BEFORE THE INDIAN CLAIMS COMMISSION

THE PRAIRIE BAND OF POTAWATOMI INDIANS, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	Docket No. 15-J
THE CITIZEN BAND OF POTAWATOMI INDIANS, et al., Petitioners, v. UNITED STATES OF AMERICA, Defendant.	Docket No. 71-A
JAMES STRONG, et al., as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS, including all descendants of Chippewa members of the UNITED NATION OF INDIANS, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 13-J
ROBERT DOMINIC, et al., as the representatives and on behalf of all members by blood of the OTTAWA TRIBE OF INDIANS, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 40-H

Decided: September 19, 1956

Appearances:

O. R. McGuire and Robert Stone,
Attorneys for Plaintiffs
in Docket No. 15-J

Howard D. Moses, Edward I. Devlin
and Louis L. Rochmes,
Attorneys for Petitioners
in Docket No. 71-A

James R. Fitzharris, Jay H. Hoag,
and Arthur B. Honnold,
Attorneys for Plaintiffs
in Docket Nos. 13-J and 40-H

Sim T. Carman, with whom was
Mr. Assistant Attorney General
Perry W. Morton,
Attorneys for Defendant.

OPINION OF THE COMMISSION ON GENERAL ISSUES

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

The Citizen Band of Potawatomi Indians, Docket No. 71-A, and the Prairie Band of the Potawatomi Tribe of Indians, Docket No. 15-J, filed separate petitions in which they predicated their respective claims upon the gross inadequacy of the consideration the defendant paid the Potawatomi Nation for the cession of 5,000,000 acres of lands located in Iowa (Royce 265, Iowa 2) by the treaty of June 5, 17, 1846, 9 Stat. 853, and for the 909,565 acres of land located on the Osage River in Kansas (Royce 266, Kansas 2), included in the above cession.

The petitions in the dockets above referred to were by the Commission consolidated for trial.

In addition to the named bands, each petitioner joined as a party the Potawatomi Tribe or Nation which is represented by individual members thereof. However, it is conceded by defendant, or at least not questioned, that the Citizen and Prairie Bands are the successors in interest of and constitute the Potawatomi Tribe or Nation and represent all its members.

Another party to the petition in Docket No. 71-A is the United Nations of Chippewa, Ottawa and Potawatomi Indians which is represented herein by individual members thereof. The two bands mentioned above are the successors in interest of the United Nation and represent all its members.

In using the name "Potawatomi" generally herein, we follow the spelling adopted by the Bureau of American Ethnology and the Indian Bureau, 1 Kappler 1021. The use of this adopted spelling seems desirable because of the many differences in spelling of the name of the Indians involved in this case. Where we quote from a document the spelling will be as it appears in the document itself.

Before going into the merits of these claims, it seems appropriate to mention the magnitude of the record. There were received in evidence upwards of 400 exhibits, ranging from a page to as many as 350 pages. The testimony of witnesses exceeded 1400 pages. Then there were over 200 pages of proposed findings of fact and over 600 pages of briefs. To review this mass of material has been an arduous and time-consuming task. Some of the more lengthy documents written over a century ago have become so dimmed with age that their contents could not be determined without painstaking work; these, counsel have with much effort copied in typewritten form and thereby saved the Commission much time. We wish to express our appreciation for this help.

Ottawa and Chippewa Claims

Dockets 13-J and 40-H were, on motion of defendant, consolidated for the purposes of trial with Dockets 15-J and 71-A. Finding No. 3.

The claims in Dockets 13-J and 40-H are respectively asserted by individual members of each tribe who allege they are members by blood of the Chippewa and Ottawa tribes, respectively, and represent all the descendants of the tribe of which they are members. In each docket there is claimed a third interest in the 5,000,000 acres of Iowa land, and the proceeds from the sale thereof, sold by the treaty of June 5, 17, 1846, and a like share of the recovery in this case.

As we gather from the petitions, and the findings of fact submitted jointly by these plaintiffs, they base their respective claims upon the premise that the Chippewa and Ottawa tribes are the same groups who, with the Potawatomi, as the United Nation of Chippewa, Ottawa and Potawatomi, were parties to the treaties of September 26, 1833, and June 5, 17, 1846. But the facts are, and many of the documents relied upon by plaintiffs in their proposed findings show it, that the Chippewa and Ottawa Indians who, with Potawatomi, made the treaties of 1833 and 1846, and the treaties of August 24, 1816, 7 Stat. 146, August 25, 1828, 7 Stat. 315, and July 29, 1829, 7 Stat. 320, were small groups of Indians with Chippewa and Ottawa ancestry who affiliated with the predominant group of Potawatomi. Those plaintiffs have offered no proof to the contrary. A number of exhibits offered by the plaintiffs in 13-J and 40-H refer to Ottawa and Chippewa cessions, in some of which Potawatomi is a party, however, the lands involved are in areas remote from those of the United Nation and in none of

the exhibits or the treaties does it appear that they were the Chippewa or Ottawa who were affiliated with the United Nation Potawatomi. The testimony of Dr. Wallace, Trans. p. 1044, is to this effect. See also Def. Ex. 51, p. 549, in which the Indian Agent at Council Bluffs, Iowa, states that although there are at his sub-agency (in the Iowa tract) Indians of Chippewa and Ottawa ancestry, they describe themselves as Potawatomi.

A review of the evidence offered by the plaintiffs in Dockets 13-J and 40-H, and the evidence offered by the defendant and petitioners in Dockets 15-J and 71-A convinces us that such plaintiffs had no interest in the Iowa lands and are not entitled to share in the recovery herein. Therefore, both petitions must be dismissed.

Consideration under the 1846 treaty.

The question of the actual consideration paid the Potawatomi Nation for the 1846 cession of the Iowa and Osage river tracts is important in determining the amount that, under the Indian Claims Commission Act, must be deducted as payment of the claim, and also in determining whether the consideration was unconscionable. The pertinent provisions of the treaty are set forth in Finding 35.

Article 3 expressly provides that the cash consideration to be paid by defendant was $850,000 "subject to the conditions, deductions and liabilities provided for in the subsequent articles of this treaty."

Passing for the moment Article 4 and examining Articles 5 and 6, we find that in Article 5, the defendant is required to pay the Indians, out of the agreed consideration, $50,000 to enable them to arrange their

affairs, pay their debts, to purchase transportation facilities, etc. And in Article 6, defendant was required to advance out of the agreed consideration further sums, aggregating $70,000, to cover the expense of removal and one year's subsistence after their arrival on the Kansas Reservation.

The petitioners contend that in determining the actual consideration the total of these advances or deductions, $120,000, should be deducted from the $850,000, and that the difference, $730,000, constitutes the consideration for the cession of 1846. We do not agree. The cash consideration was definitely fixed by Article 3 and payments for arranging the affairs of the Potawatomi preparatory to their moving, the cost of moving and subsistence after their arrival on their new reservation were items to be borne by the Indians but which were to be advanced to the Indians out of the cash consideration of $850,000, in effect partial payments.

The defendant, on the other hand, insists that the real consideration paid for the cession was $1,199,578.01, not including the value of the new home in Kansas, later to be discussed. In reaching this conclusion the defendant starts with a figure of $2,257,548.08 shown at page 34 of the G.A.O. report (Def. Ex. 56). This is a total of many disbursements made for Potawatomi, including disbursements out of appropriations made for Wisconsin Indians (Intervenors); $10,963.77 in lieu of tobacco and steel under Article 10 of the 1846 treaty which were provided for under an earlier treaty; per capita payments to Potawatomi aggregating some $276,000. These are but part of the items making up the total

figure set forth above. In addition, are the disbursements of $120,000 advanced under Articles 5 and 6. Then at page 31 of the report is the item of interest in the sum of $1,057,970.07, which defendant deducted from the total disbursements of $2,257,548.08 to make the sum of $1,199,578.01 it considers the cash consideration. Whether the interest item was disbursed under Article 8 of the 1846 treaty as is indicated (p. 31, G.A.O. report), or interest on the trust fund provided by Article 7, which seems more likely, the defendant does not consider it part of the consideration, and we agree. But deducting the interest item from the total disbursements does not give a figure representing the cash consideration for the 1846 cession since all but a few of the items have no relation to the consideration for the cession. Some of the items may constitute offsets, but that is a matter to be determined only after an award is made and offsets are presented.

By Article 4 of the 1846 treaty, the text of which is set forth in Finding 35, the defendant agreed to grant the Potawatomi Nation 576,000 acres of the lands in Kansas it had acquired from the Kansas Tribe by the treaty of January 14, 1846, 9 Stat. 842. It was also agreed that the defendant deduct therefor from the $850,000 cash payment provided for in Article 3, the sum of $87,000.

The defendant contends that the ceding of the 576,000 acres of land was in reality an exchange of lands the Potawatomi got for the lands they ceded and constituted part of the consideration for the Potawatomi cession. The defendant's position is supported by the facts. During the negotiations for purchase of the Potawatomi lands

in Iowa and on the Osage River, the principal discussions concerned the cash payment therefor and lands in Kansas the Government was to obtain for a new home for the Potawatomi. These negotiations began in Washington, D. C., on November 7, 1845, and ended in the West on June 17, 1846. (See typewritten copy of the Journal of the Proceedings, Claimants in Docket 71-A, Exhibits 33 and 34, at pp. 7, 22, 31, 48, 50, 52, 54, 61, 62). At the time of the Washington negotiations, which ended December 2, 1845, the Government had not acquired the Kansas lands which the Potawatomi desired and it was not until after the Government was in a position to give these Indians those lands they executed the treaty of 1846. It is inconceivable that the Potawatomi would relinquish their lands without obtaining others in lieu thereof for a new home. It is beyond question that both the Indians and the Government intended by the 1846 treaty that, coupled with and as a part of the transaction, the Indians were to receive Kansas lands in lieu of those they were ceding.

Moreover, the cash payment provided for in Article 3 was "subject to the conditions, deductions and liabilities provided for in the subsequent articles of this treaty." These provisions of Article 3 created a liability of the Government to grant the Kansas land. Thus, by the quoted phrase the Kansas grant is directly connected with the cash consideration. We are of the opinion, therefore, that the Kansas land grant must be considered as part of the consideration for the 1846 cession by the Potawatomi.

But the defendant asserts that for the purposes of this case that part of the consideration represented by the Kansas grant requires a

determination of the value of the granted lands as of June, 1846, and the value thereof as of such date be taken as that part of the total consideration and not the $87,000 the defendant accepted therefor. Further, that such value should be 50 cents per acre, or $288,000, because in the case of Kaw Indians v. United States, 1 Ind. Cl. Comm. 608, 613, we valued a large tract of land, which included the 576,000-acre grant, at 50 cents per acre as of January 14, 1846, a date only six months before the Potawatomi grant.

It seems more than coincidence that the defendant fixed a value of the granted lands (15 cents per acre) at about the same price (14.38 cents per acre) it paid the Potawatomi for their Iowa and Osage River lands. The fact that the prices are so near alike suggests a relationship between the two transactions as to the agreed value of the lands involved. Anyway, since we have found in this case that the Government should have paid about 60 cents per acre more for the Iowa lands and about 50 cents per acre more for the Osage River lands (Findings 53 and 69) than it did pay in June, 1846, equity requires that for the purposes of this case the value placed upon the Kansas grant as of near the same date, January 14, 1846, in the Kaw case, supra, that is, $288,000, that sum must be taken as the value of those lands as of June, 1846, and considered as a part of the consideration for the 1846 cession.

It is, of course, true that no proof has been offered in this case as to the value of Kansas granted lands as of June, 1846, aside from our action in the Kaw case, supra, of which we take judicial notice. It is hardly probable that the value of these lands changed between January

and June of 1846, so in the interests of a prompt determination of this case we accept the value fixed in the Kaw case. The value of 50 cents per acre does not appear unreasonable. It certainly is not arbitrary. See Otoe and Missouria v. United States, 131 C. Cls. 593, 637.

We, therefore, reach the conclusion that the consideration for the 1846 cession was cash in the sum of $850,000, plus the value of the Kansas grant, $288,000, from which is deducted the $87,000 the defendant received therefor, or the resulting sum of $1,051,000.

Value of Lands involved

The petitioners and the defendant are in agreement that the Iowa tract was acquired by the Potawatomi by the treaties of September 26, 27, 1833, 7 Stat. 431 and 442, and that there were 5,000,000 acres of Government land ceded the Indians by those two treaties. They also agree that the Osage River tract in Kansas was acquired by the Potawatomi by the treaty of February 11, 1837, 7 Stat. 532, and that there were 909,565 acres of Government land ceded the Indians by that treaty, and that the two tracts were ceded by the Potawatomi Nation by the treaty of June 5, 17, 1846, 9 Stat. 853.

The most difficult problem in this case is to determine the fair value of those 5,909,565 acres of land as of June, 1846 -- over a hundred and ten years ago. The petitioners contend for a value of $4.00 per acre or nearly $24,000,000, while the defendant contends for a value of 45 cents per acre for the Iowa land and 35 cents per acre for the Osage river land, or a total value of $2,568,347. Obviously, even if fruitful, it would be

impossible to reconcile these extremes of value between petitioners and defendant, and we shall not attempt to do so.

Voluminous evidence has been offered by the parties bearing upon the value of the subject land at the remote date of June, 1846. Much space in the briefs has been devoted to the validity of the methods or the evidentiary bases by which the experts reached their respective conclusions as to value, but we deem it unnecessary to discuss these matters in detail for the evidence in the record, much of which is relied upon by the experts, and some, in fact, assembled by them, affords a basis for determining the value as of the date of the sale by the Potawatomi.

The lands here involved were held by the Potawatomi under what is generally known as recognized Indian title. In the treaty of September 26, 1833, it is expressly provided that the Iowa lands were "to be held as other Indian lands are held which have lately been assigned to emigrating Indians." And in the treaty of February 11, 1837, the defendant agreed to convey the Osage river lands by patent, however, the patent seems not to have been issued. Whatever the title was, the Potawatomi were entitled to exclusive occupancy of the two tracts until relinquished by the 1846 treaty. Consequently, no sales of any of the lands were made until after June, 1846, that is, until after the Government acquired the Indian title and surveyed the tracts.

Our findings of fact relating to value are comprehensive, and somewhat voluminous because they pertain to the two widely separated tracts. They are designed to cover all factors which influence value, including soil, climate, classification of lands, natural resources of the ceded

lands, such as vegetation, timber, known minerals, and their then economic or potential value, water transportation and projected railroad construction, markets, existing population and population trends, economic conditions and potential use for agriculture.

There was no market, in the sense that term is usually understood, for the lands at the time of their cession, but after they were surveyed and initially offered for sale by the Government and subsequent transactions involving small tracts of the ceded land were made, there was created what may be termed "going" values which may be considered in connection with the land transactions in the vicinity of the ceded lands, not too remote in time, as bearing upon the value of the tracts under consideration. It is from a consideration of all the factors set forth in much detail in the findings of fact that constitute the bases for our determination that the Iowa tract had a fair market value of $3,750,000 and the Osage River tract a fair market value of $591,217, at the time of the 1846 cession. (Osage Nation v. United States, 3 Ind. Cl. Com. 317-373; Otoe and Missouria v. United States, 131 C. Cls. 593, 633).

Adequacy of Consideration

We have hereinabove discussed the consideration the defendant paid the Potawatomi for the relinquishment of the two tracts, and reached the conclusion that it was $1,051,000 the defendant paid for the lands we have now valued at $4,341,217. The consideration the Potawatomi received for their lands was less than one-fourth of the value thereof as of the date of the cession, which amount was so grossly inadequate as to make the consideration unconscionable.

We, therefore, conclude that the petitioner Potawatomi Nation, as created by the treaty of June 5, 17, 1846, and as it then existed, is entitled to an award for the benefit of all descendants of said nation as it was constituted and recognized by the United States in said treaty, in the sum of $4,341,217, less $1,051,000 paid on said claim, leaving a net recovery of $3,290,217; that to the extent the division of the award, as between the Prairie and Citizen Bands, may be necessary in apportioning attorneys' fees, allowed expenses of attorneys, costs of litigation, or other matters resulting from the prosecution of separate petitions for the same claim, their respective interests shall be on the basis of 780/2180ths of the award in the case of the Prairie Band, and 1400/2180ths of the award in the case of the Citizen Band. An interlocutory order will be accordingly entered, subject to offsets, if any, allowable under the Indian Claims Commission Act.

Louis J. O'Marr
Associate Commissioner

We concur in the foregoing:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner