BEFORE THE INDIAN CLAIMS COMMISSION

MINNESOTA CHIPPEWA TRIBE, et al., on Behalf of the Chippewas of Lake Superior, Plaintiffs,	)	
v.	)	Docket No. 18-U
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: March 30, 1978

Appearances:

Rodney J. Edwards, Attorney for Plaintiff. Marvin J. Sonosky was on the brief.

David M. Marshall, with whom was Assistant Attorney General Peter R. Taft, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

The Commission has previously determined that the Chippewas of Lake Superior were the owners by recognized title of the land (Royce Area 332) which they ceded to the United States by the Treaty of September 30, 1854, (10 Stat. 1109), 14 Ind. Cl. Comm. 360 (1964). Thereafter the Commission determined that the fair market value of Royce Area 332 on January 10, 1855, was $3,250,000.00. 25 Ind. Cl. Comm. 55 (1971). The Commission has also ruled on certain questions of law raised by plaintiffs. 35 Ind. Cl. Comm. 427 (1975).

This claim is now before the Commission for a determination of the amount of consideration promised pursuant to the 1854 Treaty; whether the promised consideration was so grossly inadequate as to render it unconscionable within the meaning of Clause 3, Section 2, of the Indian Claims Commission Act, 60 Stat. 1049, 1050; the amount of defendant's payments on the claim; and the allowable gratuitous offsets. Also before the Commission is plaintiffs' motion to reconsider its ruling on payments made pursuant to Article 5 of the 1854 Treaty. We will first consider plaintiffs' motion.

In our 1975 opinion, we ruled that defendant is entitled to credit as payments on the claim for so much of those expenditures under Article 5 of the 1854 Treaty as exceeded the obligation remaining on January 10, 1855, under Items 3 and 4, Article 2, of the Treaty of July 29, 1837, 7 Stat. 536, and the Treaty of October 4, 1842, 7 Stat. 591. 35 Ind. Cl. Comm. at 443-4. We have been asked to reconsider that ruling. Plaintiffs argue that defendant was delinquent in its payment under the 1837 and 1842 Treaties and the purpose of the Article 5 provision was to settle the controversy under the prior treaties, not as payment for the 1854 cession. However, it appears that the question of defendant's delinquency was dealt with in Article 9 of the treaty, which article provided that the former treaties would be examined and "all sums that may be found equitable due to the Indians, for arrearages of annuity or other thing . . . shall be paid as the chiefs may direct." Since, as part

of the consideration for the 1854 Treaty cession, the United States was creating additional reservations for the Indians, it was apparent that additional blacksmithing services would be required. The provisions of Article 5 in providing for those additional services were part of the consideration for the 1854 Treaty cession. Plaintiffs' motion for reconsideration is denied.

As consideration for the cession, the United States agreed in Article 2 to establish certain reservations for the constituent bands of Lake Superior Chippewas. In our 1975 decision we ruled that defendant is entitled to credit for the fair market value of those reservations which were outside the ceded area (Royce Area 332). By its second amended answer, filed March 26, 1976, defendant claimed that there were seven such reservations created outside Royce Area 332. For reasons which are set forth later in this opinion, we find that the January 10, 1855, fair market value of the seven reservations was $236,003.19.

The promised consideration under Article 4 was:

Annuities for 20 years		
In Coin	$5,000.00	$100,000.00
Goods, etc.	8,000.00	160,000.00
Agricultural Imps.	3,000.00	60,000.00
Education	3,000.00	60,000.00
One time payments		
As chiefs direct		90,000.00
Agricultural implements, etc. to mixed bloods		6,000.00
Guns, traps & Ammunition		3,550.00
Ready made clothing		1,000.00
Total		$480,550.00

By Article 5 defendant promised to furnish seven blacksmiths and equipment for 20 years. This was an annual obligation of $7,000.00 or $140,000.00 for the entire period. However, this obligation extended commitments which had been made under two previous treaties. As we have previously ruled, only that portion of the Article 5 payments which exceeded the obligations remaining under the previous treaties was part of the consideration for the cession under the 1854 Treaty. The value of the remaining consideration under the two previous treaties--the Treaty of July 29, 1837, 7 Stat. 536, and the Treaty of October 4, 1842, 7 Stat. 591--was $86,400.00. Since one-half of that consideration was for the benefit of the Chippewas of Lake Superior, their share of the promised consideration was $43,200.00

The value of the Article 5 consideration was:

Blacksmith and equipment - $7,000.00 per year for 20 years	$140,000.00
Less value of remaining consideration - 1837 and 1842 Treaties	43,200.00
Total	$ 96,800.00

The total value of the promised consideration, as set forth in Articles 2, 4 and 5 of the 1854 Treaty was $813,353.19. The promised consideration of $813,353.19 for land having a fair market value of $3,250,000 was so grossly inadequate as to render that consideration unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050.

Payments on the Claim

The value of the Article 2 consideration was the January 10, 1855, fair market value of certain reservations set aside for the Chippewas of Lake Superior. The reservations to be so valued are the seven Article 2 reservations which were outside the ceded tract (Royce Area 332).

Defendant's expert witness was Mr. Richard B. Hall, an expert real estate appraiser who testified and presented a written report on the fair market value of the reservations. Mr. Hall considered a variety of factors for each of the reservations. As outlined in his report, he considered the locations of the areas and their accessibility. He tabulated the surveyors' notes and considered the notations concerning the presence of timber, the character of the soils, and the vegetation in each of the townships involved. He noted the topography and drainage of the lands and the settlements in or close to the reservations. He considered the highest and best use for each of the reservations. Mr. Hall gave his opinion as to the fair market value of each of the reservations as of January 10, 1855. Actually Mr. Hall appraised eight reservation areas, since he included Royce Area 342, an area of some 11,303.50 acres which was added to the Red Cliff Reservation. In our 1975 decision we held that the setting aside of this addition was outside the scope of Article 2 of the treaty and, therefore, not a part of the consideration for the cession. 35 Ind. Cl. Comm. 427, 435-6. There was also some dispute concerning acreage figures for some of the remaining seven

reservations. However, this was resolved when defendant, by its second amended answer of March 26, 1976, reduced the figures for the reservations in question. By applying Mr. Hall's per acre value figures to the actual acreage included in each of the seven reservations, defendant has computed the following values:

	Acres	Per Acre Value	Value
L'Anse or Vieux Desert or Keweenaw Bay - Royce Area 333, Mich. 2	52,848.41	$1.00	$ 52,848.41
Bad River or La Pointe - Royce Area 334, Wisc. 2	123,993.70	.60	74,396.00
Madeline Island - Royce Area 335, Wisc. 2	195.71	1.25	244.00
Lac du Flambeau - Royce Area 336, Wisc. 2	50,232.72	1.00	50,232.72
Lac Courte Oreilles - Royce Area 337, Wisc. 2	69,136.41	.75	51,852.30
Ontonagon - Royce Area 340, Mich. 2	2,551.35	1.25	3,189.00
Red Cliff - Royce Area 341, Wisc. 2	2,592.61	1.25	3,240.76
	301,550.91		$236,003.19

Plaintiffs did not introduce any evidence relating to the fair market value of the reservations. They did, however, present the testimony of Mr. William Muske, an expert real estate appraiser, concerning the diminished value of the "restricted" title by which the Indians held their reservations. Since the Indians received only a beneficial use

of the reservations with the United States retaining legal title and controlling every form of alienation, Mr. Muske concluded that the value of such Indian use was one-half the fair market value of a full fee title. Therefore, plaintiffs contend, the fair market value appraisal by Mr. Hall should be reduced by 50 percent.

Plaintiffs have not cited any authority in support of their contention. The courts and this Commission have consistently held that the title by which Indians have held land--whether it is aboriginal title or recognized or reservation title--is not less valuable than fee simple title. In discussing the general principles which are applicable in a determination of the value of Indian land, the Court of Claims stated in Miami Tribe v. United States, 146 Ct. Cl. 421, 449 (1959):

> First we wish to observe that whether the land to be valued is held by the Indian claimants under recognized title or merely under so-called Indian title, or is held under fee simple title with all the usual rights of ownership, including that of alienation, the Supreme Court and this court have held that such land should be valued in the same way. In the case of United States v. Shoshone Tribe, 304 U.S. 111, the Court of Claims, in valuing land held by recognized title, had included in such valuation the worth of the timber and minerals in the area. On appeal the Government had urged that the Indians' title being less than fee simple in that it merely included the right to use and occupy the land, the value of the land must be less than land held under fee simple title. The Supreme Court said:
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> > For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest. Leavenworth, L. & G. R. Co. v. United States, 92 U.S. 733, 742-743. Beecher v. Wetherby, 95 U.S. 517, 525. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee. [p. 116]

> The same issue on value was present in the case of United States v. Klamath and Moadoc Tribe of Indians, et al., 304 U.S. 119, and the same holding was made in that case.
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> In the case of Otoe and Missouria Tribe of Indians v. United States, 131 C. Cls. 593, cert den. 350 U.S. 848, this court held that both Indian title land to the extent that actual occupancy thereof was proved, and reservation or recognized title land, should have the same value as though it were held in fee simple rather than on the basis of its value as subsistence for primitive Indian occupants as suggested by the Government appraiser. In its petition for certiorari, the Government again urged this theory of valuation.
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> In the case of Coeur d'Alene Tribe of Indians v. United States, 6 Ind. Cls. Com. 1, 38, the Indian Claims Commission held that land held by Indian title (mere permissive use and occupancy title) had the same value as land held by recognized or reservation title or as land held by fee simple title, citing the Shoshone and Klamath cases, supra, as well as United States v. Paine Lumber Co., 206 U.S. 467. In the Paine Lumber case the Supreme Court, noting that usually Indian tribes were not permitted to alienate their lands, stated that "The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple."

Defendant is entitled to credit for the full fair market value of the reservations.

Plaintiffs have also contended that the value of the reservations--whether it be Mr. Hall's full fair market value or Mr. Muske's 50 percent value--should be reduced by a "rental value" factor for two of the reservations. This reduction is required, plaintiffs assert, because the United States delayed in finally setting apart the reservations. In the case of the Lac du Flambeau Reservation it was a delay of 12 years (after the January 10, 1855, ratification date of the 1854 Treaty) and for the Lac Courte Oreilles Reservation it was 18 years. Contending

that the Indians suffered a loss of use of the lands involved, plaintiffs have computed a land rental value equivalent to the "rental value" of the dollars representing the full fair market value of the reservation lands. Measuring that rental value by interest at 6 percent, the figure is $36,168.00 for the Lac du Flambeau Reservation and $16,000.00 for the Lac Courte Oreilles Reservation. While it does appear that there was a delay in finally surveying the boundaries of the reservations and formally setting the areas aside as Indian reservations, it appears that Article 2(3d) of the Treaty contemplated a future agreement and fixing of boundaries for the two reservations which were described generally as each equal to three townships about the two lakes involved. And the Indians in those areas did make use of the lands during the period before the final surveys. We find no basis for allowing any reduction in the fair market value.

In determining the January 10, 1855, fair market value of the seven reservations we have adopted Mr. Hall's appraisal. He cited all of the pertinent factors affecting the market value of the lands in question. Although his appraisals rest ultimately on his expert opinion alone, plaintiffs have not contradicted it or suggested any error in it. The sum of $236,003.19 is allowed as a payment on the claim.

Defendant has claimed credit for disbursements totalling $473,873.98 under Article 4 of the treaty. In our finding 29 we consider each of the eight categories of payment under that article. Of the amount claimed we find a total of $230,197.11 is allowable as a payment on the claim--consisting of:

Cash annuities	$100,000.00
Moral and education	45,193.48
Payment of debts	85,000.00
Total	$230,193.48

In support of the claimed offset for payment of cash annuities defendant has introduced representative vouchers for annuity cash payments to Lake Superior Chippewas. As we have noted in two previous cases, also involving Lake Superior Chippewas, the annual cash payments were lumped together with similar cash annuities due under other treaties, namely the Treaty of July 29, 1837, 7 Stat. 536, and the Treaty of August 2, 1847, 9 Stat. 904. Minnesota Chippewa Tribe v. United States, Docket 18-S, 41 Ind. Cl. Comm. 102 (1977); Minnesota Chippewa Tribe v. United States, Docket 18-C, 32 Ind. Cl. Comm. 192 (1973). The payments have been allocated to the appropriate treaties. The representative vouchers indicate that the amounts claimed were properly paid and allocated to the 1854 Treaty. The total cash payments to Lake Superior Chippewas under the 1854 Treaty was $100,878.60. Since Article 4 of the treaty provided for 20 annual payments of $5,000.00 or a total of $100,000.00, the claim for that amount is allowed as a payment on the claim. The disbursement of $85,000.00 for the payment of tribal debts is also allowed as a payment on the claim.

Of the listed expenditures for moral and educational purposes ($60,526.68) only the sum of $45,193.48 is allowed. The following items are disallowed:

Board and tuition	$14,180.30
Clothing	849.02
Provisions	72.74
School farm	204.00
Transportation of supplies	27.14
Total	$15,333.20

By the Act of October 27, 1974, Pub. L. No. 93-494, 88 Stat. 1499, Section 2 of the Indian Claims Commission Act, 60 Stat. 1050, was amended to provide that expenditures for food, rations, or provisions shall not be deemed payments on the claim. All of the above listed items related to the Indians' basic subsistence needs, and, as such, they are within the precluded category of food, rations, or provisions. Defendant has not introduced any evidence to establish what portion of the $14,180.30 spent under the "board and tuition" category was for purposes within the precluded category. In the absence of any proof on this issue we must disallow all the board and tuition expenditures.

All of the remaining disbursements are disallowed because they were for purposes related to the basic subsistence needs of the Indians and therefore come within the purview of the 1974 amendment precluding the crediting of expenditures for food, rations, and provisions. The categories which are disallowed are:

Annuity "goods, household furniture and cooking utensils"	$145,092.27
Annuity "agricultural implements and cattle, carpenter's and other tools and building materials"	63,212.94

Agricultural implements, household furniture, and cooking utensils for the mixed bloods	6,000.00
Guns, rifles, beaver traps and ammunition	8,148.07
Ready-made clothing	1,000.00

While defendant has only claimed credit for $4,466.00 out of the $8,148.07 expended under the "guns, ammunition, and traps" category, we have considered the full amount under the payment on the claim category. Defendant states that only the sum of $4,466.00 was disbursed in fulfillment of Article 4 obligations, which were to furnish "two hundred guns, one hundred rifles, five hundred beaver traps, [and] three hundred dollar's worth of ammunition." The excess amount defendant wishes to claim as a gratuitous offset. However, no evidence has been presented concerning the cost of the specific items. The General Accounting Office report lists the full amount of $8,148.07 as expenditures made in fulfilling obligations under the Treaty of September 30, 1854. We also consider the full amount as payments under the treaty.

In summary the items allowed as Article 4 payments on the claim are:

1.	Cash annuity	$100,000.00
2.	Annuity goods	00.00
3.	Agricultural implements	00.00
4.	Moral and educational	45,193.48
5.	Payment of debts	85,000.00
6.	Agricultural implements	00.00
7.	Guns, etc.	00.00
8.	Clothing	00.00
	Total	$230,193.48

Defendant claims a total of $131,798.90 disbursed under Article 5 for blacksmith supplies and pay of blacksmiths. However, as we have previously ruled, a portion of this amount represented payments for obligations which remained under the previous treaties in 1837 and 1842. As set forth in finding 26, the value of the remaining consideration on the 1854 Treaty ratification date of January 10, 1855, was $86,400.00. Since one-half of that obligation was for annuities due the Chippewas of Lake Superior, their share of the promised payments was $43,200.00. Deducting this sum leaves a balance of $88,598.80 which is allowed as 1854 Treaty payment on the claim.

Defendant is allowed to offset the following amounts as payments on the claim:

Article 2	$236,003.19
Article 4	230,193.48
Article 5	88,598.90
Total	$554,795.57

Gratuitous Offsets

In our February 13, 1975, decision in this case we determined that the nature of the claim and the entire course of dealings and accounts between the United States and the plaintiffs do not in good conscience preclude consideration of defendant's claimed offsets for gratuitous expenditures. 35 Ind. Cl. Comm. 427, 449.

Defendant claims credit for gratuitous disbursements totalling some $831,688.61. The expenditures were made under a number of categories, and defendant has submitted payment vouchers and other documentary evidence for representative transactions under the various categories. The General Accounting Office report also itemizes by year the disbursements for the various bands or groups of bands of Lake Superior Chippewas. In our findings 32 through 49 we consider the claimed gratuities category by category.

Of the claimed amount only the sum of $74,029.85 is allowed as an offset. Many of the disallowed items were disbursements which were too small in consideration of the number of Indians involved to support an inference that they constituted a tribal benefit. Rather it would appear that the goods or services were for a few individual Indians. In those instances where the expenditures and purposes indicated a tribal benefit the claimed offset was allowed.

One of the claimed gratuities was the sum of $2,647.23 spent in 1942 for building material for the "Odanah Project." However, no evidence was submitted to indicate the purpose or for whom the building was done. Since the Commission is unable to determine whether the building was for tribal, agency, or individual purposes, the claim is disallowed.

Defendant claims credit for disbursements of $357,346.47 for the purchase of land for the various bands of Lake Superior Chippewas.

Defendant has introduced copies of payment vouchers together with copies of deeds and other documents in support of some of the purchases. However, in one instance the warranty deed is contrary to the information on the payment voucher, and it does not support defendant's claim. The payment voucher (Def. Ex. 24-S, part 7) indicates a land purchase for the Fond du Lac Band. However, the warranty deed (Def. Ex. 40-S) establishes that the conveyance was to the United States in trust for the Minnesota Chippewa Tribe. This was not for the benefit of the Fond du Lac Band or the Lake Superior Chippewas. Therefore, the only allowable offsets for land purchases are those for which defendant's evidence does indeed establish that title did in fact pass to or for the benefit of a band of Lake Superior Chippewas. There were fifteen such purchases for a total of $54,347.80. That sum is allowed as a gratuitous offset.

Defendant claims credit for expenditures totalling $298,923.86 for the "care and sale of timber." However, the representative vouchers which have been submitted in support of these disbursements indicate either an educational purpose or agency and administrative purposes. A large number of the claimed expenditures were pro-rated amounts of disbursements which were also allocated to the Bois Forte Band in the Docket 18-D case. Other evidence submitted in that case established that over 90 percent of the claimed expenditures was for the pay of Federal employees. We disallow all the claimed disbursements for the care and sale of timber.

With the exception of cash payments of $878.60, we disallow all the claimed gratuities under the "excess treaty payments" category and the "items and services not required by the treaty" category. The General Accounting Office report lists all the payments as having been made pursuant to the Treaty of September 30, 1854. It is therefore apparent that no examination of the payment vouchers was done for the purpose of determining whether any of the expenditures were for purposes which cannot be allowed as gratuitous offsets. Since it is not possible to determine whether the payments were for agency, administrative, educational, health or highway purposes, the claimed gratuities are disallowed.

In summary the following gratuitous offsets are allowed:

Clearing, breaking and fencing land	$ 00.00
Wells and well equipment	159.65
Seeds, fruit trees and fertilizer	00.00
Agricultural implements and equipment	2,914.99
Odanah project	00.00
Clothing	00.00
Hardware, glass, oils and paint	00.00
Household equipment and supplies	00.00
Hunting and fishing equipment	00.00
Purchase of land	54,347.80
Feed and care of livestock	00.00
Purchase of livestock	00.00
Provisions	00.00
Repairs to dock	1,600.00
Enlargement of Red Cliff Reservation	14,128.81
Care and sale of timber	00.00
Excess treaty payments	878.60
Gratuitous items and services not required by treaty	00.00
Total	$74,029.85

Defendant is entitled to offset the sum of $554,795.57 as payments on the claim and the sum of $74,029.85 as gratuitous offsets. This is a total of $628,825.42, which deducted from the interlocutory award of $3,250,000.00 leaves a net amount of $2,621,174.58. The Chippewas of Lake Superior are entitled to a final award in the amount of $2,621,174.58.

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 findings and opinion on two grounds -- the reasons for which are set forth in detail at 35 Ind. Cl. Comm. 427, 450-1.

The majority has allowed the defendant a deduction of some $236,003.19 representing the January 10, 1855, fair market value of some seven reservations set apart for Lake Superior Chippewas. In my view the proper measure of this offset is the purchase price paid by the United States. Ponca Tribe 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)).

In my opinion the United States, by paying an unconscionable consideration for the Indians' lands, has reaped the benefits of that improper conduct for over 120 years. In good conscience such conduct does not warrant the deduction of any gratuitous offsets from the award in this case.

John T. Vance, Commissioner