BEFORE THE INDIAN CLAIMS COMMISSION

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiffs,	)	
v.	)	Docket No. 181-C
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: June 13, 1975

Appearances:

Richmond F. Allen and Abe W. Weissbrodt, Attorneys for Plaintiffs. Ruth W. Duhl was on the brief.

Bernard J. Rothbaum, Jr., with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for the Defendant.

OPINION OF THE COMMISSION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR DETERMINATION OF POINTS OF LAW

Kuykendall, Chairman, delivered the opinion of the Commission.

Plaintiff tribes seek damages in this docket against the United States for alleged acts of private parties, which plaintiffs allege were in the nature of trespass upon land to which plaintiffs held aboriginal title and which had been set aside for plaintiffs' occupancy and use by an Executive order of the President, dated July 2, 1872, I Kapp. 915.

Plaintiffs allege that the acts complained of wrought injury to them by: depleting the quantities of fish in the Columbia River;

depleting the quantity of minerals and metals located beneath the land in question; taking their lands by authorizing rights-of-way for construction of railways across portions of it; and, depriving plaintiffs of the use of a "common hunting ground".

We have discussed at length in previous cases plaintiffs' aboriginal land area, the Executive order of July 2, 1872, and the opening, entry, development and settlement of these lands under the laws of the United States and the State of Washington. The findings of fact in these prior decisions set forth a detailed statement of the history of plaintiffs' relations with the defendant. See, Confederated Tribes of the Colville Reservation v. United States, Docket 181, et al., 4 Ind. Cl. Comm. 151, 187 (1956); 7 Ind. Cl. Comm. 187, 208 (1959); 8 Ind. Cl. Comm. 420, 429 (1960); 18 Ind. Cl. Comm. 531 (1967).

Defendant's motion for summary judgment or for determination of points of law, plaintiffs' motion for determination of issues of law and opposition to defendant's motion for summary judgment, and defendant's reply brief and opposition to plaintiffs' motion for determination of issues of law are now before us. No evidence has been introduced herein.

In support of its motion for summary judgment defendant argues that there is no genuine issue as to any material fact and that it is entitled to judgment in its favor as a matter of law and

moves that we rule upon five points of law which we discuss hereinafter. Plaintiffs have filed their own motion for rulings of law concerning many of the same issues. We will discuss the case in terms of the issues thus presented.

EXTINGUISHMENT OF TITLE

Both parties have requested rulings of law as to dates of extinguishment of plaintiff's title to the area set aside by the 1872 Executive order of the President, supra, containing approximately 2,850,000 acres, all of which is within the State of Washington, and is designated as Royce Area 536 in the 18th Annual Report of the Bureau of American Ethnology, Part II.

On May 9, 1891, members of a commission, acting pursuant to a provision in the Indian Appropriation Act of August 19, 1890, 26 Stat. 336, 355, entered into an agreement of cession with plaintiffs. Under the agreement plaintiffs ceded the northern portion of the Colville Reservation, hereinafter referred to as the "North half," containing approximately 1,450,000 acres. Congress, however, did not then ratify the agreement. S. Rep. No. 664, 52d Cong., 1st Sess. 3-5 (1892).

Instead, by the Act of July 1, 1892, 27 Stat. 62, Congress "restored" the North half to the public domain, and provided that it should be opened to settlement and entry by Presidential proclamation. The statute further provided that each individual member of plaintiffs residing within the North half should receive an allotment in severalty of 80 acres of land. By the Act of February 20, 1896, 29 Stat. 9, the North half

was opened to entry under the mineral laws of the United States and by a Presidential proclamation issued on April 10, 1900, 31 Stat. 1963, pursuant to the 1892 Act, the North half was opened for entry and settlement. In the Indian Appropriation Act of June 21, 1906, 34 Stat. 325, 377-78, Congress approved and carried into effect the 1891 agreement of cession, with certain modifications concerning consideration.

We now turn to the remaining portion of Royce Area 534, hereinafter referred to as the "South half," an area of approximately 1,400,000 acres.

By the Indian Appropriation Act of July 1, 1898, 30 Stat. 571, 593, Congress opened the South half to entry under the mineral laws of the United States.

In 1905, plaintiffs and commissioners of the United States entered into an agreement providing for cession to the United States of all interests claimed by plaintiffs in the South half. Congress did not ratify the cession agreement pertaining to the South half. S. Rep. No. 1424, 59th Cong., 1st Sess. 3 (1906).

By the Act of March 22, 1906, 34 Stat. 80, Congress authorized the Secretary of the Interior to make allotments to each man, woman, and child belonging to or having tribal relations on the diminished Colville Indian Reservation (the South half). The act also authorized the President to proclaim the reservation lands which were not allotted or reserved for other purposes open for settlement under the provisions

of the homestead laws. By the Act of May 3, 1916, 39 Stat. 1778, the surplus lands of the South half were opened for entry by Presidential proclamation.

Of the approximately 1,400,000 acres contained in the South half, some 580,000 were disposed of by allotment and entry. The remainder was restored to possession of the plaintiffs by the Act of July 24, 1956, 70 Stat. 626, which provided:

> That the undisposed-of lands of the Colville Indian Reservation, Washington, dealt with by the Act of March 22, 1906 (34 Stat. 80), are hereby restored to tribal ownership to be held in trust by the United States to the same extent as all other tribal lands on the existing reservation, subject to any existing valid rights . . . .

Defendant argues that the date of extinguishment of plaintiffs title to the North half of the Colville Reservation was May 9, 1891, the date of the cession agreement with plaintiffs. It cites as authority for this proposition our Finding of Fact 6a in Confederated Tribes of the Colville Reservation v. United States, Dockets 177, 181-A, and 181-B, 18 Ind. Cl. Comm. 531, 534-35 (1968). However, finding 6a merely contains a statement of petitioners' claim, and is not a determination by the Commission that title to the North half was extinguished in 1891. Moreover, the stipulation for entry of final judgment, made a part of Finding 15, Id., p. 540, states that the Final Judgment ". . . shall not be construed as an admission by either party, for the purpose of precedent or argument, in any other case."

Defendant alternatively argues that the date of extinguishment should be the date of the Act of July 1, 1892, 27 Stat. 62, which vacated the Executive order of July 2, 1872, and authorized the President to open the North half to entry and settlement.

Plaintiffs concede that the 1892 Act vacated their executive order title, but contend, as we explain below, that they retained aboriginal title to the North half until the Act of June 21, 1906, supra, carried into effect the 1891 cession agreement with the Colville Indians.

Defendant has receded from its original contention that the 1906 Act did not constitute a ratification of the 1891 agreement, citing the recent decision of the Supreme Court in Antoine v. Washington, ___ U.S. ___, 43 L. Ed. 2d 129 (1975). In Antoine the Court was concerned with hunting and fishing rights guaranteed to the Indians in article 6 of the 1891 agreement, and not the extinguishment of plaintiffs' title, the issue which is now before us. The Court held that the 1891 agreement had been approved by Congress in a series of statutes; namely, the 1892 Act, the 1906 Act, and five subsequent appropriation acts, and determined that article 6 was ratified by the 1906 Act.

However, the Court also stated that "Congress could constitutionally have terminated the northern half of the Colville Indian Reservation on the terms and conditions of the 1891 Agreement, even if that Agreement had never been made." The Court cited Mattz v. Arnett, 412 U.S. 481 (1973).

Section 1 of the 1892 Act provided that the North half of plaintiffs' reservation "be, and is hereby, vacated and restored to the public domain" and provided that those lands be opened to settlement and entry by Presidential proclamation. The Supreme Court, in Mattz, supra, at 504 & n. 22, specifically cited the 1892 Act as an example of a bill which

expressly provided for the termination of the reservation and did so in unequivocal terms.

Plaintiffs argue, however, that the legal effect of the act was merely to restore the North half lands to their pre-1872 status, i.e., aboriginal title in plaintiffs. We disagree.

Congress has the power to extinguish aboriginal title. United States v. Santa Fe and Pacific R.R., 314 U.S. 339, 347 (1941); Turtle Mountain Band of Chippewa Indians v. United States, 203 Ct. Cl. 426, 490 F.2d 935 (1974), modifying and aff'g Docket 113, et al., 26 Ind. Cl. Comm. 339 (1971). Section 8 of the 1892 Act provided that nothing in the act was to be construed as recognizing title or ownership of plaintiffs to the North half. It seems clear that the intent of Congress in passing the 1892 Act was to divest plaintiffs of any title they may have had to the North half. We are of the opinion, therefore, that the date of extinguishment of plaintiffs' title to the North half was the effective date of the 1892 Act, July 1, 1892.

Defendant's position regarding the South half of the plaintiffs' reservation is that it was taken piecemeal on two dates, July 1, 1898, and March 22, 1906. The former date is the date of the statute (30 Stat. 593) which opened the mineral-bearing lands of the South half to exploitation under the mineral laws of the United States. The latter date is the date of the statute (34 Stat. 80) which opened the South half to public entry under the homestead, mining, timber and irrigation laws of the United States.

Defendant argues that these statutes are inconsistent with aboriginal title, and finally extinguished any such title as plaintiffs may have had to lands in the South half.

Plaintiffs respond that, except as to lands lawfully taken up under the Act of July 1, 1898, supra, providing for entry under the mining laws, or under the proclamation of May 3, 1916, 29 Stat. 1778, allowing entry pursuant to the Act of 1906, supra, plaintiffs' title the South half was never extinguished.

We agree with plaintiffs. The Act of March 22, 1906, differs materially from the 1892 Act. We can find in this act no affirmative statement by Congress extinguishing plaintiffs' title.

We find support for our position in the case of Seymour v. Superintendent, 368 U.S. 351 (1962). That case, not cited by either party hereto, involved a petition for a writ of habeas corpus by a felon convicted of burglary in the courts of the State of Washington. The petitioner, Seymour, argued that the state courts were without jurisdiction because he was an enrolled member of the Colville Indian Tribe, and that his purported crime had been committed in "Indian country" as defined in 18 U.S.C. §1151 (62 Stat. 757, as amended, 63 Stat. 94), and therefore it was an offense "within the exclusive jurisdiction of the United States" under 18 U.S.C. §1153.

The state courts of Washington denied Seymour's petition, finding that although he was a member of the Colville Tribe, the burglary upon which his conviction was based did not occur in Indian country. The

crime had occurred in the South half of the Colville Indian Reservation. The Washington Supreme Court found that the 1906 Act and the 1916 Proclamation extinguished Indian title to the South half of the Colville Reservation.

The Supreme Court reversed, finding that the 1906 Act did not contain language extinguishing title to the South half. It found that the 1906 Act repeatedly refers to the Colville Reservation in a manner that makes it clear that the reservation should continue to exist as such. 368 U.S. at 356-57.

> . . . Consequently, it seems clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.
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> . . . This same construction of the 1906 Act has been adopted by the Department of Interior, the agency of government having primary responsibility for Indian affairs. And the Solicitor General has urged this construction upon the Court in this very case. We therefore conclude that the Washington courts erred in holding that the 1906 Act dissolved the Colville Indian Reservation because it seems clear that this reservation is still in existence. [footnotes omitted]

We recognize that none of the parties before the Commission were parties to that case, and that the issues are not similar. We nevertheless find the reasoning behind the Supreme Court's interpretation of the 1906 Act persuasive when applied to the issue of extinguishment of plaintiffs' title. We conclude, therefore, that except as to the approximately 580,000 acres of lands lawfully taken up by entry

pursuant to the laws of the United States,[1] plaintiffs' title to the South half has never been extinguished.

FISHERIES

Plaintiffs' first claim is for the spoliation and depletion of its fisheries and fishing grounds. Plaintiffs' petition alleges that defendant, by its acts and omissions, caused depletion of plaintiffs' fisheries so that plaintiffs lost their principal articles for barter and a major part of their food supply, and suffered other damages. Defendant's motion for summary judgment argues that this claim must be dismissed because there can be no recovery for damage to aboriginal fishing rights. Defendant cites Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130 (1968), in support of its position.

The Court of Claims considered and rejected the same argument in dealing with a similar motion in United States v. Native Village of Unalakleet, 188 Ct. Cl. 1, 14, 411 F. 2d 1255, 1261 (1969), aff'g Docket 285, et al., 19 Ind. Cl. Comm. 140 (1968).[2] The court held that a cause of action based on fair and honorable dealings

> differs from claims for damages to hunting and fishing rights, such as this court adjudicated under a more limited jurisdictional Act, in [Tlingit and Haida Indians, 182 Ct. Cl., supra]. We think, as the Commission did, that the petitioners should have an opportunity to advance these claims at a trial on the merits.

1/ The question of the date of taking of the lands taken by lawful entry has not been raised or briefed by the parties.

2/ See also Tlingit and Haida Indians v. United States, Docket 278-A, 20 Ind. Cl. Comm. 508, 511-12 (1969). This docket was later dismissed because of the enactment of the Alaskan Claims Settlement Act, 85 Stat. 688 (1971). See 28 Ind. Cl. Comm. 169 (1972).

Plaintiffs' claim herein is based on fair and honorable dealings. We therefore reject defendant's first argument.

Defendant moves alternatively that we determine:

> Whether a claim predicated upon an alleged right of ownership to freely-swimming fish in navigable waters of the United States presents--in the absence of any statutory or treaty provision recognizing title in an Indian tribe to designated lands, or granting exclusive rights to extract fish from navigable waters as a conmitant thereof--an allegation upon which any legal recovery may be had? [Emphasis added]

Defendant contends that plaintiffs' rights in an Executive order reservation[3/] are not compensable. The Court of Claims has held otherwise. Three Affiliated Tribes of Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 561, 390 F.2d 686, 696 (1968). Moreover, we held in Northern Paiute Nation v. United States, Docket 87-A, 30 Ind. Cl. Comm. 210 (1973), that the Pyramid Lake Tribe possessed rights in water and fisheries on and about their Executive order reservation, and that defendant had an obligation to protect these rights.[4/]

We turn now to plaintiffs' motion concerning fisheries. They ask that the Commission determine as matters of law that:

> 1. The plaintiffs have special fishing rights in relation to the fisheries in the Columbia River and its tributaries on and adjacent to [the 1872 reservation].

3/ Defendant's additional contention, that at no time prior to the 1956 revision did the United States recognize any title or ownership of plaintiffs to the lands in question is without merit. See Seymour v. Superintendent, supra, and Confederated Tribes of Colville Reservation v. United States, cases cited p. 184, supra.

4/ We pretermit the distinction that defendant's motion speaks of plaintiffs' claim as being predicated on a "right of ownership," while plaintiffs speak of their claim in terms of "special fishing rights."

2. The defendant was bound in fairness and honor to have protected and preserved these rights and the fisheries to which they were related for the benefit of the plaintiffs.

3. To such extent as the defendant caused or permitted these fisheries to be depleted and destroyed, it is liable to plaintiffs for breach of its obligation to have dealt with them fairly and honorably.

Plaintiffs latter two propositions are contingent on the first. Plaintiffs cite Sohappy v. Smith, 302 F. Supp. 899 (D. Ore. 1969), in support of the first proposition. But Sohappy deals with Indians' treaty rights to fish. In the absence of a treaty, as in the instant case, the existence of special fishing rights is a question of fact. Plaintiff also cites Tlingit and Haida, 20 Ind. Cl. Comm., supra. But in that decision there were findings of fact that Tlingit and Haida subsistence depended on fish. There are no such findings here.

In Northern Paiute, supra, at 219, we held that the Pyramid Lake Tribe possessed special rights in the water and fisheries on and about their reservation. In that case, however, we had before us documentary evidence submitted by the plaintiffs, as well as documents filed in court by defendant of which we could take notice, which established conclusively the intent of defendant to reserve to plaintiffs sufficient water to preserve Pyramid Lake and its fisheries. No such evidence is before us in this case.

Without having all relevant facts before us we cannot rule on this motion. Plaintiffs may introduce evidence of special fishing rights and damages, if any, at trial.

HUNTING GROUNDS

The second claim in this case is based upon the alleged failure of defendant to safeguard plaintiffs' rights in common hunting grounds. Defendant argues that the claim appears to be based on the Treaty of April 25, 1856, 11 Stat. 657, between the United States and the tribes constituting the Blackfeet Nation, but that plaintiffs were not parties to that treaty, nor were they beneficiaries of any common hunting grounds established thereby. Plaintiffs have not replied to defendant's argument and have not specified any other treaty as the source of their claimed hunting rights. Therefore, summary judgment of dismissal of plaintiffs' second claim will be granted.

REMOVAL OF RESOURCES

Plaintiffs' third claim alleges that defendant aided third parties in the removal of resources from plaintiffs' lands prior to the extinguishment of plaintiffs' title thereto. Defendant asserts as the basis for its motion for summary judgment that "there is no liability for 'trespass damages' for alleged removal of minerals." While the plaintiffs' petition speaks of this claim in terms of trespass, its brief speaks in terms of fair and honorable dealings.

In Goshute Tribe v. United States, Docket 326-J, 31 Ind. Cl. Comm. 225, 248 (1973), aff'd. 206 Ct. Cl. __ (March 19, 1975), we drew a distinction between a claim for the value of minerals removed from aboriginal title lands founded on a legal trespass theory, under clause 2, section 2, of the Indian Claims Commission Act, and such a claim

founded on the theory of a violation of fair and honorable dealings, under clause 5, section 2. Minerals had been removed from the Goshute lands pursuant to a treaty. We held that the treaty consideration paid to the Goshute Tribe was less than fair and honorable, and permitted plaintiffs to recover their "fair share" of the value of the minerals removed from their lands prior to the extinguishment of their aboriginal title.

This issue also arose in two earlier cases (discussed in Goshute) where, as here, there was no treaty permitting the removal of resources. In Washoe Tribe v. United States, Docket 288, 21 Ind. Cl. Comm. 447 (1969), we determined that defendant had failed to deal fairly and honorably with the Washoe when it encouraged and protected miners who removed minerals from Washoe lands prior to the extinguishment of their aboriginal title. In Northern Paiute Nation v. United States, Docket 87-A, 28 Ind. Cl. Comm. 256 (1972), rev'd and remanded on other grounds, 203 Ct. Cl. 468 (1974), the same issue was raised and we reaffirmed Washoe.

The Court of Claims, in its Northern Paiute opinion, declined to decide the issue of liability for pre-extinguishment "tortious trespasses" (see also Goshute, supra, 206 Ct. Cl. at ___, slip op. at p. 9), but stated that the plaintiff should be allowed to develop facts showing exploitation and removal of resources from its lands by third parties with defendant's aid. Id. at 477. The court cited its decision in Tlingit and Haida Indians of Alaska v. United States, 182 Ct. Cl. 130, 389 F. 2d 778 (1968), decided under a special jurisdictional act, as a case where damages have been awarded for pre-taking trespasses, i.e., for the failure of, and refusal by, the United States to protect Indians' properties from usurpation by non-Indians.

Accordingly, we conclude that plaintiffs have alleged facts sufficient to constitute a cause of action. Defendant's motion for summary judgment will be denied.

Defendant in the alternative has asked us to answer the following question:

> Assuming, arguendo, that the principle of liability on the part of the United States for private "trespass" to unrecognized Indian title set forth in Washoe Tribe v. United States, 21 Ind. Cl. Comm. 447 (1969) is correct, whether it can be extended to a case such as the one at bar in which no notorious retroactive validation, by Congress, of void mining claims is alleged?

Subsequent to defendant's request for this ruling, this question was decided by the Court of Claims in Northern Paiute, supra, at 477. The Court held that retroactive validation results in retroactive extinguishment of title, and once title is lost, the basis of a claim for trespass is lost. The Court also held that if there were no retroactive validation, the United States might be liable for private trespass on Indian lands.

Plaintiffs ask us to rule that if defendant aided third parties in the exploitation of and removal of resources from plaintiffs' lands otherwise than in accordance with the applicable mineral laws, defendant is liable for the value of the resources so removed. Plaintiffs also request that we make clear the applicability of such a ruling to each of the three parcels of land involved, namely (1) lands to which plaintiffs had aboriginal title lying outside the 1872 executive order reservation, (2) the north half, and (3) the south half.

In Northern Paiute, the Court of Claims stated that plaintiff should be allowed to develop facts showing exploitation and removal of resources from its lands by third parties with defendant's aid. The Court added, however, that "It may be these claims would not be maintainable under defendant's broad view as to the nature of aboriginal title." 203 Ct. Cl. at 477.

In light of the dictum of the court, we decline, at this time, to make the ruling requested by plaintiffs as to their aboriginal title lands. We will, however, grant the rulings requested by plaintiffs as to the North and South portions of the lands set aside by the 1872 Executive order, with such modifications as are necessary to conform to our views expressed above concerning the extinguishment of plaintiffs' title thereto.

RIGHTS-OF-WAY

Plaintiffs' fourth claim alleges that defendant failed to safeguard the Indians' rights to compensation for the taking and use of their lands by railroad companies.

Defendant moves for summary judgment as to this claim on the ground that each statute authorizing such a grant included detailed provisions for the protection of plaintiffs. Defendant's motion is based on the ". . . reason that the pleadings on file show that there is no genuine issue as to any material fact. . ."

Plaintiffs reply that even assuming, arguendo, the reasonableness of the statutes, the issue of fact remains whether they were properly executed. Plaintiffs add that ". . . defendant is liable to the plaintiffs

to such extent as it may be shown to have disposed of interest in plaintiffs' lands without paying or obtaining adequate compensation of damages . . ." (Emphasis added.)

We agree with plaintiffs. At least two issues of material fact are raised by the pleadings; whether plaintiffs received compensation for railroad rights-of-way, and if so, whether the compensation received was adequate. Defendant's motion for summary judgment on this issue will be denied.

Defendant has asked in the alternative that we rule on the following question of law:

> Whether a claim based upon the theory of Washoe Tribe v. United States, supra, may be asserted in regard to the granting of a railroad right-of-way across aboriginal title land when the statute authorizing the right-of-way on its face provides for full compensation for any interests taken or damage done to an Indian tribe?

First, we question the assumption that plaintiffs have based their claim on Washoe. Second, a statutory provision that an unspecified future payment for rights-of-way should be in full compensation therefor [5/] does not now preclude proof that such compensation was in fact inadequate.

5/ The Act of May 8, 1890, 26 Stat. 102, authorized the Spokane Falls and Northern Railway Company rights-of-way through a portion of plaintiffs' reservation, subject to the provision that "full compensation shall be made to such tribe or occupants for all property to be taken or damage done by reason of the construction of such railway, the amount of such compensation to be ascertained and determined in such amount as the Secretary of Interior may direct, and to be subject to his final approval."

Plaintiffs ask that we determine that:

> Defendant is liable to the plaintiffs to the extent it failed to pay or obtain for plaintiffs adequate compensation and/or damages for rights of way granted various railroads over the lands of the 1872 reservation prior to the extinguishment of plaintiffs' title thereto.

Plaintiffs' statement of the law is correct, as we have indicated above, and we will grant plaintiffs' motion for the requested ruling of law. Plaintiffs may proceed to trial to prove that they were not compensated or were inadequately compensated for rights-of-way over their reservation prior to extinguishment of their title thereto.

The case will proceed to a trial on the merits.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner