BEFORE THE INDIAN CLAIMS COMMISSION

THE WESTERN SHOSHONE IDENTIFIABLE GROUP REPRESENTED BY THE TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA, Plaintiff,	)	
v.	)	Docket No. 326-K
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: August 15, 1977

Appearances:

Robert W. Barker, Attorney for Plaintiff.

Dean K. Dunsmore, with whom was Assistant Attorney General, Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

On January 22, 1975, the defendant filed a motion for leave to file a second motion for rehearing along with a second motion for rehearing of the opinion, findings, and order of October 11, 1972, in the valuation phase of this case (29 Ind. Cl. Comm. 5, rehearing denied, 29 Ind. Cl. Comm. 472 (1972)). The plaintiff replied, opposing the motions, on February 21, 1975. Further responses were filed by the defendant on March 14 and the plaintiff on March 19, 1975. Action on the motions has been delayed pending disposition of the petition of

April 18, 1974, by the Western Shoshone Legal Defense and Education Association to present an amended claim, and by subsequent proceedings.

The defendant contends that a number of decisions by the Court of Claims issued after the denial of rehearing in this proceeding in 1973 require the reversal of the Commission's award of compensation for minerals removed from the Nevada portion of plaintiff's aboriginal title lands prior to July 1, 1872, the evaluation date for Nevada lands involved in this proceeding. We have carefully considered the decisions relied on by the defendant. We conclude that they provide no basis for allowing a second motion for rehearing in this proceeding.

The defendant's argument that the decision in United States v. Northern Paiute, 203 Ct. Cl. 468 (1974), controls the right to compensation for the pre-taking date removal of minerals from Western Shoshone lands is not convincing because the sales index method of determining value on the taking date in Northern Paiute made it difficult to separate the value of minerals removed before the taking date from the value of the land on the taking date with a result that some pre-taking date mining might be paid for twice if separate compensation for that mining were allowed.

By contrast, in Western Shoshone, the fair market mineral value on the taking date, as well as the royalty for the pre-taking

date removal of minerals, was found on the basis of actual or estimated quantities mined and on the cost of mining and marketing. This same method was followed in determining the fair market mineral value on the taking date and the compensation for removal of minerals before the taking date in United States v. Goshute Tribe, 206 Ct. Cl. 401 (1975). In affirming the Commission's award in Goshute for minerals removed before the taking date, the Court of Claims observed that the determination of the award at one time on both the pre-taking date removal of minerals and the fair market value at the time of taking offered assurance that double payment for the same thing would not be required. Id. at 412. In our opinion, the conclusion that the Western Shoshones are entitled to compensation for minerals removed from their aboriginal lands before the evaluation date is governed by the Court of Claims decision in the Goshute case, not by the decision in Northern Paiute, supra. Although there are differences between the Goshute and Western Shoshone cases arising from the fact that the treaty with the Goshutes was ratified a few months after its negotiation, whereas the Western Shoshone treaty remained unratified for more than six years after it was negotiated, we believe that the differences do not provide a basis for distinguishing between

the two regarding the right to compensation for minerals removed from their lands before the taking dates.[1/]

The Treaty of Ruby Valley with the Western Shoshones was negotiated October 1, 1863, but was not ratified until October 21, 1869. During the 6-year interval large amounts of valuable minerals were removed from Western Shoshone lands. The stipulated taking date,

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1/ The fact that the Western Shoshone treaty was not ratified during most of the pre-taking date period is a basis for distinguishing the legal consequences of mining before the taking date in this case from the results of such mining in the Goshute case in which the mining occurred after ratification of the treaty.

Pre-taking date removal of minerals from Western Shoshone lands was extra-legal and done, at best, under color of right until after ratification of the Treaty of Ruby Valley on October 21, 1869. Under that treaty, we described the property interests granted by Article IV of the treaty as permanent easements, which description was intended to cover agricultural and other uses of the land in addition to mining. In its decision in Goshute, supra, the Court of Claims suggested that licensing might be a more apprppriate description of the property interests granted under Article IV of the Treaty of Tuilla Valley which is almost identical with Article IV in the Treaty of Ruby Valley. We agree that the concept of licensing seems more apt than permanent easements do in the Goshute case in which the pre-taking date period, as well as the taking date, occurred after ratification of the Treaty of Tuilla Valley.

Mining from the Western Shoshone lands, however, was not authorized by a license or other interest granted by the Indians until after October 21, 1869, when the Treaty of Ruby Valley was ratified, by which time substantial quantities of minerals had been removed from the lands.

July 1, 1872, extended the pre-taking date period by two and one-half years beyond the date of treaty ratification. In the Goshute case, the pre-taking date period separated the earliest post-treaty years, before the Goshute reservations were established, from the later post-treaty years. This difference makes it possible to argue that subject case involves a trespass question for much of the pre-taking date period (1863-1869). However, the Court of Claims decision in the Goshute case makes further consideration of a trespass question in this case seem legalistic. 2/

2/ Two statutory provisions expressing Congressional policy with respect to Indian lands in Nevada are consistent with our conclusion that the Western Shoshones are entitled, under the fair and honorable dealings clause, to compensation for a share in the value of minerals removed from their lands before the taking date.

From and after February 27, 1851, the Indian Trade and Intercourse Act was in effect in Nevada, prohibiting the transfer or conveyance of Indian lands or claim thereto except by treaty or consent of the United States (9 Stat. 574, 587; 4 Stat. 730. Rev. Stat. §2116, now 25 U.S.C. §177). In addition, by the Act of March 2, 1861, organizing the Territory of Nevada (12 Stat. 209-10), Congress provided that nothing in that Act should be construed to impair the rights of person or property of Indians so long as such rights remained unextinguished by treaty between the United States and such Indians.

We read those statutes as reinforcing our conclusion in the Western Shoshone and Goshute cases that the United States, as fiduciary was obligated to compensate the plaintiff for the loss of profits from pre-taking date mining. See Seneca Nation of Indians v. United States, 173 Ct. Cl. 917 (1965), holding that under the Trade and Intercourse Act the United States has special responsibility to protect the Indians against unfair treatment in the disposition of their lands. See also Edwardsen v. Morton, 369 F. Supp. 1359, 1378-81 (D. D.C. 1973).

For the reasons discussed herein, the defendant's second motion for rehearing in this proceeding is denied.

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner