BEFORE THE INDIAN CLAIMS COMMISSION

SEMINOLE INDIANS OF THE STATE OF FLORIDA, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 73
SEMINOLE NATION OF OKLAHOMA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 151

Decided: October 22, 1970

Appearances:

Roy L. Strubel, Effie Knowles, and Charles Bragman, Attorneys for Plaintiff in Docket No. 73.

Paul M. Niebell, with whom was Roy St. Lewis, Attorneys for Plaintiff in Docket No. 151.

Craig A. Decker and Jonathan U. Burdick, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The Seminole Indians of Florida and the Seminole Nation of Oklahoma claim as successors to The Seminole Nation which was in Florida prior to 1823 and which, while in Florida, sustained the injuries for which compensation is sought in these suits. The Seminole

Nation of Oklahoma represents that segment of The Seminole Nation which removed to the Indian Territory. The Seminole Indians of Florida represent that segment of The Seminole Nation which did not remove to the Indian Territory. Their claims, having a common source, are wholly overlapping. Of the four claims originally encompassed in these suits, only the first, for additional compensation for most of Florida excepting three enclaves and one reservation, is now being considered, the gross sum of $12,347,500.00 having been awarded on it. That award is subject to reduction by way of offsets, and the allowable offsets are the subject of this opinion. The second claim, for additional compensation for the reservation, was dismissed with prejudice on May 13, 1970. Seminole Nation, et al., v. United States, 23 Ind. Cl. Comm. 108. The third claim, concerning the McComb Reservation, and the fourth claim, based on transactions creating the Everglades National Park, are presently consolidated in Docket No. 73-A.

Defendant in its amended answer, claimed credit for gratuitous offsets totalling $152,785.93. However, in its brief and requested findings of fact on offsets, filed August 1, 1969, defendant chose to assert only three offset items. The first is for $3,640.20 in aggregate funeral expenses incurred between July 1, 1885, and June 30, 1951 (Def. Pro. Find. No. 2). The second claim is for $84,719.37 in aggregate land expenditures (Def. Pro. Find. No. 3). The third claim is for the fair market value, as of July 20, 1956, of 27,086.10 acres of land conveyed to the plaintiffs under an Act of that date, 70 Stat. 581 (Def. Pro. Find. No. 4).

The defendant claims credit for expenditures totalling $3,640.20 for Indigent Indians: Funeral Expenses. Such payments for the benefit of indigent Indians are not proper offsets against the judgment in favor of the Seminole Tribe or Nation and this claimed offset is disallowed.

We recognize the past inconsistencies and confusion which have prevailed on the question of the allowance of funeral expenses as gratuitous offsets. Defendant contends that there is well-established precedent for the allowance of funeral expenses. Plaintiffs argue that the decisions of the Court of Claims hold that such expenses were for the benefit of individual Indians and are not proper offsets against an Indian tribe. Cases may be cited for each contention, and there is no obvious rationale by which many of the inconsistencies may be explained.

In Quapaw Tribe et al., v. United States, 128 Ct. Cl. 45, 72 (1954) the Court of Claims affirmed this Commission in its allowance of "Indigent Indians, Board and Funeral Expenses -- $54.44." 1/ In the same decision the Court reversed the Commission and disallowed as an offset "Presents to Indians -- $721.48." The Court considered that the presents were made to certain individual members of the tribe and not to the tribe as a whole.

In Kiowa, Comanche, and Apache Tribes v. United States (Docket No. 32) 5 Ind. Cl. Comm. 297 (1957) the Commission disallowed certain claimed offsets, including cash payments to individual indigent Indians. 2/ The Court of Claims affirmed. Kiowa, Comanche and Apache Tribes v. United

1/ The expenditures were: Board--$33.20 and Funeral Expenses--$21.24.

2/ The payments to individual indigent Indians were cash payments, and no funeral expense expenditures were involved.

States 143 Ct. Cl. 534 (1958). On rehearing the United States raised the question of cash payments to individual indigent Indians. The Court stated:

> . . . Defendant points to the fact that in our decision in Quapaw Tribe v. United States, 128 C. Cls. 45, the court held that the payment of board and funeral expenses of indigent Indians was a proper offset. In the same decision, however, this court held that presents to individual Indians did not constitute proper offsets against a judgment rendered on a tribal claim. Obviously, the two rulings were inconsistent and this inconsistency was discovered and briefed to the Commission in the course of the trial of the instant case. The Commission rightly determined to follow our ruling with respect to presents to individual Indians, and we affirmed that determination. To the extent that our holding is in conflict with our ruling in the Quapaw case respecting board and funeral expenses to individual Indians, that holding is overruled. United States v. Kiowa, Comanche and Apache Tribes, 143 Ct. Cl. 545, 550-551 (1958) cert. denied 359 U.S. 934.

Plaintiffs assert that the Kiowa case overruled Quapaw on the issue of allowing funeral expenses to be offset. Defendant contends that Kiowa did not change Quapaw as to funeral expenses and cites a case decided about 8 months after the Kiowa decision, United States v. Seminole Nation 146 Ct. Cl. 171, 184 (1959), wherein the Court stated:

> . . . The evidence before the Commission indicated, however, disbursements of $160.00 for funeral expenses for indigent Indians. This item, in accordance with the decision in The Quapaw Tribe of Indians, et al., v. United States, 1 Ind. Cl. Comm. 644, affirmed 128 C. Cls. 45, was allowed as an offset by the Commission.
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> By way of answering the Government's contention, it is to be emphasized that the burden is on the United States to prove the offsets it claims. Menominee Tribe v. United States, 118 C. Cls. 290, 326-327. We have further said that reports of the General

> Accounting Office are not conclusive on this matter. The determination of whether facts have been established that would support an allowable offset is for the Indian Claims Commission, subject to review by this court. Kiowa, Comanche and Apache Tribes v. United States, supra. That determination can and must be made by the Commission on the evidence presented, whether it consists entirely of matter submitted by the Government, or includes rebuttal evidence presented by the petitioner. The General Accounting Office reports reflect disbursements for funeral expenses for indigent Indians, thus establishing an offset for that item. But where those reports, coupled with the explanatory testimony of a Government employee, raise some doubt as to the purposes for which the expenditures were made, 13/ or clearly show disbursements which cannot be offset, the Government has not only failed in its prima facie showing, but also has not met its burden of proof. The Indian Claims Commission found that to be the case as to all items except the funeral expenses. We have carefully examined the record in this regard and are satisfied that the Commission did not err as a matter of law in refusing to rule that the Government had made a prima facie case on the evidence submitted.
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> 13/ In Menominee Tribe v. United States, 118, C. Cls. 290, 326-327, we said: " *** When *** an item is asserted as an offset which so far as the evidence shows may or may not have been expended for one of the purposes for which offsets cannot be made, we must resolve the doubt against the offset. ***"

It should be noted that the question of the Commission's allowance of $160.00 for funeral expenses was not before the Court, since the plaintiff had not appealed. It is obvious that for this reason, the Court carefully avoided discussing funeral expenses and limited its affirmance of the Commission to precisely the subject matter which was before it on the appeal.

Thus, the Court's opinion in Kiowa, Comanche and Apache Tribes, is left standing unimpaired. Although it is true that we now find no evidence of funeral expenses being claimed in that case, the Court evidently was of the belief that they were in the case and explicitly ruled on them. We have no reason to believe the Court would rule otherwise in the present case, merely because what was previously said has proved to be dictum. The rationale is as compelling as it ever was and we can find no sound basis for making a distinction between funeral expenses and other expenses for indigent Indians.

The Indigent Indians category in this case included:

Clothing	$ 671.00
Funeral Expenses	3,640.20
Hardware, glass, oils, and paints	15.54
Subsistence	16,685.80
(Def. Ex. 0-1, p. 37)	

Defendant elected to plead only the funeral expense item as a gratuitous offset, conceding that the cases have held the other items to be individual and not tribal payments. The entire category of expenditures for indigent Indians, including the $3,640.20 for funeral expense payments, should be disallowed as an offset against a tribal judgment.

The second claim is for $84,719.37 in aggregate land expenditures. The Commission notes that the land expenditures were made in the course of numerous transactions in which the United States bought from private parties land in Florida which, coincidentally, had at one time comprised portions of the Seminole reservation in that state. These transactions, which involved parcels ranging in size from just under a section to

more than ten thousand acres, were held by the United States in trust for the Seminole Nation, having been acquired under the authorities set out in Finding No. 65 this date entered in the cases at bar. As reflected in that Finding, the Commission has allowed offset of those land expenditures. Sioux Tribe v. United States, 161 Ct. Cl. 413, 315 F. 2d 378 (1963) cert. denied 375 U.S. 825.

The claim of the fair market value of 27,086.10 acres of land as of July 20, 1956, presents a different issue. The plaintiffs contend that the following language precludes allowance of this offset (Indian Claims Commission Act of 1946, 60 Stat. 1050, §2):

> ...Expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas. . . . shall not be a proper offset against any award.

The 27,086.10 acres are submarginal agricultural lands in Florida purchased with funds from Title II of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 200), and subsequent acts for the relief of stricken agricultural areas throughout the United States.

This issue has not heretofore been considered in the courts, and it is not immediately pending in any other suit before this Commission. 3/ The defendant contends that only emergency relief expenditures themselves are proscribed as offsets, and that the quoted ban has no application where the expenditures resulted in the acquisition of land and some

3/ Cf. Pueblo de Zia, et al., v. United States, Docket No. 137, in which the issue will be considered if that Docket proceeds to the offset phase, and in which the defendant has briefed the issue extensively.

years later the land itself, and not the expended sums, is asserted as an offset.

Concerning whether submarginal lands purchased by the Federal Government during the depression years may be offset, the Commission notes that one of the New Deal objectives was to remove from cultivation the farms which were economically and socially least desirable, that is, farms loosely termed "submarginal", and it was the best judgment of the authorities that buying such submarginal land would be cheaper than leasing it (Yearbook of Agriculture, 1934, pp. 20-23). The land acquisition program was first established by the Federal Emergency Relief Administration, and was to include four types of projects: Agricultural demonstration projects; Indian lands demonstration projects; migratory waterfowl projects; and recreational demonstration project (Yearbook of Agriculture, 1936, pp. 48, 49). The program, involving all four types of projects, was transferred to the Resettlement Administration on June 1, 1935 (id.), and the Resettlement Administration undertook to move white farmers off submarginal farms and Indians on to some of those same submarginal lands (Yearbook of Agriculture, 1937, pp. 22, 23), as the Department of Agriculture's Indian Demonstration Projects. By Executive Order 7868 of April 15, 1938 (3 CFR '36/'38 Comp. 395, et seq.), certain of the Department of Agriculture's Indian Demonstration projects were transferred to the Department of the Interior. The first transferred project itemized in the Executive Order

was Seminole Project No. L1-FL-6, that is, the 27,086.10 acres of submarginal lands purchased in Florida for the Seminole Land Acquisition Project for the benefit of the Seminole Indians and for the use of the Seminole Tribe (letter, June 30, 1970, BIA to Paul Niebell), which was thereafter to be administered by the Commissioner of Indian Affairs for the uses for which they were acquired (EO 7868, supra).

When the beneficial interest was transferred to the plaintiffs in 1956, the then Assistant Secretary of the Interior advised the House Committee on Interior and Insular Affairs that the transaction "... would fulfill an implied commitment at the time the lands were purchased that they would ultimately be transferred to the [Seminole] tribe." (Def. Ex. 0-16, p. 3). Thus, the 27,086.10 acres were not just somehow acquired by the defendant and then, many years later, generously donated to the plaintiffs. The defendant contends (Def. Rep. p. 2):

> The fact that years later (1956, when the land had no doubt been greatly improved and had become much more valuable) the United States decided to gratuitously grant these lands to Seminoles has no relationship to the emergency acts under which the lands were earlier acquired, and the transfer to the Seminoles was an outright gratuity to them alone.

However, the foregoing outline of the reasons and circumstances surrounding the acquisition makes it clear that the land was bought by the defendant for the dual purposes of aiding failing farmers and aiding Seminoles. Donation of the beneficial interest to the Seminoles in 1956 was no more than the last step in a chain of facts in which the Seminoles were always involved from 1933 to 1956.

Under these circumstances, this Commission is of the opinion that these lands were, in effect, "relief payments made since 1933, which were available [as a class] to whites as well as to Indians" and were, therefore, intended by Congress to be excluded from any category of lawful offsets (see page 7 of House Conference Report No. 2693 (79th, 2d) on H. R. 4497 which, upon enactment, became the Indian Claims Commission Act of 1946).

This Commission concludes that the claimed offset of 27,086.10 acres of land falls squarely within the quoted language of §2 of the Act prohibiting the consideration, as offsets, of expenditures made under the National Recovery Acts. Accordingly, this claimed offset is disallowed in its entirety.

Defendant contends that the entire course of dealings and accounts between the parties warrants a determination under Section 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050) that the claimed offsets should "in good conscience" be allowed. The early contacts between the United States and the Seminole Indians were marked by hostilities. The Creek Indians who had been defeated in Alabama in 1814 fled to Florida. When the United States acquired Florida from Spain (Treaty of February 22, 1819, 8 Stat. 252) the Government was engaged in fighting those defeated Creeks and Seminoles. After the conclusion of the First Seminole War in 1819, the United States took formal possession of Florida and entered into the Seminole Treaty of September 18, 1823, 7 Stat. 224, whereby the Seminole claims to Florida were ceded to the United States and a reservation was allotted to the Seminoles in south-central Florida. In 1832

the Seminole Nation signed a "removal treaty" (7 Stat. 368) providing for the exchange of the Florida reservation for a reservation adjacent to the Creek Reservation in the Indian Territory (later part of the State of Oklahoma). Subsequent efforts to remove the Seminoles from Florida led to the seven-year-long Second Seminole War.

Following the periods of hostility with the Seminoles, the United States has expended significant sums to furnish assistance for the Seminole Indians. As the defendant has stated, during the years when the United States was at war with the Seminoles, it was inevitable that there would be atrocities committed on both sides. However, defendant contends that after the war years, the United States has assisted the Seminoles in helping them to achieve better living conditions and better opportunities in life. In support of its argument defendant has cited numerous Congressional Acts and Treaties providing for assistance to the Seminoles. From the mid-1800's until the present time the Seminoles have participated in the many federal programs which have been administered for the benefit of Indians.

In The United States v. Emigrant New York Indians et al., 177 Ct. Cl. 263 (1966) the Court of Claims reviewed the Commission's allowance of certain gratuitous offsets, including moneys spent for the purchase of land. The Indians' judgment in that case had been based on a determination that the United States had acted unfairly and dishonorably and the Indians were entitled to recover under clause (5), section 2 of the Indian Claims Commission Act. The appellees contended that

since the course of dealings on the part of the Government towards the New York Indians had been found to have been less than fair and honorable, defendant should not be entitled to offset the claimed gratuities. The Court stated at pages 287, 288:

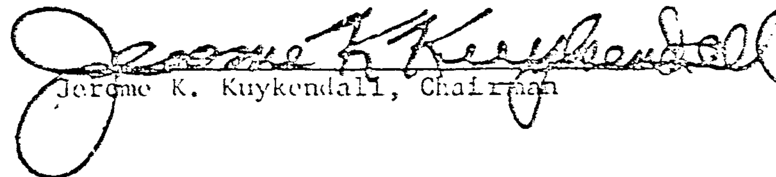
> . . . The Government's actions and its course of dealings with the Indians in 1832 do not prevent it from recovering in good conscience the gratuitous expenditures which it actually made in purchasing lands for appellees a century later. Congress plainly contemplated the offset of such a claim in the absence of a showing of irregularity or unfairness with respect to the amounts deducted.

Plaintiffs have not made any objections in this case to the defendant's proposed finding on the "course of dealing". Plaintiffs have not contended that the entire course of dealings between the parties was such that the United States should not in good conscience be permitted to set off gratuitous expenditures.

It appears to us that the instant case, in which recovery is based on unconscionable consideration, more strongly compels the allowance of the claimed offsets than does New York Emigrant Indians, supra, which was based on lack of fair and honorable dealings.

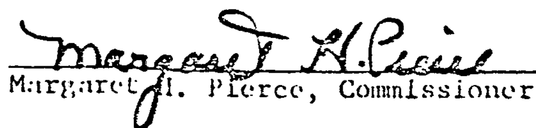
We have determined that only one item, the $84,719.37 expended for land purchases, can be considered a permissible gratuitous offset under Section 2 of the Act. We have considered the nature of the claim and the entire course of dealings and accounts between the United States and the plaintiffs, and we have concluded that in good conscience the offset of $84,719.37 should be allowed against the award in this case.

A final order consistent with the foregoing discussions and with the Findings of Fact this date entered in these consolidated cases will be issued.


Jerome K. Kuykendall, Chairman

Concurring:

Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner

Commissioner Blue dissents.
Commissioner Vance concurs in the dissent.

BLUE, Commissioner, dissenting:

I agree with the majority except in one respect. It is my opinion that the $84,719.37 offset should not be allowed. I therefore dissent to that extent.

The Act creating the Indian Claims Commission provides, in part, that 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 ..."

In considering the entire course of dealings between the Seminole Indians of the State of Florida and the United States of America, particularly and specifically as set forth in this Commission's Findings of Fact in the title stage of this case, I conclude that the actions of the United States Government were such that I cannot, in good conscience, vote for the allowance of the claimed $84,719.37 offset.

This Commission has heretofore issued its Opinion in this case, seeking to compensate claimants for the land taken, as of its fair cash market value in 1823.

Still to be considered, in this offset stage of the proceeding, is the entire course of dealings between the parties, and those dealings involve many wrongful actions on the part of the United States Government that may not be cognizable as claims and cannot in any way be considered by this Commission, except in <u>this stage</u> involving gratuitous offsets.

Those wrongs and those dealings as set forth in our previous Findings of Fact (mentioned above) are the ones I consider most heavily in weighing whether or not this claimed gratuitous offset of $84,719.37 should, in good conscience, be allowed. In weighing the entire course of dealings between the parties I believe that the claimed offset should not be allowed.

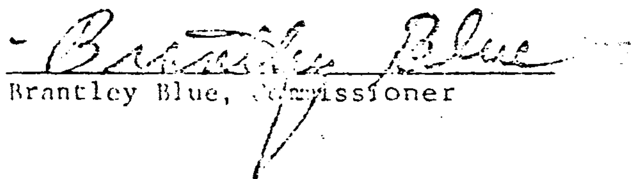
In United States v. Emigrant New York Indians, 177 Ct. Cl. 263 (1966), the Court of Claims affirmed this Commission in allowing a somewhat similar offset. However, the course of dealings differ in each case, and in the case before us I cannot see that the purchase of the lands involved, by the United States, at a much later date and given to the Seminoles, materially affected the entire course of dealings between these two parties to such an extent that the claimed gratuitous offset, in good conscience, should be allowed.

As I understand the Act creating the Indian Claims Commission, and as I understand the law as it has evolved: the burden is on the Government (defendant) to show that the claimed offset, by its very nature and in line with the entire course of dealings between the parties, should, in good conscience, be allowed. Menominee Tribe v. United States, 118 Ct. Cl. 290, 326-327; United States v. Seminole Nation, 146 Ct. Cl. 184; United States v. Assiniboine Tribes of Indians, _____ Ct. Cl. _____, Slip Opinion dated July 15, 1970, pp. 12-15.

In my opinion we must not look only at the course of dealings as they existed at the time the purchases of land were made, many

years after the several wrongs. We must consider the course of dealings as they existed in 1823, prior thereto, and subsequent thereto ... the entire course of dealings. In my view Congress clearly intended for this Commission to consider each and all of these matters when it comes to gratuitous offsets; else the language would not be in the Act.

For the above reasons I dissent to the extent indicated.



Brantley Blue, Commissioner

Commissioner John T. Vance concurs in this dissent.