BEFORE THE INDIAN CLAIMS COMMISSION

THE PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS, et al.,	)	
Plaintiffs,	)	Docket Nos. 15-C, 18-H, 29-A, 71
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: March 20, 1974

Appearances:

Robert S. Johnson, Attorney for Plaintiffs in Docket No. 15-C, Jack Joseph was on the Brief,

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket No. 29-A,

Louis L. Rochmes, Attorney for Plaintiffs in Docket No. 71, Jack Joseph was on the Brief.

Marvin E. Schneck, with whom was Mr. Assistant Attorney General Wallace H. Johnson, Attorneys for the Defendant.

OPINION OF THE COMMISSION ON DENYING PLAINTIFFS' MOTION REGARDING PRE-TRIAL DETERMINATION OF BASIS FOR VALUATION OF "EXCHANGE LAND"

Pierce, Commissioner, delivered the opinion of the Commission.

On September 20, 1972, we issued our decision on title in this proceeding, concerning lands ceded under the Treaty of September 26, 27, 1833 (7 Stat. 431, 442). [1/] We ordered that the case proceed to a

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1/ 28 Ind. Cl. Comm. 497, par. 7.b.

determination, inter alia, of the total consideration paid for said lands by the United States, including the fair market value as of February 21, 1835,[2/] of the 5,000,000 acres of exchange land provided for under the treaty.

On August 23, 1973, the plaintiffs in Docket 15-C moved for a ruling modifying our order of September 20, 1972. Specifically, they moved that the "exchange land" referred to therein be determined either:

a. not to affect the plaintiffs' recovery, or

b. to be valued on the basis of the consideration paid by the United States for said land under the treaty of July 15, 1830 (7 Stat. 328).

The plaintiffs in Docket 29-A responded on September 17, 1973, and the defendant responded on October 3, 1973. Having considered the motion and the responses, we are of the opinion that the motion should be denied on its merits.

Arguments Of The Plaintiffs In Dockets 15-C And 71

Plaintiffs urge that the defendant should be held to what they construe as a direct promise by the 1833 treaty commission, on behalf of the President, to grant the exchange lands in addition to full payment for lands ceded under the 1833 treaty. As evidence of this construction they point to a pretreaty statement by Governor Porter (one of the treaty commissioners) purporting to transmit to the Potawatomi, the following advice from the President:

2/ The effective date of the treaty.

> He says to his red children arise, take your families and go westward and you shall not be deceived. You shall have as good a country there as you possess here and be fully paid for your lands. 3/

Plaintiffs have not cited any evidence showing that the Potawatomi understood Governor Porter to mean that they would be fully paid for their lands and would receive the exchange land in addition. His statement may have meant no more than that they would be given as good a country in the west, which, together with other consideration, would fully pay them for their eastern lands.

If any ambiguity or misunderstanding on this point existed, it was, in our opinion, clarified by the express terms of the ensuing 1833 treaty. Article 2 thereof reads:

> In part consideration of the above cession it is hereby agreed, that the United States shall grant to the said United Nation of Indians . . . a tract of country west of the Mississippi river . . . to be not less in quantity than five million acres . . . [emphasis added].

Similarly the third article of the treaty begins:

> And in further consideration of the above cession, it is agreed, that there shall be paid by the United States the sums of money hereinafter mentioned . . . [emphasis added].

Plaintiffs argue that the rule of Iowa Tribe v. United States, 68 Ct. Cl. 585 (1929), should be applied to enforce their construction of Governor Porter's above quoted statement, although it was not written into the treaty. We disagree. The facts in Iowa differ substantially. In that case the treaty commissioners convinced an ignorant, impoverished, unorganized tribe, whose principal chief was blind, to sell their lands

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3/ Plaintiffs' Ex. 2, p. 15.

for 37¢ an acre and 80 acre allotments, by falsely representing that their title was insecure and that they would receive however much the commissioners ended up giving the surrounding tribes. The commissioners then proceeded to purchase land from the surrounding tribes for $1.25 an acre and 180 acre allotments. Under a jurisdictional act covering oral and written contracts, the Court of Claims effected partial equity by honoring the verbal contract to increase the Iowa payment to $1.25 per acre.

In the case before us there was no proven dichotomy between the Government's oral and written promises. The treaty is unambiguous, and Governor Porter's statement to the Potawatomi, quoted above, is not inconsistent with the plain language of the treaty on the matter of consideration.

The plaintiffs also in effect allege on other facts that the defendant's dealings with them were characterized by fraud, duress, and duplicity, and that accordingly the defendant should be allowed no credit at all for the 5,000,000 acres of exchange land. Alternatively they contend that at best, the defendant should only be allowed the value of the consideration which it paid for the 5,000,000 acres of exchange land when purchased earlier from other Indians.[4/] Plaintiffs urge that to allow the defendant anything more than its own nominal expense would be to allow the defendant to turn its alleged unconscionable behavior into a profitable transaction.

4/ The 5,000,000 acres of exchange land were made up in large part from Royce Area 151 in Iowa, purchased by the United States from various tribes under the Treaty of July 15, 1830 (7 Stat. 328).

The facts relied upon by the plaintiffs in support of this argument are in part set forth in our Findings of Fact in Prairie Band of Potawatomi Indians v. United States, Docket 15-J, et al., 4 Ind. Cl. Comm. 409, 417-419, 422-427, 429-430 (1956). These findings, together with the journal of the 1833 treaty proceedings, evidence that the 1833 treaty was procured under repeated threats of war and destruction by the United States if the Indians refused to sell their lands in Michigan, Illinois, and Wisconsin, and move west as the United States urged.

The findings also show that the 1833 treaty provided for payment by the United States of various sums of money as partial consideration for the lands ceded by the Indians under the treaty. Among the monies thus promised were $150,000 for mills, houses, blacksmith shop, agricultural improvements, implements and livestock, etc. to aid the Indians in settling the 5,000,000 acres of exchange land, and a $70,000 educational fund.[5/] By 1836 the defendant had broken its treaty commitments for the expenditure of those funds.[6/]

The findings further evidence that by 1841 the defendant concluded that the 1833 exchange lands were required for white settlement, and that it would be necessary to remove the Potawatomi therefrom.[7/] A treaty council was held for this purpose in 1845. There at the United States' treaty commissioners asserted that it was intended that the

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5/ Prairie Band, supra, Finding 24, 4 Ind. Cl. Comm. 426.
6/ Id.
7/ Id., Finding 25, p. 427.

Potawatomi should hold the 1833 exchange land only temporarily, and that the improvement fund and education fund provided for by the 1833 treaty would not be utilized until the Potawatomi moved once again.[8/] The Potawatomi delegates pointed out that the commissioners' assertions were in violation of the 1833 treaty. One of the commissioners replied that the President and the Congress were ordained by the Great Spirit as guardians of the Indians; that the President would decide the time and manner of carrying out the treaty; and that this was not the time.[9/]

It appears that the plaintiffs have established duress on the part of the defendant in coercing their participation in the 1833 treaty (as well as in the Treaty of June 5, 17, 1846, under which they sold the 5,000,000 acres of exchange land back to the United States.) Plaintiffs have also shown duplicity on the part of the defendant in carrying out the terms of the 1833 treaty, as well as failure of consideration under that treaty. The failure of consideration will be taken into account in determining the total amount of consideration received under the 1833 treaty. If that amount is less than the value of the lands ceded, the showing of duress and duplicity will entitle the plaintiffs to recover the difference even though that difference might not otherwise be so great as to be "unconscionable". It may thus permit recovery where a claim for unconscionable consideration might otherwise fail. In this way equity may at least in part be served.

8/ Id., Finding 29, p. 429.
9/ Id., Findings 29, 30, p. 430.

However, under the facts of this case we find no basis for disallowing the defendant credit for the "fair market value" of the exchange lands actually provided under the 1833 treaty. Our reasons for this will become more apparent subsequently herein.

Plaintiffs rely upon decisions cited in Pueblo de Zia v. United States, Docket 137, 21 Ind. Cl. Comm. 316 (1969), aff'd in part and rev'd in part, 200 Ct. Cl. 601, 624 (1973), in support of their contention that at best the defendant should be allowed only the value of the consideration which it paid for the exchange land, rather than the fair market value of the land. Plaintiffs concede that in the first two cases cited in Zia, this Commission uniformly held, as a matter of course, that land granted by the defendant as part of treaty consideration, is to be valued at its "fair market value." Plaintiffs would minimize this, however, by pointing out that those decisions were not reviewed by the Court of Claims. A quick look at the cases cited in Zia will be helpful.

The first of those cases, Absentee Delaware v. United States, Docket 337, 9 Ind. Cl. Comm. 346 (1961), involved a cession of land in Indiana under the Treaty of October 3, 1818 (7 Stat. 188). Under the treaty the United States agreed to provide a country for the Delawares to reside in west of the Mississippi River. This was accomplished by the Treaty of September 24, 1829 (7 Stat. 327), ratified on April 29, 1830, granting them 1,884,160 acres in Kansas, with a total 1830 value of $465,664. This was held to be part of the consideration under the 1818 treaty.

The second case cited in Zia is Prairie Band of Potawatomi Indians v. United States, Docket 15-J et al., 4 Ind. Cl. Comm. 409 (1961). This case involved the Treaty of June 5 and 17, 1846 (9 Stat. 853), under which the Potawatomi ceded two tracts of land, one of which was the very same 5,000,000 acres of exchange land received under the 1833 treaty, and which is the subject of the plaintiffs' motion herein. Under the 1846 treaty the United States agreed to pay $850,000 for the ceded lands, less $87,000 which was to be deducted therefrom in payment for 576,000 acres of Kansas land granted to the Potawatomi by the United States under Article 4 of the 1846 treaty. We held that the lands ceded, including the 5,000,000 acres of exchange land, should be valued as of the 1846 cession treaty, and accordingly granted the plaintiffs an additional 60 cents per acre therefor.[10/]

It is thus seen that in consequence of the plaintiffs' 1846 cession of the 5,000,000 acres of exchange land to the defendant, they have been granted the full 1846 fair market value of said land. In our opinion equity requires that in this proceeding the defendant be credited with the fair market value of the same land as of the February 21, 1835 effective date of the 1833 treaty, by which the defendant first granted those lands to the plaintiffs.

If any Indians may be heard to complain over any profit which the defendant may have realized, it would not be the plaintiffs but rather

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10/ In equity we held that the 576,000 acres provided by the United States should also bear an 1846 valuation of $288,000 rather than the $87,000 specified in the 1846 treaty.

the tribes from which the defendant originally purchased the 5,000,000 acres.

The third case cited in Zia, is Peoria Tribe of Indians v. United States, Docket 314, 9 Ind. Cl. Comm. 274, 292 (1961), 12 Ind. Cl. Comm. 396 (1963), aff'd, 169 Ct. Cl. 1009 (1965). Therein we found that land granted to the Weas by the United States under the Treaty of October 29, 1832 (7 Stat. 410), was a gratuity, the value of which the defendant was entitled to set off against an award to the Wea for a cession under the Treaty of October 2, 1818 (7 Stat. 186). We held that the defendant might set off either the 1832 fair market value of the Wea portion of the grant, or in lieu thereof we would consider any reasonable amount which the parties might agree upon as the proper value of the offset. The Court of Claims affirmed that the gratuity was a proper offset. The value issue was not appealed.

It is seen that none of the foregoing cases cited in the Zia decision support the plaintiffs' legal theory. However the plaintiffs point to two later cases cited in Zia, in which the cost of land, rather than its market value, was the measure of the credit to the Government. The cases referred to are Kickapoo Tribe v. United States, 178 Ct. Cl. 527, 534, 535 (1967), on appeal of Docket 316, 10 Ind. Cl. Comm. 320 (1962) and 15 Ind. Cl. Comm. 628 (1965); and Ponca Tribe v. United States, 183 Ct. Cl. 673 (1968), on appeal of Docket 323, 17 Ind. Cl. Comm. 162 (1966). The cases may be distinguished on the facts from the case at bar.

Kickapoo involved lands given gratuitously rather than as consideration as in this proceeding. In Kickapoo we found that by the Treaty of May 18, 1854 (10 Stat. 1078), the Kickapoo sold part of their Kansas lands and agreed to accept a small reservation of the balance (or equivalent acreage). They also agreed to stop their depredations. Instead they went to Mexico and raided back across the border. The United States prevailed upon them to return in 1874, by offering them a reservation in Oklahoma as an inducement. We held that the Oklahoma reservation was a gratuity which could be offset against their claim under the 1854 treaty. The United States was not obligated to give them the Oklahoma reservation, as they had an obligation under the 1854 treaty to stay on the reservation they received thereunder. We held that the Oklahoma reservation should be valued as of the date of return. The Court of Claims however held that to prevent the United States from making a profit, the Oklahoma reservation should be valued as of the date the United States purchased it in 1866.

The Ponca case involved lands given as payment on a claim. By the Treaty of April 29, 1868 (15 Stat. 635), the defendant erroneously included Ponca Reservation lands in lands granted to the Sioux. The Sioux killed many Ponca and the defendant forcefully removed many Ponca to the Kaw Reservation. Later, by way of partial indemnification, the defendant purchased other land for the Poncas. We held that in a "taking" suit for the loss of the Ponca Reservation, the defendant was entitled to

offset the fair market value of the compensatory land, as payment on the claim. The Court of Claims reversed, holding that only the purchase price of the compensatory land could be offset.

The plaintiffs argue that payment on a claim is similar to consideration since it is payment in recognition of an obligation, and therefore there is no sound basis for distinguishing land granted as consideration (as in this proceeding) from land given as payment of a claim. We disagree. In our opinion the facts of each case must be considered independently so as to reach as equitable a result as possible. Under the circumstances of this case, substantial equity will be achieved by allowing the defendant the fair market value of the 5,000,000 acres of exchange land provided as partial consideration under the 1833 treaty, computed as of February 21, 1835, the effective date of the treaty.

The plaintiffs argue further that there was no fair market value of the exchange lands in 1835 because there was no market for said lands at that time, and hence the measure of value should be the defendant's cost for the land. The same circumstances have not yet prevented determination of equitable evaluations in other cases decided by this Commission, and there is no reason why they should in this instance. Plaintiffs will have an opportunity to present valuation estimates based on all of the attendant circumstances, including the price paid by the defendant.

The plaintiffs' motion is also premised on their contention that the westward removal of the Potawatomi under the 1833 treaty was "proposed

for the benefit of the Government's white citizens; not for the Government's Indian wards."[11/] In evidence they quote the following portions of our Finding No. 9 in Docket 15-J, et al., wherein we set forth the text of a letter of March 16, 1833, from Governor Porter to the Commissioner of Indian Affairs:

> That it is an object of great importance that the Government should become possessed of their land cannot be doubted . . . Extinguish their Title, and the whole country will soon be covered by our enterprising citizens . . . [12/]

We cannot say however that there was not at least a modicum of truth in the further assertions of Governor Porter as an 1833 treaty commissioner, that it was in the Potawatomi interest to move west to find more game and to avoid the clashes already being experienced with the encroaching whites. Under analogous circumstances the Court of Claims has found no breach of fiduciary duty by the United States in the mere fact that non-Indian as well as Indian interests were benefited, Klamath and Modoc Tribes and Yahooskin Band of Indians v. United States, 193 Ct. Cl. 670, 688, 701 (1971).

Lastly plaintiffs urge that the exchange land be treated as an offset and denied under the provision of Section 2 of the Indian Claims Commission Act,[13/] which authorizes this Commission to set off gratuitous expenditures if warranted by the nature of the claim and the entire course of dealings and accounts between the United States and the

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11/ Plaintiffs' memorandum in support of their motion, pp. 1-2.

12/ 4 Ind. Cl. Comm. 417 (1956).

13/ 25 U.S.C. §70a.

plaintiffs. It is clear from the preceding portion of this opinion that the exchange land was not a gratuity on the part of the defendant. It was a principal part of the consideration under the 1833 treaty. Accordingly it may not be treated as a gratuitous offset.

Response Of The Plaintiffs In Docket 29-A

The plaintiffs in Docket 29-A take no position on the quantity of the exchange land, or on the method, amount, or date of valuation thereof, other than to argue that the value thereof is not chargeable against or deductible from any recovery they may realize in this proceeding. Their reason is that they allegedly received none of the exchange land or any benefit from it. However, it is unnecessary and inappropriate for us to rule on this argument in relation to the subject motion.

For the reasons stated herein, the plaintiffs' motion is denied by the accompanying order.

Margaret H. Pierce

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall

Jerome K. Kuykendall, Chairman

John T. Vance

John T. Vance, Commissioner

Richard W. Yarborough

Richard W. Yarborough, Commissioner

Brantley Blue

Brantley Blue, Commissioner