

BEFORE THE INDIAN CLAIMS COMMISSION

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| THE ABSENTEE SHAWNEE TRIBE |) | |
| OF OKLAHOMA, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | Docket No. 334-B |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |

Decided: March 29, 1963

FINDINGS OF FACT

The Commission makes the following Findings of Fact:

1. The petitioner, The Absentee Tribe of Oklahoma, is a duly organized tribe recognized by the Secretary of the Interior and has the authority and capacity to bring this claim before this Commission under the provisions of the Indian Claims Commission Act (60 Stat. 1049; 25 U.S.C. 70).

2. This action is brought to determine the liability of the defendant to the petitioner with respect to the sale of certain surplus lands in Kansas which were a portion of lands reserved to the Shawnee Indians under the Treaty of May 10, 1854 (10 Stat. 1053), and the disposition of the funds realized from their sale.

3. On November 7, 1825, a convention was made between William Clark, Superintendent of Indian Affairs and the chiefs and headmen of the Shawnee Nation whereby a tract of land was granted to the Shawnees in Kansas. By treaty made at Wapaghkonetta, Ohio, on August 8, 1831, the Shawnee band residing in Ohio agreed to cede their lands to the United

States in return for their removal to the western side of the Mississippi River and for a tract to contain 100,000 acres located within the area granted to the Shawnee Indians of Missouri by the Treaty of November 7, 1825.

On May 11, 1844, President John Tyler executed a deed conveying to the Shawnee Tribe of Indians the following lands:

* * * all the tract of country lying west of the State of Missouri, which was designated and set apart for the Shawnees in fulfilment of, and pursuant to, the second and third articles of a convention made between William Clark, Superintendent of Indian Affairs, and the chiefs and headmen of the Shawnee nation of Indians, at St. Louis, on the seventh day of November, one thousand eight hundred and twenty-five, which said tract was conveyed to said tribe, (subject to the right secured by the second article of the treaty made at Wapaghkonetta, on the eighth day August, one thousand eight hundred and thirty-one,) by John Tyler, President of the United States, by deed bearing date the eleventh day of May, one thousand eight hundred and forty-four -- said tract being described by metes and bounds as follows 'Beginning at a point in the western boundary of the State of Missouri, three miles south of where said boundary crosses the mouth of Kansas River, thence continuing south and coinciding with said boundary for twenty-five miles; thence due west one hundred and twenty miles; thence due north, until said line shall intersect the southern boundary of the Kansas reservation; thence due east, coinciding with the southern boundary of said reservation, to the termination thereof; thence due north, coinciding with the eastern boundary of said reservation, to the southern shore of the Kansas River, thence along said southern shore of said river, to where a line from the place of beginning drawn due west, shall intersect the same' -- * * *
(10 Stat. 1053)

4. In 1854, George W. Manypenny, Commissioner, negotiated with the several bands of Shawnee Indians who were parties to the treaties of November 7, 1825 and August 8, 1831, for cession of their lands to the United States. On May 10, 1854, a treaty was made by which, under Article 1, the Shawnee Tribe of Indians ceded and conveyed to

the United States all the tract of land conveyed to them in 1844 and lying west of the State of Missouri which had been set apart for the Shawnees described as follows:

* * * Beginning at a point in the western bounday of the State of Missouri, three miles south of where said boundary crosses the mouth of Kansas River, thence continuing south and coinciding with said boundary for twenty-five miles; thence due west one hundred and twenty miles; thence due north, until said line shall intersect the southern boundary of the Kansas reservation; thence due east, coinciding with the southern boundary of said reservation, to the termination thereof; thence due north, coinciding with the eastern boundary of said reservation, to the southern shore of the Kansas River, thence along said southern shore of said river, to where a line from the place of beginning drawn due west, shall intersect the same -- estimated to contain sixteen hundred thousand acres, more or less, (excepting and reserving therefrom, two hundred thousand acres, for homes for the Shawnee people -- which said two hundred thousand acres is retained, as well for the benefit of those Shawnees, parties to the treaty of August eighth, one thousand eight hundred and thirty-one, as for those parties to the treaty of November seventh, one thousand eight hundred and twenty-five). (10 Stat. 1054)

5. Article 2 of the treaty provided for distribution of the lands to be taken in severalty by most of the tribe and in common by two small bands, Black Bob's Settlement and Long Tail's Settlement. The treaty further recited that it was anticipated that there would still be a residue of land after such distribution. In order to provide for those members of the tribe not actually with the tribe at the time of the treaty, the following provision was made:

* * * After all the Shawnees, and other persons here~~in~~ provided for, shall have received their shares of the two hundred thousand acres of land reserved, it is anticipated that there will still be a residue; and as there are some Shawnees who have been for years separated from the tribe, it is agreed that whatever surplus remains, after provision is made for all present members of the tribe, shall be set apart, in one body of land, in compact form, under the

direction of the President of the United States; and all such Shawnees as return to, and unite with the tribe, within five years from the proclamation of this instrument, shall be entitled to the same quantity of lands, out of said surplus, and in the same manner, and subject to the same limitations and provisions as are hereinbefore made for those now members of the said tribe; * * * (10 Stat. 1055)

To further protect the interests of those Shawnees absent from the main body of the tribe, Article 2 contains the following provisions:

* * * and whatever portion of said surplus remains unassigned, after the expiration of said five years, shall be sold as hereinafter provided, -- the proceeds of all such sales shall be retained in the treasury of the United States, until the expiration of ten years from the proclamation of this instrument, after which time, should said absent Shawnees not have returned and united with the tribe, all the moneys then in the treasury, or that may thereafter be received therein, as proceeds of the sales of such surplus land, shall be applied to, or invested for, such beneficial or benevolent objects among the Shawnees, as the President of the United States, after consulting with the Shawnee Council, shall determine, -- and should any such absent Shawnees return and unite with said tribe, after the expiration of the period of five years hereinbefore mentioned, and before the expiration of the said period of ten years, the proper portion of any of said residue of lands, that they may remain unsold, shall be assigned to such persons; and if all said lands have been disposed of, an equitable payment in money shall be made to them out of the proceeds of the said sales. * * * (10 Stat. 1055)

By these provisions the existence of Shawnees separate and apart from the main body of the tribe was recognized. However, their separation from the tribe had removed from them any vested rights in the tribal property in Kansas. Article 2 specifically sets out as a condition precedent to establishment of their right to claim the lands in Kansas that they "return to, and unite with the tribe within five years from the proclamation of this instrument * * *" and that should any "return and unite" with the tribe after the expiration of the first five year period and before expiration of the ten year period, they might claim a portion

of the unsold land, if there be such, or an equitable payment of money if all the lands be sold.

6. When the war between the states began in 1861, this area was soon overrun by raiders and the Indians, including some of the Shawnees, became wanderers. In 1862 about 100 Shawnees who had been living in Indian territory were reported to have returned to the Shawnee area in Kansas. According to a letter from Shawnee chiefs to Indian Agent Taylor, dated April 22, 1869, these Indians were in a destitute condition.

A meeting was called by the Shawnee chiefs to inform them of their rights and privileges with respect to Shawnee lands as guaranteed by the Treaty of 1854, and they were urged to unite with the tribe and to select lands. The absentees held a meeting to consider the matter, and decided they would not take advantage of the offer but would return to Indian territory where it was not so cold. The Shawnees in council, nevertheless, decided that these Indians should share in their last annuity payment for 1861, and requested the Indian Agent to put the names on the pay roll so that they would receive a share of the annuity as an act of benevolence. After the payment was made in January 1863, they departed to join the Refugee Indians in southern Kansas and never returned.

Ex-agent Abbott, by letter dated April 23, 1869, stated that during his term, only four absent Shawnees returned and claimed land under the 1854 treaty. He confirmed the fact that more than 100 destitute absent Shawnees came to the main area of the tribe in Kansas during the war -- but although they were fully advised as to their rights under the Treaty of 1854, they refused to return to, unite with the tribe and take up land, preferring to return to Indian country after cessation

of hostilities. He also confirmed that they were placed on the payroll at the request of the other Shawnees in order that their destitute condition might be to a degree relieved and that upon receiving \$70.00 each in January, 1863, they left to return to Indian country.

7. Congress, by the Act of March 3, 1859 (11 Stat. 430), authorized the Shawnee Indians to sell portions of lands set aside for them in severalty under the Treaty of 1854. Soon thereafter, 148 sales were confirmed covering 11,500 acres at an average of 6¢ per acre.

8. Under the provisions of Article 2 of the Treaty of 1854, a tract of land consisting of 24,138.31 acres was set aside for "Shawnees who have been for years separated from the tribe, * * * and all such Shawnees as return to and unite with the tribe, within five years from the proclamation of this instrument * * *". By June 14, 1867, several Shawnees had returned and a total of 1,997.61 acres had been assigned, leaving 22,140.71 acres of surplus lands.

In 1863, President Lincoln, by Proclamation, declared the surplus lands within the Shawnee area available for sale, but because of the state of war, the sale was delayed until after the cessation of hostilities.

9. It was the hope of the Indian Bureau that the allocation of lands to the Indians in severalty combined with assistance from annuities would result in the Indians acquiring settled habits, a new concept of pride in personal property and farming their lands. This was accomplished to some degree, but the westward movement of white settlers was a constant, disturbing influence. Combined with the concept that the Indians were better off if controlled absolutely,

because if given freedom, they were subject to all the dangers and temptations purposely put in their way by the white man, there was created a constant pressure to place Indians upon isolated reservations and to restrict their actions and contacts with the white man.

10. Prior, during and after the Civil War, white settlers poured into the subject area, and because of the presence of the Indians and their possession of what the settlers claimed to be the "best lands" there was a constant clamor for the removal of the Indians to the south. Many settlers took over Indian lands -- and the surplus lands especially. They improved the lands although repeatedly warned of their status as trespassers, and claimed they were encouraged in this by reports that Congress would look after the rights of the settlers.

On the other hand, the feeling of unrest and uncertainty as to retention of their lands due to the white settlers' presence was evidenced in the Indians' attitude and they, to a degree, lost interest in farming and expressed a desire to sell all their lands and remove to Indian territory to live with the Cherokees. These desires prompted the promulgation of a number of treaties (1862, 1864, 1866 and 1867), which although signed by the Indians and various officials of the Department of the Interior, and concurred in by the President in the case of the 1864 and 1867 treaties, none of them was ratified by the Senate.

All of the treaties contained a provision for sale of the lands at not less than \$1.25 per acre, and in some cases \$2.50 per acre.

11. The Shawnee Indians, now known as the Absentee Shawnee Tribe of Oklahoma, settled on a tract in Oklahoma in 1840 which was within a

tract purchased by the United States from the Creeks and Seminoles where they resided continuously except for a few years during the Civil War. With the assistance of the Indian agents for the Sac and Fox tribes, they became firmly established upon the land, showed promise of becoming good farmers and were generally industrious. At the urging of the Indian agents, they were given funds to assist in their agricultural progress although they received no allotments and eventually were given permission to remain permanently on those lands by allotments of land. (Sec. 2, Act of May 23, 1872, 17 Stat. 159, 160) Further assistance for improvement of their allotments was granted to the extent of \$65,000 (Act of March 3, 1891, 26 Stat. 989, 1020). The United States, in turn, paid the Creeks and the Seminole for the lands allotted to the Shawnees and at a later date, paid the Potawatomie for the same lands. Under this latter Act of 1891, the absentees were recognized by the United States of America as the Absentee Shawnee Tribe of Oklahoma.

12. By Joint Resolution of Congress No. 9 of April 7, 1869 (16 Stat. 53), the remaining surplus lands within the Shawnee area were ordered sold to actual settlers on the lands. The preamble to this resolution contains the following statement as to the status of the absent Shawnees:

WHEREAS a large tract of lands set apart by a treaty with the Shawnee tribe of Indians, dated May tenth, anno Domini eighteen hundred and fifty-four, and proclaimed November second, anno Domini eighteen hundred and fifty-four, for the benefit of certain absentees of the said Shawnee tribe, is now, and for many years past has been, occupied by a large number of white settlers and citizens of the State of Kansas; and whereas the beneficial interest of the said absentee Shawnees in said lands was and is absolutely forfeited by reason of their continued absence and non-affiliation with the said Shawnee tribe; * * * (16 Stat. 53)

The resolution further provided that each bona fide settler

now occupying said lands and having made improvements thereon, shall be entitled to purchase the land so occupied and improved by him, not to exceed one hundred sixty acres in each case, at the price of two dollars and fifty cents per acre, under such rules and regulations as the Secretary of the Interior shall prescribe: Provided, however, That the proceeds of said sales shall be applied in accordance with the provisions of the treaty between the United States and the said Shawnee Indians, proclaimed November second, anno Domini eighteen hundred and fifty-four.

The Treaty of 1854 contained the following provision as to disposition of funds realized from the sale of surplus lands:

* * * and whatever portion of said surplus remains unassigned, after the expiration of said five years, shall be sold as hereinafter provided, -- the proceeds of all such sales shall be retained in the treasury of the United States, until the expiration of ten years from the proclamation of this instrument, after which time, should said absent Shawnees not have returned and united with the tribe, all the moneys then in the treasury, or that may thereafter be received therein, as proceeds of the sales of such surplus land, shall be applied to, or invested for, such beneficial or benevolent objects among the Shawnees, as the President of the United States, after consulting with the Shawnee Council, shall determine, -- * * * (10 Stat. 1055)

13. On June 7, 1869 the Shawnee Tribe entered into an agreement with the Cherokee Nation, whereby they would affiliate with and become a part of the Cherokee Nation upon payment of \$50,000 which would come from the sale of such surplus lands. In 1871 there remained 971-40/100 acres unsold. In 1883 the Shawnee Council consented to the purchase by settlers of lands occupied by them after the Resolution of 1869 at \$2.50 per acre -- and requested that proceeds be used for the benefit of the tribe.

14. The Treaty of 1854 recognized that there were certain Shawnees who at the time of the execution of the treaty were living

elsewhere, and in an effort to protect them and insure them an opportunity to re-unite with the tribe in Kansas and claim an allotment in its land as had other Shawnees, it made provision whereby they might individually share in the surplus lands designated for that purpose if they returned to and united with the Shawnees proper within a ten year period. That they return to and unite with the tribe was plainly a condition precedent to acquiring any vested right in the surplus lands.

15. The absent Shawnees who were not residing in Kansas with the tribe at the time of the Treaty of 1854, were, and had been for about 14 years, living in Indian territory, and, although advised of their individual rights and privileges under the Treaty of 1854, they, with a few exceptions, not only neglected but refused to take advantage thereof.

16. The right to return to and unite with the tribe, and the decision to exercise that right was an individual right; that the alleged losses, if any, were individual losses, and that they are not properly the subject of a claim by the petitioner tribe before this Commission.

17. The surplus lands remaining at the end of the 10 year period provided for in the Treaty of 1854 were sold and the proceeds from such sales were used for the benefit of the Shawnee Tribe in accordance with Article 2 of the treaty, i.e., for the purchase of other lands from the Cherokee Nation with whom the Shawnees wished to unite and which use of funds was approved by the Shawnees in 1869.

Accordingly, this Commission finds that the petition must be
and is dismissed.

T. Harold Scott
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner