

BEFORE THE INDIAN CLAIMS COMMISSION

FELIX McCAULEY, A MEMBER OF THE)	
KAW TRIBE OF INDIANS, ON THE)	
RELATION OF ALL MEMBERS OF THE)	
KAW TRIBE OF INDIANS,)	
)	
Plaintiff,)	
)	
vs.)	Dockets Nos. 33, 34, 35.
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Wilfred Hearn, with whom were George
E. Norvell, Dennis Bushyhead, and
Charles L. Tyler,
Attorneys for Plaintiff

John F. Curran, with whom was
Assistant Attorney General
A. Devitt Vanech,
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SEP. 17. 1951

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. The Kaw Tribe of Indians is an identifiable Indian tribe residing within the territorial limits of the United States, but it does not maintain a tribal organization. The plaintiff, Felix McCauley, is a Kaw Indian by blood and is authorized to maintain this action under section 10 of the Indian Claims Commission Act.

2. The Kaw Indians, frequently designated as the Kansas Indians, are closely related to the Osage, Quapaw, Omaha and Ponca, all of whom are of the Siouan Indian stock. According to tradition, these Siouan Indians lived in prehistoric times along the Ohio River, down

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which they migrated until they reached the Mississippi. The group which later became known as the Kansas or Kaw Indians moved up the Mississippi to the Missouri River, until they finally reached the mouth of the Kansas River. Near this point they established a village. In 1702, Iberville, a French explorer, estimated the tribe as having 1,500 families. In 1724 Bourgmont, the French Governor of that area, found a large village of the Kansas or Quans, as he called them, on the Missouri at the mouth of Independence Creek, near the present town of Doniphan, Doniphan County, Kansas. In 1804, according to Lewis and Clark, the Kaw Indians were living in two villages on the Kansas River, one about 20 leagues and the other about 40 leagues from its mouth. A treaty of peace and friendship was made with them by the United States on October 28, 1815 at St. Louis. They were then living on the Kansas River at the mouth of the Saline River. At that time they occupied 130 earth lodges and their number was estimated at 1,500. O'Fallon estimated their number in 1822 at 1,850. Their numbers were considerably reduced by 1825. Their numbers in 1945 appear to be 544.

William E. Connelley, in his article, Early Indian Occupancy of the Great Plains, Volume XIV, Kansas Historical Society, at page 455, tells of the hunting and roaming over of the Great Plains country by various tribes of Indians, mentioning the Pawnees, the Padoucas (Comanches), Caddoans (Wichitas and Pawnees), and the Kansas:

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This matter of a common right to hunt the buffalo on the plains after they had been exterminated in the country east of the Missouri River may never have been conceded by the Caddoans * * * to whom the country evidently belonged; and the Kansas and Osage Siouans may have asserted this right and may have sustained it by might against the Caddoans. The same causes which were driving the Siouans into Caddoan territory from the Red river to the Upper Missouri may have weakened the area of the Caddoans, rendering them incapable of holding all their domain from this violation. One thing, however, is certain. The Caddoans never relinquished their claims to all this Kansas country, except a narrow margin along the Missouri. They continued to assert their rights against the aggressions of the Kansas Indians down to 1842, when Fremont saw the ruins of a Kansas town near the present Bellvue, then but recently burned by the Pawnees. This was seventeen years after the cession of that country by the Kansas to the United States--when they probably sold much which they did not own.

The town of Bellvue mentioned above is about midway between Topeka and Manhattan and is in the portion of the reservation of the Kansas or Kaw Indians described in the treaty of 1825.

Finding III in the case reported in 80 Ct. Cls. 269, is that the plaintiff tribe was driven from their villages on the Missouri River by the Iowa and Sac, and at the time of the treaty of 1825 the tribe was living in two villages on the Kansas River.

The treaty of June 3, 1825 describes the land ceded as follows:

Article 1. The Kansas do hereby cede to the United States all the lands lying within the State of Missouri, to which the said nation have title or claim; and do further cede and relinquish, to the said United States, all other lands which they now occupy, or to which they have title or claim, lying West of the said

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State of Missouri, and within the following boundaries; beginning at the entrance of the Kansas river into the Missouri river; from thence North to the North-West corner of the State of Missouri; from thence Westwardly to the Nodewa river, thirty miles from its entrance into the Missouri; from thence to the entrance of the Big Nemahaw river into the Missouri, and with that river to its source; from thence to the source of the Kansas river, leaving the old village of the Pania Republic to the West; from thence, on the ridge dividing the waters of the Kansas river from those of the Arkansas, to the Western boundary of the State line of Missouri, and with that line, thirty miles, to the place of beginning.

There is nothing in the record to show that the cession was at any time completely surveyed.

The lands included in the Kaw treaty of 1825 situated in Missouri and Iowa were included in the lands ceded by the treaty of July 15, 1830, in which the Sacs and Foxes, four bands of the Sioux, the Omaha, and Iowa, Otoes and Missouriias were all included as grantors.

All lands south of the Platte River within the area described in the Kaw treaty of 1825 were ceded by the Pawnees to the United States by treaty of October 9, 1833.

Quitclaims to lands located between the west line of the State of Missouri as then fixed, and the Missouri River were executed by the following bands and tribes: on September 10, 1836 by the Wa-ha-shaws tribe of Sioux; on September 17, 1836 by the Iowa tribe and the band of the Sacs and Foxes of the Missouri (residing west of the State of Missouri). The terms and wording of this last treaty seem to indicate that the Indians with whom it was made were living on the lands

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lying between the Missouri State line and the Missouri River. There is no evidence to show when they had settled there. On September 27, 1836 the Sauk and Fox executed a quitclaim of any interest in the land between the State of Missouri and the Missouri River; and on October 15, 1836 the Otoes, Missouriias, Omahas and the Yankton and Santee bands of Sioux executed a quitclaim to the same lands. Said land was also included in the cession of October 30, 1836 by the Wahpaakootah, Susseton and Upper Medawakanton tribes of Sioux Indians.

The only part of the ceded territory described in the treaty of June 3, 1825 occupied and possessed at the time by the Kaw Indians was a comparatively small undefined area located near the present town of Manhattan, Kansas in the central part of the cession, within the area reserved by the treaty. The balance of the ceded area was wandered over and hunted upon by the Kaw Indians and other Indian tribes, and no one tribe had the exclusive occupancy or possession thereof.

3. In negotiating and making the treaty of June 3, 1825 the United States did not recognize or acknowledge the exclusive use and occupancy right or title of the Kaw tribe of Indians in any of the lands ceded under said treaty.

4. The treaty of June 3, 1825 provided for a reservation in the following language, to wit:

Article 2. From the cession aforesaid, the following reservation for the use of the Kansas nation of Indians shall be made, of a tract of land, to begin twenty leagues up the Kansas river, and to include their village on that river; extending West thirty miles in width, through the

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lands ceded in the first Article (referring to the area described in Article 1), to be surveyed and marked under the direction of the President, and to such extent as he may deem necessary, and at the expense of the United States. * * *

The lands embraced within the boundaries of the reservation created for the use and occupancy of the Kaw Indians by the aforesaid treaty as just described comprised 6,559,040 acres.

5. Two million acres off the east end of the Kaw reservation (as provided by the treaty of 1825) was ceded to the United States by Article 1 of the treaty of January 14, 1846 for the consideration of \$202,000.

6. By Article 5 of the treaty of January 14, 1846 it was provided that after the west line of the 2,000,000 acres ceded by Article 1 of the treaty had been determined, the President of the United States was authorized, if there was not a sufficiency of timber on the remaining portion of the reservation, to cause to be selected and laid off for the tribe another body of land for the tribe, in which event the remainder of the reservation would thereby become the property of the United States. Under the authority of said provision, a reservation of lands known as the Council Grove reservation, consisting of 255,854.49 acres near the eastern boundary of the original reservation, was provided for said tribe, and thereby there was acquired by the United States the remaining portion of said original reservation, which said remaining portion comprised 4,559,040 acres.

7. The value of the 2,000,000 acres off the east end of the original reservation was, at the time of its cession, to wit,

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January 14, 1846, to the United States, 50¢ per acre, or a total of \$1,000,000.00.

8. The value of the 4,559,040 acres acquired by the United States under the terms of Article 5 of the treaty of January 14, 1846, was, at the time of its cession, 40¢ per acre, or a total of \$1,823,616.00.

9. The value of the Council Grove Reservation, 255,854.49 acres, provided for the Indians in lieu of the 4,559,040 acres acquired by the United States, was, at the time of its cession to the Kaws, 50¢ per acre, or a total of \$127,927.25.

10. The consideration received by the Kaws for the 2,000,000 acres, and the consideration received for the 4,559,040 acres, was in each instance so grossly inadequate as to constitute an unconscionable consideration.

11. By Section 12 of the Act of Congress of July 1, 1902 (32 Stat. 640) it was provided that a Commission be created for the investigation, consideration and settlement of claims of the Kansas or Kaw tribe of Indians against the United States, said Section 12 providing in part as follows:

Sec. 12. All claims, of whatever nature, which said Kansas or Kaw tribe of Indians may have or claim to have against the United States shall be submitted to a commission to be appointed by the Secretary of the Interior from the officers or employees of his Department for investigation, consideration, and settlement; and the United States shall, without delay, render to said tribe of Indians a complete accounting of all moneys agreed to be paid to said tribe to which said tribe may be entitled under any treaty or Act of Congress. If the settlement of the

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claims of said tribe, submitted to said commission (and the accounting) is satisfactory to said tribe, the amount found due shall be placed to the credit of the members of said tribe, according to the terms of this agreement, within one year after the report of said commission is made. * * * (Underscoring supplied.)

The Kaw Commission thereafter appointed, and acting under and by virtue of the above Act of Congress, made an award to the said Indians in the amount of \$155,976.88 in satisfaction of specific claims and denied any award on the tribe's claim for reservation lands.

Thereafter, on March 3, 1905 Congress passed an Act (33 Stat. 1048, 1079) appropriating \$155,976.88, using the following language, to wit:

SEC. 7. For payment to the Kansas or Kaw Indians in settlement of their claims against the United States, as established by the award of the Kaw Commission, under the provisions of the Act of Congress of July first, nineteen hundred and two (Thirty-second Statutes at Large, page six hundred and thirty-six), one hundred and fifty-five thousand nine hundred and seventy-six dollars and eighty-eight cents, to be immediately available: Provided, That the amount herein appropriated is accepted by the said Kansas or Kaw Indians in full settlement for all claims of whatever nature which they may have or claim to have against the United States: * * * Provided, however, That no part of said sum shall be paid until said Indians, in general council lawfully convened for that purpose, shall execute and deliver to the United States a general release of all claims and demands of every name and nature against the United States: * * *

Thereafter, on April 22, 1905 the Kaw Indians assembled in general council and voted to accept the appropriation and to execute the release required by the act of March 3, 1905 and did execute an instrument of release providing in part as follows:

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Now Therefore We, the undersigned, constituting a majority of the male adults of said Kansas or Kaw tribe of Indians, for ourselves and for the Kansas or Kaw tribe, do by these presents hereby release and relinquish to the United State all claims and demands of every name and nature against the United States, this release being in consideration of the payment to said tribe of the sum of \$155,976.88 subject to the conditions mentioned in said act of March 3, 1905, to be paid and disbursed in accordance with the provisions of the Act of Congress of July 1, 1902 (32 Stat. 636)."

This release is urged by the defendant as fully releasing and discharging the claims sued on herein.

The claim of the Indians (which claim, however, was not formally submitted to said Commission) for the lands of its reservation in excess of the 2,000,000 acres definitely ceded by Article 1 of the treaty of 1846, are found by finding No. 6 herein to be the amount of 4,559,040 acres, and by finding No. 8 to have a value of 40¢ per acre, or a total value of \$1,823,616.00.

The only consideration for the release above referred to was the payment of the sum of \$155,976.88 which had been appropriated by said Act of March 3, 1905, to settle said award of the Kaw Commission in said amount and in full settlement of all claims, including that under consideration here, which the Kansas or Kaw Indians had against the United States; that the amount so paid for such release was so grossly inadequate as to constitute an unconscionable consideration.

September 17, 1951.