BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION, Plaintiff, and THE CHEROKEE FREEDMEN AND CHEROKEE FREEDMEN'S ASSOCIATION, Intervenors, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 173-A (Docket No. 123)

Decided: February 2, 1972

Appearances:

Paul M. Niebell, Attorney for the Plaintiff. Earl Boyd Pierce and George L. Norvell, were on the brief.

Jacob F. May, Jr., and Paul E. Wilson, Attorneys for the Intervenors.

A. Donald Mileur and George W. Daiger, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

Docket No. 173 was brought by the Cherokee Nation to recover additional compensation for lands of the Cherokee Outlet. That portion of the claim relating to the Outlet lands upon which friendly Indians were relocated by the defendant, some 2,122,000 acres, was severed from the main claim and docketed as Claim No. 173-A. Cherokee Nation v.

United States, 9 Ind. Cl. Comm. 435, 436 (1961). Docket No. 173-A has been processed through title and valuation phases (Cherokee Nation v. United States, 9 Ind. Cl. Comm. 162 (1961), 22 Ind. Cl. Comm. 417 (1970)), and is now before the Commission for a decision on offsets and a final award.

Docket No. 123 is the claim of descendants of Cherokee Freedmen who were included on the Wallace and Kern-Clifton Cherokee rolls but excluded from the Dawes Commission Cherokee roll. That claim was initially dismissed with prejudice as an aggregation of individual claims. Cherokee Freedmen v. United States, 10 Ind. Cl. Comm. 109 (1961). The Court of Claims affirmed that dismissal, but remanded the docket to test whether these Freedmen plaintiffs might not have a group interest in the proceeds of Cherokee Outlet lands. Cherokee Freedmen v. United States, 161 Ct. Cl. 787 (1963). This Commission approved the Freedmen's intervention in Docket No. 173-A, but declined to decide whether they, either by reason of ancestry or by reason of intervention, were then and there entitled to a specific percentage of the paid-out award in Docket No. 173 or of the prospective award in Docket No. 173-A. Cherokee Nation v. United States, 22 Ind. Cl. Comm. 417 (1970). The Court of Claims affirmed. Cherokee Freedmen v. United States, 195 Ct. Cl. 39 (1971).

Upon decision on offsets the net award will relate to the wrong suffered by the Cherokee Nation or Tribe during the period 1872 to 1893, but as a practical matter it will eventually be disbursed for the

benefit of those who, in other proceedings in other forums, may be determined to be Cherokees and as their interests may appear. These identities and these interests are not issues cognizable by this Commission and we intimate no views respecting whether the intervenors and/or others similarly situated will benefit from the award.

In its Amended Answer propounding offsets and gratuities, the defendant set up the following five items, the first of which was abandoned during the hearing on offsets:

I. Miscellaneous disbursements amounting to $101.82.

II. Interest, in the aggregate amount of $378,751.43, paid between June 12, 1873, and June 14, 1883, on a fund deposited by the United States to the Cherokee Tribe on behalf of the Osage Tribe.

III. The fair market value of about 40 acres transferred by the defendant to the plaintiff by an Act of August 20, 1964 (78 Stat. 559), as surplus to the Sequoyah Indian School. This land cost the defendant $2,280.00 in 1935 and is alleged to have had a fair market value of $6,000.00 in 1964.

IV. The fair market value of 2,667.94 acres which were part of the Cherokee Outlet and which were sold to the plaintiff by an Act of March 30, 1968 (82 Stat. 70), for $3.75 per acre. This land is alleged to have had a fair market value of not less than $455,700.00 in 1968 plus subsurface minerals.

V. The fair market value, as of August 20, 1964, of 38.5 acres of land which were sold to the plaintiff by an Act of October 21, 1970 (84 Stat. 1074), for a paid consideration of $2,258.80. This land is alleged to have had a fair market value, on the specified date, of $5,775.00.

Thus, the defendant claims as allowable offsets and gratuities at least $843,267.63 plus yet-unascertained values attributable to subsurface

minerals evidenced by two producing oil wells, against the gross award of $4,268,589.00.

The defendant views the aggregate interest (Count II) alternatively as a gratuity paid to the plaintiff before there was any obligation to pay since this Commission determined that the transfer date was in 1883 and not, as the defendant had thought, in 1872, or as an additional payment on the claim on the theory that the interest was part and parcel of the cost of settling Osages on a portion of the Cherokee Outlet. The plaintiff views the aggregate interest as neither gratuity nor payment on the claim, but only as a legal obligation of the defendant to pay interest on invested assets of the Cherokee Nation.

The aggregate interest is not allowable as an additional payment on the claim. Peoria Tribe v. United States, Docket 314, 9 Ind. Cl. Comm. 49 (1960), aff'd. 169 Ct. Cl. 1009 (1965). Respecting whether the aggregate interest is an allowable gratuitous offset, Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049, 1050) provides in pertinent part:

> . . . the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant . . .

The aggregate interest was paid in accordance with the provisions of the Act of March 3, 1873 (17 Stat. 530, 538), which directed that Osage funds in payment for lands bought by the Osages from the Cherokees be transferred on the books from the credit of the Osages to the credit of the Cherokees and

> . . . the same shall bear interest at the rate of five per cent, in accordance with the act of Congress approved June fifth, eighteen hundred and seventy-two, entitled "An act to confirm to the Great and Little Osage Indians a reservation in the Indian Territory". . .

Thus, the aggregate interest was not a gratuity, given without benefit and without expectation of return, but was a step in a tripartite contract between the Osages, the Cherokees, and the defendant. Since the aggregate interest was not a gratuity, it may not be here allowed as a gratuitous offset against the instant gross award.

Count III is a land transfer for which the defendant is claiming the fair market value of about 40 acres as of the date the land was transferred to the plaintiff. However, if the defendant were permitted to offset the transfer date value, in effect the defendant would be reaping a profit from the transaction. Ordinarily the law does not permit such a result and the Commission sees no cogent reason in the case at bar to vary the established law as enunciated in Ponca Tribe v. United States, 183 Ct. Cl. 673 (1968) (aff'g in part, rev'g in part, Docket 323, 17 Ind. Cl. Comm. 162 (1966)), and cases there cited. Along the same path is the principle that land returned to tribal ownership may not be offset at more than the cost to the defendant. Citizen Band of Potawatomi Indians v. United States, Docket 96, 19 Ind. Cl. Comm. 368 (1968). Hence, the defendant may not offset the 40 acres of Count III for more than its acquisition cost, that is, $2,280.00.

The plaintiff contends that the defendant may not offset the value of the 40 acres of Count III to any extent. Plaintiff argues that since

the Cherokees planned to use the land for rehabilitation of the members of the Cherokee Nation and to provide employment opportunities for its members, such purposes bring the claimed offset within the spirit of the policy of Congress against offsetting

> . . . . 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, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) . . . (Sec. 2, Indian Claims Commission Act, supra.)

The claimed offset involving the 40 acres is not prohibited by Section 2 of the Indian Claims Commission Act. The acquisition of this land and its conveyance to Cherokee Indian Tribe in 1964 was not made under any post-March 4, 1933, emergency relief program generally applicable throughout the United States. We find that the claimed offset under Count III is allowable but only to the extent of the acquisition cost, that is, $2,280.00.

The value of the 2,667.94 acres making up Count IV cannot be offset to any extent. The fair market value as of the 1968 date of transfer cannot be offset because it would be a substantial and impermissable profit (see the discussion on the point, above, relating to the Count III acreage). The acquisition cost cannot be offset because the first paragraph of the Act conveying the tract to the plaintiff conditioned the transfer upon the plaintiff's payment of $3.75 per acre, ". . . the original cost of the land . . ." (Act of March 30,

1968, Pub. L. No. 90-279, 82 Stat. 70), and the defendant concedes that the plaintiff has in fact paid the $3.75 per acre upon which the conveyance was conditioned. Likewise, the defendant concedes that the plaintiff had in fact paid the purchase price of $2,258.80 for the 38.5 acres conveyed by the Act of October 21, 1970. Accordingly, neither the acquisition cost nor the later-date fair market value may be offset for the reasons discussed above.

In view of the foregoing discussions, it is apparent that the only sum which may be offset against the gross award is the acquisition cost of the approximately 40 acres of Count III, that is, $2,280.00. Accordingly, the final judgment shall be $4,266,309.00. Findings of fact consistent with the foregoing have been entered this day.

Brantley Blue, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner