

BEFORE THE INDIAN CLAIMS COMMISSION

RED LAKE BAND and PETER GRAVES,)	
JOSEPH GRAVFS and AUGUST KING,)	
<u>ex rel.</u> RED LAKE BAND,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 189
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: June 21, 1973

Appearances:

Rodney J. Edwards, Attorney of Record for Plaintiffs. Marvin J. Sonosky, of Counsel.

William F. Smith and W. Braxton Miller, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This claim was brought by the plaintiffs for just compensation under the Fifth Amendment to the Constitution for certain lands located in northwestern Minnesota which were allegedly taken by the United States without the payment of any compensation under the circumstances hereinafter described.

Under the terms of the Treaty of February 22, 1855, 10 Stat. 1165, the Mississippi, Pillager and Lake Winnibigoshish Bands of Chippewas ceded to the United States a large tract of land described by metes and

bounds in Article 1 of said treaty. The tract so ceded is identified as Area 357 on Royce's Map of Minnesota 1 in Part 2 of the 18th Annual Report of the Bureau of American Ethnology (1896-1897).

Under the terms of the Treaty of October 2, 1863, 13 Stat. 667, the Red Lake and Pembina Bands of Chippewas ceded to the United States a large tract described by metes and bounds in Article II of said treaty. The tract so ceded is identified as Area 445 on Royce's Map of Minnesota 1.

The unceded area situated between the Canadian border on the north, the boundary of the area ceded under the 1855 treaty on the east and south, and the boundary of the area ceded under the 1863 treaty on the west became the original Red Lake Indian Reservation. The original reservation is identified as Area 446 on Royce's Map of Minnesota 1. In Article 6 of the 1863 treaty this unceded area was referred to as "the reservation," and thereafter was regarded by the United States and the Indians as constituting the Red Lake Reservation. See Chippewa Indians of Minnesota v. United States, 301 U.S. 358, 373 (1937).

Subsequently, surveys were run to demarcate the reservation and the adjoining areas ceded to the United States in 1855 and 1863.

A survey, approved June 21, 1872, of the western boundary of the reservation erroneously excluded 39,750.55 acres of land from the reservation. This tract, hereinafter referred to as Tract C, is a long narrow piece of land about 57 miles long from north to south and

from a fraction of a mile to about 3 miles wide. Tract C runs from the Canadian border in Township 164 North, Range 36 West, south to the main channel of the Thief River in Township 157 North, Range 42 West.

Another survey, approved December 17, 1875, of the eastern boundary of the reservation erroneously excluded 12,727.34 acres of land from the reservation. This tract, hereinafter referred to as Tract A, is a long narrow triangular tract beginning in the north with a base about 1 mile wide on a branch of the Black River in Township 157 North, Range 27 West, and extending southwesterly for approximately 60 miles to a point in Township 148 North, Range 33 West.

The lands so excluded from the reservation by reason of these erroneous surveys were disposed of by the United States as public lands on various dates, by grant to the State of Minnesota as swampland, or school sections 16 and 36, or indemnity land, and to individuals by patents under the public land laws.

A third survey, approved November 23, 1885, of the southern boundary of the reservation erroneously included 31,933.96 acres of Royce Area 357 within Royce Area 446. This tract, hereinafter referred to as Tract B, is a rectangular strip of land approximately 2 miles wide and 26 miles long extending along and just inside the short southern boundary of Royce Area 446 between Ranges 33 and 38 West. Under the terms of the Act of January 14, 1889, 25 Stat. 642, a portion (identified as Area 706 on Royce's Map of Minnesota, Northern Portion, and including Tract B) was ceded to the United States. The lands within Tract B were then public lands and were disposed of as such by the United States.

Several matters present in this claim are not in dispute between the parties and, therefore, require no amplification in this opinion. Both parties agree that the surveys were erroneous and that the number of acres excluded from the reservation by reason of the erroneous surveys comprised 12,727.34 acres in Tract A and 39,750.55 acres in Tract C. The parties also agree that the median valuation dates and the value of the lands located within Tracts A and C are as set forth in finding of fact 7, infra. Furthermore, both parties agree that this phase of the proceedings under this claim does not involve Tract B which was included within Royce Area 446 by reason of the erroneous 1885 survey.*

Those matters remaining at issue in this proceeding are legal. The basic issue is whether the disposition by the United States of the Tract A and Tract C lands constituted a taking under the Fifth Amendment. In addition, the defendant has raised certain defenses which we must evaluate. We will first discuss these defenses.

In connection with Tract C, the defendant urges that the Red Lake Band has previously recovered in a suit before this Commission for the value of Tract C on the basis of aboriginal ownership. Defendant argues that, by virtue of the erroneous 1872 survey of the western boundary of the reservation, the lands comprising Tract C became a part of Royce Area 445 which had been ceded to the United States by the Red

* The plaintiffs assert that Tract B is an offset matter. The defendant asserts that Tract B is a part of the accounting claims in Docket 189-A and 189-B.

Lake and Pembina Bands under the Treaty of October 2, 1863, supra. Therefore, when the Commission determined in Dockets 18-A, et al., Red Lake Band v. United States, 6 Ind. Cl. Comm. 247 (1958), rev'd in part on other grounds, 164 Ct. Cl. 389 (1964), that the Red Lake Band had aboriginal title to the Minnesota portion of Royce Area 445 for which they later were awarded \$0.45 per acre, the plaintiff band was compensated for Tract C, and any claim for Tract C is res judicata.

We disagree with this reasoning. In Docket 18-A the Red Lake Band received additional compensation for a portion of the lands described by metes and bounds in Article II of the 1863 treaty of cession. In our decision in Docket 18-A, we did not substitute Royce Area 445 for the treaty description of the cession. The 39,750.55 acres comprising Tract C were not part of the cession as described in Article II of the 1863 treaty and, therefore, were not involved in Docket 18-A. The erroneous survey in 1872 did not alter the boundaries of the cession described 9 years before in the treaty. Thus, this claim for the Tract C lands is not res judicata because it was not a part of the claim in Docket 18-A.

With respect to Tract A, the defendant alleges that the value of Tract A should be considered in the proceedings in Dockets 189-A and 189-B, consolidated, which dockets involve an accounting by the defendant for sales of land and timber from Royce Area 706, ceded pursuant to the terms of the Act of January 14, 1889, supra.

Tract A, however, had been erroneously excluded from the Red Lake Reservation by reason of the erroneous survey in 1875. Therefore, it certainly could not have been ceded as part of the reservation 14 years later. Since the accounting claims in Dockets 189-A and 189-B involve those lands ceded pursuant to the 1889 agreement, those claims do not involve the lands comprising Tract A.

The plaintiffs' claims to both Tract A and Tract C are, therefore, properly at issue in this docket.

The basic question herein is whether the disposition by the United States of the lands comprising Tracts A and C resulted in a taking of said lands under the Fifth Amendment. The law on this issue is clear. Disposition by the United States of Indian lands erroneously surveyed has consistently been held to constitute a taking under the Fifth Amendment in situations where the Government made no attempt to give the Indians any compensation. See United States v. Creek Nation, 295 U.S. 103, 109-11 (1935); Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 555 n. 2 (1968) (aff'g in part, rev'g in part, Docket 350-F, 16 Ind. Cl. Comm. 341 (1965)).

The defendant attempts to analogize the facts giving rise to the claim in the instant case and the facts in the case of United States v. Creek Nation, 192 Ct. Cl. 425 (1970) (aff'g in part, rev'g in part, Docket 167, 21 Ind. Cl. Comm. 278 (1969)). This attempted analogy is invalid since the Court of Claims in that case reversed the Commission's allowance of just compensation on the ground that the issue was res judicata.

Furthermore, as to the Court's affirmance of the Commission's finding of mutual mistake, the facts in the Creek case were clearly distinguishable from those in the instant case. In the Creek case, the cession agreement followed the erroneous survey and, in effect, confirmed it. The mutual mistake arose in the agreement because both parties believed the prior survey was correct. In the instant case the cessions (by the 1855 and 1863 treaties) preceded the erroneous surveys. It is not possible for a subsequent unilateral mistake to relate back to a prior agreement.

Accordingly, it is our conclusion that the lands comprising Tracts A and C were taken by the defendant without the payment of any compensation when the defendant disposed of said lands to third parties. The disposition of said lands constituted a taking under the Fifth Amendment and the plaintiffs are therefore entitled to just compensation for said lands.

Interest or its equivalent from the date of taking to the date of payment is a part of just compensation. Interest at the rate of 5 percent per annum is the appropriate rate to express the measure of just compensation. See Ponca Tribe of Indians v. United States, Docket 323, 28 Ind. Cl. Comm. 335, 344 (1972); Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-F, 28 Ind. Cl. Comm. 264, 300-301 (1972).

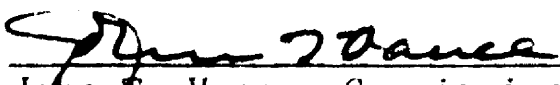
In the conclusions of law which follow our findings of fact, we have calculated the amounts due the plaintiff as just compensation for the period from the median dates of disposal agreed upon by the parties through March 31, 1973, to which should be added simple interest at the rate of 5 percent per annum on the principal sum to the date of payment.

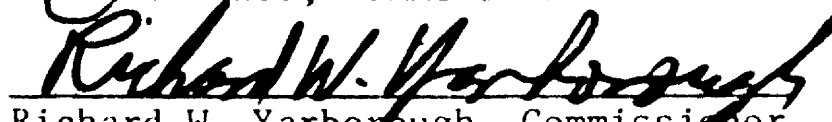
This case may now proceed to a determination of the offsets, if any, to which the defendant may be entitled under this claim.



Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman


John F. Vance, Commissioner


Richard W. Yarborough, Commissioner


Brantley Blue, Commissioner