BEFORE THE INDIAN CLAIMS COMMISSION

THE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, et al.,	)	
Plaintiffs,	)	Docket No. 363
v.	)	(2nd Claim, Amended) (Treaty of 1867, Agreement of 1872)
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: March 12 1976

Appearances:

Marvin J. Sonosky, Attorney for the plaintiffs. Emerson Hopp was on the brief.

Bernard M. Sisson, with whom was Acting Assistant Attorney General Walter Kiechel, Jr., Attorneys for the defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

There are two motions now before the Commission.

I. Defendant's Motion

The first motion, filed October 24, 1975, is from the defendant and asks leave to file an amended answer and for rehearing.

The proposed new answer is identical to the one on which the case was tried, except that it would add the following paragraph:

Fifth Defense

The plaintiffs' claim for the value of the lands ceded by the Agreement of September 20, 1872, as amended, 18 Stat. 146, 167, is barred by the doctrine of res judicata because they were settled in Docket Nos. 142, 359 through 363, and there was a consent judgment enforcing the agreement which settled the claim.1/ Sisseton and Wahpeton Bands, et al. v. United States, 18 Ind. Cl. Comm. 477 (1967).

1/ United States v. Southern Ute Tribe, 402 U.S. 159, 174 (1971) [Footnote in original].

We refuse leave to file the amended answer for two reasons.

First, to allow a non-jurisdictional technical defense which might result in dismissal of the case to be asserted for the first time after the opposing party has been to the expense of trial would be manifestly unfair and prejudicial. For this reason alone leave might be denied. Rogers v. Valentine, 426 F.2d 1361 (2d Cir. 1970); cf. Monod v. Futura, Inc., 415 F2d 1170 (10th Cir. 1969); United States v. 47 Bottles, etc., 320 F.2d 564 (3d Cir. 1963); Bertha Bldg. Corp. v. National Theatres Corp., 9 FR Serv. 2d 15a 3 Case 1 (E.D. N.Y. 1964).

It is true that in Lower Sioux Indian Community v. United States, Docket 363, 36 Ind. Cl. Comm. 295, 397, a separate portion of the instant case, we stated that the Indian Claims Commission has no rule requiring res judicata to be pleaded specially and no rule against belated amendment of an answer to assert such a defense. In that decision, however, we were making preliminary rulings on matters of law, to prepare the way for eventual trial. Our statements are to be

understood in the context in which made. We had no intention of sanctioning such an amendment after trial. Indeed, we have been cited to no decision of ours or of any court permitting the defense of res judicata to be presented for the first time after trial.

Second, the proposed amendment would be futile. Such a defense was raised, considered, and rejected by the Commission in the separate part of the instant case referred to above. See 36 Ind. Cl. Comm. at 313 (1975). The distinctions between the present part of the case and that part are insufficient to affect our ruling. In short, if the defense of res judicata were properly before us, we would deny it.

The defendant's motion for rehearing presents only one argument not previously urged upon the Commission and rejected after due consideration. The new argument is to the effect that we denied the defendant its day in Court when we decided that the plaintiff had recognized title after the parties had tried the case on a theory of aboriginal title.

In this connection, we note first that our decision, contrary to defendant's assertion, did not go beyond the issues raised by the pleadings. The so-called "Amendment to First Amended Petition," filed March 2, 1970, upon which this case was tried, simply stated that the plaintiffs "were the owners" of the lands in question. What kind of title they claimed was not specified.

Our conclusion that the plaintiffs had recognized title was based on two treaties, that of Prairie du Chien of August 19, 1825, 7 Stat.

272, and that of February 19, 1867. 15 Stat. 505. These treaties are part of the "supreme Law of the Land" which the Constitution requires us to follow regardless of whether the parties call it to our attention. U.S. Constitution, Art. VI, cl. 2. The Indian Claims Commission is not limited by the legal theories urged by the parties; but must apply the law as it finds it. Cf. International Nikoh Corp. v. H. K. Porter Co., 358 F.2d 284 (7th Cir. 1966); Dotschay v. Nat. Mut. Ins. Co., 246 F.2d 221 (5th Cir. 1957); Blazer v. Black, 196 F.2d 139 (10 Cir. 1952); Malarese v. Moore-McCormack Lines, 158 F.2d 631 (2d Cir. 1946); Gins v. Mauser Plumbing Supply Co., 148 F.2d 974 (2d Cir. 1945); Wall v. Brim, 138 F.2d 478 (5th Cir. 1943).

No purpose would be served by granting the defendant an opportunity to present evidence on the issue of recognized title; for our decision was made as a matter of law; it was not a finding on a question of fact.

Defendant claims it was denied the opportunity to argue the legal issue of recognized title. This is not true. The motion for rehearing afforded it such an opportunity. The Indian Claims Commission General Rules of Procedure, § 33(b)(2) require a motion alleging error of law "to specify with . . . minuteness the points upon which the Commission is supposed to have erred, with references to the authorities relied upon to support the motion." There is not one word in the motion to show that we misinterpreted the treaties. For the reasons stated at 36 Ind. Cl. Comm. 475-481 we are convinced we interpreted them correctly.

The defendant's motion will be denied.

II. Plaintiffs' Motion

The second motion, filed November 13, 1975, is from the plaintiffs and is entitled "Motion for Clarification." It points out that our order in this case of September 25, 1975 (36 Ind. Cl. Comm. 496) does not expressly provide for determination of the fair market value of the right to construct roads and other facilities over the plaintiffs' lands, which was granted to the United States by the Treaty of February 19, 1867, 15 Stat. 505. This grant affected not only the recognized title lands later ceded by the Agreement of September 20, 1872, 2 Kappler 1057, but also the Devil's Lake and Lake Traverse Reservations.

The pleadings reveal that the 1867 grant was indeed in issue, as well as the outright cession of 1872.

Our order of last September provides that the claims proceed for the purpose of determining the acreage and fair market value of the ceded lands as of the day the cession took effect, May 19, 1873, and of the consideration paid therefor. It also provides for determination of "all other issues bearing on the question of defendant's liability in the premises." Thus, the order is broad enough to permit the parties to submit two-stage appraisals of the lands between the two reservations--the first stage to determine the value of the rights ceded in 1867, as of that year, and the second to determine the value of the remaining estate as of the date of absolute cession some six years later.

The defendant answers the motion for clarification by stating that the cession of 1867 was merely an empty right, with the plaintiffs suffering no damage until the defendant exercised the right by establishing a road or other facility. It claims there is no evidence in the record to identify such exercise.

As a matter of law we believe the plaintiffs are correct. Whatever compensable injury they suffered accrued as of the day the rights were ceded, not when they were exercised. See Sioux Nation v. United States, 33 Ind. Cl. Comm. 151, 229-231 (1974). But as a practical matter, there may be merit in the defendant's position that damages cannot be ascertained without identifying the uses defendant made of its right. Whether defendant acquired plaintiffs' property in one bite or two, it acquired only 100 percent thereof and cannot be required to pay for more. Thus, appraising the value of the 1867 grant separately from the 1873 remaining interest may amount only to a complicated way of doing the same thing as a single appraisal of the whole estate as of 1873.

Conceivably, of course, changing land values may mean that the value of the percentage acquired in 1867 is not the same as the value of an equal percentage in 1873. We trust counsel to carefully evaluate the situation and not to proceed to a two-stage appraisal unless it is worth the extra time and expense involved.

As stated above, the 1867 grant extended to plaintiffs' two reservations as well as to the land between, which was later ceded.

In its response to the motion for clarification, defendant asserts that the plaintiff has already been compensated for the full fee simple value of the Devil's Lake Reservation, and consequently cannot be entitled to further compensation for the grant. Defendant is partially correct. In Lower Sioux Indian Community v. United States, Docket 363 (Second Claim, Act of 1904), 30 Ind. Cl. Comm. 463 (1973), we found values of certain areas within the Devil's Lake Reservation, without deduction for plaintiffs' previous grant under the 1867 treaty. Payments on the claim were found at 33 Ind. Cl. Comm. 51, 63 (1974); final judgment was entered on February 27, 1974 (33 Ind. Cl. Comm. 389); and the Court of Claims affirmed on July 11, 1975 (App. No. 17-74). As to the areas involved in the aforesaid phase of this litigation, clearly plaintiffs have received all they are entitled to, and defendant cannot be made to pay again for the 1867 grant.

As to the remaining area of the Devil's Lake Reservation, and all of the Lake Traverse Reservation, the value of the 1867 grant remains in issue. We trust counsel will carefully evaluate whether it is worth pursuing.

John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner