

BEFORE THE INDIAN CLAIMS COMMISSION

THE OSAGE NATION OF INDIANS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 106-107
)	(Consolidated)
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: September 20, 1968

Appearances:

Delmas E. Martin, with whom were Paul M. Niebell, Warren S. Watkins and George E. Norvell, Attorneys for Petitioner

Clifford S. Stearns, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant

OPINION OF THE COMMISSION

Vance, Chairman, delivered the opinion of the Commission.

This case is the successor to Docket No. 105, and involves the claim of the Osage to lands on the west side of the cession line of the Treaty of 1808. The land in question in Docket No. 106 is Royce Area 97, to which the Osage relinquished their rights in the Treaty of September 25, 1818. The land in question in Docket No. 107 is a vast area of Oklahoma and Kansas, and a small portion of Missouri and Arkansas, also contiguous to the Cession Line of 1808. The Osage relinquished their rights to it in a Treaty dated June 2, 1825.

The Osage claim the land in their cases on the basis of both recognized and aboriginal title. The claim of recognized title is on language of the Treaty of 1808, providing that the Osage:

[S]hall be permitted to live and to hunt, without molestation, on all that tract of country, west of the north and south boundary line, on which they, The Great and Little Osage have usually hunted or resided: Provided the same be not the hunting grounds of any nation or tribe of Indians in amity with the United States ...

We think the above language is far too indefinite to constitute recognition of title. First, the language provides only that the Osage "shall be permitted to live and to hunt." That language falls short of any grant or recognition of title. Second, there is no indication in the Treaty as to the boundaries of the land involved. The statements of the Indians themselves, Finding Nos. 6 and 7, cannot by any pretext be imputed to be the will of Congress or the President at the time of ratification. Cf. Ute Indians v. United States, 330 U.S. 169, 180 (1947). Absent further evidence, we cannot assume Congress had the Lewis and Clark Report of 1806 in mind at the time of ratification (see Finding No. 6).

Petitioner is not aided by the language of later treaties in this case, even though in other cases the courts have been willing to look to such other language for clarification. The Treaty of 1818 and the Treaty of 1825 ceded to the United States a very large body of land, but at no point in those treaties did the Government recognize that the Indian claim "had any

substance." Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 197 (1963).

Under those circumstances, we conclude that neither the Treaty of 1808 nor the later treaties, separately or in combination, sufficed to give recognized title to the Osage to any land in question here.

Petitioner also cites the instructions of Governor Lewis to Peter Chouteau (Finding No. 5), who negotiated the Treaty of 1808, which instructions were communicated to the Senate when it ratified the Treaty. The relevant passage reads simply: "it assures to [the Osage], for their exclusive use, the lands west of the boundary line." Here again, no specific tract was mentioned. The instructions and treaties, taken together, merely establish one boundary between the Indian and non-Indian territories. This fact in itself cannot constitute recognition of title. Minnesota Chippewa, 8 Ind. Cl. Comm. 781 at 818. Under these circumstances, we hold that the Osage did not have recognized title to the land involved and so we must examine the facts to see if they justify finding aboriginal title.

Number 106

The area involved in Docket No. 106 hereinafter referred to as Royce Area 97, was described in the treaty as follows:

Finding 9

***Beginning at the Arkansaw river, at where the present Osage boundary line strikes the river at Frog Bayou; then up the Arkansaw and Verdigris, to the falls of Verdigris river; thence, eastwardly, to the said Osage boundary line, at a point twenty leagues north from the Arkansaw river; and, with that line, to the place of beginning. [Art. I, Treaty of September 25, 1818, 7 Stat. 183, 184.]

Traditionally, the permanent villages of the Osage were located north of this region along the Missouri and Little Osage Rivers, but a sizeable village had also been established near the Verdigris River, close to the present site of Claremore, Oklahoma, only about thirty miles northwest of the nearest boundary of Royce Area 97.

The issue in this case is whether the Osages had aboriginal title to Royce Area 97. In order to establish their title, the Indians must show continuous and exclusive use and occupancy "for a long time" or "from time immemorial." Confederated Tribes of Warm Springs Reservation, 177 Ct. Cls. 184 at 194 (1967), and cases there cited. The issue is not difficult to resolve. The Government's only evidence was presented by Professor Dale Henning of the University of Missouri. Professor Henning's report, buttressed with the supporting exhibits, conceded that at about 1800, Area 97 was restricted to Osage use and occupancy:

"The Osage Indians apparently frequented Area 97 for purposes of hunting almost without opposition until the beginnings of eastern tribal movement across the Mississippi about 1800." Report of Prof. Henning, Plaintiff's Exhibit 84, page 26; and see Finding 9.

Similarly, petitioner's evidence indicates that the Osage controlled this territory by at least 1750. (Pet. Ex. 129 at pp. 114-17 and supporting evidence).

There would thus seem to be no dispute that the Osage had aboriginal title to Area 97 in 1800. It was immaterial that they did not live there so long as they had exclusive use of the area and frequented it for hunting purposes. Confederated Tribes of Warm Springs, 177 Ct. Cls. 184 at 194.

During the period 1800-18, eastern tribes began to encroach somewhat on Area 97, at one point even traversing it entirely to raid the Osage village near the Verdigris River in 1817. Except for one rather vague and dubious reference by defendant's expert to settlement by Cherokee in Area 97 in 1816, there is no evidence to support a finding that any group had permanent settlements in the area before 1818. Petitioner's expert's report states clearly that the Cherokee were settled outside Area 97 in 1816 (Pet. Ex. 129 at p. 158), and defendant's expert's own report contradicts his testimony that there was any settlement in Area 97 before 1818:

"A search of historic documents has been made in an effort to locate reference to possible village location of any known historic tribal unit, but none has been found within Area 97 previous to 1818. . ." (Def. Ex. 84 at p. 26)

Under these circumstances the Commission finds that there were no permanent Indian settlements in Area 97 before 1818.

The only question remaining to be determined is whether the encroachments of the eastern tribes' hunting and war parties in the area from 1808 to 1818 constitute an extinguishment of Osage aboriginal title. The Commission has already held that raids and similar encroachments do not extinguish title where the raiders do not succeed in establishing permanent settlements. Mescalero Apache, 17 Ind. Cl. Comm. 154, and we hold that principle applicable here. The Osage have thus established aboriginal title to the entire area in Docket No. 106.

Number 107

Number 107 is a more complicated case. It deals with parts of Arkansas and Missouri, most of Oklahoma, and a large part of Kansas.

It may be remarked that the petition asserts title only to the land ceded by the Treaty of 1825. This territory is usually considered to be completely contained in the boundaries of Royce Area 123, which are the Canadian River in Oklahoma on the south and the cession lines of 1808 and 1818 on the east. At the trial, however, petitioner's expert witness put in evidence tending to show aboriginal title all the way to the Red River on the south and well into central Arkansas on the east.

In light of the following opinion the variance is immaterial but the Commission wishes to make it clear that it has passed on the merits of the entire claim as presented in the evidence. Reference to the map (petitioner's exhibit 130) is the easiest and clearest method of defining the territory claimed.

Much of this case depends on the weight accorded the evidence marshalled by, and testimony of, expert witnesses. Petitioner's expert was Dr. Fred W. Voget, Professor of Anthropology at Southern Illinois University. Dr. Voget is a respected anthropologist and author of many papers in his field. He has worked in the anthropology of other Indian tribes, but had never conducted a study of the Osage until employed to compile a report for the petitioner. His report consisted almost entirely of findings from his study of historical documents.

The defendant's expert was Dr. Carl Haley Chapman. Dr. Chapman is Professor of Anthropology and Director of American Archaeology at the University of Missouri. Dr. Chapman has been intimately involved with work on the Osage for many years, beginning with his doctoral dissertation. His evidence and report were based both on historical documents and archeological evidence. It is the opinion of the Commission that Dr. Chapman's evidence was more persuasive than that of Dr. Voget, although to say so is no discredit to the helpful and scholarly work of Dr. Voget.

The definition of the area of aboriginal title here is rendered difficult by the nature of the Osage culture. The Osage wandered about the plains in search of game, operating from a small base of permanent villages located in western Missouri and eastern Kansas and Oklahoma.

The question must now be whether petitioner has proved title to any land beyond that immediately surrounding the villages. Petitioner's expert, Dr. Voget, presented evidence and testimony to the effect that the Osage had controlled and occupied a vast territory. The basic difference between Dr. Voget and Dr. Chapman concerned the extent of control exercised by the Osage over territory which both experts conceded had been used by the Osage for purposes of war and hunting.

The problem in this case is complicated even further by the fact that in order to prove aboriginal title the petitioner must produce evidence bearing on an era when there was almost no white settlement of the area and when, indeed, much of it was unexplored and the balance was only rarely traversed by explorers and trappers on whose journals petitioner

must rely. Maps of the area were frequently inaccurate, and observations made by travellers were always subject to the caveat that the observer may not have been thoroughly acquainted with the people and geography of the area, or was visiting the area for a purpose other than observation of Indians and may have made the observation offered here in an offhand and inaccurate manner.

Having made these general reflections, we now pass to the consideration of specific boundaries of the aboriginal territory.

1. The Eastern Boundary. The eastern boundary of the territory in dispute here is the easiest to establish. In the previous Osage case, Docket No. 105, we determined that petitioner had aboriginal title to all land on the east side of the Cession Line of the Treaty of 1808 from the northern boundary of Cass County, Missouri, to the Arkansas River. Part of the land west of that line has already been disposed of in Number 106. This region was the most heavily settled by the Osage of all the territory involved here. Traditionally, the Osage villages were located not far to the east of the cession line of 1808, but between 1790 and 1825 the principal villages were moved immediately to the west of the cession line of 1808. See Findings 19-22. Furthermore, the evidence establishes that by 1750 the Osage had cleared the area between their villages and the buffalo hunting grounds west of the 97th meridian of other Indian settlement and exclusively used and occupied the area immediately west of the cession line. See Finding 26. After their villages were moved west of that line, they continued hunting east of it (see Findings 24 and 27),

indicating a continued control of the territory immediately west of the 1808 Cession Line. The conclusion is thus inescapable that the Osage had aboriginal title to a territory having as its eastern boundary the cession line of the Treaty of 1808 from the northern boundary of Cass County, Missouri, to the point of intersection with the boundary of Royce Area 97, the cession line of the Treaty of 1818. Since we have already determined in No. 106 that Royce Area 97 was part of the Osage aboriginal territory, it also follows that the territory between the cession line of 1818 and the territory conceded by the government in this case must have been used by the Osage for hunting purposes and for purposes of transportation to other hunting grounds. Thus the cession line of the Treaty of 1818 from the cession line of 1808 to the Verdigris River also is a boundary of the aboriginal territory in this case.

2. The Southern and Western Boundaries. The southern and western boundaries of the aboriginal territory involve similar considerations. They are extremely difficult to trace for two reasons: (1) the Osage were roaming hunters and great fighters who covered a large expanse of territory, and (2) during the years in question Indian territories were constantly in flux because of the westward emigration of eastern tribes.

Petitioner's evidence tends to show an aboriginal territory extending to the Red River on the south and the 100th meridian on the west. It is quite clear from the evidence of both parties that war parties and occasional hunting parties did travel that far, but that fact in itself does not mean that the Osage had exclusive possession of the territory.

The best estimate of the Osage population from 1808 to 1825 is between five and six thousand. Petitioner would have us believe that with a population of that size the Osage were able to exclusively use and occupy this huge territory. While petitioner does bring forth some evidence tending to buttress this conclusion, the defendant, on the other hand, produced historical evidence tending to prove that other war and hunting parties did tend to use parts of the territory claimed by petitioner. Faced with conflicting evidence and expert opinion, and moreover with evidence which is at best vague and uncertain, the Commission holds that the preponderance of the evidence indicates that with a population of five to six thousand, of which about 1500 would be warriors, the Osages could not have exclusively controlled and occupied all of the territory claimed here.

Petitioner's evidence does tend to show that by 1750 the Osage had established exclusive use and occupancy all the way to the Arkansas River. See Finding 26. On the south, we find there is little evidence to support aboriginal title south of the Arkansas River. There was little to draw the Osage in that direction. The ancient homelands and hunting grounds of the Osage were to the north and east in Missouri and northern Arkansas, and the buffalo drew them primarily to the west, not to the south. Indeed, according to petitioner's own exhibit 130, a large map of the territory involved the only Osage camp sites south of the Arkansas, east of the 97th meridian, were only located by vague reports of historians, unverified by location on contemporaneous maps or archeological data. Furthermore,

petitioner's own exhibit 130 locates the supposed camps south of the Arkansas only because they were reported attacked by the Choctaws in 1822. This attack, coupled with an attack by the Choctaws on the Bright party and the Osage in 1806 (Def. Ex. 10 at p. 16) and Bright's report that a number of tribes hunted on the Arkansas River (id. at 11), indicates that the Osage never completely dominated the territory south of the Arkansas. The Commission therefore finds that in 1825 the southern boundary of Osage aboriginal territory east of the 97th meridian was the Arkansas River.

In determining the western boundary, the Commission is faced with an equally amorphous body of evidence. It appears that by 1750 the Osage had control of the east bank of the Arkansas River after it turns northward in Oklahoma. See Finding 26. Beyond that point, much depends on the nature of the buffalo hunt, which was the principal attraction drawing the Osage westward. The Osage had developed a seasonal, buffalo-hunting economy as early as 1700 which they maintained until after 1825. See Findings 24 and 27. Petitioner's evidence on the location of buffalo tends to be uncertain, but petitioner's evidence tends to prove that at the relevant times masses of buffalo began to appear beginning at the 97th meridian westward (see Finding 25). The 97th meridian is approximately the location of the Arkansas River after it turns northward in northern Oklahoma.

The Commission believes that the evidence tends to prove that the Arkansas River in part also formed the western boundary of the Osage aboriginal territory. The distance between the Arkansas and the village sites was not great, ranging from 50 to 100 miles at most points, and it

would have been necessary for the Osage to control and traverse this area to maintain access to the buffalo herds, aside from whatever hunting value the territory may have had. Given these facts, it is reasonable to conclude that the Osage had exclusive use and occupancy of the territory up to the Arkansas River from about 1750 up to and beyond 1825 (see Finding 26). Defendant's evidence indicates that the country west of the Arkansas was hunted over by hostile tribes but there is no substantial evidence that the area east of the Arkansas was used by tribes other than the Osage (see Finding 27). The petitioner's evidence that the Osage had aboriginal title to the Arkansas along its north-south course being basically uncontradicted, the Commission so finds as to the area south of the Kansas border.

The territory in question as the map shows, extends to the 100th meridian and even beyond, except for an oblong territory beginning at the southern border of Kansas, representing Royce Areas 475, 476 and 530. Naturally, none of those areas are concerned in this case, although since they penetrate far into the territory in question in an easterly direction, we must of necessity discuss them.

As we found above, to the south of the Kansas border, the Arkansas River provided a logical, natural western boundary for the aboriginal territory. By the time the Arkansas traverses Areas 476 and 530, however, and re-enters the disputed territory, it has turned in a northwesterly direction and has basically returned to an east-west course. In this northern portion of the disputed territory, petitioner's own evidence admits that other tribes, particularly the Kansas, hunted buffalo with the

Osage west of the 97th meridian. Petitioner would have us believe that the Kansas hunted in the area only as guests of the Osage. Defendant's evidence, however, tends to prove that the Osage hunted with the Kansas because they were not strong enough to venture so far from their villages without reinforcements, and that even with reinforcements they were not entirely safe in the territory west of the 97th meridian (see Finding 27). We feel that defendant's evidence is more convincing on the point, and find, lacking any logical or definite natural boundary, that between Area 476 and the northern boundary of the Osage aboriginal territory, to be defined below, the western boundary of the Osage territory was the 97th meridian.

3. The Northern Boundary. Petitioner has submitted considerable evidence to establish the northern boundary of the aboriginal territory. While this evidence, being the same sort of historical documents on which we have already commented, might be refuted by either similar or other evidence, it is interesting that defendant has not done so. In regard to the other boundaries defendant has submitted evidence of occupation and use by other tribes. In this area, however, the only evidence supporting defendant's proposed boundary from Burlington, Kansas, to Schell City, Missouri, is the assertion that a tribe the size of the Osage simply could not control a larger area.


Absent any further evidence, we feel petitioner has sustained its burden as to the northern aboriginal boundary, with one exception. In Docket No. 105, the Commission determined that the area around Fort Osage,

located approximately at the junction of the Missouri River and the cession line of 1808, was used by other tribes as well as the Osage. For that reason it was found that the aboriginal boundary of the Osage terminated at the northern boundary of Cass County, Missouri. We feel constrained to hold the same way in this case, so that from the cession line of 1808 to the Kansas Border, the northern boundary is held to have been a line corresponding to the current northern border of Cass County, Missouri.

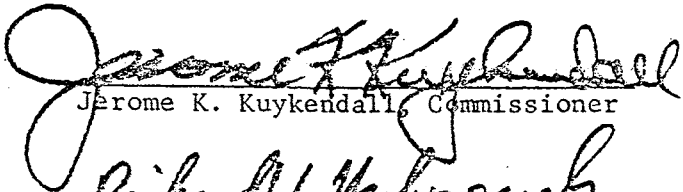
From that point the northern boundary of the territory follows the boundary of Area 123 south along the Kansas border from the northern boundary of Cass County, Missouri, then west by north-west across Kansas to a point on the Area 123 boundary due north of Emporia, Kansas. The boundary so established roughly follows the division between the drainages of the Kansas and Arkansas Rivers, which petitioner's evidence tended to prove. From that point the aboriginal boundary ran due south to the Cottonwood River, thence west and southwest along the Cottonwood River to Florence, Kansas, thence due west to the 97th meridian.

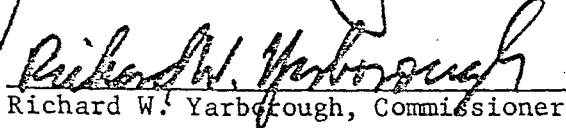
To sum up this Opinion, we find that the Osage had original title to a territory commencing at the junction of the northern boundary of Cass County, Missouri, and the cession line of 1808, running south along the cession line to the cession line of 1818; thence south-west along the latter cession line to the Verdigris River; thence down the Verdigris to the Arkansas River; thence up the Arkansas to the Kansas-Oklahoma border; thence eastward along the Kansas border; thence north and then westward

along the boundary of Royce Area 123 to the 97th meridian; thence north along the 97th meridian to a point due west of Florence, Kansas; thence due east to and eastward along the Cottonwood River to a point due south of Emporia, Kansas; thence due north to the boundary of Royce Area 123; thence east by southeast along the boundary of Royce Area 123 to the Missouri border; thence north to the northern boundary of Cass County, Missouri; thence eastward along the northern boundary of Cass County, Missouri, to the point of origin.


John T. Vance, Chairman

We concur:


Jerome K. Kuykendall, Commissioner


Richard W. Yarborough, Commissioner