BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX NATION, et al.,	)	Docket No. 74
	)	
Plaintiffs,	)	
	)	
THE YANKTON SIOUX TRIBE,	)	Docket No. 332-C
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: June 23, 1972

Appearances:

Arthur Lazarus, Jr., William Howard Payne, Marvin J. Sonosky, Attorneys for Plaintiffs in Docket 74.

Angelo A. Iadarola, Attorney for Plaintiff in Docket 332-C, Frances L. Horn was on the brief.

Craig E. Decker, with whom was Mr. Assistant Attorney General Kent Frizzel, Attorneys for Defendant.

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

Once again the Sioux cases are before the Commission. These cases are becoming continually more complex and confusing. Since the Commission issued its most recent decisions in these dockets (Dockets 74 and 332-C, March 1, 1972, 27 Ind. Cl. Comm. 49; Docket 74, March 8, 1972, 27 Ind. Cl. Comm. 79), the following have occurred: On March 29, 1972, the defendant

filed a motion for rehearing of the Commission's decisions of March 1 and March 8, and for consolidation of the two dockets for the purpose of again determining the interests of the parties in the Sioux Fort Laramie lands. On April 7, 1972, the defendant filed a motion to dismiss Docket 74 for lack of jurisdiction. These motions were responded to by the plaintiffs, and the defendant filed its replies. On May 26, 1972, and while the motions of defendant were pending before the Commission, the Docket 74 plaintiffs (Sioux Nation) filed a notice of appeal from the Commission's orders of August 26, 1970, 23 Ind. Cl. Comm. 419, December 2, 1970, 24 Ind. Cl. Comm. 175, and December 14, 1970, 24 Ind. Cl. Comm. 236, rehearings of which had all been denied in our March 1 decision, supra. On June 1, 1972, and while its motions were still pending before the Commission, the defendant filed a notice of appeal from the Commission's orders of August 26, 1970, supra, December 2, 1970, supra, December 14, 1970, supra, and March 8, 1972, supra. Finally, on June 7, 1972, the Docket 332-C plaintiff (Yankton Tribe) filed a motion to strike the two notices of appeal. This motion was answered by the Sioux Nation, a response was filed by the Yankton Sioux, a "Sur reply" was entered by the Sioux Nation, and the Yankton Sioux again responded. In sum, the Commission is faced with a motion for rehearing, a motion to dismiss, two notices of appeal, and a motion to strike the appeals. The Commission in this opinion, will attempt to free the parties from this quagmire in which they have trapped themselves.

We shall first address ourselves to the motion to strike the notices of appeal. The motion asserts that the appeals are premature in that a motion for rehearing of the decisions sought to be appealed is still pending before the Commission. The Yankton Tribe contends that the filing of the motion for rehearing tolled the running of the time for appeal and that an appeal from the Commission's orders cannot be taken prior to a Commission decision on the motion for rehearing. In its answer the Sioux Nation does not address itself to the Yankton contentions. Rather it asserts that the notices of appeal divested the Commission of jurisdiction over these dockets and therefore the Commission is powerless to consider the Yankton motion. We assume that under the Sioux theory we would also be without jurisdiction to decide defendant's motions for rehearing and dismissal. For the reasons stated below, the Commission holds that both notices of appeal are premature and as such cannot divest the Commission of jurisdiction to consider all motions properly before it. However, we choose not to strike the notices of appeal and shall issue an order denying the Yankton motion.

Generally it is the rule that a perfected appeal suspends the power of the lower court to proceed further in the case. Newton v. Consolidated Gas Co., 258 U.S. 165, 177 (1922); Hovey v. McDonald, 109 U.S. 150, 157 (1883). The effect of the appeal is to transfer jurisdiction of the matter being appealed from the trial court to the appellate court, and consequently the trial court cannot act on that matter until the appeal has been completed. Hunter Douglas Corp. v. Lando Products, 235 F.2d 631,

632-33 (9th Cir. 1956); In re Allen, 115 F.2d 936, 939 (C.C.P.A. 1940); see 9 Moore's Federal Practice ¶ 203.11 (1970). However, this rule applies only when a valid appeal is taken from an appealable order. An attempted appeal from a nonappealable order cannot divest the trial court of jurisdiction. Resnick v. La Paz Guest Ranch, 289 F.2d 814, 818 (9th Cir. 1961). The pendancy before the trial court of timely-filed substantive motions will make its orders temporarily nonappealable. Aberlin v. Zisman, 244 F.2d 620 (1st Cir. 1957); Healy v. Pennsylvania R. Co., 181 F.2d 934 (3d Cir. 1950). An attempted appeal while such motions are pending is premature and will not invest the appellate court with jurisdiction or deprive the trial court of jurisdiction. United States v. Crescent Amusement Co., 323 U.S. 173 (1944); Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971); Turner v. HMH Publishing Co., 328 F.2d 136 (5th Cir. 1964); Hawkins v. Lindsley, 327 F.2d 356 (2d Cir. 1964); Knox v. United States Lines, 294 F.2d 354 (3d Cir. 1961); Healy v. Pennsylvania R. Co., supra; Green v. Reading Co., 180 F.2d 149 (3d Cir. 1950). The Court of Claims has made it clear that the exception to the rule applies to appeals from the Commission to the court while timely-filed motions for rehearing are pending before the Commission. See Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570, 578, 372 F.2d 951, 955 (1967) (aff'g in part, rev'g in part, Docket 93, 15 Ind. Cl. Comm. 267 (1965)); Confederated Tribes of the Warm Springs Reservation v. United States, 177 Ct. Cl. 184, 192 (1966) (remanding, Docket 198, 12 Ind. Cl. Comm. 664 (1963)). Therefcre, if defendant's motion for rehearing in these dockets

was timely filed, the notices of appeal cannot divest the Commission of jurisdiction to decide it.

Rule 33 of the Commission's Rules of Procedure states that "[m]otions for a rehearing shall be filed within 30 days from the time the final determination of the Commission is filed with the Clerk." 25 C.F.R. § 503.33(a) (1968). The defendant's motion for rehearing was filed March 29, 1972, twenty-eight days after entry of the Commission's March 1 decision and twenty-one days after the Commission's March 8 decision. We hold that the motion is timely filed with respect to each decision. Under Rule 171(a)(2) of the Rules of the Court of Claims the motion suspends the running of the appeal time with regard to each decision. It follows that both the Sioux Nation notice of appeal and that filed by the defendant are premature and do not divest the Commission of jurisdiction over these dockets. We are therefore free to proceed to a decision of the motions before us. 1/

A recent decision of the Ninth Circuit Court of Appeals indicates that a notice of appeal filed while a substantive motion is pending before the trial court is not void although it is premature. The notice may become effective after the trial court rules on the motion. Song Jook Suh

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1/ Where the deficiency in a notice of appeal, by reason of untimeliness, lack of essential recitals, or reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction. . . .

Ruby v. Secretary of United States Navy, 365 F.2d 385, 389 (9th Cir. 1966).

v. Rosenberg, supra. Moreover, the Commission is not certain that it has jurisdiction to strike the notices of appeal. Therefore, because we can proceed in these cases despite the filing of the premature notices of appeal, we choose to deny the Yankton Tribe motion to strike.[2/]

We shall next consider defendant's motion for rehearing. Rule 33(b) of the Commissions Rules of Procedure specifies three possible grounds for rehearing; error of fact, error of law or newly discovered evidence. Defendant's motion appears to seek rehearing of both the March 1 and March 8 decisions of the Commission on the ground of error of law. We have carefully examined the points and authorities relied upon by defendant in support of its motion and are unconvinced that our March 1 and March 8 decisions were erroneous. We shall therefore enter an order denying defendant's motion for rehearing.

Finally we shall examine defendant's motion to dismiss Docket 74 for lack of jurisdiction. Defendant asserts that the 1868 treaty claim in Docket 74 was not presented in the original petition and therefore the Commission is without jurisdiction to hear it. Defendant is in effect requesting the Commission to vacate its order of November 4, 1960, which permitted the amendment of the petition in Docket 74 to include the

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2/ Although not specifically so holding, the Commission assumes that our orders entered today will commence the running of the appeal time under Rule 171(a)(2) of the Rules of the Court of Claims and that the notices of appeal already filed by the Docket 74 plaintiffs and by the defendant shall become effective upon the entry of those orders.

1868 treaty claim.[3/] For the reason stated below we must deny defendant's motion to dismiss.

Section 12 of the Indian Claims Commission Act, 25 U.S.C. § 70k (1970), bars all claims existing prior to August 13, 1946, but not presented to the Commission on or before August 13, 1951. The 1868 treaty claim will be barred by this provision only if when added in 1960 it did not relate back to the original petition in Docket 74 filed on August 15, 1950. The test for determining whether a claim added by amendment relates back to the original petition is whether the Government received sufficient notice of the claim in the original petition. Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570, 587, 372 F.2d 951, 960 (1967) (aff'g in part, rev'g in part, Docket 93, 15 Ind. Cl. Comm. 267 (1965)). Therefore, the Commission's inquiry in considering such a proposed amendment should "focus on the notice given by the general fact situation set forth in the original pleading." Id. The defendant will have received sufficient notice if the claim in the amended petition arose out of the conduct, transaction, or occurrence set out in the original petition. Id.

3/ Under this order the 1868 treaty claim was to be litigated in Docket 74-A. By order of January 30, 1962, the amended petition in Docket 74-A was striken and the Commission ordered the 1868 claim to be prosecuted under the original petition in Docket 74. See Order of April 5, 1962. The situation was clarified by the order entered May 25, 1966 which designated Docket 74 as the docket under which the 1868 treaty claim would be litigated.

As we stated in our March 8, 1972, opinion in Docket 74, 27 Ind. Cl. Comm. 79, 81, the original petition in Docket 74 set forth the following:

(1) An allegation that the Sioux had aboriginal title to an area covering all or parts of seven states;

(2) An allegation that the United States recognized the title of the Sioux to part of that area by the Treaty of Fort Laramie of September 17, 1851, 11 Stat. 149;

(3) A recitation of the provisions of the Treaty of April 29, 1868, 15 Stat. 635; [4/] and

(4) A recitation of the provisions of the Act of February 28, 1877, 19 Stat. 254.

The general fact situation set forth in the original pleading is that the Sioux had title to a large area of land, and that the United States, by means of treaty and act of Congress, wrongfully deprived the Sioux of much of this land. The 1868 treaty claim alleges that the United States, by means of the 1868 treaty, supra, wrongfully deprived the Sioux of portions of their aboriginal and recognized title land. The transaction

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4/ This recitation included the provision of Article II of the treaty which stated, ". . . henceforth they [the Sioux] will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided," and the provision of Article XI which stated, "the tribes who are parties to this agreement hereby stipulate that they will relinquish all rights to occupy permanently the territory outside their reservation as herein defined. . . ."

which gave rise to this claim -- the 1868 treaty -- was pleaded in the original petition. The conduct which gave rise to the claim -- that the United States wrongfully deprived the Sioux of their land -- is the same as that pleaded in the original petition. Cf. United States v. Northern Paiute Nation, 183 Ct. Cl. 321, 329, 393 F.2d 786, 791 (1968) (aff'g, Docket 87, 16 Ind. Cl. Comm 215 (1965)). It is of course true, as defendant points out, that under the original petition the Sioux Nation did not specifically ask for relief from the wrongdoings allegedly perpetrated under the 1868 treaty. However, had such relief been specifically requested in the original petition there would have been no need for plaintiff to seek to amend its petition. For the Commission to hold, as apparently requested by defendant, that a claim added by proposed amendment relates back only when that claim and a request for relief were specifically stated in the original petition, would in effect eliminate the availability of the amendment device to most plaintiffs before the Commission. We hold that the original petition in Docket 74 placed the defendant on notice that the plaintiffs might expand their claim to include lands lost under the 1868 treaty. It follows that the 1868 treaty claim relates back to the original petition and that the Commission has jurisdiction to hear it.

The defendant presents one other argument to establish that the Commission has no jurisdiction in Docket 74. Defendant asserts that following the Commission's initial decision in the docket which dismissed

plaintiffs' claim, 2 Ind. Cl. Comm. 646 (1954), the plaintiffs appealed to the Court of Claims only the portion of the claim relating to the Black Hills. Thereafter, according to defendant's theory, when the Court remanded the case to the Commission by order of November 5, 1958, it transferred to the Commission jurisdiction over the Black Hills claim only. Defendant concludes that therefore the Commission does not have jurisdiction over the 1868 treaty claim. This theory is without merit.

Once a claim is timely presented to the Commission, the Commission retains jurisdiction over the claim until either the docket is appealed to the Court of Claims under Section 20 of the Indian Claims Commission Act, 25 U.S.C. § 70s (1970), or is reported to Congress under Section 21 of the Indian Claims Commission Act, 25 U.S.C. § 70t (1970). When in 1955 the plaintiffs appealed to the Court of Claims with respect to the Black Hills claim the Commission lost jurisdiction only over that portion of the entire Docket 74. It retained jurisdiction over the remainder of the docket. When the Black Hills claim was remanded in 1958 the Commission again had jurisdiction over all of Docket 74. Nothing has occurred since 1958 which divests the Commission of jurisdiction of any part of the docket. Therefore, we hold that the Commission has jurisdiction over the 1868 treaty claim in Docket 74. We shall issue an order denying defendant's motion to dismiss Docket 74 for lack of jurisdiction.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner