

BEFORE THE INDIAN CLAIMS COMMISSION

THE NORTHERN PAIUTE NATION, ET AL,)	
)	
Plaintiffs)	
)	
v.)	Docket No. 87-A
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant)	

Decided: August 1, 1972

Appearances:

I. S. Weissbrodt, Abe W. Weissbrodt,
Richmond F. Allen, and Ruth W. Duhl,
Attorneys for Plaintiffs.

Marvin E. Schneck, with whom was Mr.
Assistant Attorney General Kent Frizzell,
Attorneys for Defendant.

OPINION ON MOTION FOR DETERMINATION OF DEFENDANT'S
LIABILITY FOR RESOURCES REMOVED FROM THE NEVADA
PORTION OF THE PAVIOTSO TRACT

Commissioner Blue delivered the opinion of the Commission.

This case is before the Commission for consideration of plaintiffs' "Motion for Determination of Defendant's Liability on Claims for Removal of Resources from the Nevada Portion of the Paviotso Tract Prior to Extinguishment of Aboriginal Title Thereto." In their motion plaintiffs ask for an interlocutory order (a) determining that the defendant is liable to the plaintiffs for the removal by miners and other persons, with the sanction, encouragement and assistance of the defendant, of resources, including minerals and timber, from the Nevada portion of the "Paviotso Tract" prior to the extinguishment of Indian title thereto,

and (b) directing that the case proceed to determination of the amount due to the plaintiffs, for and on behalf of the Paviotsos or Paiutes of Western Nevada. Defendant opposes this motion and asks that the claim for removal of resources be dismissed.

We determined in Docket 87 that the date of extinguishment of Indian title to the Paviotso Tract was December 31, 1862, Northern Paiute Nation v. United States, 7 Ind. Cl. Comm. 615, 616 (1959), and awarded the plaintiffs therein a \$15,790,000 final judgment as the fair market value of their lands as of that date less allowable offsets. 16 Ind. Cl. Comm. 215, 340 (1965), aff'd., 183 Ct. Cl. 321, 393 F. 2d 786 (1968).

The claim in Docket 87-A was severed from Docket 87 at an early date and was held in abeyance pending the final resolution of Docket 87. Briefly, that portion of Docket 87-A with which we are concerned here is a claim for the appropriation, by third parties without compensation, of resources from Northern Paiute aboriginal lands prior to the extinguishment of aboriginal title. Liability is asserted under Clause 5 Section 2 of the Indian Claims Commission Act (25 U.S.C. §70(a) (1970)), the "fair and honorable dealings" clause.

Plaintiffs state, and defendant does not dispute, that the facts necessary to determine defendant's liability were established in Docket 87, supra. Defendant argues, however, that it is not liable here because: (1) the claim now before us was decided and disposed of in Docket 87; (2) the nature of Indian title precludes a claim for removal of materials from Indian title lands prior to the date of taking; and (3) defendant's conduct did not violate fair and honorable dealings.

The main thrust of plaintiffs' argument is based almost wholly on two recent cases which have held that the United States is liable for damages to Indians where it has sanctioned, encouraged or assisted third parties in taking and removing resources of the Indian's lands while their aboriginal title thereto was unextinguished and outstanding. Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130, 389 F. 2d. 778 (1968); Washoe Tribe v. United States, Docket No. 288, 21 Ind. Cl. Comm. 447 (1969). Defendant distinguishes Tlingit on the grounds that it was decided not under the Indian Claims Commission Act, supra, but under a special jurisdictional act (Act of June 19, 1935, 49 Stat. 388) which provided for such relief. Defendant sees no comparable language in our Act. Defendant does not acquiesce in our Washoe opinion and submits that it was erroneous. Defendant did not appeal either of the aforementioned decisions.

We ruled in Washoe that the "fair and honorable dealings" clause "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." 21 Ind. Cl. Comm. at 456. We reaffirm our holding in that case and rely upon it today.

Washoe and the case now before us arose out of the same set of facts. The plaintiffs in Washoe occupied areas of Nevada and California immediately to the west of the Paviotso Tract. The date of taking for the Nevada portions of both the Washoe and Paviotso Tracts was found to be December 31, 1862. 7 Ind. Cl. Comm. 792 and 7 Ind. Cl. Comm. 615, respectively. Most importantly, the Comstock Lode silver lay in both the Washoe and Paviotso tracts.

In Washoe we held that one of the substantive rights of claimants created under the Indian Claims Commission Act was the right of aboriginal title holders to recover for minerals and timber taken from their lands under government sanction prior to the date of the taking of the land by defendant. 21 Ind. Cl. Comm. at 454-61. We based our holding on clause 5 of section 2 of the Indian Claims Commission Act which allowed "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." We found that both the legislative history of the Act and subsequent judicial interpretation supported this position. We dwelt upon the case of Tlingit and Haida Indians v. United States, supra, at considerable length for two reasons. The first reason was that the House Report on the Indian Claims Commission Act referred to the Tlingit and Haida Claims Act of 1935 (49 Stat. 388) as amended (56 Stat. 543 and 59 Stat. 231) as an example of a claim, not strictly legal, but meritorious in character, which might arise on the basis of fair and honorable dealings. H. R. Rep. No. 1466, 79th Cong. 1st Sess. 12 (1945). Although the Tlingit and Haida Act did not contain the precise language "fair and honorable dealings", the reference to it in the House Report indicates an intent that claims under the fair and honorable dealings clause would include claims such as the one in Tlingit and Haida. The second reason was the similarities between the two cases. The plaintiffs in Tlingit and Haida were awarded compensation for exploitation of mineral resources of aboriginal lands prior to the date of taking. 182 Ct. Cl. at 150. These two reasons together formed a strong basis for the holding in Washoe, and we see no basis for changing that conclusion now.

Defendant refuses to accept our finding on the date of taking, stating that it is erroneous. We cannot agree. We found that the date of taking was December 31, 1862. 7 Ind. Cl. Comm. 615. That holding was not contested by defendant in the appeal to the Court of Claims, 183 Ct. Cl. at 339 and 340, and the time for petitioners to appeal to the Supreme Court for certiorari has passed. Although defendant can take satisfaction from the separate opinion of Judge Nichols in Northern Paiute, 183 Ct. Cl. at 352-58, the undeniable fact remains that the date of extinguishment of aboriginal title has been fixed at December 31, 1862. That issue is res judicata.

Defendant argues that since the Court of Claims has held that the Government has no duty to account for the proceeds from the sale of land after the date of acquisition from the Indians, Sac and Fox Tribe v. United States, 179 Ct. Cl. 8, 383 F. 2d. 991 (1967) (aff'g. in part, rev'g. in part, Docket No. 135, 15 Ind. Cl. Comm. 248 (1965)), it necessarily follows that the same rule applies to a claim for prior removal of materials. We disagree. In Sac and Fox, the plaintiffs were attempting to increase their recovery by the amount of profit that the Government received from the sale of Sac and Fox lands to homesteaders. The Court limited the recovery of the plaintiffs to the fair market value of their Indian title lands at the date of acquisition by the Government. 179 Ct. Cl. at 29. This is simply not analogous to actions prior to the taking date; in the one case the Indians maintained title at the time of the alleged wrongdoing, in the other they did not. To argue that the Sac and Fox doctrine applies to a situation where defendant, or persons

acting with defendant's sanction, first takes minerals and timber from plaintiff and then states that plaintiff is entitled to recover only the fair market value of the diminished territory is illogical and unconscionable.

Defendant's final argument is that its conduct was neither unfair nor dishonorable, and not only did the plaintiffs suffer no injury but, in fact, their recovery in Docket 87 was tremendously enhanced by the actions of the United States. We find this argument without merit. The record in Docket 87 shows undisputedly that the miners entered plaintiffs' lands, established a mining district, and remorselessly drove the Paiutes from their homes, all with the sanction of defendant. Governmental responsibility for such actions was recognized by the Supreme Court over 100 years ago. Sparrow v. Strong, 70 U.S. (3 Wall.) 97, 104 (1865).

"And we cannot shut our eyes to the public history which informs us that under this legislation [the acts of the Nevada territorial legislature], and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up. . . ." To argue, as defendant does, that plaintiffs' recovery in Docket 87 was tremendously enhanced by the determination by the Commission as to the evaluation date, does not absolve the United States of the responsibility for its wrongful acts. We find it unnecessary to further respond to this argument except to note that the determination of whether dealings are fair and honorable is governed by the acts of defendant at the time of the taking, not by the amount of compensation awarded some one hundred years later.

For the above reasons we find that defendant is liable to plaintiffs

for the resources removed from plaintiffs' lands (the Nevada portion of the Pavioso Tract) prior to December 31, 1862, but after July 4, 1848.

The case will proceed to a determination of the value of those resources.



Brantley Blue, Commissioner

We concur:



Jerome K. Kuykendall, Chairman



John T. Vance, Commissioner



Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner