

FILED  
July 24, 1951.

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BEFORE THE  
INDIAN CLAIMS COMMISSION

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No. 156  
—○—

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

*Petitioner,*

v.

THE UNITED STATES OF AMERICA,

*Defendant.*

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**PETITION**  
—○—

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.

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TRIBES OF THE FLATHEAD RESERVATION,  
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*Petitioner,*

v.

THE UNITED STATES OF AMERICA,  
*Defendant.*

—○—  
**PETITION**

Petitioner respectfully states:

1. The Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, Petitioner, 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 con-

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stitution 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 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. Petitioner 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 petitioner under contract approved by the Secretary of the Interior and the Commissioner of Indian Affairs as provided by the Act of June 18, 1945, Sec. 476, 25 U. S. Code Annotated.

3. Petitioner prosecutes this claim under authority of the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049, 25 U. S. C. A. 70), which contains, among others, the following provisions:

#### Jurisdiction

Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all oth-

er claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U. S. C. sec. 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made

to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

4. The Act of Congress of July 30, 1946, Public Law 566—79th Congress, authorized petitioner to submit claims to the Court of Claims. A copy of said Act is attached and made a part hereof as Exhibit A. Suit under said Act has been filed in the Court of Claims by petitioner within the time therein provided. No action has been had in said suit. The claims herein asserted are included in that suit.

5. From time immemorial on the continent of North America, petitioner held, occupied, possessed and owned exclusively 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, petitioner ceded, relinquished and conveyed said lands to the United States, reserving therefrom, however, to petitioner 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 petitioner is attached and made a part hereof as Exhibit C, pp. 18-19 hereof.

6. Following the execution, ratification and proclamation of the treaty of 1855, petitioner 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 claims 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. Petitioner is and has always been the sole and absolute owner of the claims alleged in this petition; no person other than petitioner 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. Petitioner has not been paid for the claims herein made, nor any part thereof, and is justly entitled to recover thereon from the United States after allowing all legal credits and offsets. Petitioner 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.

7. At all times mentioned in this petition defendant was and is now guardian and trustee of the affairs and property of petitioner. In the determination of the validity of each of the claims herein asserted, and in its consideration of the facts pleaded, the attention of the Commission is especially called to clause (5) of Sec. 2 of the Indian Claims Commission Act, viz., "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity."

8. Petitioner incorporates and makes a part of each Cause of Action hereinafter pleaded the matters and things stated in paragraphs 1 to 8, inclusive, hereof.

#### FIRST CAUSE OF ACTION

Since the execution of said 1855 treaty defendant has not made or furnished to petitioner an accounting of its property and funds. Petitioner alleges that large amounts of its property and funds have been wrongfully misappropriated by defendant, the exact amount of which will be disclosed by said accounting. Petitioner asks that such accounting be had and stated and that the Commission render judgment for petitioner in accordance therewith.

#### SECOND CAUSE OF ACTION

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 petitioner 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 illegal action by defendant constituted a taking of petitioner's property by defendant for which petitioner is entitled to judgment against defendant for just compensation in an amount fixed by the Commission. Such taking was without the payment of compensation therefor agreed to by petitioner.

#### THIRD CAUSE OF ACTION

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 boundary of said reservation, as called for by the treaty. By such action defendant took from petitioner a tract of land several miles in width and containing many thousands of acres. Such illegal action constituted a taking of petitioner's property by defendant for which petitioner is entitled to judgment against defendant for just compensation in an amount to be fixed by the Commission. Such taking was without payment of compensation therefor agreed to by petitioner.

#### FOURTH CAUSE OF ACTION

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, petitioner 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 petitioner tribe. But the westward trend of the whites would not be stayed. Several attempts were made by defendant to secure petitioner'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 petitioner 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 Interior. The opening of the treaty reservation, without the consent and over the objections of petitioner, resulted in great damage to petitioner. 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. Petitioner is entitled to judgment for damages against defendant for the aforesaid treaty violation in an amount to be fixed by the court. Said taking by defendant was such as entitles petitioner to just compensation therefor. Such taking was without payment of compensation therefor agreed to by petitioner.

#### FIFTH CAUSE OF ACTION

The defendant wrongfully and unlawfully appropriated, used and expended several hundred thousand

dollars of petitioner'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 petitioner and will be disclosed by the accounting herein prayed for. Petitioner is entitled to judgment for damages against defendant for said amount.

#### SIXTH CAUSE OF ACTION

Petitioner's 1855 treaty reservation is surrounded by high mountains on the east, south and west, with Flathead Lake and mountains on the north. Petitioner still owns these mountainsides, most of which are covered with timber and are the source of many streams flowing down into the lowlands. Petitioner 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 petitioner's land is of great value for irrigation purposes. Beginning with the Act of April 30, 1908, 35 Stat. 70, defendant, without the consent and over the protests of petitioner, 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 petitioner 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 petitioner is entitled to recover from defendant just compensation therefor in an amount to be determined by the court. Said taking of said water was without payment of compensation agreed to by petitioner.

#### SEVENTH CAUSE OF ACTION

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 pur-

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poses 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 license 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 petitioner for which petitioner is entitled to just compensation from



defendant in an amount to be determined by the Commission.

**EIGHTH CAUSE OF ACTION**

Petitioner incorporates into and makes a part of this its Eighth Cause of Action those allegations of its Sixth and Seventh causes of action, supra, which describe the water and power resources of its 1855 reservation. Defendant wrongfully and unlawfully appropriated the waters of Hell Roaring Creek located in the northwestern part of petitioner's 1855 treaty reservation for a power plant and for a source of water supply for the city of Polson, which is located at the south end of Flathead Lake. Purporting to act under the authority of the Act of May 10, 1926, 44 Stat. 453-465, as amended, the receipts from the use of water from said Hell Roaring Creek for power and water supply have been appropriated and used by defendant through its agency, the Flathead irrigation project. By such action defendant has appropriated property of petitioner for which petitioner is entitled to just compensation from defendant in an amount to be determined by the Commission and which amount will be determined in the accounting hereinbefore, in this petition, prayed for.

Wherefore, by reason of the matters and things stated in the foregoing petition, petitioner prays for damages and compensation and final accounting and settlement as provided in the Indian Claims Commission Act, and prays that the court render judgment for petitioner 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 just and equitable.

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 20, 1951.

STATE OF NEBRASKA }  
COUNTY OF DOUGLAS } ss

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

That he is attorney employed by petitioner 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 my knowledge, information and belief.

GEORGE M. TUNISON (signed)

Subscribed and sworn to before me this 20th day of July, 1951.

THOMAS P. LEARY  
Notary Public

My Commission expires September 24, 1953.

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