

BEFORE THE INDIAN CLAIMS COMMISSION

THE OTTAWA TRIBE AND GUY JENNISON, )  
BRONSON EDWARDS and GENE JENNISON, )  
As Representatives of THE OTTAWA )  
TRIBE, )

Petitioners, )

vs. )

Docket No. 303

THE UNITED STATES OF AMERICA, )

Defendant. )

Decided: March 10, 1961

Appearances:

Allan Hull, with whom was  
Louis L. Rochmes,  
Attorneys for Petitioners

William D. McFarlane, with  
whom was Mr. Assistant Attorney  
General, Perry W. Morton,  
Attorneys for Defendant

ON DEFENDANT'S MOTION FOR REHEARING

Holt, Associate Commissioner, delivered the opinion of the Commission.

This case is before us on the defendant's motion for rehearing filed on October 14, 1960.

Petitioners' claims involve the two treaties of June 24, 1862 (12 Stat. 1237) and February 23, 1867 (15 Stat. 513) made with the Ottawa Indians whereby some 20,640 acres of their Kansas Reservation lands were set apart to endow a school for their benefit, and for the sale of the remainder of their unallotted reservation lands.

The Commission, after intensive and thorough consideration of a voluminous record, made findings of fact and rendered its opinion on June 29, 1960 (8 Ind. Cl. Comm. 831) holding that petitioners were entitled to recover the following sums: \$30,609.94 shortage in Trust Land Sales; \$22,600 as the appraised value of the Ottawa School Section; \$7,490 as the appraised value of 1,280 acres of Ottawa lands conveyed to the Ottawa University; \$3,354.75 unpaid treaty funds received by the Indian Agent; \$1,202.42 expenses of the 1872 and 1873 Commission paid by the Ottawas; and, in addition, to recover the appraised value of 10,702 acres of school lands less any payments made; an amount equal to the profit that was made from the sale of 5,000 acres of Ottawa school land, and for the value of 3,032 acres of school land sold by the trustees.

The defendant states three grounds for its motion, to-wit:

1. That the case submitted to the Commission was limited to the issues related to the right to recover while the Commission concluded as a matter of law that petitioners were entitled to recover certain sums.
2. That the ultimate findings and the interlocutory order based thereon are not supported by a preponderance of the evidence and the Commission's conclusions of law are not supported by its findings of fact.
3. That since the date of the Commission's decision the defendant through additional investigation and research has located newly discovered evidence which supports its contentions.

The defendant also urges in its memorandum in support of the motion that the claim was pleaded as a legal or equitable claim under Section 2, Clause 1 of the Indian Claims Commission Act and that the Commission recognized the claim sued on in the first cause of action as a legal claim.

In the petition the first 31 paragraphs set forth the transactions involving the lands of the Ottawas in the first cause of action and allege in paragraph 31 that petitioner is entitled in equity to the value of the lands acquired in trust for the purposes of the University and to a full and complete accounting with respect to University and trust lands and funds derived from the sale thereof. Upon the same facts set forth in the paragraphs constituting the first cause of action petitioners in their second cause of action seek relief under the "fair and honorable dealings" provision (Clause 5) of the Act, and in the third cause of action allege duress and pray for a revision of the Treaty of June 24, 1862, to impose an obligation on the United States to supervise and enforce the provisions of the school trust in the event the treaty was construed not to have expressly or impliedly imposed such a duty on the United States.

Defendant's counsel urges that the petitioner's claim "having been thus recognized as a legal claim cannot again be considered as a moral claim under Clause 5 of Section 2 of the Act." <sup>1/</sup> If the Commission had recognized or construed the pleadings as setting forth only a legal claim there might be merit to the contention made by defendant. The difficulty in following the argument hinges on the

<sup>1/</sup> Def. Memo., page 11. And also pp. 82-86.

view of defendant that the pleadings present but one claim when in reality there are a number of claims asserted in the petition. The Ottawa Indians seek among other things recovery for the shortage of the proceeds of their trust lands sold by their Indian agent under authority of the provisions of the 1862 treaty. With respect to these funds the Commission concluded there was a legal liability on the part of the Government to account to the Ottawas. <sup>2/</sup> As to the claim of the Ottawa Indians regarding the transactions involving the school lands the Commission did not hold the allegations with respect thereto set forth a legal claim. We did not construe the provisions of the treaties as imposing upon defendant trust obligations with respect to the school lands. <sup>3/</sup> We did decide however, that, based upon the facts and circumstances of record, the United States was under a moral obligation in view of the then dependent status of the Ottawas to provide sufficient supervision and control of the educational trust by officials

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<sup>2/</sup> Opn. 8 Ind. Cl. Comm. 831, 898. "As to the Government's liability to account to the Ottawa Indians for the proceeds of sale of the trust lands, this is a legal liability since the defendant assumed the duty to sell them for the benefit of the Indians."

<sup>3/</sup> Opn. 8 Ind. Cl. Comm. 831, 883 - "The relationship between the United States and the Ottawa Indians at the time of the negotiations of the treaty was similar to that of guardian and ward and a high degree of fiduciary duty rested upon the Government." While such a relationship does not impose trust obligations it has been held to create moral obligations. The Commission therefore did not view the relationship as creating a legal liability.

of the Government to safeguard the rights of the Indians. <sup>4/</sup> The Commission clearly set forth its view that the facts supported a right of recovery as to the school lands under Clause (5) Section 2 of the Indian Claims Commission Act and the petitioners had alleged a claim bottomed on fair and honorable dealings in their second cause of action (paragraphs 32 through 34, pp. 11-12 of the petition). <sup>5/</sup>

It would appear from the above portion of defendant's brief and the comments made therein on pages 82-87, that counsel for defendant misconstrues the conclusion drawn regarding the school trust. We did not hold there was a fiduciary duty on the part of the United States based on legal principles but rather one based on a moral obligation.

#### Limited Issues Submitted

Defendant's motion for rehearing is based in part on the grounds that although the case was submitted on the limited issue of petitioners' right to recover the Commission determined as a matter of law that the petitioners were entitled to recover certain sums. With respect to certain of these items such as the \$30,603.94 shortage in the Trust Land Sales, the \$3,354.75 treaty funds not turned over to

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<sup>4/</sup> Opn. 8 Ind. Cl. Comm. 831, 884 - "It is for all these reasons hereinbefore stated that the Commission concludes that the United States was morally obligated in negotiating the 1862 treaty \* \* \* to see to it that ample safeguards in the way of supervision and control of the educational trust by the Government were provided in the treaty. The failure to provide these safeguards resulted in a loss to the Ottawa Indians because of the violations of the trust by the trustee."

<sup>5/</sup> The same reasoning applies to defendant's legal argument in its Memorandum (pp. 5-6) accompanying its motion to rehear that "The petition fails to state a cause of action."

the Ottawas, and the expenses of the 1872 and 1873 Commissions amounting to \$1,202.42, these are sums certain which further proof would not change in any respect.

The Commission further held that the United States was liable for the appraised value of the Ottawa school section in the amount of \$22,600.00 and the appraised value of 1,280 acres of Ottawa lands conveyed to Ottawa University in the settlement in the sum of \$7,490.00. Counsel for defendant argues that this determination deprives the Government of "an opportunity of offering evidence as to value of such land at whatever would be the proper valuation date." The school section (640 acres without improvements) had been appraised by a United States Commission in 1872 at \$22,600.00. What better evidence of the value of said section could be adduced by the Government in the light of such an appraisal made at or near the time that the Ottawa Indians were giving up their interests in the land by a settlement with Ottawa University? The 1280 acres were appraised by the same Commission as were the 10,702 acres valued at \$50,196.97 turned over to the trustees named in the settlement agreement of 1873.

Contention that Findings of Fact are Contrary  
to a Preponderance of the Evidence

This discussion by defendant's counsel is but a review of the evidence in the record, buttressed by what defendant contends is "newly discovered evidence." It is significant that few of the evidentiary findings of fact made by the Commission are questioned either directly or indirectly. One of the few to which attention is invited is Finding of Fact No. 4 which reads in part as follows:

4. Although the Ottawas were reported to be "far advanced in civilization," their chiefs knew no English, and only a few of the Indians could understand the language. The great majority were not sufficiently advanced to cope with the white man's civilization (Pet. Ex. 31). \* \* \*

The language in this part of the finding of fact made by this Commission is taken verbatim from Petitioner's Requested Finding of Fact 6 (page 8 of Pet. Prop. Fdgs) and to which requested finding the defendant interposed no objection (page 107 of Def. Brief).

Defendant now takes the position that evidence not submitted by the parties during the course of the trial would show that the Ottawa Indians were sufficiently advanced in civilization to handle an educational trust. The new evidence pertaining to the moral, spiritual, and educational advances in civilization is cumulative and therefore not of sufficient weight to change this finding of the Commission. <sup>6/</sup>

It is apparent that defendant's use of the new evidence is to show "the Ottawa Indians were probably further advanced in civilization at the date of the execution of the 1862 treaty than any of the Indian tribes that were located in the Kansas Territory." <sup>7/</sup> Assuming this were so, it would be a matter of degree and would not in itself be sufficient to cause an alteration of our finding of fact number 4.

Defendant also questions the Commission's Finding of Fact 5 in which we found in part:

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<sup>6/</sup> Defendant's Memorandum pp. 24-41 - The defendant's "newly discovered evidence" consists of exhibits 229-315 or 87 in number.

<sup>7/</sup> Def. Memo., pp. 39-40

So far as appears, "Roger Williams University" was an institution on paper only, with no tangible assets, and with expectations arising only from the possibility of obtaining lands from the Ottawas, and from the hope, with the lands as a start, of subsequently obtaining money contributions (Def. Ex. 132).

This finding of fact was requested by the petitioners in their proposed finding of fact number 7 (page 10 of Pet. Prop. Fdgs.) and during the original briefing of the case defendant interposed no objection to the requested finding (see page 107 of Def. Brief).

While the defendant again at page 65 of its Memorandum asserts "There is no substantial evidence to support the Commission's findings Nos. 1-45 inclusive herein" there is no attempt to further specifically challenge the evidentiary findings made by the Commission except for Finding of Fact 39 and the discussion by defendant with respect to that finding is but argument.

#### NEW EVIDENCE

One of the grounds for defendant's motion for rehearing is based upon so-called newly discovered evidence collected since our determination in this case which defendant believes clarifies and supports the Government's findings in this case. Defendant's new proposed exhibits are identified by number as exhibits 229 through 315--or a total of 87 exhibits. None of the proposed exhibits meet the requirements of Sec. 33(b)3 of the General Rules of Procedure of the Indian Claims Commission Act. We believe the new evidence is cumulative. <sup>8/</sup>

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<sup>8/</sup> Cf. - Gaddo Tribe v. U.S., 8 Ind. Cl. Comm. 354, 378-380



Defendant's counsel explains the "newly discovered evidence" as follows: 9/

During oral argument when the case was submitted counsel for the defendant pointed out to the Commission that he was the fourth attorney that had been assigned to represent the United States in this case and was under the handicap of trying, in a short time, to familiarize himself with a very voluminous record of exhibits which had been assembled and presented by the previous government attorneys assigned to the case.

\* \* \* Furthermore, defendant through additional investigation and research has located newly discovered evidence which clarifies and affirms its findings heretofore submitted to the Commission. \* \* \*

There is no showing that diligent research could not have discovered this evidence.

We have, however, considered defendant's proposed exhibits and it is not believed necessary to relate what each exhibit shows since we find them to be cumulative. Many are offered to support defendant's contention that the Ottawa Indians were sufficiently advanced in civilization to manage and control a trust. Much of this evidence offered in this respect is general or comparative in nature as to other tribes. Over half of the offered exhibits are contemporary newspaper clippings pertaining to a variety of things such as the growth of the town of Ottawa, the sale of Ottawa lands, delinquent tax lists, and stories on the history of Ottawa University. The weight to be given to such evidence as newspaper articles is always questionable and the materiality of much of this evidence is doubtful. However, the defendant's proposed

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9/ Def. Memo., p. 12

Exhibits numbered 229 to 315, inclusive, will be admitted in evidence and made a part of the record in this case.

Therefore, except for the admission in evidence of the exhibits, as set forth above, defendant's motion for rehearing will be denied for the reasons hereinbefore stated.

Wm. M. Holt  
Associate Commissioner

I concur:

T. Harold Scott  
Associate Commissioner