf of Indian tribes have sought new ways to file lawsuits over old claims to circumvent the closure intended by Congress in passing the ICCA. For example, because the Act bars all claims against the United States Government, tribes have brought suits against states and even private citizens for claims over the taking of land, trespass, and loss of hunting and fishing rights. Because these claims invariably involve, at their heart, actions or wrongs by the United States, these claims are also barred by

the Act.[22] Indeed, tribes often asserted these very same claims before the Commission, but whether filed or not, if the claim existed before August 13, 1946, it is forever barred.

The Act was unique because it created both a statute of limitations of five years to file claims by August 13, 1951, and a prohibition or jurisdictional bar to the courts ever hearing the tribal lawsuit.

> [N]o claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration . . . [23]

Some courts have applied the law as written and dismissed these lawsuits. Other courts have ignored or forgotten the Act. In this twenty-first century, fifty years after the statute of limitations expired, courts need to remember and respect the twentieth century's unique judicial process to hear and forever decide all tribal claims originating from the 18th, 19th and early 20th centuries.

There is simply no legal issue today whether the tribes were "fully compensated," or even whether the federal government violated treaty rights many years ago. It may be legitimately argued that the government should have paid tribes interest on the money they held in trust, or that land should have been valued higher, or that more compensation should be given for other losses. Though these are all important questions, they are once again political questions. Congress defined the role of the special commission to decide American Indian claims, and further judicial intervention has been foreclosed. Today, the doors of the courthouse are simply closed to claims that arose between 1776 and 1946. The Indian Claims Commission Act was embraced by tribes, by the government, and by the public because it was a way to adjudicate with finality any and all claims between the government and the Indian tribes. It is time that its purpose, an end to costly and divisive lawsuits, is finally realized.

Randy V. Thompson, Esq. and Brandon Thompson co-authored this article on behalf of Proper Economic Resource Management, Inc. (PERM), a Minnesota non-profit corporation whose mission is the preservation and management of natural resources for all persons.

Footnotes

[1] Indian Claims Commission Act of July 24, 1956. 70 Stat. 624.

[2] 16 Stat. 544,566 (1871)

[3] Signing Statement, August 13, 1946.

[4] Michael Lieder and Jake Page, *Wild Justice:* The People of Geronimo vs. the United States (New York: Random House, Inc.), 55.

[5] Ibid.

[6] Lieder and Page 66.

[7] Indian Claims Commission Act of 1946. 60 Stat. 1049 §2.

[8] 102 Cong. Rec. 11931 (1956)

[9] Indian Claims Commission Final Report 5.

[10] R.C. Gordon-McCutchan, *The Taos Indians and the Battle for Blue Lake* (Santa Fe: Red Crane Books, 1991), 5.

[11] *Menominee Tribe v. United States*, 101 Ct. Cl. 22 (1944).

[12] Lieder and Page 234.

[13] *Te-Moak Bands of Western Shoshone Indians v. United States*, 31 Ind. Cl. Comm. 427 (1973).

[14] *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975).

[15] Sutton 18.

[16] Lieder and Page 127.

[17] Testimony of Commissioner Witt before the Subcommittee of the House Committee on Appropriations, January 18, 1956.

[18] Lieder and Page 136.

[19] H.R. Rep. 94-1150, 94th Cong., 2d. Sess. 27 (1976).

[20] Imre Sutton, *Indian Land Tenure: Bibliographical Essays and a Guide to the Literature* (New York: Clearwater Publishing, Inc.), 91.

[21] 122 Cong. Rec. 10319-20 (1976).

[22] *Oglala Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), cert. denied 455 U.S. 907 (1982)

Oglala Sioux Tribe v. Homestake Mining Co., 722 F.2d 1407 (8th Cir. 1983)

United States v. Dann, 470 U.S. 391 (1985)

[23] Indian Claims Commission Act of 1946, 60 Stat. 1049 §12