BEFORE THE INDIAN CLAIMS COMMISSION

THE WASHOE TRIBE OF THE STATES OF NEVADA AND CALIFORNIA, Plaintiff,	)	
v.	)	Docket No. 288
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: October 31, 1969

Appearances:

Nicholas E. Allen and George F. Wright,
Attorneys for Plaintiff.
John Lewis Smith, Jr., was on the brief.

Bernard M. Newburg, with whom was
Mr. Assistant Attorney General
Clyde O. Martz, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

The Commission now has before it the question of the fair market value of certain lands in the states of Nevada and California, hereafter referred to as the Washoe Tract. We have previously determined that Plaintiff had aboriginal title to these lands which Defendant took without compensating Plaintiff, and we have determined the boundaries of the area to be valued. 7 Ind. Cl. Comm. 266 (1959), as amended by Order of June 25, 1959. The Commission has found the valuation dates to be March 3, 1853 for the California portion

of the Tract (7 Ind. Cl. Comm 266) and December 31, 1862 for the Nevada portion (7 Ind. Cl. Comm. 792 (1959)).

The Nevada portion of the Tract was taken by gradual encroachment. The evidence shows that from 1848 to 1863 the area was overrun by miners, settlers and others with the approval, encouragement and support of the United States government. Encroachment continued with increasing intensity until by December 31, 1862 the tribe had lost all of its lands. The Government could of course have extinguished Indian title as of a specific date through legislation or treaty. It chose, for whatever reason, not to do so, and left the taking to the gradual entry of settlers, miners and others. Under such circumstances it is clear that the Washoes may properly choose to consider the taking date as the date when the "situation [became] stabilized", that is the date on which the gradual taking was completed. United States v. Dickinson 331 U.S. 745, 747-748, 749 (1947).

Not only was the encroachment upon the Nevada lands gradual, but the Washoes were completely deprived of their use and occupancy of portion of the Nevada lands at various dates prior to 1863. To determine with exactness the moment at which use and occupancy of each acre was finally and irrevocably lost is a practical impossibility. However the taking date of property "is after all a practical matter and not a technical rule of law." United States v. Dickinson, supra at 749. A basic "principle of fairness and not a technical rule of procedure enshrining old or new niceties..." is involved in compensating for property taken. United States v. Dickinson, supra at 748.

We have determined that fairness under the circumstances and the applicable law and facts justified us in setting December 31, 1862 as the taking date for the Nevada lands.

On June 6, 1969 we denied defendant's motion to set aside the December 31, 1862 Nevada valuation date. We found nothing in the majority opinion in United States v. Northern Paiute Nation, 183 Ct. Cl. 321 (1968) which would require a change in our previous determination. Indeed, clear evidence of error would be required to lead us to set aside a date to which the Government did not object for nine years and a date in reliance upon which Plaintiff incurred expenses of $75,000 for appraisers' fees.

The Court of Claims in United States v. Northern Paiute Nation, 183 Ct. Cl. 321 (1968) has held that Indian title includes title to subsurface minerals in lands acquired by the United States pursuant to the Treaty of Guadalupe Hidalgo. Thus we may pass to the valuation of the lands and the other issues in question.

Nevada Mineral Lands

Gold Hill Mining District. In determining the fair market value of the Gold Hill District, both sales indices and capitalization of expected returns as of the valuation date are evidence of the price which a willing buyer would pay. Neither valuation method results in a conclusive determination of fair market value. To be considered as evidence, however, any computation must be based upon data applicable to the land in question. The plaintiff has not established the

validity of its assumptions as to ore reserves, costs of production and period of time over which a return would be received. Thus in this case, the most probative evidence of value is the sales index based upon actual sales of separate interests. Both parties are in substantial agreement as to the final total figure for such sales index.

The Plaintiff may not recover the value of improvements placed on the land by the taker, and improvements placed there by the miners are to be treated in this case as if placed there by the Government which now stands in the miners' shoes. United States v. Northern Paiute Nation, 183 Ct. Cl. 321, 340-2 (1968). We have found the value of improvements to be $750,000.

The Plaintiff contends that the value of the land is additionally increased when the so-called Apex Law is applied in delineating the claims. However, as the Plaintiff points out, the courts of Nevada enforced the Apex Law, see Bullion Mining Co. v. Croesus Gold and Silver Mining Co., 2 Nev. St. Rep. 168 (1866). Thus contemporaneous sales would have reflected the value of minerals in tracts measured by using the Apex Law. To add an additional amount to our valuation would result in valuing the same property twice.

We therefore find the fair market value of the Gold Hill Mining District on December 31, 1862 to be $2,401,500.

Devil's Gate and Other Districts. We have found the fair market value of the Devil's Gate District to be $145,000. As to the other Nevada mining districts, the Commission does not feel that the defen-

dant has proven the value of improvements actually on the lands. Therefore, no deduction for improvements will be made. The fair value of these other Nevada districts is $120,000.

California Mineral Lands

No mineral potential was known to exist in the California portion of the Tract on the valuation date. A purchaser as of that date would not have inspected and tested for minerals the thousands of acres of virgin and isolated land in the California portion of the Tract. A reasonable purchaser could not have been expected to do so in the mid-nineteenth century. Therefore, we find that the California portion of the Washoe Tract would have added no value to the Tract by reason of its mineral resources.

Thus we find the total value of the mineral lands in the Washoe Tract to be $2,666,500.

Access to Fishing Resources. Defendant contends that neither the State nor the Federal Government nor any private land owner can convey exclusive fishery rights to anyone. Assuming this is true, this is not the question before the Commission. We are faced with the question of whether the taking of Indian title lands gave rise to a right to compensation for fishing resources in the area. On this issue we feel that the case of Tlingit and Haida Indians of Alaska v. United States 182 Ct. Cl. 130 (1968) controls.

Tlingit was a suit under the Act of June 19, 1935, 49 Stat 388, which gave the Court of Claims jurisdiction to adjudicate claims of the

Tlingit and Haida Indians against the United States for expropriation of property and for failure or refusal by the United States to protect Indian property rights. The plaintiffs claimed that the United States failed to protect the exclusive occupancy and use of aboriginal fishing rights in waters both within and surrounding the external boundaries of the plaintiffs' lands, by permitting non-Indians to extract fish from such waters. In passing upon this contention, the Court of Claims distinguished between property rights in the fish in navigable waters, and rights to an easement of access to the fisheries.

> "Fish are ferae naturae, capable of ownership only by possession and control.**** An Indian tribe might exclude non-Indians from fishing in navigable waterways which are within its reservation if the grant of the reservation includes, as a part of that grant, the right to fish in designated areas free from interference.**** Free-swimming migratory fish in a navigable waterway are incapable of possession by ownership of adjacent lands. The right to fish in navigable waterways and reduce free-swimming fish to possession is not a concomitant of aboriginal title to adjacent land because the fish in a fishing area subject to Indian use can never be possessed.**** The only added value which might accrue to the land because of the proximity to the fishery is the value of an easement over the land which provides both access to the fishery and an opportunity to exercise a common fishing privilege. This easement of access was taken.
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> "A prospective purchaser would not pay for the right of access if alternative access was available without substantial additional cost or difficulty." 182 Ct. Cl. 130, 141, 142, 145 (1968).

As we read this language, while property held under aboriginal title does not include a property right in free-swimming fish in navigable waters, the value of lands adjacent to the navigable waters may be enhanced in value by reason of their accessibility to the

waters. See also, Heckman v. Sutter, 119 Fed. 83 (1902); and United States v. Native Village of Unalakleet, 188 Ct. Cl. 1, 411 F.2d 1255 (1969). Unlike the situation in Tlingit, supra., access to fisheries of the Washoe Tract could be obtained over water without crossing Washoe lands, if at all, only with substantial additional cost and difficulty. We have found that the presence of lakes and rivers containing a large supply of fish enhanced the value of all the surrounding lands in the Washoe Tract. For convenience, we have considered the total amount of such enhancement particularly in valuing the meadow and agricultural lands of the Tract.

Meadow, Agricultural and Sagebrush Land In Nevada. The parties were far apart in their estimates of the value of the agricultural and meadow lands in Nevada. The defendant points out that there was little demand for such land. It seems likely that the better lands sold had improvements placed upon them by the valuation date. The Commission finds that the value of the agricultural and meadow lands in the Nevada portion of the Washoe Tract on the valuation date was $462,000.

The value of the 353,763 acres of sagebrush lands in the Nevada portion of the Tract was about $132,650.

California Agricultural Lands. Despite the isolation of the California portion of the Washoe Tract, the records of sales available for similar land for dates prior to the taking date do not indicate the great disparity in value which the defendant contends existed between the Nevada and California portions of the Tract. We find the

value of the agricultural lands in the California portion of the Washoe Tract to be $125,200.

Timberlands -- Nevada and California. The parties are in substantial agreement as to the retail value of the Nevada timberlands. Applying an appropriate discount for size, risk and other costs, we find their total value including pinon lands to be $300,000.

Considering the differences in expert opinion on the value of the timberland in the California portion of the Washoe Tract and the lack of contemporaneous sales, the evidence of value of California timberlands is sparse. Considering all the evidence, we find the value of the timberlands of the California portion of the Tract to be $150,000.

Valuation of Townsites. The Commission finds the value of the town and mill sites in the entire tract to be $82,000.

Other Lands. The remaining lands in the Tract added nominal value to the Tract.

Taking of Minerals and Timber Prior to Valuation Date. Plaintiff asks for damages for minerals and timber wrongfully removed from Washoe lands. In United States v. Northern Paiute Nation, 183 Ct. Cl. 321, 340 (1968), the Court in referring to improvements placed upon aboriginal title lands by miners said:

> "The Government referred to miners as 'others', disassociating them from the United States. However, the land involved was part of the public domain which they exploited, not only without interference by the national Government, but under its implied sanction;... they were in no sense trespassers.... By allowing the prosecution of the claim before us, the United States adopts the miners' acts and assumes responsibility for them, however tortious they may have been in their origin.

Shoshone Tribe of Indians v. United States, 299 U.S. 476, 495 (1937).

> "It would seem to follow that the United States stands in the shoes of the miners with respect to the improvements and is liable to the Indians to just the same extent as if its own engineers had constructed the improvements, but to no greater extent."

Since the Washoe lands were also exploited under Government sanction we feel that the same rationale applies to acts by settlers in this case. But to say that the Government stands in the shoes of the settlers does not conclude our inquiry. There remains the question of whether a compensable wrong is committed when the Government itself or through others removes minerals and timber from land held aboriginally.

Absent the Indian Claims Commission Act, it appears that the Government would not be a wrongdoer in severing minerals and timber from aboriginal title land. "It could not then be a trespasser, or in any sense a wrongdoer. . . ." The Kwash-Ke-Quon Indians v. United States, 137 Ct. Cl. 372, 374 (1957). This doctrine appeared to relate not merely to the absence of a remedy but to the absence of a wrong. The Indian Claims Commission Act, however, created new causes of action where they did not previously exist. Otoe and Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593 (1955). The Supreme Court has stated that the Indian Claims Commission Act is to receive an interpretation "in sympathy with its compassionate purpose." Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 273-274 (1955).

Clause 2 of Section 2 of the Indian Claims Commission Act allows suits "with respect to which the claimant would have been entitled to

sue in a Court of the United States if the United States were subject to suit". This clause is generally seen as merely waiving sovereign immunity from suit and not creating new substantive causes of action. See H.R. Rep. 1466, 79th Congress, 1st Sess. 11 (1945); Otoe and Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593, 598 (1955). Thus under Clause 2 alone, the plaintiffs could not recover. Removing sovereign immunity does nothing to create a cause of action not previously in existence for intrusion upon aboriginal lands.

However Clause 5 of Section 2 of the Indian Claims Commission Act does create new substantive rights in claimants. Otoe and Missouri Tribe of Indians v. United States, 131 Ct. Cl. 593, 607-8 (1955). The Commission has found that the encouragement and protection by the United States of miners who took minerals from the Washoe Tract without compensating the plaintiffs for such minerals was conduct that was not fair and honorable. In allowing "claims based upon fair and honorable dealing that are not recognized by any existing rule of law or equity", Clause 5 permits recovery for the severing and carrying away of minerals and timber from aboriginal title lands to the same extent as such takings would be compensable if committed on lands held under recognized title. Both the legislative history and judicial interpretation of Clause 5 support this result. In the hearings on the bill to create an Indian Claims Commission, Secretary of the Interior Harold L. Ickes presented a statement on the bill which included the following comment upon the predecessor

of Clause 5*:

> In addition, the Commission would be given jurisdiction over so-called 'moral' claims as well as over claims strictly legal in nature. This authority would overcome the defect in the present system under which many of the claims of Indians are precluded from a hearing on their merits on technical legal grounds such as would challenge the conscience of a court of equity". Hearings Before House Committee on Indian Affairs on H.R. 1198 and H.R. 1341, 79th Cong., 1st Sess. 139 (1945).

Thus the Commission was to act as did courts of equity in granting just remedies which were otherwise precluded by technical legal rules. The unequal treatment of Indians possessing land under Indian title and those holding recognized title is the consequence of one of these technical legal rules. Cf. remarks of Congressman Robertson, 92 Cong. Rec. 3317 (1946).

But one may find more explicit recognition in the legislative history of the Act that the "fair and honorable dealings" clause was intended to create a cause of action for incursions upon land held under aboriginal title in cases in which mere waiver of sovereign immunity would allow a suit if the same lands were held under recognized title. The House Report on the bill to create an Indian Claims Commission discusses the "fair and honorable dealings" clause as

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*The clause at that time referred to "claims of whatever nature which morally exist though not recoverable by law". The change to the present "fair and honorable dealings" language was made because "the word 'moral' was vague enough so that it might leave considerable doubt in people's minds in regard to what was considered the basis of fair and honorable dealing on something". Hearings before House Committee on Indian Affairs on H.R. 1198 and H.R. 1341, 79th Cong., 1st Sess. 150 (1945). The Secretary's comments were included in the House Report on the bill containing the present "fair and honorable dealings" language, H.R. Rep. 1466, 79th Cong., 1st Sess. 15 (1945).

follows:

> "The sixth classification, supra, permits Indian tribes to assert any claim which would arise on a basis of fair and honorable dealings, even though not recognized by any existing rule of law or equity. This extension of jurisdiction is believed to be justified by reason of the fact that we have always treated the Indian tribes as non sui juris and have set ourselves up as their guardians. In this relationship many claims, not strictly legal, but meritorious in character have developed, which the Congress has recognized in a few special jurisdictional acts (e.g., Tlingit and Haida Claims Act of 1935 (49 Stat. 388),* as amended by the acts of June 5, 1942 (56 Stat. 543), and June 4, 1945, (Public Law No. 70, 79th Cong., 1st Sess.))...." H.R. Rep. 1466, 79th Cong., 1st Sess. 12 (1945).

The claim of the Tlingit and Haida Indians involved the taking of aboriginally held lands, some with valuable mineral deposits on them. Under traditional legal principles, Indians could not recover for such a taking. In the above report, the Committee made clear that such a taking would be compensable under the fair and honorable dealings clause of the Indian Claims Commission bill under consideration. This was so even though another clause, appearing as the present Clause 4 of Section 2, in the bill also clearly allowed recovery under the facts of the Tlingit and Haida taking.

Following this, the Senate passed the bill in amended form, inter alia omitting the present Clause 4, see H.R. 4497 as reported in Senate, July 15, 1946 and Senate Rep. 1715 to accompany H.R. 4497, 79th Cong.,

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* [The Tlingit and Haida Claims Act of 1935 did not contain a "fair and honorable dealings" clause.]

2d Sess. (1946). In conference, the present Clause 4 was reinserted with an explanation most relevant for the case at hand:

> "Out of an abundance of caution the conferees reinstated two of the classifications struck by the Senate because they wanted to make sure that if any tribal claimant could prove facts sufficient to make a case under either of these classifications, the Commission would have authority to make an award to such claimant. ***
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> "The second of these classifications covers claims arising from the taking by the United States of Indian lands, ie., lands to which tribal claimants had 'Indian title' or the 'right of occupancy'. . . .
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> "Both of the classes of claims reinstated by this amendment may fall within the category of 'fair and honorable dealings'. To set them forth explicitly helps to clarify the contents of that category." (Emphasis added) Statement of the Managers on the Part of the House, Conf. Rep., H.R. Rep. 2693, 79th Cong., 2d Sess. 5-6 (1946).

Thus the fair and honorable dealings clause was intended to give to aboriginal title holders the right to recover for interferences in addition to the taking of their lands without compensation provided for in Clause 4.

Judicial interpretation of the Act also supports this result. In Otoe and Missouria Tribe of Indians v. United States, 131 Ct. Cl. 593 (1955), the Court of Claims pointed out forcefully that Clause 5 applies to Indian title lands. This was reaffirmed in the Lipan Apache Tribe v. United States, 180 Ct. Cl. 487 (1967) when the Court held that if United States troops and officials drove the claimants from aboriginal title land, a claim under Clause 5 as well as Clause 4 was stated: "Appellants, to recover under this claim [Clause 5] must show to the Commission's satisfaction that the United States forces

or officials drove them from the lands to which they held Indian title." Lipan Apache, supra, at 501-2.

In the present case it has been shown that minerals and timber were removed from lands to which the plaintiff held Indian title. This was done by persons for whose acts, under the holding of Northern Paiute, supra, the Government is responsible. Mining claims made under systems of local rules were retroactively validated both by the Nevada Territorial legislature and by Congress. Federal troops quickly responded to calls for assistance from miners in the Comstock Lode. Residents of Gold Hill, in the Washoe Tract, cheered on the regiment of Federal troops and irregulars as they marched toward Pyramid Lake to face the Paiutes. Exploitation of the Comstock Lode proceeded so notoriously under the implied sanction of the Federal government that almost contemporaneously the United States Supreme Court was able to take judicial notice of the fact, Sparrow v. Strong 3 Wall. (70 U.S.) 97, 104, 18 L. Ed. 49, 50 (1866). These facts are sufficient to create liability on the part of the Government under Clause 5 of Section 2 of the Indian Claims Commission Act.

The defendant has contended that incursions on the Indian lands led to their development and is the cause for their enhancement of value. With this we agree and have indicated that the proved value of any improvements placed upon the land would not be recoverable by the plaintiff. However, the plaintiff here alleges a taking and carrying away of products of the lands. The lands have been valued without the products which were carried away before the valuation

dates. For the value of these products, the Government is liable to the plaintiff.

A similar result was reached in Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130, 323-327, 333-334, 335 (1968), where under the Tlingit and Haida Claims Act the trial commissioner awarded compensation for exploitation of mineral resources of aboriginal title lands prior to the taking dates. This was approved by the Court upon review of the findings. Id. at 150.

We think that the measure of damages for the minerals removed should be such as to compensate plaintiff for the value of its lands without diminution of their resources by the miners' incursions. Such damages should be measured by computing the profit which would have been realized from the minerals prior to the valuation date. This method used by its trial commissioner, was approved by the Court of Claims in Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130, 150, 323-327, 333-334, 335 (1968). We have found this profit to be $1,225,000.

We have also found that timber was removed from the Nevada portion of the Washoe Tract prior to the 1862 valuation date. Since this timber was used primarily by miners for fuel to operate mine equipment and for construction of shafts and tunnels, we feel that Plaintiff may recover damages for the same reasons that recovery was allowed for the pre-valuation date taking of minerals. Since the amount of timber actually removed has not been shown and since the cutover lands retained some value, we have found the proper measure of damages to be the difference in value between the lands before and after timber

was removed. We have found this amount to be $10,000.

Conclusions. In valuing the Washoe Tract, we have applied the method of valuation described in Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130, 137 (1968):

> "The single highest and best potential use of the resources of each tract within the larger area was considered. . . . Each possible use for the same single tract of land may not be cumulated to determine its value. The total unit value ... is the cumulative value of each tract within that larger area to which a single highest use of timber, forest or mineral value has been assigned. No single tract value is the total of all of the various uses to which it might have been put."

Accordingly, the Commission concludes that Defendant is liable to Plaintiff for $5,053,350 less offsets, if any, allowable under the Indian Claims Commission Act.

On September 25, 1969, Plaintiff filed a Motion for Leave to Amend Plaintiff's Proposed Findings of Fact and Brief on Valuation. The amendments in effect ask for additional damages equal to the amount which the principal award would have earned if paid at the time of the wrongful taking. This motion does not interject any new claim into the case since Plaintiff's original petition asked for interest on the award. Despite Plaintiff's attempt to phrase his proposed findings in the language of the opinion in Peoria Tribe v. United States, 390 U.S. 468 (1968), on remand, 20 Ind. Cl. Comm. 308 (1969), the gravamen of Plaintiff's proposed findings is for interest and not for damages. In Peoria and similar cases, the award was for damages resulting from the failure to carry out treaty provisions as to the disposal of the lands and the investment of the proceeds. These were not awards for damages based

merely upon the delay in payment for property taken. These were awards for loss of earnings when the Government had an affirmative duty to invest the funds to earn interest. In the present case, any loss of earnings, so-called, results merely from delay in payment to the Washoes and the resultant inability of the Washoes themselves to use the funds.

Nothing in the Peoria case or the Commission's decisions following that case overrules the long-standing doctrine that interest is not payable on awards for takings of property held aboriginally. United States v. Alcea Band of Tillamooks 341 U.S. 48 (1951); Nooksack Tribe v. United States 162 Ct. Cl. 712, 818 (1963), cert.den. 375 U.S. 993 (1964). Likewise, nothing in Delaware Tribe v. United States 21 Ind. Cl. Comm. 18 (1969) which related only to the Commission's discretionary power in the award of gratuity offsets changes the doctrine.

We have granted Plaintiff's motion to amend its proposed Findings of Facts and brief. We find no reason to allow additional oral argument on the motion since the question of interest has been present in the case from its inception. We conclude that there is no basis for allowing interest or damages for loss of earnings to Plaintiff.

Concurring:

John T. Vance, Commissioner

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner