BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS, Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant.

Docket No. 259-A

Decided: February 10, 1971

Appearances:

J. Roy Thompson, Attorney for Plaintiffs,

Gordon W. Daiger, with whom was Mr. Assistant Attorney General, Shiro Kashiwa, Attorneys for Defendant, Clifford R. Stearns, on the briefs.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pierce, Commissioner, delivered the opinion of the Commission.

This matter is now before the Commission on defendant's Motion for Summary Judgment by which defendant requests judgment:

(a) in favor of plaintiffs in the amount of $24,025.86 as compensation for lands acquired by the United States in 1900 but wrongfully excluded from a previous award of the Commission,

(b) in favor of plaintiffs for an accounting as to some 1,920 acres of the Rainy Mountain Boarding School Reserve as

described in the Act of June 24, 1946 (60 Stat. 305), from the date of enactment to August 13, 1946, and

(c) in favor of defendant as to all other claims presented in the Amended Petition for a general accounting.

For reasons which we shall discuss the motion will be denied.

In this case the plaintiffs bring an action in accounting for the proceeds from the disposition of certain lands in which they claim an interest. The lands involved have heretofore customarily been referred to as "10,310 acres of administrative and Indian school land."

The circumstances surrounding this claim were set forth in detail in our opinion of April 1, 1970, on defendant's motion to dismiss or to require plaintiffs to make the petition more definite and certain (22 Ind. Cl. Comm. 482). We will not again detail the history of the claim and all the related actions before this Commission and the Court of Claims. In our previous opinion we considered the question of the ownership of the "10,310 acres" of Indian school and other administrative land. That question depended upon the meaning and effect of Section 6 of the Act of June 6, 1900 (31 Stat. 672, 676); the Presidential Proclamation [No. 6] of July 4, 1901 (32 Stat. 1975, 1977, Part 2); and the Jerome Agreement of October 6, 1892.

The Jerome Agreement entered into in 1892 by the plaintiffs herein and a Commission of which David H. Jerome was chairman provided in general that, subject to certain conditions, title to most of the land in plaintiffs' reservation was to be transferred to the United States. Section 6 of the

Act of June 6, 1900, supra, purported to ratify that Agreement. The pertinent Presidential Proclamation of July 4, 1901, supra, opened for settlement the unallotted and unreserved lands in the reservation.

For the reasons detailed in our April 1, 1970, opinion we concluded that it was not the intent of the parties to the Jerome Agreement of 1892, to retain title to the Indian school and other administrative lands in the Indian tribes; that the provisions of Section 6 of the Act of June 6, 1900, supra, transferred title to the lands in question to the United States; and that the Presidential Proclamation of July 4, 1901, supra, merely excepted from entry for settlement certain lands including the land used for Indian school and other administrative purposes. Since the United States acquired title to the lands in question by the 1900 Act, those lands should have been included in the total acreage of the lands for which the plaintiffs were awarded additional compensation in the earlier decision of the Commission in Docket No. 32. 1/

While rejecting the basis for plaintiffs' requested accounting action (that the lands belonged to them, having been reserved for their use and benefit pursuant to Section 6 of the 1900 Act, supra), the Commission indicated the possibility that subsequent congressional enactments might

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1/ The Kiowa, Comanche and Apache Tribes of Indians v. United States, 4 Ind. Cl. Comm. 95, 110 (1955) aff'd 143 Ct. Cl. 534, 163 F. Supp. 603 (1958), reh. denied, 143 Ct. Cl. 545, 166 F. Supp. 939 (1958) cert. denied 359 U. S. 934 (1959). When the petition in Docket 32 was originally filed on August 9, 1948, the tribes apparently assumed that the 10,310 acres of administrative land remained in tribal ownership after the 1900 cession. The lands were excluded from the acreage computation, and an award was entered based upon a valuation of $2.00 per acre for some 2,033,583 acres.

have created a beneficial interest in the 10,310 acres of land. Accordingly, plaintiffs were afforded the opportunity to file an amended petition.

The plaintiffs filed an amended petition on May 4, 1970. Now the defendant has moved for a summary judgment as set forth above. The amended petition has detailed, in Appendix 1, a description of the lands involved in this claim from which description it appears that the total acreage claimed is precisely 12,012.93 and not 10,310 acres. Defendant concedes that these 12,012.93 acres were excluded from the award rendered in Docket No. 32 and maintains that the plaintiffs are now entitled to recover $24,025.86 ($2.00 per acre) as the fair market value of the lands.

In their amended petition plaintiffs have set forth some 28 statutes and Presidential proclamations to support their claim that they acquired certain beneficial interests in the land in suit entitling them to an accounting from defendant. The Statutes and Presidential proclamations are the identical ones which were originally set forth in the petition in this case. One of the enumerated acts, the Act of June 24, 1946, 60 Stat. 305, provided that some 1,920 acres of land be eliminated from the Rainy Mountain School Reserve in Oklahoma and that title thereto be vested in the United States in trust for the Indians of the Kiowa, Comanche, and Apache Indian Reservation. This act created in plaintiffs a beneficial interest in the described lands and defendant admits that an accounting should be rendered with respect to 1,920 acres described in the Act of June 24, 1946, supra.

Such accounting, however, will be limited, at this time, to the period commencing June 24, 1946, and ending August 13, 1946, the date of the enactment of the Indian Claims Commission Act, 60 Stat. 1049. The rule regarding the defendant's obligation to furnish an accounting to the present time applies only when there is an initial wrongdoing giving rise to a claim accruing before the August 13, 1946, statutory time bar and continuing past that time. 2/ If it appears from this initial accounting that the defendant was guilty of any wrongdoing, then plaintiffs may be entitled to a further accounting to the present time.

None of the remaining 27 Acts of Congress and Presidential proclamations cited in the petition created in plaintiffs any beneficial interest in the lands involved in this action. Accordingly, plaintiffs have failed to establish any right which may give rise to an accounting action. Plaintiffs have not presented any theory, amplification, or explanation to support their contention. The right to an accounting presumes that the pleading party has a property interest in the subject matter. With the exception of the 1,920 acres referred to above, plaintiffs have not established any proprietary interest in the lands involved. Accordingly, the only accounting which defendant is required to furnish will relate to the 1,920 acres involved in the Act of June 24, 1946, supra.

2/ Southern Ute Tribe v. United States, 191 Ct. Cl. 1, 423 F. 2d 346 (1970), cert. granted Nov. 16, 1970, 400 U. S. 915 . The issue concerning the Commission's jurisdiction to order an up-to-date accounting is in issue at the defendant's appeal from the Court of Claims decision.

The remaining question in this case concern the valuation of the entire 12,012.93 acres of administrative and Indian school lands which were erroneously excluded from the lands for which plaintiffs were awarded additional compensation in the Docket No. 32 case. In that case the total acreage was 2,033,583 acres. The Commission determined that the lands had a fair market value on the average of $2.00 per acre. Since the 12,012.93 acres erroneously excluded were entirely within the boundaries which circumscribed the 2,033,583 acres, defendant urges that the $2.00 average per acre value be applied to the excluded acreage.

Plaintiffs apparently are not willing to accept the $2.00 per acre figure as the fair market value of the 12,012.93 acres in question. Plaintiffs raise two points in their brief. Since the excluded acreage was not included in the lands considered in arriving at the previous fair market value determination, their particular attributes and qualities have not been before the Commission. As a second point plaintiffs argue that the fair market value of 12,012.93 acres, a relatively small tract, should be greater than the average per acre value of a 2 million acre tract.

Despite the fact that in Docket No. 32 the value of 12,012.93 acres of land ceded by plaintiff in 1900 was mistakenly excluded from the award to plaintiffs, those same plaintiffs may not in this action seek a separate judgment for the value of the excluded acreage as a matter totally unrelated to the award based on the fair market value of the 2,033,583 acres involved in Docket 32. To entertain plaintiff's claim on such a

theory would be tantamount to permitting plaintiffs to split what is in reality a single cause of action, since the claim to recover the value of the 12,012.93 acres asserted in this docket is identical in all material respects with the claim asserted and determined favorably to plaintiffs in Docket No. 32. Von Der Ahe Van Lines, Inc. v. United States 175 Ct. Cl. 281, 287; 358 F. 2d 999, 1001 (1966) cert. denied, 385 U.S. 837, Medwin Benjamin, et al., v. United States, 172 Ct. Cl. 118, 348 F. 2d 502 (1965); N. L. and J. L. Terteling, et al., v. United States, 167 Ct. Cl. 331, 334 F. 2d 250 (1964) Accordingly, the issue to be determined herein is not the fair market value as of 1900 of the 12,012.93 acre tract without reference to and unrelated to the value of the 2,033,583 acre tract with which the smaller tract should have been valued in Docket No. 32, but rather how much more the fair market value of the 2,033,583 acre tract would have been if the 12,012.93 acres had been added to the tract which was valued in Docket No. 32. 3/ In other words the issue is the increase in value of 2,045,595.93 acres (2,033,583 + 12,012.93) over the previously determined $2.00 per acre average for 2,033,583 acres. The question of the amount of reduction or discount in the fair market value of the Docket No. 32 tract because of its large size will therefore not be pertinent in this proceeding.

It is, of course, true that the particulars with respect to the 12,012.93 acres were not before the Commission in the Docket No. 32 case.

3/ If the exclusion of the 12,012.93 acres from consideration in Docket No. 32 had not been the result of a succession of errors on the part of all concerned, plaintiffs' claim in this Docket to recover the value of the excluded acreage would be vulnerable under the rule prohibiting the splitting of single causes of action or as barred by a former adjudication in Docket No. 32. Under the peculiar circumstances of this case, however, such a course is obviously precluded in the interests of justice.

And it is possible, theoretically at least, that the 12,012.93 acres had such special attributes that they were more valuable on the average than the $2.00 per acre value for the surrounding lands. If plaintiffs wish to present evidence of the fair market value of the 12,012.93 acres, the case will be set for hearing on the valuation issue. If, however, in the light of this opinion, the plaintiffs believe that the $2.00 per acre valuation in Docket No. 32 would represent a fair determination of the market value of the lands now involved, they may submit proposed findings of fact accordingly.

Defendant's motion is denied and defendant shall, within 15 days from the date of this opinion file its answer to the Amended Petition. Plaintiffs shall have 60 days from the date of defendant's answer within which to either file proposed findings on value or request a hearing date on the valuation issue. Defendant shall file an accounting as to the 1,920 acres described in the Act of June 24, 1946, supra, from that date to August 13, 1946.

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner