

BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE)	
FORT BERTHOLD RESERVATION, ET AL.,)	
)	
Petitioner,)	
)	
v.)	Docket No. 350-F
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: November 4, 1965

Appearances:

Donald C. Gormley, Attorney of Record for Petitioner.

William D. McFarlane, with whom was Mr. Assistant Attorney General, Edwin L. Weisl, Jr., Attorneys for the Defendant.

OPINION OF THE COMMISSION

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

The claims asserted in the amended petition filed in this case arise basically from the Act of June 1, 1910, 35 Stat. 455. The petitioner is a corporate entity, The Three Affiliated Tribes of the Fort Berthold Reservation. This Wheeler-Howard entity is the successor in interest to three separate tribes, the Arikara, Gros Ventre, and Mandan, who for many years occupied lands on the old Fort Berthold Indian Reservation in North Dakota. During the period in which these claims arose, and prior thereto, the three tribes were known collectively as the Fort Berthold Indians and for the sake of convenience we may at times identify the petitioner in the same manner. The petitioner, however, has the right and capacity under the Indian Claims Commission Act to bring and maintain these claims in its own behalf.

The substance of petitioner's claims is that it had a compensable interest in the Fort Berthold Reservation lands at the time of the passage of the Act of June 1, 1910, and that under this Act the United States deprived the petitioner of a goodly portion of its reservation lands without the payment of just compensation, and in some instances without the payment of any compensation. According to the petitioner tribe, the United States had assumed the role of trustee under the 1910 Act for the purpose of selling parts of petitioner's reservation to homesteaders and crediting the proceeds of the sales to the petitioner, but, in failing to procure the fair market value of the lands thus sold, the United States breached its fiduciary obligations, and its conduct in this regard did not comport with the concept of fair and honorable dealings. It is the petitioner's intention at a subsequent hearing to prove that the Fort Berthold Reservation lands sold by the United States were in fact worth a great deal more than what was ultimately realized from the sale of said lands.

Petitioner, of course, does not deny Congress' plenary authority to open up Indian reservation land for homestead entry and settlement, even without the consent of the Indians, but petitioner does expect that, when such tribal property rights are taken from the Indians, they are entitled to be paid just compensation. With this general proposition the Commission is in full agreement. As the Commission sees it, the ultimate issue will be whether or not in disposing of petitioner's surplus reservation land by opening them up for sale and entry to homesteaders, the United States did obtain for the benefit of petitioner

tribes compensation for said lands comparable with their then fair market value, and that, in carrying out its assumed obligations under the 1910 Act of Congress the United States did not act in a grossly negligent way, or profit in a manner inconsistent with its fiduciary role, or take unfair advantage of said tribe. Defendant, of course, insists that its conduct was exemplary at all times when it disposed of petitioner's surplus reservation lands for the benefit of the petitioner tribe.

At this stage of the proceedings the Commission must first of all determine whether or not the petitioner tribe did in fact have a compensable interest in the Fort Berthold Indian Reservation lands. If the petitioner does have compensable tribal rights in the Fort Berthold reservation lands, then we must determine just what lands were sold and when they were sold. This latter question is most important since it establishes the controlling date for valuation purposes.

The Commission has set out in some detail in its findings the historical background leading up to the establishment of the Fort Berthold reservation lands that lie north and east of the Missouri in North Dakota. Under the 1851 Fort Laramie Treaty the Arikara, Gros Ventre, and Mandan tribes of Indians had been granted a reservation south and west of the Missouri River in Montana and North Dakota (Royce Area 300). Because of continuing intertribal hostilities, as well as trouble with on-coming white settlers, the United States in 1866 sought to obtain land cessions from these three tribes. However, these treaty efforts met with failure. Thereafter through a series of executive orders the

reservation lands originally set apart for the 1851 Fort Laramie Treaty participants were rapidly diminished by being restored to the public domain. At the same time acreages outside the delimited Fort Laramie Treaty boundaries were granted to Arikara, Gros Ventre, and Mandan tribes including lands north and east of the Missouri River in North Dakota (Executive Orders of April 12, 1870; July 13, 1880; Royce Areas 621, Dakota 1, 622 Montana 2).

Further diminution of the reservation lands in Montana and North Dakota was in the offing, when by the Act of May 15, 1886, 24 Stat. 29, Congress appropriated some \$15,000 for the purpose of treating with the Indians in northern Montana and at Fort Berthold. On December 14, 1886, an agreement was entered into with the Arikara, Gros Ventre, and Mandan tribes of Indians wherein it was contemplated that for \$800,000 the Indians would cede those Fort Berthold reservation lands "lying north of the Forty-eighth parallel of north latitude, and also that portion lying west of a north and south line six miles west of the most westerly point of the big bend of the Missouri River, south of the forty-eighth parallel of north latitude." (26 Stat. 989) The area ceded is readily identified as Royce Area 712, Dakota 3. As to the diminished portion of the reservation this 1886 agreement contemplated that all members of the three tribes would take individual allotments and the United States would then hold the residue in trust for twenty five years. After twenty five years the United States would convey the same to the tribes in fee simple. The diminished portion of the Fort Berthold Reservation can be identified as Royce Area 713, Dakota 3, and it is within this area that most of the lands in the present controversy are located. The 1886

agreement was finally ratified by Congress on March 3, 1891, with the passage of the 1892 General Appropriation Act covering the expenses of the Indian Department, 26 Stat. 989.

However, the agreement as ratified contained an important amendment in Article VI thereof, which dealt with the residue land. This amendment provided that, after all individual allotments had been made, the residue of the land "shall be held by the said tribes of Indians as a reservation." (I Kapp. 428) By this slight modification in the original text of the agreement, Congress clearly intended to confirm upon the Fort Berthold Indians a reservation title to residue lands in lieu of a possible fee simple title. The net result was that by this 1891 Act the Fort Berthold Indians for the first time acquired a compensable interest in the unallotted surplus portion of their diminished reserve situated within Royce Area 713, which compensable interest they maintained at the time of the enactment of the Act of June 1, 1910.

With respect to small additions made to petitioner's reservation by the Executive Order of June 17, 1892, said area being Royce Area 716, Dakota 3, the Commission has found that there was no subsequent action taken by Congress to recognize title thereto to be in the Fort Berthold Indians. Thus, petitioner never acquired any compensable interest in this executive order land, and we therefore shall exclude it from consideration in a claim for additional compensation. In so doing the Commission rejects as untenable petitioner's further contention that because of the decision in the case of Indians of the Fort Berthold Indian Reservation in the State of North Dakota, et al., v. United States, 71 C. Cls. 308 (1930), the defendant is estopped from denying petitioner title to the entire area comprising the diminished Fort Berthold Reservation.

In the Fort Berthold case the plaintiff Indians brought suit to recover compensation for some 11,424,512.76 acres of land that had been deducted by executive orders from their permanent reservation. In determining the net deduction from the plaintiffs' original reservation for which no compensation had been paid, the Court of Claims subtracted from the total acreage figure above some 1,578,325.83 acres of land that had been added to the plaintiffs' reservation by the Executive Orders of April 12, 1870; July 13, 1880; and July 17, 1892. Thus, argues the petitioner, in the Fort Berthold case the Court of Claims in effect found that the land given to the Fort Berthold Indians by these three executive orders was as compensable as the lands that had been taken by the United States, and, since the same executive order lands are involved in the claims asserted herein, the defendant is estopped to contest petitioner's compensable interest therein. While this contention is an interesting one, we think it is abundantly clear, and the courts have so held, that the Constitution places the authority to dispose of public lands exclusively in the hands of Congress and it follows that only Congress can create a beneficial interest or recognize a tribal interest in said public lands, Sioux Tribe of Indians, v. United States, 316, U.S. 317. Certainly the Court of Claims in the Fort Berthold case could not do indirectly what it had no authority to do directly, that is, award a compensable interest to the Indians in executive order land. Furthermore, we think the petitioner has given a rather extreme interpretation to say the least, of the effect of the Court's action in deducting the executive order land from the land upon which the Court's judgment would be rendered. In making the deduction of these executive order lands, the court observed that most of it had been ceded to

defendant, and payment had been made to the Indians.

In 1907 there still remained 884,780 acres of unallotted land on the diminished Fort Berthold Indian Reservation. By the Act of March 1, 1907, 35 Stat. 1015, the Secretary of the Interior was authorized to allot a minimum of 80 acres to those Indians who had not yet received any allotments and to increase to 80 acres the allotments of those Indians who received less than 80 acres. Three years later the Act of June 1, 1910, 36 Stat. 455, was approved whereby the Secretary of the Interior was authorized and directed after survey to sell and dispose of, for the benefit of the Fort Berthold Indians as provided in the Act, "All the surplus unallotted and unreserved lands within that portion of said reservation lying and being east and north of the Missouri River." (Sec. 1, 36 Stat. 355). The Secretary was further empowered to make additional allotments of either 160 acres of agricultural land or 320 acres of grazing to each member of the several tribes then living on the diminished reservation. Among other things of note, the Secretary of the Interior was authorized to reserve coal bearing or other mineral lands from allotment or other disposition until Congress provided otherwise; reserve lands for agency, school and religious purposes; reserve tracts of land found to be valuable for power or reservoir sites; and, to set aside and reserve all timber lands as a tribal forest to be used by the Indians. Under the 1910 Act the State of North Dakota was granted Sections 16 and 36 in each township for school purposes, or the right to select lands in lieu thereof if tracts situated in Sections 16 or 36 had been allotted or reserved. The 1910 Act provided for the appointment of a Presidential commission that was charged with the responsibility of classifying and appraising

in 160 acre tracts where possible all the surplus, unallotted and unreserved lands before they would be offered for public sale and entry. Following approval of the classifications and appraisals it was provided that said lands would be opened for settlement and entry by presidential proclamation and disposed of under the general provisions of the homestead and townsite laws; said lands to be sold at the appraised price and the net proceeds to be paid into the Treasury to the credit of the Fort Berthold Indians.

Nothing in the 1910 Act bound the United States to purchase any of the Fort Berthold lands except Sections 16 and 36 thereof, or lands in lieu thereof, which lands the United States had granted to the State of North Dakota for school purposes. For these school land selections the United States obligated itself to pay the Indians at a rate of \$2.50 per acre. The 1910 Act provided for an immediate appropriation of \$100,000 for this purpose, which amount was duly appropriated and placed in the Treasury to the credit of the Fort Berthold Indians. It was further provided under the 1910 Act that the United States would not guarantee to find purchasers for said lands or any portions thereof, and as set forth in the statute:

"* * * it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided." (Sec. 14, 36 Stat. 455)

Following approval of the Act of June 1, 1910, the President, pursuant to Section 7 thereof, appointed a three man commission to classify and appraise the surplus, unallotted, and unreserved lands on the Fort

Berthold Indian Reservation. To insure impartiality insofar as possible, the commission was composed of one individual having tribal relations with the Indians, one from the Interior Department, and the third person to be a resident citizen of the State of North Dakota. The appraisal committee finished its task in June of 1911 and its unanimous recommendations as to classifications and appraisements were immediately approved by the Interior Department. Thereafter a presidential proclamation was issued on June 29, 1911, declaring all surplus, unallotted, and unreserved lands subject to disposal under the general homestead laws and the provisions of the 1910 Act, said lands to be opened for entry and settlement as prescribed in the proclamation no earlier than May 1, 1912. At the same time regulations were promulgated by the General Land Office setting up the procedures to be followed by persons eligible to purchase Fort Berthold land. Purchasers were required to pay the appraised price for the lands selected, and a schedule of the lands subject to entry was made available to prospective purchasers. This schedule showed approximately 205,000 acres more or less, would be subject to disposal under the following classifications and prices: agricultural lands of the first class, designated as "A-1", \$4.25 to \$6.00 per acre; agricultural lands of the second class, designated as "A-2", \$2.25 to \$4.00 per acre; and grazing land designated as "C", from \$1.50 to \$2.00 per acre. The initial date of entry was set for May 4, 1912.

The evidence in this case clearly shows that practically this entire offering was sold and entered upon within a year to a year and a half of the May 4, 1912, opening date of entry, and that these purchasers eventually obtained a patent for their land.

On August 3, 1914, additional legislation was adopted authorizing the disposal of the coal bearing lands that had been reserved under the 1910 Act. In line with the procedure that followed under the 1910 Act, a new three man appraisal commission was formed, and on August 12, 1915, the appraisal commission finished its task of classifying and appraising all of these coal lands. Following the official approval of the commission's unanimous recommendations as to classification and appraisements, some 110,818.28 acres of previously reserved coal lands were declared subject to homestead entry and settlement beginning on May 1, 1916. Prices to be paid for these lands ranged from as low as \$2.50 per acre for grazing land to as high as \$8.00 per acre for first class agricultural land. However, the bulk of this particular offering was second class agricultural land appraised at an average per acre price of about \$5.26 per acre. The evidence in the record shows that between May and September of 1916, nearly all of the lands offered under the 1914 Act were sold and entered upon by homesteaders.

Following the land offerings under the 1900 and 1914 Acts, two smaller blocks of Fort Berthold lands were made available to homesteaders for entry and settlement.

On November 13, 1916, some 6,848.49 acres of surplus, unallotted and unreserved land that had been previously omitted from classification and appraisal were opened for settlement. Most of it was grazing land appraised at \$3.00 to \$4.50 per acre; the remainder being second class agricultural land appraised at \$4.50 to \$6.00 per acre. As far as the Commission can determine from the evidence at hand, approximately 3500

acres, more or less, were sold and ultimately patented, with most of the entry dates occurring between November 1916 and September of 1917.

The next block of Fort Berthold lands released for homestead sale was the coal bearing lands lying in Sections 16 and 36, which lands had been classified and appraised pursuant to the 1914 Act but thereafter withheld pending satisfaction of the school land claims of the State of North Dakota. With the apparent completion of the school land selections, the Act of March 3, 1917, 39 Stat. 1131, was passed authorizing the disposal of the previously reserved lands in Sections 16 and 36. Pursuant to the 1917 Act there was made available for homestead entry and settlement, beginning on April 7, 1917, some 9,006.08 acres in Sections 16 and 36, ranging in price from as low as \$3.00 per acre for grazing land to as high as \$10.00 per acre for first class agricultural land. An examination of a Government Accounting Office report and other evidence in this case shows that 8,121.00 acres of land offered under the 1917 Act were sold and patented, and nearly all of the land sold had been entered upon in May of 1917.

On May 10, 1920, Congress enacted a statute authorizing the disposal by public auction of isolated tracts of land on the Fort Berthold Indian Reservation that had originally been opened for homestead entry under the 1910 Act (Commission's Finding 24). However, there is insufficient evidence in the record to make any accurate determination of just what lands were ever sold under this 1920 Act.

Now the petitioner has contended that for purposes of evaluating all Fort Berthold surplus unallotted land that was sold to homesteaders under the 1910 Act and the subsequent Acts, the date of patent is the controlling date for each sale. * Petitioner cites as its authority the case of Creek Nation v. United States, 302 U. S. 620 (1938). That the determination of the so-called "date of taking" or valuation date is vital to petitioner's case is made patently clear in petitioner's brief wherein it is stated:

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The situation presented here, as petitioner will show in a subsequent hearing, is that the sums received for the sale of the land sold to the homesteaders were for less than the fair market value of the land at the time that petitioner lost title. ***

In the Creek Nation case cited by the petitioner we find that as a result of an 1872 erroneous survey of lands owned in fee simple by the Creek Nation, Creek land was included within an area set apart for other tribes. Thereafter under an agreement with the United States, these tribes ceded their lands in exchange for individual allotments. The Act of February 1891, 25 Stat. 749, which ratified the agreement, provided for the disposition of the surplus, unallotted land to homesteaders by sale and entry. Under the 1891 Act fee simple land actually belonging to the Creek Nation was sold and patented to homesteaders. The Supreme Court

* A brief check of the sales recorded in Defendant's Exhibit 95 shows that the majority of successful purchasers of this Fort Berthold land obtained their patent from three to five years after making their entries. Some waited even longer.

** P. 21, Petitioner's Proposed Findings of Fact and Brief

in affirming the right of the Creek Nation to recover from the United States for the erroneous taking of its lands, fixed the date of the issuance of the patents as the date of valuing said lands, reasoning that:

The Act of 1891 did not dispose of the lands. Its erroneous application and the consequent disposals of the lands to adverse holders constituted the taking by the United States.

But we think the situation in the instant matter to be a far cry from that before the Court in the Creek Nation case. The acts complained of, to wit, June 1, 1910, August 3, 1914, March 3, 1917, and May 10, 1920, did dispose of a good deal of petitioner's land, and as far as the evidence shows, there was no erroneous application of these acts. In our judgment the most important distinction between the Creek Nation case and petitioner's present situation is the nature of petitioner's interest in lands subject to disposal under the above acts. The Creek Indians enjoyed fee simple title in their lands, having full and complete ownership, while the petitioner had only a reservation title to the Fort Berthold lands, the fee remaining at all times in the United States. That the Courts have at times recognized the substantial difference in legal effect between fee ownership and reservation title is clearly demonstrated in the case of Seminole Nation v. United States, 102, C. Cls. 565 (1946). This case was identical in many respects to the Creek Nation case cited by the petitioner. In the Seminole case, the Seminole Indians were also the victims of an erroneous survey of their boundary lines, and they too ultimately lost a portion of their reservation that they held

in fee title when individual allotments were granted to Pottawatomies and the surplus was sold and patented to white settlers. The Court of Claims applied the same rule as laid down earlier in the Creek Nation case by fixing the valuation date of the lost Seminole lands as of the date of the patents. In so doing, the Court, speaking through Judge Whitaker, rejects defendant's argument that the taking occurred when the Seminole lands were actually settled. As stated by the Court:

The defendant says that under the authority of Shoshone Tribe of Indians v. United States 299 U. S. 476; the taking occurred when the Pottawatomies were settled on the land in 1872. In that case plaintiff had the right to use and occupancy only; in this case the plaintiff owned the fee in the lands. This right of use and occupancy in the Shoshone case was first impaired when the Arapahoes were settled on their lands, over the protest of the Shoshones, and, hence, it was held that their rights in the lands had been taken as of this date. In the case at bar, plaintiff does not sue for its loss of use and occupancy while the Pottawatomies occupied the lands as a reservation, it claims the fee and sues because it has been divested of this fee. It is entitled to recover as of the date of divesture. This occurred when the lands were disposed of pursuant to the agreement with the Pottawatomies under which the Seminole lands were conveyed to the United States.

In the case at bar the petitioner can claim only a possessory interest in the Fort Berthold Reservation, albeit a possessory interest guaranteed more permanent than aboriginal title, but still only a possessory interest. Here the United States, in a proper exercise of its plenary authority over the affairs and property of the Fort Berthold Indians, and for the benefit of said Indians, chose to quiet petitioner's possessory rights to its surplus lands by selling them off to homestead settlers and crediting petitioner with the proceeds of said sale. Since the fee

title was always in the United States, the Commission is of the opinion that petitioner's permanent possession and use of the surplus, unallotted and unreserved reservation lands terminated under the 1910 Act, and subsequent acts, either as a matter of law at the time the lands were declared open for entry, or certainly as a matter of fact when the particular homesteader, having made his purchase, actually entered and settled on the lands of his choice. As a practical matter then the Commission will accept an average date of entry covering all the recorded sales in each of the four offerings of surplus land made to homesteaders as reasonable dates for valuation purposes if said lands are to be valued at some future date.

The parties herein have apparently agreed that the sum total of reservation lands disposed of under the 1910 and subsequent Acts of Congress amounts to 326,540.45 acres (Def. Ex. 95). However, the Commission will leave to the parties the additional task of supplying to the Commission a breakdown of the total acreage by showing the number of acres entered and disposed of under each of the aforementioned acts.

Turning now to the school land disposals, we find that the petitioner has contended that in arriving at an appropriate date of taking for valuation purposes, it is necessary to consider first of all the dates of survey for the so-called "place lands", being those lands reserved within Sections 16 and 36, and secondly, the dates of selection for "lieu lands" being those lands selected outside of Sections 16 and

36. Then by combining the average dates of the place lands and lieu lands, an over-all average date of taking can be calculated. The Commission believes that this approach misconceives petitioner's actual interest in the school land selections. As we pointed out earlier in this case the United States under the 1910 Act purchased for \$2.50 per acre petitioner's interest in at least 40,000 acres of reservation land that might be necessary to satisfy the school land selections of the State of North Dakota. Thus we find that when defendant deposited \$100,000 in the United States Treasury to petitioner's credit, the Indians no longer had any interest in the matter of when, where, and how the State of North Dakota would make its school selections as long as no more than 40,000 acres of surplus unallotted land was selected. The Commission has found from the evidence that including both "place" and "lieu" lands, the State of North Dakota ultimately took 29,482.03 acres to satisfy its school land selections, and that petitioner's title to this acreage was quieted as of the effective date of the 1910 Act. It is this date, that is the date of taking, or valuation date for the school lands.

The petitioner also contends that the consideration for the school lands was not the \$2.50 the United States said it would pay for them, but a \$1.48 per acre, which is the amount the Indians actually received due to an erroneous award of a claimed offset against the judgment obtained by the Fort Berthold Indians in the case of The Fort Berthold Indians v. United States, 71 C. Cls. 380 (1930). The Commission, however, is of the opinion that if an erroneous offset caused an unwarrented

deduction against the judgment in favor of the Indians in the Fort Berthold case this error can be corrected by a simple accounting or by proper adjustment at offset time in the event petitioner should obtain an award herein. In any event the consideration for the purchase of the school lands was fixed in the 1910 Act by Congress at \$2.50 per acre, and money which was more than sufficient to cover the total school selections was at that time deposited to the credit of the Fort Berthold Indians.

The petitioner is also seeking compensation for four small reserved tracts of land on the Fort Berthold Reservation totalling 1,223.85 acres. The four reserves consist of the following: St. Edward Mission, 160 acres; Shell Creek Reservoir, 490.81 acres; McLean National Wildlife Refuge, 320 acres, and the Verendrye National Monument, 253.04 acres.

The 160 acre tract upon which is located the St. Edward Mission was originally set aside on July 30, 1889, by order of the Interior Department. At this time the Fort Berthold Reservation had been established as an executive order reservation. It was not until the approval of the Act of March 3, 1891 (10 Stat, 1032) that Congress conferred on the Fort Berthold Indians a reservation title and a compensable interest in their lands. What evidence there is in the record indicates that the St. Edward Mission continued to exist and serve the Fort Berthold Indians at the same location throughout the years following its inception. We can only conclude that the mission land was not set aside under the provisions of the 1910 Act or any act of Congress at a time when the

Indians had a compensable interest in the Fort Berthold Indian Reservation. The fact that on September 16, 1916, the Bureau of Catholic Indian Missions received from the United States Government a fee simple patent to the St. Edward Mission tract does not create a compensable interest in the land in favor of the petitioner for which they can now claim compensation. The Commission therefore disallows petitioner's claim for the St. Edward Mission tract.

With respect to the Shell Creek Reservoir site of 490.81 acres, the Commission finds that this area was specifically set aside in accordance with the provisions of the 1910 Act. The land was reserved not for the exclusive benefit of the Fort Berthold Indians but for general public purposes. The Indians were not paid for the land, and are entitled to compensation based upon the fair market value of said reservoir site as of October 21, 1911, which is the date administrative approval was given reserving said land.

The McLean National Wildlife Refuge site was set aside by presidential order on June 12, 1939. However, this tract of 320 acres is located on the west half of section 16 in Township 150 N. Range 88W. Apparently this entire section had already been granted to the State of North Dakota for school purposes under the 1910 Act when it was set aside in 1939 as a wildlife refuge. There is nothing in the evidence indicating the contrary. This being the case, the petitioner had no interest in this tract in 1939, and this acreage should be included, if it has not been included, in petitioner's claim with respect to the school lands.

On June 29, 1917, a presidential proclamation set aside 253.04 acres of petitioner's reservation land as a national monument in recognition of the exploits of the French explorer, Verendrye. Under the Act of February 14, 1920, the petitioner was paid \$5.00 per acre for this land. Petitioner is of course entitled to show that the amount received from the United States as a result of this purchase was grossly inadequate when compared to the fair market value of this land at the time it was taken. For this purpose the valuation date is June 29, 1917, the date of the presidential proclamation reserving the 253.04 acres of monument grounds.

Finally, the petitioner presses for compensation for what is designated as a "temporary taking" of some 18,111.62 acres of vacant lands that were ultimately returned to tribal ownership in 1938. According to the petitioner this "temporary taking" of petitioner's land occurred between the time the lands, offered under the 1910 Act, were first proclaimed open for settlement, and when, never having been sold, they were returned to tribal ownership. Within this period of time, petitioner says the Indians "lost the right to the use and benefit of said land." The defendant contends that the bulk of the Fort Berthold reservation land returned to tribal ownership in 1938 consisted of timber land that had been reserved under the 1910 Act and never offered for sale to homesteaders. The balance, some 4,780 acres was land that had been offered for sale, but never sold, as well as land that had been sold but reverted due to cancellation and relinquishment of entries for failure to complete

payments. From the evidence of record it appears that most of the land that was returned to tribal ownership was in fact reserved timber land that was never offered to homesteaders for sale and entry under the 1910 Act and subsequent acts. Without evidence to the contrary, the Commission can only surmise that these timber lands were reserved as intended under the 1910 Act for the sole benefit of the Fort Berhold Indians.

As to the 4,780 acres of available land that were offered for sale and entry to homesteaders but were not disposed of by 1938, the Commission is unable to agree with the petitioner that this in and of itself amounts to a "temporary taking" of said lands by the United States for which defendant is liable to the petitioner. First of all, under Section 14 of the 1910 Act the United States was not obligated to find purchasers for petitioner's surplus, unallotted, and unreserved lands. Secondly, there is no evidence in the record indicating that the United States, in total disregard and in breach of its fiduciary obligations under the 1910 Act, acted in such a contrary or negligent manner as to prevent, hinder, or discourage sales of petitioner's land, nor is there any evidence of record indicating that the United States received some benefit from the mere fact that these lands never sold. On the contrary, the United States apparently took all reasonable steps to dispose of petitioner's land, and made sure that the petitioner was credited with partial payments plus interest on those tracts of land that originally sold but were subsequently relinquished for failure to complete payments. In this way the petitioner benefited by realizing some profit from the

vacant lands that were eventually returned to tribal ownership. Finally, the United States was not obligated under the 1910 Act to purchase any of petitioner's surplus reservation land except the school lands in Sections 16 and 36, that had been granted to the State of North Dakota. For these reasons, we have found that there was never any "taking", temporary or otherwise of these vacant lands by the United States, and the petitioner is therefore not entitled to recover on this claim.

The Commission has concluded that with the exception of Royce Area 716 and the 160 acre St. Edward Mission tract, the petitioner herein has a compensable interest in the Fort Berthold Reservation lands that were disposed of under the 1910, 1914, 1917, and 1920 Acts of Congress. If the Indians are to prevail in this law suit, it is incumbent upon the petitioner in subsequent proceedings to prove that the moneys received from the sale and disposition of the subject lands under the several acts involved herein were so far below the fair market value at the time petitioner lost title thereto, that the United States was guilty either of fraudulent conduct or gross negligence amounting to a breach of its fiduciary obligations assumed under the 1910 Act and the subsequent acts involved herein. With this in mind it must be remembered that proof of a mere inadequacy between moneys paid and received for said lands and their then fair market values as of the date of takings is not enough to prove fraudulent conduct on the part of the United States. The Creek Nation v. United States, 97 C. Cls. 591. The subject lands made available to homesteaders shall be valued as of

the average date of the entries of each of the land offerings disposed of under the aforementioned acts, and the parties shall advise the Commission of the acreage sold, entered and patented under each of the aforementioned acts. The school lands granted to the State of North Dakota shall be valued as of the effective date of the 1910 Act and the Shell Creek Reservoir site and the Verendrye National Monument site shall be valued as of the effective dates said sites were reserved for public purposes.

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner