

BEFORE THE INDIAN CLAIMS COMMISSION

OTOE AND MISSOURIA TRIBE  
OF INDIANS,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

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Docket No. 11

Dated: March 31, 1953

O P I N I O N

O'Marr, Commissioner, concurring in part and dissenting in part:

I join in the interlocutory order herein to the extent that it dismisses the first, second, fifth, sixth and seventh causes of action and awards the plaintiff \$554,589.85 on the third cause of action, however, I cannot assent to the award of \$624,468.55 on the claim set forth in the fourth cause of action for the reasons I shall now state.

The fourth claim is for the difference between the value of the land of plaintiff situate in Nebraska, which they ceded by the treaty of March 15, 1854, 10 Stat. 1038, and the purchase price the Government paid therefor.

The historical background of the claim is set forth in the Findings of Fact by which it is shown that by the treaty of July 15, 1830, 7 Stat. 328, II Kapp. 305, the Otoes and Missouriias joined with several other tribes in ceding and relinquishing to defendant a large area of land

lying in Iowa, along and easterly of the Missouri River. Neither the treaty nor the evidence shows the area occupied by plaintiffs, or claimed by them, but Article I of the 1830 treaty, after ceding and relinquishing all the Iowa lands of the several tribes, including those of plaintiff, contains this provision: "But it is understood that the lands ceded and relinquished by this Treaty, are to be assigned and allotted under the direction of the President of the United States, to the Tribes now living thereon, or to such other Tribes as the President may locate thereon for hunting, and other purposes." Thus, it appears that the several tribes, including plaintiff, reserved the right to have lands "assigned and allotted" to them, and other tribes which may be located thereon, "for hunting, or other purposes." Whether any of the ceded lands were ever allotted to the plaintiff I do not know, but I do know that by the treaty of September 26, 1833, 7 Stat. 431, other Indians were placed on the major part of the lands in Iowa, ceded by the 1830 treaty. While it appears that plaintiffs were located on the west side of the Missouri and on lands lying between the Big Nemaha and North Platte Rivers at the time of the 1830 treaty, I find nothing indicating a relinquishment of their rights in the Iowa lands reserved to them by Article I of the 1830 treaty until the relinquishment thereof in 1854.

By the treaty of March 15, 1854, 10 Stat. 1038, plaintiffs ceded to defendant "all their country west of the Missouri river" (Art. 1), and by Article 3, plaintiffs "relinquish to the United States, all claims, for money or other thing, under former treaties, and all claims which they may have heretofore, at any time, set up, to any land on the

east side of the Missouri river." Obviously, the reference to land on the "east side of the Missouri river" was the Iowa land in which plaintiffs retained the right to have at least a part thereof assigned and allotted to them "for hunting, and other purposes." What the "claims for money or other thing, under former treaties" were does not appear. At any rate, defendant and the plaintiffs considered the land claim and claims under former treaties of importance, for by Article 4 the consideration therein set forth was expressly stated to be in "payment for the country herein ceded and the relinquishments herein made." No separation was made of the amounts to be paid as the consideration for the Nebraska lands ceded or of the amount to be paid for the relinquishments above mentioned, either in the treaty or shown by the evidence, so it is impossible to tell what part of the consideration was for the cession and what was for the relinquishment, but we must assume that part of the consideration was for the relinquishment of rights in the Iowa land and rights under former treaties.

The Commission by its finding 12 (3) states that the total consideration paid for the cession of the Nebraska land and for the relinquishment of plaintiffs' rights in the Iowa lands was \$463,423.74, and also, that there is no evidence to show what part, if any, was for the relinquishment of the plaintiffs' claim to the lands east of the Missouri River, but treats the entire amount expended for the Indians under the 1854 treaty as the consideration for the cession of the Nebraska lands (pp. 10, 11, 12 of Opinion) and on that basis makes the award on the Fourth Cause of Action in the amount of

\$624,468.55.

The plaintiffs concede that it is impossible to determine what portion of the consideration stated in the 1854 treaty was for the ceded lands west of the Missouri (in Nebraska), and what part was for the relinquishment of their rights in the lands lying east of the Missouri (in Iowa), but they assume that a substantial part of it went for the relinquishment, for they suggest that the Commission take an "arbitrary figure" of one-third of \$463,423.74 as consideration for the relinquishment. (pp. 148-9, plaintiffs' brief, and proposed findings 18, 21, pp. 298-300 of brief.)

The Commission, as I have said, has considered the entire amount paid the Indians under the 1854 treaty, \$463,423.74, as the consideration for the cession of the Nebraska lands. I think this is contrary to the evidence and inconsistent with findings and opinion. We are here dealing with the question as to whether the amount the Indians received for their Nebraska land under the 1854 treaty was unconscionable. Certainly the amount they received for the land they ceded is necessary to determine that question. Merely for discussion, suppose we take plaintiffs "arbitrary figure" of \$308,949.16 (proposed finding 21 of plaintiffs' brief, p. 300) as the amount they received for the Nebraska cession valued by the Commission at \$1.00 per acre, obviously, an entirely different problem would thus be presented than that determined by the Commission insofar as unconscionable consideration is concerned. Furthermore, the amount received for the Nebraska lands must be determined by the evidence and not based upon an "arbitrary figure," as plaintiffs suggest, or upon a finding

not supported by evidence, as I believe is the situation here. And it would make no difference whether the ground of recovery is based upon unconscionable consideration - which the Commission doubts (Finding 17), or upon the ground, as the Commission states, that "the payment of so inadequate a consideration was unquestionably unfair and resulted in an injustice to the plaintiff tribe" (Finding 17), for in either case the resulting award would be erroneous because of the uncertainty or impropriety of the amount deducted from the value for the consideration paid in order to fix the amount the plaintiffs are entitled.

Again, but aside from the fact that there is no way under the evidence to determine what the plaintiffs were paid for the Nebraska land, I think the award is erroneous because the Commission did not deem the value of the Blue River tract, comprising 162,107.71 acres and lying outside the Nebraska area ceded by plaintiffs in 1854, a part of the consideration for that cession.

In arriving at the amount of the award, \$624,468.55, the Commission found there were 1,250,000 acres of land ceded and it deducted from this acreage the 162,107.71 acres on the Blue River, leaving a net of 1,087,892.29 acres valued at \$1.00 per acre, and it then deducted from the value of this net acreage \$463,423.74 (being the total sum of the expenditures made by defendant pursuant to Articles 4, 5, 7 and 12 of the 1854 treaty) and thereby arrived at the amount of the award. In this way, the Commission, in effect, included the Blue River tract as part of the consideration, although finding 16 clearly indicates that this land was not deemed a part of the consideration.

I would concede that if the value of the Blue River tract was

\$1.00 per acre the Commission's figures are correct, however, the method used in reaching the result assumes an arbitrary value of \$1.00 per acre for the Blue River land. This, in my opinion, is an artificial value, for there is no proof whatever as to the value of the Blue River tract as of the time plaintiffs acquired it. There is proof though (Findings 18-20), that in the late 1870's and early 1880's this same land was sold for nearly one million dollars. These sales do not, of course, fix the value as of 1854, but indicate that the tract was of substantial value when acquired. But whether the value is more or less than \$1.00 per acre is immaterial, for in my judgment value must be based on evidence and only in that way is there any legal basis for a finding based thereon.

What I have said concerning the Blue River tract would not, of course, solve my basic objection to the award, even if the value of the tract were proved, because the value of that tract, if added to the amount the Commission found to be the consideration, would simply show the total consideration paid for the cession of the Nebraska land and the relinquishment of the reserved rights of plaintiffs in the Iowa land and under treaties prior to 1854.

/s/ Louis J. O'Marr  
Associate Commissioner