

BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX NATION, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket 74-B
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: November 29, 1972

Appearances:

Arthur Lazarus, Jr., William Howard Payne, and Marvin J. Sonosky, Attorneys for Plaintiffs.

Craig A. Decker, with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

The Commission has before it two motions filed by plaintiffs on September 22, 1972. The first motion seeks leave to amend the Amended Petition in this docket to include a specific request for a judgment for the fair market value of the ". . . gold extracted from the Great Sioux Reservation during the period 1874 up to February 28, 1877, together with a sum which will provide just compensation under the Fifth Amendment, or in the alternative, for damages for the gold wrongfully removed from the Great Sioux Reservation prior to February 28, 1877." The second motion requests that the Commission "clarify" its opinion of September 13, 1972, 28 Ind. Cl. Comm. 425, by expressly

determining that the United States acquired three rights-of-way through the Great Sioux Reservation and the right to free navigation of the Missouri River under the Act of February 28, 1877, 19 Stat. 254. For the reasons indicated below we shall grant plaintiffs' motion for leave to amend, and shall deny plaintiffs' motion for clarification.

Defendant objects to the proposed amendment on the ground that it presents a new claim which is barred by the Commission's statute of limitations. 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 prior to August 13, 1951. The claim presented in the proposed amendment can escape this statutory bar only if it relates back to the original petition in Docket 74, filed August 1, 1950.

A claim proposed to be added by amendment will relate back to the original petition in a docket only if 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)). The Government will have received sufficient notice if the claim in the proposed amendment arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original petition. Id.; see Rule 13(c), Indian Claims Commission General Rules of Procedure, 25 C.F.R. § 503.13 (c) (1968).

The original petition in Docket 74 contains the following allegations:

XVI

In the year 1874, by and under the authority of the United States and at its direction, a military expedition under the command of Lieutenant Colonel George A. Custer proceeded from Fort Abraham Lincoln, Dakota Territory (now North Dakota), into the Permanent Reservation, hereinbefore described, and into the Black Hills area where gold was discovered in paying quantities. The discovery was made public by the United States in dispatches to the public prints on or about July 4, 1874, whereupon the citizens of the United States in large numbers, in the year 1875, invaded the Permanent Reservation of the plaintiff.

XVII

. . . . .

In the same year (1875) the entire mountainous area which is now known as "The Black Hills" and which is part of the area included in this action, was occupied by white citizens of the United States, to the complete exclusion of the Sioux Tribe of Indians, plaintiff herein.

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XX

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That defendant, notwithstanding its solemn obligation to restrain all persons from going on plaintiffs' lands, permitted its citizens and others to go in and upon plaintiffs' lands and take possession thereof, and misappropriate the same and exclude plaintiffs therefrom.

That defendant not only acquiesced and connived in these wrongful acts, and in the misappropriation of lands, but that defendant invaded the lands of plaintiffs with its armed military forces and by the presence of said armed forces sought to and did intimidate plaintiffs, and did by force and threats exclude plaintiffs from large areas within their reservation.

That defendant did the aforesaid wrongful acts and did knowingly and willfully misappropriate the lands of the plaintiffs, well knowing and for the reason that certain of the lands of plaintiffs were immensely valuable for gold, silver, and other minerals and timber.<sup>1/</sup>

The claim presented in the proposed amendment is that the United States, in violation of its obligations under the Treaty of April 29, 1863, 15 Stat. 635, permitted, encouraged, and sanctioned unauthorized persons to enter upon the Great Sioux Reservation and to unlawfully mine and remove gold from the reservation, with the result that gold belonging to the Sioux Nation was removed from the reservation.

The conduct alleged in both the original petition and the proposed amendment is the failure of the United States to fulfill its obligation to keep unauthorized whites from entering onto the Great Sioux Reservation. The occurrence alleged in both the petition and the proposed amendment is the entry onto the Great Sioux Reservation of white people in great numbers and their misappropriation of the property of the Sioux Nation. We therefore hold that the original petition in Docket 74 gave sufficient notice to the defendant that the plaintiffs might expand their

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<sup>1/</sup> A similar allegation appears in the amended petition in Docket 74-B, as follows:

11. In 1874, six years after the Treaty of April 29, 1868, an official military expedition ordered by defendant into the Great Sioux Reservation confirmed the existence of substantial gold deposits in the Black Hills located in the western portion of the reservation. Defendant widely publicized this gold discovery and, shortly thereafter, non-Indians in great numbers invaded the Great Sioux Reservation for prospecting and other unlawful purposes.

claim to include gold removed from the Great Sioux Reservation prior to February 28, 1877. Therefore the proposed amendment relates back to the original petition, and the Commission has jurisdiction to hear it.

In our opinion of September 13, 1972, 28 Ind. Cl. Comm. 425, we advised the plaintiffs that their prosecution of their claim for compensation for the alleged acquisition of various rights-of-way by the United States under the 1877 Act, supra, was not sufficient to allow us to decide the claim. Specifically we stated:

Plaintiffs' amended petition, in paragraph 19, does state a claim based upon the acquisition by defendant of rights-of-way through the Sioux Reservation and the right to free navigation of the Missouri River. However, the Commission is unable to find in the record any indication that the plaintiffs have attempted to prove their allegation. Apparently the plaintiffs have attempted neither to establish that the United States actually used such rights-of-way and right of free navigation nor to prove that such rights, if used by the United States, damaged the plaintiffs. Unless plaintiffs take some action to further their prosecution of this claim it will be impossible for the Commission to adjudicate it.

28 Ind. Cl. Comm. at 430-31. The plaintiffs, in their motion to clarify, interpret the above language to be a Commission conclusion that as a matter of law the defendant acquired the rights-of-way and right of free navigation under the 1877 Act. Plaintiffs are mistaken in their interpretation.

The Commission's sole intention in raising this issue in its September 13 opinion was to break an apparent impasse with regard to this particular claim. In their Memorandum Defining Lands and Rights

Acquired by the United States Under the Act of February 28, 1877, filed March 6, 1969, the plaintiffs asserted that defendant had obtained, among other things, three rights-of-way through the plaintiffs' reservation and the right of free navigation of the Missouri River through the reservation. In its response to plaintiffs' memorandum, filed June 4, 1969, defendant denied that it had obtained any compensable rights under the 1877 Act other than the Black Hills portion of the Sioux reserve. However, in a footnote, the defendant added the following comment:

No attempt was made by petitioners to show the scope and effect of the right-of-way provision in article 2 of the 1877 Act. Accordingly, we do not treat the matter herein, but merely deny any liability based thereon.

Apparently, the plaintiffs never responded to this statement.

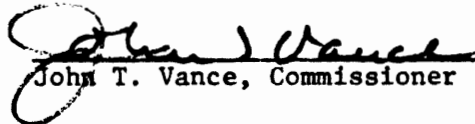
The Commission was, and still is, of the belief that the parties have not sufficiently joined issue on this matter to permit the Commission to adjudicate it. Plaintiffs have merely cited Article 2 of the 1877 Act <sup>2/</sup> as establishing their right to recover. Plaintiffs have not briefed the question whether the rights which they claim the

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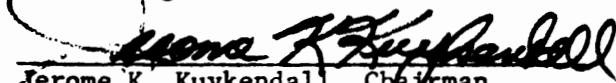
2/ That article reads as follows:

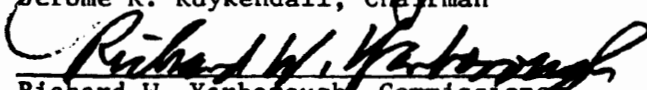
The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

defendant acquired from them under this article were compensable. They have not briefed the question whether the defendant actually obtained these rights under Article 2. They have not briefed the question of the extent of the rights which they alleged were taken. Thus, although we agree with the plaintiffs' contention that they cannot proceed to the valuation stage with respect to this claim until they know what property interests, if any, are to be valued, we reply that we cannot adjudicate that question until the parties brief it. We therefore must reiterate what we stated in our September 13 opinion that unless the plaintiffs further their prosecution of this claim we shall be unable to adjudicate it.

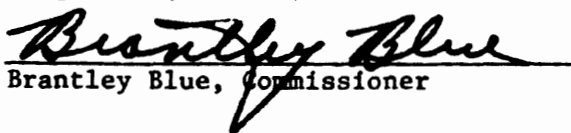
  
 John T. Vance, Commissioner

Concurring:

  
 Jerome K. Kuykendall, Chairman

  
 Richard W. Yarborough, Commissioner

  
 Margaret H. Pierce, Commissioner

  
 Brantley Blue, Commissioner