BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA, Plaintiffs,	)	
v.	)	Docket No. 192
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: March 29, 1957

Appearances:

Ralph H. Case,
Attorney for Plaintiffs.

Maurice H. Cooperman, 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.

This case has been the subject of a per curiam opinion rendered by this Commission on June 4, 1952. The defendant filed a "Motion to Dismiss or Alternatively to Require Plaintiffs (a) to Separately State and Number the Paragraphs of the Petition, and (b) to Identify the Coal-Bearing Lands." Upon consideration of the above motion and the answer filed by plaintiffs this Commission determined and so held that the prior case of the Sioux Tribe of Indians v. United States, 105 C. Cls. 725, did not constitute Res Judicata and that Docket No. 114 now pending before this

Commission was not the same claim so as to cause this case to be abated. Since the above elements of this case have been determined by that opinion they will not be considered herein.

Plaintiffs allege in this case that defendant improperly classified certain of their lands in the Cheyenne River Reservation as non-coal bearing lands and thereby caused them to be opened for settlement and that their value as coal lands was consequently lost to the Indians.

This question arose as a result of an Act of Congress of May 29, 1908 (35 Stat. 460) wherein the Secretary of the Interior was authorized to make disposition of 1,612,527.86 acres of the Cheyenne River Reservation. He was further directed to have the land examined by the experts of the Geological Survey for the presence of coal bearing lands. He was authorized to reserve any coal bearing lands until further action by Congress. The lands opened for settlement were to be appraised by three Commissioners. One of the Commissioners was to be native of South Dakota, one a representative of the Indian Bureau, and the other a person holding tribal relations with the Cheyenne River Sioux.

On October 28, 1908, the Secretary of the Interior requested the Geological Survey to make the examination of the area in question in order to determine where the coal lands lay. In pursuance of this request W. R. Calvert and a party from the Geological Survey undertook to survey the area in 1909. He made the following statement:

> The mineral resources of the Standing Rock and Cheyenne River reservations are limited to a very small amount of impure lignite * * *. The lignite occurs in such thin beds and is so impure and so meager in extent that it will never be of value except for local use but it is treated in considerable

> detail because its study was the primary purpose of the investigation here reported. * * *
>
> The Lance and Fort Union formations are coal bearing in almost every region where they occur. In the area here discussed, however, they contain very little lignite but include many beds of carbonaceous shale containing lenses of lignite a few inches thick.

There were other geological reports prior to and after 1909 and they were all virtually the same. Mr. C. E. Lesher, who testified as an expert for defendant, stated that even if today's knowledge of coal conditions in the Cheyenne River Reservation had been available in 1909, it still would not have affected the value of the land which was sold as grazing and agricultural lands. In other words the land had no additional value as coal lands in 1909 and whatever value that may have accrued since then is immaterial. See Chippewa Indians of Minnesota v. United States, 87 C. Cls. 1, 36-7 (1938), affirmed 305 U. S. 479; Warm Springs Tribe of Indians v. United States, 103 C. Cls. 741, 745 (1945); Edwards v. City of Cheyenne, 114 Pac. (Wyo.) 677, 688-9 (1911).

Plaintiffs rely solely upon the presence of coal, without regard to the question of whether or not the coal had commercial value at that time. This is not enough to create liability on the part of defendant. In addition to the physical presence of coal, it must be shown that there was added value because of the coal. The plaintiffs cannot make such a showing as of 1909.

If nothing was added to the value of the land by the presence of the coal deposits, then plaintiffs were not damaged by their sale as agricultural or grazing lands and they cannot prove damages under those conditions. See Cameron Development Co. v. United States, 145 F 2d 209,

210 (C. C. A. 5, 1944) and Searle v. Lackawanna, etc. R. Co., 33 Pa. 57, 63-64.

Plaintiffs contend that defendant has misunderstood the case when it continues to treat the matter of the coal lands as a commercial enterprise as the Secretary of the Interior did. That was the only manner in which the Secretary could treat them and still comply with the will of Congress in the matter. Plaintiffs are assuming, without proof in the record, that Congress was going to reserve any coal bearing lands in the area for the Sioux Indians. There is just as much or more reason to assume that Congress was going to treat them just as it did the other coal bearing public lands and sell them at a higher price.

The crux of this case lies in the question as to whether or not the classification of the Cheyenne River Reservation lands as non-coal lands was proper under the circumstances. This question must necessarily be determined in the light of the situation as it existed then. We obviously are not free to exercise hindsight based upon the technical and commercial knowledge of today. See Fulton Trust Company of New York, Trustee v. McCormack, 257 N. Y. 132, 177 N. E. 397, 77 A.L.R. 499, 502-3 (1931).

Conditions in 1909 with regard to the mining of the type coal found in this area were unfavorable to say the least. Strip mining was done by hand or with a horse and scraper. Economical commercial mining of these isolated, undiscovered beds of lignite was not practicable at that time. The only use to which this coal could be put was as fuel for individual families.

The question of the propriety of the classification of the Cheyenne River Reservation lands as non-coal bearing carries with it the question of whether or not the whole classification system set up by the Secretary of the Interior for the purpose of carrying out the intent of Congress was a reasonable system. It must be remembered that the regulations were established for the country as a whole and not specifically for this one area. The action was made necessary by the abuses of the coal operators who were gathering large coal land holdings by purchasing them from homesteaders who, in many instances, had gone on the land for the express purpose of selling to coal companies. As a matter of public policy it became necessary to put a stop to the practice and withholding coal lands from settlement was the method adopted by Congress. The Secretary was charged with implementing the program and it was largely a discretionary matter based upon the recommendations and experience of the Geological Survey. In order to have a standard by which to determine what was to be considered coal bearing lands the classification and valuation regulations were established beginning in 1907. Under the regulations of 1909 lignite had to be 36 inches thick with an overburden of less than 500 feet. The survey by Mr. Calvert of the Geological Survey in 1909 failed to show that the lignite deposits on the Sioux land met those qualifications. The fact that even today there is no commercial mining of lignite in beds of less than 3 feet is a good indication that the regulations were reasonable. Mr. Dollarhide testified that his operations were in beds averaging 3½ to 4 feet thick and that he was still making only a "salary" from the operation. This is true despite the progress made in cutting mining costs per ton.

The action of the Secretary in applying these regulations to the land of the Cheyenne River Reservation is not to be criticized. These lands were no different than any other land in the public domain. They were being opened to settlement and had to be classified in accordance with the law. The fact that defendant was acting as trustee for the Indians in the sale of the land does not change the need for compliance with the will of Congress. So far as the treatment of the coal on these lands under commercial regulations is concerned, that is what Congress wanted done. As stated before these lands were no different in that aspect than any other public land being opened for settlement.

So far as the trustee relationship is concerned there has not been shown any violation of fiduciary duty by defendant through the actions of the Secretary of the Interior. Defendant treated these lands the same as it treated the public lands. As stated many times the trustee is not an insurer of the property of the cestui que trust. If we were to follow the theory of plaintiffs that the commercial value of the coal lands as of 1909 is not pertinent to the case insofar as liability is concerned and yet does become pertinent when the question of value is presented, we would, in effect, be holding the defendant to a trustee obligation amounting to that of an insurer. Neither the facts nor the law justify any such proposition. See Fulton Trust Company of New York, Trustee v. McCormack, Supra, and Fletcher Trust Co. v. Hines, 211 Ind. 111, 4 N. E. 2d 562, 565-6, 108 A. L. R. 930.

Just as there has been no violation of a fiduciary duty by defendant, neither has there been any serious question of a violation of fair and honorable dealings under the Indian Claims Commission Act. The Secretary

carried out his duty to dispose of the lands as ordered by Congress and since all of the lands were not disposed of and some have been returned to defendant through forfeiture, they have been restored to the Cheyenne River Sioux, along with the mineral rights in certain other lands. The plaintiffs now own through allotment or as tribal property 102,961.22 acres of the land involved in the 1908 act, or almost one-third of the total area, along with whatever portion of the lignite discovered which lies thereunder.

It seems unnecessary to explore any other phase of this case. With the determination that the Secretary of the Interior acted properly in carrying out the duties of his office and that his method of doing so was reasonable under existing conditions, the plaintiffs are not entitled to recover. In the presence of that determination the other aspects of the case become immaterial.

It is the opinion of this Commission that the petition herein should be dismissed and an order to that effect will be entered accordingly.

Edgar E. Witt
Chief Commissioner

We concur:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner