

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 17, 1970

Appearances:

Charles A. Hobbs and Frances L. Horn of the Law Firm of Wilkinson, Cragun & Barker, Attorneys for Plaintiffs.

Edwin B. Hatch, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

The case is before this Commission for a decision on defendant's motion filed January 19, 1970, for a summary judgment of dismissal of plaintiffs' claim or in the alternative for an order defining the issues.

Under the Treaty of Fort Laramie dated September 17, 1851, ratified May 24, 1852 (11 Stat. 749), plaintiffs were granted a reservation south and west of the Missouri River in Montana and North Dakota. Pursuant to Executive Orders of August 18, 1868,

April 12, 1870, July 13, 1880 and June 17, 1892 (I Kappler 883-884) a total of 11,424,512.76 acres were deducted from plaintiffs' reservation, and 1,578,325.83 acres north and east of the Missouri River were added thereto. At that time, plaintiffs received no compensation for the lands taken from them.

Pursuant to a special jurisdictional act passed in 1920 (41 Stat. 404) plaintiffs filed a claim in the Court of Claims for just compensation for the alleged taking by defendant of lands under the provisions of the above-described executive orders. The Court of Claims in Fort Berthold Indians v. United States, 71 Ct. Cls. 308 (1930) found that for the lands taken, plaintiffs were "entitled to just compensation to be fixed upon the basis of the amount they might have obtained for the large areas taken at the time they were taken." Id. at p. 339. In its Finding XXI (Id. at p. 328), the Court found that 11,424,512.76 acres was taken from plaintiffs' reservation in 1868, 1870 and 1880 and that under the Executive Orders of April 12, 1870, July 13, 1880 and June 17, 1892 a total of 1,578,325.83 acres were added to plaintiffs' reservation. It concluded that "The total net deduction from plaintiffs' original reservation" resulting from the provisions of the said Executive Orders "for which no compensation

was received, was 9,846,186.93 acres" (Id. at pp. 328, 329).^{1/} It valued the net acreage at 50 cents an acre and rendered judgment accordingly. The decision does not indicate what valuation date was used by the Court. However, it may be assumed that Court used an average date for all the lands valued, or an average of the land values on separate dates, but did not state its valuation of each separate tract taken under three executive orders with varying dates. Neither did the Court consider or decide specifically the value of any of the "offset" lands.

On March 14, 1958, plaintiffs filed a severed claim for alleged unfair land exchanges, wherein they seek compensation for 1,578,325.83 acres. They allege that the land taken was richer, fertile and more

^{1/} The following table shows the approximate acreages of lands taken from and added to Fort Berthold Indian Reservation in the transactions in question:

<u>Executive Order</u>	<u>Acreage Taken</u>	<u>(Approx.) Acreage Added</u>
August 18, 1868	98,645.67	none
April 12, 1870	4,686,612.43	184,320.00
July 13, 1880	6,639,254.66	1,378,645.83
June 17, 1892		<u>15,360.00</u>
Total	11,424,512.76	1,578,325.83
	11,424,512.76	
	<u>1,578,325.83</u>	
Net Acreage Taken	9,846,186.93	

valuable than the added land, which was ill-watered, infertile and less valuable. They further allege that the "exchange," as treated by the Court of Claims, i.e., the offset of "added" acreage from the "taken" acreage, getting the less valuable lands north of the Missouri River for the more valuable lands south of the Missouri River, constituted their receiving unconscionable consideration under the Indian Claims Commission Act of 1946 (60 Stat. 1049), for 1,578,325.83 acres.

Defendant has moved to dismiss the claim on the ground of res judicata or alternatively for an order setting the value of all the land south of the Missouri River at the 50 cents an acre found by the Court of Claims in Fort Berthold, supra.

The argument for this claim having been the subject of the prior decision in the Court of Claims has already been rejected by the Commission, Three Affiliated Tribes of Fort Berthold v. United States, 3 Ind. Cl. Comm. 444, 450-1 (1955). An examination of the jurisdictional act controlling the Court of Claims litigation shows that the Court had no power to consider a claim based on unconscionable consideration in this exchange.^{2/} This claim is one of the new causes of action

^{2/} "... That all claims of whatsoever nature which any or all of the tribes of Indians of the Fort Berthold Reservation, North Dakota, may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribes from

arising under the Indian Claims Commission Act and its assertion is not barred by res judicata. The Creek Nation v. United States, 168 Ct. Cl. 483 (1964).

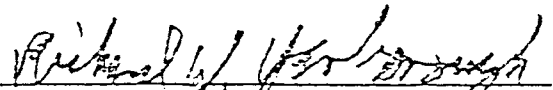
Defendant's claim of collateral estoppel rests on the Court of Claims finding that the value of the excess acres taken south of the Missouri River was 50 cents an acre and that plaintiff cannot contest that valuation in this case. We would agree if that exact finding were the issue here: "In the application of collateral estoppel no issue may be heard again on its merits where a court has previously heard and considered the facts relative to that issue, and made a specific and definitive finding thereon. Thus the factual issue that was litigated by the parties ... is binding on the parties ... in ... subsequent suits ..." The Creek Nation v. United States, 168 Ct. Cl. 512 at 519-520 (1964). However, we judge that plaintiff does not seek to have determined the same issue that the Court of Claims decided: the average value of all of the acres taken south of the Missouri River as of an average date of taking. To establish its claim resting on more valuable acres traded for less valuable acres

2/ the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds of said tribes, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon." 41 Stat. 404

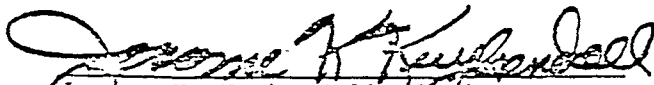
the plaintiff will be required to produce evidence as to values of acres transferred as of specific dates in question.^{3/} The previous finding by the Court of Claims is not of such a specific and definitive nature that it can be said to be binding on the more detailed examination of values at various dates as will be required here. We may assume that the ultimate findings that may be made by this Commission on the several values will not be logically inconsistent with the result reached by the Court of Claims in its summary finding of an overall average value, but that will be determined at a later date.

The "exchange" of 1,578,325.83 acres out of the total 11 million acres for the acreage north of the River is the basis of plaintiffs' action here. Such action is properly brought under the Indian Claims Commission Act. Therefore defendant's motion for a summary judgment and its alternative motion for an order, declaring that the value of all the lands south of the Missouri River was decided by the Court of Claims at 50 cents an acre, must be denied, and an appropriate order entered.


^{3/} The Commission reserves its opinion on the valuation theory advanced by the plaintiff in argument; pretrial proceedings will be scheduled to define the issues with more certainty.

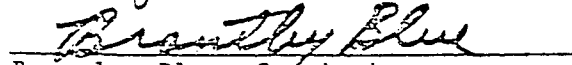

Richard W. Yarborough, Commissioner

We Concur:


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner