

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. 50233

THE CONFEDERATED SALISH AND KOOTENAI
TRIBES OF THE FLATHEAD RESERVATION,
MONTANA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,
Defendant.

PETITION

To the Honorable Chief Justice and Associate Judges of the
Court of Claims:

Plaintiff, The Confederated Salish and Kootenai Tribes
of the Flathead Reservation, Montana, respectfully states:

1. The Confederated Salish and Kootenai Tribes of
the Flathead Reservation, Montana, Plaintiff, is an Indian
Tribe having a tribal organization recognized by the Secretary
of the Interior of the United States as having authority to
represent said tribe. Said tribe is organized under the Act
of June 18, 1934 (48 Stat. 984 as amended, 25 U. S. C. A. Sec. 476)
with a constitution and by-laws approved by the Secretary of the
Interior October 28, 1935. Pursuant to said Act, as amended
(25 U. S. C. A. Sec. 477), a Federal Charter of Incorporation
was submitted to said tribe by the Secretary of the Interior

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on April 21, 1936, and was duly ratified by said tribe on April 25,
1936, whereupon said tribe became, and ever since has been, a
Federal Chartered Corporation with full power to sue.

2. Plaintiff has retained George M. Tunison, Attorney,
whose address is 1212 First National Bank Building, Omaha,
Nebraska and who is designated the attorney of record, to
represent its interests in the presentation of its claims.
Said Tunison is employed by plaintiff under contract approved
by the Secretary of the Interior and the Commissioner of Indian
Affairs as provided by the Act of June 18, 1934, Sec. 476, 25
U.S. Code Annotated.

3. Plaintiff prosecutes this action under and
pursuant to the Jurisdictional Act of July 30, 1946, a copy of
which is attached and made a part hereof as Exhibit A.

4. From time immemorial on the continent of North
America, plaintiff held, occupied, possessed and owned 16,000,000
acres of land within what is now the United States of America and
within the borders of the present states of Montana and Idaho.
By treaty dated July 16, 1855, 12 Stat. 975, 2 Kappler 722, plain-
tiff ceded, relinquished and conveyed said lands to the United
States, reserving therefrom, however, to plaintiff a reservation
of 1,243,969 acres. Said treaty was ratified March 8, 1859, and
proclaimed April 18, 1859. A copy of said treaty is attached and
made a part hereof as Exhibit B. A plat of the lands so ceded

and of the lands reserved to plaintiff is attached and made a part hereof as Exhibit C, pp. 16-17 hereof.

5. Following the execution, ratification and proclamation of the treaty of 1855, plaintiff has continuously occupied its reservation therein specified, with the exceptions hereinafter noted. No action has been taken by Congress or any department of the Government with respect to the claim herein alleged except the enactment of the jurisdictional act, Exhibit A, and the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 25 U. S. C. A. 70. Plaintiff is and has always been the sole and absolute owner of the claims alleged in this petition; no person other than plaintiff has ever had any interest therein. No assignment of or transfer of the claims alleged in this petition, nor any part thereof, nor any interest therein, has been made. Plaintiff has not been paid for the claim herein made, nor any part thereof, and is justly entitled to recover thereon from the United States after allowing all legal credits and offsets. Plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted, or given encouragement to rebellion against said Government.

6. At all times mentioned in this petition defendant was guardian and trustee of the affairs and property of plaintiff,

and in the determination of the validity of the claims herein asserted or defenses interposed the Court, under the provisions of Section 3 of the Act, Exhibit A, has the full power and authority of a court of equity.

7. Since the execution of said 1855 treaty, the defendant has not made or furnished to plaintiff an accounting of its property and funds. The Jurisdictional Act provides, Sec. 2:

"Such petition or petitions may, in addition to alleging specific claims, demand a general accounting of all funds and property expended or used by the United States for the account of said Indians, in which event the General Accounting Office shall within a reasonable time from date of filing said petition or petitions make a complete audit of said accounts, and, in addition to the usual copies furnished the Attorney General, shall furnish a copy thereof to the attorney or attorneys for said Indians; and the court, after full hearing, shall state the account and render judgment in accordance therewith."

Plaintiff asks that such account be had and stated and that the court render judgment for plaintiff in accordance therewith.

8. When the 1855 treaty reservation was surveyed and the boundaries thereof fixed by defendant, the northern boundary thereof was not fixed, as required by the treaty, viz.:

"half way in latitude between the northern and southern extremities of the Flathead Lake"

but was in fact fixed and ever since maintained by defendant on

a line six miles south of the true northern and southern extremities of Flathead Lake. By such action defendant took from plaintiff a tract of land six (6) miles in width, north and south, and thirty (30) miles in length, east and west, comprising approximately 180 square miles of land containing approximately 115,200 acres. Such erroneous and illegal action by defendant constituted a taking of plaintiff's property by defendant for which plaintiff is entitled to judgment against defendant for just compensation in an amount to be fixed by the court.

9. When the 1855 treaty reservation was surveyed and the boundaries thereof fixed by defendant, the southwestern boundary thereof was not fixed, as required by the treaty, viz.:

"Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse Prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of Flathead Lake;"

but was in fact fixed and ever since maintained by defendant on a line several miles north and east of the true southwest line of said reservation, as called for by the treaty. By such action defendant took from plaintiff a tract of land several miles in width and containing many thousands of acres. Such

erroneous and illegal action constituted a taking of plaintiff's property by defendant for which plaintiff is entitled to judgment against defendant for just compensation in an amount to be fixed by the court.

10. The 1855 treaty, after stating the boundaries of the reservation, provided:

"All of which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes,"

Following their occupation of their treaty reservation, plaintiff tribe and its members lived a peaceful, happy, pastoral life thereon. The members had ample grazing for large herds of cattle, horses and sheep. On the better lands good crops of hay and grain were produced by the Indians. The Indians were self-supporting and prosperous. The area of the reservation was sufficient to insure a comfortable living, in perpetuity, to the members of plaintiff tribe. But the westward trend of the whites would not be stayed. Several attempts were made by defendant to secure plaintiff's consent to opening the reservation and sale of so-called surplus lands. Each time the Indians refused. Finally the reservation was opened by defendant by the Act of April 23, 1904, 33 Stat. 302, 3 Kappler 79. A copy

of said Act is attached and made a part hereof as Exhibit D.

Said Act as originally drafted and introduced in Congress as H. R. 12231, 58th Congress, 2d Session, contained an additional section, Sec. 17, requiring approval by plaintiff before said Act should be effective. This protective section, which was similar to those appearing in other Acts opening Indian Treaty reservations to settlement, was stricken from the bill on the recommendation of the then Secretary of the Interior. The opening of the treaty reservation, without the consent and over the objections of plaintiff, resulted in great damage to plaintiff. The Indians were obliged to dispose of livestock for lack of range and at the present time 85% of the good agricultural lands on the reservation have passed into the ownership of whites. Plaintiff is entitled to judgment for damages against defendant for the aforesaid treaty violation in an amount to be fixed by the court.

11. The defendant wrongfully and unlawfully appropriated, used and expended several hundred thousand dollars of plaintiff's funds to pay the expenses of survey, classification, appraisal and opening of the reservation lands pursuant to the Act of April 23, 1904 and amendments thereto, the exact amount of which is unknown to plaintiff and will be disclosed by the accounting herein prayed for. Plaintiff is entitled to judgment for damages against defendant for said amount.

12. Plaintiff's 1855 treaty reservation is surrounded by high mountains on the east, south and west, with Flathead Lake and mountains on the north. Plaintiff still owns these mountainsides, most of which are covered with timber and are the source of many streams flowing down into the lowlands. Plaintiff still owns the south half of Flathead Lake and the Flathead River which flows out of the south end of the lake. The water in these streams arising on and flowing through plaintiff's land is of large value for irrigation purposes. Beginning with the Act of April 30, 1908, 35 Stat. 70, defendant, without the consent and over the protests of plaintiff, initiated and has carried through the construction and operation of an extensive irrigation project on said reservation known as Flathead Irrigation Project. In so doing, defendant has appropriated and used and is using large quantities of valuable water belonging to the plaintiff tribe as a whole, for the use and benefit of the owners, mostly whites, of allotted lands lying on the lower portions of the reservation. No compensation has ever been paid to the tribe for said water or the use thereof for irrigation of said individually owned lands pursuant to the purposes of defendant, and plaintiff is entitled to recover from defendant just compensation therefor in an amount to be determined by the court.

13. Section 22 of the Act of March 3, 1909, 35

Stat. 795, provides:

"That the Secretary of the Interior be, and he is hereby authorized, in his discretion, to reserve from location, entry, sale, or other appropriation all lands within said Flathead Indian Reservation chiefly valuable for power sites or reservoir sites, and he shall report to Congress such reservations."

Pursuant to above authority several thousand acres of land valuable for power-site purposes along Flathead River, within the reservation, were withdrawn by defendant from entry, sale or other form of appropriation. The most valuable of the power sites along the river, within the reservation, commonly referred to as Site No. 1, lies about four miles below where Flathead Lake discharges into Flathead River. By Act of March 3, 1911, 36 Stat. 1066, as amended August 24, 1912, 37 Stat. 527, Congress directed:

"That an easement in, to and over all lands bordering on or adjacent to Flathead Lake, Montana, which lie below an elevation of nine feet above the high water mark of said lake for the year 1919, is hereby reserved for uses and purposes connected with storage for irrigation or development of water power, and all patents hereafter issued for any such lands shall recite such reservation."

The Act of March 7, 1928, 45 Stat. 212, authorized the Federal Power Commission upon terms satisfactory to the

Secretary of the Interior to issue licenses for the use and development of power sites on the Flathead Reservation and for the use of water rights reserved or appropriated for irrigation projects. Said Act further provided:

"That rentals from such licenses for use of Indian lands shall be paid the Indians of said reservation as a tribe."

Under date of May 23, 1930, defendant issued a license for Flathead Site No. 1 to Rocky Mountain Power Company, a subsidiary of Montana Power Company, providing for annual payments to the plaintiff on a schedule therein specified and also providing, as a part of the consideration for said license:

"Art. 26. Coincident with the beginning of commercial operation of the project works and thereafter throughout the remainder of the term of the license, licensee shall make available, at the project boundary at or near the licensee's generating station, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of 1 mill per kilowatt-hour: (1) Electrical energy in an amount not exceeding 5,000 horsepower of demand to be used exclusively for pumping water for irrigation; and (2) electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale. Such deliveries shall be made at such standard voltage as may be selected by the commission. The licensee shall also make available, at the voltage of the line from which service is

taken, either at the project boundary at or near the licensee's generating station or at some more convenient place on the project to be agreed upon, and the United States, for and on behalf of the Flathead irrigation project or the Flathead irrigation district, may take and, having taken, shall pay for, at the price of 2½ mills per kilowatt-hour, additional electrical energy in an amount not exceeding 5,000 horsepower of demand for all project and farm uses and for resale."

The rate so provided for power for the use of Flathead Irrigation district, viz.; 1 mill per kilowatt-hour for 10,000 horsepower and 2½ mills per kilowatt-hour for the next 5,000 horsepower, was and is much less than the fair and reasonable market value of said power and has already resulted in a net profit of over one million dollars to said Flathead irrigation project. By granting said preferential low rate to said Flathead irrigation project, defendant wrongfully and unlawfully deprived plaintiff of the full and fair value of its power and has appropriated same for its own use and benefit and for the use and benefit of water users on said Flathead irrigation project and power customers of said project, and defendant continues so to do. Therefore, the total rentals from said license for use of said Indian lands is not being paid the Indians of said reservation as a tribe. By such action defendant has appropriated property of plaintiff for which plaintiff is entitled to just compensation from defendant in an amount to be determined by the court.

Wherefore, by reason of the matters and things stated in the foregoing petition, plaintiff prays for damages and compensation and final accounting and settlement as provided in the Jurisdictional Act of July 30, 1946, and prays that the court render judgment for plaintiff against defendant The United States of America for such sums as shall be found due after allowance of all proper credits and offsets, and for such other and further damages and relief as may be proper, both at law and in equity.

The Confederated Salish and
Kootenai Tribes of the Flathead
Reservation, Montana,

By George M. Tunison,
Attorney of Record,

1212 First National Bank
Building,
Omaha, Nebraska

Dated July 14, 1951.

STATE OF NEBRASKA) ss
COUNTY OF DOUGLAS)

George M. Tunison, being duly sworn, deposes and says:

That he is attorney employed by the plaintiff in the above entitled cause, under contract approved in accordance with existing law to prosecute said claims; that the matters and things stated in the foregoing petition are true to the best of his knowledge, information and belief.

George M. Tunison (signed)

Subscribed and sworn to before me this 14 day of July, 1951

Thomas P. Leary
Notary Public

EXHIBIT A

[Public Law 566—79th Congress]

[Chapter 701—2d Session]

[H. R. 6983]

AN ACT

(Copy of Act)

EXHIBIT B

TREATY WITH THE FLATHEADS, ETC.,
JULY 16, 1855

12 Stat. 975. 2 Kappler 722. Ratified March 8, 1859

Proclaimed April 18, 1859.

(Copy of Treaty)

EXHIBIT C

(Sketch of Cession and Reservation)

EXHIBIT D

FLATHEAD INDIAN RESERVATION

An Act For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

(Copy of 33 Stat. at Large 302)

Points and Authorities.

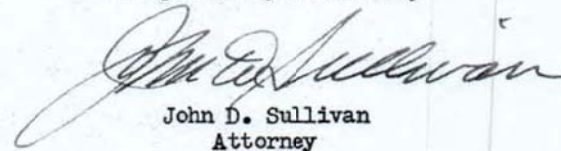
John W. Redfield v. The United States, 27 C.
Cls. 473, 475:

No plaintiff has a right to enter a second suit upon the same cause of action upon which a prior suit is pending. The pendency of the prior suit is cause for abatement of the second suit upon the defendant's motion. The doctrine here stated is elemental.

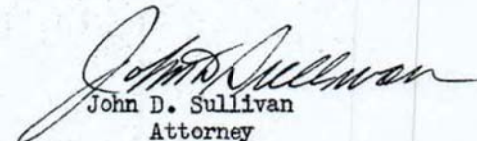
Starr v. Starr, 94 U. S. 477, 485, 24 L. Ed. 276:

* * * A party seeking to enforce a claim legal or equitable must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demands and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fails. * * *

Respectfully submitted,


John D. Sullivan
Attorney

I hereby certify that on the 24th day of September, 1951, four (4) copies of the above and foregoing Motion to Dismiss were mailed to the attorney for petitioners, George M. Tunison, 1212 First National Bank Bldg., Omaha, Nebraska.


John D. Sullivan
Attorney