

BEFORE THE INDIAN CLAIMS COMMISSION

THE SHOSHONE TRIBE OF INDIANS
OF THE WIND RIVER RESERVATION,
WYOMING,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 157

Decided: November 8, 1954

Appearances:

George M. Tunison,
Attorney for Petitioner

Donald R. Marshall, with
whom was Mr. Assistant
Attorney General
Perry W. Morton,
Attorneys for Defendant.

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

In this cause the defendant has filed its motion for summary judgment based upon the grounds:

1. That the defendant is entitled to judgment as a matter of law because the petition does not state a claim upon which an award may be granted.
2. That the issues here involved were judicially determined in a prior case between the same parties and involving the same subject matter

by the Court of Claims in *Shoshone Tribe v. United States*, No. H-219, reported in 82 C. Cls. 23 and 85 C. Cls. 331, which is res judicata as to the claim here presented.

In support of this ground, defendant has offered a record of the proceedings before the Court of Claims in the former case which is not questioned by petitioner and which is sufficient to show the issues before said court and the basis for its determination of the former case.

3. That the Commission is without jurisdiction to entertain the claim because provisions of the jurisdictional act under which the former case was decided, bar as settled and cancelled the claim here asserted.

The claim here asserted is for the value of gold taken from the southern part of the Shoshone Reservation between July 3, 1868, 15 Stat. 673, when the Shoshone acquired the reservation, and the time the Indians ceded that part of it by the Agreement of September 26, 1872, 18 Stat. 291, approved December 15, 1874.

The other claim set forth in the petition, being that based upon an alleged improper allowance of offsets in the former case, was abandoned by the petitioner at the oral argument of the motion, and since the Commission agrees with counsel for petitioner that it is without merit, it will be dismissed.

By Article 2 of the Treaty of July 3, 1868, the United States ceded to the Shoshone some 3,000,000 acres of land, including that from which the gold was taken, and agreed that such land --

" * * * shall be and the same is set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians * * *."

For a better understanding of the discussion which follows, we insert here the pertinent allegations of the petition, except we are omitting from the allegations of paragraph 17 thereof the quotations from the opinion of the Court of Claims, being paragraph 9 of the opinion.

16. Between July 3, 1868, the date of the treaty, and 1874, when the cession agreement above mentioned was ratified, gold of the value of \$1,106,750 was mined and removed by trespassers from land within the boundary of the undiminished reservation.

Said gold was wrongfully and illegally mined and removed from petitioner's reservation in violation of the duty of United States to prevent trespassing and with the active participation of the United States in protecting said trespassing miners in their operations.

17. Throughout the litigation identified in paragraph 15 of this cause of action petitioner consistently asserted its claims for the gold so wrongfully removed from its lands prior to the 1872 Brunot taking. The Court of Claims in its decision of December 2, 1935, 82 Ct. Cl. 23, rejected petitioner's claim in the following language (pp. 41-2 of decision): * * *

Because of said erroneous decision of the Court of Claims petitioner was paid nothing, under the final judgment in said litigation, for the value of the gold so wrongfully removed from its lands prior to the 1872 Brunot taking. Subsequent decisions of the Court of Claims and of the United States

Supreme Court have established that the Shoshones were in fact the owners of the minerals in and underlying said lands. (Shoshone Tribe v. United States, 304 U. S. 111, 82 L. ed. 1213, 58 S. C. 794.)

18. Said wrongful action of defendant is actionable under Section 2 of the Indian Claims Commission Act as (1) a claim in equity arising under the Constitution; (2) a claim sounding in tort with respect to which claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) a claim which would result if the agreement between claimant and the United States was revised on the ground of unconscionable consideration or unilateral mistake; (4) a claim arising from a taking by the United States of lands owned by claimant without the payment for such lands of compensation agreed to by claimant; and (5) a claim based on fair and honorable dealings that are not recognized by any existing rule of law or equity.

19. By reason of the matters and things aforesaid petitioner is entitled to judgment against the United States for the value of the gold wrongfully removed from the reservation prior to the ratification date of the Brunot 1872 taking in the sum of \$1,106,750, with interest thereon at a reasonable rate from 1872 to date of judgment as a part of just compensation.

WHEREFORE, petitioner prays judgment against defendant on this its First Cause of Action for the sum of \$1,106,750, together with interest thereon from 1872 to date of judgment and for such further relief as to the Commission may seem just and equitable.

It is the above allegations of the petition we must look to in order to determine the nature of the claim asserted, and for which recovery is asked, since they are the only allegations that state the facts upon which the claim is predicated.

Counsel for the Government seem to be of the opinion that the present petition is based upon the erroneous decision of the Court of Claims in holding (p. 85 of 82 C. Cls. 23) that the Shoshone "were not the legal or beneficial owners of the mineral rights." It is true that the Shoshone

in paragraph 17, supra, of their petition alleged: "Because of said erroneous decision of the Court of Claims petitioner was paid nothing, under the final judgment in said litigation, for the value of the gold * * ." If those allegations were accepted as indicating the basis for the claim we would be inclined to agree that they state no actionable claim, but we consider them as a mere statement of the effect of the Court of Claims decision and are of little significance except, perhaps, as an allegation that the Shoshone received nothing for the gold removed from their holdings. As we view the petition, and considering it as a whole, the gravamen of the claim is set forth in paragraph 16 thereof and alleges a claim for the gold taken from the Shoshone lands while they were the rightful possessors of the same.

Sufficiency of Petition.

The Government contends that the mining of the gold, even if done in violation of its solemn agreement with the Shoshone (Article 2 of the 1868 treaty) which provides that no persons, except certain designated persons and government representatives, "shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians," is not a compensable wrong, citing in support of their contention: *Nez Perce v. United States*, 95 C. Cls. 1; *Creek Nation v. United States*, 318 U. S. 629; and several other cases decided by the Court of Claims and the Supreme Court. The two cases first cited hold in effect that provisions such as those in the 1868 treaty with the Shoshone, by which the Government agrees to insure the exclusive use and

quiet enjoyment of their lands, does not make the Government liable in damages for encroachments on Indian lands by unauthorized persons even though the agreed protection was inadequate.

We would be inclined to agree with the Government's contentions if the alleged facts were limited to trespasses of the character involved in those cases, but the allegations here are that the Government in violation of its duty to prevent trespassing actively participated "in protecting said trespassing miners in their operations." Admittedly, these allegations are general and vague, and should be made more definite, but they do suggest that the Government, by protecting the trespassing miners in some way not disclosed, became a party to the wrongdoing. Bearing in mind that we are here considering a pleading only and must give effect to such ultimate facts as can be inferred by reasonable intendment from its allegations, we cannot say as a matter of law that the petition does not state a cause of action. Torts, for instance, when committed by the Government, are actionable under clause (2) of section 2 of the Indian Claims Commission Act. So if the Shoshone intend to base its claim upon the participation of the Government in the activities of the trespassing miners in such a way as to make the Government liable as a wrongdoer -- in contrast to a claim predicated upon the mere failure or neglect of the Government to comply with its treaty obligations to prevent trespassing -- the facts should be pleaded with such certainty, definiteness and fullness that the Commission can determine the nature of the claim and that will enable the Government to prepare and plead its defense.

Res Judicata

A case was filed by the Shoshone Tribe in the Court of Claims, being the same party as the petitioner herein, under a jurisdictional act (March 3, 1927, 44 Stat. 1349) authorizing the Court of Claims "to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which the Shoshone Tribe of Indians of the Wind River Reservation in the State of Wyoming may have against the United States arising under or growing out of the treaty of July 3, 1868 (Fifteenth Statutes, page 673), or arising under or growing out of any subsequent treaty or agreement between said Shoshone Tribe of Indians and the United States or any subsequent Act of Congress affecting said tribe, which claims have not heretofore been determined and adjudicated upon their merits by the Court of Claims or the Supreme Court of the United States."

On September 30, 1931, the Shoshone filed their amended petition in which were set forth several causes of action, among which was a claim for gold taken from their reservation by citizens of the United States. In their petition (Def. Ex. 1, p. 5), after setting forth the provisions of Article 2, which we have quoted above, alleged:

"Notwithstanding this solemn treaty stipulation, and with the knowledge on the part of the United States that certain portions of the land within the limits of petitioner's reservation contained valuable deposits of gold, and other precious metals, the United States permitted and encouraged citizens of the United States, against the protest of petitioner, to intrude, settle, reside upon, and mine and take away large amounts of gold belonging to petitioner to the loss and damage of petitioner in the sum of \$1,106,750.00."

On November 9, 1931, defendant therein filed a general traverse (Def. Ex. 1, p. 9) and the case was tried on the issues thus made, and a judgment was entered on December 2, 1935, for the Shoshone on one of the claims asserted, but not for the gold claim. The judgment (Def. Ex. 1, p. 10) did not mention the gold claim, except in the findings of fact (82 C. Cls. 23, pp. 46-7, Find. 12), so we must go to the opinion of the court for disposition of the gold claim. As to this claim the court, at pp. 84-85, said:

"The evidence is undisputed that a large quantity of gold was removed from lands lying within the boundaries of the reservation. The Government admits that gold of the net value of approximately \$350,000 was mined within the reservation. Upon a consideration of all the evidence contained in the record, we are of opinion that the maximum value of gold removed from mines located within the limits of the reservation did not exceed \$500,000. However, we deem it unnecessary to discuss this matter in detail, for the reason that, in our opinion, the plaintiff cannot recover on this item. Prior to and at the time of the making of the treaty of 1868, gold had been discovered and was being mined in the district mentioned, and the boundaries of the reservation as fixed by the treaty included within the reservation a portion of this mining district; in fact, the most valuable mines in the district were afterwards found to be located upon the reservation. As a result of this a commissioner was appointed pursuant to the act of Congress of June 1, 1872, to negotiate with the plaintiff tribe for the relinquishment of that portion of the reservation which included the mines and all gold-bearing land. Accordingly, an agreement was entered into between plaintiff tribe and the United States on September 26, 1872, ratified December 15, 1874 (18 Stat. 291), in which the former ceded to the United States, without any reservations whatever, approximately 700,000 acres of land, which included all the territory embraced within the boundaries of the reservation in any way affected by the gold-mining operations. A consideration of \$27,500, specified in this agreement, was appropriated and paid, with the exception of about \$14. In these circumstances we are not authorized under the jurisdictional act to reopen this matter. Moreover, the Indian title at the time this cession was made consisted only of the right to use and occupy the reservation, and at that time the Indians were not the legal or beneficial owners of the mineral rights."

It is the above determination by the Court of Claims in the former suit the defendant relies on as res judicata. There can be no question but that the court denied the gold claim in that manner, although not expressly by the judgment.

The above case went to the Supreme Court twice and resulted in a different judgment, but the gold claim was not involved in any of those appeals or in the final determination of the Court of Claims, so the decision referred to above is the only one affecting the gold claim, and there was no appeal from the court's decision on that.

It will be seen by a comparison of the allegations of the former petition with those in the instant case, that in spite of the difference in phraseology, the claims are the same, in fact, neither party contends otherwise.

It is plain from the opinion that the Court of Claims decided: (1) that the 1872 treaty, which included the gold-bearing lands with others ceded by that treaty, constituted a bar to the gold claim which could not be considered under the jurisdictional act, and (2), that in any event, the Shoshone were not the legal or beneficial owners of the gold.

As to the first, the court had before it the treaty of 1868, by which the Shoshone acquired the lands, and the agreement of 1872, by which they ceded the area which included the lands from which the gold was mined. But the jurisdictional question could not be determined by either the treaty or agreement alone, for, in addition to what the treaty and agreement disclosed, there had to be a finding and determination of consideration

for the 1872 cession and that gold was removed by intruders from the ceded area during the time the Shoshone were the rightful possessors thereof. And, as it will be seen, the court by its Finding 12 (82 C. Cls. 46) made such findings, namely, that the consideration paid for the cession, which included the gold-bearing lands, was \$27,500, and that gold of the value of \$500,000 had been removed from the land during the time the Shoshone were the rightful possessors of it, that is, "between July 3, 1868, the date of the treaty, and 1874, when the cession agreement * * was ratified * * ." We are not called upon to inquire into the correctness of the court's findings of fact or its decision, in fact, it would be inappropriate for us to do so.

It is a rule, generally accepted, that for a judgment or other determination of an action to become a bar to a subsequent action between the same parties on the same claim, the determination in the first case must have been on the merits. *Nooksack Tribe v. United States*, 1 Ind. C. Com. 333, 338; 30 Am. Jur. 944, sec. 208. So the determinative question here is whether the disposition of the gold claim by the Court of Claims in the former case was upon the merits. If it was not, no estoppel arises and the parties are free to litigate that claim before this Commission.

We have set out above the exact language used by the Court of Claims in disposing of the gold claim. It there plainly appears that the Court was of the opinion that the Shoshone, having by the 1872 agreement ceded their lands, including the gold-bearing land, for \$27,500 "without any reservations whatever," were bound by that agreement and that the court

could not under the jurisdictional act reopen such settlement. The court expressly stated: "In these circumstances we are not authorized under the jurisdictional act to reopen this matter." So what the court actually decided was that the 1872 agreement constituted a settlement of the gold claim. This, we find by looking at the Government's brief submitted to the court, is in accordance with the position of the Government, for at page 891 of the record we find this contention:

That the United States entered into a full and complete settlement in 1872, with the Shoshone Tribe of Indians, of all difficulties between said tribe and the United States which had arisen theretofore in consequence of the occupancy of a portion of the Shoshone or Wind River Reservation by citizens of the United States, and that amongst the difficulties which has so arisen were the intrusion, settlement, and residing upon, and mining thereon and taking away from said reservation large amounts of gold.

And at page 927 of the record in the former case this:

* * * (gold claim) any damage which had accrued to plaintiff by reason thereof prior to the date thereof, was settled by the terms of an agreement dated September 26, 1872, * * * under the terms of which, the Shoshone ceded to the United States the only portion of the Wind River Reservation in which gold had ever been found in paying quantities.

It therefore appears beyond question that the court did not dispose of the gold claim on the merits, but on the jurisdictional ground we have mentioned above. Such a disposition, as stated in the Nooksack case, supra, will not bar our consideration of the gold claim. *Hughes v. United States*, 18 L. Ed. 303, 71 U. S. 232; *Smith v. McNeal*, 109 U. S. 426, 27 L. Ed. 986; *Sachs v. Ohio National Life*, 143 Fed. (2d) 128, 132; *Freeman on Judgments*, Vol. 2, p. 1546, Sec. 733.

As to the second determination of the Court of Claims, to the effect that the Shoshone were not the owners of the gold taken from their lands, it would seem the statements in the opinion must be considered as obiter dictum for the court in the very same paragraph, and immediately preceding the statement as to non-ownership of the gold, had declared it was not authorized under the jurisdictional act to consider the gold claim. That it was not intended by the court to consider the statement as determinative of the gold claim is supported by the fact that in the same case (85 C. Cls. 331, 361), although involving another part of the reservation, the court in construing Article 2 of the 1868 treaty, said:

* * * We are of opinion that this right to "absolute and undisturbed use and occupation" of the reservation includes, as beneficial incidents, the net value of the land, including the net value of any timber or minerals within the boundaries of the reservation, and, so far as we have been able to ascertain, this view is consistent with the established policy of the government from the beginning of its dealings with the Indian tribes, the making of treaties providing reservations for them, and in the management of tribal lands and other affairs of the Indian tribes at least for several years prior to 1878 and at all times subsequent thereto.

The above conclusion of the court in the latter decision was based upon extended research and discussion of the law relating to the beneficial incidents arising from absolute use and occupancy granted Indians by treaties such as that of 1868. The mineral rights of the Shoshone were, of course, derived from the treaty of 1868. The Supreme Court in affirming the Court of Claims said:

"The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation." United States v. Shoshone, 304 U. S. 111, 82 L. Ed. 1213.

Cancellation of Claims under Jurisdictional Act

Section 3 of the jurisdictional act under which the former suit was brought (Act of March 3, 1927, 44 Stat. 1349) contains this provision:

* * * In reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Shoshone Indians in and to such money, lands, or other property.

The Government contends that these provisions bar a consideration of the gold claim by this Commission, the argument being that decision of the Court of Claims disposed of the claim and it was therefore not in existence when the Indian Claims Commission Act was passed. This argument is based upon the notion that the court in the former case disposed of the gold claim on the merits. But since we hold the claim was not so terminated the argument must fall. It will be noticed that the decree which is made to be in full settlement of damages and "annul and cancel all claim, right, and title of said Shoshone Indians in and to such money, land or other property" has reference to "claims which may be the subject matter of suits herein authorized." Obviously, a suit which the Court decided it was not authorized to hear was not a suit "herein authorized."

From the above it follows the motion must be denied.

Louis J. O'Marr
Associate Commissioner

I concur in the foregoing.

Wm. M. Holt
Associate Commissioner

Chief Commissioner Witt dissenting:

I cannot agree with the holding of my colleagues overruling the First Cause of Action asserted by petitioner. I am of the opinion that this cause of action has been previously determined adversely to the petitioner by the Court of Claims as reported in 82 C. Cls. 23, pp. 46-7, Find. 12, and that the defendant's plea of res judicata as to same should be sustained.

The opinion of my colleagues says that the claims as asserted in the Court of Claims case and in the instant case "are the same" and that "neither party contends otherwise." In the majority opinion it is further stated:

It is plain from the opinion that the Court of Claims decided: (1) that the 1872 treaty, which included the gold-bearing lands with others ceded by that treaty, constituted a bar to the gold claim which could not be considered under the jurisdictional act, and (2), that in any event, the Shoshone were not the legal or beneficial owners of the gold.

My colleagues, however, conclude that the decision of the Court of Claims was not based on the merits of the case and that therefore petitioner is entitled to maintain the claim filed with the Indian Claims Commission. While it is true that the Court of Claims said that it did not have jurisdiction to go into the facts as to the duty owed by the defendant to the petitioner in respect to the alleged unlawful mining of gold and the cooperation and encouragement given to the miners to mine the same — this statement is really obiter dictum because the Court said that whatever liability the defendant might have been under to the petitioner with reference to the gold

mining had been by the 1872 treaty settled and discharged, and that in any event the petitioner was not the legal owner of the gold. The above quotation from the opinion of my colleagues admits that the Court of Claims so decided. It is this writer's opinion that this is a decision on the merits of petitioner's claim — to the effect that it had no claim — for two reasons: (1) Because whatever claim it had ever had had been settled; and (2) And in any event the petitioner was never the legal owner of any gold.

The fact that the Court of Claims subsequently held in reference to another claim that petitioner's rights in land included minerals in the judgment of the writer in no way affects the finality and conclusiveness of the decision otherwise as made in respect to the claim here involved; and although that holding was erroneous as a matter of law, no appeal was taken therefrom and this writer thinks it is binding as to the rights of the petitioner in respect to the instant claim.

EDGAR E. WITT
Chief Commissioner