

BEFORE THE INDIAN CLAIMS COMMISSION

THE CITIZEN BAND OF POTAWATOMI INDIANS)
 OF OKLAHOMA,)
)
 Plaintiff,)
)
 v.)
)
 THE UNITED STATES,)
)
 Defendant.)

Docket No. 96

Decided: August 27, 1968

ADDITIONAL FINDINGS OF FACT

The Indian Claims Commission hereby makes the following Findings of Fact which are supplemental to the Findings numbered 1 through 41 heretofore made herein:

42. The tract of land in central Oklahoma which became the Plaintiff's reservation was paid for by the Defendant, as an advance to the Plaintiff. The cost of purchase borne by the Defendant was an expenditure in the amount of \$119,790.15.

Under Article II of a Treaty of February 27, 1867, ratified July 25, 1868 (15 Stat. 531, 535, 536), the Potawatomi "surplus" lands in Kansas were to be sold [cf. Dockets 15-B and 111 consolidated, The Pottawatomie Tribe et. al. v. United States, 3 Ind. Cl. Comm. 10 (1954), 540 (1955)], the revenue was to be paid to the Secretary of the Interior, and the Secretary was authorized to use the revenue from the sale of the Kansas lands to repay the \$119,790.75 advanced by the Defendant.

The revenue from the sale of "surplus" Kansas lands amounted to precisely \$101,630.05 and the Secretary of the Interior did not apply that amount, or any fraction of it, toward repayment to the Defendant of the advanced \$119,790.75. The entire \$101,630.05 was disbursed to the Plaintiff in 1875.

No amount has been applied by or on behalf of the Plaintiff to repay or reduce the advanced \$119,790.75 to date.

43. The Defendant renounced its right to collect the outstanding obligation of \$119,790.75 by Article IV of an Agreement between the Plaintiff and Defendant dated June 25, 1890 (26 Stat. 989, 1018), which provided:

. . . And if it shall be ascertained that said Citizen Band of Pottawatomie Indians did purchase and pay the United States for the tract of country above described in accordance with the provisions of a treaty between the United States and said Citizen Band of Pottawatomie Indians, proclaimed August seven, eighteen hundred and sixty eight, and that the United States did retain and yet retains and shall continue to retain of said Indians' funds the sum of one hundred and nineteen thousand seven hundred and ninety dollars and seventy-five cents on account of such purchase, then the United States agrees to pay to said Citizen Band of Pottawatomie Indians the additional sum of one hundred and nineteen thousand seven hundred and ninety dollars and seventy-five cents.

The change which Congress intended to work in the status of the sum of \$119,790.75 was a forgiveness of the debt, and hence the forgiveness of the debt representing the cost of the reservation became a gratuity.

The entire course of dealings between the parties in the matter of the \$119,790.75 warrants the conclusion that it would be appropriate to allow the United States an offset equivalent to the cost to it of this reservation furnished to the Plaintiff in 1867.

44. Article II of the Agreement of June 25, 1890 (supra, at 1017), provided:

. . .And it is specially agreed that the south half of section seven and the north half of section eighteen in township six north, range five east . . . for religious, school, and farm purposes, shall not be subject to allotment or homestead entry, but shall be held by the United States for the Sacred Heart Mission, the name under which said association of Fathers are conducting the church, school, and farm on said land.

And in any lawful manner, to be provided by Congress, shall be conveyed to said Fathers for the uses above expressed.

In recommending conveyance of this tract to the Benedictine Fathers, Congress observed (S. Rep. 1036, 60th, 2d):

. . .in an agreement between the tribe and commissioners representing the United States, dated June 25, 1890, which agreement was ratified by Congress March 3, 1891 (Stat. L., vol. 26, p. 1017), stipulated that said land should not be subject to allotment or homestead entry, but should be held by the United States for the Sacred Heart Mission, and should, in such manner as Congress might provide, be conveyed to said Benedictine Fathers.

Conveyance was authorized in this language (35 Stat. 781, 807):

That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee to the Benedictine Fathers of Sacred Heart Abbey, Oklahoma, for the following-described lands, now and for many years reserved for and occupied by the Sacred Heart Mission, to wit, the south half of section 7 and the north half of section 18, in township 6 north, range 5 east, on the Pottawatomie Reservation, Okla., containing 640 acres more or less.

The patent to the Benedictine Fathers was issued.

45. The Sacred Heart Mission and Abbey was founded in 1876 by Father Isidore Robot of the Order of St. Benedict on reservation lands donated to the church by the Potawatomi. The use of the 640 acres

constituting that section was done with their approval and for purposes beneficial to them. The section was used for the same purposes before, during, and after the taking by the United States and the patent to the Benedictine Fathers. Hence the Potawatomi Indians suffered no detriment or loss by reason of the taking or the subsequent patent.

The 640 acres composing the Sacred Heart Mission should be excluded from the ceded acreage for which the United States is liable; the convenient exclusion is the allowance of an offset in the amount agreed upon by the parties, \$1,920.00 (i.e., \$3.00 per acre which is the most practical mathematical approximation of a "per acre" figure that can be derived from the prior determinations of the acreage involved and the gross value therefor).

46. An Act of September 13, 1960 (74 Stat. 903), provided:

. . . That the Secretary of the Interior is authorized and directed to convey to the Citizen Band of Potawatomi Indians of Oklahoma, all right, title, and interest of the United States in and to approximately 57.99 acres of land more particularly described in section 2 of this Act, subject to the right of the Absentee Shawnee of Oklahoma, Sac and Fox of Oklahoma, Kickapoo of Oklahoma, and Iowa Tribe of Oklahoma to use the Potawatomi community house that may be constructed and maintained thereon. The title of the tribe thereto shall be subject to no exemption from taxation or restriction on use, management or disposition because of Indian ownership.

Section 2. The property referred to in the first section of this Act is more particularly described as follows: Lot 1 (northwest quarter of northwest quarter) and north half of lot 2 (north half of southwest quarter of northwest quarter) and the part of the north half of the southeast

quarter of the northwest quarter laying west of the east right-of-way line of Oklahoma State Highway numbered 18, all in section 31, township 10 north, range 4 east of the Indian meridian, in Pottawatomie County, Oklahoma, and containing 57.99 acres more or less.

Section 3. The Indian Claims Commission is directed to determine in accordance with the provisions of section 2 of the Act of August 13, 1946 (60 Stat. 1050), the extent to which the value of the title conveyed by this Act should or should not be set off against any claim against the United States determined by the Commission.

The land so identified contained a portion of the Shawnee Indian School and Agency Reserve.

47. An Act of August 11, 1964 (78 Stat. 392), provided:

. . . That, subject to valid existing rights, the Secretary of the Interior is authorized and directed to convey to the Citizen Band of Pottawatomie Indians of Oklahoma all right, title, and interest of the United States in and to the following described lands of the Shawnee Indian School and Agency Reserve, including reversionary rights and retained mineral interests under existing grants, together with all improvements located thereon:

Tract Numbered 1: Northeast quarter northeast quarter, southeast quarter northeast quarter, southwest quarter northeast quarter section 31, township 10 north, range 4 east, Indian meridian, Pottawatomie County, Oklahoma, containing 120.00 acres, more or less.

Tract Numbered 2: That part of the northwest quarter southeast quarter section 31, township 10 north, range 4 east, Indian meridian, Pottawatomie County, Oklahoma, described as: Beginning at the southwest corner of said northwest quarter southeast quarter; thence east 1,320 feet; thence north 1,320 feet; thence west 1,320 feet to the center of said section; thence south 167 feet; thence east 183 feet to the intersection with the west line of the Atchison, Topeka, and Santa Fe Railroad right-of-way; thence southwesterly along the west right-of-way line a distance of 856 feet to the intersection with a point in the west line of the northwest quarter southeast quarter, said point being 983 feet south of the center of section 31; thence south along the west line of the northwest

quarter southeast quarter, a distance of 337 feet, to the point of beginning; containing 38.29 acres, more or less.

Tract Numbered 3: That part of the southeast quarter northwest quarter section 31, township 10 north, range 4 east, Indian meridian, Pottawatomie County, Oklahoma, described as: Beginning at the northeast corner of said southeast quarter northwest quarter; thence south 1,320 feet to the center of said section 31; thence west along the south line of said southeast quarter northwest quarter, a distance of 1,255.4 feet to the intersection with the centerline of Oklahoma State Highway Numbered 18; thence northwesterly along the centerline of the highway a distance of 660.58 feet to a point on the south line of the northwest quarter southeast quarter northwest quarter; thence east 38 feet to the intersection with the east right-of-way line of Oklahoma State Highway Numbered 18; thence northwesterly along the east right-of-way line to a point in the north line of said southeast quarter northwest quarter, said point being 58 feet east of the northwest corner of said southeast quarter northwest quarter; thence east a distance of 1,262 feet to the point of beginning; containing 38.63 acres, more or less.

Tract Numbered 4: That part of the northeast quarter southwest quarter section 31, township 10 north, range 4 east, Indian meridian, Pottawatomie County, Oklahoma, described as: Beginning at the northeast corner of said northeast quarter southwest quarter, said point being the center of section 31; thence south 167 feet; thence west 1,302 feet to the intersection with the west line of the right-of-way of Oklahoma State Highway Numbered 18; thence northeasterly along the west right-of-way line a distance of 167 feet to the north line of said northeast quarter southwest quarter; thence east along said north line a distance of 1,297.4 feet to the point of beginning: containing 4.678 acres, more or less.

Tract Numbered 5: That part of the northeast quarter southwest quarter section 31, township 10 north, range 4 east, Indian meridian, Pottawatomie County, Oklahoma, described as: Beginning at the southwest corner of said northeast quarter southwest quarter; thence north along the east line of said northeast quarter southwest quarter a distance of 337 feet to the intersection with the west

right-of-way line of the Atchison, Topeka, and Santa Fe Railroad right-of-way; thence southwesterly along said west right-of-way line a distance of 367 feet to the intersection with the south line of said northeast quarter southwest quarter; thence east along the south line a distance of 129 feet to the point of beginning; containing .498 acre, more or less.

Tract Numbered 6: The reserved mineral deposits, including the right to prospect for and remove the same, in and under lands described as the south half of lot 2 (southwest quarter northwest quarter), and that part of the southwest quarter southeast quarter northwest quarter lying west of the centerline of Oklahoma State Highway Numbered 18 and adjacent to the south half of said lot 2, all in section 31, township 10 north, range 4 east, Indian meridian, Pottawatomie County, Oklahoma, containing 19.87 acres, more or less, which lands were previously conveyed to Pottawatomie County, Oklahoma, by quit-claim deed dated December 17, 1959, pursuant to the Act of June 4, 1953 (67 Stat. 71 [actually, 67 Stat. 41]; 25 U.S.C. 293a), said deed appearing of record in Pottawatomie County, Oklahoma, in deed book 174 at page 367 of the land records of said county.

The title of the tribe to the lands hereinbefore described and the improvements thereon shall be subject to no exemption from taxation or restriction on use, management, or disposition because of Indian ownership.

[Section 2 of this Act and the Tract Numbered 7 therein identified pertain exclusively to a conveyance to the Absentee-Shawnee Tribe of Indians of Oklahoma, irrelevant to the case at bar.]

Section 3. The Indian Claims Commission is directed to determine in accordance with the provisions of section 2 of the Act of August 13, 1946 (60 Stat. 1050), the extent to which the value of the title conveyed by this Act should or should not be set off against any claim against the United States determined by the Commission.

48. Taking the Acts quoted in Finding Nos. 46 and 47 herein together, they authorize conveyance to the Plaintiff of 260.086 surface acres to land of the Shawnee Indian School and Agency Reserve, plus mineral rights

to another 19.870 acres, together with the improvements located on the surface acres at the time of conveyance.

49. The 260.086 surface acres conveyed to the Plaintiff by the 1960 and 1964 Acts quoted in Finding Nos. 46 and 47 (supra) were a portion of a tract which, for a number of years after ratification of the Agreement of June 25, 1890, ratified March 3, 1891 (26 Stat. 989), was used by the Federal Government for school, school farm, and Indian agency purposes.

Many years prior to 1960 [the precise date is not determinable on the evidence of record], the school, school farm, and agency uses were abandoned. Except for the part of the tract which was utilized in connection with an Indian hospital and sanitarium [The Shawnee Indian Sanitarium], the parcel of land was regarded as excess to the needs of the Department of the Interior.

The Shawnee Indian Sanitarium was operated from an undetermined date prior to 1960 to an undetermined date prior to 1964. At a point before the Act of August 11, 1964 (supra), The Shawnee Indian Sanitarium was discontinued and the structures were vacated. At that point, the sanitarium buildings and grounds, too, were regarded as excess to the needs of the Department of the Interior.

Of the portion of the tract formerly devoted to The Shawnee Indian Sanitarium, 33.23 acres which included the hospital and most of the Sanitarium buildings were conveyed to the Absentee Shawnee [see the interpolated material between Sections 1 and 3 of the Act of August 11, 1964, relating to the Tract Numbered 7]; the balance of 260 acres with five buildings was conveyed to the Plaintiff.

50. The Shawnee Indian Sanitarium land conveyed to the Plaintiff included the buildings appraised by the Defendant's appraiser under the numbers "21" (a hay barn), "23" (a dairy barn), "28" and "29" (a garage appurtenant to a residence, respectively), and "41" (a residence).

The uncontroverted appraisal data established that the hay barn numbered 21 and the dairy barn numbered 23 contributed no value of the property conveyed to the Plaintiff. Together, cost of clean-up might equal salvage value.

The uncontroverted appraisal data establish that the residence numbered 29 and its garage numbered 28, taken together, would comprise a useable residence in a condition considered as being only fair, and that the aggregate value of the property was \$5,800.00 as of the date of conveyance to the Plaintiff.

The uncontroverted appraisal data establish that the residence numbered 41, being a four-year old two-bedroom house on an inadequate foundation, had a value as a useable residence of \$4,200.00 as of the date of conveyance to the Plaintiff.

The five buildings conveyed to the Plaintiff with the land of The Shawnee Indian Sanitarium had an aggregate value as of the date of conveyance of \$10,000.00.

51. The lands returned to Indian ownership by the 1960 and 1964 Acts (Finding Nos. 46 and 47 herein) were included in the sections set aside from homestead entry or allotment in the 1890 Agreement (supra) by the following language:

. . . Provided, that in allotments to be hereafter made, no person shall have the right to select his or her allotment in section sixteen and thirty-six in any Congressional township -- nor upon any land heretofore set apart in said tract of country for any use by the United States, or for school, school farm, or religious purposes -- nor shall said sections sixteen and thirty-six be subject to homestead entry but shall be kept and used for school purposes; nor shall any land set apart for any use of the United States, or for school, school farm or religious purposes, be subject to homestead entry -- but shall be held by the United States for such purposes, so long as the United States shall see fit to use them:

A beneficial interest in the several tracts conveyed by the 1960 and 1964 Acts was reserved to the Potawatomi Indians by the language quoted immediately above. The reserving of beneficial interest resulted in the United States not having the freedom to alienate land that is implicit in a fee simple title. Hence, only the bare legal title, of nominal value, was returned by the cited Acts of September 13, 1960, and August 11, 1964.

52. The United States should not be charged with having failed to pay the full market value for the surface acres conveyed in 1960 and 1964. It follows that the 260.086 surface acres should be excluded from the ceded acreage for which the United States is liable.


It was previously demonstrated that the acreage for which the United States was liable had a fair market value on the critical date which approximates \$3.00 per acre. Exclusion of the 260.086 surface acres may be conveniently accomplished by the allowance of an offset in the amount of \$780.26.

53. The reserved mineral deposits, including the right to prospect for and remove the same (the south half of lot 2; Tract Numbered Six of the Act of August 11, 1964 (Finding No. 47 herein) are of a nebulous and speculative value not susceptible of reduction to a dollar finding on the evidence before the Commission.

54. The sum of the offsets allowed being \$132,491.01, the Plaintiff is entitled to a net recovery of \$797,508.99.


John T. Vance, Chairman


Jerome K. Kuykendall, Commissioner


Richard W. Yarborough, Commissioner

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THE UNITED STATES,)	
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Defendant.)	

Decided: August 27, 1968

Appearances:

Howard D. Moses, with whom were Giddings Howd and Louis L. Rochmes: Counsel for Plaintiff.

Keith Browne, with whom was Mr. Assistant Attorney General Clyde O. Martz: Counsel for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the Opinion of the Commission.

Trials of three aspects of the instant suit have heretofore been conducted. Following the first trial and subject to a stipulation narrowing the issues then to be considered, this Commission determined that the Plaintiff had a compensable interest in 362,832.22 acres of land located in the now State of Oklahoma. Citizen Band of Potawatomi Indians v. United States, 6 Ind. Cl. Comm. 646 (1958). Following the second trial, this Commission determined that the acreage had an 1890 value of

\$1,090,000.00, which works out to about \$3.00 per acre, and that the entire consideration amounted to \$160,000.00. The Commission concluded that the Plaintiff was entitled to recover the difference, \$930,000.00, "less allowable offsets, gratuities, and counterclaims." Id., 14 Ind. Cl. Comm. 570 (1964). Trial of the "offsets, gratuities, and counterclaims" aspect was held in Washington, D. C., on June 8, 1966, and argued on February 7, 1968.

The issues now to be decided are whether to allow an offset of \$119,790.75; whether to correct the record to the extent of eliminating an overcharge against the Defendant amounting to 640 acres; and whether to allow an offset of lands and/or interests in land conveyed to the Plaintiffs in the 1960's.

\$119,790.75 is the amount which the Defendant paid for a reservation in Oklahoma for the Plaintiff. Under Article II of a Treaty of February 27, 1867, ratified July 25, 1868, (15 Stat. 531, 535, 536), the Plaintiff's lands in Kansas were to be sold to a railroad and the proceeds were to be used to repay the \$119,790.75 to the Defendant. A lesser sum which the sale of the Kansas lands produced, \$101,630.05, was disbursed to the Plaintiff in 1875 and no repayment to the Defendant was made.

In Article IV of an Agreement between the Plaintiff and Defendant dated June 25, 1890 (26 Stat. 989, 1018), the Defendant renounced its right to collect this outstanding debt. Hence, the forgiveness of the debt representing the cost of the Plaintiff's Oklahoma reservation becomes a gratuity.

As the claim of the United States for repayment of the cost of Plaintiff's reservation was converted to a gratuity by the Agreement of 1890, it falls to the Commission to determine whether that gratuity should be offset against the Plaintiff under paragraph 3 of Section 2 of our Act.

The Plaintiff's claim in this docket is concerned with the disposition of its Oklahoma reservation in 1891, and an award has been ordered to provide full compensation to the Plaintiff for its reservation over the unconscionable consideration received under the Agreement of 1890. Considering the nature of the claim, the Commission finds that it would be appropriate to allow the United States a deduction equivalent to the cost to it of this reservation furnished to the Plaintiff in 1867. Consideration of the entire course of dealings between the parties warrants us to reach this conclusion. The result reached appears in accord with that of Kickapoo Tribe of Kansas, et. al. v. United States, 178 Ct. Cls. 527.

The second matter, the correction of the record, is required because this Commission, in determining the gross acreage chargeable against the Defendant, included one section (640 acres) constituting the Order of St. Benedict's Sacred Heart Mission on the Potawatomi Reservation in Oklahoma. These Mission lands were specifically excluded from allotment or homestead entry by Article II of the 1890 Agreement (above). The section was patented to the Mission by the Defendant pursuant to a 1910 Act (35 Stat. 781, 807).

Although it may be that the 1890 Agreement and the subsequent patenting of the 640 acres to the Benedictine Fathers extinguished any interest of the Plaintiff in this land, we do not think it properly should be chargeable against the United States. Although this result may appear incongruous with decisions in similar situations, the Petitioner tribe is apparently content to seek no compensation. The land was devoted to the beneficial purposes of the Indians, as approved by them, and they suffered no detriment or loss by the 1890 transfer or the subsequent patent to the Sacred Heart Mission; the 640 acres was used the same before, during and after these transfers. This acreage should be excluded from the ceded average, and we accept the suggestion of the parties that for convenience an offset of \$1,920.00 should be allowed.

By Acts of September 13, 1960 (74 Stat. 903), and August 11, 1964 (78 Stat. 392), the Secretary of the Interior was authorized to convey to the Plaintiff land aggregating 260.086 surface acres. In each Act, the Commission was directed to determine the extent to which the value of the title conveyed should or should not be offset against this award.

The lands thus returned to Petitioners' ownership were among those reserved from homestead entry or allotment under the 1890 Agreement as being reserved for school, school farm or religious purposes; apparently this land had been so used for some years before the 1890 Agreement. The tracts continued to be used for many years for Indian health and education purposes, and the Government's course of conduct over many years indicated a belief that the Indians had some interest, at the least, in these tracts.

We hold that under these circumstances the Petitioners retained a beneficial interest in the subject lands, without attempting to define that interest exactly or determine whether the Government could have extinguished it by other action that it did not take. With a still current beneficial interest in the Petitioners, what was returned to them by the 1960 and 1964 enactments was a bare legal title to the land, to which we can assign no more than a nominal value.

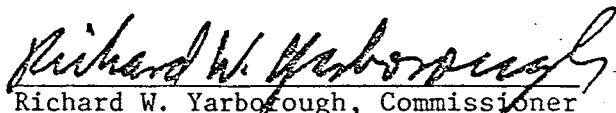
Holding that the beneficial interest to these parcels remained with the Plaintiff, it follows that the United States should not be charged with having failed to pay the full market value for them in 1890. Accordingly, the 260.086 acres of land will be excluded; i.e., for convenience we allow the Defendant the equivalent offset of \$780.26 for the surface acres.

This result may be compared with that reached in Pawnee Tribe of Oklahoma v. United States, 124 Ct. Cls. 324, where the Government was held to be obligated to compensate the Indians for the transfer of legal title in lands such as these, at the purchase price for surplus lands established under that Treaty. Here the lands were held by the United States and used for the Indians for the entire intervening period before being returned to them by Act of Congress. Upon taking legal title to the land, the U. S. owed to the Indians something for taking the land beyond their power of control and disposition, as in Pawnee, but where the beneficial use remained in the Indians, and no damage to them is shown, eventual return of the legal title relieves the U. S. from the obligation of additional compensation for the original transaction.

It may also be noted that the award in this case is stated in terms of the 1890 dollar value, but the offset is sought by the Government in 1962 dollars. Under this theory, a timely present return of a few hundred acres to the Indians might offset entirely their claim for the original transfer of the 362,832 acres. The Court of Claims in Kickapoo Tribe of Kansas, et. al. v. United States, 178 Ct. Cls. 527, has rejected a theory which allows the Government to speculate in the appreciation of Government owned lands, taking its profits in reduction of the Indians' claim for the value of the land originally taken from them. The offset claimed here fails to meet the test of good conscience as required by our Act.

Improvements constructed on the tracts by the Government had a market value of \$10,000 when conveyed to the Petitioners. The 1964 enactment placed no restrictions on the ability of the Petitioners to realize such an amount by sale. For this gratuity, the Defendant will be allowed an offset of \$10,000.

The offsets and exclusion allowed total \$132,491.01, so the net recovery will be \$797,508.99.


Richard W. Yarborough, Commissioner

We Concur:

