BEFORE THE INDIAN CLAIMS COMMISSION

BAY MILLS INDIAN COMMUNITY, SAULT STE. MARIE, ARTHUR LAWRENCE LABLANC, DANIEL EDWARDS AND JOHN L. BOUCHER, AND OTTAWA AND CHIPPEWA INDIANS OF MICHIGAN, ET AL.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket Nos. 18-E and 58

Decided: December 29, 1971

Appearances:
Rodney J. Edwards, Attorney for
Docket 18-E Plaintiffs,
James R. Fitzharris, Attorney for
Docket 58 Plaintiffs

David M. Marshall, with whom was
Mr. Assistant Attorney General
Shiro Kashiwa, Attorneys for
Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

In the title phase of these consolidated cases, the Commission determined that the plaintiffs had aboriginal title to 12,044,934 acres located within Royce Area 205 in the northern peninsula of Michigan (7 Ind. Cl. Comm. 576 (1959)). Subsequently it was determined that these lands, ceded to the United States under the Treaty of March 28, 1836 (7 Stat. 491), had a value of $10,800,000. (20 Ind. Cl. Comm. 137 (1968)).

The Commission, on January 14, 1970, deducted 1,863 allotments aggregating 121,450.75 acres (22 Ind. Cl. Comm. 372 (1970)) resulting in a net acreage of 11,923,483.25 with a value of $10,690,694.33.

On October 28, 1970, this Commission reassessed its findings made in 7 Ind. Cl. Comm. 576 (1959), specifically modifying Findings of Fact No. 24 and 25 (24 Ind. Cl. Comm. 50, 54-55 (1970)), and found that the plaintiffs held recognized title to Royce Area 113 (1,395 acres) and sub-areas "U" and "S" of Royce Area 205 (1,209,600 acres). Since these areas were not included in the land described in the treaty, and therefore have not been valued previously, we will determine the value of these areas in this proceeding.

VALUE

The Commission, upon examination of the record, has concluded that sub-areas "U" and "S" of Royce Area 205 (which were ceded under the Treaty of March 28, 1836) have an average fair market value of $0.90 an acre, making a total value of $1,088,640. We note that both parties approve of this valuation.

The parties have also requested that the evaluation of Royce Area 113 be incorporated in the determination of defendant's liability under the Treaty of March 28, 1836. Royce Area 113 was ceded by the plaintiffs under the Treaty of July 6, 1820 (7 Stat. 207), and this area lies within the boundaries of Royce Area 205. The Treaty of July 6, 1820, was not proclaimed until March 8, 1821, and this Commission has held the latter date to be the date of valuation for Royce Area 113. (24 Ind. Cl. Comm. 50, 52 (1970)).

Plaintiffs contend that, since Royce Area 113 is contiguous to the

lands within Royce Area 205, which the Commission found to be worth $0.90 per acre, Royce Area 113 should also be assigned a value of $0.90 an acre. The difficulty in plaintiffs' position is that Royce Area 113 was ceded in 1821 and Royce Area 205 was ceded in 1836, sixteen years later. Economic conditions both in the Michigan Territory and the United States were generally less favorable in 1821 than 1836. Plaintiffs, however, justify the $0.90 per acre evaluation on the basis that Royce Area 113 contains valuable timber and gypsum. The record shows that in 1848 the timber consisted of mediocre pine and swamp conifers mixed with hardwood, and that the timber had no commercial value until many years after 1821. (See Def. Ex. 251-V pp. 437-43). The Government purchased this land, not for its timber value, but for the gypsum which was used in the manufacture of plaster of paris. A civilian company that was interested in purchasing the gypsum was instrumental in having Indian title extinguished. (7 Ind. Cl. Comm. 576, 593 (1959)). There was a viable market for gypsum at the time of the 1821 Treaty. After consideration of the entire record we conclude that Royce Area 113 had a fair market value in 1821 of $1,116,00, or $0.80 per acre.

The last tracts to be evaluated are the reservations which were provided for in the amendments to the "Second" and "Third" articles of the 1836 Treaty and which comprised 401,971 acres. Originally, the parties intended that these lands would be set up as permanent reservations for the exclusive use of the Ottawa and Chippewa Indians. Prior to approval of the 1836 Treaty, these articles were amended by the Senate whereby

the duration of these reservations was limited to a period of five years from the ratification of the treaty or to any longer period which might be permitted by the United States. As consideration for these cessions (changing permanent reservations to reservations of limited duration), the "Fourth" article of the 1836 Treaty stipulated that the Indians would receive the principal sum of $200,000 to be held in trust by the United States, and the defendant would pay interest thereon until the reservations were actually surrendered. At that time the principal amount would be paid over to the Indians.

Interest was paid annually to the Chippewa and Ottawa Tribes from 1836 through 1856, a period of 20 years. In all, the plaintiffs received $240,000 in interest payments ($12,000, or 6% annually, for 20 years).

The 401,971 acres of reservation lands should be valued as of the effective date of the 1836 Treaty, and since they were contiguous to plaintiffs' lands within Royce Area 205, we see no reason why they should not be valued at $0.90 per acre, or a total of $361,773.90.

The overall evaluation of the subject lands under the treaties of March 28, 1836 and July 6, 1820 is as follows:

1.	11,923,483.25 acres (22 Ind. Cl. Comm. 272 (1970))	=	$10,690,694.33
2.	401,971 acres (reservation lands)	=	361,773.90
3.	1,209,600 acres (sub-areas "U" & "S"	=	1,088,640.00
4.	1,395 acres (Royce Area 113)	=	1,116.00
	13,536,449.25 acres		$12,142,224.23 value

CONSIDERATION

I. The Treaty of March 28, 1836, provided for total payments of $1,653,334.46, plus 6% interest on $200,000, by defendant. The total payments made by the defendant to the plaintiffs amounted to $1,821,628.06.[1/] The Commission's evaluation of the 1836 cession ($12,141,108.23) is over seven times the amount that was due under the 1836 Treaty. Therefore, we find that the consideration provided for the plaintiffs in the 1836 Treaty was unconscionable.

We will now address ourselves to the expenditures which are a subject of dispute. The first item involves the $240,000 in interest payments the plaintiffs received pursuant to the "Fourth" article of the 1836 Treaty. As we noted earlier, the Indians had agreed under the 1836 Treaty to change their permanent reservations to ones of limited duration, and the United States agreed to pay the Indians $200,000 "....whenever their reservations shall be surrendered, and until that time the interest on said two hundred thousand dollars shall be annually paid to the said Indians."[2/] The plaintiffs contend that the interest paid annually by the defendant under this provision cannot be deemed to be consideration since they were the beneficial owners of the principal sum of $200,000 from which the interest was theoretically derived. Therefore, the plaintiffs argue that they are entitled to the interest free of any contention that the amounts so paid are any part of

1/ This figure excludes the $191,243.48 in annuities that were paid to the Grand River Ottawas from the total treaty consideration since the Grand River Ottawas are not parties in either Docket numbers 18-E or 58.

2/ 7 Stat. 491.

the consideration for the treaty. The defendant would have us credit the United States with both the principal and interest, or $440,000, as consideration for the treaty.

Plaintiff's theory of the case would result in a double payment. It disregards the fact that during all the time the interest was being paid the plaintiffs had the possession and use of the reservations. The plaintiffs suffered no detriment until they lost possession of these reserves, and at that time they obtained possession of the principal sum of $200,000 and had already received $240,000 in interest. Plaintiffs' contention on this point must be overruled.

The second disputed item is defendant's claimed expenditure of $21,000 for "annuity goods" under the "Fourth" article of the 1836 Treaty. The Commission finds no language in said article that would account for a $21,000 payment to the Indians as due and owing under the 1836 Treaty. Therefore, this alleged expenditure does not qualify as a payment made under the 1836 Treaty. We will, however, deal with this payment in our discussion of gratuitous offsets.

The defendant also claims additional expenditures under the "Fourth" article of the 1836 Treaty for education in the amount of $140,858.83. Plaintiffs contend that the 1836 Treaty provides for a maximum of $100,000 ($5,000 annually for 20 years) and the difference should not be allowed as consideration. Plaintiffs have ignored the fact that the section provides, not only for payment of five thousand dollars per annum for twenty years, but also "....as long thereafter as Congress may appropriate for the object." (Emphasis supplied) Congress appropriated and the

defendant paid the stipulated sum for more than twenty years as authorized by the treaty. Therefore all sums paid pursuant to this provision represent consideration for the treaty.

Under the "Fifth" and "Sixth" articles of the 1836 Treaty defendant claims expenditures in the amount of $4,975.65 for investigation of debt claims and half-breed reservation claims. We find no provision in either of these articles for this type of expense. Because of the absence of evidence to substantiate this claim, it must be disallowed. We will, however, consider this item as a possible gratuitous offset.

There remains the question of whether the Treaty of July 31, 1855 (11 Stat. 621), was for the most part additional consideration for the cessions made by the plaintiffs in the Treaty of March 28, 1836.

During the period from 1785 to 1871, the United States entered into forty-four treaties with the Ottawa and Chippewa Indians of which thirty-three treaties were concluded prior to the Treaty of July 31, 1855. By the language of Article 3 of the 1855 Treaty, the United States was released and discharged from all liability on account of the thirty-three former treaty stipulations including the Treaty of

June 16, 1820.[3/] This release and satisfaction of all claims was a new consideration bargained for by the defendant in an effort to immunize itself from future claims and suits. The Court of Claims in Ottawa and Chippewa Indians v. United States, 42 Ct. Cl. 240 (1907), considered the relationship of the 1836 and 1855 Treaties in regard to a trust fund established prior to the 1855 Treaty as a part of the cash consideration for the Treaty of 1836. The court did not accept the Government's interpretation of Article 3 of the 1855 Treaty and stated at page 248:

> . . . It is possible that the parties to the treaty meant as contended for by the Government, but in the language which was used they did not say so . . . .

The 1855 Treaty was not additional consideration for the cessions made pursuant to the 1836 Treaty, but was new consideration for the discharge from all liability of former treaty stipulations which defendant was legally responsible to perform.

II. The Commission, in the instant case, has determined that Royce Area 113 (ceded under the Treaty of July 6, 1820) had a fair market value of $1,116.00 or $0.80 per acre in 1821. Defendant has disbursed

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3/ The text of the 3d Article of the 1855 Treaty reads:
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 or encampment secured to the Chippewas of Sault Ste. Marie by the Treaty of June 16, 1820.

$599.46 in payment for Royce Area 113 (See Def. Ex. 251-V, pp. 431-43). We find this consideration to be unconscionable.

The defendant's expenditures as consideration under the Treaty of March 28, 1836, and July 6, 1820, total $1,822,227.52. Subtracting the consideration paid ($1,822,227.52) from the total valuation ($12,142,224.23), the plaintiffs are entitled to a judgment of $10,319,996.71 less any allowable gratuitous offsets. 4/ We now turn to offset expenditures claimed by defendant under the Treaty of March 28, 1836.

OFFSETS

Defendant claims gratuitous offsets in the sum of $37,170.73 against any award made herein. Additionally, the Commission will consider payments in the amount of $25,975.65 which were disallowed as treaty consideration expenditures but are possible gratuitous offsets. In Red Lake, Pembina and White Earth Bands, v. United States, Dockets 18-A, et al., 9 Ind. Cl. Comm. 457, 517, 519 (1961), aff'd 164 Ct. Cl. 384 (1964), and in Suquamish Tribe of Indians v. United States, Docket 132, 24 Ind. Cl. Comm. 35, 36 (1970), this Commission developed certain criteria for determining whether a given gratuity is for the benefit of the tribe or for individual members thereof. Among other things the amount and character of the offset in light of the tribal population among whom the expenditures were disbursed and the period of time over

4/ One small drafting error on the part of the defendant should be corrected to compute the exact consideration of the Treaty of March 28, 1836. Defendant claims, under Article 7 of the Treaty, expenditures totalling $142,005.91 for blacksmith shop, supplies, dormitories, salaries, equipment, etc. The actual amount is $143,005.91 (See Def. Ex. 152-V, pp. 25-26.)

which the disbursements were made were considered.

Precise statistics of tribal population are unavailable and unascertainable in many instances. Representative figures show, however, that the Chippewas and Ottawas totalled approximatly 6,500 members or about 61% of the Mackinac Agency, during the years from 1874 to 1877. (See Def. Ex. O-1, Sec. 5, p. 201) Disbursements were made by the defendant during the years 1836 to 1884, and from 1939 to 1943. It is only reasonable to conclude that the claimed subsistance expenditures for provisions, clothing, transportation, feed, care and purchase of livestock, hardware and accessories, agricultural aid and implements totalling $4,324.00 should be disallowed for the reason that they were miscellaneous small payments made over a long period of time and constituted a benefit to individuals rather than to the tribe. We so hold.

Defendant's claimed expenditures for presents to the Indians ($1,369.00) are also disallowed as they constitute individual benefits rather than tribal benefits. Disbursements made by defendant for expenses of Indian delegations ($636.05) are also disallowed because the record does not disclose whether the Indian delegations were sent at the request of the United States or on the volition of the Indians.

Defendant claims an expenditure of $10,092.00 in excess of the amount required under the "Ninth" article of the Treaty of 1836 as payments to half-breeds in lieu of reservations. These payments are denied because they benefitted individuals and not the tribe.

During the period from 1938 to 1942 defendant expended $19,749.68 under the Experimental Land Acquisition Project, to acquire title to

land in Chippewa County, Michigan. This acquisition was for the sole benefit of the Bay Mills Indian Community, and the expense thereof will be allowed as a gratuitous offset.

Two additional "excess" payments under the Treaty of March 28, 1836, should be considered. One of these is the expenditure of $21,000 under the "Fourth" article entitled "Annuity goods." There is no provision under this article calling for the payment of $21,000 for "Annuity goods."

This payment was allegedly made in 1837, but there is no record of this single $21,000 expenditure in defendant's disbursement schedule. Additionally there are no notations, as there are in other instances, showing which tribes received the goods and in what proportions. Therefore this amount will not be allowed as a gratuitous offset.

Lastly, defendant claims, under the "Fifth" and "Sixth" articles of the 1836 Treaty, expenditures in the amount of $4,975.65 for investigation of debt claims and half breed reservation claims. We find no provision in either of these articles for this type of expense and it is unclear from the record what sums of monies were being allocated for which investigation. Because of the absence of evidence to substantiate this claim, it must be disallowed.

Therefore, the Commission will allow gratuitous offsets against the award herein in the amount of $19,749.68.

CONCLUSION

Accordingly, the plaintiffs are entitled to recover on behalf of the respective entities entitled thereto a final award in the sum of $10,300,247.03.

Jerome K. Kuykendall, Chairman

Concurring:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner