BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS, Petitioners, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 32

Appearances:

W. C. Lewis, J. Roy Thompson, Jr. and Frank Miskovsky, Attorneys for Petitioners.

Ralph A. Barney, with whom was Mr. Assistant Attorney General A. Devitt Vanech, Attorneys for Defendant.

APR 9 1951

OPINION OF THE COMMISSION

O'Marr, Associate Commissioner, delivered the opinion of the Commission.

1. The Claim here asserted by the petitioners, the Kiowa, Comanche, and Apache Tribes of Indians, is to recover the sum of $16,268,664 less $2,000,000 paid by the Government, for 2,033,583 acres of land lying west of the 98th Meridian in what is now the State of Oklahoma, which land is part of an area of 2,968,893 acres situated in a larger territory historically known as the Leased District.

2. The lands involved in this case were acquired by the petitioners under the Treaty of October 21, 1867, 15 Stat. 581. By this

treaty the lands hereinafter described were ceded by the United States to the Confederated Tribes of Kiowa and Comanche Indians; that the lands so ceded are located in the State of Oklahoma and are described in the treaty as follows:

> "commencing at a point where the Washita River crosses the 98th meridian, west from Greenwich; thence up the Washita River, in the middle of the main channel thereof, to a point thirty miles, by river, west of Fort Cobb, as now established; thence, due west to the north fork of Red River, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian-line, and thence south, on said meridian-line, to the said north fork of Red River; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red River; thence down said river, in the middle of the main channel thereof to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian-line, to the place of beginning, * * *." (Finding No. 1)

Subsequent to said cession, and on the same day that said treaty was executed, the said Apache Tribe of Indians united with the Kiowa and Comanche Tribes, and thereafter shared and enjoyed jointly with the Kiowa and Comanche Tribes all the above-described land and the benefits arising from said treaty. See treaty between the United States and the Kiowa, Comanche and Apache Tribes of Indians, dated October 21, 1867, and ratified July 25, 1868, 15 Stat. 589. Said treaty with the Kiowa and Comanche is historically known as the Medicine Lodge Treaty.

3. Pursuant to section 14 of the Act of March 2, 1889, 25 Stat. 980, the President of the United States appointed a Commis-

sion, composed of David H. Jerome, Chairman, Warren G. Sayre and Alfred M. Wilson, to negotiate an agreement with petitioners for the cession of their lands in the ceded area, and said Commissioner on the 6th day of October, 1892 (this date is sometimes referred to as the 21st day of October, 1892), concluded an agreement by which the petitioners ceded all of their lands described in paragraph 2 hereof, to the United States, and the United States agreed to allot to each member of the petitioner tribes, over the age of 18 years, 160 acres of the lands ceded, and the members of said tribes were also allowed to select a like area for each of his or her children under the age of 18 years. A copy of said agreement so negotiated and concluded appears in Finding No. 2 hereof and is historically known as the Jerome Agreement, and will be so referred to hereafter, or as "the agreement."

The agreement contained an express provision that it should become effective only when ratified by the Congress of the United States.

4. On the 22d day of October, 1892, the Commissioners who negotiated the Jerome Agreement transmitted the same to the President. In due time the President reported said agreement to the Congress; however, Congress took no action thereon until it passed the Act of June 6, 1900, 31 Stat. 677. A copy of said Act, insofar as it applies to the matter here under consideration, is set forth in Finding No. 3 hereof, being Section 6 of said Act; that by said Act the Congress did not ratify the Jerome Agreement in the form in which it was negotiated

and submitted to it by the President, but made substantial changes therein, which will be hereinafter referred to.

5. After the passage of said Act of June 6, 1900, purporting to ratify the Jerome Agreement, the so-called ratified agreement was not submitted to the petitioners for their consideration and approval of the changes made by Congress in said Act of 1900, nor was said Act, as passed by Congress, ever submitted to petitioners for their consideration or approval, nor have petitioners ever approved the same, although the $2,000,000 provided for in Article VI of the agreement appearing in said Act of 1900 was eventually paid as required by the provisions of said Article. (Finding No. 4).

6. As required by the Act of June 6, 1900, the defendant made individual allotments to the members of the three tribes in the aggregate amount of 445,000 acres and set apart 480,000 acres of pasture land for the common use of said Indians; however, 100,000 acres of this pasture land was later allotted to individual members of said tribes. The defendant also set apart for agency, school, religious, and other purposes, 10,310 acres. So there remained the 2,033,583 acres which the defendant received under the Act and which is the land involved in this claim. (See Finding No. 4).

7. Let us now compare the provisions of the Jerome Agreement, which was executed by the treaty Commissioners and the Indians in 1892, with the provisions of the Act of 1900. In the Act of June 6, 1900,

31 Stat. 677, which purports to ratify the Jerome Agreement, we find in Article I that the cession of the 2,968,893 acres was subject to the allotments to the individual Indians and subject to setting apart as grazing lands for said Indians 480,000 acres of land for grazing purposes. No mention of the reserve for grazing purposes was made in the Jerome Agreement, and in Article III of the so-called ratified agreement provision is made for the setting aside of the grazing land by the Secretary of the Interior for use in common by said Indians. There is no provision of that character in the Jerome Agreement.

Article VI of the Jerome Agreement provided for the payment to the petitioners the sum of $2,000,000 as follows: $200,000 in cash to be distributed per capita within 120 days after the ratification of the agreement; $200,000 to be paid out for the Indians under the direction of the Secretary of the Interior, and $100,000 to be paid in the same manner within one year from the date of the second payment, and the remaining $1,500,000 to be retained in the Treasury of the United States to the credit of the Indians and to draw interest at the rate of five per centum per annum, the interest to be distributed to the Indians per capita each year. In the purported ratification of the agreement, Article VI was changed to provide for the payment of said $2,000,000 as follows: $500,000 to be distributed per capita to the members of said tribes in such manner as the Secretary of the Interior shall deem to be for the best interests of the Indians, and the balance of the payment to be credited to the Indians and the interest

thereon distributed as provided in the Jerome Agreement. Thus, it will be seen that a substantial change was made in the terms of payment; but that was not all, for in the last paragraph of the Act of June 6, 1900 [Finding 3 (i)] the payment of the $1,500,000 is required to be held until an alleged claim of title to said land by the Choctaw and Chickasaw Nations had been determined, and in the event that it should be adjudged in any suit brought by the Choctaw and Chickasaw Nations, as authorized by said Act of June 6, 1900 that they have any compensable right in said lands, the payment of said sum of $1,500,000 shall be subject to such legislation as Congress may deem proper. No such condition or contingency as this appears in the Jerome Agreement.

Again, the Jerome Agreement, by Article III, reserved sections 16 and 36 in each township for public school purposes, and such school lands may not be selected for allotments unless occupied by Indians. This provision was not substantially changed in the ratified agreement. However, in the legislative portion of the Act of 1900 following the purported ratification of the agreement [Finding 3 (e)], it is provided that in addition to sections 16 and 36 in each township of the cession which shall be reserved for use of the common schools, sections 13 and 33 in each township were reserved for the university, agricultural colleges, normal schools, and public buildings of the Territory and future State of Oklahoma, and in the event that a part of the reserved sections should be occupied, land in lieu thereof might be selected. Sections 13 and 33 were not reserved by any provision of the Jerome

Agreement, or for that matter, by any provision of the agreement ratified by the Act of 1900. The reservation of sections 13 and 33 would perhaps not affect the Indians unless they were not subject to allotment.

Furthermore, and contrary to the Jerome Agreement, it is provided in the legislative portion of said Act that the lands allotted to the Indians, which may contain valuable mineral deposits, such deposits shall be open to location and entry under the then existing mineral laws of the United States, which were extended to cover the said lands. [Finding 3 (g)].

And furthermore, by Article III of the Jerome Agreement provision was made for the classification of the lands to be allotted into grain-growing and grazing land, and the allottees were required to select at least half of their allotment in grazing land. This provision was entirely eliminated from the agreement set forth in the 1900 Act.

8. From the foregoing it will be seen that there were not only substantial changes made in the Jerome Agreement as it was acted upon by Congress, but the legislative provisions following the purported ratification in the Act of 1900 added further conditions and restrictions to the plan agreed to by the Indians and the Commissioners appointed to negotiate the agreement, and, as we have stated before, the new plan or arrangement adopted by Congress in said Act was never submitted to the Indians for their acceptance or approval, and was never agreed to by them.

9. The appointment of Commissioners to negotiate an agreement with the petitioners for the government's acquisition of their lands, and the Jerome Agreement consummated with the Indians, in truth and in fact amounted to nothing more than an offer by the Indians to cede their lands for the consideration and upon the terms and conditions set forth in the Jerome Agreement, because any agreement that might be entered into was subject to the approval of Congress, not only by the express provisions of section 14 of the Act of March 2, 1889, 25 Stat. 980, but by the express provisions of the Jerome Agreement itself.

10. It is elementary law that when an offer is made, as was done here by the Jerome Agreement, the acceptance of it must be substantially as made, and there must be no variation between the acceptance and the offer. In other words, the acceptance must be without substantial qualification, condition, or departure from the offer. 12 Am. Jur., p. 543, sec. 53; Iselin v. United States, 271 U. S. 136, 70 L. Ed. 872; Minneapolis etc. v. Columbus, 119 U. S. 149, 30 L. Ed. 376; First National Bank v. Hall, 101 U. S. 50, 25 L. Ed. 822.

11. It is plain from the above that the passage of the 1900 Act created no contractual obligations on the part of petitioners for the Jerome Agreement was substantially changed by Congress, not only by the changes of its terms and the addition of new clauses, but by legislatively imposing conditions and restrictions which affected the

Indian selection and enjoyment of their allotments and the payment of the purchase price. Accordingly, Congress ignored the offer of the petitioners to sell in the manner and upon the conditions set forth in the Jerome Agreement, and by virtue of said Act the Government acquired the land without the consent of the Indians upon its own terms and conditions and in disregard of the rights of the Indians under the treaty of October 21, 1867. That the Government had this power no one can deny. Lone Wolf v. United States, 187 U. S. 553, 47 L. Ed. 299. However, by exercising the power it had does not relieve defendant from paying the Indians any damages they may have sustained through such action.

12. Because of the above, it is not necessary to determine whether the inoperative Jerome Agreement was obtained by fraud, duress, mistake, or based upon an unconscionable consideration, or whether the number of Indians, required by Article 12 of the 1867 treaty, executed it.

13. So, we reach the conclusion that under our rules of procedure [Sec. 22 (f)] the petitioners have sustained the issue of fact and law relating to their right to recover; however, since an award is dependent upon the difference, if any, between the value of the land at the time it was acquired by the defendant and the amount paid, less allowable offsets, that question can only be determined upon a final hearing of the claim. Our order will now be, therefore, that the case proceed for the purpose of determining the difference, if any, between the

value of the land of June 6, 1900, and the purchase price paid petitioners, and the amount of offsets, if any, the defendant may be entitled to.

Chief Commissioner Witt and Associate Commissioner Holt concur.

April 9, 1951.