BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO de ZIA, ET AL., )
)
Plaintiffs, )
)
v. ) Docket No. 137
)
THE UNITED STATES OF AMERICA, )
)
Defendant. )

Decided: July 23, 1969

Appearances:

Claude S. Mann and M. J. Clayburgh, Attorneys for the Plaintiffs

Bernard M. Newburg, with whom were Ralph A. Barney and Acting Assistant Attorney General Glen E. Taylor, Attorneys for the Defendant

OPINION ON DEFENDANT'S MOTION FOR A PRETRIAL DETERMINATION OF THE BASIS FOR THE APPRAISAL OF GRATUITOUS OFFSETS OF REAL PROPERTY

Yarborough, Commissioner, delivered the opinion of the Commission.

In its Amended Answer defendant claims the right to offset from any award the fair market value of the gratuitous grant in trust to plaintiffs of approximately 163,000 acres of land following legislative action occurring in 1949, 1956, 1960, 1961 and 1966. Defendant alleges that these grants include lands directly acquired by the United States as public domain by virtue of the Treaty of Guadalupe Hidalgo of February 2, 1848, (9 Stat. 922), lands purchased by the United States in subsequent years, lands obtained by exchange with the State of New Mexico, improved lands and unsurveyed lands, and lands with and without mineral rights.

On April 21, 1969, defendant filed a "Motion for a Pretrial Determination of the Basis for the Appraisal of Gratuitous Offsets of Real Property." In this motion defendant moves that the Commission "...determine that defendant may offset against any award to petitioners the fair market value of lands gratuitously conveyed to them at the time of the conveyance." A brief was submitted in support of the motion.

In their response to this motion plaintiffs have argued that the trust lands should not be allowed as an offset and, alternatively, that if any lands are considered to be a proper offset, the amount of the offset should be the cost of these lands to the United States rather than their fair market value at the time they were put in trust for the plaintiffs.

Any decision as to which of the alleged offsets will be allowed in this case must necessarily be deferred until after the scheduled hearing on value and offsets. However, assuming that the various land transfers may be proved to be gratuities eligible for offset under the whole course of dealings, we think a determination by the Commission of the basis for the valuation of these lands as an offset is in order at this time to guide the parties as to the necessity of preparation of appraisal reports.

Defendant has quoted and discussed Peoria Tribe v. United States, 9 Ind. Cl. Comm. 274, 292 (1961), 12 Ind. Cl. Comm. 392, 396 (1963), aff'd, 169 Ct. Cls. 1009 (1965), Absentee Delaware v. United States, 9 Ind. Cl. Comm. 346 (1961), and Potawatomi Tribe v. United States, 4 Ind. Cl. Comm. 409 (1956), as authority that the offset value of land gratuities should be the

fair market value of these lands of the date they were given to plaintiffs or placed in trust for their benefit. We do not agree with defendant's application of these cases to the question at hand. The Delaware and Potawatomi cases involved land transfered as consideration rather than gratuitously. In testing the adequacy of that consideration the Commission was required to compare the value of the land lost by the Indians to that gained. The Peoria case may present some authority for defendant's position, but the question of the basis for the valuation of land gratuities as an offset was not an issue expressly ruled on by the Court of Claims.

Later decisions of the Court of Claims in Kickapoo Tribe v. United States, 178 Ct. Cls. 527, 534-535 (1967), and Ponca Tribe v. United States, 183 Ct. Cls. 673 (1968), on this and related questions lead us to the conclusion that the proper basis for the valuation of the trust lands as an offset in this case should be the funds actually expended for these lands by the United States rather than their fair market value at the time they were put in trust for the plaintiffs. The language in the Kickapoo decision may have indicated a narrow ruling on this point as suggested by defendant. However, in the subsequent Ponca case the Court has given the Kickapoo rule a broader statement that applies in the present situation. In Ponca the Court said:

> "When before we have been given the option under comparable circumstances to offset Indian 'taking' claims by deducting therefrom either the value of land or the purchase price paid therefor by the United States, we have held that the purchase price is the proper measure of adjustment. See, e.g., Kickapoo Tribe of Kansas v. United States, 178 Ct. Cl.

> 527, 535, 372 F.2d 980, 985-86 (1967); United States v. Emigrant New York Indians, 177 Ct. Cl. 263, 287 (1966); Sioux Tribe of Indians v. United States, 161 Ct. Cl. 413, 416-417, 315 F.2d 378, 380 (1963), cert. denied, 375 U.S. 825. That these cases treated the purchase of land as offsets within the gratuity provisions of Section 2 rather than as direct payments on the claims, does not, in our view, affect their applicability. This is because the gratuity provisions, by allowing offsets for either 'property given... or funds expended' present the court with a choice between applying the purchase price of property (the funds expended) or its value as of a given date in reduction of the claim." 183 Ct. Cls. 673, at 689.

We interpret these statements as signifying that in this case the "funds expended" by the United States for the trust lands rather than their fair market value at the time they were put in trust for the plaintiffs should be the proper basis for their valuation as an offset.

The soundness of this principle is illustrated in the present case. Here some aboriginal title lands taken from the Indians in 1936 were returned in 1961. Presumably if the more recent market value were to be offset, the Indians might be said to owe the United States some balance for having their lands taken from their control for some years. We do not think Congress intended such a result under the statutory language "...may set off all or part of such expenditures against any award..." (25 U.S.C. §70a, emphasis supplied). We cannot countenance a reading of the Act that would allow the Government to take lands from the Indians, hold them for appreciation, and avoid liability for the taking by a return of a fraction of what was taken. See Citizen Band of Potawatomi v. United States, 19 Ind. Cl. Comm. 368 (1968).

Other pertinent questions raised by the parties relating to the allowance of offsets will be reserved for determination following the reception of evidence on value and offsets at the scheduled hearing.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret A. Pierce, Commissioner

Brantley Blue, Commissioner