BEFORE THE INDIAN CLAIMS COMMISSION

THE SIX NATIONS, by Dean Williams, Jacob Jimerson, Ruby Charloe, David Charloe, Lewis Whitewing, Stewart Jamison, Peter Buck, Milton Babcock, Beryl Smith, Amanda Pierce, Julius Danforth, Oscar Archiquette, Sherman Skenadore, and Mamie Smith, members and representatives thereof, THE SENECA NATION OF INDIANS, THE CAYUGA NATION, by Stewart Jamison and Peter Buck, members and representatives thereof, THE ONEIDA NATION, by Julius Danforth, Oscar Archiquette, Sherman Skenadore, Mamie Smith, Milton Babcock, Beryl Smith and Amanda Pierce, members and representatives thereof, THE SENECA-CAYUGA TRIBE OF OKLAHOMA, THE ONEIDA NATION OF NEW YORK, THE ONEIDA TRIBE OF WISCONSIN, THE TUSCARORA NATION, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 84
THE STOCKBRIDGE MUNSEE COMMUNITY, THE STOCKBRIDGE TRIBE OF INDIANS and the MUNSEE TRIBE OF INDIANS by Arvid E. Miller and Fred L. Robinson, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	Docket No. 300-B

Decided: August 11, 1970.

Appearances:

Paul G. Reilly, Attorney for Plaintiffs in Docket No. 84. Aaron, Aaron, Schimberg & Hess were on the brief.

Marvin S. Chapman, Attorney for Plaintiffs in Docket No. 300-B.

Milton E. Bander with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Commissioner Blue delivered the opinion of the Commission.

The plaintiffs herein are various tribes of New York Indians who have brought claims pursuant to Section 2, Clause 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050) for an accounting by the United States of monies payable or goods distributable. Docket No. 300-B was severed from the claims of the plaintiffs in Docket No. 300 and consolidated with Docket No. 84 because of the mutual interest of the plaintiffs in 300-B and 84.

The accounting petition filed in Docket No. 84 is very lengthy, making reference to 21 treaties or agreements entered into with the United States or other parties under the guidance of the United States. The present claims, however, relate only to plaintiffs' objections to the accounting under two agreements, an Article of April 23, 1792, and the Treaty of November 11, 1794. There is a third claim, that of the Seneca Nation of Indians. It arises out of the Treaty of Buffalo Creek, August 31, 1826, which was a private agreement between the Senecas and purchasers of Seneca land.

By an Article dated April 23, 1792, the United States agreed to expend annually for the Five Nations, including the Stockbridge Indians, the sum of $1500 in purchasing certain described articles. The payments had been proposed by the President because of the then existing "crisis of affairs" involving the Indians, and it was on condition that the Indians evidence their attachment to the interests of the United States.

Defendant has contended that the promise of the United States to expend $1500 annually was not supported by any consideration and was no

more than a mere gratuity. The stipulation of the United States was made at a time when the continued friendship of the New York Indians was of great importance to the United States. Certain tribes of the Six Nations previously had been allied with England in the war against the Colonies. President Washington noted the crisis of affairs which rendered the expenditure for the Indians highly judicious. The obligation of the United States was undertaken on condition that the Indians continue their attachment to the interests of the United States. We find that under these circumstances the terms of the Article were not merely gratuitous. There was consideration for the Article of April 23, 1792, and the United States was obligated to fulfill its stipulated terms.

The Article was superseded by the Treaty of November 11, 1794 (7 Stat. 44). However, the records of the United States indicate that no sums were ever appropriated or disbursed in fulfillment of the Article during the three years that it was in effect. Accordingly, the plaintiffs are entitled to recover $1500 for each of those three years (1792, 1793 and 1794) or a total amount of $4500.

The Treaty of November 11, 1794, superseded the 1792 Article by adding the sum of $3000 to the $1500 annual payment. The monies were to be expended in "purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers, who shall reside with or near them, and be employed for their benefit." The Treaty became effective on January 21, 1795.

The 1794 Treaty also provided that "the immediate application of the whole annual allowance now stipulated /was/ to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid."

The defendant has argued that the treaty word "immediate" in regard to application of the terms should be read to mean that the allowance would be applied "directly" to the affairs of the Indians. We do not find this to be a reasonable interpretation. The Treaty of 1794 did not provide that the annual allowance was to be spent only when the Indians had use for the items enumerated. Therefore the Commission has found that the payment of $4500 was to begin in 1795 and was to continue yearly thereafter. It was, of course, to be spent only in accordance with the terms of the treaty.

The defendant's accounting report respecting the 1794 Treaty covered the years commencing in 1795 through 1952, a period of 158 years. Defendant claims credit for disbursements during that period totaling $703,133.33. Since the 1794 Treaty required payments of $711,000.00 for the 158 year period, defendant concedes the difference is now owing the plaintiffs. However, plaintiffs have other objections to certain items and the records used by defendant to support some of its claimed credits.

While it is not possible to correlate and reconcile all of the plaintiffs' objections, tabulations and conclusions, the Commission has given full consideration to all of the exceptions taken by plaintiffs. And, with certain mathematical corrections, we have substantially resolved

the figures and conclude that the defendant is entitled to a total credit of $678,781.58 for expenditures made in fulfillment of the 1794 Treaty.

As set forth in Finding of Fact No. 5, the plaintiffs' exceptions involve two matters:

(a) the use by defendant of records showing the forwarding of goods in lieu of the disbursement records, and

(b) the expenditure of funds under 10 specific categories (totaling $16,203.47) for purposes which plaintiffs contend do not come within the purview of the 1794 Treaty.

We agree with plaintiffs on the first exception. The disbursement records which reflect the actual delivery of goods to the Indians total $9,148.28 less than the total listing of goods forwarded from Philadelphia. Defendant is only entitled to credit the smaller sum which represents the value of the goods delivered in fulfillment of the Treaty.

The 10 specific items to which plaintiffs take exception total $16,203.47. We agree with plaintiffs on all except one item. We believe that the payment of $1000.00 for a sawmill for the Oneidas at Wisconsin was properly made in discharge of defendant's obligations under the 1794 Treaty. We consider a sawmill to be within the contemplated "implements of husbandry, and other utensils suited to their circumstances." But care of orphans, expenses of delegations, agents,

interpreters and education are just not the type of expenses contemplated. Neither is the payment for provisions since we understand "provisions" to mean stocks of food or other supplies. The payment out of the Civilization Fund was also an inappropriate expenditure. The General Accounting Office report which refers to this item gives no details concerning how the money was spent and only indicates it was derived from the sale of Indian lands. Accordingly, we find that the expenditures under 9 categories totaling $15,203.47 are not proper credits under the 1794 Treaty.

The defendant is entitled to credits of $678,781.58 under the 1794 Treaty. Plaintiffs are entitled to recover the difference between this amount and the $711,000.00 required to have been expended. This amounts to $32,218.42.

Plaintiffs contend that they are entitled to interest on the sums due under the 1792 Article and the 1794 Treaty. They argue that the contracts are divisible into annual periods and if private parties were involved actions for the failure to perform each year would separately lie and interest would be allowed for the entire period of each breach. Of course this is not a case involving private parties. The United States is the defendant. The rule is well established that the United States is not liable for interest unless there is an express contractual or statutory requirement to pay interest. There is no such authority in this case. Plaintiffs further rely on the Commission decision in The Delaware Tribe of Indians v. United States, 21 Ind. Cl. Comm. 18 (1969), affirmed in

part and reversed in part, 192 Ct. Cl. ___ (June 12, 1970) and our language concerning the policy to "make the Indians whole . . . had the Government done what it should have done." As noted above, the decision relied upon was appealed and the reversal by the Court of Claims related to that portion of the Commission's decision upon which plaintiffs based their argument.

The third claim, which involves only the Seneca Nation of Indians, devolves from a private agreement (called the Treaty of Buffalo Creek) of August 31, 1826, between the Senecas and three men who purchased Seneca land. The arrangement was not to become effective until the Senecas were assured of receiving a perpetual annuity of $2583.00. The purchasers of the Seneca land did provide for this by buying stock bearing 6% interest. Thereafter most of the purchase price was deposited in a bank in Upstate New York in trust for the Senecas, and the Bank, for over 29 years, paid the Seneca Nation of Indians the yearly annuity of $2583.00.

On June 27, 1846 (Sec. 3, 9 Stat. 20), the United States enacted legislation to provide for the United States Treasury to take over this fund from the 1826 Treaty, and thereafter the Indians were to receive 5% interest on this money. The actual receipt of the fund by the Treasury didn't occur until 1855 and no appropriation was made for the Senecas until 1857. At that time $2152.50 was appropriated, representing 5% interest on the fund from the 1826 Treaty, in accordance with Section 3 of the Act of June 27, 1846. A yearly payment of $2152.50 continued until 1910 when a commingling with other Seneca monies took

place. No claim is made concerning the new fund created.

The Seneca Nation of Indians has complained that the United States, as guardian of its funds, when it took over the principal from the Treaty of 1826, reduced the annual annuity which the Senecas expected and had been receiving; that the decrease was a breach of the fiduciary relationship and resulted in an unconstitutional taking of Seneca Indian property in the amount of $430.50 per year through 1909.

Although the terms of the Treaty of 1826 did not provide for investment of the principal, it is clear that a simultaneous oral agreement was concluded between the sellers, the Senecas, and the buyers, the three private citizens, concerning a yearly annuity the Indian Nation was to be paid. A contract may be partly written and partly oral, and a written contract may be varied by an oral agreement when such is collateral and not inconsistent with the expressed conditions of the written contract. There is no question but that the Seneca yearly stipend was a part of the contractual obligation. The Bank which had dealt with the original purchasers and which had been acting as trustee of the account for nearly 30 years, stated without reservation that the annuity was to be perpetual in the amount of $2583. It paid to the Senecas, through a United States Agent acting on their behalf, for nearly 30 years, that specific annual amount of money, $2583.00. It is even reasonable to assume that the Treaty

of 1826 might not have been effected but for this understanding between the parties as to the amount due and owing yearly to the Seneca Nation.

The United States, it is true, was not a party to the Treaty of 1826 or to the annuity arrangement made between the buyers and the Seneca Nation of Indians. However, it was necessary that the sale be held under the authority of the United States, (Act of July 22, 1790, 1 Stat. 138). In fact, a representative of the United States in the person of a Commissioner attended the treaty ceremony. And the United States was well aware of the terms of the agreement. On January 26, 1827, the purchasers of the Seneca land wrote at length to James Barbour, then Secretary of War, about the Treaty agreement. On February 16, 1827, an employee of the Office of Indian Affairs wrote to the Secretary of War about the agreement. The United States Senate, on February 24, 1827, received information on the Treaty from the President and a United States Agent received the annual annuity from the Bank.

Because of the power of the United States and the relationship which existed between the United States, in the person of the President, and the Indians, the Indians would necessarily rely on the good faith of the United States to preserve their equities. This would seem to be the basic reason for their wanting the annuity or annual stipend to be put in the President's name, to assure its perpetual safety on their behalf.

> "When the Federal Government undertakes an 'obligation of trust' toward an Indian tribe or group . . . the obligation is 'of the highest responsibility and trust,' not that of 'a mere contracting party' or a better-business-bureau." Seneca Nation of Indians v. United States, 173 Ct. Cl. 917, 925 (1965)

Therefore, when the United States, through the legislation of June 27, 1846, provided that the Seneca Treaty fund would be taken and deposited in the United States Treasury, they were in effect assuming the obligation to continue the yearly payment according to the contract right of the Seneca Nation. The assumption of a liability entails the duty of making payments as specified. As the Supreme Court said in the case of Peoria Tribe of Indians of Oklahoma v. United States, 390 U.S. 468 (1938):

> "Indian treaties are not to be interpreted narrowly as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the senses in which naturally the Indians would understand them. They are to be construed so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." (390 U.S. at 472)

Therefore the Commission believes that the United States is liable in the amount of $430.50 for every year, from 1857-1910, when a lesser sum was paid to the Senecas than that to which they are entitled. The defendant also is liable for the full amount of $2583.00 for the year 1856 when no annuity at all was appropriated or paid to the Seneca Nation. Here again, however, there should be no entitlement to interest on the deficiency.

In summary then the plaintiffs are entitled to recover:

1792 Article	$ 4,500.00
1794 Treaty	32,218.42
	$36,718.42

And in addition, the Seneca Nation of Indians is entitled to recover $25,399.50.

Since these gross recoveries are subject to such gratuitous offsets as may be allowable, the cases will now proceed to the offset phase.

Brantley Blue, Commissioner

Concurring:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner