BEFORE THE INDIAN CLAIMS COMMISSION

OTOE AND MISSOURIA TRIBE OF INDIANS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Docket No. 11

Decided: March 31, 1953

Appearances:

Luther Bohanon, with whom was Bat Shunatona and Bert Barefoot, Jr., Attorneys for Plaintiff

Ralph A. Barney, John F. Curran, and Cornelius J. McCool, with whom was Mr. Assistant Attorney General Wm. Amory Underhill, Attorneys for Defendant

OPINION OF THE COMMISSION

WITT, Chief Commissioner, delivered the opinion of the Commission.

This case involves seven claims presented by the Otoe and Missouria Tribe of Indians, which are separately treated and will be separately considered.

FIRST CAUSE OF ACTION

This cause of action is based on a claimed undivided interest of approximately one-seventh in the lands lying east of the Missouri River, principally in the territory now part of the State of Iowa, ceded by treaties to which plaintiff was a party, dated July 15, 1830 (7 Stat.

328), October 15, 1836 (7 Stat. 524), and March 15, 1854 (10 Stat. 1038). Plaintiff's interest is alleged as being approximately 2,322,285 acres of the average reasonable market value of $1.25 per acre; plaintiff alleging that the consideration received by it by said cession was a total of $64,682.78, or 2.8 cents per acre. This consideration, it alleges, was unconscionable, and it sues for the difference between the alleged value and the amount received. The land involved is tract 151 on Royce's Map of Iowa No. 1.

Plaintiff claims, if not Indian title jointly with the other plaintiffs, at least a bona fide "right of occupancy and use for hunting purposes." The initial question to be considered is the title, if any, of the plaintiff to the lands claimed. In this connection, it is to be noted that there is no substantial proof of the actual occupancy by the plaintiff tribe at any time of any definitely described portion of the land in which it claims an undivided interest. The most that can be said of the proof is that the plaintiff tribe did some hunting on some portions of the territory.

Early in the Eighteenth Century the plaintiff tribe was located in what is now the southern part of Nebraska, between the Platte River on the north, and the Great Nemaha River on the south. The villages which were occupied by the tribe at various times were all located on the south side of the Platte about 30 to 40 miles above its confluence with the Missouri. The tribe was usually found in only one village when visited by explorers and traders, but this village was not at all times in the same place, being occasionally moved from one location to another in the same vicinity. The tribe continued to occupy its villages in this area

and to hunt over the area between the Platte and the Great Nemaha Rivers, west of the Missouri River, and was so occupied in using this area in Indian fashion at the time of the Louisiana Purchase, and at the time of the treaty of July 15, 1830.

While the plaintiff tribe also claimed an undefined area east of the Missouri River over which it sometimes roamed and hunted, we find no actual occupancy or claim of the right of possession to any defined area east of the Missouri River. Therefore, this Commission holds that the plaintiff tribe has not established Indian title to any of the lands claimed as a basis for its First Cause of Action. Said tribe at most only had hunting rights to be exercised jointly with other tribes over an undefined area east of the Missouri, and the value of these hunting rights was growing less and less as the buffalo and other game disappeared, and the Commission, even granting ownership of such rights, is unable to determine their value, or that the compensation received therefor was not adequate or was unconscionable; or that the plaintiff has been unfairly treated.

The First Cause of Action must therefore be dismissed.

SECOND CAUSE OF ACTION

This Cause of Action is based on Article X of the treaty of July 15, 1830. In this article there is set aside a tract of land west of the Missouri River and bounded on the east by said river, and lying between the Little and the Great Nemaha Rivers (being Royce's Plat 155 of Nebraska), comprising 143,647.33 acres, to the half-breeds of the plaintiff tribe and of other tribes. The treaty recites that the acreage so set aside to said half-breeds belonged at the time to the plaintiff

tribe, and the plaintiff tribe alone of the tribes making the cession was paid for said lands the sum of $3,000, or 3.26 cents per acre. Of the lands so ceded, 93,864.62 acres were allotted to half-breed members of tribes other than the plaintiff tribe. Plaintiff contends that it owed no duty to the half-breeds of the other tribes and that the defendant, as the guardian of the plaintiff, owed the plaintiff the duty of preventing it from disposing of its lands at such a price, and that it should have a judgment against the defendant for the difference between the then fair actual value of the said 93,864.62 acres allotted to the half-breeds of tribes other than half-breeds of its own tribe and the consideration actually received by it for said lands.

Growing out of this same cession, plaintiff also asserts a cause of action for the difference in the amount received and the fair market value, at the time, of 15,697 acres which plaintiff alleges the defendant failed by error in surveying to allot to the half-breeds.

Plaintiff alleges that at the time of the cession, the value of the 93,864.62 acres was $2.50 per acre, and that of the 15,697 acres was $4.82 per acre.

The article of the treaty making this cession recites that the Omahas, Ioways and Ottoes, for themselves, and in behalf of the Yanckton and Santie Bands of Sioux, having earnestly requested that they might be permitted to make some provision for their half-breeds, are conveying the land involved to said half-breeds. It is apparent that the defendant neither suggested that this cession be made for the benefit of these half-breeds or what the consideration moving to the tribe for such conveyance should be. There was no profit or benefit of any kind moving

to the defendant by reason of such conveyance to these half-breeds. We find that the Indians were intelligent enough to know what they were doing and that they were not improperly influenced in any way in the making of such provision for half-breeds. This Commission does not think the duty of the defendant warranted its interference in this transaction of these tribes with each other; nor that the plaintiff can require, just because the defendant stood by and did not interfere with the transaction, that it should be held liable to the plaintiff when it (the defendant government) was not profiting in any way by the transaction.

With reference to the question of liability of the defendant for its failure to convey 15,697 acres to these half-breeds because of an erroneous survey, Congress is shown to have made an appropriation of $19,621.27, which was $1.25 per acre for the 15,697 acres which the half-breeds failed to get, and that this money was paid to them in lieu of the lands which they did not receive. The plaintiff tribe had made an outright cession of these lands for the benefit of their half-breeds, and when the half-breeds were reimbursed for the loss of this acreage as to which complaint is made, it would seem that the liability of the defendant for its error had been discharged.

This Commission cannot sustain the contention of plaintiff that defendant has not fully discharged its obligation growing out of this erroneous survey.

Both claims, therefore, under the Second Cause of Action must be dismissed.

THIRD CAUSE OF ACTION

This Cause of Action is based on the cession of 807,456.49 acres of land made by the treaty of September 21, 1833. By stipulation this acreage is reduced and fixed as 792,000 acres.

Plaintiff contends that it had Indian title to the land ceded; that the land had a true value at the time of the cession of $1.50 per acre; that the consideration of $39,510.15, or 4.9 cents per acre received by plaintiff for the cession was unconscionable and not fair, and plaintiff should receive an award for the difference between what it was worth and what it received therefor, together with 5 per cent interest thereon from the date of the treaty.

The first question to be decided is whether or not the plaintiff has established by satisfactory evidence the aboriginal possession and ownership of the land involved.

In this connection, attention is called to the reports by Charlevoix in 1721, by Choteau in 1816, and by Major Stephen H. Long in 1820, all of whom place the plaintiff tribe in occupancy of different villages on the tract involved. No other tribe contested the occupancy in Indian fashion or the claim of ownership of plaintiff tribe of any part of the entire acreage involved at these dates. The eminent historian and researcher, Dr. Waldo Wedel and his wife, Mrs. Wedel, and B. B. Chapman, Professor of History at Oklahoma A&M College, all confirm the exclusive use and occupancy by plaintiff of the tract involved herein, and probably somewhat further west and south. Dr. Chapman was positive in his testimony that from his study of this tribe it possessed the area ceded in 1833 to the exclusion of all other tribes; that no other Indian tribe or

tribes claimed any part of this particular area; and that the adjoining tribes recognized the Otoe and Missouria ownership and possession thereof. The treaty involved was negotiated for the United States government by Henry L. Ellsworth and he reported to the Secretary of the Interior with reference to the lands described in the treaty — "I find the Indian title in said lands good."

As confirmation of the generally recognized ownership of this land by the plaintiff tribe, attention is also called to the admitted ownership by the plaintiff tribe on the part of the United States to the lands ceded by the 1830 treaty to the half-breeds, in which treaty of cession (July 15, 1830, 7 Stat. 328; Art. XI) the ownership of the lands ceded to said half-breeds is stated as being in the plaintiff tribe. This tract is Plat 155 of Nebraska by Royce, and lies immediately east of the 1833 cession, and is further removed from the villages of the plaintiff tribe just south of the Platte River than most of the 1833 cession, and further than any part of the 1854 cession discussed later herein upon which plaintiff's Fourth Cause of Action is based. As will be pointed out in a discussion of the Fourth Cause of Action, which involves lands to the north of the cession of 1833, approximately 42 cents per acre was paid the plaintiff tribe for said cession of 1854, which price can hardly be considered as compensation for only a quitclaim, rather than for recognized Indian title. This is very persuasive of the ownership also of the lands ceded in 1833 involved in this Cause of Action, because as stated, this 1833 cession lies largely between the cession of 1854 and the previous cession of 1830 to the half-breeds of lands recognized as owned by the plaintiff tribe.

Based upon the proof held necessary to establish Indian title as made by this Commission in previously decided cases, we are of the opinion that Indian title to the land in this Cause of Action has been established.

The next question to determine is whether or not the consideration received by plaintiff tribe for the cession was unconscionable or so grossly inadequate as to be unfair and unjust. It is undisputed that the consideration paid for the cession was $39,410.15, that is, 4.9 cents per acre. The evidence of value consists of the testimony and research of Dr. Thomas E. Le Duc, Research Professor, Department of History, University of Nebraska, a witness for the plaintiff, and Mr. John Muehlbeier, an Agricultural Economist of the Bureau of Agricultural Economics, Department of Agriculture, a witness for the defendant. The lands of this cession were not put on the market by the defendant government until 1859; much of it was sold at the ceiling price of $1.25 to actual settlers, and the only sales in evidence are sales of smaller tracts in nearby states. Based on these sales, Dr. Le Duc contends that the land should be valued at $1.50 per acre as of the date of the cession. Mr. Muehlbeier places a value of 15 cents an acre on the land as of 1833. It is conceded that the lands had no actual market value in tracts of the size involved at the time of the cession.

We find that the 792,000 acres involved in this cause of action had a fair actual value at the time of the cession of 75 cents per acre, or a total of $594,000.00.

Applying the principles and reasoning as to the determination

as to whether or not a consideration is unconscionable, as previously held by this Commission and the Court of Claims, we decide that the consideration paid for the land involved herein was unconscionable and that plaintiff is entitled to an award in the amount of $594,000.00, less $39,410.15 paid under the provisions of the cession, that is, $554,589.85, less such offsets, if any, as may hereinafter be allowed in accordance with Section 12 of the General Rules of Procedure of this Commission.

FOURTH CAUSE OF ACTION

This Cause of Action is based on the treaty of March 15, 1854, which ceded 1,250,000 acres (acreage and boundaries stipulated), west of the Missouri River, together with any remaining claims the plaintiff tribe might have east of the river. The plaintiff claims Indian title to the land west of the river ceded and sues for additional compensation therefor based on the contention that the amount received under the terms of the treaty was much less than the fair value of the land ceded at the time, and was unconscionable. It is undisputed that the money consideration for the cession was $463,423.74. The treaty also grants to the plaintiff a reservation in lands owned by the government in the amount of 162,107.71 acres in Kansas and Nebraska, which tract was located some miles to the south of the tract ceded, so that the net acreage ceded to defendant was 1,087,892.29 acres.

The proof of possession and exclusive occupancy by plaintiff tribe of said ceded tract is substantially the same as that of the tract ceded in 1833, upon which treaty and cession the Third Cause of Action is based. Therefore, we are of the opinion that possession

and exclusive occupancy of the land involved has been established; or if not established, that such ownership was recognized by the defendant for the reasons set forth in the discussion of the Third Cause of Action, and for the further reason that it is hardly conceivable that any such consideration as was given the plaintiff tribe for this cession would have been given for a mere quit-claim, or in the absence of recognized ownership. As heretofore stated, the consideration in money for the net acreage of 1,087,892.29 acres ceded was $463,423.74, being approximately 42 cents per acre. While said treaty also ceded whatever remaining rights the plaintiff tribe had in territory east of the Missouri River, those rights were only hunting rights, the value of which are little, if anything, because the game at the time of the cession had largely, if not wholly, disappeared; and in 1833 the area was occupied by the Potawattomie Tribe to whom said land had been ceded by the United States.

The proof of value of the tract ceded as in the Third Cause of Action consists almost wholly of the testimony and research of Dr. Thomas E. Le Duc, a witness for the plaintiff, and Mr. John Muehlbeier, a witness for the defendant. The lands involved in this tract include more valley acreage because of the extensive frontage on the Platte and Missouri Rivers; and this frontage also provides for the tract an easier approach from the states to the east, to-wit, Iowa and Missouri, which were in 1854 rapidly being settled by the whites, together with better transportation facilities than the acreage involved in the Third Cause of Action. The value of this acreage must also be made as of a later date than that involved in the Third Cause of Action, after more -