BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Plaintiffs,	)	
v.	)	Docket No. 350-H
THE UNITED STATES, Defendant.	)	

Decided: February 18, 1966

Appearances:

Donald C. Gormley and Charles A. Hobbs of the law firm of Wilkinson, Cragun & Barker, Attorneys for Plaintiffs

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

PER CURIAM OPINION ON DEFENDANT'S MOTION TO DISMISS

The allegation of compensable damage enunciated in the instant suit was originally the eighth of several causes of action assigned Docket No. 350 (The Three Affiliated Tribes of The Fort Berthold Reservation v. United States, 3 Ind. Cl. Comm. 444 (1955), pp. 452, 453). Two amended severed petitions later, Docket No. 350-H was assigned to the plaintiffs' claim for loss of game.

The contention is that on September 16, 1851, when the plaintiffs' title to their land (Fort Berthold, supra, pp. 449, 450) was recognized in the Treaty of Fort Laramie (II Kapp. 594), that land contained

"natural products . . . including game and buffalo" essential for the plaintiffs' subsistence. By some date in 1915, the land contained no more game and particularly no more buffalo (B. bison). The plaintiffs seek to hold the defendant liable for the depredations which resulted in the dearth of game, charging (Second Amended Petition, paragraph 9):

> . . . defendant or others permitted by defendant dissipated or wasted, or have caused or permitted others to cause the wanton or reckless or useless destruction of natural products of petitioner's lands, including game and buffalo.
>
> . . . Defendant failed to restrain its citizens or others from entering upon petitioner's lands and trespassing upon them.
>
> . . . Defendant, or persons permitted by defendant, have profited from the sale of hides at great and disproportionate expense of petitioner . . .

The defendant's Motion to Dismiss contains two chief grounds and a number of supporting objections. The two chief grounds for dismissal are that the twice-amended petition:

> . . . (1) fails to allege the acts committed or participated in by defendant which are relied upon by petitioner as giving rise to a claim or to set forth the time, manner and place of such acts . . .
>
> . . . (2) fails to allege any treaty, statute, agreement or other provision imposing an obligation on defendant to indemnify petitioner for the losses alleged.

Among the supporting objections are the points that such a claim is wildly conjectural and difficult of proof, that nonprotection of game was not a violation of fiduciary duty and in any event no such duty existed, and that the plaintiffs had no title to game which would support a claim for damages.

The merits of this suit have not been argued and no evidence has been adduced, save two documents consisting of a few "Letters from the

Editor" contemporaneous with and commenting upon the treaty cited above. Briefs have been submitted and oral argument was heard on the subjects of who owns game and under which parts of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C.A. 70a) this action could be brought if it lies at all.

The motion under consideration was filed under this Commission's Rule 11(b) (25 C.F.R. 503.11(b))and is within the purview of subsection (4) of Rule 11(b), "failure to state a claim upon which relief can be granted." The Rule provides:

> . . . on a motion asserting the defense numbered (4) . . . the motion shall be treated as one for summary judgment . . .

This Commission recently observed that in disposing of a motion for summary judgment, the allegations of the party not so moving must be construed in the light most favorable to that party. Osage Nation v. United States, 16 Ind. Cl. Comm. 190 (1965), 192.

This inflexible rule would seem to obviate, for the purposes of ruling on the pending motion and for no other purposes, the defendant's contention that the treaty cited above did not in fact impose on the defendant any duty or burden to preserve game or to refrain from exterminating game. It may be that proof of the treaty negotiations and of the intent or understanding of the parties thereto will not support adequately the plaintiffs' position, but for the limited purpose of ruling on this motion now, this Commission must refrain from reading into the unofficial minutes any tortured or esoteric interpretation. The Commission refers, of course, to this language (Def. App. A, p. 2):

> The ears of your Great Father are always open to the complaints of his Red Children. He has heard and is aware that your buffalo and game are driven off, and your grass and timber consumed by the opening of roads and the passing of emigrants through your countries. For these losses he desires to compensate you. He does not desire that his White Children shall drive off the Buffalo and destroy your hunting grounds, without making you just restitution.

Not to belabor the point, it may be that the language quoted above will be shown to relate only to pre-treaty losses, or will not be found a commitment binding the United States, or will be held a mass of glittering generalities, without substance and so understood by the parties. But for the present, the defendant's second chief ground for dismissal must be regarded as not well-taken.

The defendant's first chief ground for dismissal was that the acts complained of were not alleged with particularity--the time, manner, and place of each such act. It may be that this claim will suffer a failure of proof. Such an assessment of the plaintiffs' case, which has not yet been offered, would amount to prejudgment on a record bereft of evidence. Adhering to the construction most recently enunciated in Osage Nation, supra, this Commission views the defendant's first chief ground for dismissal as not well-taken.

There is one further point. The defendant has cited a number of cases in which claims for the destruction of fish, game, or buffalo were denied by the Court of Claims (pp. 8, 9, Defendant's Response to Supplement to Petitioner's Objections to (Defendant's) Motion to Dismiss). None of these invoked any remedy made available by Section 2 of the Indian Claims Commission Act of 1946. The unique remedies of

the said Section 2 preclude dismissal of this suit as a matter of law on the authority of the cases collected by the defendant.

Therefore, the defendant's motion to dismiss the petition will be denied.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

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ORDER OVERRULING MOTION TO DISMISS

The above-entitled cause came on to be heard before the Commission upon the motion of the defendant to dismiss the petition of the petitioner, at which time said motion was argued by the attorneys for the respective parties and submitted to the Commission and taken under advisement, and the Commission now being fully advised in the premises, and for the reasons set forth in the opinion in said cause this day filed herein, finds that said motion should be denied.

IT IS THEREFORE ORDERED that the defendant's motion to dismiss be and the same is hereby denied.

IT IS FURTHER ORDERED that the defendant shall file its answer or other defensive pleading to petitioner's severed petition within sixty days from the date of this order.

Dated at Washington, D. C., this 18th day of February, 1966.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner