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Gratuities: pp. 7, 25-29 (Overs H. Berthold Cases reversed)

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Individuals

Court of Claims of the United States

No. E-427

(Decided April 8, 1935)

THE BLACKFEET, BLOOD, PIEGAN, AND GROS VENTRE NATIONS OR TRIBES OF INDIANS, RESIDING UPON THE BLACKFEET AND FORT BELKNAP RESERVATIONS IN THE STATE OF MONTANA; AND THE NEZ PERCE NATION OR TRIBE OF INDIANS, RESIDING UPON THE LAPWAI INDIAN RESERVATION, IN THE STATE OF IDAHO, AND UPON THE COLVILLE INDIAN RESERVATION, IN THE STATE OF WASHINGTON, v. THE UNITED STATES

Mr. Guy Patten for the plaintiffs. *Serven, Joyce & Barlow*, and *Messrs. John G. Carter* and *John W. Smith* were on the brief.

Mr. Assistant Attorney General Charles B. Rugg for the defendant. *Mr. George T. Stormont* was on the brief.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

AMENDED SPECIAL FINDINGS OF FACT

I

By an act of Congress approved March 13, 1924 (43 Stat. ch. 54, p. 21), it was provided:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States, to consider and determine all legal and equitable claims against the United States of the Blackfeet, Blood, Piegan, and Gros Ventre Nations or Tribes of Indians, residing upon the Blackfeet and Fort Belknap Indian Reservations, in the State of Montana; and the Flathead, Kootenais, and Upper Pend d'Oreilles Nations or Tribes of Indians, residing upon the Flathead Indian Reservation, in the State of Montana; and the Nez Perce Nation or Tribe of Indians, residing upon the Lapwai Indian Reservation, in the State of Idaho; and upon the Colville Indian Reservation, in the State of Washington, for lands or hunting rights claimed to be existing in all said nations or tribes of Indians by virtue of the treaty of October 17, 1855 (Eleventh Statutes at Large,

page 657, and the following), and in said Flathead, Kootenais, and Upper Pend d'Oreilles Nations or Tribes of Indians by virtue of the treaty of July 16, 1855 (Twelfth Statutes at Large, page 975, and the following), with said Indians, and all claims arising directly therefrom, which lands and hunting rights are alleged to have been taken from the said Indians by the United States, and also any legal or equitable defenses, set-offs, or counterclaims, including gratuities, which the United States may have against the said nations or tribes, and to enter judgment thereon, all claims and defenses to be considered without regard to lapse of time; and the final judgment and satisfaction thereof shall be in full settlement of all said claims.

"That suits under this act shall be begun by the filing of a petition within two years of the date of the approval of this act, to be verified by the attorney or attorneys selected by the claimant Indians, with the approval of the Secretary of the Interior, employed under contracts executed and approved in accordance with existing law. The claimant Indians shall be parties plaintiff and the United States shall be party defendant, and such suits shall on motion of either party be advanced on the docket of the Court of Claims and of the Supreme Court of the United States. The compensation to be paid the attorneys for the claimant Indians shall be determined by the Court of Claims in accordance with terms of the said approved contracts and shall be paid out of any sum or sums found and adjudged to be due said Indians: But in no event shall said compensation exceed 10 per centum of the amount of the respective judgments, nor exceed $25,000 for the Indians residing on each respective reservation: *Provided, however*, That said compensation shall not exceed $25,000 for the Nez Perce Nation or Tribe of Indians residing on both the Lapwai and Colville Indian Reservations, nor exceed 10 per centum of the amount of any judgments rendered in favor of said Nez Perce Nation or Tribe, said compensation to be exclusive of all actual and necessary expenses in prosecuting said suits. The balance of any such judgments shall be placed in the Treasury of the United States to the credit of the Indians entitled thereto and draw interest at the rate of 4 per centum per annum."

Under the provisions of this act the petition herein was filed on July 10, 1925, by the Blackfeet, Blood, Piegan, and Gros Ventre Nations or Tribes of Indians, residing upon the Blackfeet and Fort Belknap Indian Reservations in the State of Montana, and the Nez Perce Nation or Tribe of Indians residing upon the Lapwai Indian Reservation, in the State of Idaho, and upon the Colville Indian Reservation, in the State of Washington.

II

The Blackfeet, Blood, and Piegan Tribes of Indians were for many years known as the Blackfoot Nation of Indians. The Gros Ventre Tribe, a branch of the Arapaho and known as the Falls Indians, was an alien tribe who had become separated from their kindred, had drifted to the west and subsequently became associated and affiliated with and a part of the Blackfoot Nation.

The Blackfoot Nation had in earlier times roamed over a vast region of country extending from the north fork of the Saskatchewan River in Canada to the headwaters of the Muscle Shell River and

from the Rocky Mountains on the west to the 106° of longitude on the east. They were a warlike, nomadic people, depending on the buffalo for practically every want of their primitive existence. They followed the buffalo in its migrations, usually spending their summers in the part of the territory lying to the north of the international boundary line and their winters on American soil. Their country was the home of vast herds of buffalo, which ranged on the plains of the Muscle Shell, the Judith, the Missouri, the Milk, and the Saskatchewan Rivers in countless numbers. That portion of their territory on the east slope of the Continental Divide was rich in elk, deer, antelope, mountain sheep, and other game and fur-bearing animals. While these Indians were truly nomadic, there were certain sections of their territory which in time became recognized as their "home" territories. Thus the Blackfeet proper and the Bloods occupied principally the country about the sources of the Maria's and Milk Rivers, while the Piegans occupied generally the country between the Milk River on the north and the Maria's and Teton Rivers on the south. The Gros Ventres, the most settled of the four tribes, occupied the country bordering on the Milk River from its mouth to the territory of the Piegans.

The Nez Perce Tribe, now residing upon the Lapwai and Colville Indian Reservations in Idaho and Washington, formerly occupied a large tract of country in western Idaho, northeastern Oregon, and southeastern Washington, living principally on the headwaters of the Columbia and Snake Rivers. In early times they subsisted entirely on salmon, roots, and berries. With the introduction of horses into their country, of which the tribe soon possessed herds, they were enabled to extend their hunting expeditions and their quests for food. As early as 1805 they were accustomed to make annual or semiannual expeditions for buffalo to the plains east of the Rocky Mountains. This country was rich in beaver and in the mountains on the east they obtained their supply of elk, deer, and mountain sheep.

III

Prior to the year 1855 there had been serious tribal wars among the Indians bordering on the area in question here, and the Government in furtherance of its policy of establishing amicable relations between the United States and the Indian tribes and among the tribes themselves, had negotiated various treaties of peace and amity and of mutual recognition of tribal rights.

On October 17, 1855, a treaty was made between the United States and the Blackfoot Nation and other tribes (11 Stat. 657), seeking the establishment and maintenance of a peaceful condition and the assent of the tribes to the restriction of their wanderings within the limits of the areas set apart for and to be occupied by them, as well as to secure the safe passage for white emigrants through the respective areas of the various Indian tribes.

IV

The provisions of the treaty of October 17, 1855, pertinent to the plaintiffs' claims are contained in articles 1 to 10, inclusive, as follows:

"ART. 1. Peace, friendship, and amity shall hereafter exist between the United States and the aforesaid nations and tribes of Indians, parties to this treaty, and the same shall be perpetual.

"ART. 2. The aforesaid nations and tribes of Indians, parties to this treaty, do hereby jointly and severally covenant that peaceful relations shall likewise be maintained among themselves in future; and that they will abstain from all hostilities whatsoever against each other and cultivate mutual goodwill and friendship. And the nation and tribes aforesaid do furthermore jointly and severally covenant that peaceful relations shall be maintained with and that they will abstain from all hostilities whatsoever, excepting in self-defense, against the following-named nations and tribes of Indians, to wit: The Crows, Assineboins, Crees, Snakes, Blackfeet, Sans Arce, and Aunce-pa-pas Bands of Sioux, and all other neighboring nations and tribes of Indians.

"ART. 3. The Blackfoot Nation consent and agree that all that portion of the country recognized and defined by the Treaty of Laramie as Blackfoot territory lying within lines drawn from the Hell Gate or Medicine Rock Passes in the main range of the Rocky Mountains in an easterly direction to the nearest source of the Muscle Shell River, thence to the mouth of the Twenty-five Yard Creek, thence up the Yellowstone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction, to the point of beginning, shall be a common hunting ground for ninety-nine years, where all the nations, tribes, and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing, and gathering fruit, grazing animals, curing meat, and dressing robes. They further agree that they will not establish villages or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof:

"*Provided*, That the western Indians, parties to this treaty, may hunt on the trail leading down the Muscle Shell to the Yellowstone; the Muscle Shell River being the boundary separating the Blackfoot from the Crow territory:

"*And provided*, That no nation, band, or tribe of Indians, parties to this treaty, nor any other Indians, shall be permitted to establish permanent settlements or in any other way exercise, during the period above mentioned, exclusive rights or privileges within the limits of the above-described hunting ground:

"*And provided further*, That the rights of the western Indians to a whole or a part of the common hunting ground, derived from occupancy and possession, shall not be affected by this article, except so far as said rights may be determined by the Treaty of Laramie.

"ART. 4. The parties to this treaty agree and consent that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell River, thence down said river to its mouth, thence down the channel of the Missouri River to the mouth of the Milk River, thence due north to the forty-ninth parallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning, shall be the territory of the Blackfoot Nation, over which said nation shall

exercise exclusive control, excepting as may be otherwise provided in this treaty. Subject, however, to the provisions of the third article of this treaty, giving the right to hunt, and prohibiting the establishment of permanent villages and the exercise of any exclusive rights within ten miles of the northern line of the common hunting ground, drawn from the nearest source of the Muscle Shell River to the Medicine Rock Passes, for the period of ninety-nine years:

"*Provided also*, That the Assineboins shall have the right of hunting, in common with the Blackfeet, in the country lying between the aforesaid eastern boundary line, running from the mouth of Milk River to the forty-ninth parallel, and a line drawn from the left bank of the Missouri River, opposite the Round Butte north, to the forty-ninth parallel.

"ART. 5. The parties to this treaty, residing west of the main range of the Rocky Mountains, agree and consent that they will not enter the common hunting ground, nor any part of the Blackfoot territory, or return home, by any pass in the main range of the Rocky Mountains to the north of the Hell Gate or Medicine Rock Passes. And they further agree that they will not hunt or otherwise disturb the game, when visiting the Blackfoot territory for trade or social intercourse.

"ART. 6. The aforesaid nations and tribes of Indians, parties to this treaty, agree and consent to remain within their own respective countries, except when going to or from, or whilst hunting upon, the 'common hunting ground' or when visiting each other for the purpose of trade or social intercourse.

"ART. 7. The aforesaid nations and tribes of Indians agree that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them. And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.

"ART. 8. For the purpose of establishing travelling thoroughfares through their country and the better to enable the President to execute the provisions of this treaty, the aforesaid nations and tribes do hereby consent and agree that the United States may, within the countries respectively occupied and claimed by them, construct roads of every description; establish lines of telegraph and military posts; use materials of every description found in the Indian country; build houses for agencies, missions, schools, farms, shops, mills, stations, and for any other purpose for which they may be required, and permanently occupy as much land as may be necessary for the various purposes above enumerated, including the use of wood for fuel and land for grazing, and that the navigation of all lakes and streams shall be forever free to citizens of the United States.

"ART. 9. In consideration of the foregoing agreements, stipulations, and cessions, and on condition of their faithful observance, the United States agrees to expend, annually, for the Piegan, Blood, Blackfoot, and Gros Ventres Tribes of Indians, constituting the Blackfoot Nation, in addition to the goods and provisions distributed at the time of the signing this treaty, twenty thousand dollars, annually, for ten years, to be expended in such useful goods and provisions, and other articles, as the President, at his discretion, may from time to time determine; and the superintendent, or other

proper officer, shall each year inform the President of the wishes of the Indians in relation thereto: *Provided, however*, That if, in the judgment of the President and Senate, this amount be deemed insufficient, it may be increased not to exceed the sum of thirty-five thousand dollars per year.

"ART. 10. The United States further agree to expend annually, for the benefit of the aforesaid tribes of the Blackfoot Nation, a sum not exceeding fifteen thousand dollars annually, for ten years, in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and Christianization: *Provided, however*, That to accomplish the objects of this article, the President may, at his discretion, apply any or all the annuities provided for in this treaty: *And provided, also*, That the President may, at his discretion, determine in what proportions the said annuities shall be divided among the several tribes."

V

The territory set apart by article 3 of the treaty as a "common hunting ground", at the time of the treaty and for a number of years thereafter, was well supplied with fur-bearing animals and game, such as elk, deer, antelope, and mountain sheep, and prior to and after the treaty of 1855 was ranged over by large herds of buffalo.

The common hunting ground at the time of the treaty of 1855 was claimed and hunted over by the Flatheads, the Bannocks, the Crows, the Shoshones, the Sheepeaters, and practically every tribe of that section of the United States lying between the Cascade Range and the Rocky Mountains, including the Nez Perces, Kootenais, Yakimas, Cayuses, Pend d'Oreilles, Coeur d'Alenes, Spokanes, Umatillas, Walla Wallas, Pahutes, and Snakes, and was traversed by these tribes in their annual or semiannual expeditions to the east and northeast for buffalo in the plains of the Yellowstone, the Muscle Shell, and the Judith Rivers, a custom which persisted up until as late as 1876. The common hunting ground was also resorted to by the tribes of the Blackfoot Nation for hunting purposes, but their "home" territory was amply supplied with game and buffalo and vast herds ranged at various times on the Maria's, the Teton, the Sun and Milk Rivers, and north of the international boundary line in Canada.

At the time of the negotiation of the treaty of 1855 the common hunting ground was not well known to the outside world, and the number of white people in the region was negligible. Following the discovery of gold, emigration to the section increased rapidly, and by the spring of 1864 the population of Montana, largely located in the common hunting ground, had increased to such an extent that by the act of May 26 of that year (13 Stat. 85) the Territory of Montana was created.

VI

The history of the practice of the Indians in the area in question, prior to 1855 and for several years thereafter, is clearly shown to have constituted a wholesale slaughter of buffalo in their semiannual

hunts far beyond the needs for shelter, clothing, and food, and that those killed in excess of the number needed for the purposes just noted were bartered by the Indians in exchange for flour, coffee, sugar, pots, firearms, powder, shot, axes, and trinkets at the trading posts which they had permitted to be set up.

In 1849 the Blackfoot Nation exchanged at the trading post of the American Fur Company surplus buffalo robes in excess of 500 packs.

Even after the execution of the treaty of 1855 the wholesale killing of buffalo by the plaintiff Indians was continued unabated for the purpose of trade and to the extent permitted by the dwindling herds.

During the years following the making of the treaty of 1855 the hunting trips of the plaintiff Indians to the common hunting ground became less frequent and it was visited for the purposes of hunting by smaller bands of the various plaintiff tribes and was ultimately abandoned by them as a hunting ground for buffalo.

VII

In compliance with the provisions of articles 9 and 10 of the aforesaid treaty of October 17, 1855, the United States expended on behalf of the plaintiffs, the Blackfeet, the Blood, the Piegan, and the Gros Ventre Tribes out of congressional appropriations a total sum of $408,535.29, or $58,535.29 in excess of the amount the United States was obligated to expend under the treaty.

VIII

By an act of Congress approved March 3, 1865 (13 Stat. 541, 559), a treaty was negotiated with the Blackfoot Nation "to relinquish so much of their reservation as lies south of the Missouri River" for the purpose of opening up the region to settlement. The treaty was made at Fort Benton, Montana, on November 16, 1865; by article 3 a cession to the United States was provided of all the lands theretofore claimed or possessed by the Blackfoot Nation, particularly the lands described in the third and fourth articles of the treaty of October 17, 1855, except the following described area which was to be retained as a reservation, to wit:

"Commencing at a point where the parallel of forty-eight degrees north latitude intersects the dividing ridge of the main chain of the Rocky Mountains, thence in an easterly direction to the nearest source of the Teton River—thence down said river to its junction with the Maria's River, thence down the Maria's to its junction with the Missouri River, thence down the Missouri River to the mouth of Milk River, thence due north to the forty-ninth parallel of north latitude—thence west on said parallel to the main range of the Rocky Mountains—thence southerly along said range to the place of beginning, which said last-described tract or portion of country is hereby reserved to and set apart for the use, occupancy, possession, and enjoyment of the said Blackfoot Nation of Indians."

It was further stipulated that in the event the United States made a treaty with the Crow or other tribes of Indians wherein it should be agreed that said tribes should remove to and live upon the above-

described reservation, said tribes should be permitted to do so and should be treated in all respects by the Blackfoot Nation as owners in common with them of said lands and be entitled to all privileges and benefits thereto pertaining, in all respects as though they were parties to the treaty.

By article 8 it was provided that the United States, in consideration of the cession, should expend $50,000 annually for twenty years and for the chiefs of the four tribes a total sum of $6,000.

The treaty was not presented to the Senate for ratification and was not ratified, the Indians going on the warpath almost immediately after its conclusion.

IX

Thereafter, on July 13, 1868, a treaty was negotiated with the Gros Ventre Tribe of Indians, and on September 1, 1868, one with the other tribes of the Blackfoot Nation. These treaties were identical in all essential respects. By the third article of each a cession by the Indians to the United States of " all the lands now or at any time heretofore claimed or possessed by them * * * " was incorporated, and it was proposed that they retain as a reservation for their occupancy and possession the same area above described.

By a similar article of the treaty with the Gros Ventres, it was provided—

" 3. It is hereby provided and agreed that in the event of a treaty being made by the United States with the Crow Tribe of Indians, whereby it may be stipulated that the said Crows shall remove to and live on the lands hereinbefore described and reserved to the use and benefit of the Gros Ventre Tribe of Indians and under the supervision and control of the same agent, and occupying and using in common all agency buildings, together with the services of such of the employees as may be deemed practicable, said Indians shall be permitted to do so and shall be treated in all respects by said Gros Ventre Tribe of Indians as owners in common of said lands and entitled to all privileges and benefits thereto pertaining, the same in all respects as though they were parties to this treaty."

The third article of the Blackfoot treaty contained practically the same stipulation, except that it applied to " the Crows or other tribes of Indians " with whom the United States might make such an agreement.

By the eighth article of the Gros Ventre treaty the consideration for the proposed cession constituted the expenditure over a period of twenty years of a total sum of $547,000 and to pay debts of the tribe to traders in a sum not to exceed $25,000. By the eighth article of the Blackfoot treaty the consideration noted constituted an expenditure over a like period of years, in the manner provided, of a total sum of $1,000,000 and to pay debts of the tribe to traders in an amount not to exceed $75,000.

The treaty of 1868 was presented to the Senate for ratification, but was not ratified.

X

In the Indian Appropriation Act of March 3, 1871 (16 Stat. 544), there was inserted a proviso that thereafter no Indian nation or tribe within the United States should be recognized as an independent nation, tribe, or power with whom the United States could contract by treaty (*Id.*, 566).

XI

On July 5, 1873, upon the recommendation of the Secretary of the Interior and the Commissioner of Indian Affairs, the President of the United States by Executive order (1 Kapp. 855) set apart as a reservation for the Gros Ventre, Piegan, Blood, Blackfeet, River Crow, and other Indians a delimited and described tract of land.

The reservation thus established constituted practically the same area described in the treaties of November 16, 1865, July 13, 1868, and September 1, 1868, except that it included an additional area on the southwest lying between the Teton and Medicine or Sun Rivers and an additional area on the east lying between the Missouri River on the south, the one hundred and fourth meridian of west longitude on the east, the international boundary on the north, and the east line of the reservations described in the aforesaid treaties on the west. The area of this latter addition was approximately 4,332,440 acres.

XII

By an act of Congress approved April 15, 1874 (18 Stat. 28), a delimited and described tract of land in the Territory of Montana was set apart for the use and occupation of the Gros Ventre, Piegans, Bloods, Blackfeet, River Crows, and such other Indians as the President from time to time might locate thereon.

The reservation thus established is the same as that delimited in the aforesaid Executive order of July 5, 1873, less the area lying between the Maria's River and Birch Creek on the north, the Missouri River on the east, the Medicine or Sun River on the south, and the Rocky Mountains on the west. It is the same as the reservation retained by the Blackfeet, Bloods, Piegans, and Gros Ventres in the aforesaid treaties of November 16, 1865, July 13, 1868, and September 1, 1868.

By Executive order of August 19, 1874, the President restored to the public domain all that portion of the reservation as established by the Executive order of July 5, 1873, which was not included within the boundaries of the reservation as established by the above act of April 15, 1874.

XIII

Thereafter, by Executive order dated April 13, 1875, there was added to the reservation established by the above act of April 15, 1874, a certain area on the southeast boundary of the former reservation, of approximately 5,865,900 acres. Subsequently, under Executive order of July 13, 1880, the said addition was reduced by approximately 4,622,750 acres and added to the public domain, thus leaving a net addition in that quarter an area of 1,243,240 acres.

XIV

The area taken from the plaintiffs under the provisions of the act of April 15, 1874, and the Executive order of August 19, 1874, constitutes 15,289,344 acres; the area added under the same act of

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Congress and Executive order constitutes 4,332,440 acres, and under the Executive orders of April 13, 1875, and July 13, 1880, constitutes a net addition of 1,243,240 acres, making a total addition of 5,575,680 acres.

By reason of the foregoing, the plaintiffs, the Blackfeet, the Blood, the Piegan, and the Gros Ventre Tribes, were deprived of 12,261,749.76 acres, for which they have received no compensation.

The value of the area taken at that time was $6,130,874.88.

XV

By an act of Congress approved May 15, 1886 (24 Stat. 29, 44), the Secretary of the Interior was authorized to negotiate " with the various bands or tribes of Indians in northern Montana * * * for a reduction of their respective reservations." In December 1886 and January 1887 an agreement was concluded with the various bands or tribes of Indians residing upon the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Reservations in Montana Territory, which agreement was ratified in the act of Congress approved May 1, 1888 (25 Stat. 113). Under the terms of this agreement the Indian tribes ceded to the United States all their right, title, and interest in and to the lands embraced within the reservation, except as to three certain described tracts of land (art. 2), which, under the terms of the agreement (art. 1), were set up as separate reservations, one for the Indians then attached to and receiving rations at the Fort Peck Agency, one for the Indians then attached to and receiving rations at the Fort Belknap Agency, and one for the Indians then attached to and receiving rations at the Blackfeet Agency.

By article 3 of the agreement the United States, in consideration of the cession, agreed to advance and expend annually for a period of ten years following the ratification of the agreement, for the Fort Peck Indians, $165,000; for the Fort Belknap Indians, $115,000; and for the Blackfeet Agency Indians, $150,000; or a total consideration of $4,300,000. The obligations of the United States in this respect were fully complied with.

The area of the lands ceded to the United States under this agreement was approximately 17,500,000 acres.

XVI

Under the terms of an agreement concluded with the Indians of the Blackfeet Reservation on September 26, 1895, ratified by an act of Congress approved June 10, 1896 (29 Stat. 321, 353), the said Indians ceded to the United States all of their reservation west of a certain line, reserving the right to go upon the ceded lands " so long as the same shall remain public lands of the United States " to cut and remove wood and timber therefrom for agency and school purposes and for their personal use for houses, fences, and all other domestic purposes, and to hunt upon said ceded lands and fish in the streams thereof " so long as the same shall remain public lands of the United States." In consideration of the cession, the United States agreed to expend in the manner and for the purposes stipulated the total sum of $1,500,000.

By an act of Congress approved May 11, 1910 (36 Stat. 354), the said tract in question was withdrawn from settlement, occupancy, or disposal under the laws of the United States and dedicated and set apart as a public park under the name of " the Glacier National Park."

Under the terms of the act, control of the tract was placed under the Secretary of the Interior, and the duty was placed upon him to make and publish such rules and regulations as he might deem necessary for the proper care and management of the park, for its preservation in a state of nature, and for the care and protection of the fish and game within its boundaries.

Prior to the act of May 11, 1910, the Indians of the Blackfeet Reservation did not exercise to any appreciable extent the rights reserved in the aforesaid agreement of September 26, 1895, to hunt and fish in and remove timber from the land ceded in the agreement, and such rights were authoritatively terminated by the limitations of the act of May 11, 1910.

XVII

During the period from 1856 to June 30, 1927, the United States, in addition to the appropriations and disbursements therefrom made in satisfaction of treaty or other obligations, expended on behalf and for the benefit of the Blackfeet, Blood, Piegan, and Gros Ventre Tribes of Indians out of gratuity appropriations, the total sum of $5,508,409.31.

Of the aforesaid amount $4,032,155.61 was expended for the benefit of the Blackfeet, Blood, and Piegan Tribes, and $1,476,253.70 was expended for the benefit of the Gros Ventre Tribe.

During the same period the United States, in addition to the appropriations and disbursements therefrom made in satisfaction of treaty or other obligations, expended on behalf and for the benefit of the Nez Perce Tribe the sum of $1,823,421.86.

Out of the gratuity disbursements made for the benefit of the Blackfeet, Blood, Piegan, and Gros Ventre Tribes, $1,299,465.50 was expended for the purpose of education, $940,252.23 being for the benefit of the Blackfeet, Blood, and Piegan Tribes, and $359,213.27 for the benefit of the Gros Ventre Tribe. By far the larger part of the aforesaid expenditures was made for the support and maintenance of agency schools located on the various reservations then occupied by plaintiffs.

XVIII

The average proportion in population of the plaintiffs, the Blackfeet, Blood, and Piegan Tribes residing upon the Blackfeet Indian Reservation, and of the Gros Ventre Tribe, residing upon the Fort Belknap Reservation, for the years 1855 to 1925, inclusive, was 73.2 percent for the former, and 26.8 percent for the latter.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that the plaintiffs, the Blackfeet, Blood, Piegan, and Gros Ventre Tribes, are entitled to recover $6,130,874.88.

The defendant on its counterclaim (finding XVII) is entitled as a set-off against said plaintiffs, the Blackfeet, Blood, Piegan and Gros Ventre Tribes, amounting to $5,508,409.31, leaving a balance of $622,465.57, of which amount the Blackfeet, Blood, and Piegan Tribes will be entitled to receive $455,644.80, and the Gros Ventre Tribe $166,820.77.

It is therefore adjudged and ordered that the plaintiffs the Blackfeet, Blood, and Piegan Tribes recover of and from the United States the sum of four hundred fifty-five thousand six hundred forty-four dollars and eighty cents ($455,644.80), and the Gros Ventre Tribe one hundred sixty-six thousand eight hundred twenty dollars and seventy-seven cents ($166,820.77).

The plaintiff the Nez Perce Tribe is not entitled to recover, and the petition as to it is dismissed.

OPINION

BOOTH, *Chief Justice*, delivered the opinion of the court:

This case is now before the court upon plaintiffs' and defendant's second motions for a new trial. The present conclusions of the court, in view of certain conceded corrections of the findings, make it imperative to reconsider the case in most of its aspects, and state our judgment in this our final opinion.

The case, like all tribal Indian cases, is before us under a special jurisdictional act, approved March 13, 1924 (43 Stat. 21). The act is set forth in finding I and no controversy revolves around it. The case was argued and submitted upon issues of fact and law.

Four claims are asserted in the petition:

1. Claim on behalf of all the plaintiffs for loss and damage resulting to them because of the alleged failure of the defendant to protect from invasion, and consequently protect from destruction the buffalo and other game upon the territory comprising 19,044 square miles, defined in article 3 of the treaty of October 17, 1855 (11 Stat. 657). The sums sought to be recovered under this claim are: For the Blackfeet, Blood, and Piegan Tribes, $19,200,000; for the Gros Ventre Tribe, $5,760,000; and for the Nez Perce, $19,200,000; a total of $44,160,000.

2. Claim of plaintiffs, the Blackfeet, Blood, Piegan, and Gros Ventre Tribes, for the surface and royalty values of the 13,361,200 acres of land granted to them by article 4 of the treaty of 1855, which it is alleged were taken by the United States without the consent or agreement of the tribes, and for which they have not been compensated, amounting to $24,312,753.09.

3. Claim of plaintiffs, the Blackfeet, Blood, Piegan, and Gros Ventre Tribes, for the value of 2,092,420 acres of land alleged to have been taken by the defendant in virtue of the Executive order of August 19, 1874, and for which plaintiffs have not been compensated, amounting to $2,615,525.00.

4. Claim of plaintiffs, the Blackfeet Tribes, based on the acts of the defendant, under the act of Congress of May 11, 1910 (36 Stat. 354), in taking from them and depriving them of the right to cut and remove wood for agency and school purposes, and for their personal use for houses, fences, and all other domestic purposes, and to hunt and fish thereon, a tract of land constituting a part of Glacier

National Park, which rights had been reserved by the plaintiffs in an agreement with the defendant ratified by the act of June 10, 1896 (29 Stat. 321), $250,000.

The total recovery sought in the petition on the four claims aggregates $71,338,278.09. This demand is considerably increased in plaintiffs' requested findings of fact.

The Blackfoot Nation of Indians constituted a confederated tribe made up of Blackfeet, Blood, Piegan, and Gros Ventre Indians. Prior to 1855 they were "a wild, warlike, nomadic people, depending upon the buffalo for practically every want of their primitive existence", and this particular source of living was at the time not only sufficient but more than abundant. In the territory over which they roamed and hunted, i. e., the plains of the Muscle Shell, the Judith, the Missouri, the Milk, and the Saskatchewan Rivers in the Rocky Mountain country, not only were buffalo in large numbers to be found, but additional small game, as well as deer, antelope, mountain sheep, and a variety of fur-bearing animals abounded in vast numbers—an area amply suited to their habits and purposes.

The early habitat of the Nez Perce Tribe was in what is now western Idaho, northeastern Oregon, and southeastern Washington. Unlike the Blackfeet, who relied principally upon the buffalo for living, this tribe subsisted upon salmon, roots, and berries, which were obtainable in abundance from and adjacent to the headwaters of the Columbia and Snake Rivers. Following the introduction of horses into their country they embraced more nomadic habits and thereafter pursued in semiannual expeditions the same class of food found in the plains east of the Rocky Mountains.

The plaintiff Indians were not the only tribes who resided near and hunted upon the territory above described. Neighboring tribes mentioned in the treaty of 1855 and the Laramie Treaty of 1851 traversed this precise area in pursuit of the buffalo and other game, resulting in frequent hostilities between the tribes and creating a precarious condition for white emigrants going upon or passing through the territory, an existing condition inimical to the policy of the Government in its relationship to the Indians and the civilization of the tribes themselves.

The written instructions given by the Commissioner of Indian Affairs to the representatives of the Government selected to negotiate with the Indians explicitly set forth the purpose and intent of the treaty of 1855. In keeping with the Government's established policy, the treaty was intended to establish amicable relations between the Government and the Indians, foreclose internecine warfare, establish a condition favorable to working a change in their present habits and mode of living, encourage cultivation of the soil, and render the country involved safe for both the Indian tribes and white emigrants.

The Government recognized the increasing emigration to the West; the condition which prevailed in this territory within a few years subsequent to 1855 was clearly and correctly anticipated by the Government officials, and the treaty of 1855, supplemented by contemporaneous reports of accredited officials of the Government, discloses with far greater certainty the exact status of affairs than the oral testimony of witnesses taken generations after the event and elicited

from witnesses who recite what occurred in their very early childhood. Undoubtedly they narrate what they remember, but written records of events and conditions preserved in histories and official documents prepared in large part by wholly disinterested parties, universally accepted as accurate, are obviously more convincing than oral testimony produced long after the event.

Article 3 of the treaty of October 17, 1855, we quote *in haec verba*, as follows (11 Stat. 657):

"ART. 3. The Blackfoot Nation consent and agree that all that portion of the country recognized and defined by the treaty of Laramie as Blackfoot territory, lying within lines drawn from the Hell Gate or Medicine Rock Passes in the main range of the Rocky Mountains, in an easterly direction to the nearest source of the Muscle Shell River, thence up to the mouth of Twenty-five Yard Creek, thence up the Yellowstone River to its northern source, and thence along the main range of the Rocky Mountains, in a northerly direction, to the point of beginning, shall be a common hunting ground for ninety-nine years, where all the nations, tribes, and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting, fishing, and gathering fruit, grazing animals, curing meat, and dressing robes. They further agree that they will not establish villages, or in any other way exercise exclusive rights within ten miles of the northern line of the common hunting ground, and that the parties to this treaty may hunt on said northern boundary line and within ten miles thereof:

"*Provided*, That the western Indians, parties to this treaty, may hunt on the trail leading down the Muscle Shell to the Yellowstone; the Muscle Shell River being the boundary separating the Blackfoot from the Crow territory:

"*And provided*, That no nation, band, or tribe of Indians, parties to this treaty, nor any other Indians, shall be permitted to establish permanent settlements, or in any other way exercise, during the period above mentioned, exclusive rights or privileges within the limits of the above-described hunting ground:

"*And provided further*, That the rights of the western Indians to a whole or a part of the common hunting ground derived from occupancy and possession shall not be affected by this article, except so far as said rights may be determined by the treaty of Laramie."

The first item in suit is predicated upon an alleged liability to plaintiffs growing out of the foregoing article in conjunction with article 7 of the same treaty as follows:

"ART. 7. The aforesaid nations and tribes of Indians agree that citizens of the United States may live in and pass unmolested through the countries respectively occupied and claimed by them. And the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit."

Prior to 1855 the plaintiffs and neighboring tribes of Indians frequently clashed, provoked to hostilities over conflicting claims to hunting grounds. The buffalo, as previously observed, was the principal source of living for the Blackfoot Nation, and sought after by the other tribes. The area described in article 3 as a "common hunting ground" was claimed by plaintiffs, but it had not been ceded

to them in any treaty. It was at the time rich in game of almost every description.

The plaintiffs contend that the establishment of the common hunting ground for a period of ninety-nine years by article 3 of the treaty vested in them a proprietary interest in the food and shelter supply which the area afforded, and which the Government by article 7 of the treaty obligated itself to protect and secure to them for the full term of ninety-nine years; that the Government failed to observe this obligation; that on the contrary, as early as 1858, three years after the execution of the treaty, it permitted white emigrants and others to invade said area, who killed and destroyed the game and otherwise rendered the same valueless to the plaintiffs as a source of living.

The damages claimed under this item total $44,160,000 and the total amount claimed is prorated among the tribes claiming, in the following amounts, viz, Blackfeet, Blood, and Piegan Tribes, $200,000 per annum, for an unexpired term of 96 years, a total sum of $19,200,000; the Gros Ventres $60,000 per annum, a total of $5,760,000 for 96 years, and the Nez Perce Tribe $200,000 per annum, a total of $19,200,000 for the same period of time. The amounts given are taken from the plaintiffs' petition. The plaintiffs in the request for findings claim $57,272,000.

The proof adduced to sustain the damages claimed is based upon what the plaintiffs assert as the reasonable value of the hunting grounds to the plaintiffs, equal in amount to the value of the food, clothing, lodges for shelter, bedding, furs, and hides necessary for the support and maintenance of each of the tribes for that portion of the 99 years of which they allege they were deprived. From historical and official documents the average number of the various tribes interested is sought to be established and a stated sum of $100 per year per person is fixed as the reasonable value of food, etc., necessary to maintain them.

The treaty contains no express stipulation that the Government will respond in damages for the diminution in quantity or the entire loss of food and shelter supplies at the time available on the hunting ground. Article 7, relied upon, has exclusive reference to the plaintiffs' Indian reservation set aside and ceded to them in article 4 of the treaty, and as to the Nez Perce Tribe, by article 2 of a treaty consummated June 11, 1855, between this tribe and the Government. The hunting ground was not Indian territory in a legal sense; no one tribe possessed any exclusive right of occupancy. The limited privilege and license to exploit the territory for game and wild animals, while limited as to parties, was not, we think, intended to fix other obligations than the one to delimit an area of lands, vast in extent, over which the Indians mentioned might hunt without interference from other and hostile tribes. Assuredly no article of the treaty may be cited wherein the Government obligated itself to maintain this enormous acreage of land as a game preserve for the Indians for 99 years. The right accorded was a permissive one and its continued existence was dependent upon numerous factors over which neither the Government nor the Indians could possibly have control. The Indians for many years had hunted over this area and conflicting claims were set up as to the right to do so; the treaty did no more than adjust the difference by an amicable agreement

among the Indians that those mentioned in the treaty would assent to the common privilege set forth therein, without in any way or by any terms guaranteeing to the Indians a maintenance of the *status quo* for almost a century.

We need not, however, discuss at length the arguments pro and con advanced in the briefs. The plaintiffs' contention is vulnerable in many aspects. The court under the law could not award a money judgment upon proof conjectural and uncertain as to facts. Human testimony is incapable of establishing with any degree of certainty that either the quantity or character of food and shelter supplies at the time on the hunting ground area would have remained sufficient to supply the plaintiffs' needs had not the white emigrants and the Indian traders gone upon the lands. Well-defined customs and rules did in some instances govern the buffalo hunt. It is probable that in early times the Indians in their own way regulated to some extent the number of buffaloes each tribe would take; but in later years as the Indian trader and the emigrant pushed their way into this region, limitation of numbers to be taken disappeared and both Indians and white settlers disregarded the essential necessity of preserving the buffalo and took them in numbers beyond their living necessities. It would be impossible from the record to ascribe to the Government alone the responsibility for the disappearance of game and wild animals from the hunting ground. The Indians participated in this devastation and were eager and willing to enter into the prevalent custom of bartering buffalo hides and other valuable pelts for what the trader had to give in exchange. There were comparatively few white settlers within the hunting area up to 1862. The discovery of gold vastly stimulated emigration into this region, and plaintiffs' petition alleges that by 1858 buffalo had almost disappeared.

The real or even reasonable value to the plaintiffs of the hunting grounds, in the way of game and wild animals, has not been proven, and the proof presented to sustain it is manifestly of such a character as to preclude the court from awarding a money judgment against the Government of millions of dollars.

Again, it is extremely doubtful if the buffalo and other wild animals within the area were, at the time the treaty was made, sufficient in number to supply what we may say is the inflexible sum set up as necessary to support an individual Indian. The record amply supports the Government's contention that the buffalo was not the predominating game of the hunting ground after 1855. On the contrary, the area was rather confined to small game, deer, antelope, and a variety of fur-bearing animals. It would be difficult, in view of the proof submitted, to hold that the buffalo existed in sufficient numbers within the area to meet all the living wants of the plaintiff Indians at all times.

The rule as to construction of treaties with the Indians invoked by plaintiffs does not extend to the point whereby the court may indulge presumptions and implications of assumed obligations if the attendant facts and circumstances surrounding the created relationship clearly negative any intention upon the part of the Government to respond in damages in the event the contemplated results do not obtain.

Manifestly it would exact a most convincing degree of proof to warrant the court in holding that, by either the express terms of the treaty of 1855 or by necessary implication from them, the Government intended to guarantee to the Indian population involved a source from which they might derive their living for 99 years.

While it is true that in 1855 the hunting ground area was a more or less wild and uninhabited tract of land located in a section of the country where Indian tribes in large numbers had their habitat, nevertheless it is apparent from the many obligations the Government expressly assumed in the treaty and afterwards observed that had it been the intention of the Government to pay for the extermination of game within the area, or otherwise respond in damages if the privilege of hunting therein was lost to the Indians, the treaty would have so provided. *Leighton* v. *United States*, 161 U.S. 291.

Article 4 of the Blackfoot Treaty of October 17, 1855, delimited a reservation to the tribe out of the lands embraced within the designated hunting ground. On March 3, 1865 (13 Stat. 541, 559), Congress appropriated $15,000 to be used by the Secretary of the Interior in an effort to negotiate a treaty with the Blackfoot Nation to secure if possible a cession of so much of their existing reservation " as lies south of the Missouri River." The moving cause for this legislation and procedure was a prevalent supposition that the lands abounded in gold and should be made available to settlement by incoming emigrants. A treaty was made with the plaintiffs at Fort Benton, Montana, on November 16, 1865 (4 Kapp. 1133), by the terms of which the United States procured the contemplated cession; but the treaty, it is admitted, failed, for immediately after its consummation the Indians became hostile and the Secretary of the Interior did not submit it for ratification.

November 15, 1867, the Secretary of the Interior renewed the efforts to procure a treaty similar to the one of 1865, and as a result a treaty was concluded with the Gros Ventre tribe of the Nation on July 13, 1868 (3 Kapp. 705), and later with the Blackfoot Nation on September 1, 1868 (4 Kapp. 1138). Two treaties instead of one were due to the fact that the Gros Ventres had during the interim separated from the Nation proper and were living at a distance therefrom. These treaties were substantially alike, and the pertinent provisions herein involved go to the reservations established and the lands ceded. Beyond a doubt, as the articles of the treaties state, the Indians were willing to cede to the United States all the lands set aside to them by articles 3 and 4 of the treaty of 1855, accepting the delimited reservation provided in the treaty for them in consideration of the payments of money to be made and other beneficial provisions contained in the same. The treaty contained the following provision:

" This treaty shall be obligatory upon the contracting parties whenever the same shall be ratified by the President and Senate of the United States, and shall continue in force for twenty years from and after said date unless sooner violated and broken by said Indians."

These treaties were never ratified by the President and Senate of the United States. The reason why is not material; if it is, it may possibly be ascribed to objection to some or many of the treaties'

provisions or to the contemplated change of governmental policy with respect to dealing with the Indians. Plaintiffs and defendant suggest the latter reason, for some three years later, in 1871, Congress enacted legislation (16 Stat. 544) discontinuing the policy of negotiating treaties with Indian tribes and dealing directly therewith by acts of Congress.

If either the treaty of 1865 or 1868 was a valid and binding agreement between the Indians and the United States, obviously the claim of the Indians asserted herein is in all substantial respects without merit. If, on the contrary, they failed as treaty agreements because of lack of ratification, the plaintiffs' reservation was not ceded as therein stated. The defendant contended in its original brief, and repeats the same in its brief upon motion for a new trial, that the treaties were binding and valid agreements.

If we correctly apprehend the defense—a new and novel one—it is predicated upon the doctrine of estoppel, i. e., the Indians having entered into the treaty agreements and the United States having substantially observed its obligations thereunder, the court must infer that both parties treated and recognized the treaty as valid and binding, notwithstanding it was submitted to the Senate for ratification and was not ratified. In other words, the court is to assume that the legislation with respect to plaintiffs' lands and the appropriations made for their benefit subsequent to 1868 by Congress is in legal effect a ratification of the treaty, and was so understood and recognized by the parties.

The first and primary question to be considered is the legal and political status of the parties at the time the treaty was made and subsequent thereto. It is a familiar and very ancient rule of Indian law that tribal Indians, from, and even prior to, the adoption of the Constitution, were regarded as domestic dependent nations. They were accorded a possessory title to their claimed lands dependent upon occupancy. For more than eighty years the United States entered into treaties with the Indians, in each of which their landed estates were concerned; the negotiation of treaties was entrusted to Commissioners duly appointed for such purpose, and their validity depended upon ratification. The same procedure was uniformly adopted which applied to treaties with a foreign power. *Cherokee Nation* v. *Georgia*, 5 Pet. 1.

The courts of the United States, without a single exception, have approached the adjudication of Indian rights arising under Indian treaties with the fundamental principle of law in view, that the Indian tribe, unlettered and subordinated to a superior power, was entitled to have all doubts resolved in its favor, and that the parties to the treaty were not in all respects upon an equal footing. What the representatives of the Indian tribe understood with regard to their rights was a vital factor in determining the scope and effect of treaties. The Indians looked, as long ago said, "to our Government for protection"; they had faith in the observation of treaties, and above all else they wanted the approval of the President "whom they addressed as their father", and the Congress to what was done. No court has ever held that the Indian tribes, parties to treaties with the United States, were in all respects *sui juris*, or to be treated as such. Therefore, it is our opinion that what the Indians did subsequent to the abortive treaty of 1868 was only what they had to do, or go on the warpath. The contributions they received were, of course, accepted as either coming from the Government in pursuance of its Indian policy or in an indifferent attitude towards their source. The tribal Indians at this time looked to the Government for support, for the wild lands which theretofore supplied their living were rapidly yielding to the western emigrant, and this the Government recognized, not only in observance of treaty stipulations but by generous appropriations of money in addition. There is no fact of record which indicates that the Indians thought they were receiving these funds in fulfillment of the treaty obligations of 1868. *United States* v. *Kagama*, 118 U. S. 375; *Jones* v. *Meehan*, 175 U. S. 1. The competency of the parties to fully comprehend their rights is an important factor in characterizing conduct.

We can find no precedent which would warrant a departure from the reason for the necessity of formal ratification of Indian treaties. Indian treaties were negotiated by duly accredited Commissioners of the United States, and Congress in no legislation pointed out to the court ever indicated an intent to entrust the finality of the agreements and surrender the superior right of supervision, amendment, and approval, by way of ratification of the same, until 1871. Until 1871 the Congress refused "to expose the Government to the errors of a single person" and ratification of a treaty to render it obligatory was uniformly recognized. The act of March 3, 1871 (16 Stat. 544, 566), changing the Indian policy of the Government, contains provisions which disclose the Government's clear intentions to withhold the exercise of a power possessed over Indian tribal lands and property as to past transactions evidenced by treaties, and preserve rights acquired thereunder. We quote the act as follows:

"For insurance and transportation of goods for the Yanktons, one thousand five hundred dollars: *Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and *ratified* with any such Indian nation or tribe." (Last italics inserted.)

We have yet to find a single instance in the whole course of the relationship between tribal Indians and the Government where the latter has surrendered, either in dealings between itself and the tribes or in dealings of third parties with the tribes, its sovereign right of supervision, control, and approval. All the Indian legislation with which this court is familiar has either directly and expressly determined Indian and governmental rights involved therein or taken the form of agreements between the parties which became effective after submission for approval of the tribe and later ratified by Congress. The doctrine of governmental ratification has been firmly entrenched during the entire course of the Indian relationship. The tribal Indian was in law the ward of the Nation, and, notwithstanding comparatively recent acts, the relationship to a considerable extent continues to exist. No third party may make a contract with tribal Indians to act for them in the capacity of an attorney at law or in

fact without first complying strictly with section 2103, Revised Statutes, and procuring the approval of the Secretary of the Interior to the contract, Congress having delegated to the Secretary this authority. In the face of this long-continued and existing policy it is impossible for the court to hold that contractual rights involving the Indians' estate in lands accrue because perchance the Government's dealings with the Indians during a period of nineteen years bear some similarity to the stipulations of an unratified treaty. The Government's policy was expressed in the treaty in many if not all of its aspects. The articles reflect what the Government considered its duty aside from the treaty, and manifestly appropriation bills would follow the segregation of obligations assumed. No one would suppose the Government intended Indian appropriations to be in a lump sum, and to be disbursed by the tribal Indians in their discretion. The uniformity of appropriation statutes with respect to all the Indian tribes, irrespective of treaties, attests this fact.

We think the defense is vulnerable in another important respect. If the treaty of 1868 delimited the plaintiffs' reservation and accomplished the cession of their surplus lands, the legislation which thereafter attempted to establish a similar reservation was unnecessary. It was not until July 5, 1873 (1 Kapp. 855), that the Government by direct act set aside a reservation for the plaintiffs and other Indians, and this reservation so set aside by Executive order added to the reservation delimited in 1868, 4,332,440 acres. In 1874 by legislation a different reservation was delimited for the plaintiffs and the total area decreased to the extent of 2,115,993.6 acres. Again, in 1875, the reservation was increased which resulted in the end in a total increase of the reservation to the extent of 5,575,680 acres. This legislation, enacted at a time when the policy of the Government was to deal directly with tribal Indian lands, can hardly be said to have been enacted upon the basis of a congressional belief that an unratified treaty concluded in 1868 conferred a right to place foreign Indians upon plaintiffs' reservation.

On the contrary, the large increase in acreage which finally entered into the question seems to indicate that Congress recognized a very substantial increase was essential to care for the augmented population of the reservation which was in 1888 placed thereon. The agreement of May 1, 1888 (25 Stat. 113), resulted from the authorized negotiations of 1887 wherein the Secretary of the Interior was to secure, if possible, an agreement from the Indians of northern Montana and Fort Berthold, Dakota, for a reduction of present reservations, or removal to new ones (24 Stat. 29, 44). The Secretary concluded negotiations which are evidenced by the agreement *ratified* by Congress May 1, 1888. The ratified agreement of 1888 disposes of the lands delimited as a reservation for the plaintiffs in 1874, and specifically recites that said reservation being in excess of the needs of the nation, a desire exists to dispose of so much of the reservation as is not required by the Indians in order to acquire sufficient funds to maintain the nation and promote its civilization.

No provision of any act in this series of legislation refers to the unratified treaty of 1868, and the fact that Congress in 1874 permitted the plaintiff Indians to occupy a reservation containing an area of 33,830 square miles, or 21,651,200 acres, indicates that the moving

cause for the ratified agreement of 1888 was a disintegration of this enormous reservation area and its segregation into distinct reservations for the Indian tribes of northern Montana, and this is precisely what was done; the Sioux, Assineboine, Gros Ventre, and Blackfoot Nations composed of Piegan, Blood, and Blackfeet Indians received a delimited reservation, and the United States received a cession of 17,500,000 acres of land thrown open to public settlement.

Notwithstanding the inherent difficulties of indulging inferences that Indian legislation resulted from the preconceived validity by the Congress of an unratified treaty which had been before the Senate for consideration from 1868 to 1871 and never ratified, we think the legislation referred to indicates an exercise of the exclusive jurisdiction Congress possessed over tribal Indian lands and funds as to an existing condition of affairs relating not only to the plaintiffs but to all the Indian tribes in northern Montana. It discloses an adherence to the established Indian policy of the Nation, and in the absence of an express and more positive intention than the record discloses, we cannot say the legislation was induced by any other cause or for any other reason.

The defendant concedes that there was a determined opposition upon the part of Congress to paying the debts due from the Indians to Indian traders which the treaty of 1868 provided should be done, but which Congress never paid, and we cannot assume that Congress without legislative action approved a treaty which manifestly involved numerous provisions of both pecuniary and moral concern to the Government, because perchance in subsequent legislation no provision was made for paying the Indians for their surplus lands. Omissions of this character have occurred heretofore, and numerous special jurisdictional acts have been passed to afford the Indians a forum where their rights due to the same might be adjudicated and determined. We find nothing in the record indicative of the fact that the conduct of the Indians subsequent to 1868 lulled the United States into a prejudicial position which it would not have assumed except for the same. The bookkeeping methods of the Treasury Department can hardly be available to charge actual knowledge of the same to a tribe of Indians residing some three thousand miles away, and, as self-serving evidence, are not convincing.

The United States did not, subsequent to the conclusion of the treaties, restore the lands ceded to the public domain until 1874, and only then in pursuance of congressional authority so to do, and while separate Indian agencies were established within this territory to which foreign Indian tribes were attached, this fact is not alone sufficient to warrant an inference that the Indians conceded the right under the unratified treaties. As a matter of fact, the Indians could have accomplished no more than a protest against the acts of the Government, as about that time the Government's policy of dealing with the Indians was in process of radical change, involving direct legislation in opposition to treaty negotiations theretofore prevailing. Aside from our opinion that unratified treaties, which expressly provide that they are to become effective only when ratified, are not binding, the court would hesitate to apply the doctrine of estoppel to tribal Indians, in the absence of positive

proof that the tribe as such comprehended its rights and was accepting benefits from the Government with full knowledge of and in pursuance of rights created by treaties between the parties. We need not cite precedents to establish the rule that Indian treaties prior to 1871 were recognized, though made with dependent nations, as binding contracts creating mutual rights and duties which special jurisdictional acts empowered this court to adjudicate and determine. The special act in this case refers specifically the claim of the plaintiff Indians "by virtue of the treaty of October 17, 1855", and inasmuch as the defendant does not challenge the right to recover under the unratified treaties except under the rule of estoppel, we think the plaintiffs are entitled to recover under this item in suit. In this connection it is proper to observe that the Nez Perce Tribe has never ceded nor relinquished its rights under the treaty of 1855.

On the basis of the invalidity of the treaties of 1865 and 1868 it is admitted that the surplus lands ceded to the plaintiffs under the treaty of 1855 and thrown open to settlement by the act of April 15, 1874, totaled 15,289,344 acres. The remaining issue with respect to this area revolves around whether the increased acreage added to plaintiffs' reservation totaling 5,575,680 acres, should be deducted from the total acreage of 15,289,344 as a basis of judgment for plaintiffs' loss. Plaintiffs' reservation having been increased in acreage, their loss was proportionately decreased when their surplus lands were taken under the act of 1874, for the increased area was included in plaintiffs' cession of their reservation in 1888 for which they secured consideration.

The issue would be one of easy solution were it not for the provisions of the act of May 1, 1888 (25 Stat. 113). This act, embodying agreements between the United States and the tribes of Indians heretofore mentioned, accomplished the cession of the plaintiffs' entire reservation and its division into separate reservations ceded to the Sioux, Assineboine, Gros Ventre, and Blackfoot tribes. In other words, the United States acquired by the agreement of 1888 the plaintiffs' entire reservation, then totaling 21,651,200 acres, made up of 16,075,520 acres of plaintiffs' original reservation and the 5,575,680 acres added thereto by the United States. 17,500,000 acres of the reservation were thrown open to settlement, and 4,151,200 acres segregated into reservations of which the plaintiffs acquired a reservation of 3,099,298 acres.

The agreement of 1888 created a landed unit to which the plaintiff Indians contributed their reservation and the United States 5,575,680 acres. The Indians in virtue of this agreement, wherein consent was given to allocate the unit among the plaintiffs and the foreign Indians as the United States might see fit, put all the tribes upon an equal basis. The plaintiffs acquired their proportionate share of the added lands and the foreign Indians their proportionate share in the entire area, which of course included the plaintiffs' contribution. The Government was intending an equitable and just division of the estate and to this end it realized the rights of the plaintiffs. The plaintiffs constituted 54.3 percent of the entire Indian population placed upon the lands, and the foreign Indians 45.7 percent. Predicated upon this percentage of reciprocal rights

acquired and surrendered, the plaintiffs failed to derive a monetary benefit in the added lands in excess of the proportion of their population to that of the entire landed estate.

In addition to what has been said, it is to be noted that the act of 1888 was consummated by an express agreement acceded to by the plaintiffs, upon a money consideration substantial in proportions which they then needed, and also secured to them a delimited and permanent home. To secure these monetary and landed benefits the plaintiffs were willing to make a contribution as evidenced by the agreement, and in so doing we believe they should be charged in accord with their proportionate population in the benefits which accrued to all under the act. The agreement could not, or at least it might not, have ever been concluded upon any other basis. The lands added to the reservation by the United States totaled 5,575,680 acres. 54.3% of the same equals 3,027,594.24 acres. To this extent, in equity and fairness, the contribution of the United States entered in the creation of joint estate for the joint benefit of all the Indians. Beyond this the plaintiffs did not, we think, in justice receive a proportionate benefit, and the plaintiffs should not be charged with a greater contribution to the added lands than the above acreage. The defendant in its brief has not favored the court with an expression of settled opinion with respect to the above. A statement is made disclosing the fact and submitting the question "without further comment", which the court, while not accepting as an admission without examination, assumes to be an admission that the contention of the plaintiffs upon the issue is admittedly sound. Finding XIV details the facts.

The most difficult issue is the amount which the plaintiffs are entitled to recover. The reservation set aside for the Indians in 1855, as well as the common hunting grounds described, clearly indicates by its vastness of acreage that the primary objective of the proceedings was peace and amity among the Indians and peaceful relations with the white settlers, rather than any definite consideration of land values. Manifestly neither the representatives of the Government nor the Indians themselves attached great value to the lands involved. The Indians were securing rights in the hunting grounds and a delimited reservation which up to this time had involved force and hostility to protect, and that they attached special value to the lands is not inferable from what was done. The value to the Indians was represented in hunting rights, not in the soil; they possessed neither the inclination nor ability to develop the territory. The Government certainly viewed the situation with manifest indifference to land values. That this is so is demonstrated by the fact that the treaty granted communal hunting rights within a territory over 19,000 square miles in extent.

In 1865 and 1868, and possibly within a few years prior thereto, land values as to the lands involved became of more concern to the white settler and the Government. The supposed existence of gold therein inaugurated a policy of acquiring surplus lands over and above sufficient acreage for Indian reservations and opening the same to public settlement. The Indians, as disclosed by the facts, did not attach greatly enhanced values to the titles by which they held their lands. They were willing in 1868 to cede the over thirteen

million acres herein involved to the United States for a total consideration of $1,547,000, to be expended over a period of twenty years, or a trifle less than 12 cents per acre. In 1886 the plaintiffs did part with their land title to 17,500,000 acres for $4,300,000, i. e., 24½ cents per acre, so that it is irrefutably established that the Indians, both before and after the passage of the act of 1874, did not regard their land titles of extremely great value. Whether this was due to the character of title they possessed, or the location and character of the lands, is not shown. Nowhere does it appear, nor is it charged, that they were overreached or deceived by officials of the United States as to the value of their landed estates when the treaties were signed, and as we view the situation no greater value can be ascribed to the lands than the Indian title thereto was worth in 1874, when they were thrown open to public settlement. *United States* v. *Winans*, 198 U. S. 371; *Choctaw Nation* v. *United States*, 119 U. S. 1.

The plaintiffs contend that recovery is to be based upon a value of at least $1.25 per acre, i. e., the value given them by the United States when they were sold under the general land laws subsequent to 1874. In deciding this precise issue the court said in the case of *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 339:

"The acreage price offered to settlers was adjusted on a basis of limited allotments, the entire consideration to be paid in stated installments. The judgment we are to render is to be based on takings embracing large areas of land, totaling in two instances millions of acres and in the other close to a hundred thousand acres. When these large tracts were acquired it is apparent that enormous expense is involved in the future segregation of the tracts into marketable units and their sale upon installment payments. The Government's overhead in the maintenance of a department to accomplish their disposition and the incidental expense accompanying the transaction indisputably establishes that the $1.25 per acre was not all profit, if, in fact, profit accrued at all. The Indians could not have disposed of the lands in the way and manner the Government did, and while the homestead laws valued the lands at $1.25 per acre, the return to the Government was not a net but a gross price. We give the Indians a judgment in this case for the value of the lands free from all the expense of sale or segregation for sale. To claim a uniform price of $1.25 per acre, free from the character of expense enumerated, would, in our judgment, award the plaintiffs a sum much beyond any price they could have obtained had they offered the tracts for sale.

"The plaintiffs are entitled to just compensation to be fixed upon the basis of the amount they might have obtained for the large areas taken at the time they were taken."

Taking into consideration the price fixed in contemporaneous treaties made with Indians residing in and adjoining the territory taken, as well as the character of the plaintiffs' title to the same, we are of the opinion that the fair and reasonable value of the land is not in excess of 50 cents per acre. This conclusion is inescapable when it is further considered that only a few years before the taking of the land by the Government the plaintiffs, in the unratified treaties of 1868, had agreed to cede to the United States 13,173,350.4

acres of land at a price of less than 12 cents per acre, and that plaintiffs later did cede to the United States a larger tract of land than that here involved at a price of 24½ cents per acre.

Again, the court in fixing acreage value has recourse alone to the record, with its conflicting claims, the plaintiffs contending for public lands and the defendant for prior treaty stipulation values. We have already commented upon the plaintiffs' argument, and as to the defendant's, we think a reconciliation of the differences set forth requires a consideration of what the acreage was worth at the time it was taken, in connection with the manner of taking and the title possessed by the Indian nation. It would not, we think, be either just or equitable to ascribe an acreage value to the lands upon the basis of cessions contemplated at a time when possessory rights were regarded as worth little or nothing. In later years the wild lands of the West increased in value, and the Government offered in 1874 to settlers the plaintiffs' land for $1.25 per acre. So that the court in reaching a conclusion of fact in this respect can do no more than harmonize the record and from all the facts and circumstances reach what it regards as an acreage value sufficient to attain the object of justice and equity.

Another factor of importance enters into the process of ascertaining and fixing land values under Indian treaties. The Government is not, we think, to be placed in the attitude of simply negotiating a bargain and sale of the lands involved. The condition of the Indians at the time and the maintenance of the Indian policy then in force clearly indicate that the Government, in stipulating for amounts of money to be paid the Indians, was not inspired wholly by the value of the lands acquired, but by an intention to provide as generously as thought proper for the Indian tribes' necessities in the way of food, clothing, etc., as well as separate funds looking toward the adoption of agricultural pursuits, and in the end accomplishing the civilization of the Indians, if possible, and in so doing may pay more or less than the lands are reasonably worth. Few, if any, Indian treaties disclose a bargain and sale of the Indians' lands upon the strict commercial basis observed in ordinary transfers of landed property. For this reason the court is firmly convinced that an established value applicable in all cases is not available to the parties as a precedent. Too many factors, varying with respect to the case to be adjudicated, enter into the issue to warrant the court in sustaining a fixed value upon the theory that the sum claimed is the same sum fixed in some prior litigation.

The plaintiffs—the Blackfeet, Blood, Piegan, and Gros Ventre Tribes—were deprived of 12,261,749.76 acres for which they have not been compensated (finding XIV). These plaintiffs are, therefore, entitled to judgment for the value of the same, which at fifty cents per acre amounts to $6,130,874.88, subject, however, to a reduction of allowable items set up in the defendant's counterclaim, later to be considered.

SET-OFFS OR COUNTERCLAIMS, INCLUDING GRATUITIES

The act of March 13, 1924, confers jurisdiction upon the court to consider and determine all claims of the plaintiff Indians, and also any legal or equitable defenses, set-offs, or counterclaims, includ-

ing gratuities, which the United States may have against the said nations or tribes, and to enter judgment thereon.

The report of the Comptroller General discloses that between the date of the treaty, October 17, 1855, and June 30, 1927, the United States expended large sums of money for the use and benefit of all the plaintiff tribes, over and above the disbursements made for their benefit in satisfaction of treaty or other legal obligations. These disbursements amounted to $4,010,301.51 for the Blackfeet, Blood, and Piegan Tribes, $1,239,007.34 for the Gros Ventres, and $1,823,-421.86 for the Nez Perce Tribe.

The Nez Perce Tribe not being entitled to recover in any amount, the counterclaim in respect to it need not be considered, as the jurisdictional act does not contemplate the consideration of counterclaims against the plaintiff tribes otherwise than as set-offs against whatever amount they are entitled to recover. *Osage Tribe of Indians* v. *United States*, 66 C. Cls. 64.

Plaintiffs do not question that the disbursements contained in the defendant's counterclaim against the Blackfeet, Blood, Piegan, and Gros Ventre Tribes were made in the amounts stated by the Comptroller General in his report. They contend, however, that certain items included in the expenditures are not properly chargeable against them as set-offs. The items objected to by plaintiffs are as follows:

First: The sum of $58,535.29, an alleged excess of the amount the defendant was obligated to pay plaintiffs under articles 9 and 10 of the treaty of October 17, 1855. Article 9 of the treaty provided for the expenditure of $20,000 annually for a period of 10 years, with the proviso that if, in the judgment of the President and the Senate, this amount be deemed insufficient, it might be increased not to exceed the sum of $35,000 per year. Article 10 provided for the expenditure of $15,000 annually for a period of 10 years. The purposes for which the expenditures were to be made were specifically set forth in each article. It is not shown that the expenditure of $20,000 per year for the period of 10 years, required under article 9 of the treaty, was deemed by the President and the Senate insufficient for the purposes named in the article, nor does it appear that expenditures for the purposes designated were in fact in excess of that amount. The maximum liability, therefore, of the defendant under articles 9 and 10 of the treaty was $350,000. The amount actually expended under the treaty was $408,535.29, an excess of $58,535.29 over the amount the defendant was obligated to expend thereunder. The excess expenditures were gratuities for which the defendant is entitled to credit.

Second: Expenditures for the payment of agents, Indian police, judges, interpreters, miscellaneous employees, agency buildings and repairs, superintendents and teachers, surveying, and other like items. It is contended by plaintiffs that these disbursements were made for the general administrative expenses of the Indian Service of the United States, and that the record does not show that the plaintiffs, as tribes, received any benefit from such expenditures, or, even if it be assumed they did, to what extent.

It is difficult to conceive any theory under which these expenditures did not inure directly to the benefit of the plaintiff tribes.

They were expenditures which the United States was under no legal obligation to make for, or in behalf of, the plaintiffs. They were unqualified gratuities, and, as such, under the plain provisions of the jurisdictional act, are properly chargeable against the plaintiffs as set-offs against the amounts they are entitled to recover.

Third: Disbursements made for the purpose of education. These disbursements amounted, in the case of the Blackfeet, Blood, and Piegan Tribes, to $940,252.23, and for the Gros Ventre Tribe, $359,213.27. The plaintiffs in the motion for a new trial contend that a total deduction of $70,469.01 should be made from the above sums because the deduction claimed is said to have accrued by reason of the expense incurred in sending children to nonagency schools. What this court said in the *Fort Berthold Indian case*, 71 C. Cls. 308, is relied upon as authority therefor. In deciding a similar issue in the *Fort Berthold case* the court, on pages 340 and 341, said:

"The jurisdictional act charges the Indians with 'all sums heretofore paid or expended for the benefit of said tribe or any band thereof.' The Government, under the foregoing provision of the jurisdictional act, charges the Indians with $290,827.25, alleged to be pro rata cost of educating individual children of the bands at various nonagency Indian schools. The amount charged is arrived at by ascertaining the per capita cost of maintaining the schools and charging the same to the Indian tribe as the number of children attending appears. The Government during the period maintained at its expense Indian schools at Carlisle, Pa.; Chilocco, Okla.; Lawrence, Kans.; Pipestone, Minn.; and Pierre, S. Dak. Congress appropriated from the Treasury in accord with a governmental policy to extend the privileges of education to Indian children for the express intent of eventually changing the hereditary habits and customs of the tribes. The motive involved was more directly beneficial, from a governmental standpoint, to the Government than to the tribe. Of course, educational facilities were of prime necessity and imperative, and eventually resulted in benefit to the tribe, but the immediate beneficial results were individual and not tribal.

"We do not believe that the jurisdictional act comprehends a set-off against the claim of the Indians for this item of expenditure in behalf of children of Indian tribes indiscriminately. To so hold might result in sustaining an obvious injustice, for the bands involved in this litigation would be held to contributing a sum toward the maintenance of the schools, while other tribes with much larger attendance would escape payment for benefits of equal value. The sums chargeable, we think, must be restricted to the usually recognized and customary distributions made to the Indians as tribes and bands, unless a contrary purpose is expressed in the act. Public institutions established for the Indian race were maintained from public funds as an adopted public policy, in the nature of gratuity."

The court was convinced that the language of the special jurisdictional act in the above case did not embrace a set-off of gratuities, and stated that governmental Indian schools were maintained from public funds "in the nature of gratuity." In this case the special act authorizes "set-offs, or counterclaims, *including gratuities*." No such language appears in the Fort Berthold act, and we are of the

opinion that in this case it was the intent and purpose of Congress to charge the plaintiffs with all sums disbursed for their benefit over and above those provided for in treaty or other obligations. In addition to this, a supplemental report from the General Accounting Office discloses that while some of the items claimed were expended for attendance upon nonagency schools, the greater number were expended for sending children to mission, boarding, and contract schools not maintained by Government appropriations.

This case has been delayed because of two motions, by both parties, to amend the findings and grant a new trial. The plaintiffs vigorously challenge the basis upon which the court awarded a judgment in their favor, and seek to demonstrate that the set-offs allowed by the court, in the matter of the Government's contribution of lands disposed of under the act of 1888, are erroneous, as well as a charge against the Indians for the expense of educating Indian children at nonagency schools.

The respective motions of the parties exacted a review of the entire record, and the court is of the opinion that the basis invoked to arrive at the amount of the judgment to be awarded the plaintiffs is not inequitable but one justified by the record. It must not be overlooked that the act of May 1, 1888 (25 Stat. 113), while not in form a treaty, was one in legal effect. The plaintiffs by assenting to the terms of the act approved the division of the proceeds, recognized the rights of the foreign Indians involved, and voluntarily for a good consideration granted the rights which accrued to all.

The defendant's motion for amendment of the findings and correction of the judgment is predicated upon what the court in its opinion said as to the allowance of items embraced within the defendant's counterclaim. The court allowed the counterclaim as presented, holding that under the special jurisdictional act this language, "all set-offs or counterclaims, including gratuities", clearly disclosed a congressional intent to charge the Indians "with all sums disbursed for their benefit over and above those provided for in treaty obligations." The court is still of that opinion.

The defendant, both before and on the date when the case was heard, did not include in its counterclaim the sum of $259,100.46 which had been expended for the education of tribal Indian children at nonagency schools, viz: Carlisle Indian School, $33,829.99; Genoa Indian School, $72,602.70; Haskell Institute, $34,210.14; Pierre Indian School, $11,926.36, and Salem Indian School, $106,531.27. The omission to plead these items as a set-off is ascribed to the decision of the court in the *Osage case*, 66 C. Cls. 64, and the *Fort Berthold case*, 71 C. Cls. 308.

The court's opinion points out the distinction between the special jurisdictional act in this and the *Fort Berthold case*. We will not repeat it. In addition to what was stated, it is apparent that so far as this precise issue is involved, what was said with reference thereto in the *Osage case* was *obiter*. The *Osage case* did not turn upon this question, and the observation of the court with respect to including the expense of educating Indian children at nonagency schools as a set-off was not a definite determination of that issue. There was no occasion to decide it.

The plaintiffs contest the allowance of any sums expended by the Government as claimed by the defendant. A comparison of the special acts in the *Osage* and *Fort Berthold cases* and this case is set forth in the brief, and from the same a construction of the language used in the acts is said to confirm a conclusion that to all intents and purposes it means the same.

A gratuity, "a free gift; a recompense", is designed to be beneficial. In a special jurisdictional act covering correlative rights and liabilities of the parties involved, it by no means follows that sums expended "for the benefit of said tribe or band thereof" include gratuities. When Congress in the special act now before us used the words "also any legal defenses, set-offs, or counterclaims, including gratuities, which the United States may have against the said nation or tribes", the intention to include gifts we think is evident.

The court, as we view it, is obliged under the special act to credit the Government with not only all items of expenditure legally and equitably chargeable against the Indians, but with additional items in themselves gratuities which do not fall within the other category. From a legal and equitable point of view set-offs and counterclaims possess a significance quite distinct from gratuities.

It is next urged that nonagency schools inured exclusively to the benefit of individual Indians and not to the tribe or band. In a narrow sense this is true. In its larger aspect it is not. Irrespective of this contention, there exists no legal impediment which precludes Congress from charging against an Indian tribe sums which afforded members of the tribe an opportunity to procure a higher education at Government expense. The opportunity was afforded children of the tribes eligible to accept it.

In addition to the agency schools, the United States offered educational facilities to the Indians at its expense, and because all the Indian children could not avail themselves of the privilege it in no way detracts from the clear intent of Congress to grant to the Indian tribes something theretofore denied them.

Cases are cited establishing the rule that Congress does not legislate for the institution of suits by individual tribal Indians. We grant the fact, but that is not this case.

We think the defendant's motion should be allowed. The former findings will be withdrawn and amended findings filed, the former judgment of the court set aside, and a new judgment for $622,465.57 this day awarded the plaintiffs, in accord with the court's opinion this day filed. It is so ordered.

WHALEY, *Judge;* WILLIAMS, *Judge;* LITTLETON, *Judge;* and GREEN, *Judge*, concur.

A true copy.
Test:

Chief Clerk, Court of Claims
of the United States.

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