

BEFORE THE INDIAN CLAIMS COMMISSION

OTOE AND MISSOURIA TRIBE OF)
 INDIANS,)
)
 Plaintiff,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 11-A

THE IOWA TRIBE OF THE IOWA RESERVATION)
 IN KANSAS AND NEBRASKA, THE IOWA TRIBE)
 OF THE IOWA RESERVATION IN OKLAHOMA, et)
 al., OMAHA TRIBE OF NEBRASKA, et al.,)
 THE SAC AND FOX TRIBE OF INDIANS OF)
 OKLAHOMA, THE SAC AND FOX TRIBE OF)
 MISSOURI, SAC AND FOX TRIBE OF THE)
 MISSISSIPPI IN IOWA, et al,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 138

Decided: July 31, 1957

Appearances:

Luther Bohanon with whom was Marvin J. Sonosky, Attorneys for Plaintiff in Docket No. 11-A

Elroy O. Jones, Attorney for the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska; Nicholas C. English, Attorney for the Iowa Tribe of the Iowa Reservation in Oklahoma; I.S. Weissbrodt, Attorney for the Omaha Tribe of Nebraska; George B. Pletsch, Attorney for the Sac and Fox Tribe of Indians of Oklahoma; Stanford Clinton, Attorney for the Sac and Fox Tribe of Missouri; Lawrence C. Mills, Attorney for the Sac and Fox Tribe of the Mississippi In Iowa, Attorneys for Petitioners in Docket No. 138.

Ralph A. Barney (in Docket No. 11-A), Curtis Shears (in Docket No. 138), 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.

This opinion applies to each of Dockets No. 11-A and 138.

In Docket No. 138 the Iowa, the Sac and Fox and the Omaha Tribes seek to recover for the value (less previous considerations received by them) of their alleged respective interests in a tract of land located in what is now western Iowa and northwestern Missouri, This tract is part of a larger area known as Royce Cession No. 151, which is described in Article 1 of the Treaty of July 15, 1830 (7 Stat. 328). The part of Cession 151 for which recovery is sought is that part south of the line described in Article 2 of the Treaty of August 19, 1825 (7 Stat. 272), sometimes called the Article 2 line (also called the Sac and Fox-Sioux line, and the Yancton line).

In Docket No. 11-A the Otoe and Missouri Tribe seeks to recover for the value of its alleged interest in the same tract of land.

The four claimant tribes joined with certain Sioux bands in executing the Treaty of July 15, 1830 by which they ceded to the United States, subject to certain conditions hereafter discussed, an area of land in western Iowa extending north into Minnesota and south into what is now Missouri bounded on the west by the Missouri River and including small portions in Minnesota and Missouri and the balance in Iowa; the area being what is known as Royce Cession 151. The total of the claims of all petitioners in Dockets No. 11-A and No. 138 comprise that part of Cession 151 south of the line known as the Sac and Fox-Sioux line described in Article 2 of the Prairie du Chien Treaty of August 19, 1825.

All the claimants maintain that in the period of the said two named treaties they had possession of and made use of different portions of the claimed area, aggregating the whole of same, and that the United States recognized and acknowledged by the 1825 treaty or the 1830 treaty, or both, that they together possessed Indian title at the dates of said treaties to the whole of the land involved herein. While the claimants agree that they jointly had recognized Indian title to the entire area, they disagree as to the extent of each tribe's interest in said land; and that this disagreement among the claimants, and their inability among themselves to agree upon boundaries of each, was a matter of dispute between their ancestors more than a century ago and is largely responsible for transactions with the United States which are involved in this litigation.

The claimants contend that the lands involved had far greater value than they received for the same and that they are therefore entitled collectively to the difference in the real value of said land at the time the United States acquired their title and the consideration they received therefor. As stated, they disagree, however, as to how they should participate in this total excess value of said lands. Claimants also contend that if these treaties and conduct of the defendant does not constitute a recognition of their title to the lands involved that they had title thereto by reason of aboriginal use and possession.

The defendant takes issue with claimants on all counts. It denies that any of the claimants or all of them together had aboriginal title to the lands or any part of same or that their ownership of said lands or any

part of same was recognized by the United States. Defendant contends that the treaties at most recognized hunting rights only, which the defendant had a right to extinguish at its pleasure without liability.

Needless to say the different parties take different views of the evidence and there are some conflicts in the evidence that may be the subject of argument. These conflicts relate, however, in large part to the use, possession and degree of control exercised by the different tribes over different portions of the area at different times. These conflicts, because of their nature and because more than a century has elapsed since the events upon which based occurred, are very difficult of determination at this time. The problem is also greatly aggravated because there were unsettled questions of fact at the time of the treaties involved.

The claim of occupancy by the Iowa dates back to 1673 when Marquette found them at the mouth of the Des Moines River. Marquette states that the records show that the Iowa were in the Lake Okoboi-Spirit Lake Region which is in the southern part of Minnesota and the northern part of Iowa for a period from 1660 to 1669, and that they ranged between this region and the Mississippi River. The Iowa contend that by reason of pressure of the Sioux on the north and northeast by 1765 they had moved west to the Missouri River--both sides of it, down to Council Bluff area where they established villages which they maintained until approximately 1765. Thereafter they claim to have moved for trading purposes back to the Des Moines River and that they hunted in the Iowa country between the Mississippi and Missouri Rivers for years--that in the late 1700's and early 1800's

they had villages on the Grand and Chariton Rivers in Iowa, east of Cession 151; that they later went to the southern part of Cession 151 and hunted along and across the Missouri River to the north and the east; that in the early 1800's they more-or-less joined up with the Sac and Fox in using and hunting the same territory. In Agent Dougherty's statement in letter of July 5, 1830 he seems to think that the Iowas more extensively than any other of the plaintiff tribes used the land lying north of the State of Missouri and east of the Missouri River to the Nodoway River and east to the Des Moines River. It may be that they and the Missouri Sac and Fox had one or two settlements in the very southern most portion of Cession 151 at the time of the 1830 treaty and that they probably were the only claimant tribes who actually had settlements in the territory claimed.

The Sac and Fox claim alone practically the entire east half of Area 151, or with the Iowa at least two-thirds if not all of 151. They admit that they had not been long in possession and use of said territory, but claim that under the provisions of the Treaty of 1825 they were recognized by the United States as such owner.

The Sac and Fox agree that the Omaha and Otoe at one time used and occupied portions of Cession 151 but that the right of exclusive control later became the property of the Sac and Fox by conquest. The Sac and Fox also claim rights in Cession 151 by reason of recognition of ownership by the Treaty of 1825.

Agent Dougherty thinks the Otoe and Missouria because of use have the better claim to approximately the middle third of Cession 151; the Iowas

to the lower third; and the Omahas the northern third of the cession.

The findings go into more detail as to the respective tribal claims and evidence of use, but in view of our ultimate findings as to same, and our reasons therefor, it is not deemed necessary to go into more detail here as to these respective claims, or as to evidence upon which based.

By reason of the conflicting claims of the different tribes and the inability of the tribes themselves to determine their boundaries between each other in this territory to the east of the Missouri River, and because of the hostilities by reason of said conflicts between tribal contenders east of the Missouri River and to the Mississippi River, the Government undertook to terminate said disputes and to establish boundaries between said tribes and for that purpose a treaty convention was called in 1825. An Act of Congress providing for the negotiation of this treaty, provided that same should be "for the purpose of establishing boundaries and promoting peace." These wars and disputes were not only causing suffering between the tribes but were injuring white settlers and traders.

The convention authorized, convened at Prairie du Chien in August, 1825, and a treaty dated August 19, 1825 was concluded. Treaty Commissioner William Clark told the Indians assembled that peace would be achieved by defining the boundaries of the land of the various tribes. He summarized the Government's objective in these words:

"We therefore propose to make peace together and to agree upon fixed boundaries for your country within which each tribe should hunt & over which, others shall not pass without their consent."

It was stated in the preamble of the treaty that the objective was to promote peace among the tribes and to establish boundaries among them and other tribes who lived in the vicinity and to remove all causes of future difficulty.

For most of the tribes at the treaty council, definite boundaries were determined by the treaty, and no controversy arose thereafter with respect thereto. In a few cases lines left unsettled were fixed by subsequent treaties. This occurred with respect to the Chippewa, Winnebago, and the Menomonee Tribes. However, the controversy between the claimants to the area east of the Missouri River, being that involved herein, was not settled and there was failure of the Government thereafter to take steps which under the terms of the treaty it had obligated itself to do to settle the same. It was provided by the treaty that the northeast boundary known as the Sac and Fox-Sioux line should be assented to by the Yancton Band which was not present at the time of the 1825 treaty. This line was later approved by the Yancton Band however. By Article 3 of the treaty joint ownership of a portion of the territory was acknowledged as being in the Sac and Foxes and Iowas, and it was agreed that the two tribes should peaceably occupy same "until some satisfactory arrangement can be made between them for a division of their respective claims to said country." There was never any fixing of boundaries to their respective countries. Said treaty also recognized that the Otoes were interested in a portion of the country, but their interest was never determined. It was provided by Article 11 of this treaty for the convening of "such of the tribes, either separately or together, as are interested in the lines left

unsettled herein, and to recommend to them an amicable and final adjustment of their respective claims." This article also provides for an adjustment of the title between the Otoes, Sacs, Foxes and Iowas.

It is undisputed that the 1830 treaty convention was called to complete the work begun by the 1825 treaty--that is to settle the disputed issues as to boundaries and achieve the peace that the 1825 treaty had been expected to bring about but which had not resulted. It is undisputed that the continuing controversies and hostilities arising after 1825 because of boundary disputes caused negotiations for and the execution of the treaty of July 15, 1830. The findings of fact made herein leave no doubt as to such difficulties and hostilities and as to the purpose of the convening of delegates to a convention intended to bring about the execution of a new treaty, settling such controversies, fixing such boundaries as might be possible, and the securing of the peace which the former treaty had not brought about. Communications calling for the sending of said delegates stated that the treaty desired was for the purpose of completing the work begun by the 1825 treaty, and the Indians were advised that the boundaries which were unsettled would be finally settled.

However, shortly before the convening of said treaty convention, a proposal was advanced by Indian Agent John Dougherty that a session be obtained from all tribes interested in the area in dispute, so that the area might be converted into a "common hunting ground" for the use of all the tribes interested. Findings of fact show the representations

made by Mr. Dougherty in this respect and the favorable reaction of General Clark and the War Department to this suggestion. Communications show instructions as to the tribes to be summoned, which indicated a recognition of the tribes interested in the land by reason of possession, use and claim thereto. The tribes summoned to said convention were the Sioux, Sac and Fox, the Iowa, the Omaha, and the Otoe and Missouriia, and they were the ones and the only ones who participated in the treaty thereafter executed and dated July 15, 1830.

In giving consideration to the effect of these treaties of 1825 and 1830, it is significant that the purpose of the United States in negotiating the treaties and the conditions that brought about the same are very similar to the situation that existed later in 1851 which brought about the Treaty of Fort Laramie with the Sioux, et al., executed on September 17, 1851. The Fort Laramie Treaty and the circumstances that caused its negotiation were carefully analyzed in the opinion of Commissioner O'Marr for this Commission in the case of Crow Tribe of Indians v. United States, 3 Ind. Cls. Comm. 147.

This Commission, as had the Court of Claims previously, held that the Fort Laramie Treaty, which fixed the boundaries of various tribes, constituted a recognition of the title of the tribes within such boundaries. It is difficult to see how any treaty negotiated at a convention called for the purpose of fixing boundaries could have any such effect except by recognizing the title of the tribes involved to the lands within the boundaries fixed. There would be no way of bringing about a settlement of controversies as to boundaries by merely recognizing the boundaries as claims

of the respective contenders; such recognition would merely leave the situation as it was before. The only way the conflicts could be settled and the hostilities avoided by reason thereof would be to definitely find ownership in keeping with the boundaries fixed.

Regardless of whether the purpose of fixing boundaries is considered sufficient to make the treaty one recognizing ownership, certainly the parallel between the 1825 treaty of Prairie du Chien and that of the Fort Laramie Treaty of 1851, makes the interpretation of the 1851 treaty recognizing titles have great weight in determining the effect of the 1825 treaty.

The 1825 treaty and the 1851 treaty were both prompted by the same situation--intertribal warfare; both had the same objective--to end the warfare by fixing boundaries; both treaties had the same basic provisions--the description of the outside boundaries of the territories of the different tribes. The 1825 treaty really went a little farther than the 1851 in that by the 1825 treaty the United States expressly agreed to recognize the boundaries therein set up and agreed to thereafter fix the intertribal unfixed boundaries. General Clark even advised the Indians that the "President intends to be always on the different lines which separate your different countries," which could only mean that the Government would protect the boundaries. General Clark said to the 1825 Indian delegations: "We therefore propose to make peace together and to agree upon fixed boundaries for your country within which each tribe should hunt & over which, others shall not pass without their consent." The Treaty Commissioners in 1851 were instructed:

"It is important, if practicable, to establish for each tribe some fixed boundaries, within which they should stipulate generally to reside; and each should agree not to intrude within the limits assigned to another tribe without its consent." (Quoted in the Crow decision at page 161.)

While the 1825 Treaty mentions only the Sioux, Sac and Fox, and the Iowa Tribes as definite possessors of the land described as the East of and immediately joining the Missouri River, it mentions the Otoe and Missouriia as being thought to have an interest there; and in the subsequent treaty of July 15, 1830 an interest of the Otoe and Missouriia is acknowledged, and likewise an interest in the Omaha. Considered together the two treaties show the recognized owners of the land involved in two law suits (Dockets 138 and 11-A) to be the Sac and Fox, the Iowa, the Omaha and the Otoe and Missouriia. Unless the participation of the Otoe and Omaha in the 1830 treaty, and their interest in the land otherwise recognized by the Government officials, makes them recognized owners by the 1825 treaty, it would follow that the 1825 treaty vested the title to the entire acreage in the Sac and Fox and Iowa, and we do not think this conclusion is tenable or reasonable. We think the reasonable construction of the treaties and the conduct of officials all taken together is that the lands involved in the 1825 treaty were recognized as belonging to the Indians occupying the same, and that the Indians in whom this acknowledgment of title to the land herein involved vested were shown by subsequent facts and conduct of all parties to be the four tribes as stated.

Failure to determine the lines between the several tribes does not indicate a different conclusion; the Government's failure to fix such boundary lines left the title to the area in the four tribes.

This Commission in the case of Miami Tribe, et al., vs. United States, 2 Ind. Cls. Com. 617, held that certain tribes were the "joint owners" of certain territory, that the title of all together had been recognized by the United States.

In Beecher vs. Wetherby, 95 U.S. 517, 24 L. ed. 440, discussing the question of ownership of lands which were within the area of the approximate boundaries fixed for the Menominee Tribe by the 1825 treaty, the United States Supreme Court declared:

"In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different Tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribe acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee Tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. . . ."

This Commission in a recent opinion in Miami Tribe, et al. v. United States, Docket 253, held Indian title was recognized by the United States although definite boundaries had not been fixed.

Defendant contends that the petitioners at most were possessed of only permissive hunting rights in the territory involved, which rights were not compensable but subject to termination by the defendant at any time without liability to the petitioners.

The Sioux case referred to by the defendant deals with rights under an executive order and therefore we think not applicable.

The Blackfeet case (81 C. C. 116, 117), to which defendant refers, depended upon treaty provisions providing that certain territory therein described "shall be a common hunting ground for 99 years, where all the

nations, tribes, and bands of Indians, parties to this treaty, may enjoy equal and uninterrupted privileges of hunting and fishing, and gathering fruit, grazing animals, curing meat, and dressing robes. They further agree that they will not establish villages, etc." (Treaty of Oct. 17, 1855; 11 Stat. 657). The claim asserted by the Indians by reason of said quoted provisions was for compensation in the amount of \$44,160,000 as damages for the failure of the Government to protect the Indians in said hunting rights. In discussing the liability of the Government, by reason of said provisions, the court determined that the grant involved was not Indian territory and that the language granting was of the limited privilege and license to exploit the territory for game and wild animals. The decision further called attention to the fact that the acreage of land was "enormous" and that another article of the treaty "delimited a reservation to the tribe out of the lands embraced within the designated hunting grounds." For these and other reasons the court held that the petitioners were not entitled to recover. This Commission does not think the Blackfeet case is determinative of the question involved in the instant cases, as to whether the title involved is the usual Indian title or mere hunting rights, as was held to be the basis of rights in said Blackfeet case. The Indians themselves in the Blackfeet case construed the language of the treaty to grant them only hunting rights. While it is true that in the instant cases the use and occupancy made by the tribes of the lands in Cession 151 were primarily for hunting purposes, the Indians claimed Indian title to the land, and there was no restriction provided or recognized against settlement or permanent villages, or any use the Indians

desired to make of the land. At times over the years each and all of the tribes did have settlements somewhere in the territory involved.

A significant reference to occupancy by the Iowa Tribe is made by William Clark (one of the negotiators of the 1825 treaty) in letter dated January 5, 1837 (to whom written not clear) in which he says:

"I state for your information that upon my arrival in Upper Louisiana 34 years ago, I found the Ioways in possession of an immense tract of country between the Mississippi and Missouri Rivers, their claim to which so far as my knowledge extends, was undoubted and unquestioned, and which they have never abandoned, living on it from that time to the present."

In all the discussions with reference to the rights of the Indians that took place at the conventions resulting in the Treaty of 1825 and 1830, the land involved in Cession 151 was always referred to by the Indians as "my country," "my land," and "my boundaries." Such was the understanding not only of the Indians but of the United States Government itself as is evidenced by the Government officials using similar language in discussing the claims of the Indians, and in the viewpoint of the Government later that additional cessions following that of 1830 from the Indians were needed in order to "extinguish" the "title" recognized by the defendant as being still possessed by the Indians subsequent to the Treaty of 1830.

This Commission thinks the opinion of the Court of Claims (rendered on February 8, 1955) in the appeal of Dockets No. 27-A and No. 241 of this Commission, entitled Delaware Tribe of Indians v. United States (130 C. Cls. 782) is confirmatory of our viewpoint that the rights held by the petitioning tribes in Cession 151 amounted to Indian title. In

the Delaware Tribe case the issue was the title acquired in a grant to the Indians of what was called an "outlet" for the use of said Indians in reaching hunting lands some distance from their residence lands.

This Commission had held that such outlet was in the nature of an easement and that the Indians had not acquired Indian title by virtue of the grant to them of said outlet. The Court of Claims in holding that the Indians had acquired Indian title to said land used this language:

"It is agreed, then, that the Delawares could not only pass through their 'outlet' but could hunt on it. We suppose, then, that they could also fish on it, gather berries and edible plants on it, take wood from it, camp on it, and pasture their livestock on it. But those were the only things that Indians ever wanted to do on the land they did not live on, and are the only things they have done on lands for which they have obtained compensation in numerous cases. It is really drawing the line pretty fine to say that the Delawares had the right to do all these things on their lands which they did not live on, but still had a title inferior to that of all the other Indians who did only these same things on their lands they did not live on."

Following such reasoning the Court of Claims held that the Indians "unquestionably" had "Indian ownership" of the outlet acreage.

Having determined that the land involved belonged (Indian title) to the petitioners, in both dockets, the problem of determining their respective interests therein is the next question. In view of the conflicting claims asserted by the respective petitioners with respect to the portions of the territory being used by them at the time of the Treaties of 1825 and 1830, and both before and after, and in view of the failure of the defendant, notwithstanding its promises so to do, to fix the respective boundaries of petitioners, this Commission at this late date is of the opinion that the problem of fixing boundaries is even

more difficult now than it would have been at the time of the Treaties of 1825 or 1830.

Several plans for dividing the involved area are suggested in the briefs. The Otoe-Missouria plan would divide the tract equally between the four tribal groups, while the plan suggested by Sac and Fox would give the Omaha and Otoe-Missouria a 25% interest in the lands between the Nodewa-Nishnabotony watershed and the northerly or Article 2 line, and the remainder to Sac and Fox. As to the lands southerly of said watershed, the Sac and Fox would share that area equally with the Iowa.

The difficult problem of determining tribal interests in the area has been referred to above. As we view the evidence we believe it supports the division we have made in Finding 50.

We of course recognize the difficulty of valuing the northerly part of the area because of the dates of the cessions by the tribes interested therein, which range in time from 1838, in the case of the Sac and Fox, to 1854, in the case of the Omaha and Otoe-Missouria but the problem seems unavoidable under the circumstances. Perhaps the claimants and the defendant can agree upon a mean date for the purpose of proving value.

Edgar E. Witt
Chief Commissioner

Concurring:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner