

BEFORE THE INDIAN CLAIMS COMMISSION

THE KICKAPOO TRIBE OF KANSAS,)	
THE KICKAPOO TRIBE OF OKLAHOMA, ET AL.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 316
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: August 31, 1965

Appearances:

Mr. Allan Hull and Mr. Louis L. Rochmes, Attorneys for Petitioners.

Mr. W. Braxton Miller and Mr. Edwin L. Weisl, Jr., Assistant Attorney General Attorneys for Defendant.

OPINION OF THE COMMISSION

Watkins, Chief Commissioner, delivered the opinion of the Commission.

This phase of Docket No. 316 has to do with the issue of what offsets, if any, will be allowed under the Indian Claims Commission Act against an interlocutory judgment for petitioners in the amount of \$936,000.

Defendant claims offsets aggregating \$507,001.96. These claimed offsets include the value of a reservation in Oklahoma which defendant alleges was given to the Kickapoos by the defendant, the payment of depredation judgments against the Kickapoos, expenditures for the purchase of land for the Kickapoos, and other expenditures made over a period of many years for the support and benefit of the Kickapoo Indians. Petitioners deny the validity of all these claimed offsets asserting that these benefits were either not gratuities, were individual rather

than tribal benefits, or that the entire course of dealings between petitioners and defendant made them disallowable as offsets under the Indian Claims Commission Act.

In our conclusions as reflected in Findings of Fact 23 through 41, we have been unable to completely agree with either petitioners or defendant. Some of the alleged offsets we have allowed and others we have denied. We will now proceed to a discussion of our conclusions in each case.

Kickapoo Indians who had left the main body of Kickapoos and migrated to Mexico between 1840 and 1864, in 1873-1874 were brought back to a reservation in Oklahoma through the diligent efforts of representatives of the United States Government. With material help from the United States the Kickapoos began farming in this area and in 1883 the President of the United States issued an Executive Order which set apart the tract they were then occupying by metes and bounds for the permanent use and occupancy of the Kickapoo Indians. Later, said territory was ceded by the Kickapoos to the United States under an agreement dated September 9, 1891, which became effective under the Congressional Act of March 3, 1893. Under the Acts of March 3, 1893 (27 Stat. 557) and April 30, 1908 (35 Stat. 70, 89-90) the Kickapoos received allotments and cash for the above cessions amounting in value to \$312,899.37. Defendant alleges that the Kickapoos did not have any right, title or claim to this area and so the consideration received from the cession was a gratuity which should be offset against the award in this case. In the alternative defendant alleges that if the Commission should find that the Kickapoos had title to the land prior to the above Acts of Congress, the land itself was a gratuity and the

value of the land as of a date set by the Commission should be offset against the award. Petitioners assert that the Kickapoos had title to the above land as the result of an agreement with the defendant and for valuable consideration. Petitioners deny that either the land or the consideration received for the land was a gratuity.

We have concluded in Finding of Fact 30 that the so-called Mexican Kickapoos were placed on this reservation in Oklahoma and received title to said reservation at the time they moved on and possessed it in 1874. Although there was no formal treaty or agreement at this time in which their title to this reservation was recognized by the United States, such a formal recognition is not necessary as long as there is shown "**** the definite intention by Congressional action or authority to accord legal rights, not merely permissive occupation." Tee-Hit-Ton Indians v. United States, 348 U. S. 272, 278. "Recognition of Indian title may be formally expressed in a treaty; it may be derived from the necessary implications of a treaty; it may be found in a statute; it may appear in pronouncements and conduct of responsible government officials." The Miami Tribe of Oklahoma v. United States, 2 Ind. Cl. Comm. 640.

Because of problems arising on the Texas border due to the presence of the Kickapoos and other Indians who had formerly lived in the United States, the Commissioner of Indian Affairs recommended that the Kickapoo Indians which had most recently left the Kickapoo reservation in Kansas be returned to that reservation, and that the remaining Kickapoos, estimated to number about 600, be moved to "some suitable locality in the Indian Country." Subsequently, by the Act of July 15, 1870, Congress appropriated \$25,000

"*** or so much thereof as may be necessary to enable the Secretary of Interior to collect bands of Kickapoos or other Indians roving on the borders of Texas and Mexico, and to locate and subsist them in the Indian Territory ***" (16 Stat. 335, 359). Again on March 3, 1871, Congress appropriated \$40,000 "*** or so much thereof as may be necessary, for the removal of the Kickapoo and other American Indian tribes roving on the borders of Mexico and Texas to reservations within the territories of the United States, and for their settlement and subsistence on such reservations ***" (16 Stat. 544, 569).

Shortly thereafter, United States Indian Agent John D. Miles, pursuant to instructions, went to Mexico with a delegation of chiefs and headmen from the Kickapoo reservation in Kansas for the purpose of persuading the Kickapoos there to return to the United States. Agent Miles and his delegation stayed three weeks in Santa Rosa and during that period discussed the purpose of their visit with the majority of the Kickapoos residing in Mexico. Miles reported that they,

*** made use of every opportunity to present them our friendly mission and the advantage they would derive from the acceptance of the kind offer made by the Great Father at Washington. ***
(Def. Ex. 19, p. 193)

He explained that,

*** The people of Santa Rosa, both native and American citizens, treated us very kindly, and at the same time were free to acknowledge that they were decidedly opposed to the removal of Kickapoos, giving for their reason the assertion that the city of Santa Rosa and the whole community around would be invaded at once by Mescalero Apaches, Lipans, and other marauding bands of Indians; that the Kickapoos were their only defense; and not only this, but that the Kickapoo labor and the Kickapoo trade was a matter of no mean importance to them. (Def. Ex. 19, p. 194)

The local officials were also opposed to the Kickapoos leaving and "every means was made use of to buy up the chiefs and headmen." (Def. Ex. 19) Miles reported that these Mexican officials distributed cattle, oxen, corn meal and trinkets to bribe the Indians to stay. After a council meeting with the Indians and a public statement to them, "*** the chiefs asked many questions about their proposed home, some of which I was not authorized to answer." (Def. Ex. 19) One of the chiefs, Wah-pa-ka,

*** did not like the idea of taking his people up to an unknown reservation without some assurance that the land was good and where it was to be located, and how much was to be given them, and who their neighbors were to be, and some other questions that I was not authorized to answer. *** (Def. Ex. 19), p. 195)

Miles reported that Wah-pa-ka then proposed,

*** to select thirty of his leading men and secretly withdraw from Mexico, and proceed with them west of Forts Clark, Concho, Griffin, &c., to Kansas, 'on his own hook', and when there to be joined by the Agent and some of the tribe there, and then proceed to the Indian territory, and look at the land proposed for their future home, and if found satisfactory, then he thinks he can succeed in bringing at least three-fourths of the Kickapoos to such reservation. (Def. Ex. 19, p. 195)

However, there was a difference of opinion among the Kickapoos on the issue of returning to the United States because of the pressure of the local citizens. Even though Wah-pa-ka had originally favored the idea, Miles wrote that,

*** every effort was brought to bear upon him that evening by the citizens of Santa Rosa to buy him over in opposition to our side, and we believe that he accepted presents and money favors to change his position. In fact, his party said they were going to get all they could from the Mexican commissioner while we were there, for, as soon as we were gone, they could expect nothing more. *** (Def. Ex. 19, p. 195)

Miles wrote that another council was held but the Indians declined to come with them. Miles further said that they had done all they could to accomplish the removal of the Kickapoos and that they would have been successful if it had not been for the local Mexican officials and citizens who interfered. He commented that,

*** The Indians were very clamorous to tell us of the ill treatment they have received at the hands of the Mexicans, and yet they suffered a small bribe of money to influence them against the acceptance of our proposition. *** (Def. Ex. 19, p. 196)

In 1873 Special Agents H. M. Atkinson and Col. T. G. Williams were appointed to make another attempt to remove the Kickapoos to some place within the limits of the Indian Territory. (Pet. Ex. 3-A) Atkinson and Williams succeeded in getting assistance from Mexican provincial officials and, in spite of local opposition, were able to effect the removal of over 400 Kickapoos from Mexico. Three hundred of them removed to the Indian Territory on the north fork of the Canadian River in the early autumn of 1874 and an additional 114 Kickapoos arrived at the Kickapoo Agency in Kansas in July, 1875.

In accordance with the promises made in Mexico to the Kickapoos, the United States provided aid and assistance to them "on their reservation" (Pet. Ex. 11-A) in the Indian Territory in the years following their removal from Mexico. Because of the desire of the Kickapoos to have this reservation secured to them by further governmental action, the President of the United States issued an Executive Order on August 15, 1883, in which he set apart the tract they were then occupying, describing it by metes and bounds for the permanent use and occupancy of the Kickapoo Indians in the following language (Pet. Ex. 13-A):

It is hereby ordered that the following-described tract of country in the Indian Territory, viz: Commencing at the southwest corner of the Sac and Fox Reservation; thence north along the western boundary of said reservation to the Deep Fork of the Canadian River; thence up said Deep Fork to the point where it intersects the Indian Meridian; thence south along said Indian meridian to the North Fork of the Canadian River; thence down said river to the place of beginning, be, and the same hereby is, set apart for the permanent use and occupation of the Kickapoo Indians.

The reservation so set apart was part of an area ceded to the United States by the Creek Nation in 1866 to comply with "the desire of the United States to locate other Indians and freedmen thereon." These lands were "to be sold and used as homes for such other civilized Indians as the United States may choose to settle thereon." (14 Stat. 785, 786) In commenting on the Executive Order of 1883, Commissioner Price said that the Kickapoo tract was,

*** within the 'Oklahoma district' which has been subject to incursions by Payne and others, and it is believed that this action will tend to defeat such attempts at colonization. The lands thus set apart should be secured to these Indians by a more permanent title, and legislation providing for the issuance of patents will be recommended at the coming session of Congress. (Pet. Ex. 14-A)

These facts clearly indicate that it was the intention of Congress to recognize in these Kickapoos permanent rights to the lands on which they were placed. First, Congress by treaty purchased the area in the Indian Country to which the Kickapoos were later assigned. This area was purchased for the purpose of locating "other Indians and freedmen thereon." Congress then appropriated money to collect the Kickapoos "roving on the borders of Texas and Mexico, and to locate and subsist them in the Indian Territory." Congressional intention with respect to the Kickapoos was further clarified by another Act passed less than a year later in which

money was appropriated for the removal of the Kickapoos "roving on the borders of Texas and Mexico to reservations within the territories of the United States, and for their settlement and subsistence on such reservations."

(Emphasis supplied) The United States Commissioners sent to persuade the Kickapoos to return to the United States were carrying out this intent of Congress by offering the Kickapoos a reservation. This is evidenced by the communication of Commissioner Miles in which he referred to "the kind offer made by the Great Father at Washington" and then explained that one of the chiefs "*** did not like the idea of taking his people up to an unknown reservation without some assurance that the land was good ***" (emphasis supplied). Later, after these Kickapoos were located on the north fork of the Canadian River, Agent Shorb refers to them as being "located on their reservation". (Pet. Ex. 11-A)

In his 1876 report, Agent Woodward, in referring to the lands of the Kickapoo and Shawnee, speaks of "the baneful influence of unauthorized white men upon these reserves ***" (emphasis supplied, Pet. Ex. 10-A).

Apparently because white people were making attempts at colonizing their lands, the Kickapoos desired additional action on the part of the United States to secure the lands they were occupying. In 1883 Commissioner Price reported that,

*** some four hundred of the Kickapoo tribe of Indians, who left the State of Kansas and migrated to Mexico in 1863 and 1864, were returned to the United States and settled in the Indian Territory in 1873 and 1875. Although the lands were promised them no steps were taken to secure them in possession of the lands which they have continued to occupy. Inasmuch as the insecurity of their title was a source of uneasiness and discontent an Executive Order was issued August 15, 1883, setting apart for their permanent use and occupation a tract of land west of the Sac and Fox Reservation in the Indian Territory, sufficient for their present and future wants. (Pet. Ex. 14-A)

We think it is clear from these actions of Congress and the "pronouncements and conduct of responsible government officials" as they carried out their assignments, that it was the intention of Congress to recognize permanent rights in these Kickapoos to the land to which they removed in 1874.

Defendant alleges that the reservation in Oklahoma to which the Mexican Kickapoos removed and settled upon was a gratuity allowable as an offset in the present case. Petitioners claim that "The grant of land in Oklahoma and the agreement of the Kickapoo to remove were quid pro quo and that the Kickapoo Indians "had been offered all sorts of inducements by the Mexican Government to remain in Mexico". (Pet. Brief, p. 17)

We agree with the defendant that the reservation was a gratuity. The offer of the United States to grant the Kickapoos in Mexico a reservation, removal expenses, and subsistence in return for their voluntary removal to such reservation in the United States did not contain a request for consideration but was rather an offer of a gratuity subject to a condition. These Kickapoos, among other things, were promised a reservation, in the Indian Territory if they voluntarily removed themselves to it. The only thing the Kickapoos gave up, aside from benefits derived from illegal raids into Texas, was a rather tenuous arrangement with local citizens and officials in Mexico. The Mexican Government, as such, encouraged the Kickapoo to leave. In recounting the background of the whole situation the Mexican Minister of Foreign Affairs said:

Finally the United States entertained the idea of appointing commissioners that should come and in a peaceful manner threat with these Indians, and make arrangements with them for their transportation to the reservations to which they had been

assigned. The Mexican Government, which has no interest in these Indians remaining in Mexico, not only approved with pleasure that proposition, but, assenting willingly to the suggestions made by the United States Minister and Mexican Minister at Washington, instructed the local authorities at Tamaulipas, Nuevo Leon, and Coahuila to facilitate the removal; ordered that the necessary forces should be furnished to escort the Commissioners; ***" (emphasis supplied, Def. Ex. 20, p. 941)

He went on to say that the authorities in the provinces where the Kickapoos resided,

*** have stated that the departure of these Indians should be encouraged on account of the harm they do within Mexican Territory, and because their depredations in Texas are not only detrimental to the neighboring republic, but because they increase the uneasiness of the inhabitants of both frontiers, cause them to distrust each other, engender animadversion, and serve as a pretext for attributing to Mexicans all the disorders, robberies, and crimes committed in those places, thence originating interminable complaints and hateful recriminations. (Def. Ex. 20, p. 941)

The evidence indicates that the ones who would suffer a detriment by reason of the Kickapoo removal was not the Kickapoos but rather the local citizenry who were beneficiaries of the Kickapoo trade and labor. To protect this "interest they caused the failure of Commissioner Miles' mission by bribing the Kickapoos to remain." (Def. Ex. 19) Miles reported that the Kickapoos had decided to take advantage of the situation and get all they could from the Mexicans while the United States agents were present as they had previously been ill treated by the Mexicans and could expect nothing from them after the United States agents had gone. This is in accord with what Commissioner Atkinson found a short time later when it appears that many of the Kickapoo were in destitute condition and were willing to leave Mexico in order to better their condition. (Def. Ex. 20)

In summary, the Kickapoos gave up nothing which could properly be considered a quid pro quo for the Oklahoma reservation. Their move to the Oklahoma reservation was the fulfillment of a condition contained in defendant's gratuitous promise. In accordance with the intention of Congress and the subsequent acts of United States representatives carrying out that intention, the title to the Oklahoma reservation became vested in the Kickapoo Indians when they moved on it and began to farm it. However, the extent of the territory was not officially defined by metes and bounds until the President of the United States did so by Executive Order in 1883.

The Commission having determined that the Oklahoma reservation was a gratuity, we have also found that the value of the reservation as of October 1, 1874 is the sum properly offsetable against the present award. The determination having been made by the Commission that the Oklahoma reservation was a gratuity and the Commission having allowed the value thereof as of October 1, 1874, as an offset, the claim of defendant as set forth in Findings of Fact 31 and 32 for offsets in the amount of \$312,899.37 as the value received by the Kickapoos for said reservation under the Act of March 3, 1893, and April 30, 1908, either in the form of cash or land allotments on said reservation, has been disallowed for obvious reasons.

As set forth in Finding of Fact No. 33, defendant claims as an offset \$44,000 paid by the United States for 966 acres of land purchased for the Kansas Kickapoos between 1939 and 1941. Petitioners claim "*** that the nature of the claim and the entire course of dealings and accounts between the United States and the Claimant in good conscience

warrants" that this expenditure should not be allowed as an offset in this case. As a basis for this request, petitioners allege that the United States violated the trust provisions of the General Allotment Act of 1887. (24 Stat. 338) "The consequence was the loss of additional lands, a loss which the Government made good in part by the purchase of the acreage here in question." (Pet. Br. p. 18)

Under the General Allotment Act of 1887 a total of 19,907.28 acres were allotted to 237 allottees. The Act provided for the United States to,

*** hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, ***
(24 Stat. 389)

The Act also provided that the President of the United States could, in his discretion, extend the trust period.

According to the report of Land Agent George C. Wren, which was made in 1938, the United States issued policy patents in fee to a number of these allottees before the expiration of the trust period in 1912. Though most of the fee patents were issued with the consent of the Indians, some were issued to Indians against their will as a result of a local policy of liberal recommendations for fee patents for Indians. Mr. Wren also said that,

This liberality in removal of restrictions on trust lands enabled the government to effect administrative economies through consolidation of the Kickapoo Agency at Horton with the Potawatomie Agency at Mayetta. As a result of this the Indians of the Kickapoo Tribe have been neglected to an appreciable extent. (Def. Ex. 30 b, p. 13)

By 1938 only 75 of the 237 allotted tracts comprising but 1,439 acres were still held in trust.

On the other hand, Mr. Wren reported that the Kickapoos did all right during the period of prosperity following World War I but as a result of the depression of the early 1930's they soon became destitute and many were saved from starvation by work projects initiated by the Indian Service during the winter of 1933-1934. There were about 25 landless families of Kickapoos for whose benefit the Government proposed to acquire lands pursuant to the Act of June 18, 1934. (48 Stat. 984) Accordingly, between 1939 and 1941 the defendant purchased 8 tracts of land comprising 966 acres at a cost of \$44,000. Title was taken by the United States in trust for the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas. (Def. Ex. Nos. 30b; 30d; 16, 16b; Tr. pp. 78-79, 81, 107, 108)

We do not believe these facts justify disallowing this expenditure as an offset based on the "entire course of dealings" clause of the Indian Claims Commission Act. Assuming that the United States did violate its trust under the 1887 Allotment Act, the evidence does not show that this was the cause of the loss of the lands which necessitated the \$44,000 expenditure. On the contrary, it appears that the Indians were doing all right until the depression of the 1930's. It has not been shown that the families who received fee patents to their lands involuntarily prior to the termination of the trust period were the landless families for whom land was purchased in 1939-1941. In the absence of such evidence we are unable to find any logical relationship between the issuing of fee patents to Kickapoos prior to the termination of the trust period and the purchase of said lands in 1939-1941. It also appears that the United States was doing much to help these Indians

during this period. Agent Wren reported that many of the Kickapoos were saved from starvation during the winter of 1933-1934 by work projects started by the Indian Service and the record indicates substantial material help was given to these Indians down through the years by the United States.

With reference to the \$49,916.00 appropriated for the purpose of paying deprecation judgments against the Kickapoo Tribe, we have held that this sum is not a proper offset. This holding is in accord with our decision in Kiowa, Comanche and Apache Tribes v. United States, 5 Ind. Cl. Comm. 72, Affirmed, 143 C. Cls. 545. In the Kiowa case the deprecation payments were not allowed as offsets because of the provisions of the legislation appropriating the money to pay these claims as well as specific provisions of the agreement under which the cause of action arose. Either of these two grounds were sufficient in the Kiowa case. The legislation appropriating the \$49,916.00 to pay deprecation claims in the present case has the same provisions upon which we based our decision in the Kiowa case. The sum of \$49,916.00 has, therefore, been disallowed as an offset against this award.

Of the remaining \$100,893.38 claimed by defendant as offsets against the award in this case, \$76,252.93 has been allowed and \$24,640.45 disallowed in Findings of Fact Nos. 35 through 40 herein. The amount alleged by defendant as offsets represents expenditures for various types of subsistence supplies, equipment, agricultural aid, the purchase of livestock, the transportation of supplies, and other expenses relating to the Kickapoo Indians. In determining whether or not the various

expenditures were valid offsets under the Indian Claims Commission Act, we have followed closely our detailed decision in Red Lake, Pembina and White Earth Bands, et al., v. United States, 9 Ind. Cl. Comm. 457, which was upheld by the Court of Claims (Appeal No. 7-62, Decided January 24, 1964).

As a general matter, petitioners have argued that the "nature of the claim and the entire course of dealings" between the United States and the claimant "does not warrant offsetting against the award the expenditures claimed." (Pet. Br., p. 28) Petitioners' argument is threefold. First, the expenditures were made necessary by the United States policy of extinguishing Indian title and attempting to convert the Indians to farmers. Second, the \$936,000 award is worth much less today than it would have been in 1854 when the Kickapoos should have received it as part of the fair market value of their lands. Third, the defendant by exempting itself from the obligation of paying interest on this award which was entered over a century after the wrong, has aggravated the wrong itself, and the sums expended by the defendant for the benefit of petitioners represent only a small fraction of what a reasonable rate of interest would be.

We do not believe this is the proper interpretation or application of the "entire course of dealings and accounts" clause of the Indian Claims Commission Act. To disallow the offsets in this case for the above reasons would nullify, for all practical purposes, the offset provisions in the Indian Claims Commission Act. In effect, it would be

granting interest on the award under another guise. We do not believe this was the intention of Congress in inserting this clause in the Act.

As we stated in Finding of Fact No. 41, the total offsets comprise \$120,252.93 in cash plus the fair market value of the Oklahoma reservation as of October 1, 1874. It will be necessary, therefore, to hold a further hearing in which the fair market value of said reservation can be determined before a final award can be made in this case. An order will be entered accordingly.

Arthur V. Watkins
Chief Commissioner

We Concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner