

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

Appearances:

Howard D. Moses, with whom
 was Edward I. Devlin and
 Louis L. Rochmes,
 Attorneys for Petitioner.

William O. Chatterton, 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 Citizen Band of Potawatomi Indians have filed "five causes of action" in their petition, all based upon their alleged rights and interest in and to the "Oklahoma Reservation." The first three causes of action respectively claim additional compensation, first, for the whole of the Oklahoma Reservation; secondly, for that portion of the Oklahoma Reservation north of Little River; and thirdly, for the area of unallotted lands in the Oklahoma Reservation. The fourth and fifth causes merely allege different alternative bases for relief upon the land claims previously alleged.

Defendant and petitioner stipulated prior to the hearing of the evidence now being considered that the issues to be determined are (a) whether petitioner ever acquired any interest in the "Oklahoma Reservation," and if so, (b) the nature and quality of same, and (c) the area to which petitioner is entitled to claim additional compensation. (Finding 2)

The defendant alleges that petitioner was never granted a patent to the "Oklahoma Reservation," and has, in fact, never paid the agreed consideration for such reservation lands to the Government, and consequently has never owned or held a compensable right or interest in the same. Defendant further maintains that all members of petitioner tribe became citizens of the United States, and there was no Potawatomi Nation in existence to accept a patent to such lands from the defendant and therefore the treaty obligation to issue such patent expired. In 1891 the Government granted individual allotments in the Oklahoma Reservation lands to members of petitioner and paid petitioner \$160,000 for the surplus lands (Finding 12); but defendant contends that such payment and allotments were considered merely as a gratuity and cannot be considered as any recognition by the Government of petitioner's ownership interest in such lands. The Commission is of the opinion that the agreement of 1867, if not a grant of title, was a contract to grant title to the Citizen Band or to its members.

The defendant also contends that because the Absentee Shawnee were in possession of certain northern portions of this Oklahoma

tract for about thirty years (since the 1840's) before the Citizen Band came to Oklahoma that such possessory rights of the Absentee Shawnee constituted notice of their prior rights superior to the Potawatomi, to that portion of the Oklahoma Reservation which was occupied by Absentee Shawnees. (Def. Br., p. 11)

Defendant also contends that because the Treaty of 1867 itself provided that the reservation area to be selected "should not interfere with locations made for other Indians" that such selection in Oklahoma although approved by the Secretary of the Interior, as well as the Citizen Band, interfered with the prior possessory rights of the Absentee Shawnee and therefore the Citizen Band was barred from selecting a reservation which included the lands occupied by the Absentee Shawnees.

The issue first to be decided is whether or not the petitioner acquired any compensable right or interest in and to lands, or any portion thereof, involved herein and is dependent primarily upon the performance and conduct of the respective parties, the Citizen Band and the Government, in carrying out the express provisions of Article I of the 1867 treaty (15 Stat. 531) that "the said tract shall be patented to the Potawatomi Nation."

This treaty did not contain present words of grant nor a description by metes and bounds of land in the Indian country. In these respects it can be distinguished from the case cited by petitioner, New York Indians v. United States, (170 U.S. 1) where

the United States Supreme Court held a treaty to constitute an in praesente grant of reservation lands. (Pet. Br., p. 38)

However, such treaty did contain a clear and unequivocal promise to issue a patent to the petitioner to a home in the Indian country of an area not exceeding thirty miles square upon certain conditions expressly stated therein. The 1867 treaty was an agreement "to issue a patent to a tract of land thirty miles square," * * * "to be set apart for the exclusive use and occupancy" of petitioner in the Indian country south of Kansas. This treaty was duly ratified by the United States Senate and proclaimed by the President (15 Stat. 534, 535). We construe this treaty agreement to issue petitioner tribe such patent as a contract to convey land and that it created certain legal and equitable rights and duties upon the parties who signed it.

The Citizen Band and a Government commission pursuant to the terms of the treaty selected the Oklahoma Reservation and the Secretary of the Interior approved their selection. The Government thereupon purchased this Oklahoma tract comprising some 575,877 acres for the Citizen Band (Finding 7) and in reliance upon the Government's good faith, the Citizen Band departed from their home in Kansas and moved to this new home in the Indian country. (Findings 7 and 8)

We have made no finding as to whether or not the Indians paid the Government for the land involved. We do not find it necessary to make a finding on this issue in order to decide the stipulated

issues and we leave this issue of payment, or not, open for future hearings incident to valuation and offsets.

However, we think such payment or non-payment a matter wholly within the control and supervision of defendant. Article II of the 1867 treaty, as amended, provided:

* * * and the sum to be paid by the tribe for said reservation shall be taken from the amount which may be received for the lands which were offered for sale to the Leavenworth, Pawnee, and Western Railroad Company, under the treaty dated November fifteen, eighteen hundred and sixty-one, which amount shall be the common property of the tribe, except the Prairie Band, who shall have no interest in said reservation * * *. And provided further * * * the said purchase-money shall be paid (by the railroad for Potawatomi Kansas lands) to the Secretary of the Interior in trust for said Indians within five years from the date of such purchase * * *. (Finding 6; 15 Stat. 531, 535, 536, underscoring supplied)

Thus, the Secretary of the Interior was made trustee of the Citizens Band's funds which he received from the sales of their Kansas lands. When this reservation was duly selected, approved, surveyed and possession transferred (Findings 7, 8, and 9), it then became the Secretary's duty "to take from tribal funds" the consideration agreed to be paid the Government for such reservation. The Citizen Band had signified to him their approval of the Oklahoma Reservation selected for them (Finding 7) and the failure of the Secretary to perform his express duty as trustee of the Citizen Band's funds (if he did fail) cannot be charged to the Indians.

We conclude that the failure to pay the consideration, in the event it be determined that it was not paid, was a failure of the Government to make the necessary and authorized transfer of tribal

funds belonging to the Citizens Band and in the possession of and in the control of the Government, and was not a default of the Citizen Band.

In regard to the contention that the defendant makes as an excuse for not issuing a patent to the Citizen Band for the lands involved, that same was not done because members of the said band had become citizens and there was no longer a tribe to receive said patent, the Commission thinks same not well founded. Certainly the members of said band constituted an identifiable group and could have been as such a grantee in an instrument of patent; or the lands could have been granted to the individual members who by reason of such membership had become the owners of the property of the previous entity--if same can be construed as having become extinguished. In this connection, however, it might be noted that some twenty years later (in the 1890's) the Government found no difficulty in accepting a conveyance from the Citizen Band as an entity of the unallotted lands constituting a part of the Oklahoma Reservation tract involved herein. We cannot reconcile the acceptance of said group of Indians by the Government as a qualified grantor of a tract of land with the Government's contention that the same group could not have been the grantee of a cession. (Finding 12; 26 Stat. 101)

The defendant contends that the Citizen Band never became entitled to that portion of the Oklahoma Reservation occupied by the Absentee Shawnee Indians, and it contends that the Citizen Band, in fact, consented and agreed that the Shawnees should remain on the land undisturbed. We do not find any evidence in the record

of any consent or waiver on the part of the Citizen Band to a tract of land containing less than 900 square miles. That the Citizen Band did not waive its claim of ownership of the lands occupied by the Shawnee is evidenced by the Band's willingness to have their west boundary extended sufficiently to add an equivalent area of land to that occupied by the Shawnees within the 900 square mile tract that had been approved for the Citizen Band by the Government, if the Government desired to let the Shawnee remain permanently on the Oklahoma Reservation tract. (Finding 9)

It is undisputed that the Absentee Shawnee's possession of such Oklahoma lands were not "locations made for them" by the Government. They were, as defendant states, "in the nature of squatters" (Def. Br., p. 9) whose possession was neither from time immemorial nor was their possession of lands within the Oklahoma Reservation obtained under any color of title or recognition of ownership by the Congress or the exclusive branch of the Government or by the Citizen Band. (Finding 8)

The agreement of June 26, 1890 (26 Stat. 1019) wherein the Absentee Shawnees ceded the entire Oklahoma Reservation for a consideration of \$65,000 and confirmation of their allotments cannot be construed as a ratification of a "reservation title" or of a use and occupancy title from time immemorial. Their possessory right was in the nature of a tenancy at will; they were in "peaceable possession" after the arrival of the Citizen Band only because the Citizen Band expressed a willingness not to disturb them provided the

Government extended the Citizen Band's reservation to include an equivalent area westward. (Finding 8)

The ancient maxim of equity that "equity looks upon that as done which ought to have been done," (1 Story Eq. Jur. 64g) applies in this case.

We hold that the Citizen Band covenanted with the Government in the Treaty of 1867 to select, approve, purchase and move to a new home in the Indian country; which new home in the amount of 900 square miles the Government agreed to secure and grant to it. The Citizen Band in all things complied with its part of the agreement. We held that petitioner has established a compensable right and interest to the extent of full ownership in and to the 575,877 acres of land known as the Oklahoma Reservation; and that petitioner is entitled to claim additional compensation for 362,837.22 acres of said Oklahoma Reservation land, being the excess over allotments to petitioner members.

An Interlocutory Order will be entered in keeping with this opinion and the findings of fact this day made.

Edgar E. Witt
Chief Commissioner

Concurring:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner