BEFORE THE INDIAN CLAIMS COMMISSION

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| SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, and JAMES STRONG, as representatives of all members of the Chippewa Tribe of Indians having any interest in the claims asserted, | ) | |
| Plaintiffs, | ) | |
| v. | ) | Docket No. 13-H |
| UNITED STATES OF AMERICA, | ) | |
| Defendant. | ) | |

Decided: May 14, 1953

Appearances:

Arthur B. Honnold and
Charles B. Rogers,
Attorneys for Plaintiffs.

Sim T. Carman, Leon J. Moran,
and Donald E. Schwinn, with
whom was Mr. Assistant Attorney
General James M. McInerney,
Attorneys for Defendant.

OPINION OF THE COMMISSION

O'MARR, Commissioner, delivered the opinion of the Commission.

The claims hereafter referred to have been presented by the Saginaw-Chippewa Indian Tribe of Michigan and one James Strong, a member of the plaintiff tribe. This plaintiff tribe consists of the Saginaw Tribe and portions of the Swan Creek and Black River Bands of Chippewa Indians. The identity of the claimants and their right to maintain the claims is not questioned. The claimant will hereafter be referred to as the "Saginaw.

The petition herein sets forth seven separate claims. However, the case is determined on the first claim, which is based upon a cession of lands located on Saginaw Bay in the State of Michigan; the second claim which is for the removal of timber from lands in the Isabella Reservation, hereinafter to be referred to, and the fourth claim which is based upon taking of Indian lands under the Swamp Land Act passed by Congress in 1850; the third, fifth, sixth, and seventh claims have been dismissed by the plaintiffs.

Prior to the treaty of 1855, which will hereafter be referred to, the plaintiff tribes were interested in certain Michigan lands and had rights in annuities growing out of various treaties with the Chippewa Nation of Indians, or the separate plaintiff bands. No further reference to these rights will be made since they are not involved here and have no bearing upon the questions involved in this case because whatever rights they had to such lands or annuities were duly relinquished by Article 3 of said treaty of 1855, and formed part of the consideration for the rights acquired under that treaty.

By the treaty of August 2, 1855, (11 Stat. 633), the United States agreed with the Saginaw to withdraw from sale, for the benefit of said Indians, all the unsold public lands within the State of Michigan, embraced within the following area: six townships of land in the County of Isabella to be selected by said Indians, and which were selected and described as shown by Finding 2. The unsold public lands within this area comprised 98,051.13 acres, which were made available for Indian selection and entry. This area became known as the Isabella Reservation. In addition, the Saginaw were granted four full townships and two fractional townships on Saginaw Bay in said State. By this grant the unsold public

lands therein comprised 60,873.23 acres, which were made available for selection or entry by said Indians (Finding 2). This area lies about 25 or 30 miles east of the Isabella Reservation, and became known as the Saginaw Reservation. Said area is also described in Finding 2 hereof.

After the 1855 treaty became effective, members of the Saginaw made selections in both reservations, which they were, under the treaty, permitted to do, and according to the record herein, all of the unsold lands located within the Isabella Reservation were eventually selected by the members of the Saginaw to the extent of 98,051.13 acres, but it is not definitely shown the number of acres selected by the Saginaw in the Saginaw Reservation. By the treaty of 1855, the members of the Saginaw were given the right to select lands within either of said reservations for a period of five years after the time of the completion of the lists of persons eligible for selection thereof, and the members of the Saginaw were also given the exclusive right to enter (purchase) upon the lands so withdrawn and unsold for a period of five years after the time limited for selection. The rules and regulations governing such selection are set forth in Finding 3, which fixes the amounts of land that could be selected by the individual Indians. These amounts vary according to marital status, age, etc., of the Indians.

FIRST CLAIM

For its first claim the Saginaw alleges that the Indians were deprived of their lands in the Saginaw Reservation through fraud perpetrated upon them by the defendant, and for an unconscionable consideration, in the consummation of the treaty between the Saginaw and the

United States, dated October 18, 1864, (14 Stat. 657). Since we have determined that no fraud was practiced upon the Saginaw in the conclusion of said treaty, we need not refer to that feature of the claim again, but will devote our attention to the charge of unconscionable consideration.

The plaintiffs' theory of the case seems to be that the Saginaw, by the treaty of 1864, released their rights in the 60,593.23 acres of the Saginaw Reservation, without receiving any compensation therefor, claiming that all they received for this cession was the right they already had to select lands in the Isabella Reservation. This contention ignores the plain facts, for an examination of the treaty which is set forth in Finding 5 insofar as applicable, shows that by Article 1 the Saginaws released all their lands in the Saginaw Reservation, reserved to them by the treaty of 1855, and, specifically, their rights to the selections they had already made therein, as well as the right to purchase lands in said reservation remaining after the period for making selections had expired, and in place thereof were granted the exclusive use, ownership and occupancy of the Isabella Reservation lands, which included the right to make individual selections in the Isabella Reservation. It will be observed that at the time of the 1864 treaty, the five-year period within which the members of the Saginaw were given the right to make selections in the Isabella Reservation had expired long prior to the 1864 treaty, so that at the time of that treaty they only had the right of entry, that is purchase, the lands not previously selected in the Isabella Reservation. So far as the record now before us shows, this was a valuable right acquired by the Indians through the 1864 treaty, and it appears from Defendant's Exhibit 1 that at least 2303.42 acres of 98,051.13 acres of land in the

Isabella Reservation had been selected by members of the Saginaw pursuant to the 1864 treaty. So the Saginaw did receive valuable rights which it and its members did not enjoy prior to the 1864 treaty, and in addition to that, the government expended, as required by the latter treaty, $20,000 for educational purposes.

We have mentioned that under the 1855 treaty, the Saginaw acquired 60,873.23 acres in the Saginaw Reservation. This acreage figure is based upon Defendant's Exhibit 1, which shows that after the 1855 treaty, the government sold 43,025.82 acres (pp. 3-16, inclusive), to which has been added 17,567.41 acres of lands in the Saginaw Reservation granted to railroads under the Act of June 3, 1856, (11 Stat. 21), this grant having deprived the Indians of that amount of land within the Saginaw Reservation which they had acquired by the 1855 treaty. Taking the total acreage, therefore, and deducting therefrom 280 acres, which the Saginaw retained in the Saginaw Reservation under the treaty of 1864, it would appear that the Saginaw relinquished 60,593.23 acres by the latter treaty.

The government's defense to this claim, as set forth in its answer and brief, is that the Saginaw, as such, obtained no title by the 1855 treaty to the lands located in the Saginaw Reservation, in that by the provisions of that treaty it was only the individual members of the Saginaw who derived any benefit to lands under the treaty, and hence, the tribe, as such, had no claim it, as a tribe, could assert.

It is difficult for us to see the force of this reasoning, for the government dealt with the Indians as a group, represented by chiefs and headmen of the tribe, in consummating the treaty of 1855 and again in concluding the treaty of 1864. At no time did it deal, or attempt to

deal, with the individual members of the Saginaw. Whatever rights the individual Indians acquired in the two reservations stem from the two treaties which were brought about by tribal, not individual, action.

Before discussing the legal or equitable principles involved, it may be pointed out that the defendant in all its transactions with the Saginaw treated that group as an entity. In the very first paragraph of the 1855 treaty it is recited, "In view of the existing condition of the Indians aforesaid, ***" and in the first paragraph of Article 1 defendant promised to withdraw from sale for "the benefit of said Indians," the lands they received in the Isabella and Saginaw reservations. Obviously, in both of these instances the treaty refers to the entity named in the opening clause of the treaty, namely, the "Chippewa Indians of Saginaw" and a portion of the "band of Chippewa Indians of Swan Creek and Black River," the Indian parties to the treaty. Later, and in concluding the 1864 treaty, it again dealt with the same entity in obtaining a relinquishment of the Saginaw reservation lands. And, it will be noted, that in the first paragraph of Article 1 of said treaty, October 18, 1864 (14 Stat. 657), said entity, the Saginaw, released "the several townships of land reserved to said tribe by said treaty aforesaid," referring to the treaty of August 2, 1855, and by the second paragraph of the same article there was relinquished the "right to purchase the unselected lands in said reservation," meaning, of course, the Saginaw Reservation. The word "reservation" is used in several other places in the treaty. While the use of the word does not itself indicate title, it is not without significance when used in connection with a relinquishment of valuable rights in land set aside for

the Indian use. Whether it acquired title in the accepted meaning of that term is not important if the Saginaw acquired, as it did, sufficient interest in the lands to compel a compliance by defendant of its obligations with respect thereto. That the Saginaw had such an interest was recognized and confirmed by later acts of the defendant hereafter referred to.

Nor does the fact that the 1855 treaty provided for individual allotments militate against tribal interest because that very interest or title or right, whatever it may be called, was a protection of individual rights in that it insured that individual members could make selections or entries on the lands withdrawn for their occupancy.

Furthermore, if the Saginaw, as such, had any rights in the Saginaw Reservation they were acquired under the 1855 treaty; if the Saginaw acquired no such rights under that treaty, as defendant claims, it parted with none by the 1864 treaty. But it is evident that both the Government and the Saginaw thought the latter had rights in the Saginaw Reservation that could only be eliminated by a solemn treaty which sould cancel the tribal rights and also the rights of the individual members who had made selections therein, otherwise no treaty with the tribal entity would have been effective or necessary. It appears contrary to the previous position of defendant to now contend that this same entity it had previously recognized and dealt with as owner of the land cannot prosecute a claim based upon a grossly inadequate consideration for the rights relinquished by that treaty.

But whatever tribal rights the Saginaw, as such, acquired in the Isabella Reservation by the 1855 treaty are only incidental to the

question before us because the claim here presented arose out of the 1864 treaty and by that treaty, as before noted, the Saginaw, as such, by Article 1, (1) released to the "United States the several townships of land reserved to said tribe by the treaty aforesaid (1855), situate and being upon Saginaw Bay * * *," and (2), the Saginaw, as such, relinquished their "right to purchase the unselected lands in said reservation" (Isabella), as provided in the 1855 treaty. (As to the relinquishment of the claimed right to "locate lands in lieu of lands sold or disposed of" in Isabella Reservation, see Defendant's Ex. 17, p. 451).

As consideration for the above relinquishments -- and Article 2 of the 1864 treaty expressly so provides, (see Finding 5) -- the Saginaw, as such, was granted the "exclusive use, ownership and occupancy * * * of all the unsold lands within the six townships in Isabella County reserved to said Indians by the treaty of August 2, 1855 * * *." Language plainer than this is difficult to find as showing the vesting of title to Isabella lands in the Saginaw. True, as provided by Article 3 of the treaty, individual Indians were given the right of making selections in Isabella but until they did so, and probably until they obtained patents, tribal title remained; but in any event, the question we must answer is whether the consideration the Saginaw received for the land they relinquished in the Saginaw Reservation was so grossly inadequate as to be unconscionable. In the determination of this problem it makes no difference whether the land in Isabella was taken by individual Indians or not; they certainly were given the right by Article 3 of the 1864 treaty to again make selections on Isabella Reservation, and many undoubtedly did so, but those facts do not alter our problem. As we have said, the consideration

for the relinquishment of the Saginaw Reservation lands was the "exclusive use, ownership and occupancy" of all the Isabella Reservation lands. That is what the Saginaw got for what they relinquished. Accordingly, we must know the value of this consideration as well as the value of what the Saginaw relinquished if we are to determine whether the consideration was unconscionable.

As before stated, there being no proof of fraud, the question raised by the pleadings and remaining to be determined is whether the Saginaw received an unconscionable consideration for the lands they relinquished in the Saginaw Reservation by the 1864 treaty. It is plaintiffs' theory, as shown by their petition, that they relinquished that acreage and received nothing for it and as proof of damage sustained relies upon the price obtained by defendant when part of the lands were sold by it. This price, as plaintiffs state in their brief, "is the best evidence of its value" and is obtained from Defendant's Ex. 1, pp. 3-16.

The exhibit shows that beginning in 1855 and ending in 1874 the defendant made sales in small tracts totaling 43,025.82 acres of the Saginaw Reservation land for the aggregate sum of $96,580.55. These sales accounted for all the Indian land in the Saginaw Reservation, except the 17,567.41 acres granted the railroads, but as to this no proof has been offered.

Nor have plaintiffs or defendant offered any evidence whatever as to the value of what plaintiffs received as consideration for the relinquishment of the Saginaw Reservation lands. In their petition plaintiffs plead that under the 1864 treaty they obtained rights in Isabella, but allege in effect that such rights were those they already had under the 1855 treaty. We have already pointed out that as a result of the 1864 treaty

the Saginaw were given the exclusive use, ownership and occupancy of all the unsold lands in Isabella Reservation, which included the right of selection by individual members thereof, a right which had expired long prior to that treaty. These rights had value beyond doubt, but until proof of such value is offered we are unable to determine whether the consideration was unconscionable.

In view of the above, and in justice to the Indians we are of the opinion that the plaintiffs are authorized to assert the claim set forth in their petition as First Claim and that the case must be reopened to permit proof of value, as indicated above.

SECOND CLAIM

This claim is for loss of timber taken from the Isabella Reservation resulting, it is alleged, from the failure of defendant to issue allotment certificates and patents to the Indians, to protect them in their tribal rights, perform its duties as guardian and fulfill its obligations under the 1855 treaty.

The proof offered and mainly relied upon by plaintiffs is based upon a report (Pl. Ex. 2) prepared on February 21, 1935, by the Assistant Secretary of the Interior. This proof consists of reports of Indian agents indicating the removal of timber from the reservation but is so lacking in definiteness as to time, place and value of the timber alleged to have been taken it cannot be accepted as a basis of liability. It shows, perhaps, that the timber was taken in part from lands occupied by Indians who had made selections and who dealt with timbermen for the removal thereof, and it shows that part was taken from tribal lands. No attempt was made to separate the

places from which timber was removed. The evidence also shows that a large part was removed by the Indians themselves through connivance with timber operators. Also that the Indian agents tried in many ways to protect the Indians but to no avail.

No proof has been offered showing that the loss of the timber was due to the delay of defendant to issue allotment certificates or patents to the Indian selectees or that the defendant was obligated in any way to do more than it did in protecting them from timber removals. The evidence offered is so vague and indefinite that a finding of liability would have to be based upon mere conjecture. We, therefore, see no basis for believing any better proof could be presented at another hearing, so we dismiss this claim as unproven.

FOURTH CLAIM

The fourth claim involves the selecting and patenting of 29,430.84 acres of swamp lands to the State of Michigan under the Act of September 28 1850, (9 Stat. 519), generally referred to as the Swamp Land Act. Lands aggregating the above acreage were selected in the areas of the Isabella and Saginaw Reservations and patented to the State of Michigan.

As we understand the allegations of the petition, the plaintiffs are claiming that part, about 15,000 acres, of the 29,430.84 acres were classified as swamp lands when in fact they were timber lands and because of such wrongful classification the Saginaw was deprived of at least 15,000 acres in the two reservations. In their briefs, however, plaintiffs present an entirely different theory of liability which in some respects is in conflict with the allegations of their petition. They contend, (1) that all the 29,430.84 acres patented to Michigan were wrongfully classified as

swamp lands, and (2) in any event the swamp lands of the two reservations did not come within the definition of "unsold public lands" set aside by the 1855 treaty. Rather than limiting our inquiry to the claim plainly pleaded we shall consider both aspects of the claim asserted by plaintiffs in their briefs.

In the first place, plaintiffs have offered no proof that any of the swamp lands were wrongfully classified as such. A few Indian witnesses testified about "wet lands" within the reservations which were covered with timber but such testimony is of little value because it was very general in character and in no place was it shown that any specific land patented to Michigan was wrongfully classified as swamp land. (Pltf. Ex. 1). Opposed to such testimony the defendant offered much documentary evidence indicating all lands selected as swamp lands were properly classified as such and patents issued therefor. We find no proof indicating, even remotely, that any specific part of the lands patented by the State of Michigan were wrongfully classified as swamp lands. Not only that, but under the Swamp Land Act the classification of such lands by the Government officials charged with the duty of designating them is conclusive and may not now, nearly a century later, be questioned. See Wright v. Roseberry, 121 U. S. 488, Chandler v. Calumet, 149 U. S. 79.

As to the other contention of plaintiffs they seem to concede that the swamp lands within the two reservations passed to the State of Michigan as of September 28, 1850, the date of the Swamp Land Act (p. 13 of Reply Brief), but say such lands must be included within the category of "unsold public lands" which were by the treaty of 1855 set aside for the benefit of the Saginaw. The undisputed evidence (Def. Ex. 30) shows

the Indians were well aware of the fact that swamp lands did not pass to the Indians under the 1855 treaty, and at no time claimed they did until the present claim was filed. On December 3, 1855 (Def. Ex. 30) they asked for two additional townships of land and two fractional townships in addition to the two townships originally provided for in the treaty, and in accordance with the Saginaw request the Senate amended the treaty and gave them the unsold public lands in the four full and two fractional townships described in the treaty. (Def. Ex. 30). Had the Indians believed they were entitled to the swamp lands their request of December 3, 1856, and the approval of the Indian Agent would have so indicated, but, as we have said, those documents plainly indicate that they recognized the fact that the swamp lands were not intended to be available for Indian use under the treaty.

Furthermore, the evidence offered of the surrounding circumstances which brought about the treaty of 1855 plainly shows that the parties to that treaty understood that in using the phrase "unsold public lands" within the area of the Isabella and Saginaw Reservations that it did not include the swamp lands previously selected therein, in fact, the request for additional lands in the Saginaw Bay area was based upon the understanding of all parties to the 1855 treaty that the Indians were not to receive the swamp lands.

From the above, it necessarily follows that the second and fourth claims must be disallowed, and the first claim reopened for the purpose

of permitting the parties to offer such additional evidence as they may think proper on the question of unconscionable consideration.

It will be so ordered.

LOUIS J. O'MARR
Associate Commissioner

I concur in the foregoing:

WM. M. HOLT
Associate Commissioner