BEFORE THE INDIAN CLAIMS COMMISSION

THE DELAWARE TRIBE OF INDIANS and THE ABSENTEE DELAWARE TRIBE OF OKLAHOMA,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket Nos. 27-A and 241

Decided: June 4, 1969

Appearances:

Louis L. Rochmes and Stanford Clinton, Attorneys for Plaintiffs.

W. Braxton Miller, with whom was Mr. Assistant Attorney General Ramsey Clark, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the Opinion of the Commission.

In prior decisions on aspects of the cases at bar, this Commission determined that the Plaintiffs had title to the Delaware Outlet (The Delaware Tribe, et al. v. United States, 3 Ind. Cl. Comm. 622 (1955)), and that in ceding the Delaware Outlet to the United States, the Plaintiffs ceded land worth $617,980.00 for a consideration of exactly $10,000.00 (id., 8 Ind. Cl. Comm. 150 (1959)). Left for subsequent consideration was the question of what offsets, if any, ought be deducted from the gross judgment of $607,980.00.

The issue of appropriate offsets was tried in 1961, argued in 1964, and reargued before the Commission in 1968. One point raised in the

arguments, and in the Defendant's Amended Answer, should be discussed before the Commission proceeds to a determination of proper offsets.

Paragraph 41(b) of the Defendant's Amended Answer sets out the allegation that $150,000.00 was paid by the Defendant to the Plaintiffs on this and others of the Plaintiffs' claims. This Commission in first considering the cases at bar determined, and found as facts, that the particular sum was paid to these Plaintiffs against a Release of "all claims and demands" pursuant to Section 21 of an Act of April 21, 1904 (33 Stat. 222); that the amount was credited to the Delaware Tribe by the treasury warrant; and that the amount was in fact disbursed to the Plaintiffs in the years 1906 to 1923, inclusive. The Delaware Tribe of Indians, et al. v. United States, 2 Ind. Cl. Comm. 536 (1954), at 547, 548; rev. other gr. 130 Ct. Cl. 782 (1955).

Since the $150,000.00 was a payment on the claim, and since the payment was in fact received by the Plaintiffs, we regard it as a compulsory counterclaim which must be deducted from the judgment before this Commission can reach the question of discretionary allowable offsets. Accordingly, the gross judgment of $607,980.00 (Delaware Tribe, supra, 8 Ind. Cl. Comm. 150, at 194) must be adjusted downward to reflect deduction of this counterclaim. The Findings of Fact this day issued reflect the adjustment in showing that the judgment from which allowable offsets, if any, are to be deducted is $457,980.00.

The Commission now proceeds to consider the merits of the offset alleged in paragraphs 44 and 46 of the Defendant's Amended Answer: whether such interest as the Absentee Delaware Plaintiffs may have had in the tract

of land commonly known as the Wichita Reservation should be offset against the judgment. Defendant argues that the Wichita first obtained an interest in the Reservation by an 1891 agreement incorporated in an 1895 statute (28 Stat. 895) allotting and ceding the Reservation, and that the interest then transferred was a gratuity. (See Caddo Tribe of Oklahoma, et al. v. United States, 19 Ind. Cl. Comm. 385 (1968), at 391)

The Absentee Delaware became associated with the Wichita Indians sometime prior to 1859, when the other affiliated tribes arrived from Texas and all were invested with possession of the reservation. Some at least of the Delaware had lived in the area for some years, perhaps "a long time." The Delaware rights to their interest in the reservation are equivalent to those of the Wichita.

The following background material, extracted from The Wichita and Affiliated Bands, et al. v. United States, 89 Ct. Cl. 378 (1939), will aid in understanding the ramifications of this claimed offset; the findings in that case we deem to be binding, where relevant. The Wichitas and their affiliated bands (including the Delawares) claimed that they had as their habitat and range for fields, grazing, and hunting some 10,283,635 acres in the now states of Oklahoma and Texas. The claimed area was, roughly, bounded from a line somewhat east of the 98th Meridian to the 100th Meridian, and from the Canadian River on the north to the Red River on the south. The ten-million-plus acres also included the Wichita Reservation.

The Court found that the early history of the Wichitas and affiliated bands showed:

> "....Since about 1750 the Wichitas and certain members of their affiliated bands (Towaconies, Wacos, Keechis, Ionies, and the Delawares) have lived and hunted a part of the time on the south bank of the Red River in what is now Texas and a part of the time on the north bank of said river in territory which later became a part of Oklahoma. A number of other tribes of Indians also lived, roamed, and hunted in the same territory.... The Wichitas were seminomadic Indians, remaining in a settled place for some time and building thatched huts shaped like a beehive. Wherever they established their camps, the Wichitas engaged in cultivating the soil.... Sometime subsequent to 1835 and until about 1860, the Wichitas roamed, lived, hunted and established villages from time to time in certain parts of the territory between the Canadian River on the north, the Red River on the south, the 98th meridian on the east and the 100th meridian on the west.... At no time prior or subsequent to 1835 did the Wichita tribe and its affiliated bands exclusively possess, occupy, or hunt over the entire territory herein claimed; nor did they possess and occupy at any time any very large portion of such territory to the exclusion of other tribes or bands of Indians or with the full recognition by such other tribes or bands to the right of the Wichitas to exclusive possession and occupancy.... The record in this case does not establish as a fact that the Wichitas and affiliated bands of Indians at any time prior to 1859 ever possessed or occupied, to the exclusion of other tribes or bands of Indians, an area, within the territory which they claim, greater than the reservation within that territory of 743,257.19 acres which was set aside for and given to them by the United States for their absolute use and occupancy...." 89 Ct. Cl. 378, 381-5.

Thus the Court of Claims found that the Wichita and affiliated bands did not establish exclusive use and occupancy of the large area claimed, but left the inference that the evidence would not negate Wichita exclusive use and occupancy within the area of the reservation. For the purpose of determining this claimed offset, the Commission is not required to make a finding of aboriginal title for the Wichita, but we shall presume they had at least some area of exclusive use around their villages and the Court of Claims has located that area nowhere else but within the reservation. Their interest

in the reservation, whenever perfected, would come under claim of right, not gratuitously. The defendant confirmed their possession of that reservation area by various acts over a long period, and denied them any claim of a right of possession elsewhere.

For the Wichitas and the Absentee Delaware, the central issue would be whether the reservation was given them by the United States as an act of generosity, a gratuity. The fact that the Wichitas did not buy the reservation from the United States for cold cash is not conclusive: the Wichitas had something else of value with which to make payment. Specifically, the United States received the great benefit of tranquility and certainty when the Wichitas acceded to concentration on a reservation, and simultaneously the Wichitas sustained a detriment: no longer did they enjoy the unfettered and unrestricted way of life, a fact of immense value to the Indian point of view.

The Commission must conclude that regardless of whether a treaty was the causative factor in compelling the Wichitas' exchange of freedom for a reservation, that reservation was no gratuity. Since the Plaintiffs were an integral component of "The Wichita and Affiliated Tribes" by the time that reservation was populated, it follows that the Plaintiffs along with the others paid the consideration of living in circumscribed surroundings. Viewed from any angle, the Government should not now benefit, by way of offset, for the fact that it only belatedly sought to give good title to these Indians to a reservation within the area of their aboriginal lands. The facts compel the conclusion that no share of the Wichita Reservation is a gratuity

offsettable against the judgment in the case at bar.

The final issue is whether a portion or all of the claimed offset of general gratuitous expenses ought to be allowed.

In dealing with those offsets incurred by the Government in behalf of the Indians, the Commission must be guided by the words of the statute: "....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...." 25 U.S.C. 70a.

Congress has thus in effect directed the Commission to be guided by its basic sense of equity in determining whether a claimed offset should "in good conscience" be granted. In the past, the Commission has exercised the Congressional grant of discretion by weighing all the circumstances of the nature of the claim and the course of dealings in passing on the claimed offset. It is admitted that this case-by-case, tribe-by-tribe review by as uncertain a compass as is furnished by the statute has led to results that, if not inconsistent, at best furnish little predictive value from the Commission's offset precedents.

The claimed general gratuity offsets in this case illustrate what may be called typical offset claims before the Commission: various Government expenditures for food, clothing, shelter, and other purposes for a tribe that may be said to have been treated no worse than most other tribes.

Because it is the typical case, should the Commission's conscience tend to allowance of such proved offsets? In the light of new guidance from the Supreme Court, discussed infra, the Commission feels that the occasion is appropriate for formulating a rule of general applicability as a more certain guide to the situations that will invoke its discretion under the Congressional authorization.

From our previous Delaware findings, this tribe's history recapitulates that of most of the Indian tribes. Removed from their original lands, or reduced to a reservation within them, the tribes were given an inadequate consideration for the loss of their lands (more often than not, our decisions indicate). The reservations would not support the tribes. The buffalo and other game were gone, and the Indians were discouraged from roving in its pursuit. The best efforts of the Government over many years could not convert the Indians into self-subsistent agrarians from their former way of life, if indeed the reservation were capable of productive cultivation. Often the tribes received their subsistence from Government gratuities; new cycles of dependency developed, and the United States never found itself free from an "Indian problem."[1/]

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1/ A representative account from a modern historian:

> "....The first decades of reservation life were harsh, marked by murders of Indians, systematic persecution of Indian leaders, withholding of rations, and other punishments designed to break the spirit of the people and force them to conform to the orders of the agents and missionaries. Traditional methods of self-government were undermined and destroyed, and in their place was substituted dictatorship by the agents.

At the time of white contact, the tribes then found had achieved their independent survival and subsistence. Since the trend of Indian history has been to change them to a dependent status, requiring the gift of food,

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1/ (continued)

> From one administration to the next, Congress dutifully, but with little interest, appropriated funds necessary to feed the Indians, meet treaty obligations, and finance in a minimal way policies hopefully fashioned to hasten assimilation. The programs changed impatiently in almost each administration, being carried out by commissioners and agents who also changed with a rapidity that caused confusion and further defeatism to the tribes. While accultration occurred slowly, the Indians, with minor exceptions, did not become assimilated. For a long time the Indians, regarded as wards of the government, were confined to their reservations -- sometimes behind barbed wire-- and were often forbidden to leave them without a permit. Far from being given an opportunity to learn to manage their own affairs, they were treated as prisoners or children; the smallest detail was directed and handled for them by the agent. Their religious practices, ceremonies, and organizations were banned, and their children were taken from them, sometimes forcibly, and sent to distant all-Indian schools like Carlisle in Pennsylvania, where they were taught the white men's ways. Some of these Indians, as adults, eventually became assimilated into the white culture, others returned to Indian life on the reservations, and still others became hopelessly lost, unable to make their way successfully among non-Indians, and out of place and scorned when they tried to return to their own people. On the reservations, strong efforts were made to end tribal cultures and ways of life, but no satisfactory substitutes were offered. Traditional means of livelihood had disappeared, but no suitable new economy was introduced. The hunters and warriors, stripped of their dignity and self-respect, were given few manly diversions, and many of them, losing the respect of the women and children, sank into an indolence that withered their souls and turned them, ultimately, to alcohol as an escape and violence as an outlet for their hurts. At the same time, corruption and graft on the part of many agents and hostility and pressures from neighboring whites added to the demoralization of the beaten people."
> Alvin M. Josephy, Jr., The Indian Heritage of America, pp. 349, 350 (1968).

clothing and shelter for them, we do not feel that the fact of the gift alone, in these "typical cases," satisfies the statute's requirement of "in good conscience." We feel that the thrust of the Congressional intent is for Indian claims litigation to result in judgments that compensate so far as possible for any injustices or inequities done the Indians.

In determining the consequence of applying the above principle to this question of general gratuity offsets, we are struck by the applicability of the reasoning of the Supreme Court in its most recent decision on Indian claims: Peoria Tribe v. United States, 390 U.S. 468 (1968). In that case, it will be recalled, Indian lands, by treaty, were to be sold at auction and the proceeds held at interest for the benefit of the Indians. In awarding the Indians the additional compensation they should have received had the lands been sold properly in compliance with the treaty, the Commission, and subsequently the Court of Claims, declined to allow interest on the principal award. The Supreme Court, reversing, allowed the Indians' claim, not as interest, but as damages. The reasoning may be broadly stated to be that had the Indians received the full compensation they should have received, that sum would have been invested (by treaty), so they should also receive the equivalent of interest on sums they should have received, but actually did not. The Commission has studied carefully the holding of the Court and has issued its order setting the appropriate measure of damages, see Peoria Tribe v. United States, 20 Ind. Cl. Comm. 62 (1968). The Commission in its future holdings will give great weight to the principle of the Supreme Court's decision: To make the Indians whole by considering

what the full benefits would have been had the Government done what it should have done at the time of the transaction complained of.

In this case, as in many others before the Commission, the principal award is based on what the Indians should have received in compensation when relinquishing their land. Had they received that full compensation, it presumably would or could have been placed in an interest-bearing fund, and provided an additional annual income for the tribe. With that additional annual income, the tribe would have been able to provide a greater portion of its needs, and the Government obliged to furnish less. There is a causal relation between the original Government failure of full payment, and the subsequent need for the various types of gifts now commonly claimed as general gratuities by the Government. It is our opinion that to the extent the Indians would have been able to provide their own needs had the Government fulfilled its obligation, the test of "in good conscience" under our statute does not allow the offset of subsistence-related expenditures the need for which was created by the Government's failure to pay full value.

Following the reasoning of our recent Peoria decision, supra, we find a statutory guideline for determining what amount Indian land sale proceeds should have produced: 25 U.S.C.A. 158. This general statute, in effect from 1836 to present, calls for 5% interest to be paid on Indian land sale proceeds required by treaty to be invested for the Indians. For the present purpose, the Commission will consider this figure as the reasonable guideline to what sums the Indians should have had available to them had the Government not failed in its obligation to them.