BEFORE THE INDIAN CLAIMS COMMISSION

THE SISSETON AND WAHPETON BANDS OR TRIBES, ETC.,	)	Docket No. 142
THE LOWER SIOUX INDIAN COMMUNITY, ETC.,	)	Docket No. 362
Petitioners,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: April 22, 1966

OPINION: RE PETITIONERS' MOTION FOR DETERMINATION OF QUESTIONS OF LAW, ETC.

Chief Commissioner Watkins delivered the opinion of the Commission.

By their motion filed in the above dockets on June 28, 1965, the petitioners have asked this Commission to answer the following questions relative to certain issues that the Commission has either previously decided in these dockets or which are still subject to future determination. The first question submitted was:

> "Whether the area embraced in the Minnesota River Reservation was ceded by the two treaties of 1851?"

and secondly:

> "What constitutes 'payment on the claim' with respect to the two treaties of 1851?"

On August 5, 1965, the defendant responded to petitioners' motion with an accompanying brief, and on the basis that "there is no such issue in this case" the defendant objected to any determination of question number one concerning the Minnesota Reservation. The defendant also interposed an objection to a determination of question number two

with respect to what constituted a payment on the claim. On August 20, 1965, the petitioners filed a reply brief and thereafter on September 15, 1965, the Commission heard extended argument on both questions.

The above dockets had been consolidated for trial with Docket Nos. 359, 360, 361, and 363. On January 12, 1962, this Commission issued its findings of fact, opinion, and interlocutory order in this consolidated case, in which we made certain determinations concerning what we shall designate generally for the sake of convenience, the "title phase" of these several claims.

At that time we found from all the evidence that, by virtue of the provisions of the 1825 Prairie Du Chien Treaty, the four bands of the Mississippi Sioux, the Sisseton and Wahpeton bands in Docket No. 142, and the Medawakanton and Wahpakoota bands in Docket No. 362, had recognized title to Royce Area 289 at the time they ceded the area to the United States under the Traverse des Sioux Treaty of July 23, 1851 (10 Stat. 949), and the Treaty of Mendota of August 5, 1851 (10 Stat. 954).* Under Article 3 of both treaties as originally drawn two reservations adjoining and extending along both sides of the Minnesota River were set aside for the four bands.** The Sisseton and Wahpeton reserved

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* Interlocutory Order, January 12, 1966:

"4. That by virtue of the provisions of the Treaty of August 19, 1825, 7 Stat. 272:

* * * * *

(c) The Sisseton and Wahpeton Bands of Mississippi Sioux in Docket 142, and the Medawakanton and Wahpakoota bands of Mississippi Sioux in Docket 362 had recognized title to Royce Area 289 as of the effective dates of the treaties of cession of July 23, 1851, 10 Stat. 949, and August 5, 1851, 10 Stat. 954." (See also Commission's Finding 25; 10 Ind. Cl. Comm. 137, 153)

** Commission's Findings 41, 42; 10 Ind. Cl. Comm. 137, 163, 164.

the area contained 1,120,000 acres, while the Medawakanton and the Wahpakoota reservation contained 960,000 acres. However, before ratification, the Senate struck out Article 3 in each treaty and in lieu of these two reserves the Senate decided to pay the four bands ten cents per acre for each reservation. To carry this into effect a supplemental provision was added to both treaties which also provided that, with the consent of the Indians, the President would be authorized to set aside suitable tracts of land for their permanent homes outside of the ceded area. Therefore, we answer petitioners' first question in the affirmative, and hold that the two proposed reservation areas which were to comprise the two reservations contemplated under Article 3 as originally drafted in both 1851 treaties were in fact ceded along with the bulk of the area comprising Royce Area 289 under the 1851 treaties as finally ratified. The additional ten cents per acre paid by the United States for the lands was added to considerations stated in both treaties.

We now turn our attention to the question, "What constitutes 'payment on the claim' with respect to the two treaties of 1851?"

The principal claim asserted by the four bands of Mississippi Sioux for Royce Area 289 is for the difference between the 1851 fair market value of the ceded area and the allegedly unconscionable consideration paid by the United States under the two treaties of cession. A separate claim for the balance of the unpaid treaty consideration is also asserted by the four bands.* A determination by the Commission of

* In the event of a recovery under the petitioners' principal claim for the 1851 fair market value of Royce Area 281 less treaty considerations, the Commission would necessarily adjudicate favorably petitioners' separate claim for the balance of the treaty consideration by simply allowing the Government to set off only that part of the treaty consideration actually paid to the Indians.

just what was the 1851 treaty consideration is vital to both claims, and in this case a determination of what constitutes "payment on the claim" will also settle the issue of treaty consideration.

The consideration for the cession of Royce Area 289 is set forth in Article 4 of the 1851 treaties, and, except for different amounts the language employed in both treaties is substantially identical. For the sake of convenience we shall quote only from the July 23rd treaty with the Sisseton and Wahpeton Sioux and substitute where necessary the dollar figures applicable to the Medawakanton and Wahpakoota Sioux.

* * * * *

> Art. 4. In further and full consideration of said cession, the United States agree to pay to said Indians (Sisseton and Wahpeton) the sum of one million six hundred and sixty-five thousand dollars ($1,665,000) /for the Medawakanton and Wahpakoota Sioux the figure was $1,410,000/ at the several times, in the manner and for the purposes following to wit:
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> 1st. To the chiefs of said bands (Sisseton and Wahpeton) * * * the sum of two hundred and seventy-five thousand dollars ($275,000) /for the Medawakanton and Wahpakoota chiefs the sum was $220,000/.
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> 2d. To be laid out under the direction of the President * * * manual labor schools, * * * mills and blacksmith shops, * * * (Sisseton and Wahpeton * * * thirty thousand dollars ($30,000) /for the Medawakanton and Wahpakoota the sum was also $30,000/.
>
> The balance of said sum (Sisseton and Wahpeton), * * * to wit: One million, three hundred and sixty thousand dollars ($1,360,000) /for the Medawakanton and Wahpakoota Sioux the balance is $1,160,000/ to remain in trust with the United States, and five percent interest thereon to be paid, annually, to said Indians for the period of fifty years, commencing the first day of July, eighteen hundred and fifty-two (1852) which shall be in full payment of said balance, principal and interest, the said payment to be applied under the direction of the President, as follows to wit: * * *

* * * * *

As a result of the Senate's action in eliminating the proposed reservations in both treaties and in lieu thereof paying the four bands an additional ten cents per acre, the supplemental articles to the two 1851 treaties caused to be added to trust funds provided for the Sisseton and Wahpeton Sioux an additional $112,000, thus creating a new balance of $1,472,000, and to the Medawakanton and Wahpakoota Sioux trust funds an additional $69,000 which raised the balance to $1,229,000. The annual interest to be paid out under these new balances at 5 percent was $73,600 for the Sisseton-Wahpeton and $61,450 for the Medawakanton-Wahpakoota, or a total annual payment of $135,050.

As a result of the Mississippi Sioux outbreak in 1862, Congress declared all their future annuities forfeited under the Forfeiture Act of February 16, 1863 (12 Stat. 652). Years later separate law suits were instituted in the Court of Claims by the four Mississippi Sioux bands to recover the forfeited annual payments that would have been due under the 1851 treaties.* The jurisdictional acts under which the suits were brought provided that the Court should deal with these Sioux claims "as if the act of forfeiture had not been passed." Subject to offsets, a recovery was had in both suits on an account stated for interest due and owing. In each case no claim was made for the amount of the principal that had been set aside in trust.

In answer to the proposition of what constitutes "payment on the claim" with respect to the 1851 treaties the petitioners insist that only the moneys actually paid out to the chiefs of the several bands,

* Sisseton and Wahpeton Bands v. United States, 42 C. Cl. 416 (1907) Affirmed 208 U.S. 561.
Medawakanton Indians et al., v. United States, 57 C. Cl. 357 (1922)

to wit, $555,000 is all that can be credited to the Government, and that we must hold that the annual payments specified in the 1851 treaties are interest payments on the balances of the purchase price for the ceded lands.* The Government, of course, claims a credit for the aggregate of all payments actually made under the provisions of both treaties; it contending that the annual payments were not interest payments but in fact an annuity. Thus the Government contends the "full consideration" for the cession of Royce Area 289 is not the $1,777,000 provided for in the Sisseton-Wahpeton treaty, and not the $1,229,000 provided for in the Medawakanton-Wahpakoota treaty, but rather (assuming for the sake of this motion that all 50 annual payments were made under both treaties) $7,307,500.**

In urging the Commission to adopt its views the Government succinctly lays out the issue before us as follows:

> "The issue really to be decided in this case is whether the payment of $7,307,500 to these four tribes ($3,985,000 to the Sisseton and Wahpeton Indians and $3,322,500 to the Medawakanton and Wahpakoota Indians) is to be considered as the amount 'paid on the claim' for the cession of the land involved in these treaties, or whether the Commission is going to be misled by such words as 'interest', 'in trust', and the like." (p. 6, Def. Response to Pet. Motion)

Among the words and phrases cited above, the defendant should have included the prefatory language appearing in Article 4 of the 1851 treaties, to wit, "In further and full consideration of said cession."

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* Both treaties having specified "five percent interest" Congress annually appropriated the money to pay such "interest" until the enactment of the 1863 Forfeiture Act.

** $135,050 x 50 = $6,752,500 plus $555,000 = $7,307,500.

But the issue is not whether the Commission is going to be misled by the above cited words and phrases in the two 1851 treaties, but whether the 1851 Indian treaty participants would have been misled by such words, and, if so, was it the intention of the treaty writers to create an atmosphere savoring of double entendre.

Keeping in mind, as we must, that the treaty dealings between the United States and its Indian wards were hardly that of equals negotiating at arms length, it is incumbent upon this Commission to scrutinize with care all facets of the 1851 treaty negotiations giving rise to the claims asserted herein. The Indian Claims Commission Act has certainly afforded the Commission great latitude in searching the record in this respect. What's more, we know that prior to the advent of this Commission it was nigh impossible to make judicial inquiry into such things as the motive and intent that controlled certain governmental actions in the consumating of treaty agreements. We can, of course, make such inquiry, and in so doing we can render moral judgments where such actions on the surface have all the earmarks of overreaching and unfair play. Thus, revision of agreements and treaties can be made under our Act on grounds of "fair and honorable dealings."

Our views above are consistent with some of the more recent pronouncements of the Court of Claims reflecting upon the broad and remedial purposes of the Indian Claims Commission Act. Noting particularly that our Act has definitely changed the legal climate under which Indian claims had formerly been adjudicated, the Court in the case of The Creek Nation v. United States, stated the following:

> "At the heart of the Indian Claims Commission Act is a recognition by the legislative branch of the Government that the special acts and existing facilities for adjudicating the claims of the Indians did not, in many instances, give the Indians a fair deal in their relations with the United States Government. The Congress acknowledged the moral obligation this nation owes to its Indian quasi wards. These conclusions are evident in the legislative history of the Act from its first inception as H. R. 7963, 71st Congress, 1st Sess. (1930) to the statement by the President in signing H. R. 4497, August 13, 1946. It was emphasized in the hearings on the bill that this court had dismissed many Indian claims on purely legal grounds, since the special jurisdictional acts did not give this court the right to adjudicate the claims on the basis of moral obligations.
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> "The very Act creating a special tribunal as the Indian Claims Commission, rather than granting increased jurisdiction to the courts, in itself, reflects a change in the legal climate. Furthermore, the grant of authority to the Commission to determine whether the United States had, in its treaties and agreements with the Indian tribes, violated the principles of fair dealings, and, where this appears, to revise and correct these treaties and agreements, certainly constitutes a change in the manner in which Indian claims are to be viewed."*

If the Government's position is correct, then without a doubt the stipulated price for the cession as set forth in Article 4 of both treaties never was intended by the treaty makers to be the "further and full consideration of said cession." Therefore, there is built in an obvious contradiction in terms bearing upon the treaty consideration, and in the present case this contradiction now works to the disadvantage of the Indian claimants. Under our Act the Commission is duty bound to resolve such contradiction in favor of the Indians. Furthermore, we think that the conflicting language was purposely written into the treaties.

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* pp. 8, 9, slip opinion, Appeal No. 9-63, decided December 11, 1964, The Creek Nation v. The United States.

While this may be a rather harsh judgment to make against the treaty writers, what else can be concluded if we are to accept Governor Ramsey's (the Treaty Commissioner) frank evaluation of his accomplishments in successfully concluding the two 1851 Sioux treaties. His post-treaty comment is most enlightening. He reported:

> "The whole cost to the Government of the cessions made by both the upper (Sisseton and Wahpeton) and lower (Medawakanton and Wahpakoota) Sioux is nominally $3,075,000. Of this sum $575,000 do not bear interest, but are to be paid in hand for various purposes specified in the treaty. The balance, $2,500,000 is held in trust by government and five per-cent. interest thereon is to be paid under different heads of expenditures, for fifty years, when the interest ceases, and the principal reverts to the Government; so that in one sense, estimating the lands ceded to be worth and to yield the interest on their price, the actual cost to the government for this magnificent purchase is only the sum paid in hand (i.e. the $575,000).*

Thus Commissioner Ramsey's statement indicates that the balance of the consideration is to be given to the Sioux bands and in the next breath taken back after the government had paid 5 percent interest on said balance for 50 years.

In our judgment Commissioner Ramsey's statement throws cold water on the defendant's contention that the language as written in Section 4 of both 1851 treaties was merely expository of the method of calculating the 50 year annuity for the Sioux bands. If such was the only purpose of the treaty writers, why indulge in an unusual exercise in semantics when there was equally available plain, unambiguous language more readily comprehended by the Indian mind that would have clearly

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* p. 19, Memorandum in Support of Petitioners' Motion for Determination of Questions of Law with Respect to the Mississippi Sioux Treaties of 1851 in Docket Nos. 142 and 362.

show that the "further and full consideration" for the cession of Royce Area 289 was in fact so much money down and a 50 year annuity at x number of dollars per annum.

The Commission concludes that the annual payment of "five per cent" interest on the unpaid balances as specified in both 1851 treaties was in fact interest payments on monies equitably and morally belonging to the four bands, which money the Government is not entitled to a credit as "payment on claim" in these dockets. The full consideration for the cession of Royce Area 289 under the July 23, 1851 Sisseton-Wahpeton treaty was $1,777,000 ($1,665,000 full consideration on the original treaty plus $112,000 added thereto by Senate Amendment). Of this amount the Government can claim a credit of $305,000 as "payment on the claim." The full consideration for the cession of Royce Area 289 under the August 5, 1851 Medawakanton-Wahpakoota treaty was $1,479,000 ($1,410,000 full consideration under the original treaty plus $69,000 added thereto by Senate Amendment). Of this amount the Government can claim a credit of $250,000 as "payment on the claim."

Arthur V. Watkins
Chief Commissioner

We concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner

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ORDER GRANTING PETITIONERS' MOTION FOR DETERMINATION OF QUESTIONS OF LAW WITH RESPECT TO THE MISSISSIPPI SIOUX TREATIES OF 1851 IN DOCKET NOS. 142 and 362

Upon consideration of petitioners' motion, as captioned above, filed herein on June 28, 1965, the defendant's response thereto of August 5, 1965, the petitioners' reply thereto of August 20, 1965, and the argument of September 15, 1965, on said motion;

IT IS ORDERED that petitioners' motion be and the same is hereby granted, and said questions of law as submitted to the Commission are hereby answered and determined as set forth in the opinion accompanying this order.

Dated at Washington, D. C., this 22nd day of April, 1966.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner