

BEFORE THE INDIAN CLAIMS COMMISSION

RED LAKE, PEMBINA AND WHITE EARTH)
 BANDS, ET AL.,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES,)
)
 Defendant.)

Docket No. 18-A

TURTLE MOUNTAIN BAND OF CHIPPEWA)
 INDIANS,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES,)
)
 Defendant.)

Docket No. 113

THE LITTLE SHELL BAND OF CHIPPEWA)
 INDIANS, ET AL.,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES,)
)
 Defendant.)

Docket No. 191

Decided: October 5, 1961

Appearances:

Jay H. Hoag, Attorney of Record for
Petitioners in Docket No. 18-A

Ernest L. Wilkinson, Attorney of
Record for Petitioners in
Docket No. 113

Lawrence C. Mills, Attorney of
Record for Petitioners in
Docket No. 191

Sim T. Carman, Maurice H.
Cooperman, William D. McFarlane,
with whom was Mr. Assistant
Attorney General, Ramsey Clark,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

By order dated June 15, 1961, the Commission amended its previous determination concerning the allowable items to be included as payments on the claim and ordered that the parties submit such additional evidence as may be required to determine the treaty-date value of the consideration paid petitioners. Petitioners in Docket No. 18-A have submitted detailed computations of the treaty-date value of each allowable item of consideration. Those computations indicate that the treaty-date value of all allowable items was \$512,518.43. Neither defendant nor the petitioners in Docket No. 113 and 191 have filed any objections to the computations submitted. Accordingly, the Commission has found that the amount of \$512,518.43 represents the value of the United States' payment on the claim.

We turn now to the question of determining the amount of the gratuitous offsets to be allowed against the award.

In its amended answer defendant alleged that some \$2,478,081.06 in gratuitous expenditures should be allowed as offsets. Thereafter, defendant amended its answer and further reduced this amount by eliminating those disbursements which it considered were:

1. Made prior to October 3, 1863;
2. Made for indigent Indians;
3. Made for administrative, educational, health, police, highway or other governmental functions and purposes;
4. Indian removal expenses;

5. For non-tribal purposes;
6. Expenditures from emergency appropriations made subsequent to March 4, 1933, which were of general application throughout the United States; and
7. Those which appeared to be in contravention of Section 2 of the Indian Claims Commission Act.

However, even after this elimination there remains for determination a great number of disbursements for a wide variety of purposes. Petitioners initially object to the allowance of any gratuitous offsets claiming that the course of dealings between the United States and petitioners does not, in good conscience, warrant the allowance of offsets. And, with the exception of one item for the purchase of land within the Red Lake Reservation, petitioners object to the allowance of all other offsets as falling within the classes barred by Section 2 of the Indian Claims Commission Act. While it is true that previous decisions of this Commission or the Court of Claims can be cited as authority for the disallowance of virtually every category of gratuitous expenditures claimed as offsets, other decisions can likewise be cited wherein the same categories of expenditures have been allowed as gratuitous offsets.

Section 2 of the Indian Claims Commission Act provides that:

* * * 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, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the

law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984), save expenditures made under section 5 of that Act, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award.

In our Findings of Fact No. 58 through 65 we have applied these provisions of the Indian Claims Commission Act and made our determinations as to which of the numerous disbursements set forth by the defendant may properly be offset. We shall not in this opinion laboriously detail our reasons for our findings under each of the categories of expenditures, most of which are repeated in each of the disbursement schedules relating to the various divisions of the petitioners in this case. But we do feel called upon to set forth in general, at the outset of this opinion, our approach to this question of gratuitous offsets and the various factors which have been weighed in reaching our ultimate determinations.

The intent of Congress in enacting the above quoted provision relating to gratuitous offsets is expressed in the statement of the House Managers which accompanied the Conference Report on the Indian Claims Commission bill. With respect to this section it was stated:

The bill as originally passed by the House also required deduction of legal offsets in all cases and permitted, in the discretion of the Commission, deduction of gratuities in cases based upon "fair and honorable dealings." The Senate amendment made all types of deductions wholly discretionary with the Commission.

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. The gratuitous expenditures which the United States is not permitted to set off are monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health, or highway purposes, as well as other expenditures which, under existing law, cannot be offset, and which generally relate to relief payments made since 1933, which were available to whites as well as to Indians.

Prior to 1920 only one jurisdictional act permitted the Government to offset gratuities; prior to that time 15 tribal suits were disposed of in the Court of Claims without the Government being permitted to offset any gratuities. After 1920, jurisdictional acts for the Five Civilized Tribes did not permit the United States to deduct gratuities. Other jurisdictional acts have permitted the United States to set off gratuities in varying degrees. In 1935 the Second Deficiency Appropriation Act permitted the Government to set off certain types of gratuities against tribal judgments. In no other field of law, known to your conferees, is a defendant permitted to set off against a valid judgment a gratuity given to the plaintiff. Under these facts the conferees felt that there should be uniform offset provisions in all tribal suits. They felt also that there was no justification in charging the tribes with money spent for removal of the claimant from one place to another at the request of the United States, for such removals were generally for the benefit of the United States; also, that the tribes should not be charged with expenditures for agency or other administrative expenses because such expenses have been as much to accomplish the purposes of the expanding economy of our white citizenry as for the benefit of the Indians; also, that since any other citizen of the United States could sue the United States without facing an offset for educational expenses, there was no justification in charging the Indians therefor; also, that since a substantial part of the hospitalization and other health expenditures have

been made to prevent the spread of disease from the Indians to the white population, there was no justification for charging the Indians therefor; also, that since most of the highways on and through Indian reservations are for the benefit of the entire public, they should not, with propriety, be charged against tribal judgments. The other gratuitous expenditures which the conferees decided should not be set off are precluded from being set off under the present law.

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. (House of Representatives Report No. 2693; 79th Congress, 2nd Session)

A supplemental statement of the House Managers appears in the Congressional Record as follows:

Amendment 6 of the Senate lists certain gratuitous expenditures which shall not be set off against any award made to an Indian tribe. Whether other gratuitous expenditures shall be set off is left to the discretion of the Commission, or to the Court of Claims in those cases which have been or will be brought in that court. While this discretion seems very broad, it is contemplated that the Commission will, by analogy, in general follow the broad pattern of the statute and set off only those gratuitous expenditures which are for the exclusive benefit of the Indians, and then only if the nature of the claim and the entire course of dealing between the United States and the claimant justifies their being set off.

In stating that "agency or other administrative" expenses shall not be set off, the conferees intended that that language should have a broad interpretation and applied to all agency or administrative expenses of every kind and description. Since these expenses have, in general, been expended for all tribes, there is no reason why they should be set off against a tribe which has a claim against the United States when it cannot possibly be charged against other tribes. The conferees also intend that the other special items which are not to be set off shall have a broad interpretation. By "educational" expense, for instance, is meant all expenses connected in any way with the education of the Indians, such as the construction of buildings, the construction and maintenance of public utilities for these buildings, the transportation of educational supplies, board and room for the children, the pay of all employees, etc. (92d Cong. Rec. A-4924)

The Commission, in considering the allowability of claimed offsets, has measured each item against the following requirements:

(1) Were the disbursements made by the United States gratuitous expenditures made to or for the petitioners without any obligation on the part of the Government to make them and without obligation on the part of the Indians to repay them.

(2) Were the gratuitous expenditures for the benefit of the entire tribe.

(3) Do any of the gratuities come within the scope of any of the excepted categories.

(4) Does the nature of the claim and does the course of dealings between the petitioner and the United States in good conscience warrant the offset.

If any of the claimed items fails to meet all these criteria, it must be denied as an offset.

In support of the claimed offsets the defendant has introduced into evidence a two volume report of the General Accounting Office (Def. Exs. 0-3 and 0-4), which sets forth in various "parts" the disbursements made for the groups into which the petitioners were divided. The report is further broken down by sections to reflect the appropriation categories, and the items are listed for each fiscal year with a description of the amount or nature of the articles or services rendered.

Oral testimony was received by the Supervisor or Examiner of the Indian Tribal Branch Office of Administrative Services, General Accounting

Office, who supervised the preparation of the report. In this testimony further explanation was given concerning the preparation of the report, and it was correlated with certain photostatic copies of the vouchers, invoices and other documentary evidence representative of the material used in the preparation of each category of the report.

The Commission has carefully reviewed the numerous items in the various categories and the representative vouchers. In some instances the description of the articles or services rendered or the amount furnished has, in itself, clearly indicated that the expenditures fell with the prohibited classes of offsets such as agency or administrative expense or items for education or individual Indians.

The Commission has also reviewed the various appropriation acts by which the funds were made available for the various uses. The language of Congress in setting forth the purposes of each appropriation is not material in determining whether sums expended under a particular appropriation should be allowed as offsets. In a number of instances we have disallowed items where the funds were clearly appropriated for purposes which are precluded from being set off.

Both parties have introduced into evidence extracts of various reports contained in the yearly Commissioner of Indian Affairs Reports. We have examined the annual reports and the detailed statistical information contained therein for the periods involved in the various categories of claimed offsets. We have found much information in these reports which helps explain the purposes for many of the expenditures involved. Further the information as to the Indian population on each

of the reservations and the statistics concerning their progress in agricultural pursuits, such as the number of acres in cultivation, the number of acres fenced, the amount of livestock owned by the Indians and the crop production figures have all served to assist the Commission in reaching its ultimate determinations.

In summary then the Commission has weighed the available evidence which relates to the amount of goods or extent of the services rendered; the intent of Congress in providing the funds as expressed in the appropriation statutes; the uses to which the goods or services were directed as indicated on the vouchers, invoices or other documentary evidence; the number of Indians on the various reservations who could have benefited from the expenditures; the evidence indicating the method of subsistence and general way of life of the Indians involved; and the evidence concerning the nature, extent and apparent purpose of the assistance being furnished the Indians by the government agents.

One group of disbursements appearing in most of the categories was for agricultural and farming assistance such as "clearing, breaking, harrowing and fencing land"; "planting and harvesting crops"; "purchase of seeds, fruit trees and fertilizers"; and "agricultural implements and equipment."

The Commission has excluded items under these agricultural categories in those instances in which it appeared that the nature of the articles or services rendered or the amount thereof indicated that the expenditures were not made for tribal purposes or where the language of the appropriation act indicated a probable use for education or

demonstration purposes or for individual indigent Indians. As to the remaining items, in view of the evidence referred to in our findings of fact, we have found that the expenditures made by defendant should be allowed as gratuitous offsets against the award in this case.

The Commission has found that the petitioner Indians on the Red Lake, White Earth and Turtle Mountain Reservations were, during the period covered by the claimed offsets, engaged in farming. Even as early as 1866 the Indians at Red Lake were farming. Likewise, the Indians at the White Earth and Turtle Mountain Reservations were raising substantial crops. As was reported in 1880, the Indians at the White Earth and Red Lake Reservations were practically self-supporting having harvested that year a total of 74,000 bushels of wheat, corn and potatoes.

Almost all of the allowable items in these agricultural categories involved expenditures made from appropriations for "support and civilization." Petitioners have urged that any reference in an appropriation to "civilization" is indicative of educational purposes and all expenditures from such appropriations must be disallowed. In this conclusion the Commission cannot agree. Of course we recognize that to a great extent efforts to civilize involve the necessity of education. But we believe it is unreasonable to conclude that because Congress appropriated moneys to assist in civilizing Indian tribes it must follow that all sums spent under such appropriations must be considered to have been for educational purposes. Obviously sums spent for large quantities of clothing, as an example, would serve to assist the Indians in replacing

their savage customs of dress by more civilized attire. Inducing the Indians to adopt the white man's method of dress was certainly an element of civilization. But we do not consider that all money expended for such purposes was educational and therefore not allowable as an offset. We believe that all of the various factors previously discussed must be carefully weighed in reaching a determination as to whether each disbursement is to be allowed or rejected as being for educational purposes or for other precluded items of offset.

Further, the expenditures from "support and civilization" appropriations clearly involve in a great many instances money spent primarily for support purposes. For example under Finding of Fact No. 63(b) we have allowed the sum of \$74,692.10 expended for the purchase of seeds. Of this sum a total of \$65,743.52 was appropriated from appropriations for "support and civilization of Chippewas, Turtle Mountain Band." The circumstances surrounding the issue of seeds to the Indians, as revealed in the reports of their agent, as well as the large quantities of seed involved make it obvious that the purpose for these expenditures was not educational or for demonstrations but rather to support the Turtle Mountain Chippewas.

Likewise, with respect to the other allowable items under these agricultural categories, we find evidence in the reports of the Indian agents and on the various representative vouchers from which we have concluded that the disbursements should not be rejected as educational. We have found from the evidence cited in our findings that the allowed items were for the purposes of assisting the Indians in their general support.

In The Menominee Tribe of Indians v. The United States, 118 C. Cls.

290, 326-327, the Court of Claims stated that:

In the absence of any showing as to just what was the purpose of the expenditures for planting and harvesting crops, seeds, fruit trees and fertilizers, and agricultural implements and equipment, we assume that they were for the purpose of demonstration, and were educational. We assume the same as to items for feed and care of livestock, transportation of livestock, transportation of supplies for agricultural aid, and transportation of agricultural implements and equipment. The Government has the burden of proving the propriety of the offsets which it asserts. When, therefore, an item is asserted as an offset which so far as the evidence shows may or may not have been expended for one of the purposes for which offsets cannot be made, we must resolve the doubt against the offset.

Based on the evidence cited and for the reasons set forth above, we believe that the allowed expenditures involved were for purposes of support and not for educational or demonstration purposes.

We have also noted that a number of the representative vouchers in evidence in this case include items and services rendered for Indian schools, for hospitals, for Indian police and for other purposes clearly indicating that such uses cannot be included as allowable items for gratuitous set offs. The General Accounting Office has excluded all such items from their accounting and defendant does not claim these expenditures as offsets. Further the yearly appropriations for the Indian service include substantial amounts for the specific purpose of providing for the purchase of supplies and rendering of services for Indian police; construction of agency buildings, schools, and hospitals; for the maintenance of various types of Indian schools; and for a wide variety of health, education, and highway purposes. All of the moneys disbursed under such appropriations are also excluded from the items urged by defendant as gratuitous offsets in this case.

Another related group of disbursements appearing in most of the categories was for "purchase of livestock" and for "feed and care of livestock." The Commission has found that the petitioner Indians owned livestock. Most of the representative vouchers in the category for "purchase of livestock" indicated on their face that the purchases were made for the Indians to aid them in their work, in particular in their agricultural pursuits. With the exception of the items which were disallowed because the appropriation acts involved indicated uses for educational purposes or for relief of indigent Indians, the Commission has found that the disbursements in these categories were proper offsets.

In addition to the disbursements for assistance to the Indians in their agricultural pursuits there are substantial items under each category for direct support of the Indians including "purchase of clothing," "provisions," and "household equipment." The Commission has excluded some items in these categories where the language of the appropriation involved indicated that the expenditures were for purposes precluded from being offset or where the small number of items involved indicated that the distribution was to a small number of individual Indians.

The Commission has also allowed expenditures under a category for hunting and fishing equipment since there was no evidence to indicate that items purchased under this category were used for any purposes which would be excluded as proper offsets.

Another category under which items have been allowed is for "miscellaneous building supplies." The Commission has found that the

Indians involved were, during the material period, engaged in building houses for themselves and that it was the practice of the Indian agent to provide them with building materials. As previously mentioned, it was the practice of the Indian service to indicate on the vouchers and expenditure authorizations the specific purposes of the various disbursements, such as for schools, agency buildings, or hospitals. It further appears that the various appropriation acts, in addition to containing provisions relating to the expenditures involved in this category, such as "support and civilization," also contained specific appropriations for the building costs of agency buildings, schools and hospitals. The expenditures for such purposes as constructing agency buildings, schools and hospitals have been excluded from the accounting and are not claimed by defendant as offsets. Those items which have been included in this category appear to have been for building supplies for use in constructing houses for the Indians and are proper offsets.

The Commission has found that the expenditures made for supplies for the blacksmith and carpenter shops and the pay of blacksmiths, carpenters and flour and grist mill employees should not be allowed as gratuitous offsets against the award since these services and employees were maintained primarily as part of the agency and administrative services on each of the respective reservations.

As we have stated in our Finding of Fact No. 60(o) no evidence has been submitted upon which a determination could be made concerning the sources of the funds used to purchase the various items for which transportation costs have been claimed. Defendant's expert accountant testified that it was not possible to relate specific transportation costs to specific items. Since the Commission has disallowed under a great

number of categories certain items which were claimed as offsets and since it appears obvious that a great proportion of the transportation costs were for articles purchased with funds other than those referred to in our findings under the various categories, it is not possible for the Commission to allow the transportation costs or to compute any allocation of the proportionate amount of the costs which were for allowable items of offset.

The Commission has disallowed expenses of Indian delegations where the evidence fails to indicate that the purposes for the delegations were a tribal benefit. Expenditures were also disallowed for the administrative expense of re-surveying the Red Lake Reservation.

With the exception of its general objection against the allowance of any offsets, petitioners have no specific objection to the allowance of the \$6,118.71 expended in acquiring certain lands within the Red Lake Reservation.

Petitioners do, however, object to the allowance of \$324,310.12 expended for the purchase of land for the Turtle Mountain Indians. The Commission has found (Finding of Fact No. 63(j)) that the evidence establishes that title was, in fact, recorded in the name of the United States in trust for the Indians of the Turtle Mountain Reservation. We cannot agree with petitioners' contention that there is no proof that valid title passed to the United States in trust for the Indians of the Turtle Mountain Reservation. Petitioners' second objection is that the purchase of land for the Indians of the Turtle Mountain Reservation was not for the benefit of the Turtle Mountain Band of Chippewas. We have examined the history of the establishment and subsequent operation of the Turtle Mountain Reservation and conclude that the purchase of this

land was for the benefit of the Turtle Mountain Band of Chippewas. There have been administrative problems which have occurred during the years since the establishment of the reservation involving registration or the prohibition from membership of half-breeds, whites, and Canadian Indians. The Commission recognizes that similar questions of enrollment have been involved with most Indian groups on their reservations. From the evidence in this case we cannot conclude that the purchase of this land for the Indians of the Turtle Mountain Reservation was not a gratuitous expenditure for the direct benefit of the Turtle Mountain Band of Chippewas, and we have accordingly allowed this item as an offset.

Another land purchase involved the Pembina Band for whom the United States bought a township within the White Earth Reservation. The evidence establishes that, by Act of Congress, the purchase was authorized "for the use and benefit of the Pembina band of Chippewas" and the General Accounting Office has reported the sum expended for this purpose. While it is true, as petitioners contend, that no evidence of the actual conveyance has been presented, the Commission has found the evidence sufficient to establish that the expenditure was made to purchase the land and that the Pembina Band did move to and has continued to live on this township set aside for them on the White Earth Reservation. We do not agree that because of the difficulties in getting the Pembinas located on this reservation we should reject this item as an offset. We cannot conclude from the evidence that the removal of the Pembinas to the White Earth Reservation was not for the Indians' benefit. We have allowed this expenditure as an offset.

The General Accounting Office has segregated the disbursements for the Indians on both the Red Lake and Turtle Mountain Reservations to show first those items where the respective vouchers indicate on their face that the disbursements were for the Red Lake and/or Pembina Indians or for the Turtle Mountain Indians or Turtle Mountain Band of Chippewas. In another section the expenditures are listed where the respective vouchers indicate on their face that the disbursements were for items delivered to the respective reservations. We have found that the expenditures made in each of the respective categories were for the benefit of the petitioners in this case. Even in those categories wherein the vouchers did not list the Indians by name the evidence has indicated that the expenditures were in fact made for the benefit of the Indians on the respective reservations. As detailed in our findings of fact the moneys were spent from appropriations for the Indians, and there were vouchers included which clearly indicated that the gratuities were for the Indians.

Petitioners have objected to the allowance of any offsets on the ground that "there is no proof that the goods, if purchased, were delivered to the Tribe, or that services, if rendered, were for the Tribe." We have found sufficient evidence to establish that, in a great number of instances, there was proof of actual delivery. But we do not consider the failure to affirmatively prove actual delivery should operate to bar the allowance of offsets. It must be recognized that a majority of the transactions involved occurred over 50 years ago. The defendant has produced documentary evidence based on its available records. Where the evidence establishes the appropriation of funds for stated objects and

purposes and there is a recorded accounting of disbursements made under authority of the various acts of Congress, which accounting is based on various vouchers, invoices and other documentary evidence which record the dates and amounts of the expenditures and for whom the expenditures were made, the Commission believes that it is reasonable to presume that the goods were received by the Indians in due course. To require the tracing of individual items or the performing of services to specific Indians would be unreasonable and neither this Commission nor the Court of Claims has imposed such a requirement in the determination of sums disbursed as gratuitous or legal offsets.

Petitioners further object to the allowance of offsets on the grounds that there is no proof that the claimed offsets were for the benefit of the "Tribe." The Commission is satisfied that the quantity of goods furnished and services rendered together with the reports of the various government agents concerned indicates that the items of offset which we have allowed were for a sufficient number of Indians to have constituted a tribal benefit.

Petitioners contend that expenditures made subsequent to (a) August 13, 1946, or, in the alternative (b) January 12, 1948 (when this suit was commenced), or, in the alternative (c) to August 13, 1951, (the last date on which suit could be filed under the Act) are not proper offsets. The Indian Claims Commission Act itself does not provide for any cut off date as to offsets and this Commission knows of no authority to support petitioners' argument. This same contention was presented in the case of The Kiowa, Comanche and Apache Tribes of Indians v. The United States,

5 Ind. Cl. Comm. 96, 109-111. The Commission rejected it then and we find no basis upon which to hold otherwise in this case.

The Commission, after considering the evidence and the contentions of the petitioners, is satisfied that the course of dealings between petitioners and defendant has not been such that the defendant is prohibited from setting up against the award previously entered any credits or offsets which it may have that are not precluded by Section 2 of the Indian Claims Commission Act.

We have found that the United States is entitled to credit against the award of \$3,369,726.00 the sums of \$512,518.43, representing payments on the claim, and \$699,061.57, representing allowable gratuitous offsets, leaving a net balance of \$2,158,146.00. Accordingly, the petitioners herein are entitled to recover from the defendant for and on behalf of and for the benefit of the members and descendants of members of the Red Lake and Pembina Bands, as such bands were constituted and recognized by the United States at the time of the Treaty of October 2, 1863, the sum of \$2,158,146.00. Judgment in this amount will be entered.

Wm. M. Holt
Associate Commissioner

Concurring:

Arthur V. Watkins (See concurring opinion)
Chief Commissioner

T. Harold Scott (See concurring opinion)
Associate Commissioner

Watkins, Chief Commissioner, concurring:

I concur in the result. However, I feel compelled to file this concurring opinion outlining my views on the question which has been raised in this case concerning the propriety of allowing the defendant any gratuitous offsets against the award of the Commission.

The issue arises from the provision in Section 2 of the Indian Claims Commission Act which 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, * * *

Petitioners in Docket No. 18 have objected to the allowance of gratuitous offsets on the ground that "there is no proof that the nature of the claims and the entire course of dealings and accounts between the United States and plaintiffs in good conscience warrants the allowance of any such gratuities as offsets." While petitioners contend that the burden is on defendant to prove facts establishing that the nature of the claim and course of dealings and accounts permit the allowance of gratuitous offsets, they do refer to certain matters which they consider preclude a finding that the Government's dealings in good conscience warrant deduction of gratuities.

One of the matters complained of by petitioners is alleged to have occurred over 25 years after the treaty cession involved in this case and concerns the alleged mismanagement of their lands and property.

Specifically it is contended that the United States wrongfully classified highly valuable timber land on the Indians' reservation lands and sold it for far less than its value. The transactions allegedly involved "scandalous" actions by the United States, "incompetent or dishonest" examiners, "rigged" bidding and "fraudulent" allotments. It is petitioners' position that evidence of such a course of dealings "leaves no room for the conclusion that good conscience dictates to the Commission that it should allow gratuitous expenditures as offsets."

The question is whether, in view of the language of the Indian Claims Commission Act concerning gratuitous offsets and the contentions of petitioners, the Commission is now able to determine whether good conscience would permit the consideration of any gratuitous offsets. The Act provides that the Commission may set off all or part of the gratuitous expenditures (with certain specified exceptions) "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."

In my opinion this wording in the Act requires that the Commission take into consideration the nature of the claim involved in the case at hand together with the entire course of dealings and accounts between the United States and the Indians involved. This entire course of dealings and accounts is not limited in time by any provision in the Act. I find nothing in the legislative history of the Act which would imply any limitation as to the course of dealings to be considered. Rather

I believe that Congress intended that the Commission should have discretionary power to consider the entire picture as to the course of dealings between the United States and the Indians and to weigh all the equities. After so doing, the Commission must determine whether in good conscience all or part of the gratuitous expenditures may be offset. It seems clear to me that Congress intended that this Commission should be vested with the power to consider all the payments and dealings with the Indian claimants in finally striking a balance which will be fair and just to the Indians, and the United States as well. Only by considering all the entries on both sides of the ledger can a fair balance ever be reached. In this case both petitioners and defendant appear agreed on this point for they both refer to accounts and dealings over the years following the 1863 treaty.

Part of the entire course of dealings to be considered in this case includes the alleged mismanagement of petitioners' land and property. However, these matters are the subject of pending claims in Docket Nos. 189-A, 189-B and 189-C. Should the Commission, therefore, withhold final determination of the offsets in the subject case until these pending claims and all other pending claims involving the petitioners in this case are finally decided? I believe that such a procedure is not warranted. If, after trial on the issues raised in the still pending claims, the Commission determines that petitioners' allegations are true, awards will be made fully compensating petitioners. Therefore, it appears that if there was any mismanagement of petitioners' property, whether it involves fraud, duress, or unfair and dishonorable dealings, the petitioners

will be fully compensated by the United States. In such event I would see no reason for the Commission denying consideration of gratuitous offsets against the award in this case. If petitioners do not recover in their pending claims, it will be because of their failure to prove the alleged mismanagement and accordingly, petitioners' contentions provide no basis for denying gratuitous offsets in the subject case. Regardless of the outcome in the pending claims it does not appear that the matters complained of could justify the disallowance of gratuitous offsets under the "good conscience" provision in the Act. Further, if the Commission should find against the contentions of petitioners in the pending claims in Docket Nos. 189-A, 189-B and 189-C, and has denied offsets in the present proceedings, then the defendant can have no effective recourse with respect to offsets which it now asserts.

While I am well aware of some instances of overreaching conduct by the United States in the early history with dealings with the various Indian tribes, the subsequent commendable actions of our government cannot be overlooked. While petitioners speak of scandalous actions, fraud and dishonest dealings, we must not fail to recognize the good deeds of defendant. In 1946 Congress enacted the Indian Claims Commission Act whereby there was created this Commission which has been vested with very broad powers to act as the conscience of the nation in correcting the past wrongs against the Indians. The Act created the means and the grounds of action by which all the outstanding claims against the government could be finally and equitably settled. The

United States waived the defenses of the statute of limitation and laches and even went so far as to permit the Indians to recover on claims based on the moral grounds of fair and honorable dealings that are not recognized by any existing rule of law or equity. Thus Congress in enacting the Indian Claims Commission Act has provided the means for correcting all the wrongs complained of by petitioners. This is a most important and unprecedented part of defendant's course of dealings with the Indians.

I believe it is proper to now assume that when all the matters pending before this Commission which have been filed by petitioners have been finally adjudicated (and that means when final judgments have been entered by this Commission and the appeals disposed of, if petitioners or defendant should elect to appeal) the books will have been balanced between the defendant and the petitioners with respect to those claims. And it cannot be equitably claimed after this balance has been struck that the defendant should not be entitled to credit for its good deeds and thus be permitted to offset gratuitous and other allowable offsets.

In conclusion I find no basis for denying defendant the right to assert gratuitous offsets against the award in this case.

Arthur V. Watkins
Chief Commissioner

Scott, Associate Commissioner, concurring:

I concur in the result in this phase of the proceedings which involves offsets of \$699,061.57 but find it necessary to file this separate concurring opinion.

I am in agreement with the opinion which has been filed by the Commission as to the various reasons why these offsets, insofar as they are gratuities, do not come within the exceptions in Section 2 of the Indian Claims Commission Act. However, I feel that I must add my comment in reference to the following language in Section 2 of that Act:

* * * 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,
* * *

Petitioners contend that the nature of the claim and the course of dealings between the parties has been such that the Commission could not find any basis "in good conscience" to "warrant such action." They cite the fact that the Commission has found that the consideration herein was unconscionable; and they allege unfair and dishonorable dealings in the negotiation of the 1863 treaty; and cite a number of other facets in their course of dealings with the defendant, which they contend are relevant and material to this issue.

Except for the question, however, of the negotiations of the 1863 treaty, the course of dealings which petitioners cite in support of their

contention are the subject of the pleadings in Dockets 189, 189-A, 189-B and 189-C, which are yet to be litigated. These various alleged courses of dealings, including that relating to the alleged mismanagement of their property, sale of their timber, etc., are the basis of their claims for damages against the defendant which must be determined in the future on the basis of the facts of record in those proceedings.

Under these circumstances, it is my opinion that the Commission has before it for consideration the question of whether, in good conscience, it may in its discretion allow these gratuities under Section 2 in the light of the course of dealings presented only by the record in this matter; and that it cannot at this time consider the course of dealings which are raised by the pleadings in these other petitions. On this basis I have reviewed the facts of record in this matter; and have taken into consideration the fact that, although the consideration was unconscionable, as the Commission has found, there were negotiations, and the Indians involved did make an agreement in a binding treaty with the defendant; and that since that time there has been a long and diversified course of dealings between the parties.

From my review of all of these dealings, and excluding consideration of those dealings which are the subject of future litigation, and for which damages are requested by the petitioners, I am in agreement that the offsets which have been set out in the findings of fact may be allowed in this matter. Otherwise, if the Commission were to wait until all pending litigation involving these petitioners were to be

tried in order that the Commission might know of the entire course of dealings between the parties, the judgment in this matter would be held up. In my opinion this would be unnecessary, unjustified and unfortunate.

T. Harold Scott
Associate Commissioner