BEFORE THE INDIAN CLAIMS COMMISSION

MINNESOTA CHIPPEWA TRIBE, et al.,	)	Docket No. 188
	)	
RED LAKE BAND, et al.,	)	Docket No. 189-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: November 7, 1974

Appearances:

Rodney J. Edwards, Attorney for Plaintiffs. Marvin J. Sonosky was on the briefs.

Robert E. Fraley with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

These consolidated cases are now before the Commission on plaintiffs' motions for leave to amend the complaints and defendant's motion to strike. Plaintiffs' motions to amend were filed on February 7, 1973, and on May 21, 1973, defendant filed its opposition and moved to strike certain words and phrases from the complaint in Docket 189-C. Plaintiffs' replies were filed on June 6, 1973.

On July 31, 1974, plaintiffs submitted another series of proposed amendments to the petitions in the subject dockets. It appears that the

proposed amendments generally duplicate the amendments which are the subject of this decision. Accordingly, the Commission is returning the proposed amendments to plaintiffs. If any matters involved in the submission of July 31, 1974, are not resolved by this decision, plaintiffs may resubmit them in accordance with our rules of procedure.

Plaintiffs' proposed amendments relate to claims for lands or property taken without payment of just compensation within the meaning of the Fifth Amendment. In most instances plaintiffs had not pleaded Fifth Amendment claims in their original complaints, but first raised this issue in their objections to defendant's accounting report. In our opinion of November 29, 1972, 29 Ind. Cl. Comm. 211, we held that in the absence of such pleaded claims in the complaints, the plaintiffs would have to amend their petitions before we would permit them to proceed with a claim for a taking of their property, within the meaning of the Fifth Amendment. In that opinion we followed a broad rule we had formulated in Ft. Peck Indians v. United States, Docket 184, 28 Ind. Cl. Comm. 171, 190 (1972). We have recently reversed that position. In Ft. Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24, 47-61 (1974), we held that Fifth Amendment claims may be brought as exceptions to an accounting report, without amendment. In that case we held that no amendment of the petition was necessary since the accounting exception and its supporting statement had already sufficiently defined the issues. We further found that there was no rule of law which prohibits a claim for just compensation from being asserted in the same case as a claim for an equitable accounting. The distinction between a Fifth Amendment claim and an equitable claim affects

the quantum of proof and the measure of damage, but it does not affect the plaintiffs' right to assert both in the same case. Ft. Peck, supra, 34 Ind. Cl. Comm. at 58. However, plaintiffs have moved for leave to amend their petitions, and we shall rule on those motions even though the requested amendments may not be necessary in the light of our decision in Ft. Peck.

Defendant has opposed the motions to amend the complaints on the ground that the proffered amendments set forth new claims not timely pleaded and therefore barred by the statute of limitations. Since the last day for filing claims before the Commission was August 13, 1951, any new cause of action now brought by amendment to a petition is barred by the statute of limitations, 25 U.S.C. § 70k.[1/] At issue then is the question whether the claims alleged in the amended petitions were "presented" in timely-filed complaints thereby permitting the causes of action set forth in the amended petitions to relate back. In determining whether a claim relates back we consider the notice given by the general fact situation set forth in the original petition. If the claim arose out of the same conduct, transaction, or occurrence, the Government was timely notified of the claim and the Commission has jurisdiction to consider it. Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 750, 372 F.2d 951 (1967), aff'g in part, rev'g in part, Docket 93, 15 Ind. Cl. Comm. 267 (1965).

Our determination on each of the requested amendments and on defendant's motion to strike is as follows:

1/ The Indian Claims Commission Act provides as follows:

"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."

Docket No. 188 - Amended Count II.

This amendment substantially restates Count II of the original complaint. We have already held that the plaintiffs have alleged the basis of a claim for a taking under the Fifth Amendment on this claim. 29 Ind. Cl. Comm. at 230-232. Defendant contends that the "taking" of the Leech Lake damsite was not pleaded in the original complaint. Although the word "taking" does not appear in the original, the claim is clearly set out. The original Count II reads as follows:

COUNT II

> 22. Plaintiffs reallege all the foregoing allegations and further allege:
> 23. An act of Congress of June 6, 1880, (21 Stat. 193) and other acts of Congress authorized the construction of dams upon the Mississippi River and other waters, including Winnibigoshish and Leech Lake.
> 24. Pursuant thereto dams were constructed and thereafter the height was raised, thereby flooding large areas of land belonging to plaintiffs, and causing damage to the rich beds, hunting and fishing areas, burial grounds and lands and timber.
> 25. Defendant paid damages for flooding portions of the areas thus flooded but plaintiffs have not been compensated for all of the damages sustained thereby, particularly by reason of raising the height of the dams. Some of the plaintiff bands have received no compensation. The extent of the damages must be left to the proof herein.
> 26. Plaintiffs allege on information and belief that they have not been compensated for the site of the dam on Lake Winnibigoshish.

Defendant was placed on notice of all claims arising from the construction and operation of the dams in question. The absence of the words "taking" or "just compensation" will not bar a claim under the Fifth Amendment. The amendment is not barred by our statute of limitations.

Defendant also objects that the Amended Count II asks for double damages. We will not consider the merits of this argument at this time, as it presents no reason to deny amendment. Plaintiffs will be granted leave to file their Amended Count II.

Docket 188, Amended Count IV

This claim involves lands granted to the State of Minnesota as swamplands. The plaintiffs assert their right to compensation for some 25,699.92 acres of such swampland alleging that the lands were the property of the Chippewas on the date of the grant. Swamplands in Minnesota were granted to the state by the Act of March 12, 1860, 12 Stat. 3.[2/] In 1925 the Supreme Court held that any swamplands which were within Chippewa reservations created prior to the 1860 grant did not pass to Minnesota. But swamplands which were located within the boundaries of reservations granted to the Chippewas after 1860[3/] were not excepted from the swamplands grant. The Court found there were 152,124.18 acres of such lands which belonged to the State of Minnesota, and the 1863, 1864, and 1867 treaties with the Chippewas had impliedly excepted those swamplands from the Indians' reservations. United States v. Minnesota 270 U. S. 181 (1925).

In 1936 Congress appropriated $223,162.62 to compensate the Chippewas for some 178,530.1 acres of swampland embraced within the 1863, 1864, and 1867 reservations but which had been patented to Minnesota pursuant to the

---

2/ This act extended the Swamplands Act of 1850, 9 Stat. 519, to the new States of Minnesota and Oregon.

3/ The reservations involved had been granted to the plaintiffs by three treaties: Treaty of March 11, 1863, 12 Stat. 1249; Treaty of May 7, 1864, 13 Stat. 693; and Treaty of March 19, 1867, 16 Stat. 719.

1860 amendatory Swamplands Act. We are now concerned with the 25,699.92 acre difference between the acreage set forth in the 1936 act and that involved in the Supreme Court decision.

The plaintiffs previously asserted this claim as exception 10 to the accounting report filed in Dockets 19 and 189-A, claiming therein that the 25,699.92 acres were parts of Chippewa reservations existing before 1860 and that the United States was liable for a taking under the Fifth Amendment. In our previous decision on this issue we held that a Fifth Amendment taking claim was not pleaded in the Dockets 19 and 189-A complaints, and, therefore, we would not proceed with the asserted claim until the complaints had been appropriately amended. 29 Ind. Cl. Comm. 211, 215-220. As previously noted the basis for this ruling was specifically reversed by us in Fort Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24, 61 (1974). In that Fort Peck decision we held that a claim such as that presented as exception 10 was a proper exception to an accounting and that no amendment to the complaint was required.

The plaintiffs now wish to prosecute the above described claim as amended Count IV of the Docket 188 petition. It is plaintiffs' contention that this claim relates to the general fact situation set forth in paragraphs 29 and 30 of the original, timely-filed Docket 188 complaint. Those paragraphs are as follows:

> 29. Plaintiffs are entitled to an accounting for all property and money belonging to plaintiffs which have come into the hands of defendant or under its control belonging to the various bands of Minnesota Chippewa Indians or arising out of the reservations of the Minnesota Chippewa Indians.

> 30. On information and belief plaintiffs allege that defendant has failed to sell and dispose of timber on the various reservations which has long since matured and timber which has blown down or been otherwise killed or damaged.

We do not agree with plaintiffs. Nowhere in the cited paragraphs, or elsewhere in the complaint, are there allegations which in any way relate to the claim which is now being asserted. The original Docket 188 complaint does not mention the 1860 Swamplands Act or allege that the United States failed to set aside for the Chippewas all of the land promised them in the 1863, 1864, and 1867 treaties. The Government did not receive timely notice of this claim in Docket 188, and the Commission is without jurisdiction to consider it. Plaintiffs' motion for leave to file an amended Count IV is denied.

This swampland claim is still before the Commission as exception 10 to the accounting report filed in Dockets 19 and 189-A, and, in view of our more recent ruling in Ft. Peck, plaintiffs may proceed with this claim in those dockets.

Docket 188, Amended Count V

This count contains claims which were raised by exceptions to the accounting provided by defendant in Dockets 19 and 189-A. Count V duplicates the claims under exceptions 14, 15, 16, and 27, which claims were held to have been barred by the doctrine of res judicata, having been previously adjudicated by the Court of Claims in Chippewa Indians v. United States, 87 Ct. Cl. 1 (1938), aff'd 305 U.S. 479 (1938). 29 Ind. Cl. Comm. at 220-225. The claims under exceptions 14, 15, 16, and 27 were dismissed by order of the Commission on November 29, 1972, 29 Ind. Cl. Comm. 242-3.

In moving for leave to amend the Docket 188 petition to include these claims plaintiffs seek to reargue the merits of the claims. Thus, in effect, the plaintiffs would have the Commission rehear these claims even though the time for filing a motion for rehearing has expired. The claims having been dismissed and no timely motion for rehearing having been filed, the Commission will not permit them to be reinstated by means of their inclusion as Count V of the Docket 188 complaint. Plaintiffs will have an opportunity to appeal the Commission's decision on these claims when final determinations are entered in Dockets 19 and 189-A.

Docket 188, Amended Count VI

Count VI duplicates the claims asserted under exceptions 18 through 23 in Dockets 19 and 189-A. On November 29, 1972, the Commission entered a decision on plaintiffs' motion for determination of legal issues. Among the issues determined at that time was the question of whether the Free Homestead Act of May 17, 1900, 31 Stat. 179, constituted a Fifth Amendment taking of Indian trust land. The Commission decided it did not. 29 Ind. Cl. Comm. at 225-228. However, we withheld ruling on two alternative arguments under exceptions 18 through 23. The claims under these exceptions were not dismissed and are still pending under Dockets 19 and 189-A. We will not permit them to be duplicated by including them in an amended petition to Docket 188. If plaintiffs do not wish to proceed on their alternative theories, the Commission, upon proper motion, will consider dismissing these claims in Dockets 19 and 189-A.

Docket 189-C, Amended Count I

Plaintiffs state that Amended Count I does not involve any substantive

change but merely restates the count set out in the Docket 189-C Complaint. However, defendant now objects to the Docket 189-C Complaint on the ground that it alleged takings under the Fifth Amendment which had not been alleged in the original Complaint and that these taking claims were impermissible enlargements of the original complaint. The original petition in Docket 189 was filed on August 2, 1951. The Docket 189-C petition was filed on February 2, 1956, when Docket 189 was subdivided into Dockets 189, 189-A, 189-B and 189-C. Since the last date for filing claims before the Commission was August 13, 1951, any new cause of action asserted in the Docket 189-C petition was barred by the statute of limitations, 25 U.S.C. § 70k.

The "enlargements" to which defendant refers are the underlined portions of the following:

> 4. By Treaty of October 2, 1863, 13 Stat. 667, 1 Kappler 853, a reservation identified as Royce 446 was confirmed as property of the Red Lake Band. Subsequently, by agreement, or by cession, or by taking under the Fifth Amendment, portions of Royce 446 were made available for disposal leaving the Red Lake Band with a reservation identified as Royce 707.

As originally pleaded the Royce 446 claims read:

> 7. The lands of plaintiffs in Minnesota and Dakota were ceded to defendant by the Red Lake Band and the ancestors of plaintiffs pursuant to the treaties of:
>
> October 2, 1863
> May 12, 1864
>
> Lands surrounding Red Lake were retained as described by Royce as No. 446 Minnesota 1.

> 8. By the treaty of June 21, 1785, 7 Stat. 16, and subsequent treaties, acts and rulings, the defendant constituted and assumed itself to be, became and was and ever since has been a trustee and guardian of the plaintiffs, and the defendant became obligated to deal justly and fairly with plaintiffs and with their property and to carry out said trust agreements and the provisions of treaties according to their plain tenor and not otherwise, and without compensation or reimbursement for so doing, save as expressly provided in the treaties.
>
> 9. Members of plaintiff bands and their ancestors were largely unlettered and ignorant of the ways of the white men and were easily convinced that the agreements sought wre [sic] advantageous, though the contrary was true.
>
> COUNT 1
>
> 10. Defendant acquired a portion of the aforesaid area so retained and described as No. 446 in Royce by various acts and executive orders, including the act of January 14, 1889, (25 Stat. 642, 1 Kapp. 301). . . .

Defendant states that the underlined portions of the Docket 189-C complaint constituted a new claim.

We do not agree with defendant's contention. The original petition in Docket 189 included a claim arising from the defendant's acquisition of Royce Area 446 by various acts and executive orders. The present claim under Count I alleges that the defendant's acquisition of plaintiffs' lands (Royce Area 446) constituted a Fifth Amendment taking. Therefore the claim which plaintiffs asserted in the cited language of the Docket 189-C complaint was presented in the original, timely-filed complaint in Docket 189, and the Docket 189-C cause of action identified as Count I relates back to claims filed in the original petition. Defendant's motion to strike is denied. Plaintiffs will be permitted to file Amended Count I.

Docket 189-C, Amended Count II

Count II is a claim for damages arising from the alleged mismanagement of the Red Lake Indian Forest. We discussed this claim in detail in our November 29, 1972, opinion, 29 Ind. Cl. Comm. at 236-39. At that time this claim constituted exception 12 to the Docket 189-C accounting report.

The original complaint, filed on August 2, 1951, contained (in Count III thereof) a request for an accounting of the logging operations conducted on plaintiffs' reservation.

The pertinent parts of the complaint read as follows:

> 24. Defendant in administering the business and affairs of plaintiffs has made illegal and improper deductions and charges, the nature and extent of which can only be determined by an accounting. Among such items are the following:
>
> * * * *
>
> (c) Plaintiffs were illegally charged with the cost of logging the tribal timber upon the reservations, including scaling charges.
>
> (d) Timber upon the reservations was sold at prices below the market value and reasonable worth.
>
> (e) Defendant caused estimates to be made of timber by inexperienced persons and charge the expense thereof to plaintiffs, although said services were of no value.
>
> (f) As a result of such improper estimate timber was sold below the true value.
>
> (g) Upon information and belief plaintiffs allege that defendant failed to collect for timber cut from plaintiffs' tribal lands either in trespass or otherwise.
>
> (h) Funds of plaintiffs have been illegally used for various illegal and unlawful purposes and contrary to law, some of which include the repair and maintenance of agency buildings and for other administrative expense, as well as for education, highway and medical aid.
>
> 25. On information and belief plaintiffs allege that defendant has failed to sell and dispose of timber upon the various reservations which had long since matured and timber which had blown down or been otherwise killed and damaged.

> WHEREFORE, Plaintiffs, collectively and individually, as the case may be, demand judgment against defendant:
>
> First--That defendant be required to account to plaintiffs when such accounting is necessary for all property and money belonging to plaintiffs which have come into the hands of defendant or under its control; that the account should set out what funds and other property have been taken from plaintiffs, their ancestors and predecessors, by defendant or disposed of by defendant without compensation to plaintiffs, their ancestors and predecessors.
>
> * * * *

Although the 1916 act and the actions of the Secretary of the Interior were not expressly mentioned, we find that this was a timely notice of all claims arising from logging operations conducted on plaintiffs' reservation, and the defendant was placed on notice with respect to all such claims. Amended Count II properly relates back to the original complaint. See Menominee Tribe v. United States, 102 Ct. Cl. 555, 564 (1945). Plaintiffs will be permitted to file Amended Count II.

Docket 189-C, Amended Count III

This count involves a claim which plaintiffs previously asserted as exception 8 to the accounting report in Docket 189-C. In its decision of November 29, 1972, the Commission determined that there had been no taking of plaintiffs' lands within the meaning of the Fifth Amendment (29 Ind. Cl. Comm. at 232-235), and the claim was dismissed (29 Ind. Cl. Comm. 244-245). This claim having been dismissed and no timely motion for rehearing having been filed, the Commission will not permit it to be reinstated by amendment to the petition in this case. The plaintiffs

will have an opportunity to appeal the Commission's decision on this case when a final determination is entered in Docket 189-C.

Margaret H. Pierce, Commissioner

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner

Kuykendall, Chairman, dissenting in part:

I dissent from that part of the decision which permits the plaintiffs to prosecute a claim for a Fifth Amendment taking of 25,699.92 acres of "swampland" as an exception to the accounting report filed in Dockets 19 and 189-A. My views on this issue are set forth in my dissent in Ft. Peck Indians v. United States, Docket 184, 34 Ind. Cl. Comm. 24, 67-76 (1974).

Jerome K. Kuykendall, Chairman