

BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD)
RESERVATION, to wit, the Arikara, Gros Ventre)
and Mandan Tribes of Indians, an Indian Reor-)
ganization Act Corporation, in its own behalf)
and on behalf of the ARIKARA, MANDAN and GROS)
VENTRE TRIBES OF INDIANS,)

Petitioner,)

v.)

Docket No. 350)

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: March 24, 1955

Appearances:

Ernest L. Wilkinson, with whom
were Francis M. Goodwin and
Donald C. Gormley,
Attorneys for Petitioner.

William D. McFarlane, with whom
was Mr. Assistant Attorney
General, Perry W. Morton,
Attorneys for Defendant.

OPINION OF THE COMMISSION

WITT, Chief Commissioner, delivered the opinion of the Commission.

Questions Presented

The defendant has filed a motion for summary judgment as to all claims alleged by the petitioner herein, which motion is based on the decision of the Court of Claims rendered on December 1, 1930, in suit of the same petitioner against the defendant (71 C. Cls. 308-341), the contention of the defendant being that the aforesaid decision adjudicated all the claims asserted in the instant case, or could have determined all

of them, and that therefore all said claims now being asserted are res judicata, and that defendant's motion for summary judgment should be granted as to all and each of the claims herein asserted.

In order to determine the merits of said motion, it is necessary to take into consideration the question of jurisdiction of the Court of Claims by reason of the jurisdictional act under which the previous decision was rendered, whether or not the claims presented in the instant case were heard and determined in the prior case or might have been, and therefore, whether or not the plea of res judicata should be sustained as to all the claims now being prosecuted or as to any of them.

It is admitted by the petitioner in the instant case that it was a party to the prior case upon which the defendant relies for its plea of res judicata; that the Court of Claims had jurisdiction to render judgment rendered in the prior case, and that the defendant has discharged the judgment rendered in that case and paid for the land involved in the prior case at its value at the time of its taking by the defendant, not including any interest by reason of the delay in the payment of said value.

The claims will be taken up seriatim as discussed by the defendant in this motion for summary judgment.

The First Claim—Claim for Interest

This is a claim for interest on the amount of the judgment in the previous case wherein the Court awarded a judgment to the petitioner for the amount of \$4,923,093.47 as compensation for 9,846,186.93 acres. It is being alleged by petitioner that said award was for the value of

the land at the time of the taking; that just compensation for said lands required payment of the value as found by the Court in the amount of \$4,923,093.47, "together with damages for the delay in making payment, reasonably measured by interest at 5% from the date of taking to the date of payment", that said failure to make said award include damages for the delay in making payment was contrary to the guarantee of the Fifth Amendment of the Constitution of the United States, and alternatively was not in keeping with fair and honorable dealings due by the defendant to the petitioner.

The defendant shows that the petitioner asked for interest as a part of just compensation for the land, the value of which it sued for, that the Court of Claims had jurisdiction to grant such interest, and therefore the question of whether or not the petitioner should recover interest has been litigated and the decision relied on is res judicata as to same.

This Commission has had two similar cases before it, to wit: The Assiniboine Tribe of Indians v. United States (Dkt. No. 62), the opinion of the Commission in said case being in Vol. II, I.C.C., p. 272; and the Blackfeet Tribe, et al v. United States (Dkt. 279), the opinion of the Commission in this case being in Vol. II, I.C.C., p. 302. In each of these cases this Commission held that interest was a part of just compensation and that it did not comprise a separate and distinct claim from that of the value of the land, and that previous decisions awarding the value of the land became res judicata as to any claims of interest. These decisions were appealed and were affirmed by the Court of Claims and writs of certiorari denied by the Supreme Court, the Assiniboine

case being reported in Vol. 128 C. Cls. p. 617, and the Blackfeet case being reported in Vol. 127 C. Cls. p. 807. Therefore, it is the opinion of this Commission that the defendant's motion for summary judgment as to this claim in this case should be sustained and the claim dismissed.

The Second Claim

This is a claim for additional compensation for lands ceded by the petitioner to the defendant under the agreement between it and the United States dated December 14, 1886, and ratified by Act of Congress on March 3, 1891 (26 Stat. 1032). It is contended by the petitioner that under the terms of the said agreement it ceded all its right, title and interest to approximately 1,800,000 acres of land for a stated consideration of \$800,000. In inducing petitioner to sell its lands for such a small consideration, defendant "(a) paid an unconscionable consideration, or (b) acted unfairly or dishonorably, or (c) took advantage of a mistake of fact or law by either or both of the parties thereto, as to the area of land ceded by said agreement, or as to the value thereof" and, therefore, is liable to the petitioner for the difference between the amount paid for said land and its value at the time. The defendant contends that petitioner sets forth the same claim in paragraphs VII, VIII, and IX of its amended petition in the previous case and "alleged therein in substance the same kind and character of claims against defendant as now alleged" in the instant suit. The defendant further contends that under the jurisdictional act, the Court of Claims was given authority "to hear and determine all legal and equitable claims, if any, of said tribe against the United States and enter judgment thereon." The defendant contends by reason of said language in said

jurisdictional act that, "it is clear from this statute that the Court of Claims had jurisdiction to consider and determine the amount, if any, due said tribe, from the United States under any treaties, agreements, or laws of Congress." That the language of the jurisdictional act did not give the Court of Claims jurisdiction to determine the right of a petitioner to additional compensation to that provided in an agreement entered into by reason of unconscionable consideration or because unfairly or dishonorably secured, is unquestioned; this Commission is therefore of the opinion that the Court of Claims in the previous case did not have jurisdiction to consider such claim (if it did consider the same) and therefore the defendant's plea of res judicata is not good and should be denied.

The Third Claim

The Third Claim of petitioner is based on an unratified agreement between petitioner and defendant dated July 27, 1866 (II Kappler 1052) wherein it was agreed that petitioner would cede lands of the estimated acreage of 200,000 acres for a stipulated consideration; that the defendant took possession of said lands and failed to compensate petitioner whatsoever therefor. The defendant contends that this claim was asserted "in substance" and was "adjudicated in the previous case as shown by allegation contained in Paragraph X of the Amended Petition (in said previous case), brief, and motion for a new trial filed therein." Reference to these pleadings shows conclusively that the claim as made in the instant case was not asserted in the previous lawsuit relied upon. It may further be stated that if the pleadings in the former case were construed as asserting the same claim as in the instant case,

and was considered by the Court (which this Commission does not think are facts), that same was not within the jurisdiction of the Court and therefore not legally entitled to be considered by the Court. Attention is called to the fact that the jurisdictional case under which the decision relied upon was made authorizes the consideration of claims against the United States "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said tribes, or for the failure of the United States to pay said tribes any money or other property due." Certainly under the limitations of said act the Court had no jurisdiction to consider a liability growing out of an unratified agreement because the same was not a binding agreement. Even though the claim was presented, its consideration (if any was given to it by the Court) was of no binding effect because of the want of jurisdiction to consider the same. Therefore, defendant's plea of res judicata is not well taken and must be denied.

The Fourth Claim

This is a claim by petitioner for compensation for lands it claims to have owned outside of lands recognized as owned by it by the Fort Laramie treaty, and petitioner's title thereto was Indian title, if any, and under the jurisdictional act the Court of Claims had no authority to consider the matter of compensation to the petitioner for the taking of the land involved, if it did consider the same -- which the petitioner contends it did not. The defendant contends that the petitioner in the previous lawsuit alleged that its title to the land had been recognized by the defendant in the treaty of 1825. The language of petitioner's pleadings in the previous suit makes the general statement

that by said treaty the defendant had "recognized the district of country then occupied by them." Attention is called to the fact, however, that in the same petition petitioner alleged that it "with sundry other tribes of Indians occupied, held and used" this and other territory; and in its requested findings of fact the petitioners asked that a finding be made that "petitioner tribes of Indians from time immemorial had their habitat" in the lands involved. The holding of the Court of Claims distinctly limits the award made to lands set apart to the petitioner by the Treaty of Fort Laramie, which lands do not include the land involved in this claim; and regardless of the fact that compensation may have been asked for these lands in the prior lawsuit, the Court of Claims had no jurisdiction to consider the same and did not consider the same. Wherefore, this Commission is of the opinion that the defendant's plea for summary judgment based on res judicata is not well taken and should be denied.

The Fifth Claim.

This is a claim for alleged unfair land exchanges. Petitioner alleges that by the Executive Orders of April 12, 1870 (I Kappler 883), July 13, 1880 (I Kappler 883), and June 17, 1892 (I Kappler 883), lands recognized by the Fort Laramie treaty were removed from petitioner's reservation and other lands added thereto, in lieu of those removed. Petitioner contends that the lands taken from petitioner's reservation were much more valuable than those that were added thereto and that therefore petitioner is entitled to compensation therefor. Petitioner alleges, and the decision of the Court confirms, that this claim was never considered by the Court in said prior suit; that in its special

findings of fact the Court considered these transactions merely for the purpose of determining the quantity of land taken by the defendant; that the Court did not take into consideration the difference in the value of the land involved; that it failed therefore to consider this claim on its merits. Moreover, the jurisdiction of the Court in considering such a claim might be questioned, but in any event, the Court did not consider this claim on its merits and therefore the Commission is of the opinion that the plea of the defendant for summary judgment, based on res judicata, is not well taken and should be denied.

The Sixth Claim

This is a claim for damages in the amount of value of the use made by defendant for its use of buildings, works and improvements, the cost of which have been paid by petitioner, or the market value thereof in the alternative because of wrongful taking or the use of the same by the defendant. The claim as asserted by petitioner in paragraphs 28 to 31 of its petition and as described in its objection to motions of defendant for summary judgment (pp. 15, 16, 28, 29) is very vague and indefinite and doubtless must be amended before trial; but, notwithstanding, as far as we have been able to determine in a careful examination of pleadings in the prior case, no claim of this kind was asserted therein and the petitioner contends that "the facts from which it arose had not even occurred when that petition was filed." Therefore, it is the opinion of this Commission that the motion of the defendant for summary judgment, based on res judicata, is not well taken and should be denied.

The Seventh Claim

This claim, is based on petitioner's contention that the taking of petitioner's lands, as detailed in its petition, under the Act of June 1, 1910 (36 Stat. 455-456-458), without petitioner's consent and in violation of defendant's duties and obligations as a guardian of petitioner as to petitioner's property, was not in keeping with fair and honorable treatment and was in violation of defendant's fiduciary duties as guardian and trustee of petitioner and that, therefore, defendant has become liable to the petitioner for just and equitable compensation for the lands involved and otherwise as fully set out in said petition. It is doubtful if any such claim was within the jurisdictional act under which the previous decision was rendered but, in any event, the pleadings in that case seem to present only a demand for an accounting of the handling of the property and funds authorized by the defendant under the Act of June 1, 1910. The present claim seems to this Commission to be based on the contention that fair and honorable dealings were not accorded the petitioner and the failure to do so is the basis of this claim which is an entirely different claim to that merely for an accounting for that which had been done. Therefore, it is the opinion of this Commission that the motion for a summary judgment, based on res judicata as to said claim, is not well taken and should be denied.

The Eighth Claim

This claim is based on the alleged destruction of natural resources on petitioner's lands and is not specifically discussed in defendant's motion. The claim is one based on the alleged lack of fair and honorable

dealings by the defendant in connection with its handling of petitioner's lands. It was not within the jurisdiction of the Court of Claims in the litigation upon which the plea of res judicata is based and therefore could not and was not considered by said Court. Therefore, the plea of res judicata as to same should be denied.

The Ninth Claim

This is a claim for a general accounting of petitioner's money and property. No such accounting was requested in the prior suit nor does the defendant specifically discuss this claim on its motion for summary judgment. In any event any accounting involved or discussed in the previous litigation could not have been an accounting to the present time and therefore the previous decision could not be res judicata as to the present claim. Therefore, the defendant's request therefor should be denied.

While the merits of the plea of res judicata as to all claims has been discussed as to each one separately, attention will be called to the fact that the Court of Claims in the opinion relied upon states in its opinion that the record in the case narrowed the issues "to three claims": first, "the alleged taking by the Government of lands embraced within the Indians' reservation without their consent and without compensation"; second, "a claim for \$50,000 for the value of timber alleged to have been cut and taken from their reservation by white trespassers"; and, third, "the cost of surveying the inner lines of their reservation in December 1836, it being charged that the expense incident thereto was by express agreement chargeable to the United States and not

the Indians."

Attention is also called to the defendant's proposed finding II in the prior case wherein defendant urges the following finding:

Under the provisions of this act, the plaintiffs herein, the Indians of the Fort Berthold Reservation, North Dakota, filed their petition on July 31, 1924, alleging a number of claims against the United States. All of the claims set forth in the petition have been abandoned by the plaintiffs with the exception of the following:

The claim based upon the alleged misappropriation by the Government of parts of their alleged tribal domain by the Executive Orders of April 12, 1870, and July 13, 1880, defining and delimiting a reservation for the Arikara, Gros Ventre, and Mandan Indians, the claim based upon alleged depredations by white people upon the timber growing within the boundaries of the country claimed by them; and the claim arising out of the alleged use of their funds by the Government in defraying the expenses of the interior surveys of their diminished reservation under the agreement of December 14, 1886, ratified by the act of March 3, 1891. (Emphasis supplied.)

This Commission had occasion in the Iowa Tribe v. United States, our Dkt. No. 79 (Vol. II, I.C.C., p. 167), to pass on the effect of the withdrawal or abandoning of claims even though sued on and the effect of the decision in which they were asserted as being res judicata as to the withdrawn claims, and in such situation we held that when claims, though previously asserted, were withdrawn "there was not and could not have been an adjudication of any of them * * * in the former case." As supporting said viewpoint we referred to the case of Stark v. Star, 94 U. S. 477, 485, and quoted therefrom.

In keeping with this opinion, an order will be entered sustaining motion for summary judgment as to the First Claim -- that is, the claim for interest -- and will be denied as to all the other claims.

Concurring:

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner