

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: November 26, 1962

ADDITIONAL FINDINGS OF FACT

Preliminary Statement

This case is before the Commission for the second time for the purpose of determining the amount of recovery petitioners are entitled to have of and from defendant which issue as to certain transactions was not ascertainable without additional hearings. In the prior decision (8 Ind. Cl. Comm. 831) this Commission determined that the United States was liable to petitioners for certain specific sums of money and by Interlocutory Order of June 29, 1960, also held the petitioners were entitled to recover as follows:

2. . . .
  - (a) The appraised value of the 10,702 acres of school lands, amounting to \$50,196.97, turned over to trustees by the 1873 agreement for sale for benefit of the Ottawas, less whatever sums are shown to have been actually paid to the Ottawas by the trustees from the proceeds of sale and less the amounts expended for expenses and services of trustees set forth in Finding of Fact No. 44, and

- (b) For an amount equal to the profit that may be shown was made by Hutchinson and Kalloch from the sale of 5,000 acres of Ottawa school land which may be shown by the records of bona-fide first sales of these lands, and
- (c) For the value of 3,032 acres of Ottawa school lands sold by the trustees who did not invest the proceeds as required by the Treaty of June 24, 1862--the amount to be determined by taking the average sales prices of record for these sales.

Defendant's motion for a rehearing was denied by the Commission (9 Ind. Cl. Comm. 98) and the case proceeded to trial on the remaining issues and on the question of offsets. The Commission makes the following additional findings of fact which are supplemental to Findings of Fact No. 1 through No. 45 hereinbefore previously entered herein (8 Ind. Cl. Comm. 831-874):

46. The parties have stipulated that the value of the 10,702 acres of school lands was appraised by the Irwin Commission on August 23, 1872, at \$50,196.97, and that the sum of \$1,571.45 had been expended by the trustees charged with disposing of said lands for expenses and services (Finding of Fact No. 44). On December 4, 1881, the Ottawa Indians received the sum of \$4,934.27 from the trustees as payment under the settlement made under the Act of 1873 (Findings of Fact Nos. 32-33). On March 10, 1883, the Federal District Court at Topeka, Kansas, examined the accounts of the trustees and found the amount then due the Ottawa Indians from the trustees was \$7,280.88 but the judge "did not make any order for the transfer of said fund" (Def. Ex. 169). Petitioners are entitled to recover of defendant \$50,196.97, less the sums of \$1,571.45 and \$4,934.27, or a total amount of \$43,691.25.

47. The parties stipulate that the evidence in this case shows that the 640 acre tract of school lands was sold by J. W. Young to C. C. Hutchinson on January 19, 1864, for \$800.00, which tract said Hutchinson conveyed on September 15, 1864, to the Ottawa Town Company for \$10,000.00 (Finding of Fact No. 11(a)), and that the Ottawa Town Company had this 640 acre tract divided into town lots and thereafter sold them within the next few years for the sum of \$116,172.68. Hutchinson by thus dealing with these lands made a profit of \$9,200.00 and petitioners are entitled to recover this sum from defendant.

48. (a) On February 24, 1865, the General Land Office issued a patent for 4,348.79 acres of the 5,000 acre school land tract to I. S. Kalloch as assignee of J. W. Young. On June 17, 1865, I. S. Kalloch sold Richard D. Lathrop an undivided one-half interest in the 5,000 acre tract for the sum of \$4,000.

Between 1865 and 1871, 4,093.60 acres of the 4,348.79 acre tract were resold by the following parties to the public for the sum of \$43,537.03 as follows:

	<u>Acres</u>	<u>Amount</u>
(1) I. S. Kalloch and Wife	2,818.12	\$18,292.84
(2) R. D. Lathrop	982.81	18,106.56
(3) I. S. Kalloch and R. D. Lathrop	130.12	2,550.00
(4) C. C. Hutchinson	<u>162.55</u>	<u>4,587.63</u>
Total	4,093.60	\$43,537.03

Of the total 4,348.79 acres, 255.19 acres are unaccounted for. By agreement of counsel these acres had an average value of \$12.35 per acre or a total of \$3,151.59.

Since the record does not show otherwise, we think it must be presumed that Kalloch received half of this sum or \$1,575.80.

The total amount received by Kalloch amounts to \$27,344.31 (\$4,000 + \$21,768.51 (half of \$43,537.03) + \$1,575.80 = \$27,344.51). From this must be deducted the original purchase price \$5,450.00 to show Kalloch's profit.

(b) However, in the sales enumerated above, petitioners contend that the sale to Lathrop and also the following 1,020 acres were not bona fide sales:

	<u>Amount</u>
(1) I. S. Kalloch to Sen. Pomeroy .... 380	\$ 475.00
(2) I. S. Kalloch to Sen. Lane ..... 400	500.00
(3) Kalloch and Lathrop to H. F. Sheldon .....	
<u>240 + 6 lots</u>	<u>100.00</u>
1,020 + 6 lots	\$1,075.00

Petitioners have offered no evidence to show that the sale to Lathrop was not an arm's length transaction and it must be considered bona fide. With respect to the sale to Senator Pomeroy the resale by the Senator occurred almost three years later. Improvements or change in conditions during the time interval undoubtedly added value to these lands. This is clear from the fact that adjoining lands had sold in 1864 at about \$2.50 an acre (Finding of Fact No. 11(e)). The evidence shows the sale to Senator Pomeroy may have been below the market value of these lands in 1865 but petitioner has introduced no evidence comparing this 380 acre tract with adjoining lands in 1865. The same factors

are present in the sale to Senator Lane of 400 acres in 1865 at \$1.25 per acre (Finding of Fact No. 11(f)) which were sold in 1866, together with 90 town lots, for \$2,000.00. The sales price of the town lots is not separately stated nor may it be determined whether they or the other lands contained improvements when sold by Senator Lane. For these reasons the sales made by Senators Pomeroy and Lane may not be considered as first sales to ascertain the profits made by Kalloch. On July 29, 1868, R. D. Lathrop sold to H. F. Sheldon 240 acres and six lots in the town of Ottawa for \$100.00 and on the same day Sheldon sold these for \$1600.00. The record does not show separately the sales price of the lots when sold by Sheldon. Some individual lots sold for \$350.00 and \$400.00 in 1868. Sheldon's sale cannot be considered a first sale. Petitioners are entitled to recover Kalloch's share of \$27,344.31 from the sales less \$5,450.00 paid for the lands, leaving a balance of \$21,894.31.

49. The total recited consideration received for 3,032.24 acres of school lands sold by Hutchinson (Finding of Fact No. 41), as a member of the Board of Trustees established by the Treaty of June 24, 1862 (12 Stat. 1237) was \$22,685.13. Additional consideration was disclosed by deed examination, Franklin County, Kansas, and amounted to \$1,469.50. For 30 acres of the aforesaid 3,032.24 acres, no actual consideration was determinable, but at the average price paid for the remaining acres (\$8.05 per acre, see Stipulation, Tr., Oct. 5, 1961,

p. 8) amounts to an additional \$241.54. Petitioners are entitled to recover a total of \$24,396.17 for said 3,032.24 acres.

50. Summary - Petitioners are entitled to recover from defendant the following sums:

(1) Trust Land Funds unaccounted for by Agent Hutchinson (with accrued interest thereon at rate of 5% from March 22, 1869, to March 22, 1934, and 4% thereafter) .....	\$30,603.94
(2) Appraised value of School Section .....	22,600.00
(3) Appraised value of 1280 acres conveyed to University .....	7,490.00
(4) Treaty Funds .....	3,354.75
(5) Expenses of 1872 and 1873 Commission paid by Ottawas .....	1,202.42
(6) Value of School Lands in Trust in Liquidation .....	43,691.25
(7) Hutchinson's Profit on Sale of Townsite .....	9,200.00
(8) Profit by Kalloch and Hutchinson on Sale of 4,348.79 school land tract ....	21,894.31
(9) Consideration for Sale of 3,032.24 acres of School Lands by Hutchinson ...	24,396.17

OFFSETS

51. Defendant seeks offsets in the amount of \$15,996.26. The claimed offsets consist of three classifications. First, defendant would offset \$11,372.97 as the value of 1,747 acres of land which defendant contends petitioners received in excess of the amount of land promised them under Articles III and XI of the Treaty of August 30, 1831, 7 Stat. 359, II Kapp. 335. The second classification of offsets involves claimed offsets totaling \$2,014.55 which defendant urges were gratuitously expended from public funds for the benefit of the Ottawa Indians of Blanchard's Fork and Roche de Boeuf during the period from 1862 to 1947. The third division involves claimed offsets of \$2,608.74 which defendant asserts is petitioners' proportionate share of sums gratuitously expended from public funds from July 1, 1870, to August 31, 1947, for these Ottawa Indians jointly with other Indians of the Quapaw Agency.

52. Claimed Offset for 1,747 Acres - By the Treaty of August 30, 1831, supra, the United States agreed to grant the Ottawas of Blanchard's Fork a tract of land to contain 34,000 acres (Art. III) and an adjoining tract of 40,000 acres of land, west of the Mississippi, to the Ottawas of Roche de Boeuf. The Commission previously found (Finding of Fact No. 2) that the new reservation thus obtained contained approximately 75,000 acres and may have contained 75,747 acres when allocated by the 1862 treaty although the acreage figures were approximate since the documentary proof varied (Finding of Fact No. 9). In any event

defendant is not entitled to this offset of \$11,372.97 for 1,747 acres of land allegedly given gratuitously to the petitioners in 1831 long prior to the dates of the treaties involved in this case, The Quapaw Tribe v. United States, 128 C. Cls. 45.

53. Claimed Offsets of \$2,014.55 for Ottawas alone.

(a) Purchase of Seed - \$87.50 -- During the fiscal year 1879-1880 the sum of \$87.50 was expended for the benefit of these Ottawa Indians in purchasing 100 bushels of seed wheat (Def. Ex. 0-1(a) and letter attached dated September 11, 1879). The disbursement was made from the Osage Civilization Fund (See GAO Report, Def. Ex. 317, p. 39) and is not allowable as an offset, Quapaw Tribe v. United States, 128 C. Cls. 45; Red Lake, et al., v. United States, 9 Ind. Cl. Comm. 457, 467, 495.

(b) Purchase of Clothing - \$130.95. This sum consists of \$124.40 expended in fiscal year 1891 for "the destitute among the Ottawa Indians." These are proper offsets. Two items making up the balance of \$130.95, that is \$3.95 for one pair of shoes and \$2.50 for two sets of unionsuits in 1922 under an appropriation "Relieving Distress & Prevention, etc. of Disease among Indians, 1922" are not tribal gratuities and therefore not proper offsets.

(c) Expenses of Indian Delegations - \$800.00. A delegation of Ottawa Indians from petitioner bands went to Washington, D. C. to try to secure the passage of the Act of June 10, 1872, 17 Stat. 388 (Finding of Fact No. 28). Since passage of this Act would not have been necessary



if the defendant had performed its moral obligation to the Ottawas the sum is disallowed as an offset.

(d) Funeral Expenses - \$185.00. During the fiscal years 1919-1920 and 1931-1932 the sum of \$185.00 was expended gratuitously for the burial of indigent Ottawa Indians. Petitioner does not object to this offset if offsets are allowed. The defendant is entitled to offset \$185.00.

(e) Provisions - \$752.10. During the fiscal years 1891, 1895, 1917, 1919, 1920, 1923, 1924 and 1931-1936, expenditures for provisions in this amount were made by the United States. The amount of \$6.00 disbursed in fiscal year 1895 was under appropriation "Contingencies, Indian Department" and may well have been for agency use (Def. Ex. 317, p. 44). The balance \$746.10 is a proper offset.

(f) Travel Expenses of Indigent Indians - \$59.10. During the fiscal years 1883 and 1895 the sum of \$59.10 was expended for travel expenses of indigent Indians. These disbursements were not a tribal gratuity, and are not proper offsets. Red Lake et al., v. U. S., 9 Ind. Cl. Comm. 457, 495.

54. Expenditures - Jointly to Ottawas and other Indians at Quapaw Agency - \$2,608.74

During the period July 1, 1870, to August 31, 1947, the United States claims there was gratuitously expended jointly for the benefit of the Indians of the Quapaw Agency, including these Ottawas, the sum of \$20,428.67. The population percentage of the Ottawas to the total

Indian population of the agency was 12.77% and the defendant requests offsets of \$2,608.74, to be taken from the following:

(a) Clearing, Breaking and Fencing Land - \$28.00. This sum was expended in fiscal year 1883, under appropriation "Support of Indians of Central Superintendency." The amount of the item being a small sum it appears to have been an individual benefit rather than a tribal one. It is disallowed.

(b) Digging Wells and Well Equipment - \$21.00. During the fiscal years 1882 and 1883 the sum of \$21.00 was expended at the Quapaw Agency for "Assisting in digging wells" and "cementing cistern." These expenditures appear to have been for the benefit of individuals rather than tribal in nature and are disallowed.

(c) Planting and Harvesting Crops - \$51.91. During the fiscal year 1880 this sum was expended at the Quapaw Agency for cutting and stacking 37 tons of hay. This item is allowed as an offset.

(d) Purchase of Seeds - \$291.05. During the fiscal years 1881, 1882 and 1942 the sum of \$291.05 was expended at the Quapaw Agency for the purchase of seeds. Of this sum \$3.00 was expended in 1942 under appropriation "Agriculture and Stock Raising among Indians"; \$90.95 in 1881 from the "Civilization Fund"; and the balance \$197.10 in 1882 under an appropriation for "Support of Indians Central Superintendency." The expenditure of \$90.95 from the Osage Civilization fund (GAO Report, p. 236) is not allowed as an expenditure from public funds. The balance of \$200.10 is allowable as an offset.

(e) Agricultural Implements and Equipment - \$1,382.23. During the fiscal years 1880, 1881, 1883, 1939, and 1943 the sum of \$1,382.23 was expended at the Quapaw Agency for items in this category. Of this sum \$50.00 was disbursed from the Osage Civilization Fund in 1880 (GAO Report, p. 237) and is not an allowable offset; and \$4.55 expended in 1883 under appropriation "Contingencies, Indian Department" (GAO Report, p. 237) is not allowed as an offset. The sum of \$1,327.68 for agricultural implements and equipment is allowed with the Ottawas to be charged their proportionate share.

(f) Clothing - \$3.90. In fiscal year 1880 there was expended this sum for the purchase of 10 balmoral skirts. The sum is allowed.

(g) Expenses of Indian Delegation - \$2.87 - This sum was expended to purchase 34½ pounds of bacon in fiscal year 1880 for the use of Indian delegates. There is no evidence concerning the purpose and for whose benefit the trip was made. It is not a proper offset.

(h) Hardware, Glass, Oils and Paints - \$250.36. During the fiscal years 1880, 1881, 1882, 1885, 1889 and 1943, this sum was expended at the Quapaw Agency for items in this category. Of this amount \$6.72 was disbursed from the "Civilization Fund" (Def. Ex. 317, p. 235) in fiscal year 1880 and is not a proper offset. The sums of \$4.55 and \$22.87 disbursed under an appropriation "Contingencies, Indian Department" in fiscal year 1883 and 1889 could well have been agency expenses and are not allowed. The amount of \$216.22 is allowed as an offset.

(i) Household Equipment and Supplies - \$194.79. This amount was expended at the Quapaw Agency in the fiscal years 1885, 1887, 1888, 1891, 1937, 1938, 1940 and 1941 for items in this category. Of these items, fifty-five cents was expended in fiscal year 1887 (Def. Ex. 317, p. 238) under appropriation "Contingencies, Indian Department" and also \$3.68 in fiscal year 1891 (GAO Report, p. 239), and these amounts are not allowed as offsets. The amount of \$190.56 is allowable.

(j) Hunting and Fishing Equipment - \$9.00. During the fiscal year 1883 this amount was expended under the appropriation "Support of Indians of Central Superintendency" for the purchase of 300 cartridges required for slaughtering beef cattle. The sum is allowed as an offset.

(k) Board for Indigent Indians - \$33.20. During the fiscal year 1881 there was expended from the "Osage Civilization Fund" the above amount "For board furnished five orphan Indian children belonging to Quapaw Indian Agency School - during vacation - \* \* \* ." This sum is denied as an offset.

(l) Clothing, Indigent Indians - \$98.23. This amount was expended at the Quapaw Agency for "clothing for May Whitecrow's children, indigent Indian pupils attending public schools" in fiscal years 1947 and 1948 under an appropriation for the Bureau of Indian Affairs which provided for "Welfare of Indians." The item is an individual rather than a tribal benefit and the tribal affiliation of May Whitecrow no doubt could be established. The sum as a joint offset is denied.

(m) Funeral Expenses Indigent Indians - \$96.24. Of this sum \$75.00 was expended for the funeral of an infant child of Ernest Whitetree (tribal affiliation not shown) from the appropriation "Welfare of Indians." This sum is not allowed (Red Lake, et al., v. U. S., 9 Ind. Cl. Comm. 457, 506, 507). The remaining expenditures totaling \$21.24 from appropriation "Contingencies, Indian Department" are allowed.

(n) Subsistence for Indigent Indians - \$608.27. This amount was expended at the Quapaw Agency during fiscal years 1947 and 1948 from appropriations made for the "Welfare of Indians." This category is denied as an offset. (Red Lake, et al., v. U. S., 9 Ind. Cl. Comm. 457, 506, 507).

(o) Feed and Care of Livestock - \$2,976.96. During the fiscal years 1881, 1883, 1884, 1885, 1886, 1889, 1890, 1891 and 1894, this amount was expended for items under this category at the Quapaw Agency. Of this sum, the amount of \$2,234.96 was expended under appropriations for "Contingencies, Indian Department," may well have been for agency use and is not allowed as a proper offset. The balance of \$742.00 was expended under the appropriation "Support of Indians" and is a proper offset.

(p) Recovery of Strayed or Stolen Livestock - \$14.50. This sum was expended in fiscal year 1882 under appropriation "Support of Indians of Central Superintendency" and is a proper offset.

(q) Purchase of Provisions - \$5,140.57. This amount was expended for items in this category during the fiscal years 1871, 1873, 1875, 1878 through 1889, 1893 and 1847. Of these items the following are not proper offsets: \$172.40 disbursed in fiscal year 1881 from the "Civilization Fund"; \$9.70 in 1887, \$19.50 in 1889, \$17.40 in 1890, \$77.00 in 1893 (all fiscal years) under appropriation "Contingencies, Indian Department," or a total of \$296.00. The balance of \$4,844.57 for provisions is a proper offset.

(r) Surveying and Allotting - \$5.00. During the fiscal year 1907 this sum was disbursed from the appropriation "Contingencies, Indian Department" for an abstract of title number 314 for an allotment to Ettie Hammett, a deceased Quapaw Indian. The item is not a proper offset.

(s) Transportation - Defendant claims items under this category to be offsetable as transportation costs as follows:

Agricultural Implements and Equipment	\$460.77
Clothing	365.70
Feed for Livestock	357.74
Fuel	1,312.33
Hardware, Glass, Oils and Paints	829.45
Household Equipment and Supplies	664.19
Livestock	61.60
Miscellaneous Building	1,354.39
Miscellaneous Indian Supplies	132.70
Provisions	3,636.60
Supplies for Agricultural Aid	45.12

These transportation costs include items for which there is no corresponding category showing offsets for items furnished the Indians; some of the transportation items exceed the total amount claimed in the categories

showing disbursements for items furnished the Indians; some part of the transportation costs in certain of the categories would be for items which have been disallowed as offsets; costs paid for transportation of articles which themselves cannot be offsetable cannot be offset and no method is available for allocation of costs to allowable offsets.

Red Lake, et al., v. U. S. 9 Ind. Cl. Comm. 457, 474-475. The transportation costs are not proper offsets.

55. Summary Allowable Offsets

Defendant is entitled to set off against the award in this case the following amounts which total \$2,028.77.

<u>Ottawa Alone</u>	(12.77% of total)	<u>Joint Disbursements</u>	
Clothing	\$124.40	Planting & Harvesting Crops	\$ 6.63
Funeral Expenses	185.00	Purchase of Seeds	25.55
Provisions	<u>746.10</u>	Agric. Imp. & Equip.	169.54
Total	\$1,055.50	Clothing	.50
		Hardware, Glass, Oils,	
		Paints	27.61
		Household Equip. & Supplies	24.33
		Hunting & Fishing Equip.	1.15
		Funeral Expenses	2.71
		Feed & Care of Livestock	94.75
		Recovery of Strayed or	
		Stolen Livestock	1.85
		Provisions	<u>618.65</u>
			\$973.27

56. The Commission finds that the course of dealings between petitioners and defendant has not been such that the defendant is prohibited from setting up against the award in this case the offsets allowed herein.

57. Conclusion - Petitioners are entitled to recover of and from the defendant the amounts listed in Finding of Fact No. 50, less offsets in the amount of \$2,028.77.

Wm. M. Holt  
Associate Commissioner

T. Harold Scott  
Associate Commissioner