BEFORE THE INDIAN CLAIMS COMMISSION

THE AMERICAN INDIANS RESIDING ON THE MARICOPA-AK CHIN INDIAN RESERVATION, Plaintiff,	)	
v.	)	Docket No. 235
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: September 19, 1973

Appearances:

Z. Simpson Cox, Attorney for Plaintiff.

David M. Marshall, with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

Plaintiff's petition originally contained six causes of action. On March 7, 1968, plaintiff's second and third causes of action were dismissed by order of the Commission. On October 15, 1969, plaintiff's fourth and fifth causes of action were dismissed by order of the Commission. There remain plaintiff's first and sixth causes of action. The sixth, an accounting claim, is not now before the Commission. The remaining first cause of action presently before us alleges that defendant, having undertaken the duties of plaintiff's guardian, failed to develop the water and agricultural resources on the plaintiff's reservation, and as a result thereof, plaintiff has lost water and crops.

Plaintiff is an identifiable band of American Indians descended from seminomadic Papago Indians who lived near Maricopa Wells, Arizona, prior to the mid-1870's. At that time the plaintiff band was engaged in flood water farming and raised enough crops to enable it to sell its surplus produce to the stagecoach station at Maricopa Wells. Although there were wells at the location, as the name implies, apparently these wells were not used for the purpose of irrigation. The coming of the railroad eliminated the stage stop at Maricopa Wells in 1870. Because accumulating alkali deposits made the land decreasingly productive, the plaintiff band moved to its present location on the Ak Chin (or Vekol) Wash around 1874 and there established its farm.

On May 28, 1912, the Ak Chin Reservation was established by Executive order. Modifications were made by subsequent Executive orders dated September 2, 1912, and October 8, 1912. The lands reserved to the plaintiff band, totaling 21,840 acres, included the land it then occupied plus some of the surrounding area. The land was relatively flat desert land, of which 16,000 1/ acres were potentially irrigable. At the time of the creation of the Ak Chin Reservation the plaintiff band consisted of approximately 100 Indians who were actively farming a total of 180 acres. Plaintiff used the available surface (flood) water to irrigate its crops. The Ak Chin

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1/ Defendant urges us to accept the much lower figure of 4,972 acres. However, the undisputed evidence indicates that there have been approximately 11,000 acres subjugated for agricultural use on the reservation.

Reservation is crossed by two "washes." These washes are known as the Ak Chin (or Vekol) Wash and the Santa Cruz Wash. These washes are normally dry, but in the summer months they flow intermittently, flooding on occasion. The average annual precipitation is approximately seven inches.

In 1912, the United States filed notice of water appropriation with the Recorder of Pinal County, Arizona, for 60,000 annual acre-feet of water from the Santa Cruz Wash and 10,000 annual acre-feet from the Ak Chin Wash, indicating its intention to build and maintain an irrigation system including dams, canals, reservoirs and other works on the Ak Chin Reservation. In 1913, the United States Indian Irrigation Service studied the Ak Chin Reservation and found that the Santa Cruz Wash did not flow for more than a few weeks of the year and the amount of water that could be taken from it for irrigation purposes was negligible. It found the Ak Chin Wash also unsuitable for irrigation purposes. The Ak Chin Wash had been the source of the plaintiff's irrigation water prior to the establishment of the Reservation. It flowed only during major storms and then only for a short time. The Indian Irrigation Service concluded that the only feasible source of water supply was underground.

In 1913 the defendant initiated well construction on the reservation. By the end of 1915, four wells had been dug and three were put into operation. The depth of water at rest at each well ranged between 46 and 57 feet. Each well was gasoline powered and capable

of pumping between 600 and 1100 gallons per minute, sufficient to irrigate 500 to 600 acres of land. During 1915, necessary ditches to deliver water to 10 acre tracts were constructed. In addition to drilling the wells the defendant also provided the associated equipment to support the project. As part of the program, defendant surveyed the land most easily accessible to the pumps in operation and divided that land into 120 2-1/2 acre "allotments."[2/] These tracts were assigned to individual Indians and the defendant then undertook to instruct the Indians in modern techniques of farming.

The agricultural development of the reservation was slow. The gasoline powered pumps frequently failed. The Indians resisted the change to modern farming techniques. It was not until 1930 that the irrigated acreage total for the reservation reached 400 acres. The Indians residing on the reservation found it necessary to work on neighboring, white-owned farms to provide for themselves.

The construction costs of the original ground water irrigation system, amounting to $125,139.00, were borne by defendant but carried on its books of account as a reimbursable item. The Leavitt Act of July 1, 1932, 47 Stat. 564, cancelled this and similar Indian obligations.

2/ These allotments were made to supplant 160 acre allotments which had been previously filed for by the Indians. The reservation land was never "allotted" in the technical sense, but assigned to individual Indians for their beneficial use. The land remains tribally owned. Hereafter, we will refer to these "allotments" as farm plots to distinguish them from allotment of Indian land pursuant to the Dawes Act, 25 U.S.C. 331.

In the early 1930's, the plaintiff petitioned Congress that each Indian be given 10 acres of land with water, that two 24 inch wells be drilled for them and that the new and old wells be electrified. By January 1934, defendant had completed two new 20 inch wells, purchased three new electrically powered pumps, run an electrical power line to Ak Chin and laid 2660 feet of 16 inch underground concrete pipe. In 1937, another well was dug and provided with an electric pump. Despite this there were only 297 acres farmed on the reservation in 1944 and 472 acres farmed in 1951.

Plaintiff alleges that defendant assumed the obligation to develop a ground water irrigation system on the Ak Chin Reservation, and further that it prohibited plaintiff from developing its own land. The plaintiff argues that the defendant assumed a "fiduciary-like" obligation to plaintiff to develop irrigation water in sufficient quantity to irrigate the entire irrigable portion of plaintiff's reservation. Implicit in plaintiff's argument that the defendant should have done more is the remarkable agricultural development of Pinal County, Arizona. The crop acreages in that county increased nearly ten fold from 1924 to 1949. Also implicit is that after the plaintiff's reservation had been developed by lessees between 1947 and 1957, it became a very profitable tribal farming operation as the Ak Chin Farms. We have found, Finding 16, infra, that plaintiff's irrigable acreage could have been developed profitably with ground water irrigation beginning in 1930, although this did not occur. The issue is the extent of defendant's duty to plaintiff.

The law regarding the fiduciary duty of the United States towards its Indian wards has been often discussed. The relationship between the Indians and the Government depends, of course:

> . . . upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presented arises. It is true that the word 'fiduciary' and the expression 'guardian-ward relationship' have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is 'similar to' or 'resembles' such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. (Gila River Pima-Maricopa Indian Community et al. v. United States, 135 Ct. Cl. 180, 189 (1956).)

In the case of the plaintiff's reservation we have a reservation established by Executive order specifying no legal relationship or special obligation. The order reads as follows:

The White House, May 28, 1912.

> It is hereby ordered that the following-described lands in Pinal County, Arizona, be, and the same hereby are, reserved from settlement, entry, sale, or other disposition and set apart as Indian reservations for the use of the several bands or villages of Papago Indians settled thereon, and such other Indians as the Secretary of the Interior may see fit to settle thereon, as follows: [Description omitted] provided that nothing herein shall affect any valid existing rights of any person.
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> Wm. H. Taft.

The source of defendant's alleged obligation, if any, must be found elsewhere. The plaintiff cites Chickasaw v. United States, Docket No.

269, 7 Ind. Cl. Comm. 64 (1959), and Oneida Tribe of Indians v. United States, 165 Ct. Cl. 487 (1964), cert. denied, 379 U.S. 946 (1965) (aff'g. Docket 159, 12 Ind. Cl. Comm. 1 (1962)), as support for its position that defendant assumed a fiduciary duty to plaintiff. In the former case the United States gave away one-fourth of the Chickasaw Reservation and we held that it was liable to the Chickasaw for that land. As in Chickasaw, here the Government has the fiduciary duty to protect the integrity of the reservation, within the meaning of the treaty or order establishing the reservation. However, here, unlike Chickasaw, there is no allegation that the Government has violated this duty. Chickasaw does not help us in determining the obligations of the parties not specified in the Executive order.

The Oneida case involved the Government's duty to protect that plaintiffs' timber resources on the Oneida Reservation. In that case the court held that the Government did have the duty to protect the timber on the Oneida Reservation but that, under the circumstances of that case, it had not breached that duty. 165 Ct. Cl. at 499-500. Here, plaintiff's resources were the land itself and whatever water that was available to make that land productive. Plaintiff indirectly argues that the defendant failed to protect the water resources of the reservation. We have held that where the obligation to preserve the water resources of a reservation is established, and the federal government fails to protect that resource, the government is liable for the resultant damages. Northern Paiute Nation v. United States,

Docket No. 87-A, 30 Ind. Cl. Comm. 210 (1973); see also Gila River Pima-Maricopa Indian Community et al., v. United States, Docket No. 236-C, 29 Ind. Cl. Comm. 144 (1972).

However, given the duty to prevent waste of the plaintiffs' water assets, we do not find that the facts here presented show any breach of that duty. As to the erratic supply of surface floodwater, although the defendant filed water appropriation notices in 1912, by the time of the 1915 water study of the reservation it was clear that the only feasible regular source of irrigation water was underground.

Wells were drilled in the 1910's, and improved in the 1930's, providing irrigation water for the small portion of plaintiff's land that was cultivated. Plaintiffs argue that the small use of ground water on the reservation, with extensive use of ground water in the areas surrounding the reservation, caused a flow of groundwater away from the reservation and thus waste of plaintiffs' ground water assets. However, before August 13, 1946 (the date before which our claims must accrue) any decline in the reservation water table was minimal, perhaps caused by plaintiffs' own usage, and no waste is shown. We conclude that defendant did not allow spoliation of plaintiffs' property, or appropriate any of its water rights.

The plaintiff also argues that the defendant's words and actions created the obligation to develop plaintiff's water resources. Plaintiff cites as evidence of this obligation, the statements in the aforesaid notices of water appropriation that "the United States intends to

construct and maintain irrigation works. . . ." and alleges that the water supply system built by the defendant was insufficient. It appears to us that the notices of water appropriation were filed (before thorough studies of the reservation had been made) primarily to preserve whatever priorities existed in the waters of the Ak Chin and Santa Cruz Washes at the time of the creation of the reservation. Even if we assume that the defendant did, in fact, intend to construct such works, the failure to do so would not amount to a violation of any duty on its part. Construction of such works would have required legislative action, and "[T]he United States as guardian, fiduciary, custodian, or protector is not easily to be held for the refusal or failure of Congress to pass new statutes." Oneida, supra, at 500.

The Court of Claims, in Pima-Maricopa Indian Community et al. v. United States, 190 Ct. Cl. 790, 427 F.2d 1194, cert. denied, 400 U.S. 819 (1970) (aff'g Dockets 236-K, L, M, 20 Ind. Cl. Comm. 131 (1968)), refused to accept that plaintiff's argument that the fact that the Government undertook affirmatively to provide certain services for plaintiffs was sufficient to establish the duty of doing so upon defendant. It said:

> It can therefore be seen that more is needed to create such a 'special relationship' than mere 'affirmative actions' . . . . Affirmative acts such as those allegedly undertaken in our case may lead to liability if they are indeed less than 'fair and honorable,' and if there is a duty owed; they do not, in and of themselves, create that duty. (190 Ct. Cl. at 799-800.)

This is not a case where defendant took no action to improve the economic condition of the plaintiffs; the defendant substantially improved the plaintiff's reservation with public funds. Faced with an impoverished band of agricultural Indians living in the Arizona desert, defendant undertook to provide them with a reliable source of water sufficient to sustain the band. To argue that these gratuitous acts constituted the basis for a greater duty to plaintiff to maximize its economic potential is erroneous; defendant had no legal duty to do more absent any showing of a source of obligation. The plaintiff's allegation is that once defendant decided to do something it did not do enough. Under these circumstances this cannot be said to be less than fair and honorable and creates no obligation. Gila River, supra, 190 Ct. Cl. at 799-800.

Accordingly, we find that defendant owed no duty to plaintiff to develop the water resources on plaintiff's reservation to a greater extent than it has already developed them. In the absence of such a duty there could be no breach of any obligation to plaintiff.

We find no merit in the plaintiff's second allegation--that the defendant prohibited the plaintiff from developing its land. Plaintiff introduced no evidence to indicate its desire to develop its reservation independently of the defendant, other than one apparently isolated incident in 1919, in which nine Indians were taken from the Ak Chin Reservation to the Indian Agency at Sacaton, Arizona and detained a short period.

To evidence their allegation of the absolute control the defendant exercised over the plaintiff band, plaintiffs quote from a portion of a letter explaining this incident. The letter was written by the Superintendent of the Pima Agency to the Commissioner of Indian Affairs in response to his inquiry about the incident, an inquiry originated by a congressional inquiry from their United States Representative, Carl Hayden. The letter, taken in context, indicates that the intent of defendant was to train the Indians in modern farming techniques. The persons taken to Sacaton were, in the words of Superintendent Hawyard, "a disturbing element . . . who were trying to prevent the other Indians from accepting these allotments." At this time the wells were newly dug, the Indians were given 2-1/2 acre farm plots instead of the 160 acre allotments they had applied for, and the farming methods--ground water irrigation--were alien to the methods they had used for centuries--flood water irrigation. However arbitrary and shocking these detentions appear, there seems no causal chain from them to conditions on the reservation in the 1930's when commercial farming became feasible. Standing alone, this incident does not indicate a prohibition or limitation of plaintiff's development of its reservation. Given the absence of any evidence indicating a desire by the plaintiff band to independently develop their reservation when feasible, plaintiff's allegation is not sustained.

Plaintiff's first cause of action will be ordered dismissed with prejudice. The case will proceed to plaintiff's sixth cause of action.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner