

BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE AND APACHE)
 TRIBES OF INDIANS,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 259-A

Decided: April 1, 1970

Appearances:

J. Roy Thompson, Attorney
for Plaintiffs

Clifford R. Stearns, with whom
was Mr. Assistant Attorney
General, Shiro Kashiwa, Attorneys
for Defendant.

ON DEFENDANT'S MOTION TO DISMISS OR REQUIRE
PLAINTIFF TO MAKE PETITION MORE DEFINITE AND CERTAIN

Commissioner Pierce delivered the opinion of the Commission.

This case comes before the Commission on defendant's motion to dismiss the petition or, in the alternative, to require plaintiffs to make the petition more definite and certain.

The petition in this case was filed pursuant to a stipulation entered into by plaintiffs and defendant in Docket Nos. 258 and 259, accounting cases, which were consolidated and settled. The Kiowa, Comanche and Apache Tribes of Indians v. The United States, 18 Ind. Cl. Comm. 640 (1968). The stipulation provided that the plaintiffs

could exclude from the settlement their claims in connection with defendant's disposition of approximately 10,310 acres of land. At the time the stipulation was signed, the parties apparently were in agreement that the 10,310 acres of land belonged to the plaintiffs, having been reserved for their use and benefit pursuant to Section 6 of the Act of June 6, 1900 (31 Stat. 672, 676), under which Act most of plaintiffs' reservation had been transferred to the defendant.

On May 28, 1968, the defendant moved to dismiss the instant petition on the ground that the claim was not timely filed within the five year statute of limitations set forth in Section 12 of the Indian Claims Commission Act (25 U.S.C. 70k). On October 10, 1968, the Commission issued an order denying defendant's motion. Defendant's position in its present motion to dismiss is that title to the 10,310 acres of land, for which the present accounting is sought, was acquired by the United States pursuant to the provisions of Section 6 of the Act of June 6, 1900, supra, and that, accordingly, the defendant has no obligation to account to plaintiffs for the later disposition of this land.

Section 6 of the Act of June 6, 1900, supra, purportedly ratified an agreement previously entered into by the plaintiffs herein and a Commission composed of Chairman David H. Jerome and members Alfred M. Wilson and Warren G. Sayre, appointed by the President of the United States in accordance with the provisions of Section 14 of the Act of March 2, 1889 (25 Stat. 980, 1005). The Commission is generally referred to as the Cherokee

Commission and the Agreement which was negotiated is commonly called the Jerome Agreement. The Jerome Agreement was signed October 6, 1892, and provided in general that, subject to certain conditions including the allotment of some of the reservation land in severalty to members of the signatory tribes, title to most of the land in plaintiffs' reservation was to be transferred to the United States.

The provisions of Section 6 of the 1900 Act, supra, differed from the negotiated agreement in several material respects. Under the terms of the 1892 Agreement, the reservation land was to be classified as grain growing or grazing, and each Indian was to select one half of his 160 acre allotment from each type of land. The statute did not include this provision, providing instead that 480,000 acres of land would remain tribally owned and be used for a common pasture.^{1/} The Jerome Agreement stated that the lands located in sections sixteen and thirty-six were to be reserved for state school purposes but the 1900 Act also reserved sections thirteen and thirty-three for school purposes in addition to sections sixteen and thirty-six.

^{1/} During the negotiations a dispute arose concerning the price to be paid as compensation by the United States to plaintiff Indians for ceding the unallotted lands. The Cherokee Commission proposed \$2,000,000 and the plaintiff Indians wanted \$2,500,000. It is possible that Congress inserted the common pasture clause in Section 6 of the 1900 Act, supra, to meet the demand of the plaintiff Indians for more money. See generally House Report No. 1775, February 6, 1895, 53rd Cong., 3d Sess. accompanying H.R. 2877 and House Report No. 419, February 22, 1900, 56th Cong. 1st Sess. accompanying S. 255 (the bill which became Section 6 of the June 6, 1900, Act, supra.)

At the time of the 1900 cession, the parties were uncertain as to the precise size of the reservation. Subsequently the land used as the Fort Sill Military Reservation was included in the computation of the total acreage in the reservation. The parties herein now agree that the total size of the Kiowa, Comanche and Apache reservation at the time of cession was 2,991,933 acres.

The unallotted and unreserved lands in the reservation were opened for settlement on August 6, 1901, by Presidential Proclamation [No. 6] of July 4, 1901 (32 Stat. 1975, 1977, Part 2). Specifically excepted from entry for settlement were the lands allotted to individual Indians (445,000 acres), sections 16, 36, 13, and 33 reserved for the State of Oklahoma for school purposes, the common pasture (480,000 acres), the lands then being "used, occupied, or set apart" for religious societies, a common wood reserve for Indian use (23,040 or 25,000 acres), and the lands involved in the instant case and used for Indian schools and other administrative purposes (10,310 acres).

The proclamation as applicable reads, 32 Stat. 1975, 1977:

Now therefore, I, William McKinley, President of the United States of America, by virtue of the power vested in me by law, do hereby declare and make known that all of the lands so as aforesaid ceded by the Wichita and affiliated bands of Indians, and the Comanche, Kiowa, and Apache tribes of Indians, respectively, saving and excepting sections sixteen, thirty-six, thirteen and thirty-three in each township, and all lands located or selected by the Territory of Oklahoma as indemnity school or educational lands, and saving and excepting all lands allotted in severalty to individual Indians, and saving and excepting all lands allotted and confirmed to religious societies and other organizations, and saving and excepting the lands selected and set aside as grazing lands for the use in

common for said Comanche, Kiowa, and Apache tribes of Indians, and saving and excepting the lands set aside and reserved at each of said county seats for disposition as townsites, and saving and excepting the lands now used, occupied, or set apart for military, agency, school, school farm, religious, Indian cemetery, wood reserve, forest reserve, or other public uses, will, on the 6th day of August, 1901, at 9 o'clock a.m., in the manner herein prescribed and not otherwise, be opened to entry and settlement and to disposition under the general provisions of the homestead and townsite laws of the United States.

Congress thereafter authorized the sale of the Common Pasture and Wood Reserve pursuant to the Act of June 5, 1906 (34 Stat. 213), and directed that the proceeds be deposited in the Treasury for the benefit of the three tribes. The Indian school and other administrative lands, excepted from entry under the 1901 Proclamation and not then being used, were directed to be sold according to Section 17 of the Act of June 30, 1913 (38 Stat. 77, 92), and proceeds of the sales in excess of \$1.25 per acre were to be used for the maintenance of the Kiowa Agency hospital.

Subsequent to the passage of the Indian Claims Commission Act (60 Stat. 1049), plaintiffs commenced several actions which, among other things, related to the ownership of the 10,310 acres of land involved in this case. In Docket No. 32, plaintiffs sought and received additional compensation for the reservation land ceded to the United States pursuant to Section 6 of the 1900 Act, supra. In that case, the Commission concluded that the fair market value of the reservation land at the time of its acquisition by the United States

was \$2.00 per acre, that the \$0.98 per acre price paid was unconscionably low, and that the tribes should be awarded the difference between the price paid and the fair market value. (The Kiowa, Comanche and Apache Tribes of Indians v. United States, 4 Ind. Cl. Comm. 95, 110 (1955) aff'd 143 Ct. Cl. 534, 163 F. Supp. 603 (1958), reh. denied, 143 Ct. Cl. 545, 166 F. Supp. 939 (1958) cert. denied 359 U. S. 934 (1959)). When the petition in Docket 32 was originally filed on August 9, 1948, the tribes apparently assumed that the 10,310 acres of administrative land remained in tribal ownership after the 1900 cession. The petition stated in part:

21. Of the 2,968,893 acres of land in the Kiowa, Comanche and Apache reservation there was reserved 480,000 acres of land for the Big Pasture to be used in common by said tribes; 445,000 acres of land was allotted to the individual Indian members of the said tribes, and 10,310 acres was reserved for agency, school, religious and other purposes, thereby leaving a balance of 2,033,583 acres of land for which said tribes were to be paid \$2,000,000 or about 98 cents per acre. [Emphasis supplied]

The plaintiff tribes subsequently changed their position as to the ownership of the 10,310 acres as evidenced by their requested Finding of Fact No. 53 reading in part:

53. By virtue of the Act of June 6, 1900, all the 2,968,893 acres of land in the Kiowa, Comanche and Apache reservation, except 480,000 acres of land reserved for the Big Pasture to be used in common by said tribes, and approximately 445,000 acres of land to be allotted were ceded to the United States. Thus, the defendant acquired full title to at least 2,043,893 acres of land on this reservation, and was obligated to pay \$500,000 for the same. Only in the event the petitioners were successful in defeating the claims of the Choctaw and Chickasaw

