BEFORE THE INDIAN CLAIMS COMMISSION

THE DELAWARE TRIBE OF INDIANS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 27-A

JCS

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 241

Decided: January 21, 1954

PRELIMINARY STATEMENT

Separate petitions were filed in these cases, the first by the Delaware Tribe of Indians, Docket No. 27-A, and the other by the Absentee Delaware Tribe of Oklahoma, Delaware Nation, ex rel. W. E. Exendine and Myrtle Holder, Docket No. 241. Both claimants base their claims on a strip of land ten miles wide and extending west from a north and south line (Def. Ex. 46. (a) (1)) about 45 miles west of Leavenworth, Kansas. This strip is provided for in the treaty of September 24, 1829, hereafter referred to as the "outlet", and it is so referred to by the parties in their pleadings and briefs. East of the east end
of the "outlet" was a large area ceded to petitioners referred to in the briefs as "residence lands," but this area is not included in these claims since the claims are only for the "outlet." The claimants are not in agreement as to the western boundary of the outlet, the Absentee Delawares claiming the western terminus to be much farther west than the claimant in Docket No. 27-A.

Because the two groups, who represent all groups of the Delaware Tribe or Nation of Indians, are asserting the same claim, the Commission on January 22, 1953, entered its order in the two Dockets, 27-A and 241, consolidating them "for the purposes of trial on the merits." Thereafter, and on April 15, 1953, evidence was concluded by all parties and the claims were submitted to the Commission on the question of the Government's liability in accordance with the rule of the Commission, leaving for later determination the amount of damages should it be determined that the claimants were entitled to recover. (Sec. 22 (f), Rules of Procedure.)

The petitioners have presented separate proposed findings of fact and briefs but we have considered the case as though the two groups of petitioners had been joined in a single petition.

Accordingly, the Commission makes the following findings of fact as applicable to both claimants:

**FINDINGS OF FACT**

1. The petitioners in Docket No. 27-A and Docket No. 241 represent the entire Delaware Nation of Indians and are authorized by the Indian Claims Commission Act to present and prosecute the claim of said Nation.
2. On October 3, 1818, 7 Stat. 188, by treaty of that date, the Delaware Nation of Indians ceded to the United States all their claim to land in the State of Indiana. As part payment for their Indiana land the United States by Article 2 of said treaty agreed:

"In consideration of the aforesaid cession, the United States agree to provide for the Delawares a country to reside in, upon the west side of the Mississippi, and to guaranty to them the peaceable possession of the same."

After the conclusion of this treaty the Indiana Delawares joined other Delawares then located in southwest Missouri on the James Fork of the White River.

3. Considerable time elapsed after the 1818 treaty was concluded in obtaining a satisfactory location west of the Mississippi River for the Delawares but they finally selected an area at the forks of the Kansas and Missouri rivers and on September 24, 1829, 7 Stat. 327, concluded a treaty with defendant which contained the following provisions:

Whereas the foregoing Treaty stipulates that the United States shall provide for the Delaware Nation, a country to reside in, west of the Mississippi as the permanent residence of their nation; and whereas the said Delaware Nation are now willing to remove on the following conditions from the country on James' Fork of the White River in the State of Missouri to the Country selected in the fork of the Kansas and Missouri Rivers, as recommended by the Government for the permanent residence of the whole Delaware Nation; it is hereby agreed upon by the parties that the country in the fork of the Kansas and Missouri Rivers extending up the Kansas River to the Kansas line and up the Missouri River to Camp Leavenworth and thence by a line drawn westwardly, leaving a space ten miles wide north of the Kansas boundary line for an outlet; shall be conveyed and forever secured by the United States to the said Delaware Nation as their permanent residence; and the United States hereby pledges the faith of the Government to guaranty to the said
Delaware Nation forever the quiet and peaceable possession and undisturbed enjoyment of the same against the claims and assaults of all and every other people whatever.

This treaty was in fulfillment of the obligation of the defendant under the treaty of 1818, in fact, was supplementary to that treaty.

4. The Treaty of September 24, 1829, was ratified by the Senate of the United States in a resolution dated May 29, 1830, as follows:

   Resolved (two-thirds of the Senators present concurring), that the Senate do advise and consent to the ratification of the supplementary article concluded at Council Camp on James' Fork of White River in the State of Missouri, the 24th day of September, 1829, to a Treaty between the United States and the Delaware Indians made the third day of October, 1818: Provided, that the President of the United States with all convenient dispatch, employ a surveyor at the usual rate of compensation for like services, to run the lines of the country by the foregoing Treaty granted to the said Delaware Nation of Indians, to establish certain and notorious landmarks, accurately and permanently to distinguish the boundaries of the said granted country and of the said outlet reserved in this Treaty; that the said surveyor run the lines and fix and establish the boundaries of the said granted country and the said outlet in the presence of an agent to be designated by the Delaware Nation; and that it shall be the duty of the said surveyor to report to the President of the United States his proceedings in the premises, together with a map or draft of the said granted country and the said outlet; and that when the President shall be satisfied that the said proceedings have been concurred in and approved of by the agent of the said Delaware Nation, he shall also approve of the same by his signature and seal of office and cause one copy of the same to be filed among the archives of the Government and one copy to be delivered to the agent of the Delaware Nation, for the use of the said Nation, and which shall be thereafter binding and conclusive upon the respective parties to the foregoing Treaty. (Emphasis added). (Def. Ex. 43).

5. Pursuant to the Senate resolution (Finding 4), Isaac McCoy was appointed to make the survey required by the resolution (Def. Ex. 44).

McCoy had with him John Quick who had been appointed by the chicis and
warriors of the Delaware Nation to represent said Nation in surveying and marking the lands assigned to it by the treaty of September 24, 1829. (Def. Ex. 46(d)).

In locating the "outlet" McCoy started on the Kansas River where the eastern boundary of the Kansas Reservation crosses that river and from there he ran north along the east line of the Kansas Reservation to the northeast corner thereof. From this corner he ran a line due north 10 miles to a point he designated as the "N. W. corner of the Delaware Lands and commencement of the Northern line of the Delaware outlet * *." (See Def. Exs. 46(a) 1, and 46(b) 1). This north and south line formed the eastern boundary of the outlet and the western boundary of the ceded lands lying east of that line and which McCoy referred to as "the lands designed for the residence of the Delawares." From this so-called boundary line McCoy surveyed the outlet west for a distance of "210 miles west of the State of Missouri" as it was then (1830) bounded. (The western boundary line of Missouri was not changed from a line due north of the confluence of the Kansas and Missouri rivers to the Missouri River until June 7, 1836, 5 Stat. 34).

In his report of the survey of the Delaware lands (filed in Indian Office on April 20, 1831) he said, concerning the survey of the "outlet," at pages 18-19 thereof:

"After completing our survey of the lands designed for the residence of the Delawares, we extended our survey of the Delaware outlet (so called) to a point two hundred and ten miles west of the State of Missouri. The termination of the line was on Solomon river, about one hundred and forty miles west of the western village at present occupied by the Kanzas on the south and about forty miles west of the Republican Pawnee villages on the north. The latter is the most westwardly Indian settlement towards the Rocky Mountains, from Red river six hundred miles north. We stopped about forth miles within the region abounding with Buffaloes, Elks, Antelopes, etc. We saw many and killed what we needed for use." (Pet. Ex. 109, pp. 17-19).
6. On September 28, 1830 (Def. Ex. 46-5), the Delawares approved the survey referred to in Finding 5 and thereafter, and on February 11, 1831 (Def. Ex. 47), the President approved such survey and on March 24, 1831, proclaimed the treaty of September 24, 1829.

In approving the survey for the Delawares, said John Quick certi-

fied as follows:

I John Quick, 2nd Chief of the Delaware nation of Indians having been duly appointed by the Chiefs and Warriors of my nation to attend to the surveying and marking of the lands assigned to my nation in the forks of the Kanzas and Missouri Rivers, by the treaty with the United States of September the 24th 1829, having performed the duties required of me by my nation, do certify:

That, I have accompanied Mr. McCoy from near the mouth of Kansas River across our tract of land to Cantonment Leavenworth, thence across it again in another direction to the Kanzas Agency, thence to our western limit on the Kanzas River; thence I accompanied him in his actual survey and measurement of our land, 24 miles to the northeast corner of the Kanzas lands, where a large mound was repaired in my presence, thence ten miles to the northern limit of our land, where another large mound was made - these two mounds being at the commencement of the outlet, thence on the trial line to Cantonment Leavenworth on Missouri River. I have seen the inlet of about two miles on Missouri River and four miles back, for the use of the military post now called Cantonment Leavenworth. I have not only seen the limits of the land, but most of the land itself.

With the country I am well pleased. It is good. With its boundaries as shown to me, and as exhibited on a map, both agreeing, I am perfectly satisfied knowing them to be precisely as required by the treaty by which, we obtained a claim to this land.

The measuring and marking of our lines, are not yet completed. Mr. McCoy has from my first joining his party insisted that I should continue with him until the surveying of the land for settlement and the outlet should be completed, but my nation have instructed me to remain no longer than to see the limits of the land assigned us for settlement. My nation wish to remove to this country immediately, before the commencement of cold weather, and they wish me to return to aid them in removing. Moreover the removal of my own family requires my presence, and my
age and infirmities forbid me to remain longer on this
surveying tour. Nor, is there any necessity for me to
remain longer, since I am perfectly satisfied that the
terms of the treaty are complied with and my nation have
instructed me to return, they being anxious to remove on
to the land immediately.

Cantonment Leavenworth
September 28th 1831

his
John x Quick
mark

2nd Chief of Delawares
and Special Agent.

Signed in presence of

* * * *

And thereafter, John Campbell, Sub-Indian Agent of the Shawnee Agency

(Def. Ex. 46-D), also certified as follows:

Shawnee Agency November 1st 1830

I hereby certify that I have examined, alone, Capt John
Quick, the agent chosen by the Delawares to attend the
surveying and marking of the Delawares lands north of
Kansas river on his return to his people from said service,
and find that Mr. McCoy wished said Quick to continue with
him until the marking of their lands was completed, and
that said Quick returned to his tribe sooner than had been
desired in compliance with the instructions of his nation.

I have further ascertained that the said Quick is
perfectly satisfied with the surveying and marking of their
land, and their outlet and deeming it unnecessary for him
to remain longer with the surveying party he left it.

I further say that since said John Quick's return to his
nation, their first Chief William Anderson, with many others,
have moved on to their lands, said Anderson declares himself
well pleased with their new country, and entirely satisfied
with the report of their agent John Quick, relative to the
surveying and marking of their lands and the outlet.

7. In a letter to the Secretary of War, dated January 29, 1829, Isaac
McCoy summarized the meaning and purpose of an outlet as follows:

By outlet, is understood a slip of land extending from
that more particularly stipulated in the treaty as being
designed for settlement, west, into the uninhabitable regions
of the desert and the mountains. * * * The object of these
outlets is that each /tribe/ may have access to hunting
lands in the West.
Prior to the 1829 treaty, provisions for outlets had been included in several treaties with other tribes, so at the time of the Delaware treaty of September 24, 1829, the assignment of an outlet to a tribe had a definite meaning both to the Indians and to the Government. (Def. Ex. 42, pp. 20-21).

The Delawares began occupying the "residence lands" (that is, the lands lying east of the "outlet") in 1829 and 1830, but at no time during over 24 years of use of the "outlet" did the Delawares establish any permanent settlements or villages on the "outlet."

8. The "Outlet" provided for the Delaware Indians by the Supplementary Treaty of September 24, 1829, was, according to the custom of the times, intended as a passageway or road to the hunting grounds to the west, and would have been so understood by all parties concerned in 1829. The fact that there was "no game on the land designed for the residence of the Delaware Indians and that they were going a great distance to hunt" establishes both the necessity and the purpose of the assignment of an "outlet" to the Delawares. (Def. Ex. 5).

9. By the Act of March 3, 1853, 10 Stat. 226, 238, the President was authorized to negotiate with the western tribes for extinguishment of Indian title to their lands and Commissioner Manypenny conducted the negotiations on the part of the Government. Preparatory to such negotiations the Delaware Tribe or Nation of Indians, through its Council, appointed several of its members to represent the Nation at such negotiations and gave them full power to make a treaty with defendant. Def. Ex. 57, dated April 3, 1854.
10. On May 6, 1854, 10 Stat. 1048, the authorized representatives of the Delaware concluded a treaty with the defendant containing the following provisions:

Article 1. The Delaware Tribe of Indians hereby cede, relinquish and quitclaim to the United States, all their right, title and interest in and to their country lying west of the State of Missouri, and situate in the fork of the Missouri and Kansas Rivers, which is described in the article supplementary to the Treaty of October 3, 1818, concluded in part on the 24th September 1829, at Council Camp on James' Fork of the White River in the State of Missouri; and finally concluded at Council Camp in the fork of the Kansas and Missouri Rivers on the 19th October 1829; and also their right, title and interest in and to the "outlet" mentioned and described in said supplementary article; excepting that portion of said country sold to the Wyandotte tribe of Indians by instruments sanctioned by Act of Congress approved July 25, 1848, and also excepting that part of said country lying east and south of a line beginning at a point on the line between the land of the Delawares and the halfbreed Kansas forty miles in a direct line west of the boundary between the Delawares and Wyandottes, thence north 10 miles, thence in an easterly course to the point on the south bank of the Big Iron Creek which shall also be on the bank of the Missouri River where the usual high water line of said creek intersects the high water line of said river.

Article 2. The United States hereby agree to have the ceded country (excepting the said "Outlet") surveyed as soon as it can be conveniently done, in the same manner that the public lands are surveyed—such survey to be commenced and prosecuted as the President of the United States may deem best. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale at public auction in such quantities as he may deem proper, being governed in all respects, in concluding such sales by the laws of the United States respecting the sales of the public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry in the same manner that private entries are made of the United States lands; and any or all of such lands as remain unsold after being three years subject to private entry at the minimum Government price may by Act of Congress be graduated and reduced in price until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares and also the speedy settlement of the country.
Article 3. The United States agree to pay to the Delaware Tribe of Indians the sum of $10,000.00; and in consideration thereof the Delaware Tribe of Indians hereby cede, release and quitclaim to the United States the said tract of country hereinbefore described as the 'outlet'. And as a further and full compensation for the cession made by the First Article, the United States agree to pay the said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding Article after deducting therefrom the cost of surveying, managing and selling the same.

Article 6. The Delawares feel now, as heretofore, grateful to their old chiefs for their long and faithful services. In former treaties, when their means were scanty, they provided by small life annuities for the wants of these chiefs, some of whom are now receiving them. These chiefs are poor and the Delawares believe it their duty to keep them from want in their old and declining age. It is the wish of the Delawares, and hereby stipulated and agreed, that the sum of $10,000.00, the amount provided in the Third Article as a consideration for the "outlet" shall be paid to their five chiefs to wit: Captain Ketchem, Sarkoxey, Segondine, Neconhecond and Kockkatowha, in equal shares of $2,000.00 each to be paid as follows: To each of said chiefs, annually the sum of $250.00 until the whole sum is paid; Provided that if any one or more of said chiefs die before the whole or any part of the sum is paid, the annual payments remaining to his share shall be paid to his male children, and in default of male heirs then to the legal representatives of such deceased chief or chiefs; and it is understood that the small life annuity stipulated for by former treaties shall be paid as directed by said treaties.

The provisions of the treaty respecting the cession of the outlet and the consideration of $10,000 therefor were well understood by the petitioners, the Delaware Nation (Def. Ex. 59) as well as the disposition of said sum (Pet. Ex. 129), which was paid in accordance with the terms of Article 6 thereof to the chiefs named in said Article. (Def. Ex. 61).

11. By the Act of July 1, 1902, Congress conferred "jurisdiction upon the Court of Claims to examine, consider and adjudicate with the right of appeal to the Supreme Court of the United States by any party
in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee Tribe, or any band thereof, arising under Treaty stipulations may have against the United States, upon which suit shall be instituted within two years after the approval of this Act; and also to examine, consider and adjudicate any claim which the United States may have against said tribe or any band thereof."

Under the provisions of this Act the Delaware Tribe filed twelve petitions in the Court of Claims, namely, Nos. 23104, 23162, 24067, 24645, 24926, 24927, 24928, 24929, 24930, 24931, 24932, and 24933.

12. Petition No. 24928 contained among others the following allegations:

Paragraph 3(b). "That plaintiffs are descendants of the Delaware Tribe of Indians who removed from the States of Indiana and Ohio in accordance with the provisions of treaties made with defendant and entered into on October 3, 1818 (7 Stat. 188), and August 3, 1829 (7 Stat. 327), and upon such removal plaintiffs settled on a reservation provided for them in the State of Kansas, as described and set apart for the use of said tribe of Delaware Indians in the said treaty of August 3, 1829. That subsequently plaintiffs removed to the Indian Territory and became residents, members and citizens of the Cherokee Nation by virtue of their compliance with the provisions of a certain agreement made between said Delaware Tribe and the said Cherokee Nation on or about April 8, 1867."

Paragraph 3(d). "That plaintiffs have succeeded to all the rights of property formerly enjoyed by said Delaware Tribe including all causes of action or choses in action belonging to said tribe and including the cause or causes of action hereinafter set forth."

Paragraph 10. "That the land in said State of Kansas described as aforesaid in said Treaty of September 24, 1829, was subsequently surveyed and was found to contain 38 square miles only, or only 924,160 acres, so that it turned out that the said lands received by the Delawares in exchange for said Indiana lands were less in acreage to the amount
of 3,555,640 acres, and that by reason of said deficiency
in acreage said Delawares were deprived of at least
$2,555,660.00 which represents the value of 3,555,640
acres of Indiana land of the value of $1.50 per acre.
That the outlet referred to in said Treaty of September 24,
1829, was found to contain about 1,000,000 acres, but that
the said Delawares were not the owners thereof and merely
had an easement or right of way therein, and that sub-
sequently the rights of said Delawares in said outlet were
purchased by the defendant under a certain Treaty of May 6,
1834 (10 Stat. 1048), for the sum of $10,000.00 only and
that at the time of the negotiation of said Treaty of
September 24, 1829, the value of the rights in said outlet
granted to said Delawares did not exceed the sum of $5,000.00."

At the end of the above petition was a verification by Richard C.
Adams, who was a Delaware Indian and an attorney in fact of the Delaware
Indians, plaintiffs in said action, who swore upon oath: "that the fore-
going petition and all matter therein stated are true to the best of his
knowledge, information and belief." (Def. Ex. 62).

13. By the Act of April 21, 1904, it was provided in Section 21
thereof "The Secretary of the Treasury is authorized and directed to pay
to the Delaware Tribe of Indians residing in the Cherokee Nation, as
said tribe shall in council direct, the sum of $150,000.00 in full of
all claims and demands of said tribe against the United States, and the
same is hereby appropriated and made immediately available: Provided,
that said sum shall be paid only after the tribal authorities, there-
unto duly and specifically authorized by the tribe, shall have signed a
writing stating that such payment is in full of all claims and demands
of every name and nature of said Delaware Indians against the United
States, which writing shall be subject to the approval of the President
of the United States and shall have provided for the discontinuance of
all actions pending in all courts wherein said Delaware Indians are
plaintiff and the United States defendants."

In accordance with the terms of this Act, the Delaware Tribe of Indians executed the specified release in the manner required, the release being approved by the President on January 10, 1905. The cases enumerated in Finding 11 were dismissed on the stipulation of the parties on January 9, 1905.

The amount appropriated by the Act was credited to the Delaware Tribe by treasury warrant on April 21, 1904, and was disbursed in per capita payments to members of the Tribe and in payment of attorneys' fees in the years 1906 to 1923, inclusive. (Pet. in 27-A, Ex. 12, pp. 223, 796-7).

14. The release referred to in the last preceding finding was the following form (Def. Ex. 64):

"We, the business committee of the Delaware Tribe of Indians, residing in the Cherokee Nation by due and specific authorization of said Tribe in general council assembled, do hereby state that the payment of $150,000.00 by the Secretary of the Treasury to said Delaware Tribe of Indians in pursuance of an Act of Congress approved April 21, 1904, is in full of all claims and demands of every name and nature of said Delaware Indians against the United States and do hereby authorize and request the Attorney General of the United States and the attorneys in fact of said tribe, Messrs. Richard E. Adams, John Bullette and Walter S. Logan, or either of them, by proper motion of stipulation to cause to be dismissed all actions or suits pending in any court wherein said Delaware Indians are plaintiffs and the United States are defendants."

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner

Wa. M. Holt
Associate Commissioner