

Second District

657

In the Court of Claims of the United States

CONGRESSIONAL No. 17641

THE CHOCTAW AND CHICKASAW NATIONS, PLAINTIFFS

vs.

THE UNITED STATES, DEFENDANT

DEFENDANT'S REPLY BRIEF TO PLAINTIFFS' BRIEF IN OPPOSITION TO STATEMENT OF GRATUITIES

Evidence to support certain of the items in defendant's claim of offset (R. pp. 461-465) not having been available, the claim is now restated, omitting items not supported by evidence. The re-statement includes the appropriations from which the payments were made.

RESTATEMENT OF GRATUITIES

(a) During the fiscal years from 1867 to 1934, inclusive, the United States expended gratuitously and without obligation for the benefit of the Chickasaw Nation under other than treaty or contractual appropriations the sum of \$35,572.50 for the following purposes:

Purpose	Appropriations	Amount	Report G. A. O. page
1 Agricultural aid	Agriculture and stock raising among Indians.	\$27. 00	8
2 Automobiles and repairs.....	Automobiles and repairs.....	148. 34	

Purpose	Appropriations	Amount	Report G. A. O. page
3 Education.....		\$29,137.08	27, 30, 39-41, 46-50, 58, 60, 64, 65
4 Expense of delegations.....	Provisions for Indians.....	200.00	57
5 Household equipment.....	Support of Indians and administra- tion of Indian property.	80.85	63
6 Indian dwellings.....	Indian dwellings.....	73.77	63
7 Medical attention.....	Conservation of health among In- dians.	194.49	11, 60
8 Miscellaneous agency.....	Contingencies, Indian Department..	1, 653.34	8, 21-6, 27, 28, 60, 62-3
9 Pay of interpreters.....	Relieving distress, etc. Pay of interpreters.....	3, 149.99	55
10 Presents.....	Support of Indians and administra- tion of Indian property.	30.00	63
11 Provisions and other rations..	Provisions and other rations.....	779.81	63
12 Transportation, etc., of supplies.	Telegraphic transportation, etc., Indian supplies.	97.83	61, 65
		35,572.50	

(b) During the fiscal years from 1867 to 1934, inclusive, the United States expended gratuitously and without obligation for the benefit of the Choctaw Nation under other than treaty or contractual appropriations the sum of \$132,871.79 for the following purposes:

Purpose	Appropriations	Amount	Report G. A. O. page
13 Automobiles and repairs.....	Agriculture and stock raising among Indians.	\$236.59	73
14 Burial of Indians.....	Conservation of health among Indians.	350.75	91
15 Education.....		94,230.64	76, 88, 89, 108, 112, 120, 121, 126-8, 130-1, 145-6, 151, 155, 161
16 Expense of delegations.....	Provisions for Indians.....	200.00	143
17 Medical attention.....	Conservation of health among Indians. Relieving distress and prevention, etc., of disease. Suppressing smallpox.	30,949.22	91, 145-6, 152

Purpose	Appropriations	Amount	Report G. A. O. page
18 Miscellaneous agency ex- penses.	Agriculture and stock raising among Indians. Conservation of health among Indians. Contingencies, Indian Depart- ment. General expenses, Indian service. Industrial work and care of timber. Relieving distress and prevention, etc. of diseases among Indians. Telegraphing and purchase of Indian supplies.	\$3,324.30	73, 91, 107, 111, 133, 146-8, 153, 154
19 Pay of interpreters.....	Pay of interpreters.....	3,299.99	
20 Pay of miscellaneous em- ployees.	Suppressing the spread of small- pox, Indian territory.	237.00	139
21 Provisions and other ra- tions.	Support of Indians and adminis- tration of Indian property.	43.30	152 158
		132,871.79	

(c) During the fiscal years from 1867 to 1934, inclusive, the United States expended gratuitously and without obligation for the joint benefit of the Choctaw and Chickasaw Nations under other than treaty or contractual appropriations the sum of \$503,784.68 for the following purposes:

Purpose	Appropriations	Amount	Report G. A. O. page
22 Agency buildings and re- pairs.	Buildings at agencies and repairs.....	\$5,056.50	190, 193, 211
23 Agricultural implements and equipment.	Contingencies, Indian Department..	230.50	211
24 Clothing.....	Conservation of health among Indi- ans.	129.83	207
25 Education.....	Civilization fund.....	11,735.27	191, 230, 243
	Purchase and transportation of In- dian supplies. Support of schools not otherwise pro- vided for.		
29 Feed and care of horses.....	Incidentals in Indian territory, in- cluding employees.	120.00	216
30 Feed and care of live-stock..	Contingencies, Indian Department..	956.88	
31 Fuel, light, and water.....	Buildings at agencies and repairs.....	823.20	192-3, 208, 209-11
32 General office expenses.....	Conservation of health among Indi- ans. Administration of affairs of Five Civilized Tribes. Commission, Five Civilized Tribes.	231,048.77	188-8, 199, 201-5

Purpose	Appropriations	Amount	Report G. A. O. page
33 Hardware, glass, oils, and paints.	Conservation of health among Indians.	\$11. 99	207, 211
34 Incidental expenses-----	Contingencies, Indian Department.		
	Incidentals, Indian territory-----	694. 90	215, 216-20, 228
	Protection of people of the Indian territory.		
35 Livestock-----	Contingencies, Indian Department.	345. 00	211
36 Locating coal and asphalt lands.	Commission, Five Civilized Tribes.	1, 662. 89	202
37 Medical attention, Choctaw-Chickasaw Hospital.	Relieving distress and prevention, etc., of diseases among Indians.	179, 531. 61	221-2, 231-5
	Increase of compensation, Indian service.		
38 Miscellaneous agency expenses.	Buildings at agencies and repairs-----	13, 489. 90	191-3, 208, 209-13, 214, 240, 241
	Conservation of health among Indians.		
	Contingencies, Indian Department.		
	General expenses, Indian Service.		
	Subsistence, clothing, etc., of destitute Indians.		
	Support and civilization of Indians.		
39 Pay of interpreters-----	Pay of interpreters-----	200. 00	223
40 Pay of miscellaneous employees.	Incidentals in Indian territory, including employees.	2, 065. 00	217, 220, 228
	Incidentals, inspector's office, Indian territory, including employees.		
	Protection of the people of the Indian territory.		
42 Per capita payment expenses.	Administration of affairs of Five Civilized Tribes.	208. 71	185
43 Preservation of records-----	Provision of records, office of Superintendent of Five Civilized Tribes.	386. 05	224
44 Probate expenses-----	Probate attorneys, Five Civilized Tribes.	540. 77	225-6
45 Protecting property interests.	Protecting property interest of minor allottees, Five Civilized Tribes.	356. 50	227
46 Provisions and other rations.	Conservation of health among Indians.	202. 25	207, 229
	Provision for Indians.		
49 Sale of unallotted lands-----	Administration of affairs of Five Civilized Tribes.	12, 855. 24	185, 238-9
	Sale of unallotted lands, Five Civilized Tribes. (Reimbursable.)		
54 Timber estimating-----	Administration of affairs of Five Civilized Tribes.	7, 035. 45	185, 201, 204
	Commission, Five Civilized Tribes.		
55 Transportation, etc., of supplies.	Buildings at agencies and repairs.	16, 331. 01	191, 207-8, 209, 211
	Conservation of health among Indians.		
	Contingencies, Indian Department.		
56 Traveling expenses-----	Incidentals in Indian territory-----	4, 394. 08	215-8, 220, 228
	Incidentals, inspector's office, Indian territory.		
	Protection of people of the Indian territory.		
		503, 784. 68	

(d) During the fiscal years from 1867 to 1934, inclusive, the United States expended gratuitously and without obligation for the joint benefit of the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations or Tribes under other than treaty or contractual appropriations the sum of \$11,094,-587.86 for the following purposes:

Purpose	Appropriations	Amount	Report G. A. O. page
53 Agency building and repairs.	Buildings at agencies and repairs-----	\$130, 794. 22	283, 307-9, 322, 335, 340-1
	Contingencies, Indian Department.		
	General expenses, Indian service.		
	Indian agency buildings.		
	Indian school and agency buildings.		
59 Agricultural aid-----	Agriculture and stock raising among Indians.	24, 331. 81	279, 412-4
	Support of Indians and administration of Indian property.		
	Contingencies, Indian Department.	152. 20	307-11
60 Agricultural implements and equipment.	Appraisal and sale of restricted lands, Five Civilized Tribes.	24, 999. 20	282
64 Appraisal and sale of restricted lands.	Support of Indians and administration of Indian property.	23, 799. 99	278-80, 306, 321, 413-6
65 Automobiles and repairs--	Administration of Indian forests.		
	Conservation of health among Indians.		
66 Construction and maintenance: Claremore Hospital.	Conservation of health among Indians.	77, 127. 98	305, 335, 343, 397
	Indian agency buildings-----		
	Purchase and transportation of Indian supplies.		
67 Copying allotment records.	Copying records allotted lands, Five Civilized Tribes.	14, 648. 72	320
68 Education-----	Care of orphan Indian children, Indian territory.	2, 177, 277. 86	284-92, 305, 332-65, 391-414, 424
	Conservation of health among Indians.		
	Increase of compensation, Indian service.		
	Purchase and transportation of Indian supplies.		
	Transportation of Indian supplies.		
71 Feed and care of horses---	Incidentals in Indian territory-----	3, 371. 96	325-30, 389
	Protection of the people of the Indian territory.		
72 Feed and care of livestock--	Contingencies, Indian Department.	1, 396. 28	207-11

50, "Accounting" out. 186,243.14
 51, "Accounting and allotting" out. 9315.37
 52, "Accounting, Clothing, etc." out. 119,624.29

Purpose	Appropriations	Amount	Report G. A. O. page
73 Fuel, light, and water....	Contingencies, Indian Department.	\$899.70	307-16, 322
74 General office expenses....	General expenses, Indian service-- Administration of affairs of Five Civilized Tribes.	4,353,284.99	270-5, 298-303 <i>In Out. In</i>
75 Hardware, glass, oils, and paints.	Commission, Five Civilized Tribes.	11.24	307, 310
76 Household equipment....	Contingencies, Indian Department.	2,625.33	412-3
77 Incidental expenses.....	Support of Indians and administration of Indian property.	30,115.98	317-9, 325, 326-8, 329, 330-1, 339-90
	Contingencies Indian Department.		
	Incidentals in Indian territory.		
	Incidentals in Indian territory, including employees.		
	Incidentals in Oklahoma, including employees.		
	Incidentals, inspector's office, Indian territory, including employees.		
	Protection of the people of the Indian territory.		
78 Investigating leases, allotted lands. :	Investigation of fraudulent leases, allotted lands, Five Civilized Tribes.	29,955.95	367-8
79 Leasing of mineral and other lands, expenses.	Administration of affairs, Five Civilized Tribes.	4,514.39	270-2, 302 <i>In Out. In</i>
80 Livestock.....	Contingencies, Indian Department.	1,837.50	307-10, 413
	Support of Indians and administration of Indian property.		
81 Medical attention.....	Conservation of health among Indians.	1,638.06	306-10, 399, 401, 417, 426
	Contingencies, Indian Department.		
	Relieving distress and prevention, etc., of diseases among Indians.		
	Suppressing the spread of small-pox, Indian territory.		
82 Miscellaneous agency expenses.	Vaccination of Indians.	219,738.88	279-80, 305-6 <i>In Out. In</i>
	Agriculture and stock raising among Indians.		
	Conservation of health among Indians.		315-23, 400, 418, 420
	Contingencies, Indian Department.		
	Relieving distress and prevention, etc., of diseases among Indians.		
	General expenses, Indian service.		
	Telegraphing and purchase of Indian supplies.		
	Field representative, Indian service.		
83 Oil and gas expenses.....	Administration of affairs of Five Civilized Tribes.	7,028.28	272-3, 275, 277

Purpose	Appropriations	Amount	Report G. A. O. page
84 Oil and gas mining, supervision allotted lands.	Oil and gas inspectors, Five Civilized Tribes.	\$85,703.40	369-0
85 Pay and expenses of farmers.	Agriculture and stock raising among Indians.	327,793.63	279-0, 310, 332-4, 366
	Contingencies, Indian Department.		
	Increase of compensation Indian service.		
	Industrial work and care of timber.		
86 Pay and expenses of field matrons.	Increase of compensation, Indian service.	6,217.32	332, 366
	Industrial work and care of timber.		
91 Pay of interpreters.....	Increase in compensation, Indian service.	125,783.64	332-4, 410-4
	Support and civilization of Indians.		
92 Pay of miscellaneous employees.	Conservation of health among Indians.	1,761,043.55	206, 324, 410-11, 412-14
	Contingencies, Indian Department.		
	Incidental expenses of Indian service.		
	Support and civilization of Indians.		
	Support of Indians and administration of Indian property.		
93 Pay of skilled employees..	Contingencies, Indian Department.	415.80	307-11
95 Per capita payment expenses.	Administration of affairs of Five Civilized Tribes.	111.43	270
96 Preservation of records....	Preservation of records, office of Superintendent of Five Civilized Tribes.	8,886.62	378
97 Probate expenses.....	General expenses, Indian service...	1,053,120.71	323, 332-4, 379-86, 413-4
	Increase of compensation, Indian service.		
	Probate attorneys, Five Civilized Tribes.		
	Support of Indians and administration of Indian property.		
98 Protecting property interests.	Protecting property interest of minor allottees, Five Civilized Tribes.	386,847.59	387-8
100 Provisions and other rations.	Support of Indians and administration of Indian property.	139.27	413
101 Purchase of horses.....	Incidentals in Indian territory, including employees.	720.00	328, 390
	Protection of people of the Indian territory.		
102 Removal of alienation restrictions.	Removal of restrictions, allotted lands, Five Civilized Tribes.	88,346.12	406-8
104 Sale of allotted lands....	Administration of affairs of Five Civilized Tribes.	265.12	271
105 Sale of restricted lands....	Administration of affairs of Five Civilized Tribes.	1,577.09	271

87. "Pay of expenses of Indian Police", out, 255,843.93
 88. "Pay of expenses of Indian Police", out, 47,411.62
 89. "Pay of expenses of Indian Police", out, 67,639.53
 90. "Pay of expenses of Indian Police", out, 22,381.97
 91. "Pay of expenses of Indian Police", out, 47,411.62
 92. "Pay of expenses of Indian Police", out, 47,411.62
 93. "Pay of expenses of Indian Police", out, 47,411.62
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 104. "Pay of expenses of Indian Police", out, 47,411.62
 105. "Pay of expenses of Indian Police", out, 47,411.62

Purpose	Appropriations	Amount	Report G. A. O. page
108 Sale of unallotted lands...	Administration of affairs of Five Civilized Tribes.	\$53,538.80	271, 409
	Sale of unallotted lands, Five Civilized Tribes. (Reimbursable.)		
114 Timber estimating.....	Administration of affairs of Five Civilized Tribes.	33,776.10	271, 299
	Commission, Five Civilized Tribes.		
115 Transportation, etc. of supplies.	Contingencies, Indian department.	8,349.60	307-13, 315-6, 322, 391-8, 412-13, 420, 424
	Copying records allotted lands, Five Civilized Tribes.		
	Purchase and transportation of Indian supplies.		
	Support of Indians and administration of Indian property.		
	Telegraphing transportation, etc., Indian supplies.		
Traveling expenses.....	Transportation of Indian supplies.	22,401.55	317-8, 325-31, 389, 425
	Contingencies, Indian department.		
	Incidentals in Indian territory, Indian schools, Five Civilized Tribes, surplus court fees.		
	Traveling expenses, Indian inspectors.		
		11,094,587.86	

During the period covered by account (d), the Choctaw and Chickasaw tribes together composed 36.62% of the total population of the Cherokee, Choctaw, Chickasaw, Seminole, and Creek tribes. Applying that percentage to the aggregate expenditure in account (d), the sum of \$4,062,838.07 is chargeable as an offset. (Repts., Comm. Ind. Affairs 1867, p. 396; 1877, p. 690; 1887, p. 354; 1897, p. 484; 1908, p. 185; 1918, pp. 93-94; 1928, p. 41.)

CONTENTIONS OF PLAINTIFFS

Plaintiffs object to each of the items set forth in the foregoing statement of gratuities upon one or more of the following reasons:

1. That the expenditures were made for the benefit of individuals and not for the benefit of plaintiff Nations.

2. That the expenditures were made pursuant to obligations of a treaty or agreement.

3. That part of the moneys came from the "Civilization Fund," which did not belong to the United States.

JURISDICTION

The act of August 12, 1935, 49 Stat. 571, 596, provides that—

in all cases now pending or hereafter filed in the Court of Claims, in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its findings of fact and conclusions to Congress, the said Court of Claims is hereby directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of said tribe or band.

I

Plaintiffs' objections on the ground of individual benefits

Miscellaneous personal benefits. Plaintiffs oppose the inclusion as offsets in the report of the court moneys expended for such purposes as "agricultural aid," "household equipment," "education," "Indian dwellings," "medical attention," "burial of Indians," "provisions and other rations," "livestock," "pay and expense of farm-

ers," and "pay and expense of field matrons," upon the ground that the benefits derived from expenditures were individual.

In similar cases this court has held that moneys expended for such purposes were gratuities because they were made for the benefit of the tribes: *Shoshone Tribe v. United States*, 82 Ct. Cls. 23, 55-59, 93, 94; *Eastern or Emigrant Cherokees v. United States*, 82 Ct. Cls. 180; *Blackfeet et al. Tribes v. United States*, 81 Ct. Cls. 101; *Crow Tribe v. United States*, 81 Ct. Cls. 238; *Klamath et al. Tribes v. United States* (not yet reported), decided by this court June 7, 1937.

Whether, as questioned by plaintiffs, the Choctaw and Chickasaw Nations as governmental units owed any duty to supply the funds incident to the aid given by the United States in supplying the foregoing services is not a question in this case. The act of August 12, 1935, *supra*, did not limit offsets to expenditures incident to the performance of duties which the respective tribal governments recognized that they owed to the members of the tribes.

Defendant submits, also, that unless the tribes are suing on behalf of their members, and not as distinct political entities, they do not come within the provisions of the resolution (R. p. 432) referring the claim to this Court, or the act (R. p. 433) appropriating money to be placed to the credit of the tribes; they are not the real parties in interest and the petition should be dismissed.

Congress undoubtedly meant any fund allowed to inure to the benefit of the members of the tribe individually. These Congressional enactments must be construed with the Act of June 28, 1898 (30 Stat. 495, 502), which prohibits payment of moneys "on any account whatsoever" to any of the tribal governments or to any officer thereof for disbursement, but requires direct distribution to the members of the tribe by United States officers.

Moreover, the treaty (7 Stat. 333) granted the land to the "nation and to their descendants." By its language, the treaty shows that the United States plainly intended the property to go not to a political unit and its political successors, but to persons and their progeny.

Expense relating to individual property. The inclusion of expenditures to cover "probate expenses," "investigating leases," "oil and gas mining supervision, allotted lands," "protecting property interests," and "protecting property interest of restricted members" as offsets is also opposed by plaintiffs on the ground that the benefits therefrom were individual.

That such expenditures were made to cover the expenses of services incident to the care and protection of the individual property of enrolled members of the tribe who were minors or incompetents is admitted. It is not admitted, however, that the benefits of such services were limited to the individuals whose property interests were protected.

Defendant contends that the tribes were interested in and benefited by the services rendered. If steps had not been taken to preserve the estates of minors and incompetents they would have become paupers and consequently, a burden to the tribes.

II

Objections on ground that expenditures were made pursuant to obligations of treaties and agreements

A. Expenditures made prior to agreement of 1898 (30 Stat. 495)

The only items representing disbursements made prior to the agreement of 1898, *supra*, which plaintiffs oppose on the ground that they were made to cover specific contractual obligations, are the items for "agency buildings and repairs," "miscellaneous agency expenses," and "pay of miscellaneous agency employees."

The early treaties with these tribes provided that the United States would furnish an agent. Thereafter under Article 17 of the treaty of 1855 (11 Stat. 611) with the plaintiff Nations it was stipulated that the United States "shall have the right to establish and maintain such * * * Indian agencies, as may be deemed necessary within the Choctaw and Chickasaw country, * * *."

The foregoing provision did not require that the Government construct agency buildings or pay miscellaneous agency employees or pay miscellaneous agency expenses but merely granted the privilege to do so. In the case of *Crow Tribe*, 81 Ct. Cls.

238, the Court allowed offsets for expenditures made for identical purposes, although a treaty provision required that an agent be furnished the tribe.

B. Expenditures made subsequent to the treaty of 1898 (*supra*)

Plaintiffs oppose the inclusion of items disbursed subsequent to the agreement of 1898 (*supra*) for the alleged reason that said agreement and the agreement of 1902 (31 Stat. 636) required the United States to make a division of the tribal property without cost to the tribe.

The only provision in either of said agreements placing upon the Government the burden of expense incident to a division of tribal property is found in the agreement of 1898 (30 Stat. 495), wherein it is provided (page 509):

That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for granting, appraising and allotting the lands, or town lots as herein provided.

All disbursements made to cover the expense of doing acts which the foregoing provisions required be done at the expense of the United States, have been eliminated from defendants' statement of gratuities.

The provision in the agreement of 1898 which specified the particular services which the United States would perform without expense to the tribes

had the effect of excluding from its requirement any other class of service. The maxim of *inclusio unius est exclusio alterius* is controlling.

In determining the question whether an expenditure is a gratuity, no sound reason exists for plaintiff's attempted distinction between an Indian tribe which is one of the "Five Civilized Tribes" and other Indian tribes. In either case the expenditure is gratuitous unless it is required to be made by treaty or agreement. (See cases cited *supra*.)

III

The civilization fund

Defendant calls attention to the fact that part of the funds used for education came from a fund set up in the Treasury as the "Civilization Fund."

This fund originated from the treaty with the Osage Indians of September 29, 1865 (14 Stat. 687). By Article 1 of said treaty a cession was made to the United States of certain lands for a consideration of \$300,000. The same article of the treaty provided that the ceded lands should be sold for cash as other public lands of the United States and after deducting certain expenses of sale and the said sum of \$300,000, the remainder of the proceeds of sale would be placed in the Treasury to the credit of the "Civilization Fund" to be used for the education and civilization of "Indian Tribes within the limits of the United States."

It is asserted that moneys placed in the "Civilization Fund" were not the moneys of the United States but the moneys of the Osage Indians.

In the case of *Osage Tribe v. United States* (66 Ct. Cls. 64), the Osage Indians sought to recover money which had been placed in the "Civilization Fund" and which was alleged to have been misappropriated by the Government. With respect to the ownership of said fund, the court said (page 80):

* * * However this may be, the treaty was a sale and conveyance of the land for the sum of \$300,000, and the land thereby became the property of the United States Government. *By its terms it was obligated only to pay to the Indians the sum of \$300,000, and there is no dispute about the fact that it did this. Any surplus proceeds which might arise from the sale would therefore, under the treaty, become the property of the United States Government, and had it not gratuitously devoted this surplus to a "civilization fund" for the civilization and education of Indian tribes, there could have been no question raised such as is raised here. [Italics ours.]*

In view of the decision of this court in the Osage case, *supra*, no further discussion of this question is deemed necessary.

CONCLUSION

It is submitted that under the authority of the act of August 12, 1935 (*supra*), the court's report to Congress should include a statement showing that the defendant has expended gratuitously for the benefit of plaintiff tribes the moneys shown to have been so expended in defendant's foregoing statement.

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