BEFORE THE INDIAN CLAIMS COMMISSION

SENECA-CAYUGA TRIBE OF OKLAHOMA AND PETER BUCK, STEWART JAMISON, RUBY CHARLOE, DAVID CHARLOE AND LEWIS WHITEWING, MEMBERS AND REPRESENTATIVES THEREOF,	)	
Plaintiffs,	)	
v.	)	Docket Nos. 341-A and 341-B
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: December 7, 1972

Appearances:

Paul G. Reilly, Attorney for the Plaintiffs.

Roberta Schwartzendruber, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

These cases are currently before the Commission on plaintiffs' request for an accounting of monies allegedly due and owing to plaintiffs as a result of defendant's failure to fulfill its obligation under the treaties of February 28, 1831, 7 Stat. 348 (hereinafter the Sandusky Treaty), and July 20, 1831, 7 Stat. 351 (hereinafter the Lewistown Treaty).[1/] The plaintiffs in both dockets are identical, and

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1/ A general accounting has been requested in Docket No. 84. Plaintiffs herein are also plaintiffs in that docket, portions of which have already been disposed of by the Commission, Six Nations v. United States, 23 Ind. Cl. Comm. 376 (1970). See also Cayuga Nation of Indians v. United States, Docket 230, 26 Ind. Cl. Comm. 271 (1971).

for convenience will also be referred to as plaintiff tribe or Seneca Tribe

Docket 341-A (Royce Area 163) concerns the Sandusky Treaty of February 28, 1831, and Docket 341-B (Royce Area 164) concerns the Lewistown Treaty of July 20, 1831. In our previous consideration of the issues raised in these dockets we treated the claims asserted herein as separately involving questions of land valuation and a request for an accounting. 26 Ind. Cl. Comm. 625 (1971). We ordered the case to proceed for the purposes of determining the fair market value of the lands involved and the resulting damages, if any. We further ordered the plaintiff to file separately any objections or exceptions to the accounting submitted by the defendant. In compliance with said order as to the accounting, plaintiff filed objections on April 10, 1972. On May 3, 1972, defendant filed a reply to plaintiff's objections and exceptions. The parties have, in substance, followed the procedure set down by the Commission for accounting cases. See Sioux Tribe of Indians v. United States, Dockets 114, et al., 12 Ind. Cl. Comm. 541 (1963).

We note at this point that the defendant has in several instances in its reply brief referred to our decision of December 29, 1971, as being conclusive on certain issues raised in the accounting. In that decision we merely summarized a number of defendant's computations which consisted of sums it conceded were not accounted for, and payable to plaintiff. We did not, however, enter any specific findings of fact and refrained from making any determinitive conclusions respecting the accounting claims.

Before we take up the consideration of the specific items of the accounts raised in plaintiff's exceptions and defendant's reply thereto, we deem it necessary to dispose of certain questions relating to the effect of the Treaty of February 23, 1867, 15 Stat. 513, on the accounting computations submitted by the defendant.

Defendant alleges that the interest and principal due under the 1867 Treaty are not a part of the accounting due plaintiff tribe under the 1831 treaties under consideration and thus the 1867 Treaty is not relevant to the present case. Other than this simple denial of the applicability of the 1867 Treaty to the present action, defendant has not offered any additional information, which we believe the present status of the record demands. Defendant's summary dismissal of the 1867 Treaty appears in its reply to plaintiff's exception to defendant's accounting. For reasons which appear below, we find that the 1867 Treaty is not only relevant to this case but is an indispensable and integral part of the accounting due under the 1831 treaties.

In brief, the pertinent provisions of the Treaty of February 23, 1867, fully quoted in Finding No.17 entered herein, provide in Article 5, for the dissolution of the union of Senecas and Shawnees, parties to the July 20, 1831, Lewistown Treaty, and for a new union of the said Senecas with their Seneca brethren, parties to the February 28, 1831, Sandusky Treaty. Article 5 also provides for the several bands of Senecas to unite their funds, including the funds provided for under the two 1831 treaties, into "one common fund" for the benefit of the

whole tribe. Article 6 of the 1867 Treaty deals with the disposition of a fund totaling $40,000 resulting from two small cessions made by the Senecas in the 1867 Treaty. Article 6 specifically provides that the $40,000 be invested by the Government at five percent for the tribe of Senecas "as constituted by this treaty".

Thereafter until 1903, when plaintiff's funds were distributed, defendant combined the Seneca funds in accord with Article 5, and, as indicated by defendant's accounting report (Def. Ex. 86), defendant did not maintain separate accounts, except in the case of the Senecas who were coparties with the Shawnees to the Lewistown Treaty. It appears that for purposes of accounting, and in view of an Article 5 requirement that an equitable distribution be made of funds held in common by said Seneca and Shawnees, the defendant accounted separately for monies due under the Lewistown Treaty.

Defendant asserts that no accounting is due under the 1867 Treaty and that it need only show a proper allocation of the merged funds to the respective 1831 treaties by the use of accepted accounting techniques. Presumably defendant's contention is founded on the posture of the original petition which requested a specific accounting under the 1831 treaties and on its interpretation of the provisions of the 1867 Treaty. Defendant has, in effect, viewed the 1867 Treaty as creating a new and distinctly separate trust fund for which it need not account since plaintiff's original demand was directed to funds established in 1831. As a consequence of this position, defendant has by a mathematical

formula "traced" interest and principal due under the 1831 treaties through the merged funds of 1867 without accounting for the $40,000 principal added by the merger. The anomaly of defendant's methodology seems apparent. A proper accounting of 1831 funds necessarily includes an accounting under the 1867 Treaty by virtue of the total merger of plaintiff's funds.

It is therefore our view that the Treaty of February 23, 1867, was not intended to create a new and separate trust fund; nor have the parties so treated it. By Articles 5 and 6 of said treaty, all interested parties had, by agreement with defendant trustee, extended the terms of the original 1831 agreements to include new property with provisions for its investment. To the extent that the 1867 Treaty added additional funds to the res, it was merely a modification of the 1831 agreements and not their termination. We know of no rule in the law of trusts which prohibits all interested and competent parties from modifying the terms of an existing trust. When all parties are in accord, there is no one with any standing to complain. The trustee must act in accordance with the changed terms of the trust. G. Bogert, The Law of Trusts and Trustees, §922 at 424 (2d ed. 1962).

Defendant's treatment of plaintiff's accounts subsequent to 1867 is further support for our view respecting the intent of the parties to the 1867 agreement. After 1867, interest due on 1831 funds was combined with interest due on 1867 funds and was so reported as evidenced by defendant's accounting schedules. If indeed there were two separate

funds, then the defendant, at the risk of being guilty of breach of trust, was under a clear duty to keep the res of each trust separate and to maintain separate accounts notwithstanding that the cestui was the same for each trust. Bogert, supra, §596 at 315-19.

The record establishes that the United States administered the trust moneys since 1867 as one fund. The defendant (following what we now find to be the intent of the parties) simply continued the administration of the 1831 trust funds, modified in 1867 by the addition of $40,000 in principal. Accordingly, we hold that plaintiff's request for an accounting under the 1831 treaties must of necessity include an accounting of monies due under the 1867 Treaty and that defendant is under a duty to provide the same. Since defendant's accounting report contains all the necessary data for our purpose, and since defendant has, in fact, accounted for the merged funds, there is no need to order a further accounting.

We may now proceed to a consideration of plaintiff's exceptions to the accounting submitted by the defendant. Our findings, which are sufficiently detailed and therefore need not be repeated here, are based on the data in defendant's report, about which there appears to be little disagreement.

I. Interest Due under the Sandusky Treaty and the 1867 Treaty.

Plaintiff's principal exception hereunder revolves around the sum of $5,000 which plaintiff states, without corroboration, was due as principal under the Sandusky Treaty of February 28, 1831. Defendant's

accounts clearly indicate that the principal due is $3,985.08. In the absence of evidence to the contrary, we find said sum to be correct.

The record establishes that a total of 40,805.81 acres of Royce Area 163 in Ohio were sold for $65,546.04 under the Sandusky Treaty. Pursuant to Article 8 of said treaty, the defendant was required to make certain deductions which we find totalled $61,560.96. Accordingly, there was due plaintiff tribe the sum of $3,985.08 from the sale proceeds. Under the same Article 8, defendant agreed to pay 5 percent on the principal balance as an annuity for the benefit of plaintiff tribe.

Pursuant to the Treaty of February 23, 1867, plaintiff sold additional lands for which it received from defendant $44,000, the sum of $4,000 of which was distributed immediately. Under Article 6 of the 1867 Treaty, the $40,000 balance was to be invested at 5 percent for the plaintiff tribe as constituted under Article 5 of that treaty. Defendant's accounts disclose that between 1833 and 1872 inclusive, $7,917.59 in interest was disbursed pursuant to the Sandusky Treaty, and that between 1873 and 1904 the combined interest payments under the 1831 and 1867 treaties were $72,628.29, for an overall total of $80,545.88.

Under the fund as originally constituted in 1831, plaintiff was entitled to interest at 5 percent on $3,985.08, or $199.25 per annum, from 1833, when the sale of Royce Area 163 commenced, until 1867 inclusive, when the 1831 principal was merged with the 1867 Treaty fund of $40,000. The interest during this period should have totalled $6,973.75. From 1868 to 1903 inclusive, plaintiff was entitled to interest at 5

percent per annum on $43,985.08 (being the combined principals), or $2,199.25 per annum. The interest during the latter period should have totalled $79,074.00.

Accordingly, there should have been disbursed to plaintiff tribe annuities totalling $6,973.75, and $79,074.00, or a combined total of $86,047.75. Since defendant disbursed a total of $80,545.88, we find interest in the amount of $5,501.87 due and owing plaintiff tribe on the combined principals held in trust between 1833 and 1903 under this item.

II. Principal due under the Sandusky Treaty and the 1867 Treaty.

Plaintiff's main exception under this item relates to the principal disbursed in 1903, which the record discloses amounted to $40,949.60. As discussed above, defendant pursued a separate trust theory, and calculated both principal and interest due only under the 1831 Sandusky Treaty. As we have already determined, the total combined principals of both treaties amounted to $43,985.08. The disbursement schedules in defendant's accounting report show only $40,949.60 in principal, held pursuant to Article 8, Treaty of February 28, 1831, and Article 6, Treaty of February 23, 1867, was disbursed to plaintiff tribe during fiscal year 1903. Accordingly, we find that there remains a balance of $3,035.48 in principal due and owing plaintiff under this item. The fund as to this amount not yet having been distributed, the obligation to pay the 5 percent annuity assumed by defendant under the 1831 and 1867 treaties continues until the money is paid. It must be simple interest. Peoria Tribe v. United States, 390 U.S. 468 (1968). Thus, we further find that defendant is liable to plaintiff for 5 percent

simple interest, or $151.77 annually, on the principal balance of $3,035.48 held since 1904. This simple interest totalled $10,320.36 over the 68-year period 1904 through 1971 inclusive. This interest coupled with the remaining principal balance of $3,035.48 brings our award to $13,355.84 due plaintiff tribe under this item.

III. Principal and Interest due under the Lewistown Treaty.

For the sake of convenience and for a more accurate accounting only, we have calculated deficiencies under the 1831 Lewistown Treaty separately, in line with defendant's schedule. Since monies were still due and owing the Shawnees, who were part of the Mixed Band of Shawnees and Senecas, under the 1831 Lewistown Treaty, and since defendant was required under Article 5 of the 1867 Treaty to make an equitable division of funds held in common by the Senecas and Shawnees, defendant was obliged, apparently for accounting purposes, to report the July 1831 annuity and principal disbursements separately. Whether calculated separately or combined with 1867 funds pursuant to the 1867 merger under Article 5, the results are the same.

We find no merit in plaintiff's exceptions to defendant's accounting of monies due and owing under this item. We believe defendant has accurately and fairly accounted for the annuities and principal due hereunder. In the absence of any evidence showing sums due in excess of or in addition to the deficiencies admitted by defendant, we fully

accept defendant's accounting and consequent admissions respecting monies due under this item. Accordingly, we adopt all of defendant's proposed findings respecting this item and conclude that there is due and owing plaintiff tribe under Article VIII of the Lewistown Treaty interest in the amount of $4,010.07 on a total principal of $8,357.87 held in trust between 1833 and 1902.

It appears from the record that during the payout of principal between 1903 to 1909, the defendant failed to pay additional interest in the amount of $926.85 on annual principal balances. We therefore find that defendant is liable to plaintiff tribe for the total amount of $4,936.92 (4,010.07 + $926.85) as undistributed interest on sale proceeds under the 1831 Lewistown Treaty.

The record establishes that of $8,357.87 principal owed plaintiff from land sale proceeds in Royce Area 164, under Article VIII of the Lewistown Treaty, only $6,961.48 was disbursed between 1903 and 1909. Accordingly, $1,396.39 has not been disbursed but held since 1909 without payment of interest notwithstanding the interest provision of Article VIII of said treaty. Thus, we find that defendant is liable to plaintiff for 5 percent simple interest or $69.82 annually on $1,396.39, or a total of $4,328.84 in the period 1909-1971 inclusive. In sum, we conclude that defendant is liable to plaintiff in the amount of $1,396.39 principal plus combined interest, totalling $9,265.76, or a total award of $10,662.15 under Article VIII of the Lewistown Treaty.

IV. Compensation for School and Other Lands.

The record establishes that section 16, each containing 640 acres, in

both Royce Area 163 and Royce Area 164 were set aside by the defendant for use as school lands. The Treaties of February 28, 1831, and July 20, 1831, made no provision for this 1280 acre deduction. Accordingly, plaintiff tribe must be compensated for these school lands. We find that plaintiff has failed to establish valid exceptions with regard to defendant's accounting of the school lands. The defendant, in order to determine what money was unaccounted for, has properly used the average price per acre at which all the lands in the two subject areas were sold pursuant to treaty requirements. The issue of the fair market value of the school lands, raised by plaintiff, is not appropriate here. Defendant's duty to account is delimited by the terms of the trust agreement. The issue of the fair market value of all the treaty lands will be the subject of further proceedings previously ordered in these dockets. 26 Ind. Cl. Comm. 625, 630.

We find that lands in Royce Area 163 sold at an average of $1.61 per acre and that the 640-acre school tract would have sold for $1,030.40. Since plaintiff tribe received no credit for this amount, a 5 percent annuity pursuant to Article 8 of the February 1831 Treaty must be awarded over the entire period during which credit was withheld for these lands. We therefore find the 5 percent annuity on $1,030.40 to be $51.52 and simple interest on the principal over the 1833 through 1971 period to be $7,109.76. Accordingly, our award to plaintiff tribe under this item for Royce Area 163 school lands is $1,030.40 in principal, plus interest in the amount of $7,109.76, or a total combined award of $8,140.16.

We further find that lands in Royce Area 164 sold at an average price of $1.31 per acre, and that the 640-acre school tract would have realized $838.40 in proceeds. Following the same principle here as we have above for Royce Area 163 school lands, interest annuity due on $838.40 from 1833 to 1971 totals $5,784.96 or a combined principal and interest of $6,623.36, which was due the Mixed Band of Shawnees and Senecas, parties to the Treaty of July 20, 1831. In view of the Shawnee interest, we find that plaintiff's share is one-half of the principal and interest, or $419.20 and $2,892.48, respectively. Accordingly, our award to plaintiff tribe for withheld school lands in Royce Area 164 is for the combined amount of $3,311.68 under this item.

Plaintiff in its exceptions states that defendant failed to account for 82 acres in Royce Area 163. Defendant, following the average sale price method it adopted for calculating the school lands above, has now fully accounted for the proceeds of these lands plus the annuities due from 1833 to 1971 on the principal withheld. Accordingly, our award to plaintiff tribe for the proceeds of the said 82 acres unaccounted for is $132.02 plus interest at 5 percent, or a total $917.40 in interest. The combined principal and annuity award is therefore $1,049.42.

V. Summary.

The Commission, on the basis of the foregoing, awards the plaintiff Seneca Tribe, as constituted under the provisions of the Treaty of February 23, 1867, 15 Stat. 513, a total principal and accrued interest

payments of $42,021.12, plus additional interest at the rate of 5 percent on the total unpaid principal in the amount of $6,013.49 from January 1, 1972, until paid.

Brantley Blue
Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret M. Pierce, Commissioner