

BEFORE THE INDIAN CLAIMS COMMISSION

THE FORT BELKNAP INDIAN COMMUNITY,)
sometimes referred to as the Gros)
Ventre Tribe and Assiniboine Tribe)
of Fort Belknap Indians,)

Petitioner,)

v.)

Docket No. 250

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: November 20, 1962

Appearances:

Stanford Clinton, with whom
was associated Arthur J. Lazarus, Jr.,
Attorneys for Petitioner.

William D. McFarlane, with whom was
Mr. Assistant Attorney General
Ramsey Clark,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Scott, Associate Commissioner, delivered the opinion of the
Commission.

The petitioner, The Fort Belknap Indian Community, sometimes
referred to as The Gros Ventre Tribe and Assiniboine Tribe of Fort
Belknap Indians, filed its petition in this action on August 9, 1951,
and amendments to that petition on October 6, 1953 and February 2, 1954.

The petitioner generally claims that the United States acted as
guardian and trustee of the property and affairs of the petitioner,
that it had exclusive management and control of petitioner's property,
and exclusive possession and control of all monies of the petitioner

on deposit in the United States Treasury, and exclusive custody of all books of accounts relating to transactions concerning petitioner, and prays judgment for compensation under the Fifth Amendment and for such other and further relief as may be equitable and in conformance with standards of fair and honorable dealings for the following:

1. For the value of timber, grass and water rights alleged to have been conveyed in 1896.
2. For land taken by erroneous survey of the east boundary of the reservation.
3. For land taken by erroneous survey of land relinquished by agreement dated October 9, 1895, accepted by Act of June 10, 1896.
4. Mismanagement of tribal herd and wasteful and improper use of tribal trust funds as well as an accounting for construction of a fence.
5. For unlawful expenditure of trust funds for payment of non-tribal horses destroyed in extinction of dourine epidemic.
6. Use of tribal funds to reimburse the defendant for expenditures on irrigation systems.

A seventh claim has been severed from this claim and assigned Docket No. 250-A, its merits to be determined after disposition by the Commission of the six claims made herein.

The defendant in reply contends that the petitioner, in its amended petition, has failed to state a compensable claim, that the matters at issue are res adjudicata by reason of decisions of the United States Court of Claims (Assiniboine Indian Tribe v. United States, 77 C. Cls.

347, certiorari denied 292 U.S. 606; and The Blackfeet, et al v. United States, 81 C. Cls. 101).

Defendant, in its answer, admits that it has exclusive custody and control of certain books of account and records relating to certain transactions concerning the petitioner, but denies it is or ever has been the guardian of and trustee for petitioner, or that it has or that it has ever had exclusive management, possession and control of all of petitioner's money and property, but rather has had supervision and control of only certain property and affairs of petitioner pursuant to certain acts of Congress, the Constitution and certain treaties and agreements entered into between petitioner and defendant.

The allegations of the petitioner and defenses of the defendant as to the First Claim through the Sixth Claim are subsequently dealt with individually and at length.

FIRST CLAIM

The petitioner, in this portion of the claim, asks "for the value of timber, grass and water rights denied petitioner since 1896," and defendant designates it as "for the value of timber, grass and water rights conveyed in 1896."

The petitioner would have the Commission find that the defendant appointed certain Commissioners to negotiate with the petitioner in order to obtain consent to opening the Fort Belknap Reservation to prospecting, development and exploitation for minerals; that the defendant had, prior to the negotiations, caused a mineral survey to be

made of the area which indicated the presence of mineral-bearing ores; that the Fort Belknap Indians would, within two years, reach the end of payments due them under a prior agreement; that the Commissioners, in bargaining with the petitioner, held an advantage in that the Indians were not only illiterate and unable to hold their own in bargaining, but they were uninformed as to the value of the tract; that a number of the members of petitioner tribe stated that they would consent to sell minerals or particular mines, but that they would not consent to sell any grass, trees or water; that the Agreement of October 9, 1895, was executed by a small majority of the Indians present with the understanding that no grass, timber or water rights were conveyed; that the agreement did not contain such reservation and, as a result, valuable stands of timber, grass lands and water rights were lost to the petitioner, and their use denied by the defendant.

Defendant contends that the Commission does not have jurisdiction to consider such claims, since they were contained in amendments to the original claim, filed more than two and a half years after the closing date for the filing of claims under Sec. 12 of the Indian Claims Commission Act.

By order of the Commission, dated February 23, 1954, petitioner was permitted to amend its petition to delete the original statement of the First Claim and insert the present wording.

Accordingly, the Commission has proceeded to consider the merits of the petitioner's First Claim as set forth in the Amended Petition.

As to the First Claim, as amended, the defendant contends that the agreement in question was executed after a full hearing by a majority of both tribes; that it was understood by both parties that the land to be ceded was comprised of approximately 40,000 acres, and that the consideration was to be \$360,000 or \$9.00 per acre; that the testimony of the Indians contained numerous statements indicating that the Indians were fully aware of the nature of the area and of the presence of mines and miners on the lands to be conveyed; that the agreement was fully explained to the Indians, and that their imminent need for additional funds would be accommodated by the signing of the treaty; that when an accurate survey of the tract was made, it was found to contain 14,758 acres so that the petitioner received more than \$24.00 per acre for land which sold under mineral land laws at not more than \$10.00 per acre.

The Commission has found that the evidence does not establish that there was any understanding or agreement between the parties that the timber, grass and water rights would be reserved from the ceded area; that a majority indicated willingness to sell; that petitioner was adequately compensated for both mineral and surface rights; that there was little marketable timber on the land, and little or no land suitable for grazing; and the principal water sources were in the area surrounding the ceded area which was retained within the Fort Belknap Community Reservation.

The evidence established that an opportunity was given members of the tribes to accompany the Commissioners on an inspection of the area, and that they did so; that the Commissioners in the Council stated:

This land which some of you are ready to sell is not used by anybody . . . There is no timber there; there is no grass there; there is no place that you could plow and sow oats or wheat; you can grow nothing there. As we said before, we don't want you to part with any of your grass lands; we don't want you to sell any of your timber lands; and we want you to keep it so that you will have all the water that you need. . . .

Another Commissioner who had visited the proposed cession stated:

There is no timber in there and no grass. It is a little small strip of land where nothing grows, where there is nothing but rock, where there is no game so far as I could see and I could see no water on it . . . (Pet. Ex. 7, Def. Ex. 9)

In the instructions from the Secretary of the Interior to the three Commissioners, Pollock, Grinnell and Clements, the following appears:

One object in making the crest of the Little Rocky mountain range the south boundary of the reservation was that the Indians could have the benefit of the timber and building stone abounding in the mountains, which would be greatly needed by them in building houses and otherwise improving their homes.

Another important object was the control of the waters of the streams having their source in these mountains for much needed irrigation and domestic purposes.

These matters should receive your careful consideration, lest irreparable damage may be done the Indians by depriving them of these important benefits, - vital it may be to their very existence. A thorough study of the situation will enable you to determine how best to protect them in the continued enjoyment of these natural resources. Should the Indians be willing to cede and relinquish the mountain region, a sufficient area of timber and stone bearing land might be retained to meet their future wants. (Pet. Ex. 5, p. 4)

* * *

The sale of such portions of their respective reservations in the localities indicated, as are not needed for their future occupancy and support, and a wise investment or expenditure of

the proceeds, will doubtless be to their great advantage, but the Indians should be left free to decide the matter for themselves without undue pressure from any quarter. The terms and conditions of the sale should be just and equitable to the Indians as well as to the United States.

Any agreements you may make must be signed by at least a majority of all the male adult Indians occupying said reservations, respectively, and will be "subject to action by Congress" before taking effect in any part thereof. This, of course, you will make clear to the Indians, to the end that there may be no misunderstanding.

Care should be taken in the selection of interpreters in order to secure proper and exact interpretation of all that passes between you and the Indians. (Pet. Ex. 5, p. 8)

The proceedings of the council contain the statements of numerous Indians of both tribes, many indicating definite unwillingness to sell any part of the lands. However, there also appear numerous statements indicating a reluctant willingness to sell a portion:

Little Chief (Assinnaboine): I have something to say to you and I am not ashamed to say it. I am glad to see you here. There are many bad men among these people, but I am not one of them. I am willing to go the way you advise. I am a poor man, and when you come here and support me for a few more years, I am glad of it. You have come out here to buy the mine, but I don't like to sell any other portion of the land, but I am willing to sell that mine. I would like to have a ten-year treaty again, and by that time the generation to come might be able to support themselves alone. First of all things I would like to have some cattle, as that is the true factor to live with. And next to cattle I would like to have some implements the same as you people use. As you stated, I would not like to sell any of the forest, grass or water, but I would like to see the future generation live upon that, if possible. You see me here before you and you can see that I am weak, and not strong. You see me stand here, weak, and I cannot dig that mine, but your race can, and I would like to make a ten-year treaty with you.

Wetan (Assiniboine): When I see the Commissioners come out here to buy a portion of the land, I generally agree with them. I always look to the future and see how my children are going to live. I would like to receive a

ten-year treaty for this land. I can't count money, but I would like to have a ten-year treaty and furnish us with some cattle that we can raise. I would like to have a little more mowing machines; there are some in the warehouse, but it is a hard time to get them out. I would like to buy some mowing machines if I had the money.

Medicine Bear (Assinnaboine): I am a poor man and I will listen to what you say. I always think about living. If I was thinking of dying I would have been dead long ago. I like to eat and that is why I am living. Ever since I was born I have been accustomed to no privations, and that is the way I like to live. That is the reason the Great Father has sent you Commissioners out here. When I see you out here I see that I can live yet, and that I am going to have some more meat yet. The only thing that I am living for now is eating. Ever since I have been living there hasn't been a day but what I have had something to eat all this time. It makes me feel good when I hear a man talking about that I can live yet. I am living now and I have a hard time, and when I think that the Great Father thinks of me, and the children taken away to the Eastern schools. I don't want no big fence on the Reservation. You see these Indians around here, they are very few, but when you come out here with the intention of making a treaty with them so they will live, they feel good over it. I am not willing to give you the wood, nor the grass, nor the water, but only those rocks lying around the mines, and don't shut off the water. If you don't touch those things the people might live a little while yet. I am not strong, but if you agree to what I ask, these people around here will live. I would like to have a ten-year treaty again.

No. Bear (Gros Ventre): You Commissioners have come a long ways to get a small portion of my land, and I am willing to sell it; I want some more cattle for it. I am not willing to sell the timber, nor the grass, nor the water, but I would like to get cattle for that mine. That is all I have to say.

Long Knife (Assinnaboine) . . . I would like to have a ten-year treaty with the Government. I want to receive many things from the Government so that I won't suffer anything. I am very poor, - I am very poor, and that is the reason I am so thankful to see you come out here to make a treaty with us. I am not willing to sell the forest, nor the water, nor any of the things that you mention, - that is the grass, wood and other things, but I am willing to sell that mine. I would like to see you work it to your benefit.

Eyes in the Water (Assinnaboine) . . . You come out here with the intention of buying the mine and I am willing to give it to you, but not over a mile wide. I don't know how to count money, but I would like to make a ten-year treaty, so that by that time I might have a couple of children raised. You see these people around here (Assinnaboines) are all of the same mind, to sell. I don't know whether you will fool me or not, but that is what I have been thinking of, - whether you will fool me. I ask for a ten-year treaty, but you can get more money out of that mine than a ten-year treaty will be. I would like to raise my children and that is the reason I say that . . .

Bad Dog (Assinnaboine) . . . You ask for that mine, and I am willing to give it, but I don't want you to touch any of the rocks, or grass, or water, - that is what I will depend upon. I want cattle. I mean everything that I say . . .

Black Bull (Assinnaboine) . . . These chiefs have agreed to give you the mine, and I am willing to give it also. If you make any agreements with us, I don't want you to fool us. These chiefs are asking for a ten-year treaty, and I would like to carry it out . . .

Three White Cows (Gros Ventre) . . . My people here, these Gros Ventres, say that they are willing to let a portion of the Reservation go, a little on the other side of the saw mill, - a strip through there. I want you to help me . . .

Bear Shirt (Gros Ventre): I am glad that you come here to make me live good. I am willing to let a part of the Reservation go, but I am not willing to sell the timber nor the grass nor the water . . .

Bull Elk (Gros Ventre): I come here to see you to tell you that I am willing to sell a portion of the Reservation, but I am going to have some of the Indians to go out, and we want to know exactly how big a portion of the land you want. Eating is the only thing that makes people live and if I don't eat I will not live. I am not willing to sell the timber nor the grass nor the water, but just that little strip of land there where the mines are.

Ragged Robe (Gros Ventre): I am willing to sell a portion of the Reservation, but he is not willing to sell the timber nor the grass nor the water. That is all I can say.

Bull's Head (Gros Ventre): All I am willing to sell is that strip of land where the mines are; I would

like to get mines for it. I am not willing to sell the timber nor the grass nor the water.

Head Dress (Gros Ventre): I like cattle and I think that is the only thing that will make my children live. I am willing to sell that little portion of land where the mines are, and I want to get cattle for it.

Narrow Man, or Deafy (Gros Ventre): I am willing to sell that portion of the Reservation where the mines are.

Black Wolf No. 2 (Gros Ventre): I am not willing to sell the timber nor the waters nor the grass, but I would like to get lots of cattle. I would like to make a treaty for ten more years. That is all.

Go to War (Gros Ventre): A little over the other side of the saw mill, I am willing to let that portion of the Reservation go; I am willing to sell that. I would like to get cattle for it so that my children can live . . .

Jerry Running Fisher (Gros Ventre): I would like to see you men go home happy. We are willing to sell part of the Reservation. All the old people and these people that have good sense are willing to let the Reservation go, but them young fellows are like children playing; they don't know what they are talking about. I would like to have you give me a beef or two in the tribe so they can have a little time. We are willing to sell the reservation.

Otter Robe (Gros Ventre): When I went back East to Washington and saw the Commissioner there, the Commissioner told me that this Reservation belonged to me, and I could do as I liked with it, and now I am willing to sell that portion of the Reservation, and I would like to get lots of cattle for it, and I would like to make a treaty for about ten years more. I am not willing to sell the timber, nor the waters nor the grass. That ends the council.

Return to War (Gros Ventre): I am willing to let that portion of the Reservation go. I am willing to let that strip of land go, but not on this side. You will have to make the agreement first how much land you want, and how much the Indians are willing to let go.

Turns Toe (Gros Ventre): I am willing to let the part of the Reservation go.

Eagle Child (Gros Ventre): I am very glad to see you men here come to buy that small piece of land, and I am willing to let it go, and I would like to get cattle for it.

The Bull Easily Killed (Gros Ventre): I am willing to let that strip of land go. All I want is cattle for it.
(Pet. Ex. 7, p. 2-8 - 2-26)

Concluding the Council for October 7th, Commissioner Grinnell

addressed the Indians as follows:

Now, we have listened to all that you people have had to say, and have been glad to hear everything that each man has said. After listening to all that you have said, we feel sure that most of the people want to sell, - some of them do not. Most of you can see clearly; some are blind yet. I hope by and bye you can all see clearly. One thing we like, - that is, what you said about the land, that you didn't want to sell the grass, nor the timber, nor the water. Another thing is good; you all say, - all of you who want to sell, - that you want to begin a little on that side of the saw mill just a little strip; that is good.

Before we talked to you at all, we went down south there to see this country, to find out what you could sell without selling any grass or timber, and so that you might all understand what we had been doing down there, we took with us some men from each tribe. They went with us and they know the land we looked at, and I told the interpreters to tell them just where we run the line. They can tell you what the land was that we looked at. These men were Nosey, and Black Bull and Seven Persons, and Sleeping Bear and The Capture. The Capture was with us only one day, I think; the other men were with us both days. Maybe there were some others, but I don't remember their names.

The strip of land we talked about lies North of the South boundary of the Reservation and East of the high ridge that is East of the mill, and South of that ridge that is on the North side of the North Fork of People's Creek. There is no timber in there and no grass. It is a little small strip of land where nothing grows, where there is nothing but rock, where there is no game so far as I could see, and I could see no water on it. These men can tell you what it is. You people don't use it for anything; it is no good to you. It is good only for what there is under the ground there. Some people think that there is mineral there, but nobody knows very much about it.

Now, if there are any of you that do not understand that want to ask any questions, let them ask them, and we will try to answer. (Pet. Ex. 7, p. 2-26 - 2-27)

On October 8, Council convened and Commissioner Pollock said:

My friends, we had a long talk yesterday. From that talk we believe that the most of you are willing to make an agreement to sell that mineral land. There were some who were not then ready; I don't know whether they are now willing or not, but if more than half of you are willing to sell it, and we can agree on the terms, it will be a bargain anyhow, whether all agree to it or not. As long as it was in doubt whether more than half of you would be willing to sell, we thought it best to say nothing about the price or terms; we think it is now time to begin talking about that.

* * *

When you made the former agreement you sold a great big quantity of land, - more than you have now in the Reservation, perhaps. For that the Government agreed to pay you a good big price, to be spent so much every year. The land you now have to sell, - the land that we think you can spare, is a very small piece compared to what you sold before. It must be plain to you that you cannot expect to get for this little piece of land as much as you got for that large body . . .

(Pet. Ex. 7, p. 2-28)

During the council which followed the statements made by the Indians for and against sale -- and in all of them the phraseology used is the "land," the "mineral land," and in none of them was a reference made to selling only the minerals and reserving any portion or use in the land.

Further, since the persons taking up claims and developing them would of necessity require access to those claims, it does not appear reasonable to have left the control of the surface of the land to the petitioner, and thereby risk the chance of bad blood and continuous strife between the miners and petitioner.

The Commissioners, taking with them representative Indians from both tribes, visited the area to be ceded, and both had an adequate opportunity to observe the character of the land within the proposed boundaries. It is evident that there was no grass of any consequence on the land, there were no trees of any size -- in fact there was nothing but a rocky formation described as "porphyry." This is confirmed by a study of the geologic survey data available.

It then becomes apparent that there could have been no misunderstanding as to exactly what the treaty meant since there was no timber, no grass and no water to reserve, and both parties were advised of that fact.

The report of Walter H. Weed, the geologist authorized to make a survey of the Fort Belknap Indian Reservation, contains the following:

The Fort Belknap Indian reservation extends south from the Milk river to the watershed of the Little Rocky mountains, separating the waters of the Milk from those of the Missouri river. The only available timber on the reservation is found on this mountainous part of the reservation and the only waters available for irrigation have their source in these mountains.

The mountainous area may be roughly classified into two portions: the limestone area, on which all the useful timber is found, and the central region of porphyry, which is covered by scrubby pines, & brush - none of which is useful for timber. This porphyry area is the mineral bearing part of the mountains.

The area which it is desired shall be cut off from the reservation, is this central porphyry region. It includes the higher peaks, & headwater gulches of the streams. The miners as represented by their delegators, do not desire to include any timber land or acquire water rights, but simply to have the mineral zone separated from the reservation.

A careful examination of this area shows that the larger part of the mineral bearing country lies within the boundaries

of the reservation. A large number of prospects have been found south of the watershed (boundary line) from which I have collected specimens of ore showing free gold & that a show very promising ledges of ore. One prospect has been worked - at times, although within the reservation. A shaft 65 ft. deep had been sunk & a tunnel run in to meet it. The ore from this shaft has been shipped and yielded \$32,000 to the owners. A number of claims located upon the divide show lodes running across and the ridges, the greater part of the lead being on the reservation. Examples of this occur, south of Mission butte, at the west end, & on the divide near Hill rock mountain to the east.

The placer deposits occurring within the limits of the reserve are not of any great extent or value. In no case have any of the placers yielded more than very small returns, the miners barely making wages if that much.

After careful examination of the ground, going over the country to note mineral character, timber & water, I am convinced that the mineral deposits are of sufficient extent & importance to warrant the cutting off of a portion of the mountain part of the reservation. The following limits would reserve to the Indians all the available timber and at the same time free the mineral bearing area.

Starting from the summit of Mission butte, at the 54 mile monument of the reservation boundary, due north to the ~~nor~~ south bank of the northern fork of Peoples creek. Thence up the south bank of the stream to the divide between this creek & Lodge pole creek. Thence from this divide N. 55° E. (mag) to the intersection of a line drawn N. 20° E. from the summit of Granite butte (61 m monument?). This area would include about 35 sq. miles, as near as can be estimated with the data at hand, all of which is mineral bearing or likely to prove so. This area includes but a few acres of timber, being mainly covered by young pines of 2 ft. to five feet in height. It includes no land capable of cultivation.

The limits desired by the prospectors generally are defined by the limestone reef that incircles the porphyry. While forming a natural boundary, this is one difficult of precise definition & is moreover open to objection as there are two small isolated patches of limestone within the porphyry area, & one batch of porphyry under the main limestone area.

Very respectfully submitted
Walter H. Weed
Geologist

Boundaries of proposed area to be cut off.

The limits as defined in the last paragraph - while satisfactory to those desiring the cutting off of the reservation are open to a critical objection inasmuch as they do not include the "contact" zone between the limestone and the porphyry. Therefore a better boundary, so far as the future is concerned would be obtained by drawing a line from the summit of Mission butte (54 m. boundary monument) due north to the intersection of the limestone "rim" or "reef" lying north of the north branch of Peoples creek (the stream joining the main creek a half mile above St. Pauls mission). Thence follow the limestone reef to a point N. 15° E. magnetic from the summit of the peak known as Granite Butte (the peak south of the 61 ½ mile boundary monument). This will include all the mineral bearing porphyry area & the contact zone, & will exclude all timber lands.

Respectfully submitted

Walter H. Weed

Geologist U.S.G.S. (Pet. Ex. 9)

The Commission, therefore, has concluded that there was no understanding that petitioner should retain any interest in the lands conveyed, or reservation of any right to use such land; that the petitioner has not been damaged thereby, and that petitioner has no cause of action against the defendant and that the First Claim of the petition should be dismissed.

The Court of Claims, in Blackfeet et al., v. United States, 81 C. Cls. 101, 106, 123, has held as to construing the terms of a treaty:

The rule as to construction of treaties with the Indians invoked by plaintiffs does not extend to the point whereby the court may indulge presumptions and implication of assumed obligations if the attendant facts and circumstances surrounding the created relationship clearly negative any intention upon the part of the Government to respond in damages in the event the contemplated results do not obtain.

The Supreme Court, in Choctaw Nation v. United States, 318 U.S. 423, 432, stated:

Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. Factor v. Laubenheimer, 290 U.S. 276, 294-95; Cook v. United States, 288 U.S. 102, 112. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." Tulee v. Washington, 315 U.S. 681, 684-85. See also United States v. Shoshone Tribe, 304 U.S. 111, 116; Choctaw Nation v. United States, 119 U.S. 1, 28. But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. United States v. Choctaw and Chickasaw Nations, 179 U.S. 494, 531-33; United States v. Mille Lac Chippewas, 229 U.S. 498, 500. Here the words of the proviso are inapposite to the proposed construction and we do not believe the findings are enough to warrant departing from the language used. The findings are merely findings as to evidence. There is no finding as to the ultimate fact whether or not the two tribes intended to agree on something different from that appearing on the face of the 1902 agreement. Without such a finding the agreement must be interpreted according to its unambiguous language.

SECOND CLAIM

(For Land Taken by Alleged Erroneous Survey of the East
Boundary of the Reservation)

The Second Claim arises out of the description and survey of the boundaries of the Fort Belknap Reservation as set out and provided for in the Agreement of January 21, 1887, confirmed by the Act of May 1, 1888, (25 Stat. 113, 124), and by the provision in that Agreement that where the boundaries were not formed by natural boundaries, they should be surveyed and marked.

The petitioner alleges that the survey made by Robert J. Walker fixed the southeastern corner of the Fort Belknap Reservation on the

slope of the westernmost of three buttes, and that in doing so, he relied on the advice of white settlers; that the United States caused a new survey to be made of the southern and eastern boundaries and that, as a result, the southeastern corner of the reservation was determined to be the top of Coburn Butte, the easternmost of the three buttes; that the point fixed by this survey as the southeastern corner of the reservation was still several miles west of the eastern extremity of the Little Rocky Mountains; and that because of these erroneous surveys, more than 40,000 acres of land were excluded from the reservation and taken by the United States.

The defendant in its defense concedes that the first survey was inaccurate but maintains that the second survey accurately determined the southeastern corner at a point "528 feet east from the summit of the East Butte, or Coburn Butte."

The petitioner has based its claim as to the purported erroneous survey upon the testimony of two aged Indians, Frank Wheeler and Raymond Feather.

Frank Wheeler stated that he did not know anything about the location of the southeast corner of the reservation, but that his grandparents had told him that the eastern boundary of the reservation was from the "mouth of Turtle Creek and due straight south to the Missouri."

A study of available maps disclose no "Turtle Creek" in the area, and any line carried south from the northern boundary formed by the Milk River to the Missouri River would place the southeast corner almost 100 miles south of the established southeast corner and the Little Rocky Mountains, and into light shale soil formations.

Raymond Feather testified, inter alia, that he had been told oftentimes and believed that the extreme southeast corner would be east of the Coburn Buttes. He also stated that there was a high ridge to the east which could be seen from Coburn Buttes, and that he was always told and always understood that the extreme southeast corner was on top of that ridge, and that the southeast corner was about four miles east of the established southeast corner of the reservation.

This Commission has found that testimony and evidence introduced has established that the southeast corner of the reservation was properly and accurately located by the Page survey and included all the land provided for in the agreement of January 21, 1887, ratified by the Act of May 1, 1888, (25 Stat. 113).

This Commission for the reasons set forth above is of the opinion that petitioner has no cause of action against the defendant, and the Second Claim of the petition should be dismissed.

THIRD CLAIM

(For Lands Taken by an Alleged Erroneous Survey by the Agreement of October 9, 1895)

Since the survey made in accordance with the agreement of October 9, 1895, ratified by the Act of June 10, 1896, (29 Stat. 321) disclosed the area contained within the boundaries described and set forth in that agreement was less than that bargained for by the parties, and that the party who suffered a loss by the transaction was the defendant rather than the petitioner, there is no basis for this claim.

FOURTH CLAIM

(Mismanagement of Tribal Herd, and Wasteful and Improper Use of Tribal funds; Accounting for Construction of Fence.)

This claim arose from the purchase by the United States of a herd of cattle with tribal funds, in accordance with the provisions of the Agreement of 1887, Act of May 1, 1888, (25 Stat. 113), and the Agreement of 1895, Act of June 10, 1896, (29 Stat. 321); the setting aside of certain grazing lands for the use of that herd; the management of that herd and the construction of a fence to prevent commingling of that herd and the herd owned by the Matador Land Company, lessees of other grazing lands lying within the reservation. The tribal herd was maintained in the reservation from 1915 through 1923 when it was sold, and the sums expended from reimbursable government funds were repaid as well as those from miscellaneous funds, but only a portion of the sums expended from tribal trust funds was repaid, resulting in a loss of \$71,138.30 which petitioner asks be repaid together with interest in the sum of \$64,364.25.

The petitioner would have the Commission find that the tribal herd was mismanaged in that the defendant purchased sick and poor cattle; retained unqualified, incompetent and neglectful agents to supervise the herd; failed to adequately care for the cattle; paid excessive prices for hay and feed; employed more help than was necessary; and sold the cattle at less than the fair market value.

The defendant maintains that it acted in accordance with the Agreements of 1888 and 1895 in which it was agreed by the parties that the area was not primarily suited to agriculture but rather to grazing.

It further contends that in its attempt to put into operation the terms of the agreement, the purchase of cattle by the defendant was an effort to promote the civilization and improvement of the Indians; that the Indians refused to raise anything but wild hay on irrigated lands and this was best utilized in the feeding of livestock; that the Indians received more for their hay by sale to the defendant; that the lease of a portion of the grazing lands for cattle grazing was approved by the Indians and was a profitable one; that the division fence was built to separate lessees' cattle from the tribal herd which in turn resulted in protection of the tribal herd and assured rental income from a long term lease.

The Commission, acknowledging the fact there were some mistakes of judgment and some mismanagement, has found in Findings 28 through 43 that the defendant acted in accordance with the provisions of the Agreements of 1888 and 1895 in the purchase of the tribal herd; that the defendant acted in accordance with the often expressed desires of the petitioner; that the agents of the defendant exercised reasonable diligence in the care and management of the herd, and the loss from sale of the tribal herd was caused at least in part by the petitioner's insistence upon its disposal and immediate allotment of their land.

The record contains many statements wherein the petitioner specifically asked that in return for transfer of their interest in a portion of the reservation they be given cattle. Article II of the Agreement of 1895 provides for the expenditure by the defendant that such sums as may be necessary "shall be expended in the purchase of cows, bulls and other

livestock. . .", and Article IV provides for the encouragement and reward of Indians who "in good faith undertake the cultivation of the soil and engage in pastoral pursuits as a means of obtaining a livelihood, and the distribution of these benefits shall be made from time to time in such manner as shall best promote the objects specified." At the time of the execution of the Agreements of 1887 and 1895, the Indians were badly in need, and the agreements dealt with them fairly and provided money to be used in their best interests and to improve their condition.

It is the considered opinion of this Commission that the U. S. government acted within its plenary power and authority in the purchase of the herd, its management, and in construction of a division fence to separate the tribal herd from the herd of the lessee of other portions of the grazing land, by virtue of which lease additional revenues was obtained for the Indians.

Acknowledging mistakes and misconduct by the defendant, and considering the course of dealings between petitioner and defendant as a whole, the failure of the herd can be attributed in the main to refusal of the Indians to help care for the herd; their refusal to take any of the herd as a nucleus for their own herd; their request to the Congress for legislation providing for allotment of the lands, and their refusal to allow the herd to remain on the reservation, thereby forcing its sale at a time when the market was low with resulting loss.

The Commission for the reasons set forth above is of the opinion that the petitioner has no cause of action against the defendant, and that the Fourth Claim of the petition should be dismissed.

FIFTH CLAIM

(Unlawful Expenditure of Tribal Trust Funds for Payment of Non-Tribal Horses Destroyed in Extinction of Dourine Epidemic.)

This claim is based upon use of tribal funds to pay for livestock owned by individual Indians which stock was destroyed by government inspectors during a dourine epidemic. Petitioner contends that the defendant improperly expended such funds and asserts that defendant is liable to the petitioner for the original sum expended, i.e., \$14,355 plus interest thereon at 4% per annum from date of withdrawal from Treasury to August 13, 1946.

The defendant maintains that it acted within its plenary power and authority and for the benefit of the Indians to prevent spread of a contagious disease.

The Commission has found in its Findings numbered 44 through 46 that the defendant was acting in the best interest of the petitioner; that the destruction of the horses prevented further infection of the horses belonging to members of the community, and the use of tribal funds to compensate individuals was one which may be properly regarded as for the benefit of the tribe.

The Court of Claims has held in Sioux Tribe of Indians v. United States, 105 C. Cls. 725, 329 U.S. 680, where the disbursement of tribal funds to replace stock killed to prevent further spread of the disease, as follows:

6. The next claim, likewise involved in cases 18, 23, and 24, is for a total of \$83,573 consisting of \$2,683 in case 18; \$24,500 in case 23, and \$56,390 in case 24. These amounts represent disbursements by defendant from the trust funds of the Rosebud, Cheyenne River, and Standing Rock reservations for the cost of replacing stock, belonging to certain of the Indians on these reservations, which had to be killed

on account of and to prevent the spread of disease (see findings 9, 56 and 77). Plaintiff contends that defendant ordered this stock destroyed and therefore should have borne the cost of replacing it. It is not denied that the stock killed was afflicted with a contagious disease and that it was necessary to destroy it in order to prevent the disease from spreading to other stock. Plaintiff contends that it had been the policy of the United States in other instances to make compensation from public funds to the owner of the stock destroyed; that the compensation in these instances should have been paid out of public funds and not out of funds of the tribe, and that such use of the trust funds did not constitute payment but was an improper transfer of such funds. Plaintiff further contends that these disbursements were for the benefit of individual Indians whose stock had to be destroyed, rather than for the tribe, and were improper for that reason.

The statutes under which these trust funds arose authorized their use for the benefit of the Indians under direction of the Secretary of the Interior, and we think this was such a use. In destroying the stock and paying for its replacement out of tribal funds the Government was acting as the trustee for the Indians having the duty of controlling and managing their funds and property for their benefit. The defendant was under no legal duty or obligation to use public funds to replace the destroyed stock when the tribes of these reservations had tribal funds of their own. This was not a governmental expense which defendant was obligated to bear in its sovereign capacity, and it had not assumed such an obligation by treaty or agreement. The fact that Congress has in certain instances (see Appropriation Acts of May 10, 1926, and January 12, 1927) (44 Stat. 453, 462; 934, 942) used public funds to reimburse Indians for the destruction of stock infected with a contagious disease and for the expense of the work of eradicating and preventing such disease does not establish that the cost of replacing stock so destroyed is a legal and enforceable obligation or expense of the Government in every instance. United States v. McDougall's Administrator, 121 U.S. 89, 96. The power unquestionably resides in the Government to use tribal funds for this purpose or to make reimbursable public funds so used. The cost of replacing stock so destroyed, whether paid out of tribal or public funds is an expenditure for the benefit of all members of the tribe concerned. Then the stock of one or several Indians is destroyed in order to prevent the contagious disease from spreading to the stock of all other members of the tribe, the cost of replacement is an expenditure which may properly be regarded as one for the benefit of the tribe. * * *

It is the considered opinion of this Commission that, although the Indian Claims Commission has a wider jurisdiction than the Court of Claims in that case to consider not only the legal rights involved, but equitable and moral rights under the provisions of Section 2 of the Indian Claims Commission Act, we could come to no other conclusion in view of all the facts and circumstances presented in this claim which parallel those in the Sioux case.

Accordingly, for the reasons set forth herein, this Commission is of the opinion that the petitioner has no cause of action against the defendant, and that the petition should be dismissed.

SIXTH CLAIM

(Use of Tribal Funds to Reimburse the Defendant for Expenditures on Irrigation Systems.)

This claim arose from construction and operation of irrigation systems on the Milk River along the northern boundary of the Fort Belknap Reservation and four smaller mountain units in the southern area, which the petitioner describes as worthless.

The Fort Belknap Reservation, located in north-central Montana, contains a predominance of rolling plains country, characterized by long, cold winters and short, hot summers, temperatures varying between 60° below zero to 110° above zero, and with an average annual rainfall of 12.87 inches over a 40-year period.

It is evident that without irrigation very few agricultural crops could be grown, and that the greater portion of the reservation would be better adapted to grazing. In order to provide water to irrigate good land and to prevent loss of crops, the Indians of Fort Belknap

requested at a full council meeting held on March 13, 1894, that funds be set aside for irrigation purposes, and the superintendent joined with them in urging construction of an irrigation system.

In response to this request the defendant in 1894 authorized a survey by an engineer to determine the cost of a practical system, and the Agreement of October 9, 1895 (25 Stat. 321), ratified by the Congress on June 10, 1896, contained inter alia provision for expenditure of so much of the consideration as might be necessary to irrigate farms.

Subsequent correspondence contained numerous and continuous reference to the need to provide the Indians with the means of making their lands fertile and productive in order to improve their "civilization, comfort and improvement."

Further and actual evidence of the defendant's concern for the well being of the petitioner is that in 1905 the United States brought suit in the U. S. Circuit Court to restrain certain non-Indians from constructing or maintaining dams and reservoirs on the Milk River, and from preventing the flow of the water from the river or its tributaries to the reservation (Winters, et al., v. United States, 207 U.S. 564). The court issued an injunction from which an appeal was taken to the U. S. Circuit Court of Appeals, which in turn affirmed the lower court's decision (143 Fed. 740), and subsequently on January 6, 1908, the Supreme Court affirmed the decision and 5000 miners' inches of water were adjudicated to the Fort Belknap Reservation, assuring the petitioner sufficient water to make productive a sizeable acreage. In discussing the area to be irrigated it was stated:

* * * The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless. * * *

And with reference to the interpretation which it placed upon the Agreement of January 1887, ratified by the Act of May 1, 1888 (25 Stat. 113), the court stated:

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. The United States v. The Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste--took from them the means of continuing their old habits, yet did not leave them the power to change to new ones.

In 1908, Congress appropriated \$25,000 for work on the Milk River project and a like amount in 1909. In 1911, these appropriations and all subsequent appropriations were made reimbursable. From time to time sums were expended from tribal funds for the construction of the systems.

In 1929, '30 and '31 several investigations were conducted into the construction, operation and management of the systems pursuant to a resolution of the 70th Congress, and the Meriam and the Preston and Engle reports were issued, resulting in passage of the Leavitt Act (47 Stat. 364) which authorized the Secretary of the Interior to adjust

or eliminate reimbursable charges existing as debts against Indians or Indian tribes provided, however, that collection of construction costs should be deferred until Indian title is extinguished. Provision was also made for an annual report to the Congress, and final approval of adjustments by the Congress. (Def. Exs. 46, 47)

In 1932 the Secretary of the Interior submitted to the Congress a list of cancellations and adjustments in the amount of \$231,476.54 of reimbursable expenditures for the Fort Belknap Reservation. This, however, did not include \$107,759.78 expended from tribal funds between 1893 and 1913 for these projects.

The petitioner would have this Commission find that the defendant "improvidently and wrongfully" expended petitioner's funds for construction, operation maintenance and management of the "alleged" irrigation system, and that the United States is liable to petitioner for the sum of \$107,759.78 plus interest from dates of withdrawal to August 13, 1946.

The defendant, on the other hand, would have the Commission find that the defendant cooperated closely with the Indians, acted in accordance with their wishes in obtaining and safeguarding for them the necessary water to irrigate their lands, thereby giving them an opportunity to better their way of life; that the irrigation system worked, irrigating since its inception many acres of otherwise arid land, and it would have been even more beneficial to the Indians had they made the most of its potential value; that the Fort Belknap Indians have had the use and benefit of the irrigation system since its construction but have not been required to pay for any of the services or even taxes on the land; that the U. S.

spent about six times more than the amount spent from the tribal funds for which petitioner now asks restitution; that the expenditure of tribal funds for such irrigation purposes was for the benefit of the Indians and in accordance with agreements and statute, and petitioner is not entitled to recover such tribal funds used for such purposes.

The defendant acted pursuant to the terms and provisions of the Agreements of 1887 and 1895, and the petitioner benefited by those actions, and for that matter, is still benefiting therefrom. The defendant invested in the irrigation system, as is shown by the record, more than six times the sum taken from the tribal funds and cancelled more than \$231,000 in reimbursable charges advanced for the petitioner's benefit.

The tribal funds were expended for these irrigation projects which were carefully investigated by engineers as to feasibility, acreage susceptible to irrigation and the probable benefits which would be realized therefrom. The fact that subsequently it was determined that some of the lands were withdrawn from irrigation because of alkalinity does not per se justify branding the irrigation system a failure. This can and does happen even under most careful supervision, and where the irrigation ditches and drainage ditches on the lands of water users are not carefully tended, as the evidence would seem to indicate in this case, soils with alkaline content, will of course, become alkaline to such a degree as to be non-productive. It further appears from the evidence that the irrigated lands leased to non-Indians showed less acreage so

afflicted. Changes from time to time in the amount of water available caused by drought, change in climate conditions, disappearance of springs, etc., cannot be attributed to negligence on the part of the defendant.

In sum, this irrigation system was expanded from one which supplied water only to the small garden of the reservation school to one, which in 1943, had under constructed works, 18,768 acres of which 9,444 acres were irrigated by Indians, 2,355 acres irrigated by lessees, and 6,969 acres idle, although provided with facilities for irrigation. In addition, the defendant has secured through the years adjudication of the waters of the Milk River to the extent of 5,000 miners' inches for the benefit of the Fort Belknap Community, and more recently negotiated and secured a one-seventh (1/7) share in the Fresno Dam to further insure an ample supply.

While it is true that certain sums were used from the petitioner's tribal funds, and while it is true that there may have been some mistakes in judgment and management, on the whole the project was and has been beneficial to the petitioners. Considering the course of dealings throughout the years, we must give credit for the good intentions, diligence and continued effort of the defendant to benefit the Fort Belknap Indians by establishing, maintaining and improving the system and in acquiring additional water rights.

This Commission has great respect for the legislative branch of our government and fully recognizes its continuing interest throughout the years to the Indians, and we have given careful consideration to its

several reports concerning inter alia the affairs of the petitioners. However, this Commission has been given the duty of weighing all the facts and the jurisdiction to determine whether the dealings were fair and honorable. The Commission, therefore, must make its own judgment as to the benefits which actually have inured to the Indians of the Fort Belknap Community; the reasonable degree of diligence with which the project, in the whole, was executed; and as to the fact that a single year's crop value exceeds the amount of tribal funds about which petitioner complains and asks restitution.

It is a well established principle of law that the power and authority of Congress in the management of the properties and monies of Indians are liberally construed, and the courts will not interfere unless there is established fraud or spoliation (Pottawatomie Tribe of Indians v. U. S., 11 F. Sup. 256). Further, in 1871, Congress abandoned the policy of treating with Indian tribes as dependent nations, and since that time it has assumed and exercised the power and authority to manage, control, regulate and adjust tribal Indian affairs, including their lands and funds. This has been approved by the Supreme Court in several decisions. (Lone Wolf v. Hitchcock, 187 U.S. 553; Chippewa Indians of Minnesota v. United States, 88 C. Cls. 1, affirmed 307 U.S. 1).

This Commission, for the reasons set forth above, is of the opinion that petitioner has no cause of action against the defendant, and that the petition should be dismissed.

T. Harold Scott
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner