BEFORE THE INDIAN CLAIMS COMMISSION

LAKE SUPERIOR BANDS OF CHIPPEWA INDIANS, BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE, ARTHUR LAWRENCE LeBLANC, DANIEL EDWARDS, and JOHN L. BOUCHER, Plaintiffs,	)	
v.	)	Docket No. 18-E
THE UNITED STATES OF AMERICA, Defendant.	)	
OTTAWA AND CHIPPEWA INDIANS OF MICHIGAN, ET AL., Plaintiffs,	)	
v.	)	Docket No. 58
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: January 14, 1970

Appearances:

Rodney J. Edwards, Attorney for Docket 18-E Plaintiffs. Jay H. Hoag was on the briefs.

James R. Fitzharris, Attorney for Docket 58 Plaintiffs. Jay H. Hoag was on the briefs.

David M. Marshall, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant.

OPINION OF THE COMMISSION

Chairman Kuykendall delivered the Opinion of the Commission.

During the title and valuation phases of these consolidated

cases, the Commission decided that the plaintiffs had aboriginal title to 12,044,934 acres located in the northern part of Michigan, and that the tract, taken as a whole, had a fair market value of $10,800,000.00 as of March 28, 1836. Chippewa Indians, et al., v. United States, 7 Ind. Cl. Comm. 576 (1959); id., 20 Ind. Cl. Comm. 137 (1968). Left for future determination were the issues of consideration and offsets.

On April 24, 1969, as a necessary first step toward meeting the issue of consideration, the defendant filed a Motion for Preliminary Adjudication that 121,450.75 acres of land allotted to individuals among these plaintiffs under a Treaty of July 31, 1855 (11 Stat. 621), comprised a portion of the consideration for the land cession of March 28, 1836. The defendant further moved that the Commission decide that the parcels making up that one-hundred-thousand-plus acres should be valued, for purposes of computing consideration, as of the several dates of patent. These are the issues now before the Commission.

In their response, the plaintiffs denied that the above acreage constituted, or was contemporaneously intended to constitute, consideration for the 1836 Treaty, and argued that if the acreage was found to comprise a portion of the consideration, then the proper single date for valuation should be the date of the treaty in litigation: March 28, 1836.

The 1836 Treaty contained thirteen articles (7 Stat. 491-495). The first article detailed the cession. The eighth article is the one upon which the defendant's Motion for Preliminary Adjudication is

founded. It provided (7 Stat. 494):

> Article Eighth. It is agreed, that as soon as the said Indians desire it, a deputation shall be sent to the west of the Mississippi, and to the country between Lake Superior and the Mississippi, and a suitable location shall be provided for them, among the Chippewas, if they desire it, and it can be purchased on reasonable terms, and if not, then in some portion of the country west of the Mississippi, which is at the disposal of the United States. Such improvements as add value to the land, hereby ceded, shall be appraised, and the amount paid to the proper Indian. But such payment shall, in no case, be assigned to, or paid to, a white man. If the church on the Cheboigan, should fall within this cession, the value shall be paid to the band owning it. The mission establishments upon the Grand river shall be appraised and the value paid to the proper boards. When the Indians wish it, the United States will remove them, at their expence, provide them a year's subsistence in the country to which they go, and furnish the same articles and equipment to each person as are stipulated to be given to the Pottowatomies in the final treaty of cession concluded at Chicago.

As matters developed, the Chippewas and Ottawas did not ask the United States to remove them.

On July 31, 1855, the United States entered into a treaty with "the Ottawa and Chippewa Indians of Michigan, parties to the treaty of March 28, 1836" (Preamble to the treaty, 11 Stat. 621). Under the terms of Article 1 of the 1855 Treaty, certain lands within Royce Area 205 were withdrawn from sale for the benefit of the Indians. Out of those lands the Indians were to select allotments. Article 1 also provided that:

> . . . the benefits of this article will be extended only to those Indians who are at this time actual residents of the State of Michigan and entitled to participate in the annuities provided by the Treaty of March 28, 1836.

Consequently, in the early 1870's 1,863 Ottawa and Chippewa Indians were allotted the small tracts of land which, in the aggregate, made up the 121,450.75 acres which the defendant now contends should be regarded as consideration. The various allotments were of lands within the perimeter of the Royce 205 cession.

The effect of the provisions of Article 1 of the 1855 Treaty was to return to the individual Ottawas and Chippewas a portion of the lands which they had collectively ceded in 1836, but on which they had continued to reside, the 1836 Treaty having specifically accorded the Indians the right of hunting and "other usual privileges of occupancy" on the ceded lands until they should be required for settlement.

Thus by granting lands within Royce Area 205 to the Ottawas and Chippewas on an individual basis, the United States achieved a viable alternative to the unworkable plan to relocate these Indians to "the country between Lake Superior and the Mississippi", as expressed in the 1836 Treaty. By allowing these Indians continuous possession of the lands which they were authorized to occupy until the specific allotments were selected, the defendant saved itself the effort and expense of relocation as well as the cost of the lands which, in the 1836 Treaty, it had obligated itself to furnish.

We do not agree, however, with the defendant's contention that the allotted lands were part of the consideration for the 1836 cession and should be valued as of the dates of patent. The defendant contends

that the 1855 Treaty entirely supplanted the 1836 Treaty and, in support of this argument, relied on The Ottawa and Chippewa Indians v. United States, 42 Ct. Cl. 240 (1907). In that case, the Court decided that Article 3 [1/] of the 1855 Treaty did not abrogate the Indians' right to the accrued monies resulting from investment and reinvestment of a specified share of their annuity. The Court observed (Ottawa and Chippewa, supra, pp. 246, 247):

> The treaty of 1855, after its conclusion, took the place of the treaty of 1836, but did not take away from the Indians anything which they had already received under the latter treaty. The Government was thereby released from the payment of any annuities in the future, and was also released from its other obligations under the treaty which were to be performed in the future.

Thus the Court also decided that from 1855 the Indians could not have the benefit of those portions of Article 4 of the 1836 Treaty which provided for annual payments.

The Commission does not agree with the defendant's interpretation of the significance of the quoted portion of the decision. It is

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1/ The text of the 3d Article of the 1855 Treaty read:

Article 3. The Ottawa and Chippewa Indians hereby release and discharge the United States from all liability on account of former treaty stipulations, it being distinctly understood and agreed that the grants and payments hereinbefore provided for are in lieu and satisfaction of all claims, legal and equitable on the part of the said Indians jointly and severally against the United States, for land, money or other thing guaranteed to said tribes or either of them by the stipulations of any former treaty or treaties; excepting, however the right of fishing and encampment secured to the Chippewas of Sault Ste. Marie by the Treaty of June 18, 1820.

apparent that the Court mentioned that the 1855 Treaty replaced the 1836 Treaty simply because the Court had before it only a problem arising out of those two treaties and no others. The decision does not establish that the allotments to individual Chippewas and Ottawas were a collective substitution of consideration, or that the parties so intended them to comprise consideration for the 1836 Treaty.

The allotted lands will not be valued on their respective patent dates for the purpose of computing the consideration given by the defendant for the 1836 cession of Royce Area 205. However, it is apparent that the individual allotments were of the Indians' own land, and the defendant should not be obligated to pay additional compensation for them.

Since the 121,450.75 acres are to be excluded from the lands for which the plaintiffs may recover additional compensation, the Commission will deduct $109,305.67 (90¢ per acre for 121,450.75 acres) from the computed fair market value of $10,800,000.00 (averaging 90¢ per acre) for the entire tract taken as a whole, as previously determined by this Commission. This action is in accord with the plaintiffs' suggested computation in the event the defendant is to be allowed any credit against the fair market value of the tract for the allotted lands.

Concurring:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner