BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE AND APACHE TRIBES OF INDIANS, Petitioners, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 32

Decided: July 18, 1957

Appearances:

William C. Lewis, Jr.,
J. Roy Thompson, Jr. and
Frank Miskovsky,
Attorneys for Petitioners.

W. Braxton Miller, with whom were
Ralph A. Barney and Mr. Assistant
Attorney General Perry W. Morton
Attorneys for Defendant.

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The petitioners have filed a motion for rehearing herein claiming that the Commission by its final order of March 12, 1957, erred in allowing defendant certain deductions by way of set off against the interlocutory award made petitioners on December 13, 1955, and in failing to allow petitioners a sum in addition to the award to make just compensation.

The importance of the questions involved in this case (as well as others pending before us, according to briefs amici curiae filed herein) compels a reexamination of our action in allowing deductions from the

award as gratuity expenditures made by defendant. These deductions will be considered in the order they appear in our findings of March 12, 1957.

In this opinion we shall use the terms "tribe" or "tribal" as applying to an Indian group entity, which shall include bands and identifiable groups when the text requires it.

Gratuity Provisions of the Indian Claims Commission Act.

The items we set off against the award, which are here under attack, must, to be allowed as a gratuity deduction, come within the categories of "money or property given to or funds expended gratuitously for the benefit of the claimant," the petitioners herein, if our action in allowing them was proper.

The applicable part of the Act governing gratuity setoffs reads —

> * * the Commission may also inquire into and consider all money or property given to or funds expended gratuitously 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 * *." (25 U.S.C.A. 70a).

Following the above are provisions which expressly exclude as offsets certain gratuitous expenditures made by the Government. They, in general, are: Agency, removal and administrative expenses, expenditures for Indian education, health and emergency expenditures for general relief, and the like. These excluded outlays become important only if it is necessary to determine whether any of the claimed offsets come within any of the excepted categories.

Gratuitous expenditures under our act are those made to or for Indian groups without obligation on the part of the Government to make them; they are in essence gifts or donations. They are not, therefore, debts or obligations of the Indians which the defendant could collect in an independent suit. This is shown by the fact that allowable gratuities can only be used, as the statute provides, to "set off * * such expenditures against any award made to the claimant." This is made plain by the Court of Claims in Alcea Band v. United States, 115 C. Cls. 463, 516, in which it said:

> * * * This contention of defendant completely ignores the fact that the amounts so allowed as offsets are pure gratuities which would not be recoverable by the United States except by virtue of Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049) which provides in part that "offsets * * * may be set off * * * against any award made to the claimant * * *." [Emphasis supplied] Since those gratuities were not reimbursable items at the time they were made and since there was no obligation on the part of the Indians to repay such amounts, they cannot be held to have become due to the United States independent of the final determination of the sum due the Indians.

See also Osage v. United States, 66 C. Cls. 64, 82; Blackfeet v. United States, 81 C. Cls. 101, 136. So, it is amply clear that for reimbursement for such expenditures the Government is confined to the expedient of deducting them from awards against it and then only to the extent allowed by permissive law. Hence, a gratuity is not the subject of an offset merely because it is not excluded by our act, for although the gratuitous expenditure may have been for the benefit of the claimant it must also be tested by the "good conscience" provisions of the act and decided that the nature of the claim and the course of dealings between claimant and the United States warrants the offset. Obviously, then, in this case the first inquiry must be whether the claimed gratuities were for the benefit of the

tribe. If they were not, they cannot be set off and the "good conscience" provision cannot make them tribal benefits even though not excluded by the act.

There are tokens of Congressional intent respecting gratuities to be found in the history of the Indian Claims Commission Act. Without going into the discussions concerning gratuity offsets from awards made to Indian claimants in the many bills before Congress for the creation of an Indian Claims Commission, we shall confine our discussion to H. R. 4497, which was a House Committee substitute for H. R. 1198 and H. R. 1341. It was H. R. 4497 which, with amendments, became the present law. This bill was introduced in 1945 and limited gratuity deductions to claims arising from the fair and honorable dealings clause of the act. The Senate, however, changed that part of the bill to read (Cong. Rec., 79th Cong., 2d Sess., July 17, 1946, p. 9218):

> Whenever the Commission shall determine that a claimant is entitled to relief it shall inquire into and consider all counterclaims and set-offs and demands that would be allowable in a suit brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136, 28 U.S.C. 250), as amended; and it may also give weight to all money or property given to or funds expended gratuitously for the benefit of the claimant.

And in its report the Senate Committee said (S. Report No. 1715, 79th Cong., 2d Sess., p. 6):

> 3. Offsets against claims.--The bill as it passed the House makes no provision for consideration by the Commission of expenditures or grants of money or property including gratuities made by the United States for the benefit of the claimant in cases based on strictly legal or equitable claims. Indian jurisdictional acts have required, in most instances, that the Court of Claims deduct items of this kind from any recovery against the United States found to be due by the Court. Specific standards, however, have varied from act to act. Rather than prejudge the question

> of whether, in any particular case, gratuitous expenditures should be deducted from valid claims, the committee proposes that the Commission should be given the authority in each case to give such weight to these items as the circumstances of the case may justify. * * *

The differences between the House and Senate were composed by the conference committee (Conference Report, House 2693, July 27, 1946, p. 2) and the language now appearing in our act was adopted and passed by both Houses. In a statement accompanying the Conference Report by the House Managers, they said:

> The conferees agreed that the Senate amendment gave too broad a discretion to the Commission and accordingly rewrote the section to require, first, that all deductions generally allowable in the Court of Claims against non-Indian claimants shall be allowed by the Commission in cases heard under this act, and, secondly, that gratuities of certain specified types, which are not allowable in the Court of Claims against non-Indian claimants, shall not be allowed by the Commission under this act against Indian claimants. The effect of the substitute language is to limit the discretionary authority of the Commission and to remove in large part the possible discrimination against Indian claimants in the matter of gratuities. * * *
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> The bill does permit the Commission, where it finds that the nature of the claim and the entire course of dealing between the claimant and the United States warrants such action, to set off other gratuitous expenditures recognized to be for the direct benefit of the Indians, such as expenditures made for the purchase of land.

In all committee reports it is significant that it is expenditures "for the benefit of the claimant" that are mentioned, and the House Managers speak of "expenditures made for the purchase of land" as an example of the type of allowable gratuity intended. At no place in any of the bills that we have examined were payments to individual members of a claimant suggested as an offset nor does the present act expressly make such outlays deductible from awards.

Two decisions of the Court of Claims are helpful in solving the problem confronting us as they indicate that it is only gratuities that are for tribal benefit that may be offset. Those cases are:

Osage v. United States, 66 C. Cls. 65, 82. The jurisdictional act permitted a "set-off or counterclaim, including gratuities, which the United States may have against said Osage Tribe * *." The defendant claimed offsets (8 and 9) for expenditures made in supporting children of the tribe in nonreservation schools. In disallowing such expenditures as offsets the court said:

> * * * It may, however, be well to state that as to the counterclaims the special act directed consideration only to counterclaims against the Osage Tribe and not against individuals of the tribe. In this view of the matter, counterclaims Nos. 8 and 9, being for expenditures for education of individual Indians at schools, are not within the meaning of the special act, and could not be considered in any event as an offset against the Osage Indians as a tribe.

And the opinion closed with the statement: "The counterclaims are disallowed and dismissed."

Fort Berthold Indians v. United States, 71 C. Cls. 308, 340-341. This is what the court said in that case:

> The jurisdictional act charges the Indians with "all sums heretofore paid or expended for the benefit of said tribe or any band thereof." The Government under the foregoing provision of the jurisdictional act charges the Indians with $290,827.25, alleged to be pro rata cost of educating individual children of the bands at various nonagency Indian schools. The amount charged is arrived at by ascertaining the per capita cost of maintaining the schools and charging the same to the Indian tribe as the number of children attending appears. The Government during the period maintained at its expense Indian schools at Carlisle, Pa., Chilocco, Okla., Lawrence, Kan., Pipestone, Minn., and Pierre, S. D. Congress appropriated from the Treasury in accord with a governmental policy to extend the privileges of education to Indian children for the

> express intent of eventually changing the hereditary habits and customs of the tribes. The motive involved was more directly beneficial, from a governmental standpoint, to the Government than to the tribe. Of course, educational facilities were of prime necessity and imperative, and eventually resulted in benefit to the tribe, but the immediate beneficial results were individual and not tribal.
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> We do not believe that the jurisdictional act comprehends a set-off against the claim of the Indians for this item of expenditure in behalf of children of Indian tribes indiscriminately. To so hold might result in sustaining an obvious injustice, for the bands involved in this litigation would be held to contributing a sum toward the maintenance of the schools, while other tribes with much larger attendance would escape payment for benefits of equal value. The sums chargeable, we think, must be restricted to the usually recognized and customary distributions made to the Indians as tribes and bands, unless a contrary purpose is expressed in the act. Public institutions established for the Indian race were maintained from public funds as an adopted public policy, in the nature of gratuity.

In each of these cases the basis for the decision was that the jurisdictional act permitted offsets only for gratuitous expenditures for the tribe, although the phraseology of the jurisdictional acts are not alike. That in the Osage case -- "gratuities, which the United States may have against the Osage tribe" -- was construed as not including expenditures for individual members (children) of the tribe. The language of the jurisdictional act in the Fort Berthold case, supra -- "the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof" (italics added) -- is perhaps a little more definitive than the Osage Act, but there is no essential difference. It will be noted, however, that in the Fort Berthold jurisdictional act appears the language, "for the benefit of said tribe." This terminology is similar to that appearing in the Indian Claims Commission Act -- "funds expended gratuitously for the benefit of the claimant."

We are of course aware of the decision of the Court of Claims in the case, Blackfeet et al. v. United States, 81 C. Cls. 101, wherein the court distinguished between the jurisdictional act there under consideration and that in the Fort Berthold case, supra, and in effect allowed as offsets expenses paid for children attending nonagency schools. But the decision was founded upon a jurisdictional act the court thought required the allowance of such expenditures as gratuities. But the Blackfeet decision does not affect the fundamental doctrine announced in the Fort Berthold case —

> The sums chargeable /gratuities/, we think must be restricted to the usually recognized and customary distributions made to the Indians as tribes and bands, unless a contrary purpose is expressed in the act. (italics added).

We, of course, recognize the fact that those cases were decided under special jurisdictional acts, but the court adopted principles, quoted above, in its decisions which are applicable to our general act as respects gratuity offsets.

Considering further the text of the act, it is beyond dispute that the term "claimant" as used in the phrase "for the benefit of the claimant" can mean none other than the party prosecuting the claim, against the award for which a gratuity offset is asserted. Under the act, a member of a tribe cannot personally assert a tribal claim, for only a tribe may do that. Of course, under the act (Sec. 70i, 25 U.S.C.A.) a member of a tribe may under certain situations act for a tribe, but he does so in a representative capacity and even then the tribe is in reality the claimant. So it would appear quite plain that a gift by defendant to a member of a tribal claimant is not contemplated by the act as being for the benefit

of the claimant. But the act contains other indicia of Congressional purpose in the requirement that the allowance of a gratuity must rest upon "the nature of the claim and the entire course of dealings and accounts between the United States and the claimant /which/ in good conscience warrants" the allowance. The claimant here referred to is obviously the tribal claimant, and the "dealings and accounts" are likewise tribal, for the Government deals and keeps accounts only with Indian tribes, not with the members of such groups. Here then, are matters exclusively tribal in character which we must consider as a basis for the allowance of a gratuity offset associated with the phrase "for the benefit of the claimant," which leads to the conclusion that it is only gratuitous expenditures for a tribe, as distinguished from gifts to its members, that can be offset against an award in any case.

With the above conclusions in mind we proceed to reexamine the several groups of offsets we previously allowed.

Cash Payments to Indigent Indians - Finding No. 28.

During the fiscal years 1945 to 1956, the defendant disbursed to individual indigent members of the petitioner tribes the aggregate sum of $396,844.96 in cash payments. There is no dispute about the total amount of such payments or that they were made from appropriations for the health, welfare, support or rehabilitation of needy Indians generally throughout the United States. These appropriation acts are cited in G.A.O. Report, Def. Ex. 27, and also Def. Ex. 30, and the disbursements are shown in G.A.O. Report, Def. Exs. 26 (pp. 3, 4, 6, 7) and 30. Nor is it questioned that the recipients of the money were members of the petitioner tribes and that the relief aid was paid directly to such individual Indians.

The petitioners' contention is that such disbursements, being for the welfare of individual Indians, were not for the benefit of the claimant tribes, as the act provides. In this connection, it may be said that the defendant was under no legal obligation to provide the money and there is nothing in any of the appropriation acts from which the disbursements were made creating a tribal obligation to repay the outlays. Nor is there any proof that the petitioner tribes requested the aid or assumed any obligation to reimburse the defendant therefor.

It is plain beyond question that the appropriations were made for the relief of individual Indians in need of assistance. In each of the acts for the fiscal years 1945 through 1956, provision was made for the relief of needy Indians. The language differs slightly in the various acts but whatever the words used their purpose was to assist all Indians needing help. And, as the proof shows, the distribution of the funds was not made on a tribal basis but only to individual Indians who proved their need of assistance before the local representative of the Bureau of Indian Affairs. Obviously, therefore, such disbursements were not for the benefit of the claimant, as the act requires, to make such gratuities offsets.

On the bases of the law and facts outlined above we believe we erred in allowing this setoff and the final order of March 12, 1957, will be modified accordingly.

Clearing, breaking and fencing land - Finding 30.

According to the G.A.O. Report (Def. Ex. 26, pp. 39, 41, 46, 48, 53, 56) there was disbursed under appropriations for the "Support of Apaches, Kiowa, Comanches and Wichitas" at the Kiowa Agency, Oklahoma, for barbed