

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 272
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: September 22, 1978.

Appearances:

Paul M. Neibell, Attorney for Plaintiffs.

Glen R. Goodsell, with whom was Assistant Attorney
General James W. Moorman, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

On April 13, 1973, the Court of Claims affirmed this Commission's decision that the Creek Nation was entitled to recover additional compensation for 5,200,000 acres of land ceded under the Treaty of March 24, 1832, 7 Stat. 366, and that upon a determination of the fair market value of the ceded lands:

Defendant is entitled to an offset of other actual monetary consideration received by the tribe or its members as called for by the treaty. 1/

Thereafter, the Commission concluded that the 1832 fair market value of the ceded land was \$8,365,552, and an interlocutory award

1/ United States v. Creek Nation, 201 Ct. Cl. 386 (1973), affirming 26 Ind. Cl. Comm. 410.

was entered in that amount, "less any payments on the claim or other offsets hereinafter determined to be properly deductible."^{2/} The matter of the allowable offsets is now before the Commission.

The defendant alleges that under the provisions of the 1832 Creek Treaty it is entitled to offset \$690,844.66 as payments on the claim. No gratuitous offsets are claimed. The parties previously stipulated in Docket 21, Creek Nation v. United States, 11 Ind. Cl. Comm. 53, 130 (1962) the amount of offsets for the period from August 7, 1814, to and through June 30, 1956, and they were deducted from the award in that case. Defendant has withdrawn from this case its claim for gratuitous expenditures made subsequent to June 30, 1956, reserving its right to present such a claim in future cases, if any.

Apart from challenging defendant's legal offset claims, item for item, the plaintiff has raised two general objections to the allowance of any offsets. First, according to the plaintiff, the aforementioned stipulation in Docket 21, supra, was intended to cover all payments on the claim as well as gratuities, thus barring defendant from asserting payments on the claim in this docket. Secondly, plaintiff alleges that the entire course of dealings and accounts between the United

^{2/} 40 Ind. Cl. Comm. 175, 223 (1977), rehearing denied 41 Ind. Cl. Comm. 25 (1977).

States and the plaintiff is such that the Commission in good conscience should disallow all offsets pursuant to section 2 of our Act.^{3/} We can summarily dispose of plaintiff's second defense by simply noting that section 2 of our Act governing the allowance or disallowance of offsets based on "course of dealings" applies only to gratuitous offsets. Payments on the claim, or legal offsets, if claimed and supported in the record, must be deducted from any interlocutory award regardless of the "course of dealings." Yankton Sioux Tribe v. United States, 43 Ind. Cl. Comm. 1 (1978).

Plaintiff's contention that the offset settlement in Docket 21, supra, bars the allowance of any payments on the claim in this docket is also without merit. The stipulation in Docket 21 provided:

* * *It is further stipulated that said \$90,000.00 shall include and represent any and all offsets and counterclaims of whatsoever nature the defendant has asserted or could have asserted against said Creek Nation, Plaintiff, * * *during the period from August 7, 1814 to and through June 30, 1956; and defendant agrees that none of said offsets or counterclaims covering said period from August 7, 1814 to and through June 30, 1956, shall ever be again asserted against any of the parties hereto in any further litigation between them, or either of them, and the United States hereby does expressly waive any right hereafter to assert any of said offsets or counterclaims included within said period from August 7, 1814 to and through June 30, 1956.
Cl. Ex. V-38, Docket 21.

^{3/} 25 U.S.C. 70a.

While the language of the 1959 stipulation may appear broader than was necessary to accomplish the intended purpose -- namely the settlement of gratuitous offsets -- no consideration payments or payments on the claim were involved in Docket 21.^{4/} Only gratuitous offsets could have reduced the interlocutory award in that case. Therefore, the parties in Docket 21 had no need to consider "payments on the claim," particularly payments arising out of unrelated Creek claims in other dockets. Under these circumstances it is inconceivable that the United States would have compromised its right to assert "payments on the claim" in some unrelated matter at some future date. Indeed, we have found nothing in the record that would even remotely suggest that the Government ever intended to pursue that course of action.

Turning now to the matter at hand, we have examined each offset item claimed by the defendant. In support of its offset claims the defendant has submitted a detailed General Accounting Office Report, showing monies appropriated and disbursed to the Creek Nation pursuant to the 1832 treaty. That report has been supplemented by supporting documents consisting of vouchers, receipts, and related correspondence. With the exception of one lost voucher, the payment of each particular item is adequately supported. The question then is whether each payment legally qualifies as a "payment on the claim."

^{4/} In Docket 21, the Creek Nation ceded its lands as an indemnity for the costs of the Creek War under the Treaty of August 9, 1814, 7 Stat. 120, a treaty of "capitulation." The United States paid nothing for the ceded area under the 1814 treaty.

In carrying out the provisions of Article II of the 1832 treaty, the defendant claims expenditures of \$249,780.19, as follows:

- (a) \$122,405.50 -- payments to individual members of the Creek Nation for land reservations;
- (b) \$108,713.82 -- money received by Creek orphans and their heirs from proceeds of the sale of orphan lands;
- (c) \$15,425.87 -- costs of locating Creek reservations; and
- (d) \$3,235.00 -- costs of census to determine the number of reserves and location.

Under Article II the United States "engage[d]" to survey the ceded lands from which 90 principal chiefs of the plaintiff tribe were to select one section each and each head of a Creek family was to select one-half section each. A census of eligible recipients was to be taken under the direction of the President and the lands selected were to be reserved from sale for five years, unless sooner disposed of by the owner. In addition, 20 sections of land were to be selected under the direction of the President for the benefit of the Creek orphans, said orphan lands to be divided and retained or sold for their benefit, as the President might direct.

Payments to Individuals for Reservations - \$122,405.50

Plaintiff objects to the allowance of any credit under this category because the payments were made to individuals and not the Creek Nation. However, this is in direct conflict with our decision

that the individual reserves were part of the cession and the principal consideration under the 1832 treaty. The Court of Claims confirmed this when it mandated that defendant could offset "monetary consideration received by the tribe or its members as called for by the treaty." [Emphasis added] 201 Ct. Cl. at 410.

Plaintiff also objects to the payment of some \$86,800.00 under this category because it was disbursed pursuant to Section 4 of the Act of March 3, 1837, 5 Stat. 186. The 1837 statute was enacted as a supplement to the 1832 treaty in order to permit the President to sell at public auction all unsold reserve lands and to compensate those Creeks whose names had been omitted from the official census roll taken under the 1832 treaty as well as those whose names had appeared on the census roll but did not receive any land. The payments were made in fulfillment of obligations which defendant assumed under Article 2 of the 1832 treaty. The record shows that the claimed amount was paid out to Creek individuals pursuant to the 1832 treaty and the 1837 Act and it is allowed as a payment on the claim herein.

Proceeds of Sale of Orphan Lands - \$108,713.82

As noted above, Article II of the 1832 treaty permitted the President to sell for the benefit of the Creek orphans those lands previously

selected and set aside for them. The record shows that, in 1836 and 1837, \$106,104.00 was obtained from the sale of 20 sections of orphan lands. In addition \$2,264.00 was received from the lease of the lands; \$45.20 from the forfeiture of a deposit on the purchase price; and \$300.00 from interest on deferred payments -- making a total of \$108,713.82 realized from the lands. Plaintiff's only objection appears to relate to defendant's listing of the total sum as representing the proceeds of sale. In any event the entire amount of \$108,713.82 represents proceeds obtained from the orphan lands, and it is a proper offset as a payment on the claim.

Survey and Census Costs - \$18,660.87

The balance of defendant's offset claims under Article II represent survey and census costs incurred in administering the individual reserve program. The survey and census procedures as spelled out in Article II were integral and necessary preliminary steps in the selection process for locating individual reserves. These were special obligations assumed by the defendant under the 1832 treaty and, as such, the expenditures are allowed as payments on the claim.

Removal of Intruders - \$5,085.56

Under Article V of the treaty the United States agreed to remove intruders from the Creek lands in the same manner as intruders might be removed by law from public lands. The defendant claims expenditures of \$5,085.56 in carrying out this provision. While it could be argued

that this undertaking was part of the inducement for the Creek cession, nevertheless, we find that the Government had a pre-existing obligation under the current law to protect Creek lands from white intruders. As noted by the Court of Claims in the Creek case, supra:

The Federal Government had ample authority under the intercourse law of March 30, 1802, 2 Stat. 139, to protect the Creek Nation from physical intrusion upon Creek lands by white settlers. 5/

Under these circumstances the defendant's agreement to remove white intruders under the 1832 treaty did not amount to any new consideration flowing to the plaintiff tribe. Accordingly, the defendant's offset claim of \$5,085.56 is disallowed.

Article VIII Annuities - \$201,900.00

Under Article VIII of the treaty the United States agreed to pay the Creek Nation an additional annuity of \$12,000 for five years, then \$10,000 for a term of 15 years. Article VIII further provided that:

All annuities due to the Creeks shall be paid in such manner as the tribe may direct.

The defendant claims cash annuity payments to the Creek Nation under Article VIII from 1833 to 1852 in the amount of \$201,900.00 of which \$1,700 from the 1851 annuity payment was used to defray the expenses of a Creek delegation who visited Washington, D. C. Plaintiff

5/ 201 Ct. Cl. 386, 391.

raises three objections to the allowance of the above payments: (1) that \$31,900 of the above annuities were used to pay spurious debts; (2) that the \$1,700 expenditure for an Indian delegation apparently produced no tribal benefit and therefore is not a proper offset citing Red Lake Pembina and White Earth Bands, et al. v. United States, 9 Ind. Cl. Comm. 457, in support thereof; and (3) that there is no voucher supporting a partial annuity payment of \$5,000 for the year 1835. The record shows that the defendant did advance annuity payments for the year 1836-1837 in the sum of \$31,900 and that this money was duly received by the representative of the Creek Nation. The stated purpose for the payments was "to enable them to pay their debts so that they could emigrate." This was not a situation where the defendant agreed to pay tribal debts. Here the tribe had full use of the annuity money, and the tribal leaders had absolute authority to disburse the money as they saw fit. Plaintiff's objection that the monies went to satisfy "spurious" debts (there is no evidence that such was the case) and hence were of no tribal benefit is misplaced in this instance.

The \$1,700 expended for expenses of the Indian delegation was apparently disbursed at the request of the tribe and would therefore have been within the authority of the tribal leaders as provided for in Article VIII of the treaty. Finally we note that the \$5,000

annuity payment for which no voucher exists is adequately documented by other evidence in the record. The defendant has produced a contemporary disbursement abstract signed by the Indian agent which shows payment to the Creeks of \$5,000 for annuities for the year 1835. The defendant is therefore allowed as a payment on the claim annuity payments in the sum of \$201,900.

Article IX Payment of Debts - \$99,960.01

Under Article IX of the treaty the United States agreed to pay the Creek tribe \$100,000 "to be applied to the payment of their just debts, and then to their own relief, and to be distributed as they may direct, and which shall be in full consideration of all improvements." The evidence of record shows debt payments pursuant to Article IX for the years 1832-1834 in the sum of \$99,960.01, which amount defendant seeks to offset as a payment on the claim. Plaintiff argues that since these debt payments were not made for the lands ceded under the treaty but rather for improvements, they should not be allowed as payments on the claim. We find that in the absence of any contrary intention plaintiff's improvements were ceded with the land under the 1832 treaty. Therefore payment of tribal debts was consideration for the cession and the defendant is entitled to set off the above amount as a payment on the claim. Prairie Band of the Pottawatomie Tribe of Indians, et al. v. United States, Appeal No. 6-76 (1977) aff'g 38 Ind. Cl. Comm. 128 (1976).

Article X Delegations - \$16,000.00

In Article X of the treaty, the United States agreed to pay the sum of \$16,000.00 as compensation and expenses of the Creek delegation to the 1832 treaty proceedings in Washington, D. C. The record shows payment of the \$16,000, which amount the defendant now claims as an offset. Plaintiff objects to the allowance of the same primarily on the basis of unfair and dishonorable dealings. As we indicated earlier the question of course of dealings between the parties is relevant only to the matter of gratuitous offsets, not payments on the claim. Defendant is allowed to offset this amount as a payment on the claim.

Article XI Payments - \$23,279.96

Under Article XI of the treaty the United States agreed to pay the following claims:

1. For payments of certain judgments obtained against the chiefs eight thousand five hundred and seventy dollars.

Of this amount the defendant claims payment of \$8,303.36 for the benefit of the Creek chiefs.

2. For losses for which they suppose the United States responsible, seven thousand seven hundred and ten dollars.

Of this amount the defendant claims payment of \$7,698.90 for the benefit of the Creek Nation.

3. For payment of improvements under the treaty of 1826 one thousand dollars.

Defendant claims the entire amount was paid by the United States for the benefit of the Creek Nation in 1833.

4. The three following annuities shall be paid for life:
To Tuske-hew-haw-Cusetaw, two hundred dollars.
To the Blind Uchu King, one hundred dollars.
To Neah Mico, one hundred dollars.

Defendant claims \$2,062 in annuity payments under this provision.

5. There shall be paid the sum of fifteen dollars for each person who has emigrated without expense to the United States.

Defendant claims that \$1,275 was expended for self-emigrating Creeks.

6. There shall be divided among the persons, who suffered in consequence of being prevented from emigrating, three thousand dollars.

For this purpose the defendant claims \$2,940.70 was paid to the Creeks.

In sum the defendant alleges \$23,279.96 as a payment on the claim under Article XI of the 1832 treaty. Plaintiff concedes that the annuity payments of \$2,062.00 to the three Creek chiefs are proper payments on the claim, and they are therefore allowed.

Plaintiff does object to \$8,303.36 in debt payments on grounds that there might have been a payment of spurious claims and, therefore, the expenditures should not be included as payments on the claim. Further, plaintiff asserts, the claims had been brought by intruders upon the Creek domain, and the United States should have removed them. However, plaintiff does not question the validity of the judgments

which were the basis for the payments. All of the disbursements were made in satisfaction of judicial awards. While there were statements of displeasure and doubts as to the fairness of the circumstances surrounding the individual cases, this is not a reason for the disallowance of a legal offset. The amount of \$8,303.36 is allowed as a payment of the claim.

The plaintiff objects to the allowance of defendant's claim of \$7,698.90 under paragraph 2. The payments were made to compensate individual Creek Indians for losses for which they claimed the United States was responsible. The objection is that the payments were to individual Creeks and not the Nation and that the payments were for losses and not land. However, the promise of the United States to reimburse the Creek Indians for losses of \$7,710.00 was part of the inducement for the cession and should be included in the allowance for payments on the claim. As we have previously noted, payments to individual Indians can be offset, if provided for under the treaty. The sum of \$7,698.90 is allowed as a payment on the claim.

Plaintiffs objection to the allowance of the \$1,000 for improvements under the 1826 treaty is sustained. In this instance the agreement to satisfy an unpaid obligation under the previous 1826 treaty was not consideration for the cession under the 1832 treaty. Defendant's offset claim of \$1,000 is disallowed.

Plaintiff objects to defendant's claim to the \$1,275 disbursed to the self-emigrating Creeks because they were individual and not tribal payments and because payments of "removal" expenses are not proper offsets under our Act. Objection is also made that the offset claim of \$2,940.70, covering losses incurred by Creeks as a result of being prevented from emigrating, are barred because they were payments to individual Creeks. Again we find that these specific treaty obligations are valid consideration despite their individual aspects and that the prohibitions against "removal" expenses in our Act apply only to gratuitous expenditures. Defendant is entitled to offset both items.

Article XIII - Pay of Blacksmiths and Strikers \$34,839.44;
 Educating Creek Children \$60,000.00

Under Article XIII of the treaty, the defendant agreed to expend \$3,000 per year at the direction of the President for a term of twenty years for educating Creek children, or a maximum of \$60,000. Defendant further agreed to provide the emigrating Creeks with the services of a blacksmith for 20 years. The United States provided these blacksmith services from 1837 to 1860 at a total cost of \$34,839.44, which amount the defendant now claims as a proper offset. The plaintiff does not object

to the claim for blacksmith services. The defendant is allowed an offset credit in the amount of \$34,839.44.

With respect to expenditures for educating Creek children, the defendant says that it spent more than the \$60,000 authorized by the treaty. It does claim \$60,000 as an offset based on the following items:

1. Pay for Superintendents and Teachers	\$ 41,561.52
2. Pay for Superintendents and Teachers	2,593.37
3. Pay of Teachers for Creek Children at Choctaw Academy	14,970.00
4. Erection and Repair of School Buildings	7,870.96
5. Pay of Miscellaneous Employees	<u>1,939.15</u>
Total	\$ 68,535.00

Of the above items we have concluded that the following expenditures for education purposes under Article XIII qualify as payments on the claim and are proper offsets:

1. Pay for Superintendents and Teachers	\$ 2,593.37
2. Pay of Teachers for Creek Children at Choctaw Academy	14,970.00
3. Erection and Repair of School Buildings	4,336.71
4. Pay of Miscellaneous Employees	<u>464.40</u>
Total	\$ 22,364.48

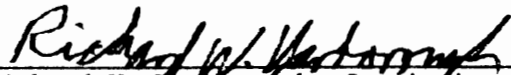
We have disallowed defendant's claim of \$41,561.52 in teachers' pay, \$3,534.25 for the erection and repair of school buildings and \$1,474.75 for pay of miscellaneous employees, or a total of \$46,570.52 as money improperly claimed by the defendant as an offset. The record shows that Congress never appropriated any money to cover the above expenses when incurred, but instead disbursed these sums from plaintiff's "Interest on Creek Fund," which of course was the Indians' money to begin with. It is true that thereafter the United States under the Act of August 7, 1882, 22 Stat. 301, sought to reimburse the Creek Nation for all improper expenditures made by the Government from the plaintiff's orphan fund. However, the 1882 Act included the following proviso:

Provided Further, That the Secretary of the Interior is hereby authorized and instructed to charge the sum of sixty-nine thousand nine hundred and fifty-six dollars and sixty-eight cents used for general purposes of the Creek Nation, against the general fund of said nation, and said sum shall be retained by the Secretary of the Interior in such installments as shall not seriously embarrass the object of the annual appropriations for the support and necessities of the Creek Nation. . . [emphasis supplied]

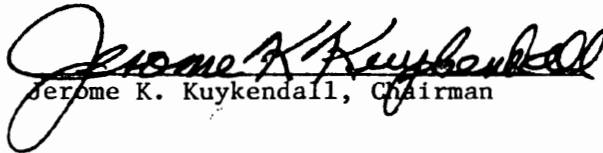
According to the GAO report, which sets forth all the disbursements from the Creek orphan fund, some \$69,354.82 was disbursed for "general purposes," and included in that sum was the \$46,570.52 disbursed for teachers salaries, employees salaries, and buildings. Without a doubt these are the same "general purposes" expenditures cited in the above proviso of the 1882 Act. Thus, the defendant actually

required the Creeks to reimburse it for the \$46,570.52 expenditure. The defendant cannot have this money offset in this case, and we therefore disallow the same as a payment on the claim.

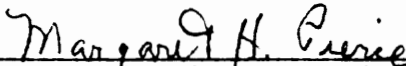
Defendant is therefore entitled to set off as payments on the claim against the interlocutory award of \$8,365,552, the sum of \$647,124.08 leaving a final award in favor of the plaintiff of \$7,718,427.92.


Richard W. Yarborough, Commissioner

We Concur:


Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner