BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION, Plaintiff, and THE CHEROKEE FREEDMEN, et al., Intervenors, v. THE UNITED STATES, Defendant.	)	Docket No. 173-A

Decided: February 4, 1970.

Appearances:
Paul M. Niebell, Attorney for Plaintiff. Earl Boyd Pierce and George E. Norvell were on the Briefs.

Jacob F. May, Jr., of Schnider, Shamberg & May, Attorney for Intervenors, Paul E. Wilson was on the Briefs.

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

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the Opinion of the Commission.

This suit was timely brought by the Cherokee Nation to recover of and from the defendant just compensation for a "taking" under the Fifth Amendment of 2,121,928.74 acres of the Cherokee Outlet lands. The claim for those lands was severed from the Cherokee case docketed as Claim No. 173 (Cherokee Nation v. United States, 9 Ind. Cl. Comm. 162 (1961)). The claim for the 2,121,928.74 acres was accordingly assigned Docket No. 173-A, (id., 9 Ind. Cl. Comm. 435 (1961), at 436). The intervenors, who had

previously and unsuccessfully prosecuted their own unrelated case, then known as Docket No. 123, now seek to secure 5.65% of the sum which the plaintiff received in the successful prosecution of its Docket No. 173; 5.65% of any award which the plaintiff may receive in the case at bar; and 5% on each judgment from the respective dates thereof.

In order to fix these objectives as integral aspects of the record of Docket No. 173-A, the intervenors moved for a Summary Judgment which, if granted, would adjudicate their alleged rights and impose satisfaction of those rights as a burden upon the net judgment, if any, in Docket No. 173-A.

The intervenor's Motion for Summary Judgment must be denied in its entirety. It appears to the Commission that each count of that Motion presupposes that this Commission has the power to determine which particular individuals will benefit from a Commission award or how such an award will be divided among classes of possible beneficiaries. This is not our understanding of the law. How an award is to be paid and precisely who can participate in an award are questions for Congressional and administrative determination and not for the Court of Claims (Peoria Tribe of Indians, et al v. United States, 169 Ct. Cl. 1009 (1965) and cases therein cited) or for this Commission (Seminole Indians, et al v. United States, 19 Ind. Cl. Comm. 440 (1968)). Inasmuch as this Commission has no jurisdiction to determine who should have received the benefit, or some benefit, of the award heretofore made in Docket No. 173 or who may benefit from

an award in the case at bar, if one should issue, the intervenors' motion cannot be granted. It follows, therefore, that there is no occasion for this Commission to determine, and the Commission intimates no view concerning, whether the intervenors who were determined to be "... an identifiable group within the intent and meaning of the Indian Claims Commission Act ..." (Cherokee Freedmen, et al v. United States, 10 Ind. Cl. Comm. 109 (1961)) are in fact Cherokees. In reaching this position, this Commission is not unmindful of the remand by the Court of Claims of Docket No. 123, now closed. Cherokee Freedmen, et al v. United States, 161 Ct. Cl. 787 (1963).

By that reprieve, those prosecuting Docket No. 123 were to have an opportunity to intervene in a pending Cherokee Nation claim to test whether they, by reason of their ancestry, are entitled to participate in awards which may be made to the Cherokee Nation at some future date (id., at 790, 791). In declining to resolve this new issue itself, the Court may have had in mind the criterion "... membership in the tribe is the touchstone to the right of individuals or groups to participate." Prairie Band of Potawatomi Indians, et al v. United States, 143 Ct. Cl. 131, 144, 165 F. Supp. 139, 147 (1958). But tribal membership is a uniquely political controversy, to be resolved in the first instance by the tribe itself (Prairie Band, supra, at 146). If those seeking to demonstrate their tribal membership are aggrieved by the tribe's determination, their remedy may be found in the jurisdiction of a local tribunal (28 U.S.C. 1360, as amended by P.L. 90-284 dated April 11, 1968, 82 Stat, 73, 79), not

before this Commission which has no jurisdiction of actions against Indian tribes (25 U.S.C. 70a).

Respecting the taking of the two-million-plus acres which are the subject of the case at bar, the Commission in an Interlocutory Order dated April 3, 1961, determined that "... the petitioner Cherokee Nation as of December 19, 1891, had no title to the 2,121,928.74 acres of its outlet lands in Oklahoma previously set apart and occupied by other Indian tribes ... for which lands deeds had been executed prior thereto by the Cherokee Nation to the United States in trust for other Indian tribes, ...". Congress passed five acts authorizing the settling of other tribes on the two-million-plus acres of Cherokee Outlet lands, which lands had been patented to the Cherokee Nation on December 31, 1838 (Cherokee Nation, supra, at 163). The settlement of "friendly Indians" on Cherokee land, and the subsequent sale of land so settled by the Cherokee Nation to the United States for a price to be determined, was authorized by Article XVI of a Treaty between the plaintiff and the defendant dated July 19, 1866 (14 Stat. 799, 804). The specific settlement authorizations were:

Date and Citation		Friendly Indians	Acreage
June 5, 1872	17 Stat. 228	Osage and Kaw	1,570,196.30
April 10, 1876	19 Stat. 29	Pawnee	230,014.04
May 27, 1878	20 Stat. 63, 76	Ponca	101,894.31
May 27, 1878	20 Stat. 63, 74	Nez Perce	90,710.89
March 3, 1881	21 Stat. 380,381	Otoe and Missouria	129,113.20
		Total.....	2,121,928.74

The third paragraph of the sixteenth Article of the Treaty of July 19, 1866 (supra), provided:

> The Cherokee nation to retain the right of possession and jurisdiction over all of said country west of 96° of longitude until thus sold and occupied, after which their jurisdiction and right of possession to terminate forever as to each of said districts thus sold and occupied.

From these few words, combined with the fee nature of Cherokee title, the parties draw very different conclusions respecting the nature of the disposition of the land and the effective date thereof. In this connection, it may be noted that the plaintiff characterizes the disposition as a "taking" in the Constitutional sense of an exercise of eminent domain by the sovereign.

The plaintiff alleges four misdeeds on the part of the defendant, done in a particular order, which added up to an actionable transaction. The plaintiff contends that the defendant: first, "completely disregarded" the provisions of Article XVI of the 1866 Treaty; second, located other tribes on Cherokee Outlet land; third, arbitrarily determined a nominal price to be paid the plaintiff for the land; and fourth, "consummated" the "taking" by requiring the plaintiff to execute deeds on June 14, 1883, conveying its fee simple title to the "friendly Indians" tracts to the United States in trust for the relocated tribes. From these allegations, the plaintiff concludes that there was a "taking of the land by the United States for public use in violation of the treaty" which warrants a cause of action for just compensation, citing Assiniboine Indian Tribe v. United States, 128 Ct. Cl. 617, 621, 121 F. Supp. 906, 910 (1954). And the plaintiff

further concludes that the effective date of the "taking", hence the date as of which these two-million-plus acres are to be valued, is the date when the Cherokee Nation executed the deeds: June 14, 1883.

The defendant disputes the allegations and the theories which they allegedly support. The defendant contends, and, in view of the evidence of record, we think correctly contends, that rather than "completely" disregarding the provisions of Article XVI of the 1866 treaty, the defendant observed its terms. That the United States had the right to locate other Indian tribes on the Cherokee Outlet land pursuant to the said Article XVI seems beyond dispute. See Ponca Tribe, et al v. United States, 183 Ct. Cl. 673, 682 (1968). This leaves only the "nominal price" dispute to support the constitutional "taking" theory. However, the price dispute, standing alone, is no more than the "unconscionable consideration" cause of action found in Clause (3) of Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a). It is apparent, therefore, that the relocation of friendly Indians upon Cherokee land was not an exercise of the sovereign's right of eminent domain. It follows that the plaintiff may not recover "just compensation".

Respecting the proper valuation date, the defendant contends that the five tracts should be valued separately on the respective dates when Congress, acting pursuant to the 1866 treaty, designated the tribes who were to be placed in the Cherokee Outlet lands (Def. Br., p. 106), citing Three Affiliated Tribes of the Fort Berthold Reservation, et al v. United States, 182 Ct. Cl. 543, 390 F. 2d, 686

(1968). The Court held that as between the date when the homesteader actually entered and settled a tract and the date when a patent to that tract was issued to that homesteader, the earlier date would control because at that point "the entryman 'was the lawful possessor clothed with an inceptive title ...'" (citing cases).

If the problem in the instant case were one of deciding between a date of patent and some earlier date, the Commission perhaps could see the application of the Fort Berthold decision. Here, such a result would seem to contravene the plain words of the treaty, and for no good reason. The third paragraph of Article XVI of the 1866 treaty provided for the plaintiff to retain ownership of (there expressed as "right of possession of and jurisdiction over") the Cherokee Outlet lands used for relocating tribes of friendly Indians "until thus sold and occupied". Clearly, the treaty contemplated actual sale as a chief element of termination of the plaintiff's title. And in the United States, termination of the owner's title to real estate by sale is accomplished by execution of a deed. Mitchell v. Nicholson, et al., 3 N.W. 2d 83 (N.D., 1942). There were deeds in this instance. From the language of the treaty, cited above, this Commission concludes that disposition of this case requires determination of the fair market value of all of the two-million-plus acres as of the date of the deeds: June 14, 1883.

The two-million-plus acres for which compensation is sought in

this suit comprised approximately the eastern one-fourth of that strip of land in the Indian Territory [now Oklahoma] known as the Cherokee Outlet. Better watered but more hilly than Outlet lands farther west and, of course, more accessible to settlers from the east, it was otherwise physically indistinguishable from the remainder of the Outlet.

The highest and best uses of this entire tract were general farming and large-scale stock raising. The former, utilizing the patches and strips of better lands, would be concentrated in the stream terraces and the level, undulating, and hilly uplands. Taken all together, general agriculture would probably account for no more than a third of the total acreage, or about 700,000 acres. The remainder, more than 1,400,000 acres, varied from good to average grazing land, in tracts suitable for extensive grazing operations.

On the crucial date in 1883, there were no settlers in the claimed lands. The government apparatus for the area was scanty. But since government, whether local, county, or state-wide, follows a population build-up and does not precede it, the minimal government facilities would constitute no detriment for a prospective purchaser.

1883 was a midpoint in two decades of steadily increasing land prices for substantially comparable land. From 1873 to 1883, land prices slightly more than doubled; from 1883 to 1893 they doubled

again. In this trend, real estate prices were not in conformity with the overall economic picture of the nation which, in 1883, was well into a downward trend which prevailed generally from 1882 through 1896.

It was within this context that the defendant paid the plaintiff a total of $2,627,411.00 for the 2,121,928.74 acres of the Cherokee Outlet on which were settled tribes of friendly Indians. The fair market value of those two-million-plus acres on June 14, 1883, was $6,896,000.00, or $3.25 per acre. The disparity between the consideration and the actual fair market value was so gross as to amount to unconscionable consideration within the contemplation of Clause 3 of Section 2 of the Indian Claims Commission Act of 1946. Accordingly, the plaintiff may have of and from the defendant the difference, that is, $4,268,589.00, less allowable counterclaims and offsets.

So ordered.

Brantley Blue

Brantley Blue, Commissioner

Concurring:

Jerome K. Kuykendall

Jerome K. Kuykendall, Chairman

John T. Vance

John T. Vance, Commissioner

Richard W. Yarborough

Richard W. Yarborough, Commissioner

Margaret H. Pierce

Margaret H. Pierce, Commissioner