BEFORE THE INDIAN CLAIMS COMMISSION

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS,	)	Docket No. 113
RED LAKE BAND, AND PETER GRAVES, ET AL., ex. rel. RED LAKE BAND, PEMBINA BAND, AND KATHERINE CARL BARRETT ET AL., ex. rel. PEMBINA BAND, JOHN B. AZURE ET AL., ex. rel. CHIEF LITTLE SHELL'S BAND OF PEMBINA CHIPPEWA INDIANS,	)	Docket No. 246
THE LITTLE SHELL BAND OF CHIPPEWA INDIANS, AND JOSEPH H. DUSSOME ET AL., ex. rel. said Band,	)	Docket No. 191
CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION, MONTANA, AND JOE CORCORAN, ex. rel. CHIPPEWA CREE TRIBE OF THE ROCKY BOY'S RESERVATION, BLANCHE PATENAUDE ET AL., ex. rel. LITTLE SHELL BAND OF INDIANS AND THE CHIPPEWA CREE TRIBE,	)	Docket No. 221
THE THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket Nos. 350-B and 350-C

Decided: June 30, 1970

Appearances:

Glen A. Wilkinson, Attorney for Plaintiff in Docket No. 113. John A. Stormon, J. Howard Stormon, Frances L. Horn, and Wilkinson, Cragun & Barker were on the Briefs.

Jay H. Hoag, Attorney for Plaintiffs in Docket No. 246. Marvin J. Sonosky was on the Briefs.

Lawrence C. Mills, Attorney for Plaintiffs in Dockets 191 and 221. Mills and Garrett were on the Briefs.

Jonathan C. Eaton, Jr., Attorney for Plaintiffs in Dockets 350-B and 350-C.

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

Walter A. Rochow, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant in Docket Nos. 350-B and 350-C.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

The McCumber Agreement of October 22, 1892, amended by the Act of April 21, 1904, 33 Stat. 189, 193, involved the cession of certain lands in North Dakota. The agreement was executed by the Turtle Mountain Band of Chippewa Indians. Three separate plaintiffs or groups of plaintiffs have filed claims based upon their alleged interests in the lands so ceded. The claims of these three groups are found in four dockets, numbered 113, 246, 191 and 221. We shall refer to these plaintiffs collectively as the "Chippewa plaintiffs". We refer to the ancestral landowning entity as "Plains-Ojibwa".

The areas originally claimed by the various plaintiffs are shown on Defendant's Exhibit 74, Docket 113. Subsequently the Chippewa plaintiffs modified their contentions. All the Chippewa plaintiffs now claim the same boundaries for lands ceded under the McCumber Agreement. The eastern portion of the area originally claimed was the subject of a final award in Red Lake, Pembina and White Earth Bands et al. v. United States.[1/] That case set the eastern boundary of the present Chippewa claim. The southern boundary as originally claimed overlapped with the claim of the Sioux Nation in Docket 74. The Chippewa plaintiffs have however, eliminated that overlap, claiming now only as far south as the Sioux-Chippewa line agreed to in the "Sweet Corn Agreement."

1/ 6 Ind. Cl. Comm. 249 (1958), 9 Ind. Cl. Comm. 315 (1961), aff'd. in part and rev'd in part, 164 Ct. Cl. 389 (1964), 13 Ind. Cl. Comm. 574 (1964), aff'd in part and rev'd in part, 173 Ct. Cl. 928, 335 F.2d 936 (1965), 19 Ind. Cl. Comm. 205, 267 (1968).

The western boundary claimed by the Chippewa plaintiffs is a line from near the mouth of the Little Knife River due north to the Canadian border. The northern boundary of the Chippewa claim follows the United States-Canadian border.[2/]

The Chippewa plaintiffs ask for compensation under clauses (3), (4) and (5) of Section 2 of the Indian Claims Commission Act for land ceded by the McCumber Agreement.

The claims of the Fort Berthold Indians in Dockets 350-B and 350-C were consolidated with the Chippewa claims because of an alleged overlap. Only Docket 350-B presents an overlap with the land claimed by the Chippewa in North Dakota. Outside the area claimed by the Chippewa plaintiffs the claims by the Fort Berthold Indians present other overlaps.[3/]

2/ Of the Chippewa plaintiffs, questions of title remain to be decided in Dockets 191, 221-A and 221-B. An accounting claim remains as Docket 221-C. This opinion disposes of all remaining title issues in Dockets 113, 246 and 221.

3/ The following claims remain to be decided: (A) Land in northern Montana involving Dockets 350-C, 221-B and 191. (B) Land east of the Missouri River in North and South Dakota, south of the McCumber Agreement land claimed by the Turtle Mountain Band and others, involving Dockets 74, 221-A, 350-B and 350-C. (C) Land in northwestern North Dakota, west of Turtle Mountain claim, involving Dockets 221-A and 350-C.

PARTIES

Several questions have been raised as to the parties who may properly maintain the claim advanced by the Chippewa plaintiffs. Both Dockets 246 and 221 involve multiple plaintiffs, certain of whom, it is conceded, have no interest in the lands presently at issue. Plaintiffs in Docket 246 concede that the Red Lake Band, and Peter Graves, Joseph Graves and August King as members of that band, have no interest in the present claim. (See Plaintiffs' Proposed Findings of Fact, Docket 246, at p. 15). The Red Lake Band and these named individuals are therefore dismissed as plaintiffs. Plaintiffs in Docket 221 concede that the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana, and Joe Corcoran as a member of that tribe, have no interest in the present claim. (See Tr. 295-296). They are therefore dismissed as plaintiffs.

The remaining Chippewa plaintiffs are the Turtle Mountain Band of Chippewa Indians, The Pembina Band of Chippewa Indians and certain individual members of that band, and the Little Shell Band of Chippewa Indians (which sometimes describes itself as the Chippewa Cree Tribe) and certain individual members of that band.

The standing of the Little Shell Band (in Dockets 191 and 221) to maintain a claim has been questioned by the other Chippewa plaintiffs. We hold that the Little Shell Band is a proper party plaintiff. As a group of descendants of the Plains-Ojibwa, the band is an identifiable group as that term has been defined by the Court of Claims. Red Lake and Pembina Bands v. United States, 173 Ct. Cl. 928, 940-941, 355 F.2d

936, 943 (1965). A motion to dismiss made by the government on the ground that plaintiff in Docket 191 is not an identifiable group has previously been denied. Little Shell Band v. United States, 3 Ind. Cl. Comm. 417 (1954). We have found that the Little Shell Band claimants in Docket 221 are part of the same group.

Plaintiffs in Docket 113 claim that under Section 10 of the Indian Claims Commission Act they have the exclusive privilege of bringing the subject claim. We disagree. Under that section they merely have the exclusive privilege of representing the present Turtle Mountain Band, whose constitution and bylaws were approved by the Secretary of Interior in 1932. McGhee v. Creek Nation, 122 Ct. Cl. 380, 394-395 (1952), cert. denied, 344 U.S. 856 (1952). The Little Shell plaintiffs do not purport to represent this Turtle Mountain Band. Rather they claim to represent a dissident group of Plains-Ojibwa who refused to sign the McCumber Agreement. The Court of Claims has held that it would defeat the purpose of Congress to deny separate representation to descendants of a group which constituted a portion of the original landowning entity. McGhee v. Creek Nation, supra, at 395.

Finally, we should note that the Commission has no jurisdiction to determine how an award is to be paid or precisely who can participate in an award. This is for Congressional and administrative determination. Red Lake and Pembina Bands, supra, at 942-943, 355 F. 2d, at 944. To dismiss the Little Shell plaintiffs would be an

impermissible predetermination of the persons who would benefit from the award, if any, in this case. Red Lake and Pembina Bands v. United States, supra, at 942-943, 355 F.2d at 944. This is particularly true in light of the contention by plaintiffs in Docket 113 that "most of the Montana 'members' [of the Little Shell Band] have abandoned any rights they may have had as Turtle Mountain Chippewa or could not qualify as American Indians." Brief, Dkt. 113, at p. 132n.

TITLE

Plaintiffs claim that the United States recognized their title to lands in North Dakota. We cannot agree. Recognition can come only through Congressional action. Statements by executive officers, many of which are cited by plaintiffs, are insufficient to establish recognized title. Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 192, 315 F.2d 896, 897 (1963) cert. denied, 375 U.S. 921 (1963). Looking to the Congressional actions cited by plaintiffs, we can find no evidence that Congress intended to grant permanent rights of occupancy to plaintiffs. The fact that the treaty of cession with the Sisseton and Wahpeton Sioux (ratified May 2, 1873, II Kappler 1059) followed part of the boundary outlined in the Sioux-Chippewa Sweet Corn Agreement and that this agreement was mentioned by the negotiators in their report to the Secretary of the Interior is a far cry from recognition of plaintiffs' title. Neither does the McCumber Agreement contain any language which could conceivably be

interpreted as Congressional intent to grant the right to occupy and use the land permanently. Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 439, 445 (1959). We must then determine whether the Plains-Ojibwa had aboriginal title to any of the area claimed.

Defendant has raised a novel point which must be resolved before a determination as to aboriginal title can be made. The government has claimed that the mixed blood Chippewas, or so-called half-breeds, were non-Indians, and that land use by the mixed bloods would not be use by the Chippewas. Dr. Stout testified for the defendants that the distinction between half-breeds and full bloods was based "primarily on cultural differences, not the biological ones." Tr. 443. In defendant's view, the half-breed was a non-Indian who could not be part of the land owning group whose use and occupancy determined aboriginal title. See Def. Proposed Finding 10. We think that both as a matter of fact, and as a matter of law, defendant's contention is incorrect. We have dealt with the factual aspects of the issue in our findings of fact.

As a question of law, we think the court's language in United States v. Higgins, 103 Fed. 348 (D. Mont., 1900) goes far toward deciding the issue. The court said:

> Considering the treaties and statutes in regard to half-breeds, I may say that they never have been treated as white people entitled to the rights of American citizenship. Special provision has been made for them -- special reservations

> of land, special appropriations of money. No such provision has been made for any other class. It is well known to those who have lived upon the frontier in America that, as a rule, half-breeds or mixed-blood Indians have resided with the tribes to which their mothers belonged; that they have as a rule, never found a welcome home with their white relatives, but with their Indian kindred. It is but just, then, that they should be classed as Indians, and have all the rights of the Indian.

Defendant in effect contends that descendants of Indians may become non-Indians by adopting the culture of non-Indians. We think that the Supreme Court has held just the contrary in Elk v. Wilkins, 112 U.S. 94 (1884), when it held that an Indian at that time did not become a citizen merely by voluntarily separating himself from his tribe and taking up residence among white citizens. Thus we conclude that in determining the extent of aboriginal ownership, it is proper to consider together the occupancy of both mixed bloods and full bloods.

In our findings of fact we have examined the evidence regarding use and occupancy of the lands in North Dakota. We have found that a group of full and mixed-blood Chippewas, best described as Plains-Ojibwa, adapted themselves to life on the plains beginning around 1800. These Plains-Ojibwa annually engaged in buffalo hunts going south and west from St. Joseph to the Missouri Coteau. While the Chippewa-Sioux Sweet Corn Agreement drew the western Plains-Ojibwa boundary at the Little Knife River, the evidence does not show actual exclusive use and occupancy that far west. To the southwest, exclusive use and

occupancy by the Plains-Ojibwa extended no farther than Buffalo Lodge Lake after 1825. North of this, exclusive use and occupancy farther west than the west branch of the Souris or Mouse River has not been shown. The temporary movement of Fort Berthold Indians in the summer of 1851 to avoid a cholera epidemic did not destroy exclusive Plains-Ojibwa use and occupancy.

We have found that the Arikara, Mandan and Hidatsa were located west of the Souris River after 1800, with the exception of their movements in the summer of 1851 to avoid a cholera epidemic. The proposed findings of fact submitted by the Fort Berthold plaintiffs do not appear to dispute this. Rather, the Fort Berthold plaintiffs contend that they retained aboriginal title to lands occupied prior to 1800 since they did not intentionally relinquish and surrender title. They maintain that their title could have been lost only by an unreserved surrender of their claim. We cannot agree.

The Fort Berthold plaintiffs rely upon language in Fort Berthold Indians v. United States, 71 Ct. Cl. 308, 334-335 (1930). That case, however, dealt with the question of loss of title which had been recognized by the Treaty of Fort Laramie, 11 Stat. 749 (1851). In the present case, we are dealing with the question of aboriginal title to lands outside those covered by the Fort Laramie Treaty. It is clear that exclusive use and occupancy "for a long time" by a tribe, even though it did not occupy an area from time immemorial, is sufficient to give aboriginal title. The aboriginal title of a tribe that has retreated after conquest gives way to that of the new tribal occupant

when it has occupied the conquered province long enough to transform it into domestic territory. Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 205-206, 315 F. 2d 896, 905 (1963), cert. denied 375 U.S. 921 (1963). The Plains-Ojibwa transformed the area which we describe below into their domestic territory through exclusive use and occupancy for a long time before 1905.

Considering all the evidence, we find that the Plains-Ojibwa exclusively used and occupied for a long time prior to 1905 the area bounded as follows:

> Beginning at the 98th parallel where it crosses the International Boundary, running due south along the 98th parallel to the point at which it intersects the Middle Branch of the Forest or Salt River; then southwest to the northeasternmost point on Stump Lake, which is the point where Stump Lake is intersected by the stream running between Stump Lake and Coon Lake; then westerly through the Devil's Lake complex to the southeastern corner of the town of Minnewaukan; then in a southwesterly direction to Dog Den Butte, which is a part of the Missouri Coteau; then in a northerly direction to the southwest tip of Buffalo Lodge Lake, which is where that Lake is intersected by South Egg Creek; then due west to the western branch of the Souris or Mouse River; then up the Souris River through the center of Lake Darling, then continuing up the Souris River to the International Boundary; then east along the International Boundary to the place of beginning.

The Plains-Ojibwa did not exclusively use and occupy for a long time prior to 1905 any other land in North Dakota claimed in this case by the Chippewa plaintiffs.

By the terms of the McCumber Agreement, the United States acquired all the land in North Dakota owned by the Plains-Ojibwa, with the exception of the reservation described in Article 2 of the Agreement. The

McCumber Agreement as amended became effective when ratified by the Turtle Mountain Band. This date of ratification, February 15, 1905, is the date as of which the land owned by the Plains-Ojibwa will be valued.

Defendant has urged that the general release which the Turtle Mountain Band was required to execute before the treaty would take effect discharged the government's obligations to plaintiffs. If at the valuation stage of this case it is determined that the release was obtained for unconscionably low consideration, under the rule announced in Felix McCauley v. United States, 1 Ind. Cl. Comm. 609, 542 (1951), and Creek Nation v. United States, 2 Ind. Cl. Comm. 66, 112-114 (1952), that release would be invalid.

This claim will thus proceed to the valuation of the lands to which the Plains-Ojibwa held aboriginal title and to the issues of consideration received and unconscionability of consideration. The claims in Docket Nos. 350-B and 350-C will proceed separately.

John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner