BEFORE THE INDIAN CLAIMS COMMISSION

THE OSAGE NATION OF INDIANS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 9
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: September 27, 1954

Appearances:

Wesley E. Disney, with whom were Francis M. Goodwin and Lawrence H. Gall, Attorneys for Petitioner

Ralph A. Barney, with whom was Mr. Assistant Attorney General Perry W. Morton, Attorneys for Defendant

OPINION OF THE COMMISSION

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

By our order of August 13, 1954, we made an interlocutory award to the Osage for $939,210.45. In arriving at this figure we determined (Find. 11) that the area ceded by Article 1 of the Treaty of September 29, 1865, 14 Stat. 687, comprised 871,751.11 acres. From this total acreage we deducted 27,118.16 acres as non-compensable and made an award for 844,632.95 acres at $1.50 per acre, the value of that acreage as of the date of the treaty, less deductions of $327,738.97. (Find. 29).

The Osage by their motion filed herein on August 26, 1954, question our determination that the full 27,118.16 acres are not compensable but admit that of that acreage the selections for the Catholic Mission and the Mograin heirs, aggregating 1274.24 acres should not be included in the compensable acreage. So what they are objecting to is the deduction of 25,843.92 acres from the total acreage as not compensable. The motion requires us to review our former determination of non-compensable acreage, and we are glad to do so.

The crux of the Osage argument in support of their motion is set forth in the following statements contained in their brief:

> "It is submitted that under the Treaty of 1865 the entire area so ceded by Article 1 was intended for sale thereunder, unless specifically otherwise donated by the treaty. To hold otherwise would in effect constitute a judicial revocation of treaty terms."

And --

> "The interpretation of the Commission, therefore, as to the provisions of these subsequent articles (except to the two donated areas) is not in harmony with the intent of the treaty and such an interpretation would in effect simply take certain areas from the Osages without any compensation whatever."

In deciding the questions presented by the motion we must re-examine the provisions of the 1865 treaty bearing on such questions.

By Article 1 of the treaty the Osage granted and sold to the United States 871,751.11 acres of their lands (Find. 11) for $300,000. The article also provides: "Said lands shall be surveyed and sold * * on the most advantageous terms, for cash, as <u>public lands are surveyed and sold under existing laws</u> * * <u>but no pre-emption claim or homestead settlement shall be recognized</u>." The article then provides that after reimbursing the United

States for the cost of said survey and sale and the $300,000 "the remaining proceeds of sales shall be in the Treasury of the United States to the credit of the 'civilization fund' to be used * * for the education and civilization of Indian tribes residing within the limits of the United States." (Emphasis added).

The law governing the sale of public lands existing at the time of the 1865 treaty is stated by Donaldson in his work "The Public Domain" at page 206, published in 1884, to be:

> The act of April 24, 1820, the general provisions of which have been carried into the Revised Statutes, fixed the minimum of the public lands at $1.25 per acre. Thereunder the lands were sold to the highest bidder at public sales for not less than the minimum rate per acre, and at private sale, after the offering, at the minimum rate. The general pre-emption law of September 4, 1841, required payment at the minimum rate for lands entered thereunder; that is the minimum rate fixed by the act of 1820.

It will be seen from the quoted provisions of Article 1 that, considered alone, it is required that all the ceded land was to be sold in the manner and for the purposes therein provided, and the net proceeds from such sales placed in the "civilization fund."

It is the above general provisions as to sale which the Osage considers as controlling all other provisions of the treaty respecting the disposition of the Osage lands, specifically, the provisions now to be referred to.

Article 3 of the treaty (Find. 12) expressly granted in fee simple a section of the ceded land (634.13 acres) for the use and benefit of the Society sustaining the Catholic Mission on such lands. And by

Article 6 (Find. 14) the Osage gave a section (640.11 acres) for the heirs of Charles Mograin. Also by Article 14 (Find. 15) provision was made for the selection by 25 Osage half-breeds of 80 acres each of the ceded lands, altogether 2052.03 acres, and for a half section of the ceded lands by and for the heirs of Joseph Swiss. Here, by clear and unmistakable language, the Osage reserved for selections for the Catholic Mission Society by the Mograin heirs, the Osage half-breeds and the Swiss heirs, 3646.27 acres of land. These grants or donations certainly were lands included in the area ceded and come within the scope of the general provisions of Article 1, yet it is plain from the provisions of Articles 3, 6 and 14 that the Osage and the Government did not intend that such lands should be sold under the provisions of Article 1 and the proceeds therefrom deposited in the "civilization fund," for manifestly there could be no proceeds since the beneficiaries of such grants were not required to pay anything for them. Here, then, are provisions in direct conflict with the general directions of Article 1, requiring the sale of all the ceded lands.

It may be stated here that the Commission is of the unanimous opinion that the 3646.27 acres donated by Articles 3, 6 and 14 should be excluded as non-compensable.

In addition to the donation for the use of the Catholic Mission, mentioned above, Article 3 provides for the selection and purchase at $1.25 per acre of two sections of the ceded lands adjoining the donated section. Such selections were made, consisting of 1263.65 acres, and paid for. (Find. 12). And by Article 4 (Find. 13) loyal heads of familie

and citizens of the United States or members of any tribe at peace with the United States who had settled on the ceded lands and were residing on them at the time of the treaty were given the right, within a year from the ratification of the treaty, to select and buy a quarter section each at $1.25 per acre. Under these provisions, 22,208.24 acres were selected and acquired by such persons. Here again are provisions for the acquisition of part of the ceded land by limited classes of selectors. Under these provisions all such selectors had to do in order to obtain the land was to make selections thereof and pay the fixed price of $1.25 per acre. This simple method of acquiring part of the ceded area had no relation whatever to sales to be made in the manner required by Article 1, in fact, this method of acquisition is diametrically opposed to sales in the manner required by Article 1, and is in direct conflict thereto.

Counsel for the Osage also stress the contention that they did not receive the $1.25 per acre for the lands patented to the Mission or the loyal settlers. Although we do not decide the question, it could, with much plausibility be contended that the payments made by the Mission Society and the loyal settlers on lands aggregating 23,471.89 acres at $1.25 per acre belonged to the Osage, however, the record fails to show what disposition was made of this money. In any event, no claim for the amount paid by those patentees is pleaded or included in the claim here under consideration, for, as we will show and as indicated in our former opinion, the lands paid for by the Mission and the loyal settlers were actually reserved for selection and purchase at a fixed price per acre by those specifically designated groups.

May we point to another matter as showing the incompatibility of Articles 1 and 4 of the treaty. Article 1 expressly forbids the recognition of pre-emption claims, while Article 4 prescribes as a qualification of settlers to acquire lands thereunder that they have "made settlements and improvements as provided by the pre-emption laws of the United States * * *."

In view of what we have said above, and if it has a legal basis, a question we shall later discuss, we believe we are compelled to interpret the treaty as reserving or excepting from the operation of the provisions of Article 1, respecting the selling of the ceded lands, all the lands directed to be disposed of by Articles 3, 4, 6 and 14. It appears to us the 27,118.16 acres of the ceded lands were in legal effect excluded from the operation of Article 1 as effectively as if specifically excepted. At the time of the treaty the lands had not been surveyed, so the treaty could only provide for grants to become definitive upon selection as required by those four articles. It would seem that these grants, donations and rights to purchase, would pass regardless of the provisions of Article 1 because they were in reality made by the Osage, the Government agreeing to consummate the grants by issuing fee-patents therefor. These lands never passed to the Government free of Indian title, for any purpose except to carry out the directions of Articles 3, 4, 6 and 14, which were to supervise the selections and convey title to the beneficiaries of the grants. Certainly, as we have already pointed out, they were not to be sold as required by Article 1, in fact, they could not be so disposed of without completely disregarding the plain provisions of the four articles

mentioned above. The conclusion seems inescapable that what the Government acquired by the 1865 treaty and for which it can be held accountable for in this case are the 844,632.95 acres of land it sold for the benefit of the civilization fund.

We shall now test the validity of our interpretation of the 1865 treaty by referring to the authorities on the subject.

Where, as here, there is a conflict between clauses of a document, the courts have established a rule of perhaps general acceptance which is stated by the Supreme Court in the case, Mutual Life Insurance Co. v. Hill, 193 U. S. 551, 48 L. Ed. 788, to be as follows:

> "That were there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. Because, when the parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought."

See Bock v. Perkins, 139 U. S. 628, 35 L. Ed. 314; Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637.

The Court of Claims in the case, Callahan Construction Co. v. United States, 91 C. Cls. 538, 635, adopted a rule similar to and based upon the rule quoted from Mutual Life Ins. Co. v. Hill, supra, which reads:

> "Where there are two clauses in a contract in any respect conflicting, the clause which is specially directed to a particular matter controls in respect thereto over a clause which is general in its terms, although within its general terms the particular may be included. This is so for the reason that when the parties express themselves in reference to a particular matter the attention is directed to that,

> and it must be assumed that it expresses their intent, whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in mind. Mutual Life Insurance Company v. Hill, 193 U. S. 551, 558; Rodgers v. United States, 36 C. Cls. 266, 278."

The Rodgers case just cited, although involving the interpretation of a statute, is important because the same rule applies to the interpretation of contracts. Mutual Life Ins. Co. v. Hill, supra. The rule adopted there at page 279 reads:

> "Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act, as the legislature is not to be presumed to have intended a conflict."

The above authorities, we think, plainly support us in giving full effect to the special and particular grants made by Articles 3, 4, 6 and 14 of the treaty even though they conflict with the general provisions of Article 1.

We, accordingly, overrule the petitioner's motion. An order to that effect will be entered.

Louis J. O'Marr
Associate Commissioner

I concur in the foregoing.

Wm. M. Holt
Associate Commissioner