

BEFORE THE INDIAN CLAIMS COMMISSION

THE ABSENTEE SHAWNEE TRIBE OF OKLAHOMA	)	
[on behalf of the SHAWNEE NATION]	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 334-B
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: November 13, 1969

Appearances:

Jack Joseph, Attorney for Plaintiff,  
Louis L. Rochmes was on the briefs.

W. Braxton Miller, with whom was Mr.  
Assistant Attorney General Shiro  
Kashiwa, Attorneys for Defendant.

OPINION ON PLAINTIFF'S MOTION  
FOR DETERMINATION OF CERTAIN ISSUES

Kuykendall, Chairman, delivered the Opinion of the Commission.

The case at bar was dismissed as an aggregation of individual claims. Absentee Shawnee v. United States, 12 Ind. Cl. Comm. 180 (1963). On appeal, the Court of Claims agreed but remanded for consideration of whether the Shawnee Nation might have a claim concerning the same land and arising out of the same transactions. Absentee Shawnee v. United States, 165 Ct. Cl. 510 (1964).

By the Treaty of May 10, 1854 (10 Stat. 1053), the Indians now known as The Shawnee Tribe of Oklahoma ceded to the United States about 1,600,000 acres of land in Kansas and simultaneously accepted a

retrocession of 200,166 acres out of which the Shawnee Indians were to select individual allotments. The land left over was to be held for five years so that any Shawnees then separated from the tribe [i.e., the Absent, or Absentee, Shawnees] who appeared and reunited with the tribe could claim allotments out of the residue. That residue amounted to 24,138.31 acres. The treaty further provided that after the five-year period, remaining "Absentee" lands would be sold, as possible, and the proceeds held in the Treasury for five more years. During the second five-year period, any Absentee Shawnee who reunited with the tribe could select an allotment if there was land to be had, or could have a cash payment if there was no land to be had.

By June 14, 1867, 1,997.61 acres of "Absentee" allotments had been taken, leaving 22,140.70 acres of residue lands, most of which were occupied by white squatters who wanted to buy the tracts they were using. By Joint Resolution of April 7, 1869 (16 Stat. 53), Congress directed the sale of the remaining land set aside for Absentee Shawnees to occupy settlers in quarter-section tracts at \$2.50 per acre. Not all the land was sold at once, and in 1883 the Shawnee Council consented to purchases by settlers who came after the 1869 Resolution. The proceeds were used, as the Treaty directed, for the benefit of the Shawnee Tribe of Oklahoma.

In explaining the reason for remanding, the Court of Claims held:

. . . The Shawnees, as a tribe or nation, therefore have a group claim based on the forced sale of the surplus absentee lands, under the 1869 resolution, at \$2.50 per acre. If that amount was less than fair value, the tribe suffered a loss cognizable under the Claims Commission Act.

and later observed:

. . . But there is an issue whether these and comparable actions by the Shawnees were freely and competently done -- without fraud, duress, mistake, or imposition -- and what they were intended to signify.

The Defendant regards the language quoted above as delineating the issues now pending.

On March 31, 1969, the Plaintiff moved for "Determination of certain issues and other relief" and supplied proposed findings and a brief in support of the motion. The Plaintiff argued that there are for present decision three issues, and that each of the three may be resolved as a matter of law. They are:

1. Whether the date of taking was April 7, 1869.
2. Whether there was a Fifth Amendment taking which would entitle the Plaintiff to recover "just compensation".
3. Whether the Defendant could offset against an award the value of property granted to the Absentee Shawnee pursuant to an Act of August 11, 1964 (78 Stat. 392).

The Plaintiff would have the Commission answer the first and second questions in the affirmative; and answer the third in the negative.

The Defendant responded to this motion by filing, on June 23, 1969, a document entitled "Defendant's Statement of Issues". In that document, the Defendant supplied the numerous and detailed reasons why there are for present decision two issues, both of which require trial, viz.: Whether the Shawnee Tribe freely and competently approved the sale of the subject lands and the application of the proceeds; and whether the sum of \$2.50 per acre received for the subject lands was their fair value as of November 2, 1854, the proclamation date of the 1854 Treaty.

The parties having been unable to agree upon the issues then pending, the scheduled trial on June 30, 1969, was cancelled and oral argument on the Plaintiff's motion was held on July 9, 1969. Hence, the pending question is whether to grant the Plaintiff's motion in chief or the Plaintiff's alternative motion that its version of the issues now pending be set down for trial, with a valuation trial to be held six months later.

Turning first to the Plaintiff's third point, that an offset issue should be regarded as for present decision, the Commission does not regard it as determinative that the decision remanding this case made no mention of the possible offset. The reason is obvious: The court decision was issued on April 17, 1964; the Act conveying the property in question was passed about four months later. However, the Commission does not regard this possible offset as an issue of law, but as a disputed issue of fact which could reasonably be treated

by the parties together with the other disputed issues of fact without imposing an undue burden on either party.

Respecting the date of taking, the Commission is guided in part by the reasons set out in The Three Affiliated Tribes of the Fort Berthold Reservation, et al., v. United States, 182 Ct. Cl. 543 (1968).

The Court there observed:

. . . as a practical matter, appellant's permanent possession and use of the surplus, unallotted, and unreserved reservation lands terminated when the homesteader actually entered and settled upon the tract chosen by him.

The problem in the case at bar is different; the principle remains the same. The question here is when the acres set aside for the appearance of any wandering Absentee Shawnee who might wish to claim any of them passed irrevocably out of the reach of an Absentee Shawnee. Certainly it was not the date of the treaty or its proclamation; it was contemplated that most of the "Absentee" lands would be taken up, for there was provision for cash lieu payments to late arrivals. Nor was it the date when the second five-year period expired, for Absentee Shawnees took their allotments of land after that date, and lawfully, with the consent and cooperation of the Defendant. But on April 7, 1869, Congress directed that all remaining "Absentee" acreage be sold to white settlers at \$2.50 per acre. At that point no Absentee Shawnee could claim an allotment, for the lands had passed irrevocably out of his reach.

The date of taking, then, must be and is April 7, 1869. The 22,140.70 acres will be valued as of that date.

Whether there was a Fifth Amendment taking would seem to turn upon the mode by which Congress placed a sales price of \$2.50 per acre upon the "Absentee" residue lands. It is not impossible to find a Fifth Amendment taking where some compensation was paid (Fort Berthold, supra); whether the sovereign merely transmuted the property from land to money is not conclusive (id.). The criterion is whether Congress here made a good faith effort to give the Plaintiff the full value of the land, and respecting this criterion, the record is silent. It remains a disputed issue of fact that will be set down for trial concurrently with the trial on value.

In view of the foregoing discussion, it is apparent that the Plaintiff's motion in chief is granted in part and denied in part, and that the Plaintiff's alternative motion is granted in part and denied in part. Findings of Fact consonant with the foregoing discussion have been entered.

It will be ordered that trial be scheduled at an early date in Docket No. 334-B on these issues:

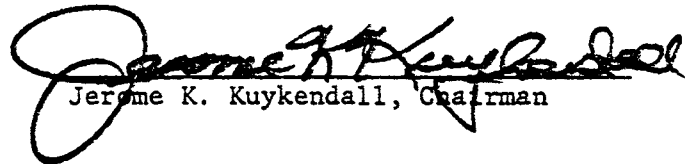
1. The fair market value of the 22,140.70 acres of "Absentee" surplus lands as of April 7, 1869.
2. The amount of the consideration paid for the "Absentee" surplus lands.

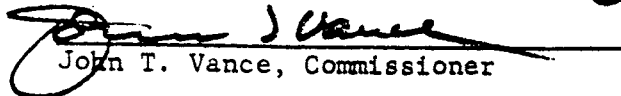
3. Whether the facts and circumstances in this case support a determination that there was a Fifth Amendment taking.

4. Whether the property granted to the Absentee Shawnee pursuant to an Act of August 11, 1964 (78 Stat. 392) is a proper offset.

The Defendant is invited to prove during the course of such trial such other offsets and counterclaims as it may deem appropriate.

Concurring:

  
Jerome K. Kuykendall, Chairman

  
John T. Vance, Commissioner

  
Richard W. Yarborough, Commissioner

  
Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner