INTERIOR BOARD OF INDIAN APPEALS

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

35 IBIA 27 (04/17/2000)

Modifying in part:
29 IBIA 241
Reconsideration granted, 29 IBIA 301

United States Department of the Interior

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

MUSCOGEE (CREEK) NATION
v.
MUSKOGEE AREA DIRECTOR

IBIA 97-50-A Decided April 17, 2000

Appeal from a decision to place revenues from minerals underlying certain lands held in trust for the Muscogee (Creek) Nation into a special deposit account, rather than depositing them into the Nation's account.

Reversed; 29 IBIA 241 (1996) modified in part.

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

   Under section 2 of the Indian Claims Commission Act, 60 Stat. 323, expenditures for the benefit of Indians under section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, and section 7 of the Oklahoma Indian Welfare Act, 25 U.S.C. § 507, can be considered as offsets in a suit brought to recover upon any claim brought by those Indians against the United States.

APPEARANCES: David A. Mullon, Jr., Esq., Jessie Huff Durham, Esq., Harry R. Sachse, Esq., and Arthur Lazarus, Jr., Esq., Washington, D.C., for Appellant; M. Sharon Blackwell, Esq., Field Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director; Tryg Jorgensen, Tribal Administrator, for the Kialegee and Alabama-Quassarte Tribal Towns; Richard L. Young, Esq., Albuquerque, New Mexico, for the Thlopthlocco Tribal Town.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Muscogee (Creek) Nation seeks review of an October 1, 1996, letter from the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the use of

certain mineral revenues underlying lands held in trust for Appellant. For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision and modifies in part its decision in Thlopthlocco Tribal Town v. Acting Muskogee Area Director, 29 IBIA 241, on recon., 29 IBIA 301 (1996).

Background

In 1936, Congress enacted the Oklahoma Indian Welfare Act (the OIWA), 49 Stat. 1967, 25 U.S.C. §§ 501-509. 25 U.S.C. § 503 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," and authorized the Secretary of the Interior to issue a charter of incorporation to any such organized group. The OIWA 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, 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].

At issue in this appeal are six tracts of land purchased under the OIWA between 1938 and 1942 as part of the Hanna and Wetumka rehabilitation projects. The tracts are: (1) Tract No. 12, Hanna Project, containing 160 acres, more or less, and paid for by voucher dated February 17, 1938, in the amount of $5,500; (2) Tract No. 18, Hanna Project, containing 80 acres, more or less, and paid for by voucher dated November 1938, in the amount of

$2,000; 1/ (3) Tract No. 14, Hanna Project, containing 38.19 acres, more or less, and paid for by voucher dated September 18, 1939, in the amount of $195.48; (4) Tract No. 7, Wetumka Project, containing 33.90 acres, more or less, and paid for by voucher dated June 20, 1942, in the amount of $914.50; (5) Tract No. 6, Wetumka Project, containing 160 acres, more or less, and paid for by voucher dated May 19, 1942, in the amount of $4,000; and (6) Tract No. 1, Wetumka Project, containing 524.35 acres, more or less, and paid for by voucher dated April 24, 1942, in the amount of $10,000.

The materials before the Board indicate that the lands in the Hanna Project were initially intended to benefit the Kialegee Tribal Town, and that the lands in the Wetumka Project were initially intended to benefit the Alabama-Quassarte Tribal Town. However, title to all of the lands at issue in this appeal was taken by "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 Act of June 26, 1936 (49 Stat. L. 1967), or to an individual Indian, then in trust for such tribe, band, group or individual."

On January 12, 1955, the Department entered into two oil and gas leases covering a portion of the lands at issue here. Lease 14-20-402-2085 covered the lands in Tract No. 12, Hanna Project, and Lease 14-20-402-2086 covered the lands in Tract No. 18, Hanna Project. Each lease notes that the leased lands were "purchased under the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967) 25 U.S.C.A. Sec. 507." Lease 14-20-402-2085 shows the United States as the lessor; Lease 14-20-402-2086 does not identify the lessor. Neither lease has a signature on the line provided for the lessor, but both were approved on May 6, 1955, by the Assistant Secretary of the Interior. Nothing in the materials before the Board shows the disposition of revenues from these leases.

On September 10, 1962, the Indian Claims Commission (Commission) issued a decision in Claims Commission Docket 21 (Docket 21). Creek Nation v. United States, 11 Indian Claims Comm. 53 (1962). This decision is discussed below.

In 1977, 1978, and 1990, four other oil and gas leases were issued on the lands at issue in this appeal. Lease G02C1420-7366 was executed on November 8, 1977, and was approved on December 9, 1977. It covers the land in Tract No. 6, Wetumka Project, and lists Appellant's Principal Chief as the lessor. Lease G02C1420-7434 was executed on July 11, 1978, and was approved on August 17, 1978. It covers Tract No. 14, Hanna Project, and also lists

1/ The day on which this voucher was dated is illegible because of a hole punched in the voucher.

Appellant's Principal Chief as the lessor. Leases 503-8293 and 503-8294 were executed on December 21, 1990, and list the lessor as the United States in trust for Appellant. Lease 503-8293, which covers the land in Tract No. 7, Wetumka Project, was approved on January 18, 1991. The date of approval of Lease 503-8294, which covers Tract No. 1, Wetumka Project, is not legible on the copy before the Board.

As with the 1955 leases, nothing before the Board shows the disposition of revenues from these latter four leases. Appellant states that, at least since 1963, oil and gas revenues from the leases were paid into a trust account for Appellant's benefit and were made available to Appellant for expenditure. No opposing party has disputed this statement, despite having the opportunity to do so. 2/

On July 19, 1996, the Board decided Thlopthlocco Tribal Town. This decision addressed two appeals; one filed by the Thlopthlocco Tribal Town and another filed by present Appellant. It considered the disposition of revenues from minerals underlying certain lands held in trust for the Thlopthlocco Tribal Town.

The Area Director based the October 1, 1996, decision which is at issue here on the decision in Thlopthlocco Tribal Town. The Area Director held that, henceforth, all mineral revenues generated from the leases described above would be placed "in a special deposit interest bearing U.S. Treasury account to be maintained by this office and designated for expenditures described in 25 U.S.C. § 504 at the discretion of this office." Oct. 1, 1996, Letter at 1-2. The Area Director continued:

> In exercise of my discretionary authority, I have determined to place a priority on requests for land acquisitions from those tribal entities who presently hold beneficial interests in the trust resources that are subject to the OIWA

2/ In Thlopthlocco Tribal Town, 29 IBIA at 246, the Board quoted from a Sept. 20, 1967, letter from the Area Director in which the Area Director stated that "[i]ncome from minerals underlying such lands purchased [in 1937 and 1938] 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 [OIWA] is available for the benefit of Oklahoma Indians."

A Nov. 9, 1989, memorandum from the Area Director to the Deputy to the Assistant Secretary - Indian Affairs states at page 2:

"Mineral revenues from these lands were never credited to the tribal town or the Creek Tribe pursuant to Section 7 of the [OIWA]. Then in a stipulation in * * * Docket 21, the U.S. accepted the amount of $90,000 as settlement of all gratuity offsets against the Creek Tribe * * *. The mineral income is now considered to belong to the Creek Tribe."

> restrictions. Factors that contributed to my decision include the need the Nation has for additional land for economic development and expansion of existing tribal enterprises, and the fact that the Nation's land acquisitions will ultimately benefit a greater number of Indians through tribally operated programs than land acquisitions for individuals, or loans to individual Indians.

Id. at 2.

Appellant filed a timely notice of appeal. The Board gave Appellant an opportunity to show why its appeal was not controlled by Thlopthlocco Tribal Town. Appellant's reply was sufficient to cause the Board to believe that this case should be fully briefed.

Appellant did not serve its notice of appeal on the Kialegee and Alabama-Quassarte Tribal Towns or otherwise indicate that the Towns might have an interest in this matter. It was not until beginning consideration of this appeal that the Board discovered that possibility. Over the objections of both Appellant and the Area Director, it gave the two Tribal Towns an opportunity to participate in this appeal.

At that time, the Board did not believe that a decision would impact the Thlopthlocco Tribal Town. However, in view of arguments raised by Appellant, which constituted collateral attacks on Thlopthlocco Tribal Town, the Board later found that the Thlopthlocco Tribal Town should also have an opportunity to participate in this appeal.

During the course of this extended briefing, Appellant specifically requested reconsideration of Thlopthlocco Tribal Town. The Thlopthlocco Tribal Town and the Area Director opposed reconsideration. The Board denied Appellant's request in an order dated May 18, 1999.

Discussion and Conclusions

In general, Appellant contends that the lands at issue here were included in a $90,000 negotiated offset in Docket 21 covering gratuitous payments made by the United States for the benefit of Appellant and the Creek Nation East of the Mississippi. 3/ Appellant argues that the effect of this inclusion is that the Federally appropriated funds used to purchase the lands were "repaid" and the purchase money was transformed into tribal funds, thereby removing the purchased lands from the restrictions in the proviso of 25 U.S.C. § 507. Appellant made the same

3/ The Creek Nation East of the Mississippi (Creek Nation East) was an intervenor in Docket 21.

contention in Thlopthlocco Tribal Town, in which, as noted above, it was an appellant. However, it failed in that case to support its contention either legally or factually. Consequently, it failed to persuade the Board that its position was correct.

While acknowledging that this case is distinguishable factually from Thlopthlocco Tribal Town, Appellant nevertheless recognizes that the issue it raises in this case was decided in Thlopthlocco Tribal Town. With respect to that issue, Appellant argues that the Board erred in its earlier decision.

Thlopthlocco Tribal Town and the Area Director argue that relitigation of the issue is precluded under the doctrine of res judicata. Appellant disputes this but also argues that the Board should exercise its authority under 43 C.F.R. § 4.318 to "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

In the present case, Appellant submits several historical documents which it did not submit in Thlopthlocco Tribal Town and makes a legal argument it did not make in that case. Appellant should have submitted the historical documents while Thlopthlocco Tribal Town was pending; it should have made its legal argument, at the latest, when it sought reconsideration of the Board's decision in that case. Appellant has not, during the course of the present proceeding, offered any explanation for its failure to submit all of its evidence and arguments in Thlopthlocco Tribal Town.

The Board has held that the doctrine of res judicata applies in cases before it. Cermak v. Acting Minneapolis Area Director, 32 IBIA 77 (1998). This case is clearly a candidate for application of that doctrine. However, because the lack of documentation in Thlopthlocco Tribal Town was in part the result of an inadequate administrative record, and because this case is evidently only one piece of a complex and longstanding dispute between Appellant and the Creek tribal towns, the Board concludes that the better approach here is to forego application of the doctrine of res judicata and to exercise its authority under 43 C.F.R. § 4.318, in order to consider Appellant's new argument and new evidence.

Although, for the reasons discussed below, the Board concludes that it should modify the conclusions it reached in Thlopthlocco Tribal Town, the holding in Thlopthlocco Tribal Town remains applicable to the lands at issue there. As was made clear in the May 18, 1999, order in this case, the Board lacks authority to alter the outcome of Thlopthlocco Tribal Town at this late date.

The Board first addresses Appellant's new legal argument. Appellant contends that the Board erred in Thlopthlocco Tribal Town in holding that 25 U.S.C. § 475 precluded the offset of land purchases under the IRA and the OIWA against a claim by an Indian tribe against the

United States. Although Appellant's argument is rather conclusory, the Board has undertaken to address the matter in some detail.

25 U.S.C. § 475 is derived from section 15 of the IRA. As codified, section 475 provides:

> Nothing in sections 461 to 479 of this title [25 U.S.C.] shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by sections 461 to 479 of this title shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.

Appellant contends that whether IRA/OIWA land purchases could be offset against the claim in Docket 21 is controlled, not by 25 U.S.C. § 475, but rather by section 2 of the Indian Claims Commission Act of August 13, 1946 (Claims Act), 60 Stat. 323, ch. 959. Section 2 of the Claims Act provides in pertinent part:

> In determining the quantum of relief [to which an Indian tribe is entitled], * * * the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that * * * expenditures made pursuant to the Act of June 18, 1934 (48 Stat. 984) [the IRA], save expenditures made under section 5 of that Act [25 U.S.C. § 465], * * * shall not be a proper offset against any award.

The legislative history of the Claims Act shows that offsets were a major topic of disagreement and discussion during the Congressional hearings. See seriatim Robert W. Barker and Alice Enrenfeld, Legislative History of the Indian Claims Commission Act of 1946 (1976) (Legislative History). However, there is very little reference in those discussions to offsets for lands acquired for Indian tribes. In one of the few references to offsets of this nature, Felix S. Cohen, Esq., Solicitor for the Indian Department, commented that "[t]here are undoubtedly many cases in which it is proper to deduct, for instance, sums paid for acquiring other lands when the deprivation of land is the very basis of the claim." Hearings before the Committee on Indian Affairs, United States Senate, 79th Cong., 2d Sess., June 1 and 12, and July 13, 1946 at 22; reprinted in Legislative History at 623.

The House and the Senate passed different versions of the bill. In particular, the offset language passed by each House was significantly different. The bill was sent to a conference committee.

In a June 4, 1946, letter to Senators Joseph C. O'Mahoney, Elmer Thomas, and Harlan J. Bushfield, Members of the Sub-Committee of the Senate Committee on Indian Affairs appointed to amend and report on H.R. 4497, Ernest L. Wilkinson, Esq., referenced section 2 of the Second Deficiency Appropriation Act of 1935, 49 Stat. 571, 596 (1935 Act). 4/ Although noting that neither the Department of the Interior nor the tribes were consulted about,

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4/ Section 2 of the 1935 Act, which is codified at 25 U.S.C. § 475a, provides:

"In all suits now pending in the Court of Claims [now United States Court of Federal Claims] by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and 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 the said tribe or band: Provided, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984) [IRA], except expenditures under appropriations made pursuant to section 5 of such Act [25 U.S.C. § 465], shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the Court of Claims or hereafter filed * * *."

The Board was unable to locate any legislative history on the 1935 Act. However, it found a reference to that Act in the Annual Report of the Department of the Interior for the Fiscal Year Ended June 30, 1935. At page 154 of the Annual Report, the Department stated:

"Three important measures passed after the close of the fiscal year:

* * * * * *

"Government offsets in Indian claims suits.--Section 2 of title 1 of the second deficiency act directed that all gratuitous expenditures for benefit of tribes or bands of Indians should be treated as offsets, and deducted from the total of Indian judgments in the Court of Claims. Gratuities expended prior to the date of the treaties or agreement are not to be treated as offsets, nor are the emergency expenditures subsequent to March 4, 1933; but expenditures for land purchased under the [IRA] unfortunately are made into offsets."

or given a hearing on, the offset language in the 1935 Act, Mr. Wilkinson suggested that similar language be incorporated into the Claims Act. At page 10 of his June 4, 1946, Letter, reprinted in Legislative History, 663, Mr. Wilkinson discussed his proposal to use language similar to that in the 1935 Act:

> (7) Expenditures made pursuant to the [IRA], save expenditures under [25 U.S.C. § 465]. * * * The present law does not permit expenditures made under this act except those made for the purchase of land under [25 U.S.C. § 465] to be charged against tribal judgments. This merely reincorporates the present law.

It appears that "the present law" to which Mr. Wilkinson alluded was section 2 of the 1935 Act, 25 U.S.C. § 475a.

The conferees rejected both the House and the Senate versions of the offset language. In terms of expenditures under the IRA, they substantially adopted the language from the 1935 Act. The Conference Report on H.R. 4497, H.R. Rep. No. 2693, 79th Cong., 2nd Sess. (1946), provides the only information which the Board found in regard to this decision. The Conference Report states at page 7, reprinted in Legislative History, 706:

> The bill does permit the Commission, where it finds that the entire course of dealing between the claimant and the United States warrants such action, to set off other gratuitous expenditures recognized to be for the direct benefit of the Indians, such as expenditures made for the purchase of land.

Neither section 2 of the 1935 Act nor section 2 of the Claims Act specifically repeals 25 U.S.C. § 475. The 1935 Act does not contain a general repealer. However, section 25 of the Claims Act is a general repealer of inconsistent laws. Repeals under a general repealer are repeals by implication. There is a strong presumption against repeals by implication. See, e.g., United States v. Borden Co., 308 U.S. 188, 198 (1939).

Regardless of the general rule concerning repeals by implication, 25 U.S.C. § 475 and section 2 of the Claims Act are clearly in conflict as to whether land purchases under 25 U.S.C. § 465 are to be treated as offsets. Because it is later in time and because it includes a general repealer of inconsistent prior laws, the Claims Act appears to control, so that, under section 2 of that Act, land purchases under 25 U.S.C. § 465 could be treated as offsets. Accordingly, the Board concludes that there was no legal impediment to the offset of the funds expended for the purchase of the lands at issue here against the award in Docket 21. See Sioux Tribe of Indians of the Lower Brule Reservation, South Dakota v. United States, 315 F.2d 378, 380 (Ct. Cl.), cert. denied, 375 U.S. 825 (1963).

The Board therefore turns to Appellant's new evidence on the question of whether such an offset was in fact included in Docket 21.

As discussed in Thlopthlocco Tribal Town, 29 IBIA at 252, the United States claimed an offset of either $423,151.99 or $434,651.84 in Docket 21. Of that amount, $102,384.08 was for lands purchased for the Creek Nation from 1938 through 1944. Counsel for the tribes in Docket 21, Paul M. Niebell, Esq., stated in a November 20, 1967, letter to the Area Director that this figure was the amount expended "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." Id. at 246. Niebell included with his November 20, 1967, letter a copy of his January 30, 1959, memorandum in Docket 21 in which he had contended that the land purchases were an improper offset against the Creek Nation because the lands were purchased for Creek tribal towns and individuals, rather than for the Nation as a whole.

The United States unilaterally reduced its offset claim to $295,822.64. In Thlopthlocco Tribal Town, the Board noted that it appeared "that the United States relinquished claims in the amount of $127,329.35 (or $138,829.20)." 29 IBIA at 252. The amount claimed for offsets was ultimately compromised to $90,000. The reason for the initial drastic reduction in the amount the United States claimed as offsets was not explained in the materials before the Board. Thus it was not at all clear that the land purchases remained in the claimed offsets at the time the compromise was reached. The Board ultimately found that "there is no evidence of specific intent to include the claim for land purchases in the $90,000 offset stipulation." 29 IBIA at 253. The Board declined to assume that the land purchases were included in the compromised offset.

Of the new evidentiary materials submitted by Appellant, the Board finds most illuminating a June 25, 1959, Resolution of the Creek Indian Council. The Resolution states in pertinent part:

> BE IT HEREBY RESOLVED By the Creek Indian Council * * * to accept * * * an offer in compromise to settle the matter of the gratuity offsets of the United States against the Creek Nation of Indians in * * * Docket No. 21, before the Indian Claims Commission, for the sum of $90,000; said offsets of the United States being those set forth in the several reports on gratuity offsets made by the General Accounting Office of the United States, covering the period from August [illegible], 1814, to June 30, 1956, including the amounts disbursed by the United States under the Indian Welfare Act of June 26, 1936 (49 Stat. 1967) for the purchase of lands for rehabilitation purposes in the Creek Nation * * *. [Emphasis added.]

An undated Resolution of the Council of the Creek Nation East accepted the $90,000 settlement offer, but stated only: "which sum shall be accepted as a total release of all claims filed by the United States in the said docket 21 against the Creek Nation."

The Creek Nation, the Creek Nation East, and the United States entered into a stipulation compromising the gratuity claims of the United States for $90,000. That stipulation stated:

> [T]he parties after negotiation and compromise, do hereby agree and stipulate that the sum of $90,000 shall represent the total amount of offsets and counterclaims of whatsoever nature the United States has asserted and could have asserted against the Creek Nation * * * and the Creek Nation East * * * which said sum shall be deducted from the above interlocutory award entered in this case; said compromise settlement having been approved by the Commissioner of Indian Affairs and by Resolutions of the Creek Nation * * * and said Creek Nation East * * *, copies of which are hereto attached.

Thus, the June 25, 1959, resolution of the Creek Indian Council, which explicitly stated that the compromise settlement included land purchases, was before both the United States and the Commission. In fact, the Commission quoted the entire stipulation in Finding of Fact 88, 11 Indian Claims Comm. 53, 88-89, and expressly stated that the tribal resolutions were part of the evidence in Docket 21.

The Board finds that there is now sufficient evidence before it to conclude that the land purchases at issue here were included in the offset settlement entered into in Docket 21.

The final question before the Board is whether the fact that land purchases under the OIWA were offset against the total amount awarded in Docket 21 removed that land from the proviso in 25 U.S.C. § 507. To repeat, the proviso states:

> 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].

Appellant contends that the inclusion of the land purchases in the offset settlement in Docket 21 meant that the tribe "repaid" the United States the appropriated funds with which the lands were initially purchased. Therefore, Appellant's argument continues, the lands were

purchased with tribal funds, and are not subject to the proviso in 25 U.S.C. § 507, because the proviso applies only to lands purchased with appropriated funds.

Appellant's argument that the proviso applies only to lands purchased with appropriated funds appears to be based at least in part on an April 23, 1941, memorandum signed by a Chief of Division in the Solicitor's Office and approved by the Assistant Secretary of the Interior. The memorandum discussed whether lands in Oklahoma that were not acquired with appropriated funds were subject to the proviso in 25 U.S.C. § 507. The Board quoted this memorandum in Thlopthlocco Tribal Town. It stated:

> The memorandum * * * 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 meeting 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, quoted in Thlopthlocco Tribal Town, 29 IBIA at 250-51.

Appellant's contention that the offset "repaid" the United States and transformed appropriated funds into tribal funds finds support in a December 12, 1963, letter to the Commissioner of Indian Affairs, in which the Area Director sought an opinion as to the effect of the offset of the land purchases in Docket 21:

> The Creek Tribe, in agreeing to the offsets in the amount of $90,000 * * * in effect paid the Government for the money expended in the purchase of these lands and placed the Creek Nation in the position of purchaser of the land so acquired. If the assumption that the Creek Tribe is the purchaser of said lands is correct, it appears that any income from the minerals should now go to the Creek Nation as the owner by purchase, and not to the Treasury of the United States as provided by [25 U.S.C. § 507]. We are bringing this matter to your attention with the request that an opinion be rendered as to the proper disposition of funds received from the mineral deposits under the above described land since the settlement of the Creek claim against the Government, and the acceptance by both parties of offsets in the amount of $90,000. If special legislation

> is deemed necessary to provide for the payment of such mineral income to the Creek Tribe, it is further requested that necessary legislation be initiated.

Dec. 12, 1963, Letter at 2.

The first response to this request that appears in either the administrative record or the additional materials submitted by Appellant is an August 20, 1969, memorandum to the Area Director from the Muskogee Field Solicitor. That memorandum states at page 2:

> 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.

This reasoning was echoed in an October 8, 1971, memorandum from the Muskogee Field Solicitor to the Area Director, and in a December 1, 1971, memorandum from the Area Realty Officer to the Superintendent, Okmulgee Agency.

Although in view of the significant reduction of the offset claim in Docket 21, it is unlikely that the offset in fact "repaid" the United States for the appropriated funds used to purchase the lands at issue here, 5/ the Board nevertheless concludes that this is a reasonable interpretation of the legal effect of that offset, especially in view of the well-established rule that agreements to which Indians are parties should be construed as the Indians would have understood them. See, e.g., Choctaw Nation v. United States, 318 U.S. 423, 432 (1943). Here, it is clear that Appellant so understood the offset stipulation. Therefore, the Board holds that the revenues from minerals underlying the lands at issue here are not subject to the restrictions in the proviso of 25 U.S.C. § 507.

5/ There is also a question, perhaps not resolvable, as to how much of the "repayment" was made by Appellant, and how much was made by the Creek Nation East, which was an intervenor in Docket 21 and a signatory to the offset stipulation.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's October 1, 1996, decision is reversed. The Board's decision in Thlopthlocco Tribal Town v. Acting Muskogee Area Director, 29 IBIA 241 (1996), is modified to the extent that it held that offsets for lands purchased under the IRA/OIWA were prohibited under 25 U.S.C. § 475 and that such an offset was not included in the offset stipulation in Indian Claims Commission Docket 21.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge