

## BEFORE THE INDIAN CLAIMS COMMISSION

|                               |   |                |
|-------------------------------|---|----------------|
| ABSENTEE DELAWARE TRIBE OF    | ) |                |
| OKLAHOMA, DELAWARE NATION,    | ) |                |
| ex rel., W. E. EXENDINE AND   | ) |                |
| MYRTLE HOLDER,                | ) |                |
|                               | ) |                |
| Petitioners,                  | ) |                |
|                               | ) |                |
| v.                            | ) | Docket No. 337 |
|                               | ) |                |
| THE UNITED STATES OF AMERICA, | ) |                |
|                               | ) |                |
| Defendant.                    | ) |                |

Decided: August 5, 1963

ADDITIONAL FINDINGS OF FACT

The Commission makes the following findings of fact which are supplemental to Findings 1 through 12 inclusive heretofore entered.

13. The Treaty of September 24, 1829 (7 Stat. 327), granting certain lands in Kansas to the Delaware Nation as their permanent residence became effective by its terms upon ratification. The treaty was ratified by Senate Resolution on April 29, 1830. Therefore, the Commission finds the effective date of the treaty and the date of valuation of the subject lands to be April 29, 1830.

14. The lands in Kansas granted by the United States to the Delaware Nation under the Treaty of September 24, 1829, contained 1,884,160 acres, of which 924,160 acres composed the so-called Residence Lands and 960,000 acres made up the so-called Outlet Land. The land is more particularly described in Finding 5.

The lands so granted were part of the Indian Territory west of the Missouri River which had been set aside for the use and occupancy of Indian tribes, including tribes such as the petitioners herein, that had

been removed from locations east of the Mississippi River.

15. The claims of the indigenous tribes to the lands granted to the petitioners herein were extinguished by the United States by two treaties, one made with the Kansas Nation on June 3, 1825 (7 Stat. 244), and one made with various Pawnee bands on October 9, 1833 (7 Stat. 448).

16. The eastern portion of the subject tract is more commonly known and identified as the "Residence Lands" and consisted of rich, rolling prairies with some hilly, broken and rocky areas, particularly in the eastern portion near the Missouri River. However, said rough and hilly lands were in relatively few townships. The Residence Lands were bounded by the Missouri River on the east and the Kansas River on the south. The Grasshopper (now the Delaware River) coursed through the westerly portion of the tract and this area was extremely well watered. The elevation of the land varied from approximately 500 to 1000 feet. There is no evidence of any swampland.

The climate of the Residence Lands was favorable for general farming with a growing season of approximately 170 to 190 days. The average precipitation varied from about 34 inches in the east section around the Kansas City area to about 30 inches in the westerly portion around Topeka.

The soil varied from the rich bottoms and slopes of the rivers and numerous tributary streams to gently rolling rich prairies with some hilly to rough, broken and rocky areas, particularly in the easterly portion along the Missouri River. However, in this area near the confluence of the Missouri and Kansas Rivers, hilly to rough lands were interspersed in small segments and predominated relatively few townships.

The timber was heavy in the eastern end of the Residence Lands near the Kansas River along the southern boundary, along the Delaware River in the westerly portion of the area and along the numerous tributary streams as appears from the maps and surveyor's notes. The timber was primarily oak, walnut and hickory with some hackberry, elm, sycamore and cottonwood.

Surveyor Isaac McCoy, the official Government surveyor of the Residence Lands made a good summation of the physical characteristics of the land in his report of April 1831. His summary is as follows:

The character of the country of the Delawares is much the same as that of the country south of Kansas River. It may be denominated elevated and rolling, though not hilly; free from swamps, and the soil exceedingly fertile, with scarcely an exception of any spot. The uplands are generally though not universally, smooth prairie, destitute of wood. All the water courses, from the largest down to the smallest ravines, are wooded. The quantity of wood in the vicinity of the Missouri and Kansas rivers is considerable. The quantity diminishes as we go westwardly, and the quality also of the timber becomes less valuable.

The quantity of land designed for the residence of the Delawares equals about 38 miles square; 1,444 square miles, or 924,160 acres. This contains wood sufficient to admit a considerable population over the whole of it.  
(Def. Ex. A-13, p. 432)

17. The Missouri River, extending 22 miles along the eastern boundary of the Residence Lands, was navigable and the Kansas River, extending 60 miles along their southern boundary was navigable at high water for steamboats of light draft. By 1820 a strip of substantial population had begun to extend along the Missouri River westwardly from St. Louis and by 1830 it had reached the confluence of the Missouri and Kansas Rivers at the southeast corner of the Residence Lands.

In the immediate vicinity of that confluence, Independence, Missouri, and Westport, within the present limits of Kansas City, Missouri, had been established by about 1821. The population density of the Residence Lands was 6 to 18 inhabitants per square mile as of 1830. Specifically, the population of this area in 1830 totaled 8,161 people, divided between Clay County (5,338), established in 1822 to the north of the Missouri River at its confluence with the Kansas River, and Jackson County (2,823), established in 1826 on the south of the river.

The Santa Fe Trail was definitely established by 1825. It began at Westport, the southeast corner of the Residence Lands, and extended southwestwardly therefrom. Fort Leavenworth was established in 1827 for the protection of the Santa Fe trade at the northeast corner of the Residence Lands.

The foregoing describes the settlements and routes of transportation on and immediately adjacent to the subject lands which were in existence as of 1830.

18. The western portion of the subject tract to be valued contains the Delaware Outlet lands heretofore set forth in Finding 5, and described in detail in the Delaware case, Docket Nos. 27-A and 241 (8 Ind. Cl. Comm. 150, 151-154). These features, as explained in the hearing (Tr. pp. 133-136) may be briefly summarized as follows:

The principal physical feature of the Outlet was its location. It began about 35 miles due west of the Missouri River and about 45 miles northwest of the nearest settlement on the river, Fort Leavenworth, and the western boundary of the 10 mile strip was 185 miles from the

River in north central Kansas.

Rainfall varied from approximately 30 inches in the east down to about 24 inches at the western boundary. The Outlet was generally composed of fertile, rolling to steeply rolling prairie lands, interspersed with hilly to rough and broken areas and intersected at wide intervals by the valleys of the streams listed below.

Timber was distributed through the eastern 9 miles of the Outlet along the headwaters of creeks and tributaries to the Delaware River. Westwardly substantial timbered valleys were confined, at intervals of from 10 to 40 miles, to the Vermillion, Big Blue, Republican and Solomon Rivers. Cottonwood and other inferior timber became increasingly predominant from east to west.

19. Dr. William G. Murray, defendant's expert witness on value, has testified as to value of land in seven previous cases before this Commission, three of which are Omaha Tribe of Nebraska v. United States (6 Ind. Cl. Comm. 730); Pawnee Tribe v. United States (8 Ind. Cl. Comm. 648) and Otoe and Missouri Tribe and Iowa Tribe v. United States, (5 Ind. Cl. Comm. 316). The last proceeding involves, among other things, the valuation of Royce Area 151 of Missouri, known and sometimes referred to as the "Platt Purchase of 1836." The southern portion of this tract lies directly across the Missouri River from the Delaware Residence Lands, their southeast corner being the south corner of Royce Area 151 of Missouri. A copy of Dr. Murray's appraisal in that case was admitted in evidence and was used by him as part of the basis for his valuation here. In subsequent findings that case will be referred to for convenience sake as the Missouria case.

In his appraisal report for the Missouria case, Dr. Murray had presented the problems and method of appraising land on the western Missouri frontier at about the time here involved, 1836; located, described and platted areas in Missouri immediately adjacent to the Residence Lands of the Delawares; traced the settlement and movement of population from 1800 to 1840 from Kentucky and Indiana westwardly across the United States to the confluence of the Missouri and Kansas Rivers at the southeast corner of the Residence Lands; analyzed, platted and illustrated with great care the record of Government sales from 1821 through 1836 and 1828 through 1836 in areas of Missouri immediately adjacent to the southeast corner of the Residence Lands; explained and illustrated the preference of settlers for lands having timber and water; analyzed and illustrated on plats the physical features of the adjacent Missouri areas; set out the routes of transportation in the United States and related and platted them with respect to western Missouri and eastern Kansas and Nebraska; analyzed the highest and best use (farming) of the adjacent Missouri areas, and, finally set out the pertinent economic factors up to 1836.

In his oral evidence, Dr. Murray verified the facts above outlined from his appraisal in the Missouria case, as being reproduced from the official and historical references there cited, and carefully reduced and related them to the year of valuation in this case, 1830.

Particularly, he cut off the record of public sales in the comparative Missouri area with the year 1830. For purposes of evaluating the Delaware lands in this case, he considered only sales from 1821 through the year 1830 and only the sales in an area lying north

of the Missouri River with its southwest corner lying at the southeast corner of the Delaware Residence Lands at the confluence of the Missouri and Kansas Rivers.

Dr. Murray then compared the Delaware Residence Lands with the Missouri sales area from the standpoint of physical features -- climate, soil, water and timber and access or transportation and adjacent settlements and their highest and best use, which was general farming.

Dr. Murray succinctly correlated all of these factors to the Delaware Outlet in connection with his valuation of that strip. In addition, as to the Outlet Area, Dr. Murray stated:

The Outlet Area with respect to its highest and best use would be that on the eastern end it could have been used for general farming as of 1830, if it had not been so far from access. The western end was so dry that it would have been considered at that time as useful for grazing purposes.

20. Since there were no actual sales of land within the Delaware Residence or Outlet Lands during the period up to the valuation date of April 29, 1830, the defendant introduced exhaustive evidence showing public land sales during the years 1821 through 1830 in an area adjacent to the Residence Lands. Said adjacent land is located on the eastern side of the Missouri River and is contiguous with the Delaware Residence Land at the southeast corner of said Residence Lands. Dr. Murray's evidence shows that from 1821 26% of the adjacent land in this area was sold at a price of \$1.25 per acre. The total acreage sold was 113,410 acres (Def. Ex. A-15, pp. 36, 38; Tr. pp. 110, 111). The evidence further shows that the first choice of the settlers in the area was for land near water and timber, and that they also had a desire to be close

to some means of transportation. In addition, these earlier settlers were also particular as to the type of soil contained in the lands that were offered for sale. Defendant introduced evidence showing that the soil in the Delaware Residence Area was in the main first rate. Defendant's witness also introduced evidence showing that the Delaware Residence Lands were well timbered; that out of 55 full townships, 25 contained timber enough for settlement and that timber was present in 17 more of the townships. The Delaware Residence Area was well watered as shown in Finding 22 and there was navigation on both the Missouri and Kansas Rivers.

21. The year 1830 was a period of moderate prosperity with some increase of public land sales over the preceding years.

22. Based on the entire record of the claim the Commission finds that as of April 29, 1830, the Delaware Residence Lands of 924,160 acres had a value of \$0.40 an acre or \$369,664.00 and the Delaware Outlet of 960,000 acres had a value of \$0.10 an acre or \$96,000.00, making a total valuation of the lands granted the Delawares by the Treaty of 1829 of \$465,664.00.

As heretofore found on June 22, 1961, Findings 4 through 12, and summarized in Finding 12, the Delawares received additional considerations in money totaling \$124,674.73. This and the value of the granted lands makes a total treaty consideration paid to the Delawares under the obligations of the Treaty of October 2, 1818, of \$590,338.73.

23. As shown in Findings 2 and 3 herein, the petitioners have a recognized one-half interest in 3,859,000 acres of the land in question.



The Commission found in Findings 2 and 3 that said amount of land had a fair market value of \$1.15 per acre. The petitioners' undivided one-half interest thus had a fair market value as of April 29, 1830, the agreed date of valuation of \$2,218,925.00.

24. The sum of \$590,338.73 was the consideration paid by the United States for the cession. This consideration of \$590,338.73, paid to the petitioners by the United States under the Treaty of September 24, 1829, for the cession of the lands described in said treaty was so grossly inadequate an amount for lands having a value to the petitioners of \$2,218,925 as to make the consideration unconscionable.

25. The Commission finds that the petitioners are entitled to a judgment, less consideration and any allowable offsets.

26. The offsets claimed by the defendant total \$1,551.27. This matter of offsets was tried on November 2, 1961, by consent thereto with the understanding that the pleadings, including the amended answer, pleaded offsets and reply thereto, would be waived and that evidence could be submitted orally and pleadings would be regarded as conforming to the evidence. The defendant presented his evidence as to offsets and the petitioners offered no rebuttal evidence.

27. The gratuitous offsets, which are enumerated below, were all incurred after the Treaty of October 3, 1818, and are properly offsettable against the petitioners herein. A schedule of the offsets follows:

- A. In Fiscal year 1844; Defendant expended the sum of \$40.00 for 25 bushels of hemp seed distributed to the heads of families of Delawares and \$2.92 for the transportation of the same seed totaling \$42.92.

Total Offsettable gratuities \$ 42.92

- B. Calendar year 1819: The sum of \$217.57 was expended for repairs by a gunsmith to such items as guns, tomahawks, knives, powder horns, etc., for Delaware Indians. Also, \$70.35 was paid for 420 pounds of bacon issued to a party of Delawares over a period of about 3 weeks. The evidence shows that all other expenditures during this year were for small items for the benefit of individual Delawares.

Tribal gratuities for the year \$287.92

Calendar year 1820: The total sum of \$56.13 was expended; \$2.00 for the recovery of a horse for the Delawares, strayed from a number previously purchased from them; and \$54.13 for 906 pounds of flour, 986 pounds of beef, some potatoes and salt issued to 140 Delawares on a visit to the agent. An additional expenditure was for an individual Delaware.

Tribal gratuities for the year 56.13

Calendar year 1822: All itemized expenditures were for individual Delawares -

Calendar year 1823: \$299.17 was expended for corn, bread, bacon, and similar provisions for the relief of and issuance to the Delawares under circumstances showing tribal benefits. All other amounts itemized for this year were for individual use or benefit.

Tribal gratuities for the year 299.17

Calendar year 1825: A total of \$129.80 was expended for various supplies and services to deputations of Delawares to councils with Osage Indians and others. The balance of expenditures for this year were in small scattered amounts for individual Delawares.

Tribal gratuities for the year 129.80

Calendar year 1826: \$108.75 was expended for pasturage and care of up to 50 horses for a party of Delawares attending a council in St. Louis. Other itemized expenditures were for individuals.

Tribal gratuities for the year \$108.75

Calendar year 1827: Minute expenditures were for individuals.

Total offsettable gratuities under item B \$881.77

- C. Fiscal year 1845: \$136.80 was paid for 342 bushels of corn issued to the Delaware Indians

Total offsettable gratuities 136.80

- D. Fiscal year 1862: \$67.64 was expended for 1,430 pounds of flour and other provisions for the Delawares.

Total offsettable gratuities 67.64

- E. Fiscal year 1897: A total of \$212.50 was expended for the board and transportation of two Delawares in a delegation, including three Caddos, sent to Washington. The record at bar and in Delaware, Dkt. Nos. 27-A and 241, show that no treaty was pending at that time.

Total offsettable gratuities 212.50

28. The petitioners claimed a total of \$209.64 as offsets expended for the Delawares at various annuity distributions (Defendant's Proposed Findings 1, 2, 4, and 5). Said amount was for provisions and supplies given to the Delawares during their attendance at the annuity distributions.

The Commission finds that the amount so expended is not an allowable offset, but rather in the nature of an administrative expense of the defendant in fulfilling its terms of the Treaty of September 24, 1829.

29. The Commission finds that the remainder of the items, comprising the gratuities, was supplied by the United States without treaty or other obligation. Each constituted a tribal benefit and none of them come within the scope of categories excepted by the Indian Claims Commission Act. The nature of the gratuities and the entire course of dealings between the United States and the Delawares warrant this allowance as offsets. Accordingly, the gratuities found to be proper offsets against the award to be entered herein total \$1,341.63 as follows:

|    |          |
|----|----------|
| A. | \$ 42.92 |
| B. | 881.77   |
| C. | 136.80   |
| D. | 67.64    |
| E. | 212.50   |

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Total \$1,341.63

30. In summation the Commission finds that the petitioners' interest in the subject tract as of April 29, 1830, had a fair market value of \$2,218,925.00; that the sum of \$590,338.73 was the treaty date value of the consideration and that this latter amount constituted payment by the defendant on the claim; and that the sum of \$1,341.63 constitutes the proper allowable offsets against petitioners' claim.

Accordingly, the Commission finds that the consideration paid and the offsets allowed should be deducted from the fair market value of the

land and net judgment should be entered herein in the sum of \$1,627,244.64  
in favor of the petitioners and against the defendant.

Arthur V. Watkins  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner

T. Harold Scott  
Associate Commissioner