

BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 190
)	
THE UNITED STATES,)	
)	
Defendant.)	

Decided: September 25, 1963

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. The plaintiff herein is an identifiable group of American Indians residing within the territorial limits of the United States. The plaintiff is the successor of The Cherokee Nation which was one of the Five Civilized Tribes resident in the Indian Territory, now Oklahoma, prior to the Civil War.

The Cherokee Nation was in an advanced state of civilization. From an early date, it had a constitutional government with legislative, judicial, and executive departments, together with a written constitution. Its leaders were described as well educated, talented, and intelligent.

Prior to the Civil War, some Cherokees owned Negro slaves. Such slaves were the property of individual Cherokees and not the property of The Cherokee Nation as a political entity. At the commencement of the Civil War, many Cherokees owned Negro slaves and, additionally, there were a number of free Negroes residing with the Cherokees.

2. In the first months of the Civil War, The Cherokee Nation was neutral, sovereign over its own people. While rebellious states, were found on three sides of The Cherokee Nation, it had not been menaced, molested, or invaded. Its neutrality was officially and actually respected by both sides. At that time, the sympathies of those Cherokees who owned slaves were with the causes of the slaveholding states in rebellion.

In April of 1861, tactical reasons necessitated the diversion of Federal troops in the Indian Territory to other locations. The War Department refused to provide fresh troops for the Indian Territory because of the exigencies of the service. At that time the United States was engaged in a life-or-death struggle and unwise diversion of troops during those crucial early months could have led to national suicide.

3. At the beginning of the Civil War, there were three divergent views of the prospective position of The Cherokee Nation. They were the views of Union officials, of Confederate officials, and of the Cherokees themselves.

Union officials speculated that The Cherokee Nation would desire to cast its lot with the Union, but that it would be unable to resist the inducements of the Confederacy.

Confederate officials intended to secure the alliance of The Cherokee Nation and believed that the only problem was one of offering sufficient treaty concessions which would appeal to the influential Cherokees. This position was supported by the natural affinity of

slave-owning Cherokees for the government which would support slavery as against a government which intended to abolish it.

The Cherokee Nation, under the leadership of its principal chief, John Ross, had embarked upon a course of neutrality until the outcome of the conflict could be predicted. When the Cherokees could forecast the probable victory of the Confederacy, neutrality would be discarded and a treaty negotiated with the anticipated victor, the Confederacy.

4. On August 21, 1861, a general meeting of the Cherokees was held at Tahlequah. About 4,000 adult Cherokees, mostly men, attended. The meeting was called by the Cherokee executive department to give the Cherokees an opportunity to express their opinions on subjects of deep interest to themselves and as a nation.

The meeting was addressed by John Ross, principal chief, on the subject of the future of The Cherokee Nation in a war-torn country. He made a candid appraisal of the then situation and explained in detail the past and current policies of The Cherokee Nation vis-a-vis the Civil War. Chief Ross explained how past conditions had caused him to advise and proclaim Cherokee neutrality, and how changed conditions had brought a crisis. He informed the assembled Cherokees that they now had to decide whether to continue the policy of neutrality or enter into an alliance with one or the other of the belligerents.

Chief Ross told the Cherokees that he had always tried to keep them "harmonious and united in the full and free exercise and enjoyment of all their rights of person and property" and wanted that situation to continue. He then stated:

Then, my countrymen, as you regard your own rights, as you regard the welfare of your posterity, be prudent how you act. The permanent disruption of the United States is now probable. The State on our border and the Indian nations about us have severed their connection from the United States and joined the Confederate States. Our general interests are inseparable from theirs, and it is not desirable that we should stand alone. The preservation of our rights and of our existence are above every other consideration. And in view of all the circumstances of our situation I do say to you frankly that in my opinion the time has now come when you should signify your consent for the authorities of the nation to adopt preliminary steps for an alliance with the Confederate States upon terms honorable and advantageous to the Cherokee Nation.
(emphasis supplied)

At the meeting on August 21, 1861, several resolutions proposed by the Cherokee people were read in the Cherokee and English languages and carried unanimously by acclamation. One of these resolutions was:

Resolved, That, reposing full confidence in the constituted authorities of The Cherokee Nation, we submit to their wisdom the management of all questions which affect our interests growing out of the exigencies of the relations between the United and Confederate States of America, and which may render an alliance on our part with the latter States expedient and desirable. * * *

5. On August 24, 1861, Chief Ross advised General McCulloch of the Confederate Army that "we are authorized to form an alliance with the Confederate States, which we are determined to do as early as practicable." Chief Ross anticipated that abandonment of neutrality might invite Union military activity. He informed General McCulloch that "To be prepared for any such emergency, we have deemed it prudent to proceed to organize a regiment of mounted men and tender them for service."

6. On October 7, 1861, The Cherokee Nation did conclude a treaty of friendship and alliance with the so-called Confederate States of

America. This treaty absolutely and unilaterally annulled all pre-existing treaties between The Cherokee Nation and the United States. No action on the part of any component of the United States contributed to the nullification.

In Article II of the treaty, The Cherokee Nation acknowledged itself to be under the protection of the Confederate States of America and of no other power or sovereign whatever. In Article XLV of the treaty, the Confederacy assumed the burden of paying all due and future monies owed to The Cherokee Nation under prior treaties with the United States, as well as under the instant treaty.

On the same day that the treaty between The Cherokee Nation and the Confederacy was signed, it was submitted to the national council of The Cherokee Nation, which was then in session. The treaty was read and deliberated on, article by article, and was unanimously adopted and confirmed by both houses of the Cherokee national council. It then became a law of The Cherokee Nation and was binding upon that Nation.

When the treaty was adopted and confirmed, there were then no Cherokees professing loyalty to the United States of America.

Three weeks later, on October 28, 1861, the Cherokee National Committee issued a declaration of the causes which impelled the Cherokees to unite their fortunes with those of the so-called Confederate States of America. Actual invasion by Union forces was not assigned as a cause, but forecast of an ultimate Confederate victory was.

7. The first Confederate regiment of Cherokees, under the command of Col. John Drew, was put into action shortly after the treaty was

signed on October 7, 1861. Another Cherokee regiment was put into action under the command of the prominent Cherokee leader, Stand Watie. This latter regiment fought on the side of the Confederacy until the end of the war.

All of the Cherokees followed their leaders' mandate to cast their lots with the Southern Confederacy, but not all Cherokees continued to honor their treaty with the south. The Cherokee soldiers under the command of Col. John Drew experienced their first defection on December 9, 1861, at the battle of Bird Creek. The northern element consisted of Unionist Creeks and Seminoles. Four companies of Col. Drew's regiment of Cherokees, unwilling to fight against other Indians, fought side by side with the Creeks and Seminoles against Confederate forces. After Col. Drew's regiment was re-formed, and ten days after the battle of Bird Creek, the Cherokees' principal chief, John Ross, addressed that regiment to convince them to fight only on the side of the Confederacy. Two things he pointed out were:

This convention was held and numerous attended by the people, so that the acts of the convention were really the acts of the whole people.

The treaty was made to the entire satisfaction of all who were concerned in it. It is the very best treaty we have ever made in many particulars, as it secures to us advantages we have long sought * * *

8. The Cherokees of John Drew's regiment did not stand fast, despite John Ross' oration. By mid-1862, 2,200 Cherokee troops raised for the defense of the Confederacy had deserted to the north and fought on the side of the north until the end of the war. They did so because the

impoverished south was unable to pay them. By the end of the war, more than 9,000 Cherokees, troops and refugees, left the Confederacy for the Union. These arrogated to themselves the label of "loyal" Cherokees, denoting their quondam loyalty to the Union.

9. In February, 1863, the "loyal" Cherokees convened the National Council of The Cherokee Nation at Cowskin Prairie. Among other things, that council passed bills abrogating the treaty with the south, deposing all officers of The Cherokee Nation disloyal to the Federal government, providing for the abolition of slavery in The Cherokee Nation, and confiscating the property of all Cherokees who remained loyal to their treaty ties with the Confederacy. These numbered about 6,500 of the more wealthy Cherokees.

Before the end of 1863, the "loyal" Cherokees attempted to return to their own country, under the protection of Union forces, to plant crops. They were driven back to Fort Gibson by Confederate forces. At least eight thousand refugee Cherokees were being subsisted by Union authorities. Their situation at that time was one of extreme destitution, as they lacked adequate food, clothing, and tools. By October of 1865, the Cherokees were returned to their lands in present Oklahoma.

10. In the Appropriations Act for the Indian Department for fiscal year 1863, Congress provided that treaty monies due the Cherokees could be suspended by the President at his discretion because a portion of that tribe was in a state of actual hostility to the government of the United States. Congress also authorized the President to declare, by proclamation, the abrogation of treaties with tribes in actual hostility to the government

of the United States. These provisions were enacted on July 5, 1862. At that time, the tribal organization of The Cherokee Nation was in actual hostility to the United States, bound by the ties of an existing treaty with the so-called Confederate States of America.

11. A commission was appointed by the United States in 1865 to negotiate new treaties with the lately hostile Indians in Kansas and in the Indian Territory. At that time, the President had not issued a proclamation declaring the abrogation of pre-war treaties between The Cherokee Nation and the United States. Such treaties had been abrogated on October 7, 1861, by the unilateral action of The Cherokee Nation.

Delegates of the "loyal" and "disloyal" Cherokee factions were selected to meet with the United States treaty commissioners. The site selected for the 1865 negotiations was Fort Smith. The treaty negotiations opened on September 8, 1865. Delegates from the "loyal" Cherokees were then present, but delegates from the "disloyal" Cherokees were not. The latter had convened at Armstrong Academy and were expected to arrive at Fort Smith later in September.

12. The United States treaty commissioners had received some instructions from the then Secretary of the Interior, Harlan, concerning agreements to be reached with the Indians. The Secretary referred to the above Congressional enactments in stating that "the claim of any tribe to the benefits of the provisions of a former treaty may be justly forfeited." The Secretary instructed the committee to try to arrange for the consolidation of Indian tribes in, and a civil government for, the Indian Territory.

13. For the first days of the treaty proceedings, only representatives of the "loyal" Indians and the United States treaty commissioners negotiated. In the opening address, the Honorable D. N. Cooley, President of the United States Peace Commission, informed the assembled Indian delegates that the tribes lately at war with the United States and which had made treaties with enemies of the United States had rightfully forfeited all annuities and interests in lands in the Indian Territory. Commissioner Cooley stated that the commission was authorized to make new treaties with the nations and tribes that were willing to be at peace among themselves and with the United States.

The Cherokee delegation expressed an inclination to negotiate, but pointed out that the Cherokee constitution prescribed the treaty power and, therefore, the "loyal" delegates could only report the negotiations to their people.

On the following day, Commissioner Cooley stated unequivocally that The Cherokee Nation, by reason of the treaty of October 7, 1861, with the Confederacy, had forfeited all right to annuities, lands, and protection by the United States. He added that the President of the United States did not desire to enforce the penalties provided for the Indians' hostility. Commissioner Cooley set out the provisions which, in the Government's view, new treaties with the Indians must contain. The third provision related to emancipation and assimilation of freedmen; the sixth, to consolidation of tribes in the Indian Territory and territorial government.

14. In their response, the "loyal" Cherokees' delegates made one general point. It was that the Cherokees were forced, by considerations

of survival, to make a treaty with the Confederacy as the only alternative to destruction. The "loyal" Cherokee delegates insisted that The Cherokee Nation only pretended to join the south until it could safely ally itself with the Union. These delegates denied that The Cherokee Nation should be included in the list of tribes which forfeited annuities and interests.

Commissioner Cooley informed the "loyal" Cherokees, and all of the Indian delegates there, that they misunderstood when they interpreted his remarks on forfeiture as a fact accomplished. He explained that he meant only that their treason warranted forfeiture, but the President intended to be magnanimous.

Commissioner Cooley rejected outright the "loyal" Cherokees' claim that the treaty between the Confederacy and The Cherokee Nation of October 7, 1861, was a mere ruse or subterfuge designed to confuse the south and gain time for the Cherokees. The rejection was based on contemporaneous correspondence of the Cherokees' principal chief, John Ross. Commissioner Cooley observed that "Your nation, if your chief can be believed, voluntarily assumed the position of an enemy of the United States."

15. The treaty of peace and amity which had been prepared by the United States Peace Commission was read to the assembled Indian delegates on September 13, 1865. The "disloyal" Indians' delegates had not yet arrived at Fort Smith. The preamble to the proposed treaty would constitute the Indians' admission that they had subjected themselves to forfeiture through their own wrongful acts and the admission of the

United States that it desired to act toward the Indians with magnanimity.

The delegates were advised that "If there is any tribe or delegation that does not wish to sign it, we wish to know it. We do not desire any tribe to sign it otherwise than willingly and cheerfully." The "loyal" Cherokee delegation signed the treaty of peace and amity with the reservation that the treaty with the Confederacy of October 7, 1861, was procured by the coercion of the rebel army. Later in the same day, the commissioners read a paper deposing John Ross as principal chief of The Cherokee Nation. The delegates from the "disloyal" Cherokee faction were then present.

16. On the next day of the conference, the "disloyal" Cherokee delegates filed a statement specifying their objections to the treaty of peace and amity. They did not object to freeing the slaves, but did object to incorporating them into the tribe. They also objected to consolidation of all tribes in the Indian Territory and to territorial government.

The "disloyal" Cherokee delegates said that although they had tried to come to terms with their brethren -- the "loyal" Cherokees -- their efforts had been repulsed by "that portion of the Cherokee nation who first extinguished, by hostile acts, the treaties with the United States, and who now affect to have been loyal from the beginning." The "disloyal" Cherokees' delegates signed the treaty of peace and amity on the ninth day of the Fort Smith conferences.

17. Further efforts of all the Cherokees to effect a reconciliation were unsuccessful. Efforts of the "loyal" Cherokees to induce the commissioners to rescind their paper deposing Principal Chief John Ross were also unsuccessful. The "loyal" Cherokees did not at the end of the conferences at Fort Smith, or at any time during those conferences, contest any portion of the treaty of peace and amity except the preamble.

18. The 1865 treaty of peace and amity was never ratified.

19. Treaty negotiations between the United States and the Cherokees were resumed in Washington, D. C., in January, 1866, when delegations from both the "loyal" and "disloyal" Cherokee factions presented their respective credentials. The United States commissioners treated with both delegations, trying to achieve a treaty which would be satisfactory to all. One of the points which the United States anticipated would consume a great deal of discussion was the proper relations which the freedmen would thereafter hold toward the remainder of the Cherokees. On this point, the Treaty Commission had the benefit of a field investigation which showed that the Cherokees wanted to make some provision for the freedmen, but preferably not assimilation into the tribe.

20. The "loyal" Cherokee delegation expended much time and effort in a continuing attempt to convince the commissioners, Congress, and the President that The Cherokee Nation was forced by the south to sign the October 7, 1861, treaty with the Confederacy.

21. The United States commissioners finally propounded nine compromises which the Government intended to be understood as ultimate. Five were acceptable to both factions, four were wholly unacceptable

to the "loyal" Cherokees, and, of those four, one was acceptable to the "disloyal" Cherokees. Neither faction objected to the proposition providing for freedmen, and the "loyal" delegates said of the freedmen that "we have no doubt that any arrangement the Government would ask for their benefit would be freely conceded by us."

The one point most in controversy was division of the former Cherokee Nation into two autonomous nations, of Northern Cherokees and Southern Cherokees. This the "loyal" Cherokees regarded as intolerable. Most of the "loyal" Cherokees' substantive arguments were directed against this proposition.

The treaty between The Cherokee Nation and the United States was signed on July 19, 1866. The skillful and experienced Cherokee negotiators were wholly successful in avoiding all four of the propositions which they deemed so repugnant. The treaty, which was a definite victory for the Cherokees, provided in Article IX that freedmen were to have all the rights of native Cherokees. Article XX of the treaty provided for ultimate allotment in severalty of Cherokee lands.

22. Principal Chief John Ross died in Washington, D. C., in August, 1866. He was succeeded by his nephew, William P. Ross. Chief Ross called into session a national council of The Cherokee Nation to ratify amendments to the Cherokee constitution which was compatible with the treaty signed in Washington. The Cherokee people, united and no longer factional, attended. Chief Ross wrote the amendments which were adopted by the Cherokees on November 28, 1866, and proclaimed on the

seventh of December of that year. No Federal influence was exerted to secure adoption of the amendments or any of them.

Section 2 of Article I of the Cherokee constitution was amended to affirm that the lands of The Cherokee Nation would remain common property until allotted as permitted by Article XX of the treaty. Section 5 of Article III of the constitution was amended to define freedmen and their descendants as unqualified citizens of The Cherokee Nation. When, after these amendments were adopted, the Cherokees had occasion to mention the freedmen, it was the consensus of its leaders that the freedmen were in fact Cherokee citizens, with all of the rights of native Cherokees, and that they acquired such rights by virtue of Article IX of the treaty of 1866.

At all material times, the Cherokees intended that when they granted the freedmen "all the rights of native Cherokees", no civil, political, or property rights were excluded and all conceivable rights were included.

23. The liability phase of litigation in which the Cherokee freedmen's representative was plaintiff and The Cherokee Nation and the United States were co-defendants, was terminated by a consent decree. The decree was regarded as desirable by the defendant Cherokee Nation if the freedmen who were entitled to be paid under the decree could be more accurately identified. Whitmire, Trustee v. The Cherokee Nation and the United States, 30 Ct. Cl. 138 (1898), and subsequent decisions.

The Cherokee Nation, by an act of its legislature, then provided for the freedmen against whom discrimination had been practiced by that

Nation. No Federal influence was exerted to initiate or pass that act of the Cherokee legislature.

24. In Section 15 of the Indian Department's Appropriations Act for fiscal year 1894, Congress gave its consent to allotment of Cherokee lands in severalty and, in Section 16 of the same Act, the President was authorized to create a commission to negotiate with each of the Five Civilized Tribes to extinguish tribal title by allotment in severalty or otherwise.

The commission to the Five Civilized Tribes, familiarly known as the Dawes Commission, was entrusted with two distinct tasks: Creation of final rolls of Cherokee citizens and negotiation of an allotment agreement with The Cherokee Nation. The Commission was given extensive instructions by the Congress on the subject of final Cherokee rolls. Subsequently, in Section 21 of the Curtis Act (30 Stat. 495, at 502) the Dawes Commission was instructed to use the Cherokee roll of 1880 for all Cherokee citizens other than freedmen, and to make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims dated February 3, 1896 (Whitmire litigation).

25. The Cherokee Nation assisted the Dawes Commission in preparing the final rolls of the citizens of The Cherokee Nation. That nation contested the enrollment of some individual freedmen and exercised its right of appeal from the Commission's decisions to the United States district court. The Cherokee Nation did not at any time contend that all freedmen as freedmen should be excluded from the final Cherokee rolls.

The final rolls, filed with and approved by the Secretary of the Interior on or prior to March 4, 1907, showed the enrollment of 4,922 Cherokee freedmen. The allotment agreement with The Cherokee Nation was approved by the Congress on July 1, 1902, and ratified by The Cherokee Nation on August 7, 1902. When the rolls were approved, individual allotments were made. The allotments of land were equalized in value, rather than in quantity. Title to land passed directly from The Cherokee Nation as an entity to individual Cherokees. The United States was not an actual or nominal party in the chain of title.

26. The United States gratuitously relinquished to the individual Cherokees all right, title, and interest of the United States in and to the lands embraced in the individual patents. The United States gratuitously freed the individual patentees from some restrictions on alienation, after five years from the several dates of patent. The individual Cherokees had more valuable, more substantial, and more tangible interests in the Cherokee lands after allotment in severalty than they had when the lands were common property of The Cherokee Nation.

The United States did not take anything from The Cherokee Nation in the course of allotments in severalty, and the Cherokees did not yield anything to the United States. No transaction between the parties involved any element of consideration. No consideration was owed to either of the instant parties by the other.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner