BEFORE THE INDIAN CLAIMS COMMISSION

SOUTHERN UTE TRIBE OR BAND OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 328
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: June 27, 1969

ADDITIONAL FINDINGS OF FACT

Statement

Plaintiff filed a petition with the Commission on August 10, 1951, praying among other things for fair and just compensation for approximately 220,495.17 acres of land unlawfully disposed of by defendant. On May 6, 1966, the Commission in the case of Southern Ute or Band of Indians v. United States, 17 Ind. Cl. Comm. 28, entered findings of fact and issued an interlocutory order concluding as a matter of law that plaintiff was entitled to just compensation for 230,547.44 acres of plaintiff's land disposed of by the defendant without payment to plaintiff. The defendant appealed from said order contending, among other things, that all claims concerning the 230,547.44 acres of land had been fully settled, paid, extinguished and adjudicated in a previous case before the Court of Claims (Case No. 46640, Confederated Bands of Ute Indians v. United States, 117 Ct. Cl. 433, 436 (1950)).

On May 15, 1967, the Court of Claims issued an order of remand with instructions to the Commission to hear additional evidence, including but not limited to testimony of the signatories to the stipulation in the Confederated Ute case, supra, and to make and report to that Court findings of fact on the question as to whether by said stipulation it was the intention of the parties thereto that the final judgment in Case No. 46640 would be res judicata as to lands involved in this case.

Pursuant to that remand the Commission held two hearings. The first hearing was on plaintiff's motion for the production of documents. The second hearing involved the taking of evidence as to the intention of the parties at the time of the signing of the stipulation in Court of Claims Case No. 46640.

At both hearings the defendant took the position that the stipulation spoke for itself and that the intentions of the parties would have to be determined within the four corners of the stipulation. At the hearing on plaintiff's motion for production of documents the defendant contended that all memoranda, letters, notes, instructions, and other data that were relevant to the stipulation and the compromise settlement were the "work product" of the attorneys for the Department of Justice and thus privileged material protected by Order No. 381-67 of the Attorney General, effective July 4, 1967.

Pursuant to an order of the Commission, the defendant furnished the Commission with the correspondence between the Department of Justice and the

Bureau of Land Management in Denver, Colorado, relative to the preparation of Schedule 1 of the stipulation. The letters were relevant only to the extent that they corroborated the testimony of Dr. Wilkinson (attorney for plaintiff and signatory to the stipulation) as to why the word "diligence" was used in the stipulation. The letters did not relate to any matters which might reveal the intention of the defendant at the time of signing of the stipulation.

There is only one attorney now living who participated on behalf of the defendant in the settlement negotiations and execution of the stipulation. His affidavit related that without the memoranda which he prepared (but of which he does not have copies) or any other settlement papers he does not have any independent recollection concerning the defendant's intention. The government, relying on the Attorney General's Order relating to the production or disclosure of department materials and information, has withheld all memoranda, notes, or letters which might relate to the defendant's intention or which might have refreshed the recollection of the government's then attorney. Accordingly, the Commission has no evidence introduced by defendant upon which to base any finding of fact as to the defendant's intention.

The following additional findings of fact are based solely on the evidence taken by the Commission pursuant to the order of remand:

21. On May 15, 1967, the Court of Claims remanded this case to the Commission with the following order:

"NOW, THEREFORE, IT IS ORDERED that this case be and is hereby remanded to the Indian Claims Commission with instructions to hear additional evidence, including but not limited to testimony of the signatories to the stipulation mentioned above, and to make and report to this court findings of fact on the question as to whether by said stipulation, it was the intention of the parties thereto that the final judgment entered in Court of Claims Case No. 46640 would be res judicata as to the land involved in this case."

22. On April 23, 1968, a hearing was held before the Commission pursuant to this order of remand.

Plaintiff presented testimony of Dr. Ernest L. Wilkinson, partner of the law firm of Wilkinson, Cragun and Barker and a signatory to the stipulation in Case No. 46640. Plaintiff also presented the testimony of Georgette Betor Lee Hall who, together with the late Charles D. Lee, prepared Schedule 1 identifying the lands which formed the basis of the settlement in Case No. 46640.

23. Dr. Wilkinson testified that he was attorney of record for the Confederated Bands of Ute Indians in Case No. 46640 and in the related Case No. 45585, and as such was familiar with the course of negotiations leading up to the settlement of Case No. 46640, as well as Case No. 45585. He noted that Royce Area 616 was involved in both Cases Nos. 46640 and 45585. In Case No. 46640 the Confederated Bands were suing for compensation for lands that had been disposed of in Royce Area 616 prior to 1938. In Case No. 45585 they were suing for compensation for lands that were undisposed of in 1938 and were taken by the Act of Congress of June 28, 1938 (52 Stat. 1209).

24. Dr. Wilkinson testified that the schedule of land disposals forming the basis of the settlement in Case No. 46640 (the aforementioned) Schedule 1) was prepared by Georgette Betor (now Georgette Betor Lee Hall) and Charles D. Lee, who were hired with the approval of the Court of Claims and the Department of Justice. Miss Betor and Mr. Lee were specifically instructed to list only lands located in Royce Area 616 and not those in Royce Area 617 because, according to Dr. Wilkinson, referring to his legal conclusion at the time the list was made, "in our judgment the lands in 617 were taken under the Act of 1895 from the Southern Utes whereas the lands in 616 which were included in the stipulation were taken under the Act of 1880 from the Confederated Utes."

Dr. Wilkinson also testified that he hired Miss Georgette Betor and Mr. Charles D. Lee to prepare a list of disposals of lands involving the Southern Ute Reservation, located in Royce Area 617, separate and apart from the list of disposals of land which they prepared for Case No. 46640. Dr. Wilkinson stated that at the time of settlement of Case No. 46640 he had two lists of land disposals in hand:

(a) the list of disposals in Royce Area 616 which became Schedule 1 in Case No. 46640, and

(b) the list of disposals of the Southern Ute lands in Royce Area 617 which was used as a basis for preparing the petition in Indian Claims Commission Docket No. 328.

25. Dr. Wilkinson testified that in his judgment the reason the word "diligence" was employed in the stipulation in Case No. 46640 was to insure

that any small areas of land not included in Schedule 1 of the stipulation would be covered by the judgment. He testified further that "diligence" in his opinion would not have permitted the exclusion of an area of 360 sections of land, an area equivalent to one mile wide and 360 miles long.

26. After Schedule 1 of the stipulation had been prepared by Miss Betor and Mr. Lee, it was submitted to the Department of Justice for verification. Some errors were found by the Department and Schedule 1 was accordingly corrected. A letter dated May 8, 1950, from C. V. Marmaduke, Jr., Special Assistant to the Attorney General, Lands Division, tends to corroborate Dr. Wilkinson's testimony as to his intention of including the following language in the stipulation: "So far as the parties with due diligence have been able to determine these descriptions in Schedule 1 represent all of the land so disposed of and set aside." The letter, relating to Case 46640 reads as follows:

> "Sir:
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> "In a recent telephone conversation Mr. Sonosky of the Department requested an opinion on the advisability of making a complete check of the land descriptions furnished by the plaintiffs in the above case.
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> "While numerous errors were disclosed by the 10% spot check of the land descriptions, yet it appears that a complete check would not be warranted because the draftsmen's estimate of the amount of acreage erroneously described would be small. * * *"

27. Dr. Wilkinson, after testifying as to the steps he had taken to refresh his recollection, testified as follows in describing his intention in signing the stipulation in Case 46640:

> "Well, it was clearly my intention in signing the stipulation for the Confederated Bands of Ute Indians that it relates only and solely to the lands in Area 616 and did not relate to the lands in 617 which was to be the basis for a separate suit which we were preparing at the time. We had, of course, Miss Betor and Mr. Lee prepare the list in 616 and also the list in 617 and to the extent that you can read the mind of attorneys on the other side, I give it as my judgment and opinion that they were of the same opinion because, in discussing the schedule No. 1 which is attached to the stipulation we always discussed it solely with reference to the land in 616 and not in 617."

28. A letter from Dr. Wilkinson to Miss Betor and Mr. Lee, dated January 25, 1950, employing them to prepare a schedule of lands in Royce 617 in the same manner in which they prepared Schedule 1 for Royce 616, would tend to corroborate the testimony of Mr. Wilkinson. The relevant language reads as follows:

> "It is possible that we may not be able to include the above claims under any of the suits we now have pending. If not, we will have to institute new suits, which we will do, however, immediately on your completing your work, and they can be completely prosecuted as quickly as if suit had already been filed. Please therefore in keeping your record of time use the above captions on this letter."

29. A. Devitt Vanech and Marvin J. Sonosky signed the stipulation for the defendant. Mr. Vanech is dead. Also one of the principals for the Government, Mr. Robert E. Mulroney, then Chief of the Trial Section, Lands Division, Department of Justice, is dead. Mr. Marvin J. Sonosky filed an affidavit with the Commission. He stated he was the attorney in charge of the Ute litigation identified as Cases 45585, 45783, 46640, 47564 and 47566, all in the United States Court of Claims. He stated that in 1950 he

prepared for the consideration of the Assistant Attorney General memoranda to the Attorney General recommending settlement; that he did not retain and does not have a copy of the memoranda of settlement or any other settlement papers; that he does not have any independent recollection of whether the settlement included the extinguishment of any claims for the Colorado reservations lands known as Royce No. 617.

30. In conclusion it was not the intention of Dr. Wilkinson to include Royce Area 617 at the time he signed the stipulation in Case 46640. There is no evidence as to the intention of the attorneys who signed the stipulation on behalf of the Government. The only inference that can be drawn as to their intention was the testimony of Dr. Wilkinson that at no time during the long period of negotiation did either he or the attorneys for the Government discuss the question of disposition of Royce Area 617.

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner