BEFORE THE INDIAN CLAIMS COMMISSION

THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, ET AL.,	)	
Petitioners,	)	
v.	)	Docket No. 314 Amended
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: August 5, 1960

Appearances:

Louis L. Rochmes,
Attorney for Petitioner.

J. Braxton Miller, with whom
was Mr. Assistant Attorney
General, Perry W. Morton,
Attorneys for Defendant.

ON PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT

PER CURIAM:

On October 7, 1958, the defendant filed an amended answer in the above matter, "setting forth the amount of any offsets, counterclaims, or any other demands against the petitioner authorized by the act."[1/] Under what is captioned "Third Defense" the defendant listed two items as legal offsets, asserting that each represented certain payments on petitioners' claim under the Treaty of October 2, 1818 (7 Stat. 186). The first is a claimed offset of $64,471.00, reflecting the sum total of all payments made to the Wea Tribe on the so-called permanent annuity granted under the aforementioned 1818 Treaty up until the Treaty of

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1/ Sec. 12(a) - General Rules of Procedure, Indian Claims Commission

May 30, 1854 (10 Stat. 1082) at which time the annuity was commuted for $34,478.16.[2/] The second item asserted as an additional payment under the 1818 Treaty involved the grant of reservation lands in Kansas jointly to Wea and Piankeshaw Indians under the Treaty of October 29, 1832 (7 Stat. 410), or alternatively as set forth in paragraph 26 of defendant's answer, "in the event this Commission should hold that the benefits received by the Weas from 250 sections of land granted by the Treaty of 1832 should not constitute a payment on the claim, then this defendant alleges that said benefits from said lands should be considered as gratuities." [3/]

On November 19, 1958, the petitioners replied to defendant's amended answer, and thereafter on January 29, 1960, filed a motion for partial summary judgment directed at those claims embodied in paragraphs 23a, 24a, 24b, 24c, and 25 of said answer.[4/] It is petitioners' contention that they are entitled to judgment as a matter of law, there being no genuine issue of fact warranting a trial on the merits.

In paragraph 23a of the amended answer the defendant asks this Commission to set off as a payment on the claim $64,471.00. As we have mentioned before, this figure represents the sum total of all the payments made under the annuity awarded to the Weas in the 1818 Treaty of cession. In opposition thereto, the petitioners have cited the recent Court of Claims decision in the Miami case[5/] in which the Court, while reversing

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2/ If actually paid, the petitioners concede this amount as an allowable offset as consideration for the ceded lands. See petitioners' "Reply to Defendant's Amended Answer."

3/ Paragraph 26, defendant's amended "Answer".

4/ Petitioners' motion was coupled with the further request for a hearing on the other claim offsets which matter is not pertinent to instant question.

5/ The Miami Tribe of Oklahoma, et al., v. United States, decided July 13, 1959, reversing in part and affirming in part Docket 67, 4 Ind. Cl. Comm. 346, 5 Ind. Cl. Comm. 494.

a final determination of this Commission on the question of value, nevertheless affirmed our decision disallowing a similar claimed offset.

In the Miami case the Treaty of October 6, 1818 provided for the payment of a $15,000 permanent anuity to the Miami Tribe in consideration for the cession made by them. Under the Treaty of June 5, 1854 (7 Stat. 1054) this annuity was commuted and the funded value paid over to the tribe. As was stipulated between the parties, the captitalized or funded value of the Miami annuity equalled $250,000.00, since this is the sum that would produce $15,000.00 annually under a 6 percentum return. When it came time to consider the question of allowable offsets, the Government amended its answer and sought to set off as payments on the claim, in addition to the capitalized sum of $250,000.00, all actual payments made between 1818 and 1854. This tidy sum amounted to over $800,000.00. We, however, disallowed the claim and the Court of Claims in upholding the Commission's position summed up the matter as follows:

> "We are of the opinion that because of the manner in which the Government chose to discharge its obligation to pay the so-called permanent annuity to the claimant tribe, its viewed this obligation as identical with that created in treaties which provided that the named consideration for a cession should be held in trust or invested in securities and the interest or dividends thereon paid to the tribe with the Government having the use of the money until the principal amount was paid. As in such situations, only the principal amount is the consideration and that consideration is not paid nor is there any payment on the claim until that principal sum is given to the Indians. In the instant case no consideration represented by the annuity was paid and no payment was made upon the claim for such consideration until 1854 when the annuity was commuted and the commuted value was paid to the tribe." 6/

6/ Miami case supra, p. 49

It is our view that the annuity problem in the Miami case is substantially on all fours with what presently confronts us. If there be any real distinction between the two cases which merits consideration, it has not been brought to our attention. Defendant's tongue in cheek suggestion without further explanation, that the stipulation accepted in the Miami case exercised some unknown and pervading influence on the reasoning of the Court in ruling against the Government, borders on the frivolous. It only goes without saying that the Court was perfectly free to make its own finding on the very fact stipulated without in any manner changing the end result.

The Commission is convinced that the principle of law enunciated in the Miami case is controlling, and there being no genuine issue of fact raised either in pleadings or the record before us, the petitioners are entitled to judgment as a matter of law. Petitioners' motion for summary judgment is granted as to that claim set out in paragraph 23a of the amended answer and the offset is hereby disallowed.

We now reach defendant's second claimed offset involving the Kansas grant made jointly to the Weas and Piankeshaw Tribes under the Treaty of October 29, 1832. This land comprises some two hundred fifty sections in eastern Kansas, and according to the defendant it represents an additional payment on the claim under the 1818 Treaty, or else it was an outright gift from Government without benefit of treaty or other obligation. We note in this connection that the defendant in paragraph 26 of its answer, has not pleaded any additional facts in support of the claim that the Kansas grant was strictly gratuitous other than to reallege

the same facts in support of the offset claim in paragraphs 24 and 25. Furthermore, defendant argues in its brief as follows:

> Under paragraphs 24, 25, and 26 of the answer, the defendant is categorical, only, that the grant of Kansas lands was gratuitious. It was a beneficient grant of 250 sections to about 450 Indians without treaty or other obligation.
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> However, under paragraphs 24 and 25 of the Answer defendant submits also, that this involuntary grant was made because the Weas had sold all of their lands under prior treaties and was accepted by the Weas in confirmation thereof. (Art. I, 1832 Treaty) Under the clear intent of both parties to the Treaty of 1832, the grant, while gratuitous, constituted a payment on the claim as to all treaties prior to 1832." 7/ (emphasis supplied)

We can appreciate defendant's desire to seek relief in the alternative, but as pleaded above, the defendant's legal conclusion lends itself to an apparent inconsistency.8/ The Kansas grant was either gratuitous, or a legal offset and if it is a legal offset in this case it must be obligated under the 1818 Treaty. Certainly it cannot be characterized as a gratuitous obligation.

Substantially the defendant contends that under the successive treaties of 1818 and 1820, the Wea Tribe had ceded all vestige of their tribal lands in anticipation that eventually the Government would relocate them on a permanent site west of the Missouri River. Therefore in 1832, when the Government granted jointly to the Wea and Piankeshaw Indians the 250 sections of land in eastern Kansas, it amounted to a

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7/ Defendant's "Reply to Petitioners' Motion for Summary Judgment" pages 6 and 7.

8/ Since the defendant has pleaded no additional facts in support of the gratuitous offsets claim, we shall treat petitioners' motion as covering paragraph 26 of the Amended Answer in addition to paragraphs 23, 24, and 25 which are specifically cited in the motion.

final payment to Weas for the cession of their eastern tribal lands in 1818 and 1820. According to the defendant, the tie in with the 1818 and 1820 treaties can be found in the following language in Article I of the 1832 Treaty.

> "The undersigned Chiefs . . . do hereby cede and relinquish to the United States forever, all right, title and interest to and in lands within the States of Missouri and Illinois--hereby confirming all treaties heretofore made between their respective tribes and the United States, and relinquishing to them all claim to any portion of their lands which may have been ceded by any portion of their said tribes."

In the Quapaw case this Commission had an opportunity to decide a somewhat similar situation.[9/] In that case we denied the Government's claimed offset of lands, granted to the Quapaw Indians under the 1833 Treaty (7 Stat. 424) as a payment on the claim arising under the prior 1224 Quapaw Treaty (7 Stat. 232), whereby the Quapaws had ceded and relinquished their lands in Arkansas and Louisiana. Defendant relied upon the following language in Article V of the 1833 Quapaw Treaty as supplying legal connection between this treaty and the 1824 Quapaw Treaty:

> "It is hereby agreed, and expressly understood, that this treaty is only supplementary to the treaty of 1824, and designed to carry into effect the views of the United States in providing a permanent and comfortable home for the Quapaw Indians . . ."

The Commission was of the opinion that under all the circumstances surrounding the execution of both treaties, each was a separate and distinct transaction, and this view was sustained on appeal by the Court of Claims.[10/]

9/ Docket No. 14, 1 Ind. Cl. Comm. 469, 644

10/ 123 C. Cls. 45

In our judgment the above quoted matter in the 1832 Wea-Piankeshaw Treaty is not decisive in determining whether the 1832 Treaty grant is or is not the fulfillment of a continuing obligation created under the 1818 and 1820 treaties. It is necessary to examine briefly the circumstances surrounding the execution of these treaties in light of the prevailing government policy calling for the eventual removal of all the eastern Indian tribes to new permanent homes west of the Mississippi and Missouri Rivers.11/

By the Treaty of October 2, 1818, the Wea Tribe ceded to the United States all lands claimed and owned by them in Indiana, Ohio and Illinois while retaining a small reservation in Indiana. Two years later they ceded this reservation for $5,000.00 in goods and money and thence moved into Illinois and joined forces with the Piakeshaw Indians. The Wea's removal to Illinois after relinquishing the Indiana reserve was certainly contemplated by the Government since it was provided under the 1820 Treaty that they would thereafter receive their annuities at Kaskaskia, Illinois.12/

11/ The avowed Government policy of relocating eastern Indian Tribes on lands bordering the western frontier is no more clearly explained than in the following excerpts of a letter from the Secretary of War to Lewis Cass, dated June 29, 1818, just prior to the first Wea treaty:

> "....The great object is to remove altogether these tribes beyond the Mississippi.... To achieve this plan, other lands, equal in quantity to what the Indians may wish to retain in Ohio, will be granted to them West of the Mississippi; and you are authorized to give them, in cash, on the spot, from 20,000 to 50,000 dollars, or an equal sum of goods .... The United States will pay the expense of removal, giving permission, if necessary, to remain on certain lands, with limits defined for three years; or until lands which may suit them can be procured west of the Mississippi .... One purpose for the proposed removal is to form a buffer between the advancing white settlements moving east to west and the hostile western tribes ...."
> American State Papers, Vol. II, pages 175, 176.

12/ Art. 3, 7 Stat. 209.

By 1825, the Weas, or a goodly portion of them, as well as the Piankeshaws, Peorias and others, had crossed the Mississippi and settled down in Missouri. 13/ Soon thereafter these eastern tribes allied themselves with the Delaware Nation, and together this alliance began to contest the Osage Nation for the choice hunting sites in Missouri and in the Arkansas Territory. So heated did the agitation and fighting become that in 1826 William Clark, Superintendent of Indian Affairs, encouraged the contestants to enter into a proposed treaty of peace at St. Louis, Missouri.14/ Clark then sent a letter to the Secretary of War in which he reported on the proposed peace treaty between these tribes, and included therein his suggestion for preventing any future difficulties;:

> "To avoid any collision from their hunting on the same grounds, I would recommend that the Delawares and other nations who have emigrated from the east side of the Mississippi should be collected together, and located on that strip of country which has been purchased from the Osages and Kansas, lying between the Missouri river and Marais des Cynes (on or near the Kanzas river) and immediately west of the boundary line of this State. I have consulted with the chiefs and considerate men of these nations, in respect to the exchange of land they

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13/ A January 10, 1825 report from the Office of Indian Affairs indicated that there were 327 Wea Indians in the State of Missouri. In addition it was noted that: - "Under the treaties of 1818 and 1820, the Weas sold out all their claim to lands in Indiana, Ohio, and Illinois, and imigrated to this state. There is no information as to the lands nowowned by them." American State Papers, Vol. II, p. 546.

14/ Proposed "Treaty of peace and friendship between the Osage Nation and the Delawares, Shawnees, Kickapoos, Weas, Piankeshaws, and Peorias," entered into at St. Louis, the 7th of October 1826. American State Papers, Vol. II, pp. 673, 674.

> hold within the bounds of this State, for the above described lands; they seem to be pleased at the idea of being placed upon lands which will be a permanent home to them, and where they will be protected from any further pressure of the white population. * * * 15/

In 1830 Congress passed an act which vested in the President the discretionary authority to exchange with those Indians residing in the states and territories their lands for new locations west of the Mississippi to which the Indian title had been extinguished.16/ In addition the United States would bear the cost and expense of removal. A commission was appointed in 1832 to examine into and report upon the lands ceded by the western tribes. In the same year Congress by statute appropriated $46,000.00 to cover the expenses for extinguishing all Indian title to lands in the states of Missouri and Illinois.17/ Thereafter and pursuant to said authority a Commission was organized to treat with the various eastern tribes, and among them were the Weas with whom the Commission included the Wea-Piankeshaw Treaty of October 29, 1832.

15/ American State Papers, Vol. II, page 673

16/ Act of May 28, 1830 - 4 Stat. 411 - Ch. 148

17/ Act of July 14, 1832 - 4 Stat. 594 - Ch. 228

> "Be it enacted * * *
> That the sum of forty six thousand dollars be, and the same is hereby appropriated, to be applied, under the direction of the President, to the extinguishment of the title of the Kickapoos, Shawnees, and Delawares, of Cape Girardeau, to lands lying in the State of Missouri; and of the Piankeshaws, Weas Peories, and Kaskaskias to lands lying in the State of Illinois * * *

18/ Other treaties negotiated by the Commission with the associated tribes during this same year include: The Kickapoos, 7 Stat. 391; the Shawnee, 7 Stat. 397; and the Kaskaskia, Peoria and affiliated bands, 7 Stat. 403.

In its final report accompanying the executed treaties, the Commission indicated the fulfillment of the prime Government objective which was the removal of all the Indians from Illinois and Missouri.[19/]

From our brief resume of the events surrounding the Wea migration from Indiana to Kansas, this Commission finds, first of all, that the Wea treaties of 1818, 1820, and 1832, while forming links in a chain of events culminating in the eventual removal of the Weas to a permanent homesite west of the Missouri River, where nevertheless three separate and distinct transactions free of mutual obligation or interdependence. All were performed in toto by the parties thereto. In neither of the 1818 or 1820 treaties is there a mention of a future grant of western lands to the Wea Tribe, for at that time the Government was in no position to make any such promise. It was not until 1825 that Indian title was extinguished to the lands in eastern Kansas.[20/] Therefore the 1832 Kansas grant cannot be considered a legal obligation created under the earlier treaties.

Secondly, we find that as a matter of law and on the record before us, petitioners's motion does not dispose of the defendant's alternative offset claim that the 1832 Kansas grant to the Wea Tribe was a gratuity.

Under the 1832 Treaty the Piankanshaw and Wea Tribes received a joint grant of the 250 sections; the purported consideration being their cession to the United States of "all their right, title, and

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19/ Letter of October 31, 1832 to the Secretary of War from Commissioners Clarke, Allen, and Kouns reporting the conclusions of the treaties with the various tribes.

20/ Treaty with the Osage, 1825 - 7 Stat. 240; Treaty with the Kansas, 1825, 7 Stat. 244.

interest to and in lands within the States of Missouri and Illinois."[21] Insofar as the Weas are concerned, this recital of consideration is meaningless, if, as we have been led to believe by the pleadings and arguments on petitioner's motion, the Weas had disposed of all their land claims, real and apparent, by virtue of the 1818 and 1820 treaties.[22] As of now the Commission has not been made aware of any additional claim or interest which the Weas may have acquired prior to 1832 and during those years in which this tribe was closely associated with the Piankashaws. Such being the case, the Commission believes that final disposition of this matter may well depend upon factual considerations that could only be developed at a trial.[23] We also take note that under our Act the exercise of the Commission's discretionary authority to allow a gratuitous offset is controlled chiefly by "the nature of the claim and the entire course of the dealings and accounts between the United States and the Claimants."[24]

21/ Art. I, 7 Stat. 410.

22/ In this regard we note with interest the following statement in petitioner's "points and authorities" in support of its motion:

> "It is true that by the 1832 treaty the Wea tribe "confirmed' all prior treaties and 'relinquished' all claims to earlier cessions. But at least so far as the 1818 treaty was concerned, such confirmation and relinquishment were unnecessary unless the Wea had some outstanding interest in the lands. If they had such interest, it should have been evaluated as of 1832, and not, as the Commission has done, as of 1818."

23/ Petitioner has already denied the validity of this gratuitous claim in paragraph 3 of its "Reply To Defendant's Amended Answer."

24/ Sec. 2, 60 Stat. 1050: ".....; offsets and counterclaims."

For this and other reasons, petitioner's motion is denied insofar as it relates to paragraph 26 of defendant's amended answer in which the 1832 Kansas grant is claimed as a gratuitous offset. Petitioner's motion for summary judgment is granted insofar as it relates to paragraphs 24 and 25 of said answer in which the 1832 Kansas grant is claimed as a legal offset, and said legal offset is disallowed.

s/ARTHUR V. WATKINS
Chief Commissioner

s/WM. M. HOLT
Associate Commissioner