

BEFORE THE INDIAN CLAIMS COMMISSION

THE OSAGE NATION OF INDIANS,)

Petitioner,)

vs.)

THE UNITED STATES OF AMERICA,)

Defendant.)

Docket No. 126

Decided: July 30, 1959

Appearances:

Delmas E. Martin, with whom were Paul M. Niebell and Warren Watkins, Attorneys for Petitioner.

Frederick C. Ward, Jr., 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.

The petitioner in this case, The Osage Nation of Indians, is the successor to the Great Osage and Little Osage Tribes of American Indians and is a tribal organization recognized by the Secretary of the Interior as having authority to represent the Osage Indians. The Commission has found in this case, as it has in the previous action of The Osage Nation of Indians v. The United States of America, 1 Ind. Cl. Comm. 43, that petitioner is entitled to maintain this action before the Commission.

Petitioner seeks a recovery of the sum of \$1,092,338.71, which amount represents payments from the Osage Tribe's oil and gas royalty

funds to the County of Osage, Oklahoma, for use in the construction and maintenance of roads and bridges in that county. The petitioner originally alleged that the claim set forth in this action was one in law and equity as well as a claim based upon fair and honorable dealings not recognized by any existing rule of law or equity. However, the Court of Claims had found in Congressional Referral Case No. 17763 that the Osage Tribe had no legal or equitable right to recover the claimed sum (The Osage Tribe of Indians v. The United States, 102 C. Cls. 545) and petitioner stated at the hearing in this matter on November 24, 1958, that the claim is limited to one based on fair and honorable dealings under Section 2, Clause 5 of the Indian Claims Commission Act (Tr. p. 3).

Briefly, the pertinent facts, which are largely agreed to by the parties, are as follows.

The Osage Tribe of Indians sold their lands in Kansas and bought from the Cherokee Nation a tract consisting of some 1,470,559 acres of land which now comprises Osage County in the State of Oklahoma. Payment for the tract, in the amount of \$1,099,137.41, was made to the Cherokees from the proceeds of the sale of the Kansas land and on June 14, 1883, the land was deeded by the Cherokee Nation to the United States to be held in trust for the use and benefit of the Osage and Kansas Indians.

The Osage Indians occupied the acquired lands in common until they were allotted to the members of the tribe pursuant to the Act of June 28, 1906, hereinafter referred to as the 1906 Act. That Act provided, among other things, that the surface of all the land belonging

to the Osage Tribe of Indians in Oklahoma Territory with the exception of an insignificant amount, should be divided among the members of the tribe but that the oil, gas, coal, and other minerals upon said allotted lands should be reserved to the use of the tribe for a period of 25 years, at the expiration of which they should be the property of the individual owners of said land unless otherwise provided for by Act of Congress.

The Act further provided that the royalties received from oil, gas, coal and other mineral leases should be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians to be distributed, after certain allowances for schools and an emergency fund, to the individual members of the tribe. Pursuant to the provisions of the 1906 Act the tract was allotted to the members of the Osage Tribe which then numbered 2,229, with each person receiving an average of about 657 acres.

Thereafter leases for oil and gas purposes were made by the Osage Tribe, through its tribal council with the approval of the Secretary of the Interior. Producing oil and gas wells were drilled on the Osage lands and royalties were paid to the members of the tribe. The royalties were modest in amount for the first few years, but, commencing in 1917, became rather substantial, amounting to \$8,090 per headright in 1920.

In the report of the Commissioner of Indian Affairs for the fiscal year ended June 30, 1920, it is written, "In the northeast corner of Oklahoma is the Osage Indian Reservation, belonging to about 2,100 Indians, who have been called the richest people, per capita, in the world. This section of the great State of Oklahoma is one of the

wonderful oil producing fields in the country, and its wells daily pour great wealth upon these Indians." (Def. Ex. 8, p. 41). The large sums which accrued from the oil and gas royalties were then required to be paid quarterly to each member of the tribe, and it was reported to have led the Osage Indians into a life of extravagance and reckless spending. Many of the tribesmen became deeply involved in debt and merchants and professional people took advantage of the Indians' ignorance.

In 1920 identical bills were introduced in the Senate and House of Representatives to provide, among other things, that the minerals covered by the lands of the Osage should be reserved to the tribe for an additional 25 years and that the State of Oklahoma should be authorized to levy a gross production tax upon all oil and gas belonging to oil and gas lessees produced in Osage County and that the Secretary of the Interior be authorized and directed to pay to Osage County 3% of the Osage tribe's royalties, such money to be used only for the construction and maintenance of roads and bridges in Osage County. At the lengthy hearings by both Senate and House Committees, the Indians expressed their approval of the bill and its passage was recommended by the Indian office and the Secretary of the Interior.

The House Committee on Indian Affairs, having received much evidence that the Osage Indians had been receiving fabulous sums of money from their oil and gas royalties and leading a life of extravagant spending, amended the proposed legislation to limit royalty payments to Osages who did not have certificates of competency and provided that the surplus income should be invested under the supervision of the

Secretary of the Interior for the benefit of such individual Indians. The House Committee stated that it also amended the taxation provision of the bill to provide "that the Osage Tribe shall be taxed . . . as are all other citizens of Oklahoma under the laws of that State" and to provide that an additional sum of 1% of the Tribe's oil and gas royalties should be paid to Osage County to be used for said County only for the construction and maintenance of roads and bridges therein. The bill, as amended, passed both the House of Representatives and the Senate and became the Act of March 3, 1921. It will hereinafter be referred to as the 1921 Act.

Under the provisions of Section 5 of the 1921 Act, the Secretary of the Interior paid to Osage County the required 1% of the oil and gas royalties until that provision was removed by the joint resolution of April 25, 1940. During that period the sum of \$1,092,338.71 was paid to Osage County. It is this item for which the petitioner now seeks recovery from the United States.

It is petitioner's contention that this payment of 1% of the Tribe's oil and gas royalties violated the standards of fair and honorable dealings between the United States and the Osage Indians. Petitioner maintains that this 1% "levy" was an unjust and unnecessary disbursement from the Tribe's trust funds which "levy" was made without the Tribe's consent and for purposes not beneficial to the Tribe. As a result, it is alleged, the United States gave away a portion of the Osage's trust funds in a manner which was not calculated to and did not benefit the Indians and as such constituted a course of unfair and dishonorable dealing

In considering the question of whether the requirement that 1% of the Osage tribal royalties be paid to Osage County for the maintenance and construction of roads and bridges in that County was an action which violated the standards of fair and honorable dealings referred to in Section 2, Clause (5) of the Indian Claims Commission Act, we must examine the many factors which led Congress to enact the complained of provision. For as the Court of Claims stated in the case of The Snake or Piute Indians of the Former Malheur Reservation in Oregon v. The United States, 125 C. Cls. 241, 270:

"A determination of whether or not a course of dealing by the United States with and in relation to bands or a tribe of Indians was in the last analysis fair and honorable, can be made only after a very thorough and careful consideration not only of what was actually done, but also of that which was not done and the motives and circumstances surrounding and underlying the overt acts of the parties, and their intentions, etc. It is often the case that an action which, on its face, appears to be cruel or shocking to the conscience, may, when examined and analyzed in its complete context, be found to have some moral justification which either mitigates or eliminates entirely the apparent cruelty of the action. The evidentiary facts based on the circumstances establishing such justification, or the lack of it, are facts as indispensable on the issue of fair and honorable dealings, as the bare facts of the dealings themselves."

The Commission, overruling defendant's objections, has admitted in evidence and considered all exhibits introduced by petitioner.

Upon a careful and thorough examination of all the facts as revealed by the record in this case, the Commission cannot agree with the contentions of petitioner that the United States acted unfairly and dishonorably in this matter. The evidence establishes that the Osage Indians were receiving a very substantial income during the years

immediately prior to the passage of the 1921 Act. However, they were not receiving the full benefit of their income because of the great extravagance and reckless spending habits of the Indians and the fact that they were easy prey for the unscrupulous merchants and professional people who took advantage of the Indians' ignorance. It was clear that the Osage Indians were in a position to utilize some of their funds to effect material improvements which would provide a more useful and lasting benefit to themselves. It was certainly desirable that the moneys realized from the Tribe's mineral resources be used for the betterment of the Osages instead of unjustly enriching the unscrupulous persons who were exploiting the Indians. In such a situation it was natural that Congress, in the exercise of its right to legislate with respect to the Osage funds, should attempt to utilize the ample funds for more beneficial projects.

Of the allotted lands in Osage County approximately one-third represented the selected homesteads of the individual members of the tribe. The homesteads were, by specific provision in the 1906 Act, non-taxable. Thus the choicest one-third of the Osage County lands were contributing nothing to local improvements. Further, as to the remaining lands, they had been non-taxable for three years following their allotment to the individual Indians. By decision of the Supreme Court the state was unable to tax any of the oil and gas production in Osage County because the minerals were under the protection of the Federal Government. Indian Territory Illuminating Oil Co. v. State of Oklahoma, 240 U. S. 522; Large Oil Co. v. Howard, 248 U. S. 549.

Section 5 of the 1921 Act gave the State of Oklahoma authority to collect a gross production tax from both the oil companies' and the Osage Tribe's shares of the oil and gas production. Under the State law a portion of that tax was returned to the County. However, Congress was undoubtedly aware that Osage County had, prior to 1921, suffered from a lack of sufficient tax funds to develop its public facilities.

Congress had, during the course of hearings on the proposed act, been informed of the poor development of the roads and bridges in Osage County. In fact the Osage Tribal Council in a statement to the House Subcommittee stated that there was much heavy truck hauling over "the very bad rough roads in Osage County." (Def. Ex. 18, p. 408). It was pointed out that Osage County required larger road and bridge funds than did other counties and that additional funds spent for such purposes would aid oil and gas development in the county and would add to the land values in the county. The House Committee in commenting on the 1% provision said, "It is believed that this provision, if properly applied, will enhance the value of all Osage property, on the principal that good roads and bridges enhance the value of property in every other section of the county; and, since there is plenty of money for the purpose, it certainly will be a great advantage to the Osages themselves as well as to those who must carry on business relations with them" (Def. Ex. 4, p. 3).

The Commission has found that the \$1,092,338.71 expended by Osage County for the sole purpose of construction and maintenance of roads

and bridges in Osage County was a distinct benefit to the Osage Tribe.

As the Court of Claims stated in the Osage case:

"* * * we think that there is merit in the Government's contention that the Tribe received a special benefit from the expenditure of its funds * * *. The construction and maintenance of roads and bridges would increase the value of the minerals * * * to whatever extent additional production on existing leases has taken place or will take place because the properties are more accessible by reason of improved highways, the Tribe has received a benefit * * *. In 1921, then, most of the lands of the county were probably still owned by the Indians, who were the same persons who, as a Tribe, owned the oil and gas royalties. The benefits of more convenient use and of increases in value of the land in the county, which would result from improved highways, would, then, go principally to the Indians, the persons who, as a Tribe, owned the royalties." The Osage Tribe of Indians v. The United States, 102 C. Cls. 545, 553-554.

The Commission recognizes that, of course, other non-Indian persons in Osage County benefited from the expenditures from the Tribe's oil and gas royalties. But this does not render the government's course of action in this matter unfair and dishonorable. The fact remains that the Osage Tribe did benefit and that their contribution was one which they could well afford. The facts do not support petitioner's contention that the Tribe's funds were unnecessarily expended for the benefit of others. The extent of the benefit to the Tribe is not capable of exact measurement nor is it material in this instance. Perhaps the same amount as involved in this case could have been spent for greater tribal benefits but there is no need to speculate on such a possibility. Congress found a situation in existence in 1921 where the great natural resources of the Osage Tribe were being depleted while the substantial royalties therefrom were being wasted in a manner which the House Committee

described as "almost criminal." The intent of Congress in passing the 1921 Act with the 1% provision of Section 5 was to benefit the Indians. Recognizing that the Tribe had "plenty of money for the purpose" (Def. Ex. 4, p. 3), Congress chose the roads and bridges of Osage County as facilities in the county upon which this small percentage of the Osage Tribe's royalties would be spent. This coincided with the Tribe's own statement of what it considered a necessary area of improvement and for which they urged expenditure of the Tribe's contribution, as originally provided.

Petitioner argues that the question of the Osage's financial status should not be considered in this case. The Commission does not agree but rather feels that the fact that the Osage Tribe did have considerable wealth is a most material factor to be considered in determining the fairness and honorableness of the government's course of dealings with them. The course of the government's dealings with impoverished tribes cannot be adopted as the measure of fairness required with tribes possessing substantial assets.

The action of Congress in imposing the 1% provision on the Osage Tribe's royalties, when considered in the light of the existent circumstances, does not shock the conscience of the Commission or appear in any way to have been a cruel or unjust imposition on the petitioner. The course of dealings by the government with the Osage Tribe, as revealed by the evidence in this case, did not violate the standards of

fair and honorable dealings within the meaning of Section 2, Clause (5) of the Indian Claims Commission Act. Accordingly, the petition should be dismissed and we shall so order.

Wm. M. Holt
Associate Commissioner

I concur:

Edgar F. Witt
Chief Commissioner