

BEFORE THE INDIAN CLAIMS COMMISSION

THE OMAHA TRIBE OF NEBRASKA, ET AL.,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 225-A

Decided: January 18, 1957

Appearances:

David Cobb and
 I. S. Weissbrodt,
 Attorneys for Plaintiffs

Maurice H. Cooperman,
 with whom was
 Mr. Assistant Attorney
 General Perry W. Morton,
 Attorneys for Defendant

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The plaintiffs herein, the Omaha Tribe of Nebraska, are seeking recovery for the difference between the amount they received for upwards of 5,200,000 acres of land located in the northeast corner of the State of Nebraska, and the value thereof at the time they ceded the land to the United States by Treaty of March 16, 1854 (10 Stat. 1043).

In their amended complaint petitioners allege ownership of the land and that the defendant in various ways recognized that they exclusively owned, occupied and used the said land and that they were entitled to own, occupy and use said land at the time of said treaty;

they also allege that the Court of Claims in the case of the Omaha Tribe v. The United States, 53 C. Cls. 549, decided that they were the owners of the land ceded by the 1854 Treaty; and that the United States may not now be heard to deny the Omaha ownership of the lands when ceded by the 1854 Treaty.

By Interlocutory Order of this Commission of October 19, 1954, this Commission held that the Court of Claims in the case to which reference has been made decided that the Omaha Tribe at the time of the Treaty of March 16, 1854 had Indian title to the land North of the Ayoway (Iowa) River line (referred to in the Treaty as due west line) in the amount of 783,365 acres; and that by the Judgment entered by the Court of Claims in said case the parties to this cause are estopped to relitigate the issue of title or boundaries of said land lying North of said river line as of the time of said Treaty.

In the said former opinion and order of this Commission in this cause it was held by this Commission that the said former decision of the Court of Claims also decided as to the lands South of said Ayoway River line, that the plaintiff tribe intended by said Treaty of 1854 to cede, and did cede, to the defendant all lands claimed by them and that such lands comprised 4,500,000 acres, and were located within the boundaries therein stated, and that the parties to this action are estopped from relitigating the said boundaries or said acreage; but that said court did not determine that the petitioners had Indian title to the said $4\frac{1}{2}$ million acres of land, South of said Ayoway River line.

The issue now before this Commission is confined to a determination as to whether or not the plaintiffs herein at the time of the cession of said 4,500,000 acres by them to the defendant by Treaty of March 16, 1854 had Indian title to said land. The plaintiffs contend that at the time of this Treaty they had Indian title to said land not only by reason of use and occupancy but also by reason of recognition thereof by the United States. The defendant contends that the Omaha Tribe had no title to any part of the area involved on March 16, 1854 either by reason of use and occupancy or by reason of recognition of title by defendant.

The Omaha Tribe contends that it established its residence in the area in issue about 1750. The defendant fixes first permanent settlement of Omaha in the territory involved as in 1795 or 1796. The Omaha Indians were found in this area in the 1700's when the white man first arrived. From about 1750, or not later than 1796, until the Treaty of March 16, 1854 the Omaha Tribe at all times had its village and its farms within the area. From time to time the village and farms were moved to different locations widely scattered over the length and breadth of the area. Throughout all these years the Omaha Tribe exploited the entire area as fully as they were able in the pursuit of game, roots, berries, and other products of the land, in the course of their customary manner by the Omaha Tribe from the time the white man first arrived until the Treaty of March 16, 1854.

During these years prior to March 16, 1854, no people other than the Omaha Tribe used or occupied any part of this area for anything

other than brief or temporary stays. From time to time Dakota war parties raided in the area but there is no record that the Dakota Indians, or any tribe except Omahas, ever intended or attempted to establish any residence in, or permanent use of, any parts of the area. White emigrants beginning about 1845 passed in large numbers through parts of the area, but the record is clear that no significant white settlement was made in this area until after the Treaty of March 16, 1854. For a number of years after 1835 the Otoe Tribe made its village within this area, and for a short time laid claim to a small part of this area. The Otoe village and Otoe claim were both short-lived. The Otoe had no village in the area when the Treaty of March 16, 1854 was negotiated and did not at that time claim land within the area. Aside from these temporary incursions by other people, the Omaha Tribe was at all times during this period the only tribe that was using and occupying the area.

The United States made its earliest ratified Treaty with the Omaha Tribe in 1815. Thereafter, the United States negotiated a series of treaties with the tribe. By an unratified Treaty of 1820 and the ratified Treaties of 1825, 1830, and 1836 the United States recognized that the Omaha Tribe was claiming ownership to a large area of land West of the Missouri River. None of these treaties, however, attempted to designate the boundaries of this Omaha land. However, a designation of such claimed boundaries was made by agents of the United States in 1834. Thereafter, on a number of occasions, agents of the United States defined the claimed boundaries of the Omaha land West of the Missouri.

On each occasion, the boundaries determined by the agents of the United States included the area in issue. Prior to the Treaty of March 16, 1854, the Treaty Commissioner and other agents of the United States explored the Omaha land for the purpose of determining the area held by that tribe. Thereafter, the Indian Office reported to the Congress of the United States that the Omaha Tribe was resident in and "indigenous" to the area in issue.

The Treaty of March 16, 1854 compensated the Omaha Tribe for the south area in issue by payment of \$881,000. The area north of the Ayoway River line, also ceded by the Treaty of March 16, 1854, as has been held by this Commission, was decided by the Court of Claims to have been owned by the plaintiff Indians by recognized Indian title.

The contents of the documents to which reference is made in support of Findings 18 to 27, inclusive, and particularly those referred to as supporting Findings 22, 24, and 25 are hereby referred to as certainly evidencing the belief on the part of the Government officials and others who are dealing with said lands, that same were owned--that is by Indian title--by the petitioning tribe.

Attention is called to the fact that aside from the documentary exhibits in evidence petitioners rely greatly on the expert testimony of Dr. John L. Champe; and the defendant upon testimony of archaeologist and historian, G. Hubert Smith. The record will show that under cross examination Dr. Smith agreed almost in toto to the facts and conclusions as testified to by Dr. Champe--Dr. Smith contending, however, that exclusive use and occupancy was established positively, beginning at no

earlier date than 1795 or 1796 and that such occupancy from that date to the date of the Treaty would not, in his opinion, result in the Indians having Indian title to the land. While Dr. Champe was of the opinion that the occupancy began as early as somewhere in the 1750's he thought that Indian title would result even if the occupancy did not begin prior to 1795 or 1796. This Commission thinks that it is immaterial as to which date occupancy actually began. Except as to beginning date of such occupancy the defendant agrees that "the evidence of both parties are in essential agreement upon the subject of immemorial possession." (Defendant's Brief p. 48)

Based on the evidence referred to in this opinion, together with that supporting the findings on the issue of title, and applying the requirements as heretofore made by this Commission and Court of Claims for establishing Indian title by use and occupancy, it is the opinion of this Commission that Indian title in petitioners at the time of the Treaty of the land involved has been established.

As title is found as having been established by use and occupancy, it is unnecessary to pass on whether or not the United States by its course of dealings with the Omaha Tribe and by the reports and actions of its agents had as a matter of fact and law recognized that the Omaha Tribe at the time of the cession held Indian title to the area in issue. However, the evidence relied on by petitioners as showing recognition strongly supports the findings of exclusive use and occupancy by the

petitioning tribe, and was considered by the Court of Claims sufficient to establish recognition of title in petitioners to lands to the north.

Edgar E. Witt
Chief Commissioner

We concur:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner