BEFORE THE INDIAN CLAIMS COMMISSION

MINNESOTA CHIPPEWA TRIBE, ET AL., Plaintiffs,	)	
v.	)	Docket No. 18-U
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: February 13, 1975

Appearances:

Marvin J. Sonosky and Rodney J. Edwards, Attorneys for Plaintiffs.

David M. Marshall, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION ON PLAINTIFFS' MOTION FOR RULING CONCERNING THE DEFENDANT'S DEMAND FOR OFFSETS, INCLUDING PAYMENTS ON THE CLAIM AND GRATUITIES

Yarborough, Commissioner, delivered the opinion of the Commission.

The Commission has before it a motion of the plaintiffs, filed August 12, 1971, for rulings concerning the defendant's demand for offsets. These claimed offsets are for the market value of certain lands reserved for the plaintiffs, for expenditures claimed as payments on the claim under the Treaty of September 30, 1854, 10 Stat. 1109, and for gratuities. The defendant requests that offsets of $2,061,506.40 be deducted from the gross award of $3,250,000.

In its decision of December 8, 1964, 14 Ind. Cl. Comm. 360, 374, the Commission held that the Chippewas of Lake Superior had recognized title to

and were sole owners of land in northeast Minnesota ceded by the Treaty of September 30, 1854, supra. This land is designated as Area 332 by Charles C. Royce on his Minnesota Map No. 1 in the 18th Annual Report of the Bureau of American Ethnology (Part II).[1/]

The Commission found on March 24, 1971, that the fair market value of Area 332 as of January 10, 1855, the date the treaty of cession was ratified, was $3,250,000. (Finding of Fact No. 24, 25 Ind. Cl. Comm. 62, 81). This was equivalent to about 55 cents per acre.

The defendant has, in its several pleadings, requested offsets in slightly varying amounts. It currently requests offsets of $1,030,964.71 as payments on the claim under the 1854 Treaty, and $1,030,541.69 as allowable gratuities.

A hearing was held on the issue of offsets on July 26, 1971. This motion, filed pursuant to an agreement of the parties, seeks to obviate detailed pleadings and trial proceedings by requesting the Commission to rule on the allowability of all or some of the claimed offsets as matters of law.

> Question No. 1. Were the reservations set aside by Article 2 of the Treaty of September 30, 1854, supra, part of the payment for the cession of Area 332?

Two of the ten reservations set aside by Article 2 were within

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1/ The subject land is subsequently referred to as Area 332.

Area 332. The remaining eight reservations, consisting of some 349,000 acres of previously ceded lands in Wisconsin and Michigan, were outside Area 332. The plaintiffs contend that these ten reservations cannot be a part of the consideration for the treaty because Article 4 of the treaty defines the consideration for the cession in terms of cash and annuities. Furthermore, they argue, Article 4 begins with the phrase, "In consideration of and payment for . . . ." Great significance is inferred by the plaintiffs from the fact that the clause agreeing to reserve these ten reservations, Article 2 of the treaty, preceded Article 4. They further argue that the treaty history confirms the treaty language in limiting payment for the cession to cash and annuities.

The plaintiffs additionally assert that the eight reservations outside Area 332, although ceded to the defendant by the Treaty of July 29, 1837, 7 Stat. 536, and the Treaty of October 4, 1842, 7 Stat. 591, were still occupied by the plaintiffs at the time of this treaty, and for that reason could not be a part of the consideration. They aver that the reservation of these lands was a condition precedent to the negotiation of the treaty, rather than part of the consideration for the cession.

A careful review of the treaty and the negotiations which preceded it convinces us that the arrangement of the several articles within the treaty does not preclude the lands reserved in Article 2 from inclusion with the provisions of Article 4 in constituting the consideration for the cession of Area 332. Neither does the mention in Article 4 of

cash and annuities limit the consideration to those items. Article 4 continues, in fact, and provides for the furnishing by the defendant of guns, rifles, beaver traps, ammuniton, and clothing. We are unable to agree, therefore, with the plaintiffs' contention that money was the only consideration and the only payment for the cession. The record indicates that both parties considered both the lands reserved and the goods to be furnished to be a part of the consideration for the lands ceded. The location of the various reservations was an important item in the treaty negotiations. The Indians were insistent that they would not relinquish their lands unless they were given reserves for their permanent homes, and they would not sign the treaty unless they were granted reservations at specified locations. The agreement of the treaty Commissioner to set aside the requested ten reservation areas was part of the inducement offered by the United States for the cession, and the reservations set apart in Article 2 constituted part of the consideration for the cession.

The plaintiffs rely on Nez Perce Tribe v. United States, Docket No. 175, 24 Ind. Cl. Comm. 429 (1971). However, in that case neither party to the treaty was aware that the tribe was receiving title to lands outside of its aboriginal lands. There was no such lack of awareness in this treaty, and Nez Perce is, therefore, inapposite.

We conclude as a matter of law that the reservations set aside by Article 2 of the Treaty of 1854 were part of the consideration for the lands ceded and may be offset as payments on the claim.

> Question No. 2. May the credit for the reservations exceed the purchase price the United States agreed to pay when it acquired the reservation lands from the Lake Superior and Mississippi Chippewas by the prior Treaty of July 29, 1837, 7 Stat. 536, and the Treaty of October 4, 1842, 7 Stat. 591?

Plaintiffs, in contending that any credit for the eight reservations outside Area 332 may not exceed the amount the United States paid for the lands from which the reserved areas were created, rely on Ponca Tribe v. United States, 183 Ct. Cl. 673 (1968) (remanding Docket 323, 17 Ind. Cl. Comm. 162 (1966)). This same issue arose in Prairie Band of the Pottawatomie Tribe v. United States, Dkts. 15-C, et al., 33 Ind. Cl. Comm. 394 (1974). In that decision we considered the Ponca case as well as a number of other related decisions by this Commission and the Court of Claims. As we also held in the Pottawatomie case the factual situation in Ponca is different from that presented herein and Ponca does not, therefore, govern this case.

In Ponca the reservation which had been established for the Ponca Tribe by treaties in 1858 and 1865 was erroneously included in lands granted by the United States to Sioux Indians under the Treaty of April 29, 1868, 15 Stat. 635. Although the reservation was originally taken by mistake, when the United States became aware of the error it nevertheless removed the Poncas. There followed a series of events that brought misery and suffering to the Poncas and ultimately resulted in investigations by a Presidential Commission as well as a Senate Select Committee. It was determined that the Poncas had been wronged and that the Indians were entitled to redress for the loss of their lands as well

as other property. To indemnify the Poncas for their losses Congress, by the Act of March 3, 1881, 21 Stat. 414, 422, appropriated $50,000.00 to be used to purchase 101,894 acres of land in Indian territory. Some $48,389.46 was actually expended for the purchase.

The Court of Claims held that when Congress in 1881 appropriated the $50,000.00 for the land purchase, it intended it to be a payment on the Ponca's claim for the wrongful taking of their Nebraska reservation. When the United States finally purchased the lands with $48,389.46 from the $50,000.00 fund appropriated for that purpose, it made payment to that extent on the Poncas' claim for the wrongful taking of their Nebraska reservation. The court, refusing to allow the United States a credit based on the 1878 fair market value of the land,[2/] held that there was a payment on the claim only to the extent of the purchase price paid by the United States.

The factual situation in the instant case is quite different from that in Ponca. This case involves an agreed cession of lands under the provisions of the Treaty of September 30, 1854, supra. The treaty provided for the consideration which the United States agreed to pay for the lands ceded by the Chippewas. The setting aside of the eight reservations was pursuant to the treaty and was part of the consideration for the cession. In determining the issue of the conscionability of the treaty agreement the fair market value of the ceded lands must be weighed

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2/ July 28, 1878, was the agreed date of the evaluation by virtue of a stipulation that the Ponca Tribe acquired its interest in the reservation on that date.

against the total value of the consideration promised by the United States. In so doing it is necessary to include the fair market value of the lands which the United States granted to the Indians as part of the consideration. The two reservations within the ceded tract, the Fond du Lac and Grand Portage Indian Reservations, were not included in the area valued in this case. Thus, the defendant has received credit for the full value of those two reservations set aside pursuant to Article 2 of the treaty. There is no reason why the eight reservations similarly created under Article 2, although located outside the ceded area, should be treated differently. The United States is entitled to have the January 10, 1855, fair market value of the eight reservations credited as part of the consideration.

We turn now to the issue of the consideration paid or the "payment on the claim." As plaintiffs' counsel has observed the issues of the consideration promised and the "payments on the claim" are not synonymous. The United States is entitled to a credit as a "payment on the claim" or as a "payment of the consideration" for that portion of the promised consideration which it can prove was paid or delivered to the Indians. In this case all the reservations promised under Article 2 were set aside for the Chippewas. Therefore the promised consideration of ten reserved areas was "paid" and the United States is entitled to credit for the value of the reserved areas as consideration paid, or as "payment on the claim."

Plaintiffs have raised one other issue which deserves comment. The lands involved in the eight reservations outside the ceded area in this case were acquired by the United States from the Chippewas under the Treaties of July 29, 1837, 7 Stat. 536 and October 4, 1842, 7 Stat. 591. Thus, plaintiff's argue, the United States seeks an unjust enrichment by having acquired lands from the Chippewas for unconscionably small sums [3/] and then receiving credit for the full fair market value as "payment on the claim" in a later treaty claim.

The land cessions involved in the 1837 and 1842 treaties are the subject of Chippewa claims in Dockets 18-S and 18-C. The Commission has already determined in the Docket 18-C claim that the consideration for the cession under the Treaty of July 29, 1837, supra, was unconscionable and that the Chippewa Indians of the Mississippi and Lake Superior are entitled to recover the fair market value of the ceded lands less allowable offsets. 26 Ind. Cl. Comm. 22, 59, 60 (1971). The claim in Docket 18-S has been partially decided, the Commission now having the issues of valuation and consideration under advisement. If it is determined that the Chippewas in 18-S were paid an unconscionably low consideration for their lands, they will likewise be awarded an additional sum to render judgment based on the full fair market value of the lands. Accordingly, the issue of the unconscionability of the consideration paid the Chippewas for lands constituting the eight reservations involved in this case is not relevant to the issue of the value of the consideration paid in this case.

3/ Plaintiffs allege that seven of the reservations were created from lands purchased by the 1837 Treaty for an average consideration of about 7 cents per acre. The eighth reservation was created from lands purchased by the 1842 Treaty for an average consideration of 6.5 cents.

Question No. 3. If Question No. 1 is answered in the affirmative, is Royce Area 342, constituting 11,303.05 acres, a reservation set aside by Article 2 of the Treaty?

Article 2 of the treaty states in pertinent part:

> The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:
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> * * * *
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> 6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief, may select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

Article 2 of the treaty thus calls for the reservation of four sections (2,560 acres) for that subdivision of the La Pointe Band of which Buffalo is chief.

By Executive Order of September 25, 1855, an irregularly shaped parcel of land along the Wisconsin shore of Lake Superior consisting of 2,592.61 acres, now known as Royce Area 341, was set aside for Chief Buffalo's band. This became known as the Red Cliff Indian Reservation. The defendant's treaty obligation to set apart four sections for Chief Buffalo's Band was thus fulfilled by the terms of this Executive order.

Subsequently, in 1863 the 11,303.05 acre tract constituting Royce Area 342 was withheld from sale for the purpose of enlarging the Red Cliff Indian Reservation. This addition to the reservation was

confirmed by Joint Resolution No. 16 of Congress of February 20, 1895, 28 Stat. 970. This resolution provides:

> That the lands [described], . . . withdrawn from sale or location for the purpose of an enlargement of the Red Cliff Indian Reservation in said county by the several orders of the Commissioner of the General Land Office bearing dates May twenty-seventh, eighteen hundred and sixty-three, June third, eighteen hundred and sixty-three, and September eleventh, eighteen hundred and sixty-three, be, and they hereby are, declared to be a part of said Indian reservation as fully and to the same effect as if they had been embraced in and reserved as a part of said Red Cliff Reservation by the provisions of the treaty with the Chippewas of Lake Superior dated September thirtieth, eighteen hundred and fifty-four. . . .

The defendant, in its response to the motion, argues that Royce Area 342 is a payment on the claim. It does not mention the question of whether or not it is a reservation set aside by Article 2 of the treaty.

The treaty provided, as we have seen, that 4 sections be set aside for Chief Buffalo's band. This was done by executive order in 1855. The setting aside of Royce Area 342 several years later is thus entirely outside the scope of Article 2 of the treaty. We conclude as a matter of law that it was not a part of the consideration for the cession, and therefore was not a payment on the claim.

> Question No. 4. Is the defendant entitled to credit as payments on the claim any expenditures made under Article 3 of the treaty?

Article 3 of the treaty provides:

> ARTICLE 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Defendant claims that it is entitled to offset expenditures of $6,903.83 for surveying 80 acre allotments made under the provisions of Article 3 of the treaty. However, it does not appear that the costs of such surveys were intended to serve as part of the inducement for the land cession. It is particularly noteworthy that the treaty did not impose any obligation upon the government to institute such surveys, but rather left this wholly to the discretion of the President. This treaty provision at the very most recognized an already existing authority to institute such surveys where deemed appropriate by the government. No duty to survey having been created by the treaty, the costs of subsequent

surveys cannot be allowed as payments on the claim. Nez Perce Tribe of Indians v. United States, supra, 24 Ind. Cl. Comm. at 433-34 (1971).

The defendant also asserts that eligible members of the St. Croix Band of Chippewas of Lake Superior did not receive their 80 acre parcels of land in accordance with Item 7 of Article 2 of the treaty. Consequently, it states that Congress in 1920 and later appropriated funds and that $135,000 was disbursed at the rate of $1,500 each to 90 eligible Indians on the St. Croix Band roll. These cash payments were in lieu of the 80 acre allotments which had not been made to members of the St. Croix Band.

Article 2 of the 1854 treaty, after stating that the United States agree to set apart and withhold from sale certain specified tracts of land for the several bands, provided in Item 7:

> 7th. Each head of a family or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

The criteria for an allotment of land under this item are thus that the allottee be:

1. Head of a family or single, and
2. Over 21 years of age on January 10, 1855, the date the treaty was ratified, and
3. Of the mixed blood and belonging to the Chippewas of Lake Superior.

The first $10,000 of the claimed amount was appropriated in 1920, "to carry out the provisions of the Chippewa treaty of September 30, 1854 . . . ." (41 Stat. 408, 433.) The statute provided further that the money was in part settlement of the amount found due certain Indians listed in House Document No. 1663. (Def. Ex. 29-S.) This document lists 95 persons in a designated final roll of the St. Croix Chippewa. These people are described as being full or fractional-blood Indians, and with very few exceptions they are listed as representing the Fond du Lac or Lac Court Oreille Bands of Chippewa Indians. This list was submitted to the Commissioner of Indian Affairs January 13, 1915. This was 60 years subsequent to the ratification of the Treaty of 1854. Any person who met the 21-year old qualification on the earlier date, found in both Item 7 of Article 2 and Article 3, would of necessity be at least 81 years old in 1915. Only three persons of the 95 listed had attained that age, and each of them is listed as a full-blood Indian. One of these is described as 102 years of age.

Article 3 states that the 80 acre allotments were to be of land within the reservations. It contemplates that sufficient land would be set aside so that allotments would be available to all heads of family and persons over 21 on a reservation. Nothing suggests that allotments were to be made to Indians who were not on one of the reservations. The Speaker of the House of Representatives was advised by letter from

the Secretary of the Interior, dated March 3, 1915, that, under the provisions of the 1854 Treaty, "had these Indians removed to their respective reservations they would have been entitled to 80 acres of land each . . . ." (Def. Ex. 29-S.) It thus appears that the presence of these Indians on one of the reservations was a condition precedent to their receipt of an allotment of 80 acres. The St. Croix Indians having failed to remove to the designated reservation, there was no obligation under the 1854 Treaty to make 80 acre allotments to them or to give them cash payments in lieu thereof.

For the foregoing reasons, we conclude that the cash payments of $135,000 to members of the St. Croix Band in lieu of allotments may not be credited as a payment on the claim.

> Question No. 5. Is the defendant entitled to credit as payments on the claim any expenditures made under Article 4 of the treaty?

Article 4 provides:

> ARTICLE 4. In consideration of and payment for the country hereby ceded, the United States agree to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to wit: five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars for moral and educational purposes, of which last sum, three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village.

> The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of six thousand dollars, in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment, among the mixed bloods of said nations. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready-made clothing, to be distributed among the young men of the nation, at the next annuity payment.

The plaintiffs confine their argument on this question to the single point that the defendant did not and cannot prove what payments, if any, were made to the Lake Superior Chippewas in satisfaction of Article 4 of the Treaty of September 30, 1854. The plaintiffs allege that the General Accounting Office report does not break down expenditures by years, does not indicate where the moneys were expended, and does not correlate the expenditures with the treaty provisions.

The defendant's exhibit 4-S is a General Accounting Office report. Disbursement schedule No. 23 begins on page 293 of this report. This schedule states that it contains disbursements made by the United States for the benefit of the Chippewa Indians of Lake Superior and the Bois Forte Band under the appropriation: "Fulfilling Treaties with Chippewas of Lake Superior." The schedule then refers specifically to the Treaty of September 30, 1854, 10 Stat. 1109, and itemizes disbursements under the several articles of that treaty, including Article 4, for the year 1855 and subsequent years. The first category listed under Article 4 in Disbursement Schedule No. 23 is "Agricultural implements and equipment."

This is included in the category of "agricultural implements and cattle, carpenter's and other tools and building materials," noted in Article 4 of the treaty. Other categories listed in the schedule are, in order, annuity cash, annuity goods, clothing, and education. These categories also correspond to the categories noted in Article 4 of the treaty.

The plaintiffs argue that the defendant did not and can not prove what payments were made to these plaintiffs in satisfaction of Article 4 of the Treaty of September 30, 1854, supra, and what payments were in satisfaction of other treaties with the Lake Superior and other Chippewas.

The Commission finds plaintiffs' argument on this issue without merit. The vital question is whether or not the plaintiffs were paid the consideration as stated in the Treaty of 1854. The pooling of funds from various congressional appropriation acts to fulfill the provisions of other treaties with the same Indian tribe does not warrant a holding of malfeasance on the part of the defendant. There is no dispute as to whether or not the funds were appropriated. The General Accounting Office report reflects the disbursement of funds to the tribe in question and refers to the specific treaty. We are convinced that although the funds were pooled the plaintiffs were paid to the extent listed in the GAO report.

For these reasons, the plaintiffs' objection to the crediting of expenditures under Article 4 of the treaty is not well founded. We conclude that the defendant is entitled to credit as payments on

the claim for those disbursements which were made in fulfillment of the express obligations under Article 4.

> Question No. 6. Is the defendant entitled to credit as payments on the claim any expenditures under Article 5 of the treaty?

This article provides:

> ARTICLE 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much longer as the President may think proper, at each of the points herein set apart for the residence of the Indians, the same to be in lieu of all the employees to which the Chippewas of Lake Superior may be entitled under previous existing treaties.

The plaintiffs contend that expenditures under this article are not payments for the 1854 cession, but are in lieu of the defendant's obligation to furnish employees under the earlier treaties of 1837 and 1842.

The Treaty of July 29, 1837, 7 Stat. 536, provides in Item 3, Article 2, that the United States will pay annually to the Chippewa Nation for 20 years the amount of $3,000 for establishing three blacksmith shops, supporting the blacksmiths, and furnishing them with iron and steel. Item 4 of Article 2 provides for the annual payment of $1,000 for 20 years for farmers together with agricultural implements and supplies.

The Treaty of October 4, 1842, 7 Stat. 591, provides in Article IV that the United States will:

> . . . Pay to the Chippewa Indians of the Mississippi, and Lake Superior, annually, for twenty-five years, ...

> two thousand (2,000) dollars for the support of two blacksmith shops, (including pay of smiths and assistants, and iron and steel etc.) one thousand (1,000) dollars for pay of two farmers, twelve hundred (1,200) for pay of two carpenters, and two thousand (2,000) dollars for the support of schools for the Indians party to this treaty. . . .

The defendant contends that the plaintiffs are entitled at most to a $15,400 reduction in the credit on the ground that this provision of the 1854 Treaty was in satisfaction of obligations under prior treaties. The defendant further contends that the 1854 Treaty doubled the number of blacksmith shops to be maintained, and greatly extended the time during which they were to be maintained.

The 1837 and the 1842 treaties provide that the defendant was to pay certain sums annually for 20 and 25 years, respectively, to the plaintiffs for the purpose of furnishing personnel, equipment, and supplies for blacksmith shops, farming, and schools. That obligation continued in 1854. It was cancelled by Article 5 of the 1854 Treaty when the defendant assumed a new obligation in lieu of that obligation imposed by the earlier treaties.

We conclude that so much of the expenditures under Article 5 of the 1854 treaty as exceed the obligation remaining on January 10, 1855, the treaty ratification date, under Items 3 and 4, Article 2, of the 1837 Treaty, and Article IV of the 1842 Treaty, were part of the consideration for the cession under the 1854 Treaty, and they may be offset as payments on the claim.

> Question No. 7. Is the nature of the claim and the entire course of dealings and accounts between the claimant and the United States such that good conscience warrants the deduction of any gratuities from the award?

Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, 25 U.S.C. §70a, provides in pertinent part:

> . . . the Commission may also inquire into and consider all money or property given to or funds expended gratuitiously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant. . . .

The plaintiffs aver that the defendant undertook to acquire 5,867,435 acres for the unconscionable consideration of about 8.2 cents per acre; that this land was determined by this Commission to have been at that time worth about 55 cents per acre (Finding of Fact No. 24, 25 Ind. Cl. Comm. 55, 81 (1971)); and that this alone should defeat the allowance of gratuities.

The plaintiffs further argue that the entire course of dealings and accounts between the parties does not in good conscience warrant the offset of gratuities for the following reasons.

a. Failure to pay fair value.

b. Delay in payment. More than 115 years will have elapsed before an award can be paid in this case, during which period the defendant will have had the use of the award money interest free. In other words, at 5%, the defendant will have gained in interest almost six times what it will pay to make conscionable its unconscionable act.

c. Failure to pay annuities. The defendant failed to pay the plaintiffs their share of the annuities due them for their cession of their lands under the Treaty of July 29, 1837, 7 Stat. 536.

d. Failure to account. The defendant has kept confused accounts of the plaintiffs money, has inter-mixed treaty funds, has made no regular accounting, and has kept the plaintiffs in ignorance of their true finances.

e. The defendant used the plaintiffs' money interest free. Although money was appropriated for payments to the plaintiffs under the 1837, 1842 and 1854 treaties, the defendant placed some of this money in its own public account. In 1904, some 60 years after starting this procedure, the defendant appropriated some $81,702.61, less attorney fees and without interest or compensation for the delay, to settle this matter. Furthermore, of the money so appropriated, $820.22 was eventually "covered into the surplus fund," rather than expended for the benefit of the plaintiffs (Def. Ex. 3-S, p. 66).

f. The defendant by statute effectually precluded the plaintiffs from employing counsel of their own choice.

g. The tribes were barred from the courts.

h. The defendant took cessions of all the country belonging to the plaintiffs. Although the defendant agreed by the Treaty

> of 1854 to establish reservations for the plaintiffs, some of these reservations were not established for several years and the defendant was then unable to deliver title to all the land promised because of prior grants.

The defendant argues that both the nature of the claim and the entire course of dealings do in good conscience justify the allowance of gratuities, and it also alleges that "many of the points advanced by plaintiffs . . . are so broad as to apply to many cases." The defendant further asserts that were the Commission to take such sweeping objections seriously, there would be few cases in which it could justify the allowance of gratuitous offsets.

The Commission has had occasion to examine the "nature of the claim and the course of dealings" with respect to various Chippewa bands or groups. In each case the threshhold determination has been made that the conduct of the United States regarding the plaintiff group was not so uniquely heinous as to bar the assertion of all offsets.[4/] While each claim and each Chippewa band involves its own "course of dealings" issue and therefore must be considered on its own merits, there is no apparent difference in the nature of the claim in Docket 18-U or the entire course of dealings with the Chippewas of Lake Superior (the party in interest in Docket 18-U) which would warrant a different determination of the issue in this case.

4/ See The Minnesota Chippewa Tribe, et al., on behalf of the Chippewa Indians of the Mississippi and Lake Superior v. United States, Docket 18-C, 32 Ind. Cl. Comm. 192, 198 (1973); Red Lake, Pembina and White Earth Bands v. United States, Dockets 18-A, 113, 191, 9 Ind. Cl. Comm. 457, 510 (1961), aff'd in part, rev'd in part on other grounds 164 Ct. Cl. 389 (1964).

We have carefully considered the charges of unfair dealing made by the plaintiffs and the response of the defendant. Although the defendant has gone into considerable detail to cite facts which do tend to establish fair and honorable dealing, it has not directly responded to many of the charges of unfair dealing raised by the plaintiffs.

The charges that the defendant at one time barred the plaintiffs from the courts and precluded them from employing counsel of their choice apply equally to all plaintiffs before this Commission. The Congress was aware of our national history when it provided for the offset of gratuitous expenditures, and in establishing the Indian Claims Commission it provided the means for correcting the wrongs complained of by the plaintiffs. The past application of misguided policies by the defendant, which were suffered alike by all Indian tribes, does not, of itself, constitute a bar to offsets.

Certain other complaints concern matters now pending before or previously considered by this Commission in other dockets. In this category are the complaints of failure by the defendant to pay annuities under earlier treaties, and conversion by the defendant to its own use of certain funds appropriated under earlier treaties for the benefit of plaintiffs. These matters either are presently in the adjudication process or have already been decided in other dockets. In either case, it is neither necessary to determine their merits in this case nor to withhold our decision in this case until the other claims filed by these plaintiffs on the earlier treaties have been determined. Thus, if these claims are meritorious, the plaintiffs will be fully compensated by the defendant.

Assuming, arguendo, that the defendant's actions and its course of dealings with the plaintiffs at the time of the 1854 Treaty, and subsequently, were less than fair and honorable, we are not convinced that this by itself would justify our prohibition of offsets for the more than $1,000,000 of gratuitous expenditures claimed.

The Court of Claims has said:

> The Government's actions and its course of dealings with the Indians in 1832 do not prevent it from recovering in good conscience the gratuitous expenditures which it actually made in purchasing lands for appellees a century later. United States v. Emigrant New York Indians, 177 Ct. Cl. 263, 287-88; Appeal No. 2-65.

We cannot agree with the plaintiff's contention that the nature of the claim and the course of dealings between the parties do not warrant the offset of any gratuitous expenditures. Neither can we determine at this stage of the proceedings and on the present record precisely what gratuities, if any, should be allowed as offsets.

We thus conclude as a matter of law that the nature of the claim and the entire course of dealings and accounts between the United and the plaintiffs do not in good conscience preclude our considering the set-off of gratuitous expenditures.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Commissioner Vance dissenting in part:

I dissent to the Commission's order and opinion to Question No. 2 and Question No. 7.

> Question No. 2. May the credit for the reservations exceed the purchase price the United States agreed to pay when it acquired the reservation lands from the Lake Superior and Mississippi Chippewas by the prior Treaty of July 29, 1837, 7 Stat. 536, and the Treaty of October 4, 1842, 7 Stat. 591?

The Court of Claims has held that when there is an option to offset Indian "taking" claims by deducting either the value of the land or the purchase price paid by the United States, the purchase price is the proper measure of adjustment. Ponca Tribe of Indians v. United States, 183 Ct. Cl. 673-689 (1968), aff'd on rehearing, 197 Ct. Cl. 1065, 1066 (1972), (remanding, Docket 323, 17 Ind. Cl. Comm. 162 (1966)), and cases cited therein.

This principle is particularly appropriate in cases such as this. The defendant has no legal or equitable right to profit from the appreciation of the several parcels of land between the dates they were acquired from the Indians and the dates they were set aside as reservations for these same Indians. Pueblo De Zia, 26 Ind. Cl. Comm. 218, 238 (1971).

The majority attempts to distinguish Ponca on the ground that in that case it purchased land from one tribe of Indians to be held in trust for another tribe. However, I cannot agree that this slender factual distinction is sufficient to warrant a decision contrary to that reached by the Court of Claims in Ponca.

The proper measure of offsets for the reservations is the purchase

price paid by the United States.

> Question No. 7. Is the nature of the claim and the entire course of dealings and accounts between the claimant and the United States such that good conscience warrants the deduction of any gratuities from the award?

The defendant acquired plaintiffs' land, which was worth $3,250,000.00, for a consideration of less than $1,030,964.71.[1/] This was clearly an unconscionable payment. The defendant has reaped the benefits of its improper conduct for 120 years and the continued use of the money which in all fairness should have been paid the plaintiff for their land has resulted in a windfall to the defendant. See United States v. Assiniboine Tribes of Indians, 192 Ct. Cl. 679, 696-97 (1970), aff'g, Docket 279-A, 21 Ind. Cl. Comm. 310 (1969). Moreover the defendant failed to fulfill its treaty obligations to establish reservations for periods ranging up to 19 years (1 Kappler 929-32, 1051-52).

Considering the nature of the claim and the entire course of dealings and accounts between the United States and plaintiffs, good conscience does not warrant the deduction of any gratuities from the award.

John T. Vance, Commissioner

1/ Defendant has claimed consideration payments totaling $1,030,964.71. Although the Commission has not yet determined the consideration for the cession, it will be less than the claimed amount because certain items, such as the claimed payments under Article 3, are not allowable.