BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, Plaintiffs,	)	
v.	)	Docket No. 78
UNITED STATES OF AMERICA, Defendant.	)	

Decided: October 27, 1961

Appearances:

Marvin J. Sonosky and
John S. White,
Attorneys for Plaintiffs

Maurice E. Cooperman, with
whom was Mr. Assistant Attorney
General, Ramsey Clark,
Attorneys for Defendant

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

This Commission on April 26, 1956, entered its Findings of Fact, Opinion and Interlocutory Order in this case in which it was decided that plaintiffs, The Sioux Tribe of Indians of the Lower Brule Reservation, South Dakota, were entitled to recover of and from the defendant the value of 25,968.24 acres of lands which were excluded from the Lower Brule Reservation because of the erroneous survey made in 1890 locating the southern line of said reservation. The Commission found the value of said lands as of February 11, 1900, the date of taking, to be seventy

five cents an acre and that the plaintiffs were therefore entitled to recover of and from the defendant the sum of $19,476.18, less such offsets or counterclaims as the defendant might prove under the Indian Claims Commission Act in further proceedings (4 Ind. Cl. Comm. 250-268).

Defendant filed an Amended Answer and a Second Amended Answer setting forth certain counterclaims and offsets. A hearing was held with respect to these counterclaims and offsets at which time defendant introduced certain evidence in support of its contentions. Defendant also filed proposed additional findings of fact and a brief in support thereof and plaintiffs submitted their objections thereto. Defendant sets forth three counterclaims and limits its request and proof for offsets to a single offset of a $157,404.46 expended by the United States under the authority of Section 5 of the Act of June 18, 1934, 48 Stat. 984 in acquiring certain tracts of land for the Lower Brule Sioux between March 11, 1936 and August 15, 1950.

First Counterclaim - By the Act of June 10, 1896, 29 Stat. 334, I Kapp. 599, it was provided that such of the Lower Brule Indians as desired to might take allotments on the Rosebud Indian Reservation and the Secretary of the Interior was directed to pay the Rosebud Indians the sum of $1.00 an acre for such lands as were taken and alloted on that reservation. Payment to the Rosebud Indians was to be appropriated out of any money in the United States Treasury not otherwise appropriated, and charged against any funds belonging to the Lower Brule Indians held by the United States. By Article 2 of the agreement between the United States and the Rosebud Sioux Indians dated March 10, 1898,

ratified by Act of March 3, 1899, 30 Stat. 1364-66, I Kapp. 690-692, the United States agreed to pay pro rata in cash to the Rosebud Indians $1.25 per acre for the lands allotted to the Lower Brule Sioux who moved to the Rosebud reservation. By Section 3 of the 1899 Act, supra, Congress appropriated $148,600 to pay the Rosebud Indians for the lands allotted to the Lower Brule Sioux and $148,361.50 was disbursed for the lands so allotted. By Article 2 of the agreement dated March 1, 1898, ratified by the Act of March 3, 1899, 30 Stat. 1362, I Kapp. 688, the Lower Brule Indians ceded to the United States an area "estimated to contain about 120,000 acres" of land "in order that the United States may reimburse itself for the lands purchased for the Indians * * *" upon the Rosebud reservation.

Defendant contends that the lands so ceded by the 1898 agreement by the Lower Brule Sioux estimated to contain 120,000 acres actually consisted of 120,295.64 acres. Within this acreage, however, were 3,763.55 acres which were erroneously added to the Lower Brule Reservation on the west side of said reservation (see prior decision in this case, 4 Ind. Cl. Comm. 267, 268). Thus, defendant urges, the area actually ceded to the United States by the Lower Brule Sioux was but 116,532.09 acres. Defendant contends that based upon the total amount which the United States paid in cash to the Rosebud Sioux for the lands allotted to the Lower Brule Indians on the Rosebud reservation, the acreage allotted aggregated 118,689.2 acres ($148,361.50 divided by $1.25 equals 118,689.2 acres). Since the net acreage ceded to the United States by the Lower Brule Indians, 116,532.09 acres, to enable it to

reimburse itself for the purchased land, 118,689.2 acres, was deficient to the extent of 2,157.11 acres, defendant urges that the United States is entitled to have the sum of $2,696.39 (2,157.11 acres at $1.25 equals $2,696.39) deducted from the gross amount awarded by the Commission.

With respect to these contentions of defendant, plaintiffs insist there can be no counterclaim. Plaintiffs' counsel correctly points out that there was no contractual obligation on the part of the Lower Brule to reimburse the United States the amount of $148,361.50 disbursed by the United States to the Rosebud Sioux for the lands allotted to Lower Brule Indians on the Rosebud Reservation. The plaintiffs only agreed to cede to the United States an estimated 120,000 acres of land in order that the United States might reimburse itself for the purchase of land on the Rosebud Reservation. The Lower Brule Indians did not guarantee that the ceded area would be equivalent in worth to the lands purchased on the Rosebud Reservation. The United States does not show that the ceded area, even reduced in acreage by excluding 3,763.55 acres, was disposed of for less than the amount disbursed by the United States for the lands on the Rosebud reservation. The counterclaim is denied.

Second Counterclaim - Under this counterclaim defendant seeks to have the sum of $659.67 credited against the gross amount awarded by the Commission. Defendant points out that this Commission in its prior decision determined that of the acreage excluded on the south side of the Lower Brule Reservation some 1,851.56 acres of land were disposed of by the United States pursuant to the terms of the Act of March 2, 1889, 25 Stat. 888, I Kapp. 328, for the sum of $1,396.14,

between February 10, 1890 and February 10, 1900 (4 Ind. Cl. Comm. 250, 255, 267). Under the terms of this act the United States also agreed to accept all undisposed of lands at the end of ten years and pay for them at the rate of fifty cents an acre. The Sioux Tribe and each of the constituent Sioux groups, including the Lower Brule Sioux, brought suit in the Court of Claims for an accounting of the proceeds received from lands disposed of during the 10 year period (1890-1900) pursuant to the 1889 Act and fifty cents per acre for all lands unsold as of February 10, 1900, and accepted by the United States. The Court of Claims determined that the Sioux Tribe was entitled to a total credit of $5,307,655.87 for both land categories for which defendant was required to account (see 97 C. Cls. 391, 396-7). Later (105 C. Cls. 658) the Court of Claims made a complete accounting and stated the account current between the parties as of June 30, 1925, and found on the basis of a proper accounting that there was no amount then due to the plaintiffs under the terms and conditions of the 1889 agreement. The Lower Brule interest in the permanent fund created by the 1889 Act was a pro rata share based upon the population of these Indians of 1,019 in relation to the total Sioux population of 20,780, namely, 4.903% (105 C. Cls. 661). Since the Sioux Tribe was found entitled to a total credit of $5,307,655.87 which included proceeds of the 1,851.56 acres within the erroneous survey acreage disposed of between 1890 and 1900 and fifty cents an acre for the balance of the 24,116.78 acres within the subject tract, the defendant is entitled to credit against the gross amount awarded by the Commission the amounts already credited to the Lower Brule Indians,

namely, 4.903% of $1,363.50, or $66.85, and 4.903% of $12,058.34, or $591.22. Accordingly, a total sum of $658.07 will be deducted from the sum of $19,476.18 which the Commission found the plaintiffs were entitled to recover, leaving an amount totaling $18,818.11. In view of the decision of the Court of Claims crediting these sums to the plaintiffs, the arguments made by plaintiffs in this case against allowing this counterclaim are not persuasive.

Third Counterclaim - This counterclaim involves the sum of $248,757.30 which the defendant contends the Court of Claims found was an overpayment to the Lower Brule Sioux in 105 C. Cls. 725, 815-6, under the terms of the Act of March 2, 1889, 25 Stat. 888. As previously stated the Court of Claims in 97 C. Cls. 391 held the Sioux Tribe was entitled to a total credit of $5,307,655.87. In further proceedings the Court of Claims in 105 C. Cls. 725, 815-816, in making a complete accounting and stating the account between the parties as of June 30, 1925, found that the principal and interest of the permanent fund of plaintiff arising under the agreement of 1889 from the proceeds of the ceded lands and miscellaneous receipts was completely exhausted through proper and legal reimbursements from and charges against the fund long prior to 1925 and that the correct account current further showed that in addition "to the said permanent fund (principal and interest) belonging to plaintiff being exhausted there were, on June 30, 1925, large deficits against the various bands of plaintiff (except the Northern Cheyennes) on the several reservations, to which said funds were allocated, as a result of large expenditures by defendant from public funds for the

benefit of the various bands of plaintiff tribe." The Court of Claims in its Finding 9(a) set the net excess of expenditures at $4,911,284.22, and allocated to the Lower Brule Sioux $248,757.30 of the total amount. In speaking of these sums the Court of Claims said (105 C. Cls. at page 671):

> * * * These excess expenditures over all funds belonging to plaintiff from the ceded lands under the agreement of March 2, 1889, and from miscellaneous receipts, were gratuitous expenditures from public funds for the benefit of plaintiff for the purposes stated in the account current for the years prior to the years in which permanent funds belonging to the several Sioux Tribes or bands were exhausted. * * * (Underscoring supplied)

In addition to the accounting respecting the proceeds of the land categories discussed above the Court of Claims was called upon to state the account in seven cases presented by separate amended petitions presenting claims for accounting with respect to the receipts and disbursements by defendant, as trustee, of certain trust funds derived from the sale or disposition of lands within the separate reservations created out of the Great Sioux Reservation by the 1889 agreement (The Sioux Tribe of Indians v. United States, 105 C. Cls. 725). In the accounting with respect to these claims the Court of Claims found certain sums to be recoverable for the plaintiff groups but permitted the United States to offset against the awards sufficient amounts of the excess expenditures of $4,911,284.22 as shown as having been made to the several Sioux groups respectively to wipe out the amounts the Court found the several groups were entitled to recover. In speaking of these offsets the Court of Claims said in 105 C. Cls. 658, at page 687:

> * * * However, to the extent that the separate tribes or bands of plaintiff in cases C-531(18) to (24), inclusive, are held entitled to recover in respect of those separate funds, the excess expenditures from public funds for the purposes above mentioned under the supposed authority of the 1889 agreement are, in effect, charged against the separate funds of these tribes or bands by offsets. See C-531 (18) to (24), inclusive, decided this day.

And see Finding of Fact 80 of the Court of Claims, 105 C. Cls. at pages 767-768, in which as to these excess expenditures the Court states that "under terms of the act of March 2, 1889, supra, and section 2 of the jurisdictional act herein /41 Stat. 738/ they are proper legal and equitable offsets against the amounts determined to be due the Indians, * * *."

Defendant also cites further decisions by the Court of Claims in 112 C. Cls. 39 and 112 C. Cls. 50 in these Sioux accounting cases in support of its contention that the $248,757.30 excess expenditures for the benefit of the Lower Brule Sioux constitute unused credits in favor of the United States which are subject to being used as a counterclaim. These two decisions resulted from the fact that while the two Sioux cases were pending in the Court of Claims the Indian Claims Commission Act was passed and the Supreme Court, upon application of the Sioux, remanded the cases to the Court of Claims to enable it to determine "whether the Act of August 13, 1946, gives rise to any claims which petitioners may assert to affect the judgment heretofore entered." In the case involving the decision of the Court of Claims in 105 C. Cls. 39 respecting the accounting under the 1889 agreement, petitioners filed a supplemental petition on remand alleging that under the terms of the original jurisdictional act as enlarged and extended by Sections 2 and 11

of the Indian Claims Commission Act the expenditures totaling $8,438,038.38 made by the Government under the provisions of Section 17 of the 1889 agreement for beneficial objects should not be held to be reimbursable expenditures under Sections 17 and 22 of the 1889 agreement and chargeable against plaintiffs' permanent fund, including interest. Plaintiffs further urged the Court of Claims to eliminate the $8,438,038.38 as a reimbursable charge and as an offset against its funds. In dismissing the supplemental petition the Court of Claims said in part:

> Plaintiff next alleges and contends that the sum of $8,438,038.38, expended for the agricultural objects and benefits, was for an educational purpose under the 1889 agreement and is, therefore, denied to defendant as an offset under section 2 of the Act of August 13, 1946, and the course of conduct of the officials of the Interior Department. In our opinion of February 4, 1946, we denied plaintiff's claim that this sum was expended for educational purposes within the meaning of the agreement of 1889, and we find no reason to change that conclusion. Moreover, the amount is not allowed and cannot be treated as an offset of an expenditure gratuitously made for educational purposes, as that term is usually and generally understood, but is allowed to defendant as an expenditure of a sum advanced and expressly made reimbursable by sections 17 and 22 of the agreement. The sum of $8,438,038.38 is a gratuitous expenditure only to the extent that it exceeded, with other expenditures, the total amount of the permanent fund and interest. But we think it is clear that this excess of $4,911,284.22 was not an expenditure for "education," as that term was used in section 2 of the Act of August 13, 1946. Industrial schools and education were mentioned in the 1889 agreement, but these expenditures were not placed in that class. Therefore, the provision of Section 2 of the Act of August 13, 1946, with reference to the non-allowance as offsets of gratuitous expenditures for educational purposes, has no application here.

In short the Court of Claims held that the expenditures for beneficial objects were allowed defendant as a sum advanced and expressly made reimbursable as legal credits by sections 17 and 22 of the agreement

of 1889, and that the excess expenditures, that is those sums over and above what was necessary to equal the total amount of the permanent fund and interest, were gratuitous expenditures. Since the Court of Claims in case No. C-531 (18-24), 105 C. Cls. 725, had allowed the defendant to offset certain of these gratuitous expenditures against certain sums found due the several groups of Sioux with respect to trust funds realized from the proceeds of sale of lands in their respective reservations it was necessary for the Court on remand to consider whether these excess expenditures totaling $4,911,284.22 were expenditures for "education" under the Indian Claims Commission Act. The Court held they were not. The Court stated in dismissing plaintiffs' supplemental petition in case No. C-531 (18-24), 112 C. Cls. 50, on remand that:

> The claim of plaintiff with respect to the elimination of the offsets, representing reimbursable expenditures under the 1889 agreement, used and applied against the amounts originally awarded in these cases, is denied on the authority of our opinion and decision this day entered, dismissing the supplemental petition in case C-531 (11).

The Court of Claims in these previous cases did not hold that the Sioux Tribe or any of its constituent bands or groups were legally liable to the United States for the total amount of the excess expenditures but did allow the United States to use part of these gratuitously expended funds to offset the amounts the several groups were found entitled to recover in case Nos. C-531 (18-24), 105 C. Cls. 725. The $248,757.30 of the excess expenditures charged to the Lower Brule Sioux by the Court of Claims is not a credit that may now be deducted from the gross amount which the Commission has found plaintiffs are entitled to recover in this case. Whether the amount might be a proper gratuitous offset need

not now be determined since it is not here claimed by defendant as an offset and for reasons stated below with respect to offsets claimed by defendant.

Offset

The single, designated offset category upon which proof was adduced by the defendant in this case was an item of $157,404.46 for the purchase of lands for the Lower Brule Sioux Indians by the United States between March 11, 1936 and August 15, 1950. Section 5 of the Act dated June 18, 1934, 48 Stat. 984, provides the authority for the purchase of lands for Indians to the Secretary of the Interior. Section 2 of the Indian Claims Commission Act provides that this Commission may consider expenditures made under Section 5 of the 1934 Act, supra, when dealing with the question of offsets. Plaintiff does not deny that the United States purchased land under the Act of June 18, 1934, in the amount of $157,404.46 for the Lower Brule Sioux Tribe. Plaintiff, however, contends the offset should not be allowed since (a) there is no proof "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, * * *" and (b) Congress did not intend that this Commission should offset gratuities against a legal claim such as is presented in this case but rather the discretion given the Commission to inquire into gratuitous expenditures is limited to claims under clause (5) of the Indian Claims Commission Act, that is moral claims. The Commission has found that the record in this case shows that there is nothing in the nature of the claim here presented and the entire course of dealings and accounts between the United States and plaintiffs which

would warrant the Commission's refusal to consider the offset herein claimed by defendant. Our views with respect to the contentions made by plaintiffs' counsel as to a limitation of gratuitous offsets to clause (5) cases are fully set forth in the opinions rendered in the Red Lake and Pembina Chippewa case, Dockets 18-A, 113 and 191, decided by this Commission on October 5, 1961. The sum of $157,404.46 expended for the purchase of land is an allowable offset. Quapaw Tribe v. United States, 1 Ind. Cl. Comm. 644, 649, aff'd in 128 C. Cls. 45, 66-67.

Just Compensation

On October 6, 1959, plaintiffs filed a "Motion to Modify Interlocutory Order," in which plaintiffs moved the Commission to modify its interlocutory order entered April 26, 1956, to provide for just compensation on the ground that the lands excluded from the reservation by the erroneous survey were taken under the Fifth Amendment of the Constitution of the United States, citing United States v. Creek Nation, 295 U.S. 103, 108-110 (1935); Yakima Tribe v. United States, 5 Ind. Cl. Comm. 636, 678 (1957); and Uintah and White River Bands of Utes v. United States, No. 48560, decided June 5, 1957, ___ C. Cls. _____, (Slip opinion, pp. 2, 10, 94). The Commission concludes that the plaintiffs were deprived of their lands omitted from their reservation due to the erroneous survey without the payment of compensation therefor. Under the facts in this case and the law of the cases above cited with respect to similar takings of Indian reservation lands the plaintiffs herein are entitled to just compensation. The adjusted gross amount which the Commission has this day determined the plaintiffs are entitled

to recover will be incremented by the allowance of interest computed at the rate of 5% from February 11, 1900, the date of taking, to July 14, 1934, and at 4% per annum thereafter until entry of the final order herein.

Conclusion

The plaintiffs are entitled to recover from the defendant the sum of $18,818.11 together with interest thereon at the rate of 5% per annum from February 11, 1900, to July 14, 1934, and at the rate of 4% from July 14, 1934, to date of this decision, or a total amount of $71,747.63. Against this total sum the defendant is allowed to offset $71,747.63 of the $157,404.46 claimed as an offset. Since the defendant is entitled to offset a sum equal to the amount plaintiffs are entitled to recover no amount is due plaintiffs and judgment will be entered accordingly.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

I. Harold Scott
Associate Commissioner