

BEFORE THE INDIAN CLAIMS COMMISSION

TUSCARORA INDIAN NATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Docket No. 340
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: March 9, 1965

Appearances:

Paul G. Reilly, Attorney of Record for Petitioner

Aaron Shannon Bennett, with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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

On August 11, 1951, petitioner filed a "General Petition" in the subject docket. Thereafter, on May 6, 1957, paragraphs numbered 5, 6 and 8(e) of the petition were ordered stricken, and, on June 28, 1957, paragraph 8(d) of the petition was ordered stricken.

On September 23, 1958, defendant filed its answer denying any liability to petitioner under any allegations of the general petition. On November 19, 1964, defendant filed a motion for summary judgment, which motion and petitioner's answer thereto of January 13, 1965, is now before the Commission.

It appears that the only remaining allegations in the general petition are contained in the following paragraphs:

8. Among the said acts were the following:

(a) By the Treaty of January 15, 1838 (7 Stat. 550, 554), the petitioner conveyed to the defendant, 5,000 acres of land "lying in Niagara County, in the State of New York, which was conveyed to the said Nation (sc the Tuscarora Indian Nation) by Henry Dearborn", to be held in trust and sold for the account of petitioner. Such lands were of great value and were sold for an inadequate consideration, in violation of defendant's duty as trustee and in violation of the principle of fair and honorable dealing with petitioner.

(b) During the greater part of the aforesaid period, defendant denied to the members of the petitioner the rights of citizens and the rights of aliens declaring an intention to become citizens.

(c) Prior to the establishment of the Indian Claims Commission on August 13, 1946, defendant continuously denied to the petitioner and its members the same access to any court or tribunal for the purpose of redress of violations of treaties between the petitioner and the defendant, that was available to non-Indian citizens and aliens with respect to agreements made between them and the defendant.

Paragraphs 8(b) and (c) contain no specific allegation of any matter over which this Commission has jurisdiction under the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

Under paragraph 8(a) petitioner alleges that its lands in the State of New York were sold by the defendant for an inadequate consideration, in violation of defendant's duty as trustee and in violation of the principle of fair and honorable dealing with petitioner. To this allegation defendant has responded alleging that it has never sold any of the lands involved and that petitioner continues to hold and occupy the same lands today in the State of New York.

Defendant has pointed out, in its argument in support of its Motion for Summary Judgment, that the Court of Claims in its decision in The New York Indians v. The United States, 30 C. Cls. 413 (1895) found that:

\* \* \* The Tuscaroras still occupy their reservation in New York. (Finding X, p. 426)

\* \* \*

XIX. The following facts, agreed upon by both parties, are at their request found by the court:

\* \* \*

\* \* \* and prior to 1788 the Tuscaroras commenced a settlement by themselves on lands which they now occupy, located in the county of Niagara, and obtained an Indian title to 1,920 acres of land from the Seneca Nation of Indians and the Holland Land Company.

In 1804 the Tuscaroras purchased with their own moneys 4,329 acres of land adjacent to the tract of land last mentioned, and they now own and occupy the last mentioned tract in fee simple; and the said two parcels of land comprise the 6,249 acres of land mentioned and referred to in the 11th finding of fact in Congressional case No. 151 as being occupied by the Tuscarora Indians. (Finding XIX, p. 431)

In 1958, subsequent to the filing of the petition in this case, the Tuscarora Nation became involved in a controversy concerning the acquisition of a portion of the lands in question for the Niagara River Power Project. In that proceeding entitled Tuscarora Nation v. Power Authority of New York the petitioner herein asserted that the lands involved had been occupied by the Tuscarora Nation for over 150 years; and was land upon which they hoped and intended to live in the future (164 F. Supp. 107). On appeal the court recited "Since that time 1804

the Tuscaroras have lived on these tracts as a tax-exempt Indian Reservation . . ." 257 F. 2d 885, 887 (1958). Finally in Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) the petitioner herein asserted its ownership and possession of the lands in question.

Defendant asserts that under the doctrine of judicial estoppel petitioner may not now claim that it is not in the present possession of the lands in question. In fact it does not appear that petitioner does so contend at this time. As petitioner has previously stated the general petition was filed solely as a "precautionary" measure. In its response to defendant's motion for summary judgment petitioner admitted the correctness of defendant's recitals in the motion. Petitioner has in effect admitted that it was at the time of filing the general petition in possession of the lands involved in paragraph 8(a) of the general petition. Petitioner has submitted nothing in opposition to the motion and has withdrawn its request for a hearing on this matter.

The Commission is not aware of any action taken by defendant with respect to the lands involved which would be justiciable under the provisions of the Indian Claims Commission Act. The Commission concludes that there is no genuine issue respecting any material fact and that defendant is entitled to a judgment dismissing the petition as a matter of law.

We concur:

Wm. M. Holt  
Associate Commissioner

Arthur V. Watkins  
Chief Commissioner

T. Harold Scott  
Associate Commissioner