

PAWNEE INDIAN TRIBE OF OKLAHOMA,)
 consisting of the four confeder-)
 ated bands of Pawnee Indians,)
 namely: Chaui or Grand Pawnee,)
 Kitkehahki or Republican Pawnee,)
 Pitahauerat or Tappage Pawnee,)
 and Skidi, Loup or Wolf Pawnee,)
)
 Claimant,)
)
 v.)
)
 UNITED STATES,)
)
 Defendant.)

Docket No. 10

Decided: June 17, 1957

Appearances:
 Arthur B. Honnold, Deceased
 John W. Wheeler, John Wheeler, Jr.,
 and Robert L. Wheeler,
 Attorneys for Claimant.

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

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

This case is now before us a second time. As shown by the explanatory statement preceding the findings of fact, the Court of Claims in an opinion filed February 3, 1953, set aside this Commission's original determinations, adverse to claimant, of the first five claims presented in the petition filed herein. These five claims were remanded to the Commission for further consideration and the making of new findings of fact thereon. (124 C. Cls. 324). In its opinion, the Court of Claims

discussed the evidence presented to the Commission by the parties, and also certain additional evidentiary material not before the Commission which that Court deemed relevant to the issues in the first five claims, and which it says should be taken into consideration by the Commission in reconsidering these claims. The additional evidence referred to has now been submitted as exhibits by the parties.

The first four claims presented in the petition are based on the alleged original Indian title of the Pawnee Tribe of Indians to the lands described therein and also on their recognized or acknowledged title to said lands. These claims as now asserted by claimant are as follows:

The first claim is for just compensation for 668,000 acres in a strip of land ten miles wide and extending $104\frac{1}{2}$ miles west from the Blue River located in north-central Kansas. Claimant contends this land was taken from the Pawnees by the defendant without their consent or payment of compensation and assigned to the Delaware Nation under the Delaware treaty of September 24, 1829 (7 Stat. 327).

The second claim is for the value of approximately 21,579,200 acres in a tract of land lying south of the Platte river in Nebraska and extending south to the Arkansas river in southern Kansas. The boundaries of this tract as now described by claimant are set forth under Claim 2 in Finding 2. This is the amount of land claimant now contends the Pawnees held by original Indian title "south of the Platte river" and ceded to the United States by the treaty of October 9, 1833 (7 Stat. 448) for an alleged unconscionable consideration. This cession included the land covered in Claim 1.

The third claim is for the value of 110,419 acres in the strip of land north and paralleling the south bank of the Platte river, including Grand Island, in central Nebraska, ceded by the Pawnees to the United States by the treaty of August 6, 1848 (9 Stat. 949) for an alleged unconscionable consideration.

The fourth claim is for the recovery of the difference between the amount the Pawnees received for all their remaining lands located north of the Platte river in Nebraska, and the value thereof at the time they ceded the land to the United States by the Treaty of September 24, 1857 (11 Stat. 727), except the reservation set aside to the Pawnees by that treaty. While the treaty contains a description of the boundaries of the cession, claimant now agrees in its proposed findings of fact that because of overlapping claims of Sioux Indians on the west and of Ponca Indians on the north of the ceded area, that said tract of land now claimed shall be bounded as follows: "On the south by the Platte river and the lands ceded August 6, 1848; on the west by the Fort Laramie Treaty (11 Stat. 749) line running from the junction of the north and south Platte rivers, northeast to the mouth of White Earth River; on the north by the divide between the Elkhorn and Niobrara Rivers; and on the east by the lands of the Omaha Tribe of Indians." Claimant contends the area within the above-described boundaries, excluding the 288,000 acres reserved, contained at least 9,577,900 acres of land for which the tribe is alleged to have received an unconscionable consideration.

At this time, by agreement of the parties and the order thereon of this Commission, the issues now before us are limited to a determination of the question whether or not under the evidence and the law, the

claimant has established its title, interests or rights in or to any of the areas of land described in Claims 1 to 4, inclusive, and if so, the extent thereof.

With respect to Claim 5, which arises out of an error made in the original survey of the Pawnee Nebraska reservation established by the 1857 treaty, the only questions are the location and description of the land area comprising the 4800 acres admittedly taken by the defendant, and the date of taking.

The claimant has the burden of proving exclusive occupancy and use of the lands involved in the first four claims, or that the Government recognized the tribe as the owner of such lands. We held originally that the proof failed to establish either aboriginal or recognized title to the lands.

On the question of claimant's original Indian title to the lands in issue, it appears from the defendant's proposed findings of fact and brief that counsel for defendant is willing to concede the evidence establishes that the Pawnees were living along the Platte and Loup rivers in Nebraska and the Republican river in southern Nebraska and southern Kansas at least as early as 1700, and were located in substantially the same areas in 1803 when the United States acquired the lands from France by the Louisiana Purchase. Counsel contends, however, that after about 1809, all the permanent villages of the Pawnees were on the Platte and Loup rivers in Nebraska, and that while they may have hunted in or traveled over most of the claimed areas, the evidence establishes that the Pawnees did not at that time occupy and use all of the claimed areas to the exclusion of other Indian tribes. As an added

defense to the first four claims, counsel contends that any possessory rights the Pawnees may have had at some time or another in all or part of the claimed areas were terminated by the subsequent abandonment of such areas by the Pawnees.

Claims 1 and 2

The first two claims will be considered together as a single claim, as did the Court of Claims, since the cession by the Pawnees under the 1833 treaty involved in Claim 1 was intended to and did include the strip of land claimed to have been taken from the Pawnees in 1829 in Claim 1. Counsel for claimant also now concede in their brief the 1833 treaty cession may have cured the 1829 taking. The land in Claim 1 will be referred to herein as the Delaware "outlet," although recovery is now sought for only that portion thereof which extends west from the Blue river in northern Kansas.

The Pawnee Tribe is now composed of the four confederated bands, namely: Grand, Republican, Tappage and Skidi or Loup. According to the evidence, from the time of first white contact during the 16th century until the Louisiana Purchase in 1803, the Pawnees were always located by explorers and traders in the Platte, Loup and Republican river valleys in what is now Nebraska and northern Kansas. Following the Louisiana Purchase, the first official Government expedition to visit the Pawnee territory was that of Lewis and Clark in 1804. They reported that the Grand Pawnees were located on the Platte river, and hunting on the south side of that river and "on the head of the Kansas" river. The Pawnee Loups were located on the Loup river, and the Republican band on the Republican river. They did not mention the Tappage

band of Pawnees. The report also describes the Osage Indians as hunting along the Arkansas and Osage rivers and nearly up to the Kansas river in what is now southern Kansas, and the Kansas Indians as hunting on the upper part of the Kansas and Arkansas rivers. (Finding No. 5). Other Government officials who visited the Pawnees after Lewis and Clark, reported the Pawnees in substantially the same areas, except Major Sibley reported in 1811 that two years previously the Pawnees on the Republican river had moved their villages to the Platte river, but stated that "the Pawnees hunt over a very extensive country."

The Tappage band of Pawnees was not separately identified by the Government officials until they were recognized as a separate band by the first treaties of peace and friendship made by defendant with the four Pawnee bands in June of 1818. In reporting on the treaties, the treaty Commissioners described the Pawnees as a "warlike and powerful tribe inhabiting the country about the river Platte, stretching immediately between us (St. Louis) and the Spanish settlements." On September 30, 1825, the United States concluded another treaty of peace and friendship with the Pawnee tribe whereby the Pawnees agreed to allow all authorized persons to pass through their country. In reporting on that treaty, the Commissioners also described the Pawnees as a numerous and strong tribe, locating the villages of the Grand and Loup bands on the Platte river, and the Pawnee Republics on the Republican fork of the Kansas river. They said the Pawnees were well armed and held "a prominent stand among their neighbors, as a warlike and brave nation. * * * They leave their villages in the spring and fall, and go far into the plains to the south, west and northwest, in pursuit of buffalo, and succeed

in supplying themselves with an abundance of the flesh of that animal for food, and their skins for robes." (Finding 9).

By 1825, the Government had decided to acquire a strip of land just west of Missouri in what is now Kansas for resettlement of emigrant Indian tribes. Since this land was reported by the Secretary of War to be held "almost entirely by the Osage and Kansas Indians," a treaty was concluded on June 2, 1825 with the Osage Indians by which they ceded "all their lands lying west of Missouri and Arkansas, north and west of the Red River, south of the Kansas river and east of a line drawn from the head sources of the Kansas river southwardly through the Rock Saline." A treaty was also concluded with the Kansas Indians on June 3, 1825, wherein they ceded all lands which they then occupied, or "to which they have title or claim," lying west of the State of Missouri within the boundaries fixed in the treaty, and a reservation was secured to the Kansas tribe extending west 30 miles in width through the cession. As to the area in the Kansas reservation, this Commission has determined in the consolidated cases of the Kansas Tribe v. United States, Dockets 33 through 35, that the reserved area was a tract of land thirty miles wide from north to south and approximately 341 miles long from east to west, thus the reservation extended across the entire northern part of Kansas. (See Finding No. 10).

The Government in 1828 had delegations of emigrant Indians visit and inspect unoccupied lands of the United States outside the limits of states and territories before their removal. Rev. Isaac McCoy, a Government surveyor, who accompanied the expedition found and reported most of the land visited had been assigned to emigrant tribes and that but a

small part of the lands ceded by the Osage and Kansas Indians remained unassigned. McCoy suggested the need for purchasing additional land from the Pawnees and other indigenous tribes for use of the emigrant tribes.

The Delaware Tribe was one of the emigrant tribes settled in eastern Kansas, and in 1829, the Government granted that tribe as an outlet, a strip of land ten miles wide immediately north of the 1825 Kansas treaty reservation. Isaac McCoy who surveyed the outlet in 1830, ran the line 150 miles west terminating at the Solomon river about 40 miles west of the Republican Pawnee village on the north. McCoy reported to the Secretary of War that he considered the western part of the outlet was on Pawnee lands, and if any outlet was granted north of the Delaware outlet it would run still further on to Pawnee lands, and he suggested the purchase of lands from the Pawnees who, up to that time, had not been requested by the Government to cede any of their territory.

The assignment to the Delawares of land claimed by the Pawnees resulted in immediate and continuing hostilities between the two tribes. That the Government was aware of the Pawnees' claim to a portion of the outlet land as well as other lands south of the Platte and the need for the extinguishment of their occupancy title to the same, is shown by the reports of the Pawnee Indian Agent, John Dougherty, the Superintendent of Indian Affairs, William Clark, and Isaac McCoy made in 1831 (Findings 15, 16, 17). In 1832, pursuant to the instructions of the Secretary of War, the Pawnee claim to the outlet land was investigated by government agents who recommended that the Government treat with the Pawnees not

only for the purchase of the portion of the outlet claimed but for all Pawnee lands south of the Platte river.

The report of March 30, 1832, of John Dougherty (Finding 18) who made the investigation of the Pawnee claim contains certain statements which we think have a significant bearing upon the Pawnees occupancy of the lands south of the Platte river, as it is apparent that his findings and recommendations were adopted by the Government. On the subject of Pawnee lands, embraced in the tract assigned to the Delawares, he said that the Delaware outlet

"leads into the heart of the country claimed and occupied by the Pawnees as their hunting grounds, and over which they regularly pass when going south for buffalo and other game. * * * Those hunting grounds through, and to which that slip leads, are, and have been, since the country was first known by the whites, claimed and owned by the Pawnees."

He then stated:

"Whether they hold claim to the land in question by conquest, or by ancient possession, I am not able to determine. That they had possession of that region of country, and occupied it as a hunting ground on our first acquaintance with them, is, I think pretty certain; and they have continued that possession down to the present moment, is also equally certain. And, furthermore, they have even considered their hunting lands intruded on by other tribes, if found there, * * *. I must consider their claim to that country as resting pretty much on the same base as the claim of all other Indians is to the lands on which the whites first find them. * * *"

From the report it will be seen that Dougherty concluded from his investigation that from the time of white contact the Pawnees had exclusively occupied and used as hunting grounds a large area of land south of the Platte river in southern Nebraska and central Kansas, including at least a portion of the Delaware outlet, and that if the land was to be used by other tribes the Government should purchase it from the Pawnees.

The Act of Congress passed July 14, 1832 (4 Stat. 595), provided for the appointment of three Commissioners authorized to examine the country set apart for emigrating Indian tribes west of the Mississippi river and to negotiate for the adjustment of boundary disputes or any other difficulties existing between the various tribes. The Commissioners appointed under the Act were given specific instructions to investigate the Pawnee claim to the Delaware outlet and to give great weight to the reports and recommendations of John Dougherty, William Clark and Isaac McCoy. They were also authorized to make arrangements satisfactory to the Pawnees if it was determined their claim was correct.

The record shows the Commissioners made their investigation and concluded that the Pawnees and the Otoe-Missouria Indians held the Indian occupancy and use title to a large area of land lying "between the Kansas and Platte Rivers" in southern Nebraska and northern Kansas which would have to be purchased by the Government in order to remove the cause of war between the emigrant and indigenous tribes in the area. As a result, Commissioner Henry Ellsworth concluded a treaty of cession with the Otoe and Missouriia Indians on September 21, 1833, whereby they ceded to the United States all their right and title to that portion of their lands lying south of a line beginning on the Missouri river at the mouth of the Little Nemahaw river "and running westerly with said Little Nemahaw to the head branches of the same; and thence running in a due west line as far west as said Otoes and Missouriias, have, or pretend to have any claim." And, on October 9, 1833, Commissioner Ellsworth and John Dougherty met in council with the four Confederated bands of Pawnees and concluded a treaty whereby the Pawnees ceded and

relinquished to the United States all their right, interest and title in and to the lands lying south of the Platte river, with the provision that until assigned the lands would remain a common hunting ground for Pawnees and other friendly Indians permitted to hunt thereon by the President (Finding 23). The Pawnees were told by Commissioner Ellsworth in the treaty council that when the Delawares were given their land the Government did not know the Pawnees claimed any part of it, and to remove the difficulty the Government would supply them with agricultural aid and goods if they would cede all their lands south of the Platte river, stating, "You have land enough that is good without this," referring to Pawnee lands north of the Platte river. Since one reason for making the treaty was to settle the Pawnee claim to the outlet land, we believe the responsive statements made in council by the Pawnee chiefs show they understood and considered that by the treaty the Government was acquiring not only the outlet lands but all other lands south of the Platte which the Pawnee claimed and exclusively used as a hunting ground. The boundaries of such area intended by the parties to be included in the cession were not described in the 1833 treaty, except for the northern boundary, and apparently were not discussed in the council. However, when the Commissioners made their report to the Secretary of War on February 10, 1834, they said the Pawnees had ceded in the 1833 treaty all their lands "from the waters of the Kansas river to the south side of the Platte and from the Otoe and Missouri reservation west to its (Platte) source."

Counsel for defendant, while admitting that prior to 1833 the Pawnees made regular semi-annual hunting expeditions as far west as the forks of the Platte river and south into the Republican river drainage, insists the

areas traversed should be considered as land traveled over as distinguished from land occupied or exclusively used and possessed, and contends there is insufficient evidence to establish definite boundaries, or exclusive use of the areas actually hunted upon by the Pawnees.

It is true that in 1829 and 1833, the permanent villages of the Pawnees were all located on the Platte and Loup rivers in Nebraska, but the evidence shows they obtained their subsistence largely from hunting. We think that such lands south of the Platte river as were used in connection with their hunting and controlled by the Pawnees should be considered as being held under Indian occupancy and use title the same as their village areas. It is noted that the Commissioners who dealt with the Pawnees in 1833, estimated their number at 12,000, so it is not difficult to see how such a powerful and numerous tribe would of necessity occupy in Indian fashion and control a large territory as hunting grounds. That the Pawnees had a concept of ownership of such lands and some idea as to the extent thereof, is shown by their reactions when the defendant assigned a portion thereof to the Delawares. This also finds support in the reports of John Dougherty and the treaty Commissioners previously referred to in this opinion.

In determining the approximate limits of the area of land south of the Platte river exclusively used as hunting grounds by the Pawnees at the time of the 1833 treaty cession, we think it appears reasonably certain from the evidence they used and controlled the lands at least as far south as the Kansas reservation established by the 1825 Kansas treaty. While the Pawnees used and made claim to lands further south, the evidence indicates other Indian tribes hunted and roamed over that area and it appears

doubtful whether any one tribe was in control.

As to the eastern boundary of the Pawnee 1833 cession, the lands of the Otoe and Missouri Tribe adjoined the Pawnee lands south of the Platte river. In the Otoe-Missouria case, Docket No. 11, this Commission found the western boundary of the Otoe lands to be a line beginning at a point on the south bank of the Platte river at the Range Line between Ranges 5 and 6 East of the Principal Meridian of Nebraska and extending south along that range line to the Big Nemaha river in Nebraska. Although claimant insists the eastern boundary of the Pawnee land should extend on south along the Big Blue river through the Delaware outlet to the Kansas river and southwest along the Smoky Hill river, we think the evidence justifies fixing the eastern boundary as the western line of Otoe lands, and extending south to the Big Blue river, thence southwest to the point where the Republican river intersects the northern boundary of the Kansas 1823 treaty reservation. This would include that portion of the Delaware outlet which extends west from the Republican river.

The claimant now concedes that the line established by the Fort Laramie treaty of September 17, 1851, as the eastern boundary of the lands of the Cheyenne and Arapahoe tribes shall form the western boundary of the 1833 Pawnee cession. This line commences at the junction of the north and south forks of the Platte river and extends southeasterly through the Kansas 1825 reservation to Dodge City, Kansas. There is considerable evidence in the record of Pawnee hunting expeditions regularly extending west to the forks of the Platte river and south along the Republican river and its tributaries, and we think there is sufficient proof of the

Pawnee tribe's exclusive use as hunting grounds and control of the area east of the 1851 Fort Laramie treaty line at least as far south as the Kansas reservation.

It is therefore the conclusion of this Commission, based on all the evidence now in the record, and giving due consideration to the boundary concessions made by claimant, that in 1829 and 1833, and long prior thereto, the Pawnee Tribe held original Indian title through exclusive occupancy and use in the usual Indian fashion to the lands south of the Platte river lying within the boundaries as set forth and described in Finding No. 30, and which were the lands ceded under the treaty of October 9, 1833.

Claim 3

This claim arises out of the treaty of August 8, 1848 (9 Stat. 949). By that treaty the Pawnees ceded and relinquished to the United States all their right, title, and interest in and to a tract of land located in central Nebraska described as follows:

Commencing on the south side of the Platte river, five miles west of this post "Fort Childs"; thence due north to the crest of the bluffs north of said Platte river, thence east along the crest of said bluffs to the termination of Grand Island, supposed to be about sixty miles distant; thence south to the southern shore of said Platte river; and thence west and along the southern shore of the said Platte river to the place of beginning.

The treaty contained a sketch map showing the area ceded. On this map, the latitude and longitude of a point immediately south and a little east of the southwest corner of the ceded land (apparently Fort Childs) is given as "Lat. 40° 33'; Long. 99°."

The claimant contends that the ceded area embraced approximately 110,418 acres of land, and counsel for defendant does not appear to question the correctness of this acreage. Counsel for defendant urges, however, as they did in Claim 2, that while the ceded area was a part of the lands used by the Pawnees as a roadway to their hunting grounds there is no proof of its use for hunting purposes or village locations.

We have found in Claim 2 that the Pawnees held original Indian title in 1833 to the lands south of the Platte river extending both east and west of the area ceded in 1848. The evidence also shows that from at least as early as 1700 and until 1848, the Pawnee had their villages in central Nebraska along the Platte and Loup rivers. During all these years the area ceded in 1848 was an integral part of the lands which were claimed, possessed and exclusively used in Indian fashion by the Pawnees. Moreover, we found no substantial evidence in the record indicating that any Indian tribe other than the Pawnee tribe ever occupied, used or claimed the ceded area at any time prior to 1848.

That the Government considered the exclusive Indian possessory rights in the lands ceded in 1848 were held by the Pawnees, is indicated we think by the reports of Government officials in the area and the action taken by the Government to extinguish such rights.

It appears that the establishment of a military post in the vicinity of the ceded area was first recommended by Government officials in 1834, for the protection of the emigrant route west to the Rocky Mountains as well as the Pawnees and other Indian tribes in eastern Nebraska who had indicated a desire to settle down permanently and follow agricultural pursuits.

Although a number of Pawnees had continued to reside on the land south of the Platte river ceded to the United States in 1833, most of them had moved to villages located north of the Platte by 1843, where they were subject to attacks by Sioux war parties. As a result, those Pawnees who had remained south of the Platte refused to move north and many who had moved returned. This situation was reported by Government officials in the area with recommendations that the Government provide protection for the Pawnees from the Sioux war parties. In his annual report of September 10, 1845, the Superintendent of Indian Affairs in St. Louis reported on the frequent difficulties occurring from the passage of emigrant trains for Oregon through Indian country without permission from the Indians, and suggested that "for the safety of the emigrants and the tranquility of the Indians" a right of way through such lands for roads to Oregon "be purchased of the Indians owning the country." He recommended one such route cross the Missouri river at Council Bluffs and pass through the Pottawatomie, Otoe, and Pawnee lands.

On May 19, 1846, Congress passed an Act (9 Stat. 13) providing for "raising a Regiment of Mounted Riflemen, and for establishing Military Stations on the Route to Oregon," and authorized the expenditure of

"a sum not exceeding two thousand dollars for making compensation to Indian tribes which may own or possess the ground on which the said station may be erected, and for each station."

Under the authority of the 1846 Act, the Secretary of War issued an order on June 1, 1847, directing the establishment of a military station "near Grand Island where the road to Oregon encounters the Platte river," and a second station at or near Fort Laramie, and authorized the Commanding Officer of the Missouri Mounted Battalion --

"to enter into a treaty with the Indians for the purchase of the grounds for these sites, which will be as extensive as the appropriation will procure."

After receiving the order, Lt. Col. Powell, Commanding Officer, wrote to the Secretary of War on January 24, 1848, suggesting the purchase of the land from the Pawnees be made with goods rather than money because of the Indians' ignorance of the value of money and that in any event more land could be procured with goods. Thereafter, on May 29, 1848, Col. Powell and the Indian Agent for the Pawnees, John Miller, met in council with the four bands of Pawnees and agreed upon the treaty providing for the purchase of the lands in issue. However, the treaty was not signed by the parties until August 8, 1848, when the purchase goods were delivered to the Pawnees. The treaty was ratified on January 8, 1849.

As the language of the 1848 act and of the order issued pursuant to that Act show, the Government intended that the treaties were to be negotiated with those Indian tribes found holding the Indian possessory rights in the lands acquired for the military sites. The negotiations and execution of the 1848 treaty would seem to justify the conclusion that the Government considered the Pawnees to be the owners of the Indian title to the lands ceded under that treaty. Moreover, the Government dealt with the Pawnees on the basis that they owned such title.

It is therefore the conclusion of this Commission the claimant has established by a preponderance of the evidence that the Pawnee tribe held original Indian title, through exclusive use and occupancy, at the time of the August 8, 1848 treaty, and for many years prior thereto, to the lands ceded under that treaty and which lands are specifically described in Finding 34.

Claim 4

The fourth claim involves the lands north of the Platte river in Nebraska ceded by the Pawnee Tribe to the United States by the treaty of September 24, 1857. The treaty description of the area ceded appears in Finding 44, and is also shown as tract 408 on Royce's map of Nebraska. The boundaries of the diminished area within the cession which the Pawnees now claim was held under original Indian title until ceded in 1857, are set forth in Finding 46.

Counsel for the defendant concede in their brief that the Pawnee tribe occupied an undefined area along the Loup river within the 1857 treaty cession "from very early times," but contends that claimant has failed to prove it had Indian title to any part of the ceded area on the date of the 1857 treaty, either by reason of exclusive occupancy and use, or by recognition of such title by defendant, except as to the area reserved by the treaty.

As has been noted in the discussion of the first three claims, the record shows that for a period of two hundred years or more prior to 1857, the Pawnees occupied a large area of land north of the Platte river, with their main villages being located at various points along the Loup and Platte rivers. The Commissioners appointed under the Act of July 14, 1832, supra, and who were instructed to examine the Indian country west of the Mississippi river and report on the Indians residing there, reported in 1834 that three tribes, the Pawnees numbering 12,000, the Omahas numbering 1400, and the Poncas numbering 800, occupied approximately 16,000,000 acres of land north of the Platte river in Nebraska. The boundaries between the three tribes were not given, but the Pawnees were said to be

"situated West of the Omahas and Poncas on the Platte and Elk-horn" rivers, which is within the area now claimed.

After 1834, when the Pawnee tribe was materially reduced in numbers by disease, there were numerous raids in the Pawnee territory by Sioux Indian war parties, but there is no record that the Sioux ever attempted to establish villages in the area now claimed or made use of it as a hunting ground.. In fact, there is no record of any Indian tribe other than the Pawnee tribe ever having villages in the claimed area at any time prior to the 1857 treaty cession. This is confirmed by the testimony of defendant's witness, Dr. John L. Champe, an anthropologist who is chairman of the Department of Anthropology at the University of Nebraska and has conducted extensive research studies of the history of the Pawnees and other Indian tribes in Nebraska. According to Dr. Champe, the Pawnees migrated into central Nebraska during the 17th century and settled in the Loup-Platte river area, and while their village locations changed from time to time, except for the two villages on the Republican river, these villages were always located in the traditional homeland along the lower course of the Loup river and the adjacent Platte river until the Pawnees removed to Oklahoma in 1873.

The increasing tide of white emigration to the West Coast passing through the Indian country west of Iowa and Missouri, coupled with the demand for making all or part of these Indian lands available for white settlement, resulted in Congress passing the Act of March 3, 1853 (10 Stat. 226, 238), authorizing the President to enter into negotiations with Indians west of Iowa and Missouri to obtain their consent to settlement

of whites upon lands held by the tribes there and to obtain relinquishment of Indian title to all or part of such land. This Act applied to the Pawnees.

The Commissioner of Indian Affairs, Mr. Manypenny, was appointed to conduct the necessary negotiations and his instructions were to make a preliminary trip to the Indian country "to explore it, and to obtain such information as would be useful and necessary in preparing full and detailed instructions as to the terms and conditions of the treaties to be negotiated," which he did in the late summer of 1853. He reported that he had visited all but three of the tribes located immediately west of Iowa and Missouri, but due to lack of time had not visited the Pawnees, Kansas or Osage Indians "with whom, although their lands are not contiguous to the boundaries of either of those States, it is desirable that treaties also be made." Since all Pawnee lands south of the Platte river had been ceded in 1833, it is apparent that the Commissioner considered the Pawnees had Indian possessory rights to lands north of that river which should be extinguished by treaty.

In this connection, we believe the table appearing in the report submitted by the Indian Office to Congress in 1854 has a significant bearing on the amount of land north of the Platte river the Government believed the Pawnee tribe held by Indian title in 1854. At that time Congress had under consideration the terms on which the treaties should be made with the tribes then located west of Iowa and Missouri and undoubtedly requested the Indian office to supply the necessary information regarding the Indians. The table shows the names of the different tribes involved, the country from which they came if emigrants, their population,

the quantity of land held by each, whether by treaty guarantee by the Government or by Indian title in the case of the indigenous tribes. The Pawnees are shown as an "indigenous" tribe with a population of 4500 Indians residing on 12,800,000 acres of land held by "Indian title." The boundaries of the lands held by the Pawnees in 1854 were given as "north by Platte, East by Omahas." We are in agreement with the suggestion made by the Court of Claims in its opinion in this case, that the "North by Platte" was obviously a misprint and should have been "South by Platte," because after the 1833 treaty cession the Pawnee lands remaining were bounded on the south by the Platte river and the Omaha lands were all north of the Platte. The Omaha Tribe is shown as having a population of 1300 Indians, owning 4,480,000 acres of land which was bounded on the south by the Platte river, on the east by the Missouri river, and on the west by longitude 98° west.

The United States concluded a treaty (10 Stat. 1043) on March 16, 1854, with the Omaha Indians and obtained a cession of all their lands west of the Missouri river, except a reserved area. Thereafter trouble developed between the Pawnees and the white settlers on the lands in the western part of the Omaha cession, which land the Pawnees insisted belonged to them. On April 21, 1857, the Pawnee Indian Agent, William Dennison, held a council with the Pawnees to investigate the complaints made by white settlers against them and the Pawnee claim to the disputed Omaha cession lands. In the council the Pawnee chiefs insisted their actions were justified, since the land belonged to them and they "had a right to do as they pleased with their own land." They expressed a desire, however, to make a treaty cession of a part of their lands.

As one chief stated, "We have a great deal of land, hope that if we succeed in making a treaty with our Grand Father, that it will be such a one as will afford us a living for many years to come; we received but little when we made our last treaty and now that lands have become increased in value, expect to receive a much larger amount."

The Commissioner of Indian Affairs, Mr. Denver, wrote to the Secretary of the Interior on May 23, 1857, directing his attention to the report of Agent Dennison on the council with the Pawnees and also to prior reports of the Commissioner of Indian Affairs in 1854, 1855 and 1856, all recommending that a treaty be made with the Pawnees, and suggested that a delegation of Pawnees be brought to Washington for the purpose of entering into a treaty whereby the Pawnees would cede "their lands north of the Platte river" and accept a small area for a permanent home. This was not done. Instead, Commissioner of Indian Affairs Denver was authorized by the Secretary of Interior in a letter dated August 15, 1857, to enter into negotiations with the Indian tribes west of Iowa and Missouri pursuant to the provisions of the Act of March 3, 1853, supra. His instructions were to visit the Sioux, Ponca and Pawnee Indians, among others, and to examine their country and obtain all information necessary to the preparation of instructions as to the terms and conditions of treaties to be made with them, or any other tribes. He was authorized, however, to enter into a treaty with any of the tribe, if, on his trip of inspection and investigation, he deemed it expedient and proper to do.

On September 24, 1857, Commissioner Denver met in council with the Pawnee tribe and concluded a treaty whereby the Pawnees ceded and relinquished to the United States all their right, title and interest in and to all lands then owned or claimed by them within the boundaries

(Finding 44) described in the treaty, except for an area reserved within the cession. This land, of course, was all north of the Platte river. While the council proceedings are not available, the evidence indicates that Commissioner Denver had determined from his investigation and prior reports the extent of the Pawnee tribe's occupancy of the land north of the Platte river and included in the cession the lands which he was satisfied belonged to the Pawnees. In this connection his report of November 9, 1857, to the Secretary of the Interior when he forwarded the Pawnee treaty contains certain significant statements which are, in part, as follows:

There have been acquired hereby all the lands which these Indians own or claim, except a reservation of 288,000 acres; the number of acres acquired will reach, by approximation, the amount of 11,842,980 acres. * * *

After giving a description of the boundaries fixed of the ceded area, he says:

I could here remark that the Pawnees claimed much further east than was allowed by me, but I was satisfied that they justly owned up to Shell creek, which includes a space of about thirty miles in breadth, embraced in the purchase made of the Omahas in 1854. (Underscoring supplied.)

It is obvious from the record that this report of Commissioner Denver was before the United States Senate when it had the ratification of the 1857 Pawnee treaty of cession under consideration. The Senate ratified the treaty on March 31, 1858 with only an amendment respecting the annuity payments, which was accepted by the Pawnee tribe on April 3, 1858, and the treaty was proclaimed on May 26, 1858.

From what is recited above, it will be seen that during the treaty period from 1833 to 1857, and prior thereto, the Government and its

various officials always recognized that the Pawnees held exclusive Indian possessory rights or title to a large area of land north of the Platte river. And, we think the evidence indicates that in the 1857 treaty the Government fixed the boundaries of the area it believed was held by the Pawnees under original Indian title. While it is true, the treaty contained no express recognition or acknowledgment of such title in the Pawnees to any part of the cession, except the reserved area, it seems unlikely that the Government would have agreed, as it did, to pay such a large sum to the Pawnees in the way of perpetual annuities and other benefits for the lands being ceded (totaling over \$4,000,000 as of 1947) if it had not considered the lands, or the major portion thereof, as belonging to the Pawnees. We think this evidence strongly supports their claim of Indian title to the lands now claimed.

It is contended by counsel for defendant that the Pawnees had abandoned and ceased to use or exclusively occupy any of the lands north of the Platte river by 1851, thereby terminating their Indian title to such lands. In support of their contention counsel cites the case of The Quapaw Tribe of Indians v. The United States, 128 C. Cls. 45, wherein the Court of Claims affirmed this Commission's findings of fact and decision denying the Quapaw's claim of original Indian title. However, we think that the situation in the instant case is clearly distinguishable on its facts. In the Quapaw case the tribe claimed original Indian title to approximately 45 million acres of land lying west of the Mississippi river and south of the Arkansas river in the States of Arkansas and Louisiana ceded by the treaty of August 24, 1818 (9 Stat. 176), with an area being reserved for them of approximately 1,164,000 acres lying

immediately south of the Arkansas river. The facts found by this Commission were, that from the time of first white contact in 1541 until some time after 1700, the Quapaw tribe occupied an area in northwest Arkansas along the west bank of the Mississippi river, extending from the vicinity of the St. Francis river to the Arkansas river. The tribe's principal village was at the confluence of the St. Francis and Mississippi rivers until they began moving southward, and about the year 1805 were located along the south bank of the Arkansas river within the area reserved in the 1818 treaty. We held in effect that the Quapaws failed to prove that they had ever occupied any part of the area ceded in 1818, except the area reserved in the treaty.

In the instant case, it is quite obvious from the record that the Pawnees, unlike the Quapaws, were the aboriginal occupants and exclusively used substantially all of the area now claimed north of the Platte river for several centuries prior to the time of the 1857 treaty cession. The Pawnees did move to temporary village sites on the south side of the Platte river around 1851, due evidently to the defendant's failure to protect their permanent villages north of the river from the raids of Sioux war parties as the Pawnees had understood would be done if they remained at peace. However, we think the evidence indicates that the Pawnees did not abandon and cease to use the lands north of the Platte river which they are shown to have occupied and used and claimed since the time of first white contact. It is also quite plain that when the 1857 treaty cession of the lands was obtained the Government itself did not believe the lands had been abandoned by the Pawnees and, as stated above, there is nothing in the record which convinces us that they did.

As to conflicting claims of the Sioux Tribe on the west and of the Ponca Tribe on the north of the Pawnee 1857 cession, the claimant tribe has filed herein stipulations made with those tribes wherein claimant has agreed with the Sioux Tribe that the eastern boundary of Sioux lands as established by the 1851 Fort Laramie treaty shall form the western boundary of the 1857 Pawnee cession; and with the Ponca Tribe on the northern boundary of the Pawnee cession as a meandering line beginning at the Fort Laramie treaty line and running generally east and southeast to the Omaha 1854 treaty cession. This line is shown on a map of Nebraska marked Claimant's Exhibit 1144 as the northern boundary of the lands identified thereon as "Claim 4." Claimant also accepts as the eastern boundary of the 1857 cession the line fixed by this Commission in the Omaha case, Docket 225-A as the western boundary of the Omaha lands. And while claimant insists the Pawnees held Indian title to the entire 1857 cession, it is here asserting a claim only to the lands north of the Platte river within the above described boundaries and disclaims any interest in the remainder of the cession.

From our consideration of all the evidence now in the record, and applying the requirements heretofore made by this Commission and the Court of Claims for establishing original Indian title, it is our conclusion that the record justifies a finding of aboriginal Indian title in the claimant tribe at the time of the 1857 treaty, and long prior thereto, to the lands north of the Platte river in Nebraska as specifically described in Finding No. 46.

Claim 5

This is a claim for the value of 4800 acres of the land reserved by the Pawnees out of the Nebraska lands they ceded to the United States by the treaty of September 24, 1857, which land was erroneously excluded in the original survey of the reserved area. This shortage was discovered upon completion of a resurvey on May 8, 1873. In 1875, Congress appropriated the sum of \$6,000 or \$1.25 per acre, to pay the claimant for this 4800 acre shortage. Claimant contends the land was worth at least \$3.00 per acre in 1875, and seeks to recover the difference between the value of the land and the amount paid, plus the equivalent of interest. The defendant concedes the land was taken but contends that claimant has been fully compensated for its value.

When this claim was originally considered, we found that by the error in the original survey the defendant had taken 4800 acres of claimant's reserved land but denied recovery because the record did not disclose the precise location of the land or when it was taken. The issues now before the Commission are confined to a determination of these two questions.

The first article of the 1857 treaty provided that out of the Nebraska land ceded by the Pawnees they reserved "a tract of country thirty miles long from east to west by fifteen miles wide from north to south," the east line of which was to be a point not further east than the mouth of Beaver Creek. In making the original survey of the reserved area the surveyor made an error by running the east-west line only $29\frac{1}{2}$ miles west. As a result, a tract of land one-half mile wide and fifteen miles long on the west end of the tract, containing 4800 acres, was

excluded from the reserved area called for by the terms of the treaty. This error was disclosed on May 8, 1873 upon completion of a resurvey of the reservation ordered by the Secretary of the Interior.

The shortage of land in the reservation shown by the resurvey was reported to the Commissioner of Indian Affairs on June 11, 1873 by the Superintendent of Indian Affairs at Omaha with a statement that he had been informed the excluded strip of land "is all settled by whites," and recommended that the United States pay the Pawnees for the land since he considered "the Indians already have an excess of land, and there appears to be no occasion for interfering with the settlements on said strip of land." This report was submitted to the Secretary of the Interior on December 20, 1873, and on January 5, 1874, he recommended to Congress that the Pawnees be indemnified for the shortage of their land. By the Act of March 3, 1875 (18 Stat. 420, 448), Congress appropriated the sum of \$6,000 for that purpose which was paid to claimant.

With respect to the location of this land erroneously excluded from the Pawnee reservation, it has been established by the evidence and counsel for defendant now concedes, that it was a strip of land one-half mile wide and fifteen miles long from north to south located immediately adjacent to the western boundary of the reservation in Nebraska as originally surveyed.

As to the date of taking of this land by the defendant, the claimant now urges that the land should be valued as of May 8, 1873, when the Government first discovered the shortage in the reserve area. It is clear from the text of the 1857 treaty that the Pawnees had a recognized Indian occupancy and use title to the entire reserved tract of land as

described in the treaty. That a shortage in the reserved area existed was disclosed in 1873 by the resurvey, but obviously this resurvey did not affect any change in the Pawnees' title to such land. However, when Congress with full knowledge of the facts passed the Act of March 3, 1875, appropriating the money to pay for the land, we think this action constituted a taking of the land, and that the Pawnees' title thereto was in effect extinguished as of the date of the 1875 Act. We accordingly conclude that the 4800 acres in question should be valued as of March 3, 1875.

Wm. M. Holt
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner