BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 175
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: February 18, 1971

Appearances:
Angelo A. Iadarola and R. Anthony Rogers, Attorneys for the Plaintiff.

John D. Sullivan, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Blue, Commissioner, delivered the opinion of the Commission.

Plaintiff has filed a motion for partial summary judgment in advance of a trial on valuation. The motion is in two parts as follows: 1. That the Commission enter judgment that the value of that portion of plaintiff's 1855 reservation, adjudged by this Commission to be outside plaintiff's aboriginal lands, can neither constitute consideration for the cession of plaintiff's lands under the 1855 Treaty, nor be offset as a gratuity against any judgment that may be eventually entered herein in favor of the plaintiff;

2. That the Commission enter a judgment that only disbursements made pursuant to Article 4 of the 1855 Treaty, and not those made pursuant to Article 5 of the Treaty, constitute consideration for the cession of plaintiff's lands. For reasons set out more fully below the Commission grants in part and denies in part plaintiff's motion.

A brief review of the history of this claim and of the claim of the plaintiff in Docket No. 175-A, in which the Commission has already entered final judgment, is necessary to a proper understanding of the issues presented in plaintiff's motion. Under the Treaty of June 11, 1855 (12 Stat. 957), the plaintiff ceded to the United States all its right, title and interest in and to a large tract of land in Idaho, Oregon and Washington. The treaty reserved from the lands ceded a tract of land to be set apart as a reservation for the exclusive use and benefit of the tribe. The plaintiff brought this claim under Clauses (3) and (5) of Section 2 of the Indian Claims Commission Act (60 Stat. 1050) asking for additional compensation for the 1855 land cession. Under the Treaty of June 19, 1863 (14 Stat. 647), the plaintiff ceded to the defendant the greater part of its 1855 reservation, and retained a small reservation in Idaho. In Docket 175-A plaintiff brought a claim for additional compensation for the 1863 cession of its 1855 reservation. On December 31, 1959, in Docket 175-A, the Commission determined that the Nez Perce were entitled to

additional compensation for the 1863 cession (8 Ind. Cl. Comm. 220)[1] and on June 17, 1960, entered final judgment in favor of the Nez Perce in the amount of $4,157,605.06.

In the instant case, Docket 175, on March 21, 1967, the Commission determined that the plaintiff had held aboriginal title to part of the lands ceded under the 1855 Treaty (18 Ind. Cl. Comm. 1). Without so specifying, our title determination did not include two areas within the Nez Perce cession which were within the boundaries of the 1855 reservation.[2] It thus results that the 1855 Treaty granted to plaintiff

1/ In that opinion, the Commission also resolved a dispute concerning the proper boundaries of the 1855 reservation. The calls in the 1855 Treaty used Indian names for certain rivers and it was uncertain which rivers were being described. There were disputes with respect to the western and northern borders of the reservation. The Commission resolved both of these disputes in favor of the plaintiff.

2/ There is some controversy as to how the Commission came to exclude part of the 1855 reservation from the aboriginal holdings of the plaintiff. When this motion was argued before the Commission, on October 29, 1970, counsel for the plaintiff speculated that had the Commission realized in 1967 that its title determination failed to include the full reservation it might have reconsidered its position. (Tr. Oct. 29, 1970, p. 28) In response to questions voiced by three Commissioners, counsel for plaintiff insisted that plaintiff had claimed, in its petition, the entire excluded area and that the Commission in its decision excluded these areas. (Tr. Oct. 29, 1970, pp. 7, 35) A careful examination of the record in this case, however, indicates that in its Severed and Amended Petition, filed herein March 1, 1963, plaintiff did not claim its entire 1855 reservation as being held aboriginally, although it had claimed it in its original petition. Plaintiff's Exhibit 2G -- which at the trial of this claim, held May 21, 1962, counsel for plaintiff displayed as indicating the extent of the lands plaintiff claimed (Tr. May 21, 1962, p. 7-A) -- contains a pink line which represents the opinion of Dr. Verne F. Ray, expert witness for the plaintiff, as to the aboriginal land of plaintiff. This line excludes from plaintiff's aboriginal holdings both of the areas involved in this dispute. The Commission's opinion indicates not that it excluded these disputed lands from the aboriginal lands of the plaintiff, but rather that, with respect to these areas, the Commission found that plaintiff had title to all that it claimed. See Findings of Fact 87-91, 18 Ind. Cl. Comm. at 106-111.

recognized title to some lands which it did not previously hold under aboriginal title, as subsequently determined by this Commission. It is these lands which are the subject matter of part one of the plaintiff's motion, and borrowing the terminology used by plaintiff, we shall refer to them as the "outside reservation area."

Plaintiff presents two separate theories in support of part one of its motion. Plaintiff first argues that the intent and understanding of both the United States and the Nez Perce, as evidenced by the language of the treaty, make it clear that the outside reservation area was neither consideration under the treaty nor a gratuity. Secondly, plaintiff argues that in agreeing to move onto and stay upon the 1855 reservation it gave full consideration for the entire reservation and therefore no part of the reservation can constitute either consideration for the land cession or a gratuity. With respect to its first theory, plaintiff contends that the outside reservation area cannot constitute consideration for the Nez Perce cession because it was not so intended by the parties to the treaty. Defendant, on the other hand, argues that the outside reservation area was consideration for the cession because it was a benefit realized by the plaintiff under the treaty. In simplified terms, it is the position of the plaintiff that only that which is so intended by the parties can be consideration, and the position of the defendant is that any benefit received or detriment suffered is consideration. We agree with the plaintiff.

Consideration for a promise has been defined as an act, a forbearance, a change in legal relationship, or a return promise, "bargained for and given in exchange for the promise," Restatement of Contracts §75 (1932). Thus for a performance to constitute consideration it must have been sought by the promisor in exchange for his promise and given by the promisee in exchange for that promise. A promise and its consideration must bear a reciprocal relationship one to the other; the consideration induces the making of the promise and the promise induces the furnishing of the consideration. Restatement (Second) of Contracts §75, comment b (Tent. Draft No. 2, 1965); see Wisconsin & Mich. Ry. v. Powers, 191 U.S. 379, 386 (1903). In other words, nothing is consideration which is not regarded as consideration by both parties. Fire Ins. Ass'n. v. Wickham, 141 U.S. 564, 579 (1891); Philpot v. Gruninger, 14 Wall. (81 U.S.) 570, 577 (1871). A mere benefit to the promisor or detriment to the promisee standing alone is insufficient to constitute legal consideration. Wisconsin & Mich. Ry. v. Powers, 191 U.S. 379, 386 (1903). There must also be present the factor of mutual inducement. In the language of the Supreme Court:

> . . .The mere presence of some incident to a contract which might under certain circumstances be upheld as a consideration for a promise, does not necessarily make it the consideration for the promise in that contract. To give it that effect it must have been offered by one party and accepted by the other as one element of the contract. In Kilpatrick v. Muirhead, 16 Penn. St. 117, 126, it was said that "consideration, like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular action by something of value or convenience and inconvenience recognized by all of them as the moving cause.

> That which is a mere fortuitous result flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration." (Fire Ins. Ass'n. v. Wickham, 141 U.S. 564, 579 (1891)

Applying the law of consideration to the present dispute, it becomes apparent that the mere fact that the Nez Perce received additional land under the 1855 Treaty, as we determined in our decision of March 21, 1967, does not make that land consideration for the Nez Perce cession. The outside reservation area, although clearly a benefit to the plaintiff, cannot be construed as consideration for the cession unless the parties so intended it. Unless the defendant offered this land to the plaintiff as inducement for the cession of its aboriginal lands, and unless the cession was offered by the plaintiff as inducement for receiving this land, the outside reservation area does not constitute legal consideration for the cession.

The language of the treaty 3/ makes it clear that the outside reservation area was not consideration for the Nez Perce cession.

3/ Article I. The said Nez Perce tribe of Indians hereby cede, relinquish and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

(Description of the cession)

Article II. There is, however, reserved from the lands above ceded for the use and occupation of the said tribe, and as a general reservation for other friendly tribes and bands of Indians in Washington Territory, not to exceed the present numbers of the Spokane, Walla-Walla, Cayuse, and Umatilla tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

(Description of the reservation)

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said tribe as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent; and the said tribe agrees to remove to and settle upon the same within one year after the ratification of this treaty. ....

At no point in the eleven articles of the treaty is there any indication that the parties intended land to pass from the United States to the Nez Perce. The only mention of land in the treaty is in Articles 1 and 2. Article 1 sets the outer boundaries for the Nez Perce cession, which included the disputed areas. Article 2 states that "[t]here is, however, reserved from the lands above ceded" a reservation for the Nez Perce Tribe (emphasis added). The language of Article 2 clearly indicates that the reservation area was being excluded from the Nez Perce cession. The reservation was the portion of its ancestral lands which the plaintiff was not ceding under the treaty. Article 1 and Article 2 must be interpreted together as the description of the net lands being ceded by the plaintiff to the defendant. The treaty language does not indicate that the United States is granting to the Nez Perce title to land. It is certain that had the parties intended conveyance of title to the outside reservation area to constitute consideration for the cession, some mention of that understanding would have appeared in the treaty. Moreover, the circumstances under which this dispute arises make it highly unlikely that the parties contemplated such an arrangement in 1855 as neither party was aware, prior to our decision of March 21, 1967, that the outside reservation area existed.

The terms of the 1855 Treaty, as were the terms of many other Indian treaties, were formulated by the defendant. We are therefore obligated to construe them "in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U.S. 1, 11 (1899); See Citizen Band of Potawatomi Indians v. United States, 179 Ct. Cl.

473, 482, 391 F. 2d 614, 619, cert. denied, 389 U.S. 1046 (1967). It is clear that from the Nez Perce standpoint the 1855 Treaty was one in which they ceded to the United States that portion of their aboriginal lands outside of the reservation. The tribe could not have understood that any portion of the reservation was being given to it by the United States. In the Indian mind, the entire reservation already belonged to the Nez Perce Tribe. Therefore, receipt of any portion of the reservation could not have been viewed by the Nez Perce as an inducement for the cession of their lands. Therefore, we hold that the outside reservation area was not consideration for the Nez Perce land cession.

In so holding, the Commission is not deviating from precedent. The four cases relied on by the defendant in its brief are not controlling in this dispute. In Cheyenne-Arapaho Tribes of Indians v. United States, 10 Ind. Cl. Comm. 1 (1961), the claimants ceded their aboriginal lands in Colorado, Nebraska, and Kansas, and received a reservation in Indian Territory. In Absentee Delaware Tribe v. United States, 9 Ind. Cl. Comm. 346 (1961), the plaintiff ceded its aboriginal lands in Indiana and received a reservation in Kansas. In Emigrant New York Indians v. United States, 13 Ind. Cl. Comm. 560 (1964), claimants' aboriginal lands had been in New York and the reservation they received was in Wisconsin. In all three of these cases, both parties to the treaty were aware at the time the reservation was created that the tribe was receiving title to lands to which it had no prior claim. The parties being aware of the transaction, it was proper in those cases for the Commission to hold that the reservation

was consideration for the cession. On the other hand, in the present dispute neither party to the treaty was aware that the tribe was receiving title to lands outside of its aboriginal lands and therefore the parties could not have intended the outside reservation area to be consideration for the cession. Upper Skagit Tribe v. United States, 13 Ind. Cl. Comm. 583 (1964), is not on point. In that case the Commission had, in the valuation stage of the litigation, valued all of claimant's aboriginal lands, including the reservation. It thus became necessary in calculating the consideration paid by the United States to include the value of the reservation, so that the defendant would not be paying for lands it had not received. Clearly, Upper Skagit does not apply to this case.

Having decided that the outside reservation area was not consideration for the Nez Perce cession, the Commission will now decide whether or not this area can be offset as a gratuity against any judgment the plaintiffs may recover.[4/] In determining whether the granting of the outside reservation area was a gratuity, we must examine plaintiff's second theory in part one of its motion. This theory is based upon the Commission's opinion in Delaware Tribe of Indians v. United States, 21 Ind. Cl. Comm. 18 (1969), aff'd in part, rev'd in part on other grounds, 192 Ct. Cl. 385, 427 F. 2d 1218 (1970).

4/ Although the defendant is claiming the outside reservation area as consideration under the treaty and not as a gratuitous offset (Tr. Oct. 29, 1970, p. 26), we must make this determination in order to fully dispose of plaintiff's motion.