

BEFORE THE INDIAN CLAIMS COMMISSION

THE CITIZEN BAND OF POTAWATOMI)
 INDIANS OF OKLAHOMA,)
)
 Petitioner,)
)
 vs.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 96

Decided: September 18, 1958

FINDINGS OF FACT

1. Pursuant to authority of the Indian Claims Commission Act of August 13, 1946, c. 949, 60 Stat. 1049, 25 U.S.C. 70(a) et seq., petitioner timely filed claim herein. The petitioner, The Citizen Band of Potawatomi Indians of Oklahoma, is an organized band of American Indians with its principal residence in Oklahoma. It has a tribal organization recognized by the Secretary of the Interior and has capacity to maintain this suit. It constitutes the majority group of the Potawatomi Nation which made the treaties hereinafter mentioned.

2. On October 30, 1957, petitioner and defendant entered into a formal stipulation of the issues to be herein determined by this Commission. Said issues were approved by this Commission and filed herein November 5, 1957, as follows:

- 1. There shall first be a hearing before the Commission, on such date and at such hour as the Commission may prescribe, for a determination of the issue as to

(a) whether petitioner ever acquired a right, title or a compensable interest of any kind or character in and to all or any part of the "Oklahoma Reservation," as delineated on the map identified as Exhibit A and attached to the petition, and if so, (b) the nature and quality of the right, title or compensable interest so acquired, if any, and (c) the area as to which petitioner is entitled to claim additional compensation.

2. In the event the Commission should determine that petitioner did acquire a right, title or a compensable interest in and to any part of the said Oklahoma Reservation, a subsequent hearing before the Commission shall be held for a determination of the value as of June 25, 1890, of the area referred to in Clause (c) of Paragraph 1, above, subject to all offsets, as provided in the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049).

IT IS FURTHER STIPULATED and agreed by and between counsel of record for the petitioner and the defendant that the foregoing are the only issues in this case to be presented to the Commission for determination.

the
3. The various bands of Potawatomi Nation, which under a treaty concluded in June, 1846, had been removed from their homes east of the Mississippi to two reserves in Iowa and on the Osage River in Kansas, were again removed to a tract on the Kansas River in Kansas. (Dkt. 111, 3 Ind. Cls. Comm. 13-17)

4. On November 15, 1861, a treaty (12 Stat. 1191) proposed by the Commissioner of Indian Affairs was concluded with the Potawatomi Nation in order to distribute part of its lands among those who desired individual allotments and the assignment of part to those who preferred to hold their lands in common. Thus, the Citizen Band, numbering 1400 members, and the Prairie Band, numbering 780 members, were formed from the Potawatomi Nation in Kansas under the 1861 treaty.

By Article III of said Treaty of 1861 it was provided and agreed that, upon proper proof to the satisfaction of the United States District Court of Kansas of their ability to control their affairs and interests, and that they have adopted the habits of civilized living and have been able to support for at least five years themselves and their families, adult male Potawatomes would cease to be members of the tribe and could then become citizens of the United States.

This treaty further granted an option to the Leavenworth, Pawnee and Western Railroad Company to purchase the remainder of the lands within six months after the above-mentioned Indian selections had been made. The funds from the sales of their lands were to be held in trust by the United States for the Pottawatomes.

Ratification of the treaty was protested in a petition presented by the Prairie Band. However, the treaty was ratified by the United States Senate on April 15, 1862 and proclaimed on April 19, 1862.

(Fdg. 13, Dkt. 111, 3 Ind. Cls. Comm. 23)

5. By 1862 many emigrants passed through the Potawatome lands in Eastern Kansas on their way further west. Theft and trespass upon Indian property grew to be a rather common occurrence. The Commissioner of Indian Affairs, in his annual report to Congress in 1862, and for several years subsequent thereto, repeatedly urged that treaties be negotiated with the tribes in eastern Kansas, including the Potawatomi, whereby new reservations would be established in the Indian country to the south of Kansas for such of the Indians as would be willing to move.

6. On February 27, 1867, the Citizen Band of Potawatomie Indians entered into a treaty with the United States (15 Stat. 531). This "Treaty of 1867," as amended, was ratified by the United States Senate on July 25, 1868 (15 Stat. 535).

This "Treaty of 1867" recited in its preamble, as amended, as follows:

Whereas the Potawatomes believe that it is for the interest of their tribe that a home should be secured for them in the Indian country south of Kansas, while there is yet an opportunity for the selection of a suitable reservation; and whereas the tribe has the means of purchasing such reservation from funds to arise from the sale of lands under the provisions of this treaty, without interfering with the exclusive rights of those of their people who hold their lands in common to the ownership of their diminished reserve, held by them in common, or with their right to receive their just proportion of the moneys arising from the sale of unallotted lands, known as surplus lands: (15 Stat. 531, 534, 535)

Article I of the Treaty of 1867 provided a Potawatomie delegation to accompany a government commission "in order to select, if possible, a suitable location for their people without interfering with the locations made for other Indians" and to be approved by the Secretary of the Interior; that "such tract of land, not exceeding thirty miles square, shall be set apart as a reservation for the sole use and occupancy of that tribe * * *" same to be patented to the Potawatomie Nation. (Underscoring supplied).

Article II, as amended, provided the price to be paid by the tribe for said reservation "shall not exceed the cost of same to the Government of the United States"; and providing such sum to be taken from tribal funds received from the sales of their Kansas lands, and

since the Leavenworth, Pawnee and Western Railroad Company had failed to exercise the option to purchase such lands as provided in the Treaty of 1861, that the Atchison, Topeka and Santa Fe Railroad Company be granted an option to purchase such lands.

Article III provided that after such Oklahoma reservation shall have been set apart for the Potawatomies, it shall never be included within the jurisdiction of any state, or territory, unless an Indian territory be organized and that Potawatomies resident thereon be given equal representation with other tribes.

Article IV provided for a register to be prepared both of those Potawatomies electing to stay in Kansas and of those desiring to remove to Oklahoma and for the right of alienation of the Kansas lands of those removing to the reservation in Oklahoma.

Article V contained the terms and conditions of the use of the funds held in trust by the United States "for the benefit of such owner" in his removal and that of his family to the new reservation.

Article VI provided that the trust funds and other provisions of "Article third of the treaty of April nineteenth, eighteen hundred and sixty two, relative to citizens who desire to be come citizens shall continue in force * * *" (underscoring supplied).

7. In February, 1870, a Citizen Band delegation selected a tract in the Indian country pursuant to the 1867 treaty. (Pet. Ex. 21-24). Secretary of the Interior Delano gave his approval of their selection on November 9, 1870, in his letter to Commissioner of Indian Affairs E. S. Parker, wherein Secretary Delano unequivocally recognized their ownership, including therein this statement:

The site selected by these Indians is reported as including the land between the Canadian River and the North Fork of said river and bounded on the East by the West line of the Seminole lands & extending west, from said boundary line to embrace nine hundred square miles, to which they are entitled. (Pet. Ex. 30, Comp., p. 59)

This tract comprised approximately 575,877 acres, of which about two-fifths had been acquired by the Government from the Creeks and about three-fifths from the Seminoles at a total cost to the Government of approximately \$119,790.00. (Pet. Ex. 54, Comp., p. 114; Def. Ex. 9)

8. The so-called Absentee Shawnees had separated from the body of the Shawnee Nation during the early 1840's and had settled at that time within the tract selected in 1870 by the Potawatomes. (Pet. Ex. 33, 51, 54, and 57). They remained loyal to the Union during the Civil War and suffered severe losses of livestock and crops because of their loyalty and were driven from Oklahoma. However, by 1870, they numbered 576, nearly all of whom possessed horses, cattle and hogs and raised corn and had moved back to their homes on the tract which was a portion of the tract selected as a reservation for the Citizen Band of the Potawatomi. (Pet. Ex. 25)

In February 1872 the Absentee Shawnee addressed a petition to the President of the United States setting forth these aforementioned facts and that they had never received any payment for Shawnee lands in Kansas and praying that the President give them title to a portion of the land on the Potawatomie reservation north of Little River upon which lands they had made their homes and had constructed valuable improvements over a period of many years.

Indian Agent Hadley endorsed the petition with the recommendation that it be granted "as reasonable, just and right." Superintendent Hoag transmitted the petition to the Commissioner of Indian Affairs also with a request of favorable action. He reported that the Potawatomi had expressed a willingness not to disturb the Absentee Shawnee, but had asked that their reservation be extended westward so as to include an additional equivalent area. (Pet. Ex. 43, Comp. pp. 78-80) (Underscoring supplied)

By letter dated April 15, 1872, the Commissioner of Indian Affairs recommended to the Secretary of the Interior that legislation be enacted to provide for an allotment to each Indian of pure or mixed blood of Absentee Shawnees, being a head of a family, or a male over 21 years of age, of 80 acres of land, to include so far as possible his improvements, together with an addition of 20 acres for each male child under 21 years of age. (Def. Ex. 3) This led to the passage of the Act of May 23, 1872 (17 Stat. 159, Pet. Ex. 49).

This Act of 1872 authorized the Secretary to make allotments of land within the reservation of the Oklahoma tract of land to each member of the Citizen Band and provided also for allotments to Absentee Shawnee Indians, within the Potawatomi Reservation, who had resided thereon for three continuous years, without payment of any consideration. The statute also contained this proviso:

Provided, Said Pottawatomie Indians shall neither acquire nor exercise under the laws of the United States any rights or privileges in said Indian territory, other than those

enjoyed by the members of the Indian tribes lawfully residing therein. And for the protection of the rights of persons and property among themselves, they may enforce the laws and usages heretofore enforced among them as an Indian tribe, not inconsistent with the Constitution and laws of the United States, and shall be entitled to equitable representation in the general territorial council and subject to the general laws which it may legally enact.

On December 31, 1884, Commissioner Price reported to the Secretary of the Interior that only 11 members of the Citizens Band and no Absentee Shawnees had been issued certificates of allotment, a majority of the latter refusing to take lands in severalty.

9. Both the members of the Citizen Band and the Absentee Shawnee continued thereafter to reside on the Oklahoma tract. However, the Citizen Band maintained the position that under the 1867 treaty the land belonged to the Band and that the Absentee Shawnee were merely residing thereon by their permission and were subject to being evicted by them. (Pet. Ex. 43, 55 and 56, Comp. pp. 80, 117-119)

10. On February 8, 1887, Congress adopted a General Allotment Act (24 Stat. 388) which authorized the allotment in severalty of lands of any tribe or band located on a reservation and also provided non-reservation Indians could obtain individual holdings on public lands.

Section 6 of the Act provided for citizenship of Indians who had adopted habits of civilized life without impairment of their individual or tribal property rights.

Upon passage of this Act the Secretary of the Interior held that provisions of the General Allotment Act applied to both the Citizen Band and to the Absentee Shawnee, and allotments on the Potawatomi Reservation in Oklahoma were made to members of both groups thereunder.

11. In 1889 the Secretary of the Board of Indian Commissioners reported his conclusions that neither the Absentee Shawnees or the Potawatomes had obtained any legal title to any lands in the Indian territory because the Absentee Shawnees settled upon such lands without authority of the Government and the Potawatome, had never paid for such lands, and were therefore never issued a patent to same. (Pet. Ex. 56, Comp. pp. 118-119)

However, the previous year, on February 7, 1888, the House Committee on Territories had published Report No. 263, 50th Congress, stating that 550 members of the Potawatome Tribe occupied a reservation of 575,877 acres with a map of tribal lands attached which omitted any mention of any ownership by or reference to the Absentee Shawnee. (Pet. Ex. 66)

12. The Government concluded an agreement with the Citizen Band June 25, 1890, which provided in substance as follows:

(1) The Band relinquished to the United States all its "claim, title and interest" in the Oklahoma tract as described by metes and bounds, "containing an area of five hundred and seventy-five thousand eight hundred and seventy and forty-two one hundredths acres of land" (Art. I).

(2) Allotments made and being made under the General Allotment Act were confirmed. If more than 1400 Indians should have allotments so confirmed, then \$1 per acre of such excess allotments should be deducted from the consideration to be paid the Band for its cession.

(3) The United States agreed to pay the Citizen Band the sum of \$160,000 and also agreed to pay the Citizen Band an additional

\$119,790.75 should it be ascertained the United States had retained said amount from the Indians' fund as reimbursement for the original cost to the Government of the Oklahoma Reservation under the terms of the 1867 treaty. (26 Stat. 989, 1016; Pet. Ex. 64)

13. On the following day a similar agreement was concluded with the Absentee Shawnee wherein the Government took a cession of the identical tract as described in the cession from the Citizen Band for the sum of \$65,000 less \$1.00 per acre for individual allotments in excess of 650. The Absentee Shawnee allotments amounted to a total of 64,677.57 acres. (26 Stat. 989, 1019)

14. A total of 213,044.78 acres were allotted to 1,487 members of the Citizen Band. (Def. Ex. 9; Def. Proposed Fdg. 11; Pet. Proposed Fdg. 29).

15. The United States, in the 1867 treaty, promised the Citizen Band of Potawatomi Indians "a home in the Indian country" not exceeding thirty miles square (900 square miles). This treaty was signed on February 27, 1867, ratified by the United States Senate on July 25, 1868 and proclaimed by the President on August 7, 1868 (II Kappler 970; 15 Stat. 531, 534, 535).

The express conditions set forth in this treaty were:

(1) A Government commission, accompanied by a delegation of the Potawatomi would select the reservation lands with the approval of the Potawatomi delegation.

(2) The location would be subject to the approval of the Secretary of the Interior.

(3) A survey of the reservation lines and boundaries would be made. Payment for the reserved lands upon a cost basis to the Government would be taken from funds of the Potawatomi. Those funds were held in trust by the United States from sales of Kansas lands which had been ceded by the Potawatomi in the 1861 treaty.

(4) The Government promised such lands would be "set apart for the exclusive use and occupancy of that tribe" and the United States would issue a patent to same to the Potawatomi Nation, and thereby it became obligated to convey same to petitioners. The patent was never issued. (Pet. Ex. 46, Comp. pp. 89 and 90)

It is not disputed that the Citizen Band relied upon the Government's promise of a home and removed from Kansas to the Potawatomi Reservation in Oklahoma. The Citizen Band occupied a portion of same as their home from 1872 to 1892. After individual allotments were made, the unallotted lands were ceded back to the Government by formal agreement in 1890. (26 Stat. 989)

16. The Oklahoma tract of land known as "the Potawatomi Indian Reservation" contained a total of 575,877 acres. This reservation was approved by the Secretary of the Interior in his letter to Commissioner Parker dated November 9, 1870. (Finding 8 above)

17. Petitioner was entitled to compensation for the surplus lands: that is, 575,877 acres less allotments of 213,044.78 acres, leaving as surplus 362,832.22 acres. Petitioners received \$160,000 for said surplus lands. Future hearings will be had as to their value

as of June 25, 1890. As to whether or not this was unconscionable will be determined after determination of the value on June 25, 1890.

Further evidence will also be received as to whether the plaintiff Indians are indebted to the defendant in the original obligation of \$119,790.75.

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner