BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Plaintiffs,	)	
v.	)	Docket No. 350-C
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: January 2, 1975

Appearances:

Jonathan C. Eaton, Jr., Attorney for the Plaintiffs.

Gordon W. Daiger, with whom was Assistant Attorney General Kent Frizzell, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

On March 30, 1971, the Commission entered its decision that under the claim in the above-captioned Docket 350-C, the plaintiffs, the three affiliated tribes, possessed aboriginal title to a large tract of land (the boundaries of which the Commission later somewhat altered) in the western portion of the State of North Dakota and that the United States extinguished the plaintiffs' aboriginal title to said lands on April 12, 1870, when by Executive order (I Kappler 883), President Ulysses S. Grant set aside a reservation for the three affiliated tribes. The Commission also found that the claim under Docket 350-B (then consolidated with Docket 350-C) should be dismissed and accordingly entered a final order of dismissal. See 25 Ind. Cl. Comm. 179 (1971); 26 Ind. Cl. Comm. 336 (1971).

On April 28, 1971, the plaintiffs filed a motion for rehearing of the Commission's determination of the date of taking for valuation purposes. On October 15, 1971, the Commission granted this motion for rehearing noting that neither plaintiffs nor defendant had submitted this issue for decision and also that the plaintiffs had not yet offered evidence on the date of taking. See 26 Ind. Cl. Comm. 326 (1971).

At the time the earliest of the above-described decisions was entered, Dockets 350-B and 350-C were consolidated for trial with several other dockets, embodying claims by several other plaintiffs to lands in the same general area, to the extent there were overlaps among the claims. The claims so consolidated with the claims under Dockets 350-B and 350-C were those of the Turtle Mountain Band of Chippewa Indians in Docket No. 113, the Red Lake Band of Chippewas in Docket No. 246, the Little Shell Band of Chippewa Indians in Docket No. 191, the Chippewa Cree Tribe in Docket No. 221, the Sioux Tribe in Docket No. 74, and the Chippewa Cree Tribe of the Rocky Boy's Reservation in Docket No. 221-A. In its order of March 30, 1971, supra, 25 Ind. Cl. Comm. at 214, the Commission had ordered that the claim in Docket 350-C proceed independently for purposes of valuation.

Appeals were taken by certain of these plaintiffs (but not by the Fort Berthold Tribes) and by the defendant from various Commission decisions under these consolidated dockets, including those decisions at 25 Ind. Cl. Comm. 179 and 26 Ind. Cl. Comm. 336, supra, relating to the boundaries of the aboriginal lands of the three affiliated tribes. On January 23, 1974, the Court of Claims affirmed these decisions in the case of Turtle Mountain Band v. United States, 203 Ct. Cl. 426 (1974) (modifying and affirming Dockets 113, et al., 23 Ind. Cl. Comm. 315 (1970), 25 Ind. Cl. Comm. 179

(1971), and 26 Ind. Cl. Comm. 336 (1971)).

As stated above, the previous decision of the Commission concluded that the aboriginal title of the three affiliated tribes to their lands in North Dakota was extinguished on April 12, 1870, which was the date of President Grant's Executive order establishing a reservation for the three tribes. See 25 Ind. Cl. Comm. 179, at 209-10. On the sparse record then before us the Commission determined that the three affiliated tribes exclusively used and occupied for a long time up to April 12, 1870, the tract described therein, the boundaries of which the Commission altered in its subsequent decision at 26 Ind. Cl. Comm. 336. The Commission also determined in the former decision that after 1870 the tribes stayed on the reservation lands and that the actual dispersal of the Indians to allotted lands took place during and after 1883. 25 Ind. Cl. Comm. at 209.

The proposed findings of fact and briefs filed, respectively, by the plaintiffs on March 27, 1972, and by the defendant on August 31, 1972, together with the plaintiffs' reply brief filed on September 25, 1972, and the evidence submitted in connection with said proposed findings of fact have further elucidated the circumstances surrounding the extinguishment of the plaintiffs' title to their aboriginal lands. In addition, the Commission now has the benefit of certain recent decisions of the Court of Claims involving similar issues. Based upon the above, we now believe that our previous determination of the date of extinguishment of the plaintiffs' aboriginal title, i.e., April 12, 1870, was prematurely entered and was, in fact, erroneous both on the law and on the facts. Consonant with this belief we have revised and supplemented our previously

entered findings of fact, as is explained in the preamble to the accompanying additional findings of fact and in the accompanying order.

We have now decided that the date upon which the aboriginal title of the plaintiffs was extinguished was May 20, 1891. Our reasons for this determination as well as our reasons for rejecting the dates, and theories underlying them, offered by both the plaintiffs and the defendant are set out in the remainder of this opinion.

The plaintiffs have urged that aboriginal title to their lands was not extinguished until entries by, or patents to, white settlers which did not, in fact, occur in significant numbers until the 1890's and 1900's. They assert that an average date should be determined based upon entries by white settlers. The plaintiffs argument is that creation of a reservation does not necessarily result in the extinguishment of aboriginal title (citing United States v. Santa Fe Pacific R.R., 314 U. S. 339 (1941)), and that only by the subsequent disposition of plaintiffs' lands to white settlers did the United States clearly manifest the intention to extinguish aboriginal title.

The defendant asks us to revert to the year 1837 when a smallpox epidemic severely depleted the ranks of the three tribes. See finding of fact No. 12, 25 Ind. Cl. Comm. 179, 200 (1971). Defendant urges that after 1837 the three tribes became so weak that they were incapable of asserting their full beneficial interest in and ownership of their lands. Defendant asserts that the few members of the three tribes alive after 1837 could not have occupied the lands constituting the award area and

that, in addition, the plaintiffs, so decimated, became the prey of the Sioux and other tribes who periodically raided the villages of the three tribes.

Defendant's theory is untenable. It presumes the inevitability of a constriction of territory co-extensive with a decrease in population. It is a fact that the three tribes were ravaged by the 1837 smallpox epidemic. However, the evidence does not support the conclusion that the plaintiffs' territory shrunk at the same time. On the contrary, the evidence reveals that after 1837 the surviving members of the three tribes used and occupied the same aboriginal area they had previously used and occupied. Undoubtedly their reduced numbers resulted in less frequent utilization of particular portions of their lands on a regular basis. However, the evidence shows they did seasonally hunt and otherwise utilize the entire award area intermittently until 1891. Furthermore, white inhabitants continued to regard the entire area as belonging to the three tribes. Intermittent or seasonal use is enough to maintain aboriginal title. San Carlos Apache Tribe v. United States, Dockets 22-D, et al., 21 Ind. Cl. Comm. 189, 193 (1969).

References to raids by the Sioux upon the Missouri River villages of the three affiliated tribes and to incursions by other tribes in the northern portion of the award area are equally ineffectual to terminate aboriginal title. The evidence reveals that these raids and incursions were sporadic, ceasing altogether during the 1870's, and were not undertaken for the purpose of making conquests or acquiring the plaintiffs' lands. In such circumstances the inability of a tribe to keep raiders out of its territory

does not adversely affect the exclusiveness of its occupancy nor terminate its aboriginal title. Gila River Pima-Maricopa Indian Community v. United States, Docket No. 228, 24 Ind. Cl. Comm. 301, 308-09 (1970).

The issues in this case relating to the date of extinguishment of plaintiffs' aboriginal title are quite similar to those raised by the defendant with respect to the extinguishment of aboriginal title to the lands of the Turtle Mountain Band of Chippewas in North Dakota located to the east of the award area in this case. Defendant appealed the Commission's determination, at 23 Ind. Cl. Comm. 315 (1970), of the extinguishment date of the Turtle Mountain Chippewas' aboriginal title, raising three arguments, all of which the Court of Claims rejected. Turtle Mountain Band v. United States, supra, slip. op. at 14-18. The Court of Claims held that an Executive order reservation does not extinguish aboriginal title where there is no adequate showing that (i) the Congress authorized the extinguishment of the aboriginal title via an Executive order reservation or (ii) the Indians accepted the reservation as quid pro quo for giving up their claims. Congress must so authorize because it has the exclusive power to extinguish Indian title. United States v. Santa Fe Pacific R.R., supra, at 347.

In the Turtle Mountain case the Court of Claims held that under the Act of March 2, 1861, 12 Stat. 239, Congress indicated its desire to continue its power over Indian affairs in the Dakota Territory, and that it was not until February 15, 1905, when the McCumber Agreement became effective (after having been ratified by Congress in 1904) that

Congress expressly authorized the extinguishment of the Turtle Mountain Chippewas' aboriginal title. However, a case of implied authorization may be found in Gila River Pima-Maricopa Indian Community v. United States, 204 Ct. Cl. 137 (1974) (aff'g Docket 228, 27 Ind. Cl. Comm. 11 (1972)). In that case it was held that an 1883 Executive order enlarging the Pima-Maricopa reservation constituted the extinguishment of the Pima-Maricopa aboriginal title to surrounding land, Congress having previously conferred upon the President authority in the 1841 Preemption Act, 5 Stat. 453, 456, to establish and enlarge Indian reservations in order to prevent white encroachment on tribal lands, and, in addition, having subsequently, in the Acts of July 4, 1884, 23 Stat. 76, 93, and March 3, 1885, 23 Stat. 362, 363, 379, appropriated funds for the maintenance of the enlarged reservation.

In this case, as in Turtle Mountain, there has been no adequate showing that Congress authorized the extinguishment of the three tribes' aboriginal title via Executive order reservation. The same statute that showed the intention of Congress to reserve to itself the elimination of the Turtle Mountain Chippewas' aboriginal title applies to the aboriginal title of the three affiliated tribes here. Furthermore, continued use and occupancy after 1870 in the usual Indian manner, the claims made by the tribes after 1870 to the lands, and acquiescence by the United States in such use and occupancy, show that the three affiliated tribes did not accept the 1870 reservation as the quid pro quo for giving up their aboriginal claims. Thus it was only when Congress acted upon the status of the three affiliated tribes in the Act of March 3, 1891, 26 Stat.

989,1032-35,which act became effective on May 20, 1891,and implemented the agreement of December 14, 1886, that the plaintiffs' aboriginal title was extinguished by Congress' exercise of its exclusive power to do so. */

In the Turtle Mountain case, the United States also argued that white settlement under preemption, homestead, timber culture and railroad acts had the effect of extinguishing aboriginal title. In response to this argument the Court stated as follows:

> ***But if the Executive Order reservation was ineffective, in these circumstances, to end the aboriginal ownership, it follows a fortiori that the acts of private citizens were also insufficient. As we have stated, the power of Congress to eliminate aboriginal title is exclusive, and Congress specifically preserved Indian rights to this land, certainly as against white settlers, by the Act of March 2, 1861, 12 Stat. 239, supra. Unauthorized white encroachment would not affect the Chippewas' ownership. [203 Ct. Cl. 426 (1974), slip op. at 17-18.]

This statement is equally valid in the circumstances of this case. Instances in the record, e.g., Pl. Ex. DT-95, of entries by white settlers before May 20, 1891, upon lands within the award area are so few as to be de minimis and do not affect our determination of May 20, 1891, as the date of extinguishment for the entire award area.

Finally, in the Turtle Mountain case, the defendant argued that the Chippewas had voluntarily abandoned most of the area before 1905. The Court found that the Commission's decision on this issue had been based

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*/ The Commission has previously found that it was not until the Act of March 3, 1891, supra, became effective that the three tribes were granted reservation title to the residue lands within the diminished reservation. See Three Affiliated Tribes v. United States, Dkt. 350-F, 16 Ind. Cl. Comm. 341, 348 (1965), rev'd on other grounds, 182 Ct. Cl. 543, 549 (1968) and finding of fact No. 31, infra.

upon sufficient evidence that through 1905, the Chippewa "*** were still attempting to use the area in their fashion, and had not at all given up their ties or claims to the area." (Slip op. at 18.) We have discussed, supra, the defendant's corresponding factual arguments and found them untenable.

For the reasons set out in this opinion we will enter an order today amending the Commission's order of March 30, 1971, 25 Ind. Cl. Comm. at 212-13, in order that Docket 350-C may now proceed to the valuation of the plaintiffs' aboriginal lands, the boundaries of which were determined and described in the Commission's earlier decisions described, supra, such valuation to be as of May 20, 1891, which is the date upon which the aboriginal title of the plaintiffs to the entire award area was extinguished. Our order will also admit into evidence Plaintiffs' Exhibit Nos. DT-1 through DT-96 and Defendant's Exhibit Nos. DT-1 and DT-2, which have been offered in connection with the determination of the extinguishment date of plaintiffs' aboriginal title. In addition our order will vacate certain findings previously entered herein, amend others and renumber several previously entered findings

of fact, as described in detail in said order and in the preamble to the accompanying findings of fact.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner