BEFORE THE INDIAN CLAIMS COMMISSION

THE PONCA TRIBE OF OKLAHOMA, and WILLIAM OVERLAND, METHA COLLINS, and JOHN WILLIAMS, as representatives of the PONCA TRIBE, and all the members thereof, Plaintiffs,	)	
v.	)	Docket No. 322
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: September 8, 1971

Appearances:

Edwin A. Rothschild, with whom was Louis L. Rochmes, Attorneys for Plaintiffs.

Bernard M. Newburg, with whom was Mr. Assistant Attorney General, Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION AS TO OFFSETS

Yarborough, Commissioner, delivered the opinion of the Commission.

This case is now before the Commission in the offset phase. The Commission previously determined in this case that the plaintiffs had aboriginal title to a tract of land 2,334,000 acres in size located in north central Nebraska and south central South Dakota (12 Ind. Cl. Comm. 292 (1963)),

and that the fair market value of this land as of the date of the treaty of cession, March 12, 1858 (12 Stat. 997), was $2,334,000 (20 Ind. Cl. Comm. 272 (1969)). The amount of $455,500 was deducted from the gross award as treaty consideration resulting in a net award of $1,878,500.

The defendant filed amendments to its answer on April 7, 1969, and October 14, 1969, pleading $1,056,703.37 as offsets. Thereafter, defendant reduced the amount claimed as offsets in its requested findings of fact. Defendant now requests that the sum of $926,394.31 be deducted from the damage award, representing $37,000 expended for land and $889,394.31 expended for subsistence. Plaintiff urges that the entire history of relations between the United States and the Ponca Tribe does not warrant the allowance of any offsets.

The Commission is directed in the last paragraph of Sec. 2 of the Indian Claims Commission Act (60 Stat. 1049, 1050) to examine the historical course of dealings between the Federal Government and the Indian tribes and to determine whether an equitable basis is present to permit the deduction of gratuitous expenditures from a damage award. As relevant, Sec. 2 reads in part as follows:

> . . . the Commission may . . . 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. . .

During the offset phase, the Commission exerts a role analgous to a court of equity weighing the fairness of the defendant's course of dealings with the plaintiffs. The Commission exercises a degree of discretion which is not reversible unless the Commission arbitrarily disallows gratuitous offsets. United States v. Assiniboine Tribes, 192 Ct. Cl. 679, 692, 428 F.2d 1324, 1333 (1970). As pointed out in the Conference Committee Report (Report No. 2693, 76 Cong. 2nd Sess. (1946), accompanying H.R. 4497), offset relief is unique to the field of Indian claims law. The Conference Report states in part:

> In no other field of law, known to your conferees, is a defendant permitted to set off against a valid judgment a gratuity given to the plaintiff. Under these facts the conferees felt that there should be uniform offset provisions in all tribal suits. They felt also that there was no justification in charging the tribes with money spent for removal, . . . agency or other administrative expenses, . . . educational expenses, . . . hospitalization and other health expenditures, . . . [or] highways. . . . The other gratuitous expenditures which the conferees decided should not be set off are precluded from being set off under the present law.
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> The bill does permit the Commission, where it finds that the nature of the claim and the entire course of dealings between the claimant and the United States warrants such action, to set off other gratuitous expenditures recognized to be for the direct benefit of the Indians, such as expenditures made for the purchase of land.

Our interpretation of the "nature of the claim and entire course of dealings" test is that the burden is placed on the defendant of proving that the entire history of the United States-claimant's relationship, including the nature of the claim sued on, contains no

overall fatal taint barring a finding that "in good conscience" gratuities should be allowed.

Defendant suggests that the phrase "nature of the claim" as used in the above quoted portion of Sec. 2 of the Indian Claims Commission Act, refers to the gratuitous expenditure claimed as an offset. Interpreting the statutory language in this manner would limit the scope of the Commission's inquiry to an investigation of the facts and circumstances surrounding the grant of each group or series of gratuities. In support of its position, defendant cites the cases of United States v. Emigrant New York Indians, 177 Ct. Cl. 263 (1966), and Seminole Indians v. United States, 24 Ind. Cl. Comm. 1 (1970).

The Commission believes that neither of these cited cases supports the defendant's viewpoint. The Commission specifically found in both of these cases that good conscience would warrant the allowance of particular gratuitous offsets, going beyond the threshold question involved here of a challenge to all offsets. The cited cases may be said to stand for the proposition that the facts giving rise to a valid claim alone need not be a barrier to a finding of "good conscience."

We agree with the defendant that merely the events giving rise to this claim and plaintiff's claim in Docket No. 323 standing alone need not bar off sets, United States v. Emigrant New York Indians, supra, nor need the application of misguided policies suffered alike by all tribes. However, these are elements to be weighed in the course of dealings determination.

The Commission has reviewed the course of dealings and accounts between plaintiffs and the federal government and the most salient

features of this relationship are stated in our findings of fact entered this date. Other facts regarding the historical course of dealings between the parties have been discussed in Docket No. 323 by the Commission (17 Ind. Cl. Comm. 673 (1968)), and the Court of Claims (Ponca Tribe of Indians v. United States, 183 Ct. Cl. 673 (1968)). As has been held, it is not necessary for the Commission to make detailed findings on the course of dealings, whether the good conscience test is met, Red Lake, Pembina and White Earth Bands v. United States, 164 Ct. Cl. 389, 395-96 (1964), or not, Assiniboine Tribe v. United States, supra. The findings entered here are but illustrative. The Commission's decision is based on the whole record in this and other Ponca cases.

The Commission concludes that the plaintiffs suffered extreme hardships caused by the actions of the defendant. In 1868 the plaintiffs' reservation was erroneously included within the boundaries of the Sioux Reservation. Thereafter plaintiffs were removed to Indian Territory, where one-third of the tribe died within a few years. The tribe seems never to have been free of severe economic and health problems. In 1930 the Superintendent of the Ponca Agency reported to a U. S. Senate Investigation Subcommittee that the economic and social conditions of the plaintiffs were the worst of the tribes in his care. The Commission believes that the unfair treatment which plaintiffs were accorded contributed to their poor economic condition. It is noteworthy to observe that whenever plaintiffs were subjected to

unfair actions by the Federal Government appropriations for gratuitous expenditures for plaintiffs' benefit increased. Thus, the Commission may properly infer that the defendant's unfair actions contributed to the necessity for making gratuitous expenditures. Accordingly, the Commission determines that good conscience, as that term is used in the last paragraph of Sec. 2 of the Indian Claims Commission Act, does not permit the deduction of any gratuitous expenditures from the award for damages in this case, and an order consonant with this decision and the findings of fact entered this date will be issued.

Richard W. Yarborough, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner