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Frank Baurland.
Ada Ok. Atty

In the Court of Claims of the United States

Congressional No. 17641

(Decided January 9, 1939)

THE CHOCTAW AND CHICKASAW NATIONS v. THE UNITED STATES

Messrs. Grady Lewis and Melvin Cornish for the plaintiff. *Mr. William H. Fuller* was on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Carl McFarland*, for the defendant. *Mr. George T. Stormont* was on the briefs.

This case having been heard by the Court of Claims, the court makes the following

SPECIAL FINDINGS OF FACT

1. This case comes to this court by reason of a Resolution passed by the Senate on February 26, 1931, referring to the court a bill, then pending in the Senate, which provides for the relief of the Choctaw and Chickasaw tribes of Indians of Oklahoma and "for other purposes." The Resolution and the Bill are as follows:

Resolution

Resolved, That the claim of the Choctaw and Chickasaw Nations of Indians for compensation from the United States for the remainder of their "leased district" lands acquired by the United States under article 3 of the treaty of 1866 (14 Stat. L. 769), not including the Cheyenne and Arapahoe lands for which compensation was made to the Choctaw and Chickasaw Nations by the Act of Congress approved March 3, 1891

(26 Stat. L. 989), be, and the same is, hereby referred to the Court of Claims in accordance with the provisions of section 151 of the Judicial Code (U. S. C., sec. 257; 44 Stat. 898); and the said court is authorized and directed, notwithstanding the lapse of time or the statutes of limitation and irrespective of any former adjudication upon title and ownership, or release, to inquire into the claim of the said Indian nations for just compensation for said lands and to report the amount which in fairness and justice and under all the facts and circumstances the United States should pay to the Choctaw and Chickasaw Nations of Indians, as fair compensation for said lands, and to report its findings of fact and conclusions to the Congress, taking into consideration the circumstances and conditions under which said lands were acquired and the purposes for which they were used and the final disposition thereof.

A Bill

For the relief of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and hereby is, authorized and directed to certify to the Secretary of the Treasury, an account of the proceeds derived from the sale of the territory in Oklahoma, known as the Leased District, including the territory known as Greer County, and excluding what was formerly the Cheyenne and Arapahoe Reservation, deducting therefrom the cost of survey and sale and for allotments of Indians therein at the rate of \$1.25 per acre, and there is hereby authorized to be appropriated the amount so certified to the Secretary of the Treasury for the purpose of placing the same to the credit of the Choctaw and Chickasaw Tribes of Indians of Oklahoma, upon the books of the Treasury, the balance shown by said account, to be disbursed in accordance with existing law.

2. Under the treaties of 1820, 1825, 1830, and 1837 and the patent of 1842 the Choctaw and Chickasaw Indians became the owners in fee simple of a vast body of land west of the Mississippi River. On June 22, 1855, the Choctaw and Chickasaw tribes of Indians entered into a treaty with the United States whereby the Choctaw Indians relinquished all

claim to territory west of the one-hundredth degree west longitude and also made provision for the permanent settlement, within the Choctaw-Chickasaw lands, of the Wichita and certain other tribes and bands of Indians for which purpose the Choctaw and Chickasaw Indians leased in perpetuity to the United States that portion of their common territory west of the ninety-eighth degree west longitude and the one-hundredth degree west longitude. The territory between these degrees of longitude is commonly known as the "Leased District." Articles 9 and 10 of the treaty are as follows:

ART. 9. The Choctaw Indians do hereby absolutely and forever quitclaim and relinquish to the United States all their right, title, and interest in, and to any and all lands, west of the 100th degree of west longitude; and the Choctaws and Chickasaws do hereby lease to the United States all that portion of their common territory west of the 98th degree of west longitude, for the permanent settlement of the Wichita and such other tribes or bands of Indians as the Government may desire to locate therein; excluding, however, all the Indians of New Mexico, and also those whose usual ranges at present are north of the Arkansas River, and whose permanent locations are north of the Canadian River, but including those bands whose permanent ranges are south of the Canadian, or between it and the Arkansas; which Indians shall be subject to the exclusive control of the United States, under such rules and regulations, not inconsistent with the rights and interests of the Choctaws and Chickasaws, as may from time to time be prescribed by the President for their government; *Provided, however,* the territory so leased shall remain open to settlement by Choctaws and Chickasaws as heretofore.

ART. 10. In consideration of the foregoing relinquishment and lease, and, as soon as practicable after the ratification of this convention, the United States will pay to the Choctaws the sum of six hundred thousand dollars, and to the Chickasaws the sum of two hundred thousand dollars, in such manner as their general councils shall respectively direct. 11 Stat. 611, 613.

In consideration of the quitclaim and the lease, the United States paid the sum of \$800,000; \$600,000 of it was paid to the Choctaws and \$200,000 to the Chickasaws. Under this

lease the United States had the right to permanently settle the Wichita and such other tribes or bands of Indians as it might desire to locate thereon, excluding, however, all the Indians of New Mexico and also those whose usual ranges were north of the Arkansas River, and whose permanent locations were north of the Canadian River.

3. From the making of this treaty to 1861, the relations of these tribes and the United States were entirely friendly, but, upon the breaking out of the war between the states, the Choctaw and Chickasaw tribes, along with other Indian tribes, entered into treaties with the Confederate States. After the Civil War had ended, negotiations were entered into with these tribes and other Indian tribes for new treaties, and in 1866 the Choctaw and Chickasaw Indians entered into a treaty with the United States whereby certain agreements were made and the "Leased District" lands were ceded to the United States for the sum of \$300,000.

Articles XXX, XLIII, and XLVI of the treaty read as follows:

ART. XXX. The Choctaw and Chickasaw Nations will receive into their respective districts east of the 98th degree of west longitude, in the proportion of one fourth in the Chickasaw and three fourths in the Choctaw Nation, civilized Indians from the tribes known by the general name of the Kansas Indians, being Indians to the north of the Indian Territory, not exceeding ten thousand in number, who shall have in the Choctaw and Chickasaw Nations, respectively, the same rights as the Choctaws and Chickasaws, of whom they shall be the fellow citizens, governed by the same laws, and enjoying the same privileges, with the exception of the right to participate in the Choctaw and Chickasaw annuities and other moneys, and in the public domain, should the same or the proceeds thereof be divided per capita among said Choctaws and Chickasaws, and among others the right to select land as herein provided for Choctaws and Chickasaws, after the expiration of the ninety days during which the selections of land are to be made, as aforesaid, by said Choctaws and Chickasaws; and the Choctaw and Chickasaw Nations pledge themselves to treat the said Kansas Indians in all respects with kindness and forbearance, aiding them in good faith to establish themselves in their new homes, and to respect all their customs and usages not incon-

sistent with the constitution and laws of the Choctaw and Chickasaw Nations respectively. In making selections after the advent of the Indians and the actual occupancy of land in said nation, such occupancy shall have the same effect in their behalf as the occupancies of Choctaws and Chickasaws; and after the said Choctaws and Chickasaws have made their selections as aforesaid, the said persons of African descent mentioned in the third article of the treaty, shall make their selection as therein provided, in the event of the making of the laws, rules, and regulations aforesaid, after the expiration of ninety days from the date at which the Kansas Indians are to make their selections as therein provided, and the actual occupancy of such persons of African descent shall have the same effect in their behalf as the occupancies of the Choctaws and Chickasaws.

ART. XLIII. The United States promise and agree that no white person, except officers, agents, and employees of the Government, and of any internal improvement company, or persons traveling through, or temporarily sojourning in, the said nations, or either of them, shall be permitted to go into said territory, unless formally incorporated and naturalized by the joint action of the authorities of both nations into one of the said nations of Choctaws and Chickasaws, according to their laws, customs, or usages; but this article is not to be construed to affect parties heretofore adopted, or to prevent the employment temporarily of white persons who are teachers, mechanics, or skilled in agriculture, or to prevent the legislative authorities of the respective nations from authorizing such works of internal improvement as they may deem essential to the welfare and prosperity of the community, or be taken to interfere with or invalidate any action which has heretofore been had in this connection by either of the said nations.

ART. XLVI. Of the moneys stipulated to be paid to the Choctaws and Chickasaws under this treaty for the cession of the leased district, and the admission of the Kansas Indians among them, the sum of one hundred and fifty thousand dollars shall be advanced and paid to the Choctaws, and fifty thousand dollars to the Chickasaws, through their respective treasurers, as soon as practicable after the ratification of this treaty, to be repaid out of said moneys or any other moneys of said nations in the hands of the United States; the residue, not affected by any provision of this treaty, to

remain in the Treasury of the United States at an annual interest of not less than five per cent, no part of which shall be paid out as annuity, but shall be annually paid to the treasurer of said nations, respectively, to be regularly and judiciously applied, under the direction of their respective legislative councils, to the support of their government, the purposes of education, and such other objects as may be best calculated to promote and advance the welfare and happiness of said nations and their people respectively. 14 Stat. 769, 777, 779, 780.

4. The whole "Leased District" was supposed to contain 7,713,239 acres. The Wichita and Affiliated Bands of Indians were located on a tract of land in this "Leased District" comprising 743,610 acres. The Government settled the Cheyennes and Arapahoes on a tract containing 2,489,159 acres; the Kiowas, Comanches & Apaches on another tract containing 2,968,893 acres and there remained what is known as the "Greer County" containing 1,511,958 acres.

5. On June 4, 1891, an agreement was entered into between the United States and the Wichita and Affiliated Bands of Indians, which was not ratified until March 2, 1895, whereby these Indians conveyed to the United States absolutely and forever "all their claim, title, and interest of every kind and character" to the land occupied by them, and, in consideration of that cession, it was agreed by the United States that out of the territory ceded allotments should be made to each member of the Wichita and Affiliated Bands of Indians. 28 Stat. 876, 895, 896, c. 188. In this agreement the Wichita and Affiliated Bands of Indians claimed "that further compensation, in money, should be made to them by the United States, for their possessory right in and to the lands above described in excess of so much thereof as may be required for their said allotments." It was further provided in this agreement that a suit could be brought against the United States for any and every claim that they might believe they had a right to prefer, saving and excepting claim for a certain tract of land described in the first article of the agreement. There was included in the above act a provision that the Choctaw and Chickasaw Nations, who claim to have some right and interest in the lands which were ceded by the Wichita and

Affiliated Bands, should have the right to be joined in the suit and assert their claim, which provision reads as follows:

That as the Choctaw and Chickasaw Nations claim to have some right, title, and interest in and to the lands ceded by the foregoing agreement [the agreement above referred to], which claim is controverted by the United States, jurisdiction be, and is hereby, conferred upon the Court of Claims to hear and determine the said claim of the Choctaws and Chickasaws and to render judgment thereon, it being the intention of this act to allow said Court of Claims jurisdiction, so that the rights, legal and equitable, of the United States, and the Choctaw and Chickasaw Nations and the Wichita and Affiliated Bands of Indians in the premises, shall be fully considered and determined, and to try and determine all questions that may arise on behalf of either party in the hearing of said claim; and the Attorney-General is hereby directed to appear in behalf of the Government of the United States, and either of the parties to said action shall have the right of appeal to the Supreme Court of the United States: * * * *And provided further*, That nothing in this act shall be accepted or construed as a confession that the United States admit that the Choctaw and Chickasaw Nations have any claim to or interest in said lands or any part thereof.

That said action shall be presented by a single petition making the United States and the Wichita and Affiliated Bands of Indians parties defendant and shall set forth all the facts on which the said Choctaw and Chickasaw Nations claim title to said land. * * * *And provided further*, That it shall be the duty of the Attorney-General of the United States, within ten days after the filing of said petition, to give notice to said Wichitas and Affiliated Bands through the agents, delegates, attorneys, or other representatives of said bands that said bands are made defendants in said suit, of the purpose of said suit that they are required to make answer to said petition, and that Congress has, in accordance with article five of said agreement adopted this method of determining their compensation, if any. 28 Stat. 876, 898.

6. Pursuant to the above act, a suit was brought in the Court of Claims by the Choctaw and the Chickasaw Indians against the United States and the Wichita and Affiliated Bands of Indians. It was claimed by the Choctaw and

Chickasaw Nations that the lands known as the "Leased District" were acquired by the United States "in trust for the settlement of Indians thereon, and in trust and for the benefit of said Indians when the aforesaid trust shall cease." The Court of Claims held that a trust did exist and decided in favor of the Choctaw and Chickasaw Nations. 34 C. Cls. 17. From this decree the Wichita and Affiliated Bands and the Choctaw and Chickasaw tribes of Indians and the United States severally appealed to the Supreme Court of the United States. The Supreme Court reversed the decision of the Court of Claims and held that the Choctaw and Chickasaw Nations had by the treaty of 1855 executed a perpetual lease of the territory in dispute and that by the treaty of 1866 had made an absolute conveyance in fee simple to these lands for a consideration which could not be looked into or questioned by the court. It was further held that no trust existed and that the Choctaw and Chickasaw Nations of Indians had neither a legal nor an equitable claim and the petition was ordered dismissed. *United States v. Choctaw and Chickasaw Nations, Wichita and Affiliated Bands of Indians*, 179 U. S. 494.

7. By Section 15 of the Indian Appropriation Act of March 3, 1891, 26 Stat. 989, 1025, c. 543, the Congress appropriated the sum of \$2,991,450 to pay the Choctaw and the Chickasaw Nations of Indians for all the right, title, and interest which said Indians may have had in and to the land occupied by the Cheyenne and Arapahoe Indians, and for the 2,393,160 acres which were left after the allotments had been provided for the said Indians. The payment of this money was not made at the time because of the action of the President of the United States in withholding it and reporting to Congress that, in his opinion, there was nothing due to the Indians for these lands. However, the Senate and the House of Representatives both adopted resolutions directing the payment of this money to the Choctaw and the Chickasaw Indians. The House resolution contained the following proviso which was added as a Senate amendment:

Provided, however, That neither the passage of the original act of appropriation to pay the Choctaw and Chickasaw tribes of Indians for their interest in the lands of the Cheyenne and Arapahoe reservation, dated

March three, eighteen hundred ninety-one, nor of this resolution, shall be held in any way to commit the Government to the payment of any further sum to the Choctaw and Chickasaw Indians for any alleged interest in the remainder of the lands situated in what is commonly known and called the "Leased District." 27 Stat. 753.

In the opinion of the Supreme Court in the Wichita case, *supra*, in which it is held that the Government had received the cession of the lands under the treaty of 1866, that there was no legal or equitable claim against the Government, and that there was no trust created by the treaty of 1866 which entitled the Choctaw and the Chickasaw Nations to have reservationary interest in the land, the Court discussed the question of the policy of Congress in making the payment for the Cheyenne and Arapahoe Reservation and held that the act of 1895, under which the suit was brought, precluded by its express terms any admission on the part of the Government of any definite policy in connection with the lands which had been ceded by the treaty. Although the court was unwilling to say that the Indians had not received full and adequate consideration, nevertheless it held that any further payment was solely within the discretion of Congress and was a political and not a judicial question.

8. In 1931 Congress passed an act entitled "A Bill conferring jurisdiction upon the Court of Claims to hear, consider, and report upon a claim of the Choctaw and Chickasaw Indian Nations or Tribes for fair and just compensation for the remainder of the Leased District lands." This bill required the Court of Claims to hear and consider a claim of the Choctaw and Chickasaw Nations or tribes that they had never received fair and just compensation for the remainder of their "Leased District" land acquired by the United States under their treaty of 1866, and to report its findings to Congress, notwithstanding the lapse of time or the statutes of limitation and irrespective of any former adjudication upon title and ownership, as to what amount, in fairness and justice, the United States should pay the Choctaws and Chickasaws for said lands, taking into consideration the circumstances and conditions under which they

were used, and the final disposition thereof. This bill passed both houses of Congress and was sent to the President and disapproved by him on February 18, 1931, upon the ground that to permit the institution of a suit, as provided by the bill, would violate the doctrine of *Res Adjudicata*. Senate Document 280, 71st Congress, 3rd Session.

9. With the elimination of that portion of the "Leased District," which was occupied by the Cheyenne and Arapahoe tribes of Indians and for which the Choctaw and Chickasaw Nations have been paid, there remain those portions occupied by the Wichitas, 743,610 acres; by the Kiowas, Comanches, and Apaches, 2,968,893 acres; and the Greer County 1,511,958 acres, making a total of 5,224,461 acres. Out of this acreage there has been allotted to the Indians 160 acres each and the rest of the land has been opened to settlers and sold by the Government for \$1.25 an acre. There must also be deducted from this acreage certain acres which were reserved for school and for educational purposes for each township.

10. From the official report of the Commissioner of Indian Affairs in the General Land Office of the Department of Interior, dated July 8, 1936, it is shown that the Kiowa, Comanche, and Apache lands comprising 2,968,893 acres had deducted therefrom 480,000 acres, known as the Big Pasture; 445,000 acres which was allotted to the Indians; and 10,310 acres which were reserved for agency, school, religious, and other purposes, thereby leaving a balance of 2,033,583 acres. It was estimated that of this remaining 2,033,583 acres, 225,953 acres were donated to the State for school purposes, leaving a balance of 1,807,630 acres open to settlement by the Government. There is nothing in the record to show that all of this land, which remained with the Government, was disposed of, but only that a majority was sold at the rate of \$1.25 per acre. Assuming a sale by the Government of all of the lands at \$1.25 per acre, the amount received would be \$2,259,537.50. Of the 480,000 acres (Big Pasture) 100,000 acres was allotted to Indians and the balance sold for \$4,864,417.05, making a total for the sale of these lands of \$7,123,954.55. The lands in ques-

tion were not taken by the Government, but were sold and conveyed in absolute fee to the Government upon consideration of allotments, reservations for school and religious purposes, and the payment of \$2,000,000 to the Kiowa, Comanche, and Apache Indians, all of which is fully set out in an act of Congress approved June 6, 1900, ratifying the agreement with these Indian tribes, 31 Stat. 672, 676, 678.

11. Under the agreement of the 4th of June, 1891, the Wichita and Affiliated Bands of Indians ceded to the United States in absolute fee all their lands in the "Leased District" for the consideration of allotments of 160 acres to each member of the Wichita and Affiliated Bands of Indians and the right to bring a suit for further compensation in money for the absolute rights in and to these lands. This suit was brought in the Supreme Court and the court decreed in the case of *United States v. Choctaw and Chickasaw Nations et al., supra*, against the Indians' rights. The Supreme Court held that all interest in the land and title had been ceded to the United States and a consideration paid. The United States received from the sale of these lands, as shown by the official report, after the allotments had been made to the Indians, \$458,496.63.

12. Greer County which is part of the "leased district" comprised 1,511,958 acres. After years of litigation, the Supreme Court on March 16, 1896, 162 U. S. 90, decreed that this land belonged to the United States and was not a part of the State of Texas. By the act of January 18, 1897, 29 Stat. 490, a provision was made for entry of lands in Greer County. By act of March 1, 1899, 30 Stat. 966, an amendment was made allowing parties, who had previously had the benefit of the homestead laws and who had purchased lands from the State of Texas prior to the decision of the Supreme Court on March 16, 1896, to perfect title to said lands according to the provisions of the act of 1897. The monies received from the sales of these lands were covered into the Treasury of the United States as public monies.

13. Of the 1,511,958 acres comprising Greer County the United States sold approximately 1,510,458 acres and received as consideration therefor \$365,941.74, which is an

average of 24 cents and a fraction per acre. At \$1.25 per acre the entire area of 1,511,958 acres would be valued at \$1,889,947.50.

In surveying the tract of 1,511,958 acres the United States was put to an expense of \$49,700.00. The record does not establish the cost to the United States of selling the lands in Greer County, other than the cost of the survey.

Deducting the cost of the survey, \$49,700.00, from the valuation of \$1,889,947.50, there is left a net valuation of \$1,840,247.50.

14. In compliance with the Act of Congress of August 12, 1935, 49 Stat. 571, 596, the defendant has interposed a counterclaim for "money which has been expended by the United States gratuitously for the benefit of said tribe or band." The amount of money so gratuitously expended is \$1,326,651.37. This sum does not include amounts which the Government agreed to expend by treaties or agreement and includes such items as agriculture aid, household equipment, education, Indian dwellings, medical attention and hospitals, provisions, and similar items which have been held to fall under the term "gratuities" by this Court in the following cases: *Shoshone Tribe v. United States*, 82 C. Cls. 23, 55, 59, 93, 94; *Eastern or Emigrant Cherokees v. United States*, 82 C. Cls. 180; *Blackfeet et al. Tribes v. United States*, 81 C. Cls. 101; *Crow Tribe v. United States*, 81 C. Cls. 238; *Klamath et al. Tribes v. United States*, 85 C. Cls. 451; affirmed by the Supreme Court, 304 U. S. 119; and *The Chickasaw Nation v. The United States*, No. K-376, decided April 4, 1938, 87 C. Cls. —.

CONCLUSIONS

Upon the foregoing special findings of fact, the court, in accordance with Section 151, of the Judicial Code, concludes as follows:

1. The plaintiffs have no legal or equitable rights and there has been no taking by the defendant of any lands of the plaintiffs for which the defendant has not paid a valid consideration. *United States v. Choctaw Nation et al.*, 179 U. S. 494, 496.

2. There is no claim made against the defendant but solely a request for a gift, grant, or bounty. Whether a gift, grant, or bounty should be made is within the sound discretion of the Congress and, being political and not judicial, this court will not express an opinion thereon. *Widmayer v. United States*, 42 C. Cls. 519, 524; *Sampson v. United States*, 42 C. Cls. 378, 385.

A true copy.

Test:

*Chief Clerk, Court of Claims
of the United States.*