

BEFORE THE INDIAN CLAIMS COMMISSION

THE OMAHA TRIBE OF NEBRASKA, AND)
 AMOS LAMSON, CHARLES J. SPRINGER,)
 JOHN F. TURNER AND HENRY F. FREEMONT,)
 EX REL. OMAHA TRIBE OF NEBRASKA,)
 OMAHA TRIBE AND NATION, INCLUDING ALL)
 GROUPS, BANDS AND MEMBERS OF SAID)
 OMAHA TRIBE AND NATION,)
 Plaintiffs,)
 v.)
 THE UNITED STATES OF AMERICA,)
 Defendant.)

Docket No. 225-C

Decided: December 27, 1957

Appearances:

I. S. Weissbrodt, with whom
 were David Cobb and Abe W.
 Weissbrodt, Attorneys for
 Plaintiffs.

I. H. Fredricks, 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.

Pursuant to the Commission's order of October 6, 1953 in the above-captioned matter, the plaintiffs filed an amended three-count complaint, the first two counts forming the principal subject of this opinion.

To this amended complaint the defendant filed a motion to dismiss in which it challenges the sufficiency of the pleadings as stating a

cause of action upon which relief can be granted, as well as raising the affirmative defense of res judicata to the allegations contained in Count II.

Thus, the questions to be decided are, first: do the allegations in Count I contain facts which, if taken as true and giving to the plaintiffs the benefit of all reasonable inferences drawn therefrom, state a cause of action entitling them to recover under the provisions of the Indian Claims Commission Act; and secondly, if the plea of res judicata does not bar prosecution of the claim presented in Count II, do the allegations therein state a cause of action entitling the plaintiffs to recover under the same principles applicable to the allegations in Count I?

COUNT I

Count I substantially embodies a broad claim covering alleged acts of trespass committed upon the tribal lands of the plaintiffs. While it is not too clear from the pleadings, it would appear that plaintiffs are resting their claims in Count I upon the tortious conduct of two distinct types of trespassers; that is, the individual trespasser acting in his own behalf, as contrasted with the trespasser who at the time may be acting as an agent of the Government, or whose relationship in some manner indicates governmental consent or participation in the tortious conduct. For the purposes of this discussion, acts of individual trespassers shall be considered in treating those claims resting upon "breach of defendant's obligations to plaintiff as trustee, fiduciary, and guardian, and in contravention of standards of fair and honorable dealing." Those claims

alleging acts of trespass "committed with the knowledge and consent and participation of the defendant and its agents. . ." shall be treated and disposed of in a different manner as affected by the motion filed herein.

It is alleged that from time immemorial and at all times specified in the complaint, the plaintiffs owned and were in exclusive possession of certain described lands west of the Missouri River and located in the present State of Nebraska; that, commencing in or about the year 1840, white settlers, miners, United States troops and other persons committed various acts of trespass upon plaintiffs' tribal lands, unlawfully carrying away and using the timber, mineral, grass, water, and other products contained thereon, and that said trespassers destroyed the aforementioned products and property to the great damage of the plaintiffs. It is alleged further that by virtue of the existence of specified treaties between the plaintiffs and the defendant, "the defendant undertook at all relevant times mentioned herein to protect the interests of the plaintiffs in their lands and other tribal property as trustee, fiduciary, and guardian." Plaintiffs state further that the aforementioned acts of trespass "were committed with the knowledge and consent and participation of the defendant and its agents"; that the defendant and its agents failed "to protect the plaintiffs from said unlawful trespasses," and failed to compensate and obtain compensation for the plaintiffs, for the use and destruction of the plaintiffs' land and property, which acts and omissions "were in breach of law and equity, in breach of defendant's obligations to plaintiff as trustee, fiduciary and guardian and in contravention of standards of fair and honorable dealing."

It should be noted from the outset that the allegations in Count I do not point to any specific language in a treaty spelling out the contractual obligation and duty which plaintiffs desire to impose upon the defendant. Furthermore, when read in context with the other grounds for recovery advanced by plaintiffs, a recovery founded upon a "breach of law and equity" falls within clause (1) of section 2 of the Indian Claims Commission Act, and calls for a legal or equitable claim arising from a breach of a contractual obligation found in a specific treaty provision.^{1/} Failure to allege the existence of any such treaty provision in Count I disposes of plaintiffs' contention that defendant's acts and omissions "were in breach of law and equity."

Plaintiffs' second contention that defendant's acts and omissions were "in breach of defendant's obligations to plaintiff as a trustee, fiduciary and guardian," poses a more difficult question.

As indicated previously, the plaintiffs point to several treaties as the source of the fiduciary guardian-ward relationship and of the alleged duty imposed upon the United States as trustee. Two of the cited treaties between the parties are peace treaties in which the supremacy of the United States is acknowledged and in which the Omahas are placed under the sole protection of the United States.^{2/} In the case of Kansas Indians

^{1/} 25 U.S.C.A. 70(a). "(1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President;"

^{2/} i.e. - Treaty of July 20, 1815 (7 Stat. 129)

"Art. 3. The undersigned chiefs and warriors, for themselves and their said tribe or nation, do hereby acknowledge themselves and their tribe or nation to be under the protection of the United States, and of no other nation, power, or sovereign, whatsoever."

80 C. Cls. 264, the court rejected the Indians' contention that a guardian-ward relationship was created by virtue of the language in Article 3 of the Treaty of October 28, 1815 by which the United States acknowledged the Kansas Indians "to be under the protection of the United States of America, and no other nation, power, or sovereign whatsoever;" in the following manner:

The purpose and effect of the treaty were to place the contracting parties upon the same footing in every respect upon which they stood before the war with Great Britain. No contention is made that the relationship of guardian and ward existed between them before the war. Certainly this relationship could not be created by a treaty that merely re-established their preexisting political status. The contention that this was the effect of article 3 of the treaty is without merit.

At most these treaties recognize an existing relationship between a dependent Indian tribe and a superior political entity, a dependent status which the Omahas have experienced from the time they were subject to British rule, and which status has remained unchanged since the United States wrested control from the English. ^{3/} The other treaties cited are land cession treaties, devoid of any suggestion of governmental protection, either expressed or implied, the language of which under the most strained construction could not impose the fiduciary duty contended by the plaintiffs. ^{4/}

Recent language from the Court of Claims in the case of Gila River-Pima-Maricopa Indian Com. v. United States, 140 F. Supp. 776, has thrown

^{3/} See Worcester v. Georgia, 6 Peters 652, 8 L. Ed. 554

^{4/} Osage Nation of Indians v. United States - (Docket No. 9)
1 Ind. Cls. Comm. 43

considerable doubt upon the existence of any fiduciary relationship imposing ordinary legal obligations which is not founded upon some language in a treaty, statute, or executive action. In that case the court stated:

Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order, or statute under which the claim presented arises. It is true, that the word 'fiduciary' and the expression 'guardian-ward relationship' have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement, or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and Government is 'similar to' or 'resembles' such legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians. (See also *Sioux v. United States*, 136 C. Cls. _____, decided November 7, 1956, page 11 of slip opinion, appeal No. 3-55).

While the court recognized that a claim for breach of such a fiduciary relationship may be brought under the provisions of the Indian Claims Commission Act, it in no way intimated that the act itself created or acknowledged the existence of such fiduciary relationship as a matter of law. An examination of the legislative history of the act shows that the United States is not to be considered in the role of an ordinary fiduciary whenever a legal claim is filed before the Commission, but whether the United States is or is not acting as a fiduciary must be

determined under the facts in each particular case. 5/

Thus, to sustain the sufficiency of the pleadings in the instant case under a motion to dismiss the plaintiffs are required to plead facts establishing the existence of such fiduciary relationship, the concomitant trustee's duty, and the breach of that duty resulting in damage to the plaintiffs.

Going back and analyzing with care the allegations contained in Count I in light of the legal principles discussed, it is evident that plaintiffs have failed to allege facts establishing the essential fiduciary relationship. The Commission can not speculate or surmise what facts are needed to support the legal conclusion which plaintiffs have asserted. Nor can the Commission delay proper action under a motion attacking the sufficiency of the pleadings by permitting the plaintiffs at a later date to supply missing links. What plaintiffs have alleged from a fair reading of the language contained in paragraph 7 of the complaint sets out nothing more than a conclusion of law without supporting facts. A conclusion of law standing alone need not be taken as true nor does it admit the allegations of the complaint under a motion.

5/ Senate Report No. 1751, July 15, 1946, at page 6.

4. United States as fiduciary

The sentence beginning in line 7, page 3, that the United States shall be treated as an ordinary fiduciary, has been stricken in the committee amendments because it seemed that the Commission should be permitted to determine according to the usual principles of law whether the Government was a fiduciary in the particular case involved, and if so what fiduciary duties were imposed upon it.

to dismiss for failure to state a cause of action. ^{6/}

Failure to plead sufficient facts is also fatal to plaintiffs' further contention that defendant's "acts and neglects to act . . . were in contravention of standards of fair and honorable dealing." Recovery upon this theory presupposes the existence of a moral obligation upon the defendant to compensate the plaintiffs for damages resulting from acts of trespass committed by strangers upon their tribal lands. But the pleadings have not demonstrated factually the manner in which the United States assumed the moral obligation of indemnifying the plaintiffs for the wrongs alleged, nor can such indemnification be implied from the language in the treaties cited by plaintiffs. ^{7/} As previously indicated, these treaties did no more than acknowledge the preexisting status of the parties, the existence of a dependent Indian tribe and a superior government of the United States.

^{6/} The Creek Nation v. United States - 92 C. Cls. 346, 351

While the demurrer admits all the allegations of the petition that are well pleaded, it does not admit allegations which are legal conclusions.

^{7/} Petitioners have unintentionally spotlighted the weakness and insufficiency of their pleadings on this point when they state at page 3 in their memorandum of points and authorities in opposition to defendant's motion as follows:

In the first place, even assuming arguendo that the proposition of law asserted by defendant is correct there is no evidence before the Commission as to the agreements, acts of defendant and the surrounding facts upon which plaintiffs rely to impose liability on the United States. It remains to be determined, after hearing and on the evidence, whether an agreement on the part of the United States can be proved.

Perhaps at trial the plaintiffs could produce some evidence, such as a collateral agreement, an affirmative act, or some other circumstance or fact which would develop a moral claim in favor of plaintiffs, and show that the defendant acted in less than a fair and honorable way. However, this is the pleading stage, and the Commission must consider and decide this motion upon what the facts, as pleaded, will properly admit and reasonably infer. ^{8/}

However, what has been said above falls only upon those claims seeking recovery for those acts of trespass committed by third persons which are grounded on breach of a fiduciary relationship and in contravention of standards of fair and honorable dealing. Petitioners have asserted acts of trespass committed "with the knowledge, consent and participation of defendant and its agents." There is also an allegation that the United States troops trespassed upon plaintiffs' tribal lands. It is not indicated in what capacity these troops were on the lands or that they were not legally acting within the scope or orbit of their duties. In any event, clause 2 of section 2 of the Indian Claims Commission Act permits recovery on claims "sounding in tort with respect to which the claimant would have been entitled to sue in a court of the United States if the United States were subject to suit." Furthermore, there is precedent to uphold the sufficiency of plaintiffs' pleading in this cause of action. Plaintiffs

^{8/} As the Court of Claims said in the case of The Snake or Piute Indians v. United States, 125 C. Cls. 241, 255 -

That something or someone is or is not fair or honorable is always a conclusion or an inference based upon many factual considerations.

have properly called attention to the case of Shoshone Tribe of the Wind River Reservation v. United States (Docket No. 157), 3 Ind. Cls. Comm. 380, in which case the claimants alleged acts of trespass upon the Shoshone Reservation committed with "the active participation of the United States in protecting said trespassing miners in their operations." Passing upon the sufficiency of the pleading as stating a claim upon which relief could be granted the Commission concluded in its opinion, page 385:

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.

It is concluded therefore that defendant's motion to dismiss Count I of the complaint for reasons that "the said count wholly fails to state a cause of action against the Defendant and in favor of the Plaintiff" should be granted in part and denied in part. It should be granted as to those claims seeking recovery for damages resulting from the tortious conduct of third persons who are strangers and the motion should be denied as to those claims seeking recovery against the defendant for trespasses committed with the participation of the defendant and its agents, but as to the latter trespasses the petition should be made definite by setting forth the facts relating to the defendant's activities bearing upon such matters.

COUNT II

As to Count II, plaintiffs seek to recover compensation from the defendant for damages and losses sustained by the plaintiffs through depredations committed upon their reservation by hostile Sioux Indians. It is alleged that in 1855 and in subsequent years the Sioux Indians conducted a series of incursions into plaintiffs' reservation, killing many members of the Omaha Tribe, stealing their horses, and destroying their property. According to the plaintiffs, liability of the defendant for the above tortious acts attaches primarily by virtue of the provisions of Article 7 of the Treaty of March 16, 1854 (10 Stat. 1043) between the Omaha Tribe and the United States which reads as follows:

...Should the Omahas determine to make their permanent home north of the due west line named in the first article, the United States agree to protect them from the Sioux and all other hostile tribes as long as the President may deem such protection necessary; and if other lands be assigned them, the same protection is guaranteed.

Plaintiffs plead that the failure of the United States to protect adequately the lands and interests of the Omahas against the depredations of the hostile Sioux was a breach of the defendant's obligation under Article 7 of the aforesaid treaty; a breach of defendant's fiduciary obligations as trustee and guardian; and, in contravention of standards required by fair and honorable dealing. ^{9/}

To the allegations contained in Count II, the defendant raises the primary defense of res judicata, grounded on the decisions in the prior cases of The Omaha Tribe of Indians v. United States, 53 C. Cls. 549, decided June 10, 1918, and United States v. Omaha Tribe of Indians, 253 U. S. 275, decided June 1, 1920. In addition, the defendant contends that the claims asserted are individual and not tribal, and do not state a cause of action upon which relief can be granted.

By virtue of the special jurisdictional act of June 22, 1910 (36 Stat. 1043) the Omaha Indians were permitted to bring suit against the United States in the Court of Claims, in order that the court might adjudicate among other claims,

... all claims of whatsoever nature which the Omaha Tribe of Indians may have or claim to have against the United States
 ... under the Treaty between the United States and the said tribe of Indians, ratified and affirmed March sixteenth, eighteen hundred and fifty four.

Accordingly, suit was filed and of the claims pressed against the United States, one called for compensation for damages sustained by the Omaha due to a series of hostile attacks by the Sioux upon the Omaha reservation in which some 22 Omahas were slain and 152 horses stolen. At the conclusion of all the evidence the court entered a finding in favor of the Omaha in the amount of \$4,560, being the full value of the horses at \$30 per head. ^{10/} In awarding judgment on this claim the court used the following language:

^{10/} The Court of Claims made no finding as to the value to the tribe of the lives of the 22 Omahas who were slain.

The amounts found to be due the Indians in the fifth ... finding(s) are supported by the evidence, and are allowed under the provisions of the treaty of March 16, 1854. (Underscoring ours).

On appeal to the Supreme Court the above claim was disallowed by the court for the following reasons:

As to the item of \$4,560 allowed as the value of horses killed by the Sioux Indians, we conclude that the objection of the government is well founded. The obligation of the treaty was to protect the Omahas from the Sioux and other hostile tribes 'as long as the President may deem such protection necessary.' The obligation depended upon an exercise of discretion by the President. There is no finding of a failure to provide any protection deemed by the President to be necessary; hence nothing to create a liability, legal or equitable under the treaty clause.

The court also indicated in additional language that the claim for the value of the dead Indians must likewise fail by what was said concerning the award for the stolen horses; namely, the same treaty provision governs both claims.

It is not denied that the parties in the pending controversy before this Commission are the same parties which litigate in the two former cases. The more difficult conclusion to reach after careful considerations is that the present claims and all the pertinent issues involved herein have been fully litigated and finally adjudicated on the merits in those prior cases. This conclusion seems inescapable and for the following reasons.

It is well settled that a jurisdictional act such as the one under which the earlier Omaha suit was instituted in the Court of Claims, confers upon that court a precise and limited jurisdiction to pass upon only those issues properly presented, which limitation in the Act of June 22,

1910 and for our purposes was as follows:

That all claims of whatsoever nature which the Omaha tribe of Indians may have or claim to have against the United States due said tribe from the United States under the treaty between United States and the said tribe of Indians, ratified and affirmed March 16, 1854,; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all legal and equitable claims, if any, of said Omaha tribe of Indians against the United States,

Thus, while the act creates no new cause of action in favor of the Omahas, it provides the forum in which all pertinent issues must be presented and fully litigated. The Omaha presented all their claims, both legal and equitable, arising under the Treaty of March 16, 1854, including a claim for compensation for loss of Omaha lives and horses through the depredations of the hostile Sioux. The Court of Claims recognized the claim as one properly before the court under the jurisdictional act, and one arising out of the obligations imposed by a treaty. Accordingly, it rendered judgment.

On appeal, the Supreme Court correctly acknowledged the jurisdiction of the Court of Claims to adjudicate this claim as an obligation arising out of a treaty, but denied recovery on the basis that there was no finding of a failure to provide the Omahas the adequate protection deemed necessary by the President. Consequently, the claim ultimately failed for lack of proof, a factual shortcoming, and not for a legal or jurisdictional deficiency. To permit this claim to be relitigated on the facts alleged as a breach of a specific treaty obligation under the provisions of clause (1) of section 2 of the Indian Claims Commission Act would do violence to the principle of res judicata.

Plaintiffs seek to escape the effect of the doctrine upon their present claim by asserting a new cause of action grounded first upon "breach of defendant's obligation to plaintiffs as a trustee, fiduciary and guardian," and further on "contravention of standards required by fair and honorable dealings." It argues in support thereof:

Claims rested on these grounds were neither asserted nor tried in the prior litigation, and the Court in the prior litigation did not have jurisdiction over claims rested on this ground; whereas, jurisdiction of claims rested on such ground has been conferred on this Commission.

It is not clear from the pleadings under which of the five jurisdictional grounds of section 2 of the Act of August 13, 1946, the plaintiffs are asking the Commission to entertain a claim based solely upon a breach of a fiduciary relationship. It would probably fall within the language of clause (2) which reads as follows:

(2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit.

In any event, the claim is asserted as one distinct from a specific treaty obligation, and founded upon a fiduciary relationship presumed to exist because there happens to be a superior government and a dependent Indian tribe, which status has been acknowledged in the several treaties previously cited by the plaintiffs. What has been said as to the existence of such fiduciary relationship in dealing with the allegations of Count I is likewise apropos to those of Count II. However, further treatment of this position is required in view of the present defense of res judicata.

While the Court of Claims has entertained serious doubt as to the existence of any such fiduciary relationship in the absence of express

language in a treaty, statute, or Executive order, the Commission under its jurisdictional act may entertain such claim. However, even under the Commission's liberal rules of pleading, the plaintiffs have failed to allege any additional facts in support of a distinct claim founded upon a breach of a fiduciary obligation. Indeed the facts as alleged are substantially identical with those which supported a prior suit in the Court of Claims based upon a breach of a specific treaty obligation, and which claim was recognized as properly before the court and adjudicated on its merits as a claim arising under a treaty by both the Court of Claims and the Supreme Court.

The same reasoning and legal principles apply to plaintiffs' final contention that their prior claim can be grounded on "contravention of standards, required by fair and honorable dealings." Such a claim calls for the enforcement of nothing more than a moral obligation not recognized under any existing rule of law or equity. Clause (5) of section 2 of the Indian Claims Commission Act does not supply a claimant with a new theory under which he may prosecute a perfectly valid legal or equitable claim. The Court of Claims has made this position abundantly clear in the case of the Blackfeet and Gros Ventre Tribe v. United States, 127 C. Cls. 807, where in unmistakable language it stated:

The contention is without merit. Clause (5) has reference to moral claims which were not recognized by any rule of law or equity. If a tribe was not entitled to recover under any rule of law or equity, it still might recover under clause (5); but if its claim was recognized by a rule of law or equity, then clause (5) has no application.

And in a prior case, Western Cherokee v. United States, 116 C. Cls. 665, which was an appeal from a judgment of this Commission dismissing a

petition for additional interest on a claim previously determined by that court,-- it was there contended before us and the Court of Claims that there could have been no determination on the merits in the former cases because the fair and honorable dealings clause was not in existence at the time of the former decisions and that clause permits a reconsideration of the interest question by this Commission. In overruling these contentions, the court said at page 677:

* * * In addition, we think it is clear from the history of the Act of 1946 that Congress did not intend to confer upon the Commission jurisdiction to permit claims, such as are here involved, to be re-litigated under clause (5) of Section 2 on the basis of fair and honorable dealings. Clause (5) obviously has reference to the fundamental character of the claim rather than to the theory on which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission.

And at page 678 added:

* * * If the claims made by appellants in these cases could be again heard and determined by the Indian Claims Commission, it would be difficult to imagine a claim, even though previously considered and decided on the merits by this court, which could not be relitigated before the Commission merely by basing the claimed right of recovery on the provision of clause (5), supra. Clause (5) was intended, as its language clearly shows, when considered in the light of its history and other provisions of Section 2, to cover only moral claims based on justice and fair dealings or broad principles of equity and justice, with respect to which no court had theretofore made a determination on the merits, or could have made such a determination under the terms of prior jurisdictional acts.

Plaintiffs' present claim under the facts alleged falls squarely within proscription of the rule enunciated above. Its claim is not only one previously recognized by a rule of law or equity, but one that has been adjudicated on its merits by a court having jurisdiction to hear and render final judgment.

Therefore it is concluded that under the facts and circumstances as alleged, the defense of res judicata must prevail, and in view of this disposition of the allegations of Count II, defendant's other contentions in support of its motion need not be discussed.

COUNT III

Count III is a demand for an accounting involving numerous transactions. We are given to understand a general accounting will, when completed, be made available to the plaintiffs. Such a report will, no doubt, require plaintiffs to make a more definite statement of their accounting claim and perhaps require a separation thereof from the petition. In the circumstances we believe the motion insofar as it applies to the third count should be overruled but the defendant may have the right to interpose a similar motion at any later stage of the proceedings which may involve an accounting.

Louis J. O'Marr
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner