BEFORE THE INDIAN CLAIMS COMMISSION

PAWNEE INDIAN TRIBE OF OKLAHOMA, consisting of the four confederated bands of Pawnee Indians, namely: Chaui or Grand Pawnee, Kitkehahki or Republican Pawnee, Pitahauerat or Tappage Pawnee, and Skidi, Loup or Wolf Pawnee,

Claimant,

v.

UNITED STATES,

Defendant.

Docket No. 10

Decided: January 31, 1961

Appearances:

John W. Wheeler, John Wheeler, Jr., and Robert L. Wheeler, Attorneys for Claimant.

Ralph A. Barney, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

On June 24, 1960, petitioner filed a motion to reconsider the additional findings of fact and opinion entered on June 14, 1960. One of the matters concerning which reconsideration was sought related to the findings on the consideration and the amount of the United States' payment on the claim with respect to the 1833 treaty cession (Claims I and II) and the 1857 treaty cession (Claim IV). The Commission, after

consideration of the motion and in view of the recent decisions of the Court of Claims, has determined that the findings of fact relating to the consideration and payments on the claim should be amended in conformity with said decisions. Accordingly, we have this date entered an order amending certain findings of fact and our third interlocutory order of June 14, 1960.

Much of our opinion of June 14, 1960, concerning the consideration remains unaltered. However, in the interest of clarity we now set forth in full our opinion under the sections entitled Consideration for the Claims I and II Area (8 Ind. Cl. Comm. 734 through 737) and Consideration for the Claim IV area (8 Ind. Cl. Comm. 749 through 752, as now modified.

Consideration for the Claims I and II Area

As detailed in our Finding of Fact No. 82, Congress appropriated various sums under the articles of the 1833 Treaty which amounts totaled $149,622.00. By stipulation the parties have agreed that the sums so appropriated were disbursed to the Pawnee Indians for the purposes itemized in the General Accounting Office report.

The Commission has found that the appropriation of $1,422.00 under Article 12 of the treaty did not constitute an item of consideration for the cession of lands involved in that treaty but rather was made as consideration for the separate agreement by the Pawnee to remain at home during the year and give protection to the teachers, the farmers, stock and mill.

We have found that the remaining items, totaling $148,200 were disbursed to the petitioner pursuant to the terms of the 1833 Treaty and

those items are to be considered in computing the value of the consideration for the cession of the Claims I and II area to the United States by the Pawnee Indians.

Petitioner has argued that certain articles of the treaty gave the President discretionary power concerning payments and that, therefore, such provisions did not bind the United States to make such discretionary payments and any sums disbursed in excess of the stated obligations of the United States should not be included as consideration for the cession.

We do not agree with petitioner's position in this regard. As consideration for the cession the United States agreed to provide the Pawnees with various goods, implements, services, etc. To a certain extent some of the articles of the treaty had conditional or restrictive provisions. The President had discretionary power concerning the payments of certain sums and he had the power to continue certain payments for longer than the stipulated period. We do not believe that such conditional provisions should remove payments made by the United States acting in good faith from the category of consideration for the cession or payments made on the claim. Of course the Congress had the power to abrogate any of the provisions of the 1833 treaty whether or not the language had been placed in any of the articles concerning a discretionary power of the President to continue payments for a longer period or to cease payments under certain provisions. As the Supreme Court stated in Lone Wolf v. Hitchcock, 187 U.S. 553,

> * * * Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. * * *

* * *

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from consideration of governmental policy, particularly if consistent with perfect good faith toward the Indians.

Certainly those provisions in the treaty providing that the President might continue payments for a longer period were an added inducement for the Pawnee's agreeing to the treaty of cession. They could rely on the good faith of the President and the Congress to make the discretionary payments if the President deemed it proper under all the circumstances respecting the condition of the Indians. While the obligations of the United States were greater under certain articles of the treaty, there were, nevertheless, obligations under the discretionary authority of the President to make the payments if he found it proper to do so. The United States acted in good faith and performed its obligations arising from commitments made under the various provisions of the 1833 Treaty. We have found all such disbursements, as detailed in Finding of Fact No. 84, are to be considered in computing the value of the consideration for the cession.

In our original opinion we arrived at the value of the consideration paid for the Claims I and II area cession by totaling the payments made to the petitioner over a period of years. Since our original decision

in this case the Court of Claims has determined that, since the consideration which the Indians received for lands which they surrendered must be valued as of the date of the treaty, all payments must be capitalized or funded as of the treaty date. In order to determine the 1833 value of the payments which the petitioner tribe received on various subsequent dates it is necessary to compute that sum of money which, if put at 5% simple interest on October 9, 1833, would have amounted to $148,200, if disbursed in the amounts in which, and on the dates on which, it was actually expended. The Crow Tribe of Indians v. United States, Appeal No. 1-59, decided November 2, 1960, page 19. Defendant has introduced in evidence computations prepared by the Federal Bureau of Investigation of the October 9, 1833 value of the subsequent payments, calculated at 5% simple interest (Defendant's Exhibits 191 and 188). Those calculations have revealed that the funded or capitalized value of the payments would be $115,095.73.

The sum of $115,095.73 was the treaty date value of the consideration for the cession of the Claims I and II area, and that amount constituted the United States' payment on the claim. The payment of consideration worth $115,095.73 for the cession of the Claims I and II area to the United States by the petitioner was so grossly inadequate an amount for lands having a value of $4,575,900 as to make the consideration unconscionable. Accordingly, the Commission concludes that the petitioner is entitled, under the provisions of Clause 3, Article 2 of the Indian Claims Commission Act, to an award in the amount of $4,575,900, less the sum of $115,095.73, constituting the United States' payment on the claim, or a net amount of $4,460,804.27.

Consideration for the Claim IV Area

As detailed in our Finding of Fact No. 135, Congress appropriated various sums pursuant to the 1857 Treaty, which amounts totaled $4,204,131.68. By stipulation the parties have agreed that the sums shown in the General Accounting Office report were disbursed to the Pawnee Indians for the purposes itemized in said report up to and including fiscal year 1928. It was further agreed that as to the lump sum appropriations for the fiscal years 1929 through 1935, the Commission shall consider that the amounts appropriated for each of those fiscal years in the sum of not to exceed $50,000.00 were disbursed to the Pawnee Indians for the same purposes and in the same amounts as itemized for fiscal year 1928 and further that any amount appropriated in excess of the $50,000.00 for any of those fiscal years shall be considered administrative expense.

The Commission has found that the $1,000.00 appropriated under Article 1 of the treaty, for surveying the exterior boundaries of the reservation, was not part of the consideration for the cession. The Commission has also found that a total amount of $68,200.00 was appropriated under Article 4 for "pay of shoemaker and carpenter" and for "physician and medicine." Since there were no provisions in the 1857 Treaty for providing any shoemakers, carpenters, physician or medicine to the Pawnees, we have found that those items were not part of the consideration for the cession.

Under Article 2 of the treaty, appropriations in a total amount of $2,340,000.00 represented perpetual annuity payments of $30,000.00

per year. The value of the provision in Article 2 creating a perpetual annuity is its capitalized or funded value. Using an interest rate of 5% per annum, the funded value of a $30,000.00 per year perpetual annuity was $600,000.00. Therefore, this amount represents the value of that portion of the consideration. Miami Tribe of Oklahoma, et al., v. U. S., Appeal No. 2-58, July 13, 1959, [illegible] C. Cls. [illegible]. Since no portion of the principal sum was ever paid to the Pawnee, no amount will be deducted from the final judgment as payment on the claim under the perpetual annuity provision of Article 2.

The remaining payments under Article 2 in the amount of $200,000.00 represented payments of $40,000.00 per year for 5 years. This limited annuity had a treaty date value, capitalized at 5% simple interest, of $177,560.27 (Defendant's Exhibit 189). This amount also constituted the United States' payment on the claim.

As detailed in Finding of Fact No. 137(i) the miscellaneous items of "transportation and insurance on annuities"; "monies erroneously carried to treasury and deposited as surplus"; "care and support of Pawnees"; and "support of Pawnees" were not expenditures provided for in the treaty. Those items have not been included in computing the value of the consideration.

In Finding of Fact No. 137(j) we have detailed the amounts of the lump sum appropriations covering the fiscal years 1929 through 1935. The payments on the perpetual annuity under Article 2 have been excluded for the reasons set forth above and the payments for physician and medicine have likewise been excluded.

Petitioner has argued, as in the case of the 1833 Treaty, that certain articles of the 1857 Treaty gave the President discretionary power concerning certain payments and that, therefore, sums disbursed pursuant to such discretionary power should not be included as part of the consideration. Our position in this respect is the same as that previously set forth in our discussion of the 1833 Treaty.

In amended Finding of Fact No. 138 we have set forth all of the items, other than the Article II payments, which are to be considered in computing the value of the consideration. That sum of $1,344,281.20 had a value on September 24, 1857, capitalized at 5% simple interest, of $568,235.54 (Defendant's Exhibit 186). To that amount is added the values of the Article II annuities resulting in a total sum of $1,345,795.81, which amount was the treaty date value of the consideration for the 1857 cession of the Claim IV Area.

The total consideration worth $1,345,795.81 for the cession of the Claim IV area to the United States by the petitioner was so grossly inadequate an amount for lands having a value of $4,939,000.00 as to make the consideration unconscionable.

Since, as previously stated, no deduction will be made as a payment on the claim for any payments made under the perpetual annuity provision of Article II, the resulting amount constituting the United States' payment on the claim is $745,795.81. Accordingly, the Commission concludes that the petitioner is entitled under the provision of Clause 3, Article 2 of the Indian Claims Commission Act to an award in the amount of $4,939,000.00, less the sum of $745,795.81, constituting the United States'

payment on the claim or a net amount of $4,193,204.19.

The parties have stipulated and agreed and the Commission has found that there shall be allowed to the United States as offsets the sum of $10,000.00.

In the final paragraph of our opinion of June 14, 1960, we summarized the claims upon which petitioner is entitled to recover. As modified by our amended findings and reflecting our decision as to offsets such summation is as follows:

Claims I and II		$4,460,804.27
Claim III		97,380.00
Claim IV		4,193,204.19
Claim V		6,000.00
Claim VI		155.00
Claim VII		31.90 plus interest at 5% per annum from March 3, 1893,
	sub-total	$8,757,575.36 plus interest on $31.90
	Less offsets	10,000.00
	Total	$8,747,575.36 plus interest on $31.90 at 5% per annum from March 3, 1893

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner