INTERIOR BOARD OF INDIAN APPEALS

Thlopthlocco Tribal Town and Muscogee (Creek) Nation
v. Acting Muskogee Area Director, Bureau of Indian Affairs

29 IBIA 241 (07/19/1996)

Clarified on reconsideration:
29 IBIA 301

Modified in part on reconsideration:
35 IBIA 27

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

THLOPTHLOCCO TRIBAL TOWN
and
MUSCOGEE (CREEK) NATION
v.
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-83-A, 95-86-A Decided July 19, 1996

Appeals from a decision concerning escrowed royalties from minerals underlying certain lands held in trust for the Thlopthlocco Tribal Town.

Affirmed.

1. Claims against the United States: Generally--Indians: Generally--Indians: Indian Reorganization Act--Indians: Oklahoma Indian Welfare Act

   Expenditures made for the benefit of Indians under the Indian Reorganization Act, 25 U.S.C. H 461-479 (1994), or the Oklahoma Indian Welfare Act, 25 U.S.C. §§ 501-509 (1994), may not be considered as offsets in any suit brought to recover upon any claim of those Indians against the United States. 25 U.S.C. §§ 475, 507 (1994).

2. Indians: Lands: Trust Acquisitions--Indians: Mineral Resources: Mining: Royalties--Indians: Oklahoma Indian Welfare Act

   Where lands are purchased for Oklahoma Indians under authority of the Oklahoma Indian Welfare Act, 25 U.S.C. § 501 (1994), using appropriated Federal funds, mineral revenues from the purchased lands are, under 25 U.S.C. § 507 (1994), made available for expenditure by the Secretary of the Interior for the acquisition of land and for loans to Indians in Oklahoma.

3. Indians: Lands: Trust Acquisitions--Indians: Mineral Resources: Mining: Royalties--Indians: Oklahoma Indian Welfare Act

   Where lands are purchased for Oklahoma Indians with funds made available for expenditure under section 7 of the Oklahoma Indian Welfare Act, 25 U.S.C. § 507 (1994), mineral revenues from the purchased lands are also subject to section 7 and are therefore made available for expenditure by the Secretary of the Interior for the acquisition of land and for loans to Indians in Oklahoma.

APPEARANCES: Richard L. Young, Esq., Albuquerque, New Mexico, for appellant Thlopthlocco Tribal Town; George Almerigi, Esq., Okmulgee, Oklahoma, for appellant Muscogee (Creek) Nation; M. Sharon Blackwell, Esq., Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Thlopthlocco Tribal Town (the Town) and Muscogee (Creek) Nation (the Nation) seek review of a February 1, 1995, decision issued by the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning escrowed royalties from minerals underlying certain lands held in trust for the Town. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

In 1936, Congress enacted the Oklahoma Indian Welfare Act (the OIWA), 49 Stat. 1967, 25 U.S.C. §§ 501-509 (1994), 1/ which authorized "[a]ny recognized tribe or band of Indians residing in Oklahoma * * * to organize for its common welfare and to adopt a constitution and bylaws," 25 U.S.C. § 503, and authorized the Secretary of the Interior to issue a charter of incorporation to any such organized group. Id. The statute also authorized the Secretary to acquire land "by purchase, relinquishment, gift, exchange, or assignment * * * Provided, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made," and required that title to the acquired lands be taken "in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired." 25 U.S.C. § 501.

Section 7 of the OIWA, 25 U.S.C. § 507, is central to this appeal. It provides:

> All funds appropriated under the several grants of authority contained in [the Indian Reorganization Act of 1934 (the IRA), 25 U.S.C. §§ 461-479] are hereby made available for use under the provisions of [the OIWA], and Oklahoma Indians shall be accorded and allocated a fair and just share of any and all funds appropriated after June 26, 1936, under the authorization herein set forth: Provided, That any royalties, bonuses, or other revenues derived from mineral deposits underlying lands purchased in Oklahoma under the authority granted by [the OIWA], or by [the IRA], shall be deposited in the Treasury of the United States, and such revenues are hereby made available for expenditure by the Secretary of the Interior for the acquisition of lands and for loans to Indians in Oklahoma as authorized by [the OIWA] and [the IRA].

1/ All further references to the United States Code are to the 1994 edition.

The Town, which is one of three Creek tribal towns, adopted a constitution under the OIWA on December 27, 1938, and ratified its OIWA charter on April 13, 1939. Prior to the Town's formal organization, BIA began to acquire lands in Okfuskee County, Oklahoma, with the expectation that the land Aculd eventually be held in trust for the Town. During 1937 and 1938, BIA acquired 14 tracts totalling approximately 1,900 acres, under a land acquisition program called the "Okemah Project." In each deed conveying land to the United States, the grantee was stated to be "the United States in Trust for the Creek Tribe of Oklahoma until such time as the use of the land is assigned by the Secretary of the Interior to a tribe, band or cooperative group organized under [the OIWA], or to an individual Indian, then in trust for such tribe, band, group or individual." 2/ In the case of six of the tracts, the conveyances included a partial interest in the minerals underlying the tract. In the remaining cases, the mineral interest was reserved to the vendors in its entirety or had been sold previously.

On June 13, 1939, the Town adopted a resolution requesting the Secretary to assign the Okemah Project lands to the Town. On April 14, 1941, the Acting Secretary of the Interior issued a proclamation stating:

> By virtue of authority contained in section 1 of [the OIWA, 25 U.S.C. § 501], and in execution of the power of designation incorporated in the deeds conveying the lands to the United States, the lands described below, embracing 1,914.96 acres, acquired by purchase under the provisions of that act, are hereby assigned to and declared to be held in trust for the exclusive use and benefit of [the Town], being a band of Indians of the Creek Nation organized under [the OIWA].
>
> [List of tracts omitted.]

On June 27, 1941, the Town enacted an ordinance governing use of the lands. The ordinance established criteria for use of the lands by Town members and prohibited assignment, lease, or permitting of the lands to non-members. Section VI of the ordinance provides:

> Subject to the approval of this provision of the ordinance by the Secretary of the Interior, royalties, bonuses and other revenues derived from oil, gas and other minerals underlying [Town] lands, and deposited in the Treasury of the United States pursuant to the authority of [the OIWA] and [the IRA], shall be set apart in a special fund for [the Town] for the purposes authorized by section seven of [the OIWA]. [3/]

2/ Similar language was used in deeds for other land acquisitions made in Oklahoma during this time period. See, e.g., Cherokee Nation v. Acting Muskogee Area Director, 29 IBIA 17 (1995), and Cloud v. Acting Muskogee Area Director, 29 IBIA 31 (1995).

3/ The Town states in this appeal that this section is still in effect and has never been amended (Town's Opening Brief at 21 n.33).

The ordinance was approved by the Assistant Secretary of the Interior on July 20, 1942, with a minor language change in section III, concerning assignment of lands, and a requirement that an annual budget be prepared for the expenditure of revenues derived from surface use of the lands.

In 1943 or 1944, BIA entered into oil and gas leases for some of the tracts subject to the 1941 proclamation. In 1946, the Town requested that BIA purchase additional lands for the Town from the proceeds of these leases. The Town's April 1, 1946, resolution stated:

> WHEREAS, The Department of the Interior, some six or eight years ago, purchased approximately 1900 acres of land located in * * * Okfuskee County, Oklahoma, for the use and benefit of [the Town] , * * *; and
>
> WHEREAS, Floods of the North Canadian River during the past few years have been the worst an memory of any members of [the Town], such floods having devastated much of the land above mentioned, rendering a considerable portion of same useless for agricultural purposes; and
>
> WHEREAS, During the last two or three years, some of the subject land has been leased for oil and gas mining purposes, from which was derived a total of $7,277.80, which is now on deposit in the Treasury of the United States; and
>
> WHEREAS, It is imperative that additional land be purchased in order to replace farming units which have been destroyed by flood;
>
> NOW, THEREFORE, BE IT RESOLVED That the Secretary of the Interior is hereby requested to allot the above-mentioned sum of $7,277.80 to the Superintendent of the Five Tribes Agency and that said Superintendent be authorized to purchase such additional land as may be obtainable for the sum mentioned herein, which is made available for such purposes under provisions of [the OIWA].

The Superintendent of the Five Civilized Tribes Agency forwarded the Town's request to the Commissioner of Indian Affairs, stating: "In view of the circumstances, this office concurs in the recommendation included in the resolution that such funds as are available be authorized for purchase of additional lands for this incorporated group" (Superintendent's Apr. 3, 1946, Letter).

The Commissioner responded on August 15, 1946:

> Reference is made to your letter of April 3, enclosing, with your favorable recommendation, a resolution adopted April 1 by [the Town] requesting that certain funds accrued as royalty on oil and gas mining leases on their lands be set apart and used for the purchase of additional land to replace tracts belonging to this tribal town which have been destroyed, so far as agricultural purposes are concerned, by floods of the North Canadian River.

> There is at present a balance of $8,535.40 in the account "14x6235 Acquisition of Lands and Loans in Oklahoma, act June 26, 1936" [4/] which may be used for the purpose recommended by you. You may, therefore, submit individual purchases of suitable land in the usual manner.

In 1948 and 1949, BIA purchased two tracts in Okfuskee County and one tract in Hughes County, Oklahoma, totalling approximately 300 acres, for a total purchase price of $8,260. Title to these tracts was taken in the name of the United States in trust for the Town. 5/

The record does not show what use, if any, was made of the funds in account 14x5235 during the period between 1949 and 1966. By letter of October 27, 1966, the Assistant Commissioner of Indian Affairs directed that, henceforth, the funds in the account were to be used only for loans. The record copy of this letter is imperfect in that it is missing all of the words on the left-hand margin of the text. However, the general sense can be discerned. The letter states:

> [For?] several years we have had considerable correspondence with both [the?] Muskogee and Anadarko Area Offices about the fund or account under [the?] symbol and title 14X5235, Acquisition of Lands and Loans to [India]ns in Oklahoma, Act of June 26, 1936. These funds are available [for?] the purchase of land for or loans to Oklahoma Indians except the [? I and Choctaw.
>
> [The?] purchase of lands from this fund on a gratuity basis for [indiv]idual Indians or tribes or groups of Indians could lead to [?] charges of favoritism. The size of the fund is so small [that?] only a very few Indians could benefit. Use of the funds on a [?] basis, with repayments available for additional loans, would [seem?] to be the most equitable use of the money. As a matter of [?] therefore, the funds may be used only for loans.

4/ It appears likely that "14x6235" is not the correct number for this account. In most of the other documents in the record which attach a number to the account with this name, the number is given as 14x5235. In one document (a Field Solicitor's memorandum dated Oct. 8, 1971, discussed further infra), the number for this account is given as 14x3235.

The Area Director states:

"A diligent search of the historical records of the Muskogee Area Office has been made and no records have been located evidencing an account designated as '14x6235.' Both the Anadarko Area Office and the Muskogee Area Office 1936 Act accounts were designated as 14x5235. We must surmise that the reference to '14x6235' was a typographical error, and that the correct reference should have been to '14x5235'" (Area Director's Brief at 14).

For purposes of this decision, the Board assumes that the correct number for the account is 14x5235.

5/ These tracts and the 14 tracts purchased in 1937 and 1938 are hereafter referred to collectively as "the OIWA lands."

In 1967, the Principal Chief of the Nation sought information from the Commissioner concerning the OIWA, lands. The Commissioner turned to the Area Director who, in a September 20, 1967, letter, provided the Commissioner with background information on the matter. After summarizing the events surrounding the original purchases, the Area Director stated:

> Income from surface use [of the lands purchased in 1937 and 1938] has been credited to a local IIM [Individual Indian Money] account for the Thlopthlocco Tribal Town Project. Income from minerals underlying such lands purchased with gratuity funds is credited to revenue account "Acquisition of Lands and Loans to Indians in Oklahoma, Act of June 26, 1936," and in accordance with Section 7 of the 1936 act is available for the benefit of Oklahoma Indians.
>
> In addition to the land included in the Secretary's [1941] Proclamation, other tracts were purchased in 1948 and 1949 totaling 300 acres with title taken directly in the United States of America in Trust for Thlopthlocco Tribal Town of the Creek Nation, State of Oklahoma. Payment for this 300 acres, costing $8,260.00, was made from "Acquisition of Lands and Loans to Indians in Oklahoma, Act of June 26, 1936." The revenue from this acreage is credited in the same manner as that from the land assigned to the tribal town by the Secretary.

(Area Director's Sept. 20, 1967, Letter at 2).

On November 3, 1967, presumably in connection with the Nation's inquiry, the Area Director wrote to Paul M. Niebell, the attorney who had represented the Nation in Indian Claims Commission Docket 21, Creek Nation v. United States, concerning whether offsets in that case included lands purchased for Creek tribal towns. Mr. Niebell responded:

> In answer to your letter of November 3, 1967, inquiring what items make up the $90,000.00 gratuity offset compromise settlement in Creek Case, Docket 21, before the Indian Claims Commission, I submit the following data:
>
> The United States claimed gratuity offsets against the Creek Nation in the total sum of $423,151.99, disbursed from 1818 through 1956. Included in this total figure was $102,384.08 for the purchase of land for the rehabilitation projects in the Creek Nation, including amounts for lands purchased for Creek tribal towns with title taken in the name of the town. * * * No specific items go to make up the $90,000.00 settlement, but in this settlement the United States waived its right to make any further claim against the Creek Nation for any items which went to make up the $423,151.99 claimed, and this waiver included the $102,384.08 for the purchase of land for the rehabilitation projects.

(Nov. 20, 1967, Niebell Letter). Mr. Niebell included excerpts from the initial General Accounting office (GAO) report prepared for Docket 21. Page 71 of this report includes the following information:

DISBURSEMENT SCHEDULE NO. 9

Disbursements made by the United States for the benefit of the Creek Nation of Indians under the appropriation:

"Acquisition of Lands for Indian Tribes"

Fiscal year	Purchase of land
1938	$42,920.50
1939	37,865.00
1940	13,004.48
1942	4,153.00
1943	3,953.89
1944	487.21
Total	$102,384.08

(Footnote omitted).

With this information, the Area Director requested an opinion from the Muskogee Field Solicitor concerning the effect of the offsets in Docket 21 on the ownership of minerals underlying the OIWA lands. The Acting Field Solicitor responded on August 20, 1969. Relying in part on an April 23, 1941, Solicitor's Office memorandum, which had concluded that the proviso in section 7 of the OIWA applied only when lands were purchased with "funds of the United States," 6/ the Acting Field Solicitor stated:

> In our opinion the deduction of the offset claims from the judgment amounted to a repayment by the Creek Tribe of the money advanced by the United States for the purchase of the trust lands. Since the provision of Section 7 of [the OIWA] concerning revenues from mineral resources is concerned with "appropriated" funds and not with tribal funds or funds of individual Indians, the repayment of the appropriated funds by the Creek Tribe is tantamount to changing the status of the funds from appropriated to tribal funds.
>
> It is therefore our opinion that revenues from mineral deposits became properly payable to the Creek Tribe when the offsets became effective on September 28, 1959. [7/]

(Acting Field Solicitor's Aug. 20, 1969, Memorandum at 2)

6/ The 1941 Solicitor's Office memorandum is discussed further infra.

7/ This is the date on which, according to the 1969 Field Solicitor's memorandum, the Indian Claims Commission accepted the offset stipulation and entered a final award in Docket 21. The 1971 Field Solicitor's memorandum, discussed immediately below, gives the date as Sept. 23, 1959.

In 1971, the Area Director again sought advice from the Field Solicitor, this time concerning ownership of both the surface of the OIWA lands and the minerals underlying them.

An attorney in the Field Solicitor's Office 8/ responded on October 8, 1971, concluding that title to the surface was in the United States with beneficial or equitable title in the Town. She further concluded that the minerals, as well as the right to receive revenues from the minerals, were the property of the Nation.

In 1973, at the request of the Tulsa Regional Solicitor, 9/ the Acting Associate Solicitor, Division of Indian Affairs, in the Washington, D.C., Solicitor's Office, reviewed the Field Solicitor's 1971 memorandum. He agreed with the Field Solicitor concerning the ownership of the surface but did not address the question of entitlement to revenues from the minerals. See Acting Associate Solicitor's July 30, 1973, Memorandum.

Sometime in 1973, presumably pursuant to the opinion expressed in the 1969 and 1971 Field Solicitor's memoranda, BIA began to pay revenues from leases of the minerals underlying the OIWA lands to the Nation.

By the mid-1980's, questions concerning the matter had resurfaced. Area Office staff again wrote to Mr. Niebell, evidently asking questions similar to those asked in the 1960's. The record includes September 24, 1985, and April 15, 1988, letters from Mr. Niebell, containing information similar to that provided in his November 20, 1967, letter, quoted above.

On May 3, 1988, a representative of the Town wrote to BIA, contending that mineral revenues had been wrongly diverted from the Town to the Nation. After a preliminary investigation into the history of the matter, BIA determined that it should suspend payment of mineral revenues pending a more thorough review. Therefore, on March 19, 1990, the Area Director informed the Nation that mineral revenues would be paid into an escrow account. On May 19, 1993, a special deposit account was established with the title "Escrow Account 1936 Act Leases - Creek." 10/

On February 1, 1995, the Area Director issued the decision in dispute here. He listed six producing oil and gas leases which covered minerals underlying the OIWA lands and stated that these leases had been executed by the Nation as lessor. He continued:

8/ This was the same individual who had signed the 1969 opinion as Acting Field Solicitor.
9/ The Regional Solicitor's Office was relocated to Albuquerque, New Mexico in 1991, at which time a Field Solicitor's Office was established in Tulsa. The Field Solicitor's Office in Muskogee was closed in 1983. Area Director's Brief at 18 n.5.

10/ Apparently, between Mar. 19, 1990, and May 19, 1993, mineral revenues from the OIWA lands were first deposited into the Nation's account and then transferred to a special deposit account. Establishment of the new account in 1993 was intended to eliminate the delays caused by this procedure.

> Our contemporary analysis of this matter, and based upon the Tulsa Field Solicitor's advice, leads us to conclude that notwithstanding the fact that the amounts expended by the United States for [the Town's] lands had been set off in the award to [the Nation], title to the purchased lands was not set over. Further, we found no records which reflected any intent on the part of [the Nation] to have the United States divest [the Town] of its title to the lands. Even had there been such an intent, an affirmative act such as a Secretarial proclamation would have been required to transfer the trust title from the Town to [the Nation]. No such act occurred and we therefore conclude that title, including any restrictions, conditions and limitations imposed upon the title by federal law, remains in [the Town].
>
> Our conclusion that [the Town] in the beneficial owner of the lands and minerals, however, does not resolve the issue of ownership of the escrowed royalties. Section 7 of [the OIWA] imposes a federal restriction upon the mineral revenues which limits expenditure of these funds to the Secretary for the purposes set forth in the statute. Thus, we have determined that the revenues derived from the listed leases shall remain in the special account maintained by this office, and that all future revenues from those leases shall also be placed in the special account.
>
> Section 7 directs that the special account is to be designated for land acquisition and loans to Indians in Oklahoma; discretionary authority is granted to the Secretary in the expenditure of these funds. In exercise of that discretionary authority I have determined to place a priority on requests for expenditure of the funds derived from the mineral estate held by [the Town] on the Town's requests for land acquisition. Tribal town acquisitions within [the Nation's] boundaries shall require the approval of [the Nation] as provided in 25 C.F.R. § 151.8.
>
> Factors which contributed to my decision include the need [the Town] has for additional land for economic development and expansion of existing tribal enterprises, and the fact that [Town] land acquisitions will ultimately benefit a greater number of Indians through tribally operated programs, than land acquisitions for individuals, or loans to individual Indians.

(Area Director's Feb. 1, 1995, Decision at 2-3).

Both the Town and the Nation appealed the Area Director's decision to the Board. The Town's appeal was docketed as Docket No. IBIA 95-83-A and the Nation's appeal as Docket No. IBIA 95-86-A. The appeals were consolidated upon docketing. The Town, the Nation, and the Area Director filed briefs.

Discussion and Conclusions

The Town and the Nation challenge the Area Director's decision on different grounds. The Board addresses the Nation's arguments first.

The Nation's principal contentions are that, under section 7 of the OIWA, the minerals underlying the OIWA lands were, prior to 1959, the property of the United States, rather than the trust property of the Town, and that "[t]he taking of the set-off [in Indian Claims Commission Docket 21] in effect paid the United States for the mineral estate that was reserved by the United States unto itself" (Nation's Opening Brief at 4). The Nation argues: "The United States could not knowingly take a set-off against [the Nation] with intention to retain discretion[ary] authority to assign the income where it wants to. The rules of equity do not permit this" (Id.). The Nation's remaining arguments are variations on the theme that the minerals underlying the OIWA lands became the property of the Nation at the time the offset stipulation in Docket 21 was approved by the Indian Claims Commission.

The Nation's argument is based in large part upon the 1969 and 1971 Field Solicitor's memoranda and the 1941 Solicitor's Office memorandum upon which the Field Solicitor relied. The 1941 memorandum is central to the matter in dispute here and the Board therefore returns to it.

The memorandum, dated April 23, 1941, was signed by a Chief of Division in the Solicitor's Office and approved by the Assistant Secretary of the Interior. It interpreted the proviso in section 7 of the OIWA in connection with a proposed lease of minerals underlying a Chickasaw allotment which had been conveyed by the allottee to the United States in trust for the allottee's minor children.

After quoting section 7, the memorandum states:

> The wording of the proviso indicates that the minerals underlying "lands purchased in Oklahoma under the authority granted by this Act" belong to the United States and not to the group or individual for which the land is purchased. That this is indeed the purpose of the proviso is shown in the hearings held before the House Committee on Indian Affairs on this act, which was S. 2047. During the hearings held on April 6, 1936, Representative Sam C. Massingale of Oklahoma pointed out that the bill, as then worded, would result in giving the exclusive benefit of minerals found in the subsoil of land purchased under the act to the individual or group for which the land was purchased. He considered that an unjust advantage for those tribes of Indians who were located in the richer parts of Oklahoma as against those tribes who live in districts where there is no oil or other mineral wealth. The Committee thereupon amended the bill at its next meting on April 8, 1936, so as to insert the proviso to section 7 as it now stands. The purpose of this proviso thus is that mineral wealth found on lands purchased in order to give Indian groups or individuals the use of more agricultural or grazing land should be used for the benefit of all Oklahoma Indians.

> It would appear from this origin of the proviso that it is meant to cover only lands purchased with "funds appropriated under the several grants of authority contained in [the IRA]" and "made available for use under the provisions of this Act." This language, which is drawn from the first part of section 7, also would appear to point to the interpretation that the proviso is intended only to see to it that funds of the United States used in the purchase of lands for certain Indians do not unduly enrich those Indians to the exclusion of other Oklahoma Indians. On the other hand, it may be fairly assumed that mineral wealth found on lands acquired by the United States in trust for Indian individuals or groups, either by gift or by purchase with funds belonging to the Indians for which these lands are being purchased, should belong exclusively to those Indians for whom the United States holds such lands in trust. Under this view, which I think is correct, the mineral rights in the lands involved in the instant case belong to the minor children of [the allottee] for whom the United States acquired the land by gift under authority of [the OIWA].

(Apr. 23, 1941, Solicitor's Office Memorandum at 2-3).

As noted, the Nation's theory here, like that of the 1969 and 1971 Field Solicitor's memoranda, is that, because the minerals underlying the OIWA lands were the property of the United States prior to the offset settlement in Docket 21, they could have been, and were, in effect "sold" to the Nation by virtue of that settlement.

The Town vigorously disputes the Nation's contention. Some of the Town's arguments are based on its theory, discussed further below, that the minerals and the revenues derived therefrom are the trust property of the Town, rather than the property of the United States. The Town makes other arguments which are not dependent on that theory, and those arguments are discussed at this point. 11/

The Town contends that there is no factual basis for concluding that the $90,000 offset stipulation included any part of the $102,384.08 claimed as an offset by the United States in Docket 21 for the purchase of lands. The Area Director makes a similar argument. The Town also contends that, even if the lands purchased in 1937 and 1938 could be deemed included in the offset stipulation, the lands purchased in 1948 and 1949 cannot be so deemed because the United States claimed no offsets for land purchases after 1944.

The Board addresses this latter contention first. As shown by the portion of the initial GAO report quoted above, that report included no land purchases made after 1944. The initial GAO report was certified by the Comptroller General on May 1, 1950, and evidently covered the period August 9, 1814, to June 30, 1947. A supplemental report was prepared by GAO to

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11/ The Nation did not respond to any of the arguments made by the Town or the Area Director although it was entitled to do so by filing a reply brief.

cover expenditures through October 31, 1956. 12/ No portions of this supplemental report are included in the record for this appeal. It does not appear, however, that any further expenditures for land purchases were included in the supplemental report, because the total claim for land purchases mentioned by Mr. Niebell in his later letters, i.e., $102,384.08, is the same as the figure given in the 1950 GAO report.

Therefore, the Board agrees with the Town that the United States claimed no offsets in Docket 21 for the lands purchased in 1948 and 1949. The Board also agrees that, if no offsets were claimed for these purchases, the amounts expended for them could not have been included in the offset stipulation in Docket 21.

It appears likely that the amounts expended for the 1937 and 1938 land purchases were included in the $102,384.08 originally claimed by the United States as an offset for land purchases. 13/ The record indicates that the amount of the United States' total original offset claim, i.e., either $423,151.99 or $434,651.84, was reduced to $295,822.64 prior to an agreement to compromise the offset claims. 14/ Thus, it appears that the United States relinquished claims in the amount of $127,329.35 (or $138,829.20) prior to entering into the stipulation with the Nation.

[1] The claim for land purchases may have been among the relinquished claims, although it is not possible to determine this with certainty on the present record. According to his memorandum an opposition to the claimed offsets, Mr. Niebell contended that the land purchases were an improper offset against the Nation because the lands were purchased for Creek tribal towns or individuals, rather than the Nation as a whole. 15/ The offset claim might have been relinquished for this reason. However, a more likely reason for relinquishment was the fact that, at least with respect to the lands at issue here, such an offset was prohibited by statute. Section 15

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12/ See Jan. 30, 1959, Memorandum of Paul M. Niebell In Re: Gratuity Offset Claims of the United States in Creek Case, No. 21, Indian Claims Commission (Niebell Memorandum) at 12.

13/ No list of specific tracts is included in the GAO report (or at least the portions of the report included in the record here).

According to the Board's calculations, which are based on the prices shown in the deeds, the total cost of the lands purchased for the Town in 1937 and 1938 was $37,564.

14/ With respect to the amount of the total original claim, Mr. Niebell's 1967, 1985, and 1988, letters give the figure as $423,151.99. However, the Commissioner's letter of Sept. 11, 1959, responding to Mr. Niebell's request for approval of the proposed compromise, indicates that Mr. Niebell had given the total figure as $434,651.84.

A reference to the reduction of the total claim to $295,822.64 also appears in the Commissioner's Sept. 11, 1959, letter. Again, the Commissioner's statement was evidently based on information supplied by Mr. Niebell.

15/ See Niebell Memorandum at 7. Mr. Niebell made similar arguments against other offset claims.

of the IRA, 25 U.S.C. § 475, provides that "no expenditures for the benefit of Indians made out of appropriations authorized by [the IRA] shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States." Pursuant to section 7 of the OIWA, the appropriation authorizations in the IRA--including the authorization covering land purchases in section 5 of the IRA, 25 U.S.C. § 465--were extended to cover expenditures made under the OIWA. 16/ Accordingly, the appropriated funds utilized to purchase lands under the OIWA were authorized by the IRA and were subject to the prohibition in section 15 of the IRA.

As the Town and the Area Director argue, there is no evidence of specific intent to include the claim for land purchases in the $90,000 offset stipulation. In the absence of such evidence--and, in particular, in the absence of evidence that the United States failed to relinquish a claim which was prohibited by statute--the Board declines to assume that the parties to Docket 21 intended to include the prohibited claim in the off-set stipulation. Moreover, it finds that, even if the parties did so intend, their intent was ineffective in light of the specific prohibition in 25 U.S.C. § 475. The Board therefore concludes that the $90,000 offset stipulation did not include funds expended by the United States in 1937 and 1938 to purchase lands for the Town. 17/

The Board finds that the 1969 and 1971 Field Solicitor's memoranda were in error insofar as they concluded that the offset stipulation in Docket 21 had the effect of repaying the United States for the OIWA lands. Accordingly, the Board rejects the Nation's similar contentions in this appeal and finds that the Nation is not entitled to the revenues from minerals underlying the OWIA lands.

The Board now turns to the Town's appeal. The Town states that it

> agrees with the Area Director's apparent legal rationale for awarding the disputed revenues to the Secretary of the Interior--i.e., where there are mineral revenues from Indian trust land in Oklahoma which was purchased with appropriated federal funds, by

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16/ 25 U.S.C. § 465 provides in part:

"For the acquisition of * * * lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year."

The statutes which appropriated funds for land acquisitions cited only the IRA appropriation authority. See, e.g., Act of June 22, 1936, 49 Stat. 1757, 1765; Act of Aug. 9, 1937, 50 Stat. 564, 573; Act of May 9, 1938, 52 Stat. 291, 300; Act of May 10, 1939, 53 Stat. 685, 695. These appropriated funds were used to purchase lands under the OIWA, as well as under the IRA.

17/ Given the dates of land purchase expenditures shown in the GAO report, it appears likely that all those expenditures, totalling $102,384.08, were made under the IRA/OIWA authority. However, the Board is concerned here only with the $37,564 expended on land purchases for the Town in 1937 and 1938.

> Act of Congress such mineral revenues belong to the Secretary and not to the beneficial owners of the surface estate.

(Town's Opening Brief at 3). However, the Town contends that: (1) the Town is presumptively entitled to all lease revenues from its lands; (2) BIA bears the burden of showing that the lands at issue were purchased with appropriated federal funds, and BIA has failed to sustain its burden in this regard; (3) even if it is shown that the lands purchased in 1937 and 1938 were purchased with appropriated Federal funds, the lands purchased in 1948 and 1949 were not purchased with appropriated funds but with trust funds belonging to the Town; (4) the Area Director erred in failing to account for Lease 503-7650, which was not among the six leases listed in the Area Director's decision; and (5) the Area Director should be required to render a full accounting to the Town for all mineral revenues derived from the OIWA lands since 1942.

[2] As evident from the quoted statement, the Town concedes that the Area Director's decision is correct insofar as any of the lands at issue were purchased with appropriated Federal funds. Thus the Town would presumably agree that, with respect to the lands purchased in 1937 and 1938, the success of its argument depends upon the quality of the evidence that these lands were purchased with appropriated Federal funds.

There are a number of historical documents in the record concerning the 1937 and 1938 purchases. The Town contends that none of these documents prove that the purchases were made with appropriated funds.

Upon review of the documents in the record, the Board finds that the following, among others, tend to show that appropriated funds were used for the purchases:

1. A 10-page report signed by George G. Wren, Land Field Agent. Although undated, this report appears to have been prepared in late 1937 or early 1938. It states at page 3:

> In 1937, 910 acres of land at a total cost of $16,860 were approved for purchase from contractual funds. * * * In order to further the development of this project and thereby assist the landless Creek Indians toward becoming self-sustaining, it is proposed to purchase seven additional tracts, aggregating 1,045 acres, at a total cost of $21,604. The options covering this acreage are transmitted herewith.

This report includes a detailed cost analysis for all the tracts approved for purchase in 1937 and all those proposed for purchase in 1938. 18/

2. A March 28, 1938, letter from the Commissioner to the Secretary, transmitting the purchase options. The letter states in part:

18/ One tract shown in this report as proposed for purchase in 1938, at a cost of $900, was not purchased.

> There are transmitted herewith for acceptance the following options constituting the Okemah 1938 Contractual land acquisition project:
>
> [List of tracts omitted.]
>
> The purchase of the land is proposed to be made under authority of the Oklahoma Welfare Act of June 26, 1936 (49 Stat. 1967). Authority to contract for the purchases is contained in the Appropriation Act of August 9, 1937 (50 Stat. 570).

3. A schedule of the Okemah Project tracts, which was attached to a November 7, 1939, letter, from the Superintendent of the Five Civilized Tribes Agency to the Commissioner. For each tract, the schedule shows the tract number, the vendor(s), the land description, the number of acres, whether or not mineral rights were reserved, and the status. In the "status" column, each tract is described as "paid," except for four tracts for which paperwork was stated to be still pending.

4. A January 9, 1941, letter to the Secretary from the Assistant to the Commissioner, transmitting the proposed proclamation assigning the OIWA lands to the Town. The letter states in part: "Under authority contained in Section 1 of [the OIWA], and with funds appropriated by the Act of May 9, 1938 (52 Stat. 300), 1,914.96 acres of land were purchased for the development of an Indian community for the use of the Creek Indians in the [Town] area."

In addition to the documents in the record for this appeal, other relevant documents are included in BIA's historical records concerning the Okemah Project, now housed at the National Archives. 19/ The records for the Okemah Project include separate files for each acquisition. The file for tract 4 is typical. 20/ It contains, inter alia, the following documents:

1. A letter, dated June 23, 1939, from the Commissioner to the Secretary, which states:

> There are transmitted herewith warranty deed, abstract of title and related papers covering 120 acres of land proposed for purchase from Simmer Canard, a widow, Pauline McKinney and her husband, David McKinney, as a part of the Okemah 1937 Contractual land acquisition project. The option to purchase this land designated as tract No. 4, for a consideration of $2,735, was formally accepted by the Department August 18, 1937.

19/ The Board takes official notice of these records under authority of 43 CFR 4.24(b), which provides that "[o]fficial notice may be taken of the public records of the Department of the Interior and of any matter of which the courts may take judicial notice."

20/ The BIA records for the Okemah Project are in National Archives Record Group 75, File No. 37475-1937-FCT-310. The records for tract 4 are in part 5 of this file.

> The authority to purchase this land is contained in Section 1 of [the OIWA], with funds made available by the Act of August 9, 1937 (50 Stat. 573), to close contractual obligations entered into during the fiscal year 1937, under authority of the Act of June 22, 1936 (49 Stat. 1763).

Attached to this letter is a September 2, 1939, notation signed by the Solicitor, stating "Title examined and found satisfactory, subject to payment of all taxes due or exigible." Following this notation is the statement "Purchase approved as recommended," signed by the Assistant Secretary and dated September 5, 1939.

2. A September 13, 1939, letter from the Commissioner to the Superintendent of the Five Civilized Tribes Agency. This letter states:

> Authority is hereby granted for the expenditure of $2,735.00 from the fund "Acquisition of Land for Indian Tribes," for the purchase of 120 acres of land from Simmer Canard, a widow, Pauline McKinney and her husband, David McKinney, in connection with the Okemah 1937 Contractual land acquisition project. An allotment of funds is being made in the usual manner.

3. A document titled "Request for Allotment." This document is dated September 7, 1939, and is addressed to the Commissioner. It states:

> Please allot $2,735.00 from Acquisition of Land for Indian Tribes
> (Appropriation)
> 14-2111-001 for use at Five Civilized Tribes Agency during the
> (Symbol) (School or agency)
> fiscal year 1940.

The request further states that the funds were sought for the purchase of the tract described above. The document shows that the request was approved by the Director of Lands and forwarded to the Chief, Fiscal Division. Finally, at the bottom of the document is a "Fiscal Division Memorandum" which states that Journal Voucher 1146 was issued on September 14, 1939.

4. A receipt which reads:

> PROJECT: Okemah 1937 Contractual
> TRACT NO. 4
>
> RECEIPT FOR PURCHASE MONEY
>
> Receipt is hereby acknowledged of U.S. Treasury Check No. 843428, dated Oct. 9, 1939, drawn to the order of Simmer Canard, Pauline McKinney & David McKinney, in the amount of $2,735.00, which represents full payment of the purchase price for the lands described in the option to purchase and warranty deed, being identified under the above project and tract number.

The receipt is dated October 17, 1939, and is signed by Simmer Canard, Pauline McKinney, and David McKinney.

The Board finds the above-described evidence sufficient to establish the fact that the lands purchased for the Town in 1937 and 1938 were purchased with appropriated Federal funds. Accordingly, the Board finds that the mineral revenues from these lands are subject to section 7 of the OIWA.

[3] With respect to the lands purchased in 1948 and 1949, the Town and the Area Director agree that the funds used to make the purchases came from the account titled "Acquisition of Lands and Loans in Oklahoma, Act of June 26, 1936." Such a conclusion also finds support in the record. See, e.g., Commissioner's Aug. 15, 1946, Letter; Area Director's Sept. 20, 1967, Letter.

Although they agree that the funds cane from this account, the Town and the Area Director disagree as to the nature of the funds in the account. The Area Director contends that the funds were Federal funds. The Town, on the other hand, characterizes account 14x5235 as the Town's "own separate trust account" (e.g., Town's Opening Brief at 26 and Reply Brief at 12), even though it acknowledges that the title of the account was "Acquisition of Lands and Loans in Oklahoma, [A]ct [of] June 26, 1936" (Opening Brief at 24). 21/ The Town's argument that the funds were trust funds appears to be based in part upon the premise that the lands from which the revenues were derived--i.e., the lands purchased in 1937 and 1938--were not purchased with appropriated Federal funds. As discussed above, the Board has rejected that premise.

The Town also cites section VI of its June 27, 1941, land use ordinance, which provided that mineral revenues would "be set apart in a special fund for [the Town] for the purposes authorized by section seven of [the OIWA]." The Town contends that the Assistant Secretary's 1942 approval of this ordinance demonstrated the Federal Government's agreement that mineral revenues would go into a special fund for the Town.

It is true that the language of section VI of the Town's ordinance indicates an intention to establish a special fund for the Town. The Assistant Secretary's approval of this provision of the ordinance appears somewhat inconsistent with his approval of the April 23, 1941, Solicitor's

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21/ The Town uses the number 14x6235 throughout its filings. As discussed in footnote 4, this number, which appeared in the Commissioner's Aug. 15, 1946, letter, is probably incorrect. The Town does not dispute that, whatever number is correct, the title of the account was "Acquisition of Lands and Loans in Oklahoma, Act of June 26, 1936."

No records for this account, other than the references in the correspondence quoted above, are included an the record for this appeal. Nor is there anything showing whether or not there was mineral production on lands purchased under the OIWA for other Oklahoma tribes or individuals.

Office Memorandum. 22/ That is, the ordinance, while recognizing that expenditures of mineral revenues from the OIWA lands must be made in accordance with section 7 of the OIWA, nevertheless suggests that such expenditures might be limited to the Town alone. By contrast, the Solicitor's Office Memorandum stated unequivocally that mineral revenues from Federally purchased OIWA lands were not to be reserved for the use of the tribe for whom the lands were purchased but were to be used for the benefit of all Oklahoma Indians.

Whether or not the intent of the Town and the Assistant Secretary in 1942 was to establish a separate account for the Town, it is at least clear that there was no intent to establish a trust account. Both the Town and BIA clearly seem to have understood that the mineral revenues from the OIWA lands were not the Town's trust funds but, rather, funds subject to section 7 of the OIWA. See, e.g., the Town's June 27, 1941, ordinance and its April 1, 1946, resolution, quoted above. In any event, section 7 precluded treating the mineral revenues as the Town's trust funds, and it is the statute which controls on this point. Thus it is not essential, for purposes of this decision, to determine whether or not a separate account was established for the Town. Mineral revenues from the OIWA lands, whether deposited into a general account or a separate Town account, were subject to section 7 of the OIWA.

In fact, however, the record contains no evidence, and the Tom has produced none, that a separate account was ever established for the Town. All the references in the record are to an account titled "Acquisition of Lands and Loans to Indians in Oklahoma, Act of June 26, 1936," a title which denotes a general account for Oklahoma Indians rather than a separate Town account. The general nature of this account is explicitly confirmed in the Assistant Commissioner's October 27, 1966, letter, quoted supra, and is also suggested in documents contemporaneous with the 1948 and 1949 acquisitions, such as the Town's April 1, 1946, resolution; the Superintendent's April 3, 1946, letter; and the Commissioner's August 15, 1946, letter. The Board concludes, based on the evidence before it, that no separate account was established for the Town.

The Town also contends that the GAO report for Docket 21 is evidence that the tracts purchased in 1948 and 1949 were not purchased with Federal funds because no expenditures for land purchases are shown after the year 1944. It is true, as discussed above, that the GAO report did not include the 1948 and 1949 purchases. However, the reason for the omission is evident. The GAO report covered disbursements made by the United States from appropriated funds, i.e., those disbursements made "under the appropriation: 'Acquisition of Lands for Indian Tribes'" (1950 GAO report at 71). The funds used to make the 1948 and 1949 land purchases were not appropriated funds.

However, the fact that the funds in account 14x5235 were not appropriated funds does not necessarily mean that they were not Federal funds. As discussed, these funds were not the Town's trust funds. It is con-

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22/ The same Assistant Secretary approved both documents.

ceivable that they might be considered trust funds belonging to all Oklahoma Indians. The wording of section 7 indicates, however, that Congress did not regard mineral revenues from purchased lands as trust funds at all but, rather, as funds resembling appropriated funds. Such an intent is evident in the fact that Congress provided for the same uses of the funds as those already authorized by the OIWA and gave the Secretary authority to spend the funds in the same manner as appropriated funds. 23/ In other words, Congress clearly appears to have intended the mineral revenues to serve as a supplement to the funds it appropriated for OIWA purposes. Thus it seems probable that Congress also intended the section 7 funds to share the attributes of appropriated funds when they were used to purchase additional lands for Oklahoma tribes or individual Indians. It is likely, therefore, that Congress expected revenues from minerals underlying the lands purchased with section 7 funds to be returned to the land purchase/loan fund rather than accrue to the sole benefit of the tribal or individual landowner. 24/

The Board finds that the funds in account 14x5235 were "funds of the United States" for the purpose of determining what use could be made of revenues from minerals underlying lands purchased with the funds. It therefore concludes that, under the principles set out in the 1941 Solicitor's Office memorandum, mineral revenues from lands purchased for the Town in 1948 and 1949 from funds in account 14x5235 were subject to section 7 of the OIWA.

For the reasons discussed above, the Board finds that the Area Director was correct in concluding that the mineral revenues from the OIWA lands are subject to section 7 of the OIWA. Accordingly, the Board also finds that he properly established a special account into which these revenues are deposited and from which the Secretary may make expenditures under the provisions of section 7.

Because none of the mineral revenues from the OIWA lands are the Town's trust property, the Area Director is not required to account to the Town for those funds. Nor is he required to account to the Town for the proceeds of Lease 503-7650.

23/ That is, within the limits set by the statute, subject to the Secretary's discretion. See, e.g., Lincoln v. Vigil, 113 S.Ct. 2024, 2032 (1993).

24/ To the extent section 7 funds were used to make loans to Oklahoma Indians, Congress undoubted expected repayments of the loans to be returned to the fund, in the manner of the revolving loan fund established in the IRA, 25 U.S.C. § 470, and extended to Oklahoma Indians in the OIWA, 25 U.S.C. §§ 503, 506. Cf. Assistant Commissioner's Oct. 27, 1966, Letter.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 1, 1995, decision is affirmed. 25/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

25/ The Board does not address the question of whether the Town must obtain the consent of the Nation under 25 CFR 151.8 before lands way be taken in trust for it within the Nation's boundaries. The Board agrees with the Town that this question would be better addressed in connection with a request for trust acquisition made by the Town. Even so, the parties are advised that the Board addressed a similar question in Kialegee Tribal Town v. Muskogee Area Director, 19 IBIA 296 (1991).