

BEFORE THE INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF INDIANS)
 OF OKLAHOMA, THE SAC AND FOX)
 TRIBE OF MISSOURI and SAC AND)
 FOX TRIBE OF THE MISSISSIPPI)
 IN IOWA, and DON WHISTLER,)
 EDWARD MACK, PAULINE LEWIS,)
 WILLIAM NEWASHE, AMOS BLACK,)
 CHARLES W. ROBIDOUX, JOHN)
 CONNELL, DOROTHY GILFILLIAN,)
 THOMAS GREEN, THOMAS HERRICK,)
 KENNETH YOUNGBEAR, CHARLES)
 DAVENPORT, HARRY LINCOLN,)
 ALBERT DAVENPORT, EDWARD)
 DAVENPORT, PERCY BEAR, and)
 COLUMBUS KEAHUA, appearing)
 as the representatives of)
 and on the relation of the)
 CONFEDERATED OR UNITED)
 TRIBES OF SAC AND FOX)
 INDIANS and as representa-)
 tives and on behalf of all)
 of the MEMBERS thereof,)

Docket No. 83

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Decided: November 17, 1954

Appearances:

Arthur M. Cox, Stanford Clinton,
 and Lawrence C. Mills,
 Attorneys for Petitioners.

Curtis Shears, with whom was
 Mr. Assistant Attorney General
 Perry W. Morton,
 Attorneys for Defendant.

OPINION OF THE COMMISSION

WITT, Chief Commissioner, delivered the opinion of the Commission.

The petition filed in this proceeding presents claims under the Indian Claims Commission Act arising principally out of the acquisition by the United States of lands belonging to the Sac and Fox Nation in northwestern Illinois, southwestern Wisconsin and northeastern Missouri, being a large part of the area designated by Royce as Cession 50 and comprising a substantial part of the lands described in Article 2 of a treaty purportedly concluded between the United States and the Sac and Fox Nation on November 3, 1804 (7 Stat. 84).

Petitioners allege that the United States paid the Sac and Fox a nominal consideration for this large tract, and upon this fact, among other bases of liability, is the contention made that the consideration paid by the United States was unconscionable.

At this time, by agreement and order of the Commission, consideration is limited to what the defendant calls its Third Defense. This defense is as follows:

46. Defendant further alleges that in 1831-1832, the Confederated Sac and Fox Nation permitted a substantial band of members of their Nation to invade the United States and to carry on war against defendant, kill many defenseless settlers, destroy buildings, livestock and other property of great value belonging to citizens of the United States, fight many battles with detachments of the army of the United States and make substantial portions of lands previously ceded by said Nation to the United States unsafe for travel or residence, and said Nation did not control or stop (or attempt to control or stop) said band or come to the aid of defendant in the "Black Hawk War" or live up to the terms of prior treaties with defendant or punish violators of said treaties or in any substantial manner show "good faith" toward defendant. Defendant further alleges that in the Treaty of Peace of 1832 (7 Stat. 374) that said Confederated Nation capitulated, surrendered and accepted confinement within a reservation provided for them and that in view of the brutal attacks made by

said Nation upon settlers and the warlike activities of said Nation against the Army of the United States and its negligent failure to suppress the insurrection by said band defendant was fully justified in forceably evicting said Nation from the lands herein and confining them to a reservation under said Treaty of 1832, lest said Nation renew its attacks upon the United States.

47. Defendant further alleges that it acquired whatever interest the Confederated Sac and Fox Nation had in all the lands herein by right of conquest under the laws of war.

48. Defendant further alleges that the Sac and Fox Indians by starting war against defendant, surrendering at the close of this war, withdrawing from said lands and accepting confinement within a reservation and annuities from defendant gratuitously set aside for said Indians by the Treaty of Peace of 1832 relinquished all right of possession to said lands; amounting therefore, to another release of all tribal rights in all lands outside of said reservation.

This defense is simplified by briefs and argument to being in effect the contention that the claims asserted by petitioners have been lost by forfeiture or conquest alleged to have taken place in 1832 as a result or in consequence of hostilities engaged in between members of the Sac and Fox Nation and the United States and generally known as the "Black Hawk War"; and by reason of the treaty entered into between the petitioners and the defendant on September 21, 1832, (7 Stat. 374).

Hearings were held and much testimony introduced, both documentary and by expert witnesses, and the parties submitted proposed findings of fact and briefs.

The petitioners, in their original petition (Par. 29), alleged that the defendant asserted dominion and ownership with respect to the land involved herein from the date of the Treaty of November 3, 1804. This the defendant admits in its answer (Par. 29).

During the oral argument the attorney for the defendant was asked these questions:

- Q. Is it the position of the Government that the United States owned these lands prior to the so-called Black Hawk War?
- A. (Mr. Shears, attorney for the Government): Yes, yes.
- Q. Is that your position now?
- A. Yes,

Commissioner Holt asked Mr. Shears the following questions:

- Q. Now, if we find that the Black Hawk War didn't amount to a release, then it puts it back to taking under the treaty, and it is a question of consideration, isn't that right?
- A. (Mr. Shears) That is correct. * * * In other words, if you find that the war did not result in a breaking of their previous treaties — and if you find that the Sac and Fox Indians have any rights under those previous treaties, then, of course, this defense fails.
- Q. Commissioner Holt: Now, that is the only question before us.
- A. Mr. Shears: That is the only question before us, that is correct.

While the claims here presented by petitioner are not strictly speaking based upon rights under the treaties made prior to 1832, — they grow out of the treaties by reason of alleged unconscionable consideration.

The Commission thinks that notwithstanding the introduction of evidence and the submission of findings of fact, that the determination of the validity of said Third Defense is solely a question of law, because it is the view of the Commission that regardless of whether

the hostilities as a result of which the treaty of 1832 was entered into constituted a war in the sense that same entitled the defendant to indemnity by reason of its conquest of the petitioners, that the terms and provisions of the said 1832 treaty embody all the indemnity or forfeiture to which the defendant is entitled.

The treaty of September 21, 1832, (7 Stat. 374) entered into between the Sac and Fox Nations and the United States at the conclusion of the Black Hawk War provides that the United States shall "partly as indemnity for the expense incurred, and partly to secure the future safety and tranquillity of the invaded frontier, demand of the said tribes, to the use of the United States, a cession of a tract of the Sac and Fox country, bordering on said frontier, more than proportional to the numbers of the hostile band who have been so conquered and subdued."

Following the above language in the preamble, Article I of the Treaty provides as follows:

Article I. Accordingly, the confederated tribes of Sacs and Foxes hereby cede to the United States forever, all the lands to which the said tribes have title, or claim, (with the exception of the reservation hereinafter made,) included within the following bounds, to wit: Beginning on the Mississippi river, at the point where the Sac and Fox northern boundary line, as established by the second article of the treaty of Prairie du Chien, of the fifteenth of July, one thousand eight hundred and thirty, strikes said river; thence, up said boundary line to a point fifty miles from the Mississippi, measured on said line; thence, in a right line to the nearest point on the Red Cedar of the Ioway, forty miles from the Mississippi river; thence, in a right line to a point in the northern boundary line of the State of Missouri, fifty miles, measured on said boundary, from the Mississippi river; thence, by the last mentioned boundary to the Mississippi river, and by the western shore of said river to the place of beginning. And the

said confederated tribes of Sacs and Foxes hereby stipulate and agree to remove from the lands herein ceded to the United States, on or before the first day of June next; and, in order to prevent any future misunderstanding, it is expressly understood, that no band or party of the Sac or Fox tribes shall reside, plant, fish, or hunt on any portion of the ceded country after the period just mentioned.

Attention is called to the fact that the above described lands so ceded to the United States all lie to the west of the Mississippi River and no part of same is east of the Mississippi River, and to the further fact that the lands involved in the claim herein all lie to the east of the Mississippi River.

In this connection attention is also called to the fact, of which judicial notice is taken, that the Sac and Fox at the time had other large land holdings west of the Mississippi not ceded by the 1832 treaty as attested by cessions of October 21, 1837, and of October 11, 1842. Lands in addition to those ceded in the 1832 treaty were therefore available, if any indemnity other than that represented by the land ceded had been desired.

Attention is also called to the fact that in Articles III, IV, and V, said treaty provides for large money payments to the Indians and to creditors of the Indians, and the furnishing of blacksmiths and merchandise for years.

Attention is further called to the fact that nowhere in said treaty is there any reference to any kind or character of any further or other indemnification or loss to be sustained by the Indians by reason of their participation in said war other than that provided in said treaty.

Finally, it is submitted that the claims asserted herein were not assertable by petitioners at the time of the Black Hawk War or when the hereinbefore described treaty of 1832 was executed. The right to assert said claims was provided by the provisions of the Indian Claims Commission Act. See Western Cherokee v. U. S. 114 C. Cls. 716, 720, 723. The claims, therefore, not being assertable at the time of the Black Hawk War, or at the time of the execution of the treaty, could not have been in contemplation of the parties and could not have been "released" or in any way extinguished by said war or said treaty.

If counsel for either party are of the opinion that findings of fact should be made in order to sustain this opinion, consideration will be given to said viewpoint.

The defendant's Third Defense should be denied and the parties required to proceed to trial on the merits.

EDGAR E. WITT
Chief Commissioner

Concurring:

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner