BEFORE THE INDIAN CLAIMS COMMISSION

THE BOIS FORTE BAND, PETER SMITH, CALVIN KADUB, WILLIAM JOHNSON, and LAWRENCE A. CONNOR, Plaintiffs,	)	
v.	)	Docket No. 18-D
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: January 28, 1977

Appearances:

Rodney J. Edwards, Attorney for Plaintiffs.
Marvin J. Sonosky was on the brief.

James E. Clubb, with whom was Assistant Attorneys General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The Commission has previously determined that the Bois Forte Band of Chippewa Indians was the owner by recognized title of the land (Royce Area 482) which it ceded to the United States by the Treaty of April 7, 1866 (14 Stat. 765), 21 Ind. Cl. Comm. 254 (1969). Thereafter, the Commission determined that the fair market value of Royce Area 482 was $1,100,000, and that the promised treaty consideration therefor, $338,200,[1/] was so grossly

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1/ The promised consideration was actually $318,200.00. The error in the Commission's previous finding arose from the incorrect listing of the Article 4 consideration as $50,000 instead of $30,000.00. An amendment to the 1866 Treaty, agreed to by the Bois Forte Band on April 28, 1866, reduced the Article 4 consideration from $50,000.00 to $30,000.00.

inadequate as to render the consideration unconscionable within the meaning of Clause 3, Section 2, of the Indian Claims Commission Act. 34 Ind. Cl. Comm. 157 (1974). This claim is now before the Commission for determination of the amount of consideration actually paid to plaintiffs and for determination of the allowable gratuitous offsets, both of which will be deducted from the interlocutory award of $1,100,000.00.

As consideration for the cession of Royce Area 482 the 1866 Treaty provided that the United States would pay the following:

Article 3 (2d)

1 blacksmith shop - not to exceed	$ 500
1 schoolhouse - not to exceed	500
8 houses for chiefs - not to exceed	3,200
Agency house and storehouse - not to exceed	2,000
Total	$6,200

Article 3 (3d)

To pay or expend $14,100.00 per year for 20 years or a total of $282,000.00. The annual payments were to be:

One blacksmith and assistant and for tools, iron, and steel, and other blacksmith articles	$1,500
One school teacher and the necessary books and stationery	800
Instruction in farming and the purchase of seeds, tools, etc.	800
Cash payments per capita	3,500
Provisions, ammunition, and tobacco	1,000
Goods and other articles	6,500

Article 4

To pay $30,000.00 to the chiefs, head-men, and warriors to assist in establishing the Bois Forte Indians on their new reservation and to purchase useful articles and presents for the Indians.

Plaintiffs have contended that the provisions of Article 4 were not consideration for the land cession but rather a "sweetener" to insure speedy removal of the Indians to the new reservation and to satisfy those chiefs who signed the treaty. The $30,000.00 payments to be made under Article 4 constituted part of the inducement for the cession by the Indians and, as such, are part of the consideration for that cession.

Plaintiffs have also asserted that the consideration recited in the treaty was not payment for the land cession alone but also for the surrender of the Bois Forte Band's claim to pre-1866 treaty payments. In Article 7 of the 1866 Treaty it was agreed that all former treaties between the parties would be abrogated and the Indians relinquished any claims for arrears of payments claimed to be due or thereafter to fall due under the former treaties. Article 7 further provided that the twelfth article of the Treaty of September 30, 1854, 10 Stat. 1109, (providing for blacksmithing and farming benefits) would continue in effect but the benefits would be transferred to the Chippewas of Lake Superior.

It is plaintiffs' contention that the Bois Forte Band had never received the payments due it under four prior treaties and that the total amount of such arrearage was $297,584.00. The four treaties were -- Treaty of July 29, 1837, 7 Stat. 536; Treaty of October 4, 1842, 7 Stat. 591; Treaty of August 2, 1847, 9 Stat. 904; and the Treaty of September 30, 1854, 10 Stat. 1109. The latter treaty, plaintiffs assert, confirmed that the Bois Forte never had received annuity payments under

the prior treaties of 1837 and 1842 because Article 12 of the 1854 Treaty recited that "In consideration of the poverty of the Bois Forte Indians who are parties to this treaty, they having never received any annuity payments. . . ." Additional evidence of the arrearage, plaintiffs allege, is reflected in the 1891 and 1892 reports of the Commissioner of Indian Affairs which contain identical reports of the La Pointe Indian Agent that the Indians (presumably all of the seven bands under the La Pointe Agency, of which the Bois Forte was one) claimed $120,000 due under the 1854 Treaty and still larger sums due under prior treaties. The agent recommended that the claims ". . . be investigated at the earliest date practicable, and if it is determined that the Indians are entitled to arrearages under old treaties, the sums due should be paid to them. If it should be found that the claims are imaginary the Indians should be so informed. The Indians waste a great deal of time in the discussion of these old claims." Report of the Commissioner of Indian Affairs to the Secretary of the Interior, 1892, Plaintiffs' Ex. V, p. 519. There is no evidence that this claim was ever pursued, investigated or its validity determined.

We do not agree with plaintiffs' contention. Defendant has introduced evidence of the payment of all consideration provided for in the four previous treaties. There is also in evidence a resolution of the Lake Superior Chippewas, dated January 20, 1866, (less than three months prior to the execution of the 1866 Bois Forte Treaty), concerning the lands involved in this case. The Lake Superior Chippewas asserted that although the lands were claimed by the Bois Forte Band as its hunting ground, the

the area was actually owned by the Chippewa Indians in common. The resolution recited that the Bois Forte had participated in the Lake Superior Chippewa's annuities for a number of years. Therefore, if the United States should treat ". . . with the Bois Forte Band exclusively, we [Lake Superior Chippewas] beg leave to present our claims before signing of any papers, for the amount they have received of our annuities to be paid out of the proceeds of said sale, otherwise we declare said sale null and void." Preamble and resolutions concerning a treaty with Bois [Forte] Indians and about the rights of the Chippewas of Lake Superior to participate in the benefits of said treaty, Def. Ex. 3, p. 3.

Thus it appears that the Bois Forte Band, in return for the right to deal for itself in ceding Royce Area 482, gave up its claimed rights to annuities under prior treaties and, by way of compensating the Chippewas of Lake Superior for annuities received under those prior treaties, assigned to the Chippewas of Lake Superior the blacksmith, smith-shop, supplies, and instructions in farming which had belonged exclusively to the Bois Forte Indians pursuant to Article 12 of the 1854 Treaty. There is no basis for excluding any part of the promised payments as consideration for the cession of Royce Area 482. To the extent that any such payments were properly made and are otherwise allowed to be offset as payments on the claim, they will be deducted from the interlocutory award in this case.

Defendant has alleged payments totalling $349,603.00 made in fulfilling its obligations under the treaty. However, we find that only

$76,191.35 can properly be offset as payment on this claim. This includes a total of $69,861.35 in per capita cash disbursements, which were made under Article 3(3d) of the treaty and the sum of $6,330.00 paid to the chiefs, headmen and warriors under Article 4.

We disallow all of the payments claimed under Article 3(2d), by which the United States was obligated to construct certain buildings and houses on the Bois Forte Reservation. The 1871 report of the Indian agent stated that the blacksmith shops, schoolhouse and eight houses for chiefs had been erected at a location which was several miles east of the eastern boundary of the reservation. All the buildings were deserted -- the schoolhouse because the teacher had never been there, and the blacksmith shop had never been used. Since the buildings were not constructed on the Bois Forte Reservation, as required by Article 3(2d) of the 1866 Treaty, and were not used by the Bois Forte Indians, none of the claimed disbursements under that article can be allowed as payment of the promised consideration.

Article 3(3d) provided for annual payments over a 20-year period for certain specified purposes. We disallow all the claimed disbursements for blacksmithing, teaching, and farming because the evidence indicates that the goods and services under those categories were not provided to the Indians at the Bois Forte Reservation. Reports of the Indian agents indicate that it was not until 1896 that any of the stipulated employees were at the Bois Forte Reservation. That was some 10 years after the 20-year period during which the annuity payments were to have been made.

We also disallow all disbursements listed under the general categories: "provisions, ammunition, and tobacco" and "goods and other articles". A recent amendment to the Indian Claims Commission Act provides that expenditures for food, rations, or provisions shall not be deemed payments on the claim. Act of October 27, 1974, Public Law 93-494, 88 Stat. 1499. The two general categories come within the purview of that act, and expenditures made for those purposes may not be deducted as payments on the claim. */

Under Article 3(3d) the only disbursements which can be allowed are the cash payments to the Bois Forte Indians. The per capita payments were to have been $3,500.00 per year or a total of $70,000.00. The defendant has itemized payments totaling $69,861.35, and this amount will be offset as a payment on the claim.

Under Article 4 the United States spent $22,969.42 for "presents and useful articles" for the Bois Forte Indians. Defendant has not introduced any evidence to establish that these moneys were not expended for articles involving the precluded category of food, rations, or provisions. In the absence of any proof on this issue we must disallow the entire offset requested of $22,969.42 for presents and useful articles. We do, however, allow as an offset the payment of $6,330.00 to the chiefs, head-men, and warriors. This sum will be deducted as a payment on the claim.

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*/ See generally, The Prairie Band of the Pottawatomie Tribe v. United States Dockets 15-C, 29-A, and 71, 38 Ind. Cl. Comm. 128, 224-227.

The defendant has claimed gratuitous offsets totaling $37,466.32. The offsets are listed in five main categories, and we consider them in detail in findings 39 through 43. We do not allow any of the claimed gratuitous offsets.

Many of the claimed items were too small to support an inference that they constituted a tribal benefit. Such disbursements could only have benefitted a few individual Indians, and those items have been disallowed.

A large part of the claimed expenditures were made through the Consolidated Chippewa Agency and the La Pointe Agency. Both of those agencies had jurisdiction over a number of Chippewa bands and reservations. The defendant is unable to identify what portion of the goods and services provided by the agencies actually was for the Bois Forte Reservation Indians. Defendant has requested offsets against the Bois Forte award based on the proportion which the number of Bois Forte Indians bore to the entire Indian population of the bands and reservations served by the agencies. This procedure of allocating expenditures on a population basis has been used by this Commission and the courts in a number of cases where records have not been available to show actual expenditures for a particular tribe or band. However, in those cases it could be presumed that the Indians under a particular agency participated in the distribution of the goods or services involved -- and in direct proportion to the percentage which their population bore to the total number of Indians involved. We have not permitted a ratable apportionment where the nature of the goods or services are such that they could not be subjected to division among

a number of bands. And we cannot permit the apportionment in cases, such as this, when there is evidence that the plaintiff Indians did not participate on an equal basis with other agency Indians. In this case reports from defendant's own agents indicate that the Bois Forte Reservation often was neglected when goods and services were dispensed. This was particularly true in the early years. In 1874 it was reported that the Bois Forte Reservation was so isolated and within a district so difficult of access that it seemed impossible to do anything more than pay the Bois Forte their cash annuities. To receive those payments it was usually necessary for the Indians to travel off their reservation to a location more convenient to the Indian agent. In 1882, a year in which defendant claims to have disbursed a relatively larger amount of provisions to Chippewa Indians, the Indian agent reported that the Bois Forte Reservation was inaccessible for the delivery of supplies. It therefore appears likely that in many instances the Bois Forte Band failed to receive any part of the gratuities disbursed by the La Pointe and Consolidated Chippewa Agencies. And it is apparent that what goods and services were delivered to the reservation represented less than the Bois Forte's proportionate share.

Defendant has claimed credit for some $10,806.37 expended for the purchase of land for the Bois Forte Indians. However, no evidence was presented to show that title to the lands ever vested in the Bois Forte Band. In fact, what evidence is available indicates that title was taken by the United States in trust for the Minnesota Chippewa Tribe. We will not allow these expenditures as offsets against the Bois Forte award.

The largest single category for which offset has been claimed is "expenses, care, and sale of timber." Defendant claims $14,787.11 for expenditures made between 1935 and 1951. This sum represents the Bois Forte proportionate share of some $335,224.04 expended through the Consolidated Chippewa Agency. Of these payments over 90% was for the pay of Federal employees such as foresters, assistant foresters, guards, and towermen. Such employees were a part of the agency or administrative service, and their pay should not be allowed as a gratuitous offset against the Bois Forte award. We also agree with plaintiffs' contention that there is no indication of the amount spent on timber owned by the Bois Forte Band as distinguished from that owned by individuals (either white or Indian), the Minnesota Chippewa Tribe, or the United States. Other payments under this category were made for the purchase of tires and tubes for government owned vehicles and for the purchase of such vehicles. Such expenditures were likewise for the agency or administrative services.

Defendant has claimed gratuitous offsets for the pay of carpenters and blacksmiths. Such expenditures were also part of the agency or administrative service, and their salaries cannot be offset against the award in this case.

We have considered all of the claimed gratuitous offsets, and in each instance, for one or more of the enumerated reasons, we have found that the claimed gratuity should not be allowed as a offset against the the award in this case. Accordingly, the only offset to be allowed in this case is the sum of $76,191.35, representing payments on the claim.

This sum deducted from the interlocutory award of $1,100,000.00 leaves a net amount of $1,023,808.65. A final award is being entered in this amount.

Brantley Blue
Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance
John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Margaret M. Pierce
Margaret M. Pierce, Commissioner