

BEFORE THE INDIAN CLAIMS COMMISSION

EMIGRANT NEW YORK INDIANS ex. rel.,)
 JULIUS DANSFORTH, OSCAR ARCHIQUETTE,)
 SHERMAN SKENDANDORE, MAMIE SMITH,)
 ARVID E. MILLER and FRED L. ROBINSON,)
 THE ONEIDA TRIBE OF INDIANS OF)
 WISCONSIN and THE STOCKBRIDGE-MUNSEE)
 COMMUNITY,)
 Petitioners,)
 vs.)
 THE UNITED STATES OF AMERICA,)

Docket No. 75

Defendant.

Decided: November 1, 1957

Appearances:

Ely M. Aaron,
 Attorney for Plaintiffs

James J. Manogue,
 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.

Petitioners in this case are seeking recovery of defendant for the value of one-half interest in an estimated 3,931,000 acres allegedly acquired by their ancestors from the Menominee Indians under a treaty between the Menominee and the Stockbridge Nation, the First Christian Party of the Oneida Nation, the Tuscarora Nation, the St. Regis Nation and the Munsee Nation on September 23, 1822.

Petitioners call themselves the Emigrant New York Indians and suit was filed on their behalf by certain individual members of the Oneida Tribe of Indians of Wisconsin and the Stockbridge-Munsee Community who allege themselves to be descendants of the New York Indians who emigrated to Wisconsin following the treaty of September 23, 1822. Petitioners further state that there is no tribal organization recognized by the Secretary of the Interior which is capable of representing them in this action. However, counsel for petitioners moved the Commission for the entry of an order joining the Oneida Tribe and the Stockbridge-Munsee Community as additional petitioners. They state in their motion that the individual members of these two groups are also the members of the alleged entity known as the Emigrant New York Indians. The attorneys' contracts under which this action is brought by the firm of Aaron, Aaron, Shimberg and Hess are with the Oneida Tribe and the Stockbridge-Munsee Community and have been approved by the Secretary of the Interior. This Commission, by order of even date herewith, has granted the motion of petitioners and admitted the Oneida Tribe and the Stockbridge-Munsee Community as additional parties plaintiff, and therefore is of the opinion that the objections of defendant to the validity of contracts of counsel for the purpose of maintaining this action are not sufficient and petitioners will be permitted to continue under said contracts.

The Treaty of September 23, 1822 under which petitioners claim their ancestors acquired one-half interest in the Menominee lands reads in part, as follows:

ARTICLE I

The Menomonee nation of Indians, in consideration of the stipulations herein made on the part of the Muhheconmuk or Stockbridge, and the first Christian party of the Oneida, and the Tuscarora, and the St. Regis, and Munsee nations, do hereby cede, release and quit claim to them, the people of the said Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations, forever, all the right, title, interest, and claim of them, the Menomonee nation of Indians, to all the lands and islands comprehended within and described by the following boundaries, viz:

Beginning at the foot of the rapids on Fox river, usually called the Grand Kahalin; thence southeast (or on the lower line of the lands last season ceded by the Menomonee and Winnebago nations of Indians, to the Six Nations, St. Regis, Stockbridge, and Munsee nations,) to or equidistant with the Manawahkiah river, emptying into lake Michigan; thence on an easterly course to and down said river to its mouth; thence northerly, on the borders of lake Michigan, to and across the mouth of Green Bay, so as to include all the islands of the Grand Traverse; thence from the mouth of Green Bay, aforesaid, northwesterly course, to a place on the northwest shore of lake Michigan, generally known and distinguished by the name of Weychquatonk by the Indians, and Bay de Noque by the French; thence a westerly course, on the height of land separating the waters running into lake Superior and those running into lake Michigan, to the head of the Menomonee river; thence continuing nearly the same course, until it strikes the northeastern boundary line of the lands ceded as aforesaid by the Menomonee and Winnebago nations to the Six Nations, St. Regis, Stockbridge, and Munsee nations of Indians in eighteen hundred and twenty-one; thence southerly to the place of beginning.

ARTICLE II

The Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations aforesaid, do promise and agree to and with the said Menomonees, that they, the said Menomonees, shall have the free permission and privilege of occupying and residing upon the lands herein ceded, in common with them the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations;

provided, nevertheless, that they, the Menomonee nation, shall not in any manner infringe upon any settlements or improvements whatever, which may be in any manner made by the said Stockbridge, Oneida, Tuscarora, St. Regis, or Munsee Nations.

ARTICLE III

The Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations, do further promise and agree to and with the said Menomonees, that, according to their request, all the French and other inhabitants who have just and lawful claims to, and are now settled and living upon, any lands herein ceded, shall remain unmolested by them the said Stockbridges, Oneidas, Tuscaroras, St. Regis, or Munsees. It is also expressly understood by the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations, that the Menomonees do not herein cede to them, the Stockbridge, Oneida, Tuscarora, St. Regis, Munsee nations, any lands in the vicinity of Fort Howard, or near the mouth of Fox river, the title of which may have been heretofore extinguished by the American Government.

ARTICLE IV

In consideration of the cession herein made by the Menomonees, the Stockbridge and Munsee nations of Indians aforesaid have, by the hands of their deputies, paid to the chiefs and head men of the Menomonee nation, this day, the sum of one thousand dollars in goods, in full of all demands in this treaty on their part, the receipt whereof is hereby acknowledged by the Menomonee nation. And the Oneida, Tuscarora, and St. Regis nations of Indians, do promise and agree to and with the Menomonee nation, to pay to them, the Menomonees, the sum of one thousand dollars in one year from

the date hereof, and also one thousand dollars in two years from the date hereof--the whole to be paid in goods; the which respective sums are to be a full and complete recompense and compensation for the lands hereby ceded, released, and quit claimed to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee nations.

In testimony whereof, the said deputies, and the said chiefs and head men, have hereunto set their hands and seals, at the place and on the day and year above written.

Witness, John Sergeant, jun., Agent on the part of the Government of the United States.

Under the description as set forth in the above treaty the Emigrant New York Indians would have claimed a one-half interest in approximately 7,480,000 acres. However, petitioners have formally disclaimed any interest in the land included within the above description to which the United States did not recognize Menominee title under the Treaty of Prairie du Chien of August 19, 1825 (7 Stat. 272). When the area of the Menominee lands is thus reduced, it is estimated by petitioners' expert witness to contain 3,931,000 acres and petitioners' claim is reduced to a one-half interest in that amount of land. This estimate of acreage is supposed to exclude all major water areas within the recognized area. With regard to the Treaty of Prairie du Chien as constituting recognition of title to the areas claimed by the respective tribes who were parties thereto, attention is invited to the decision of this Commission in the consolidated case of Otoe and Missouri Tribe of Indians. v. United States, Docket No. 11-A and the Iowa Tribe, etc., v. The United States, Docket No. 138, wherein it has been held that said treaty did constitute a recognition of title.

Petitioners construe the terms of the 1622 treaty as entitling their ancestors to a one-half interest in the land because of the reservation by the Menominees of the right of use in common of the land. This appears to be the only practicable construction of the grant. The Menominees ceded, released and quit claimed the area described to the Emigrant New York Indians and then in Article II they reserved the right to use that area in common with the Emigrant New York Indians. Since nothing was passed by the treaty but the right of use and occupancy, any reservation of use and occupancy rights amounts to reserving the same rights granted. In other words, the Menominees reserved the same rights which they passed on and the only way possible to construe such a grant and reservation is by calling it a tenancy in common of the right of use and occupancy. The fee, remaining in the Government, could not have been passed. This would give the Emigrant New York Indians a one-half interest in the Menominees' lands to whatever extent they held such lands. As stated above the Emigrant New York Indians have disclaimed any interest in lands to which title has not been recognized in the Menominees.

Without going into too much background, the facts involved in this litigation are that certain of the Indians of New York who were members of the Six Nations requested permission of the Government to remove to the west and locate on new land. This memorial included a request for assurance by the Government that whatever area the New York Indians succeeded in acquiring would be recognized. The Government gave permission to remove and agreed that the title of the New York Indians to

any land acquired would be recognized as being held by them in the same manner as it was held by those from whom they purchased it. They were given help in their quest for a new home by equipment and provisions for the members of the party.

While the New York Indians were on their way to Wisconsin to select land it was learned a Col. Bowyer had taken a cession of part of the area which they had wanted. At the insistence of Governor Lewis Cass of Michigan Territory, which included what was to become Wisconsin, the War Department disapproved the Bowyer cession. The New York Indians again went to Green Bay and with the help of the United States officers entered into an agreement with the Menominee and Winnebago Indians on August 18, 1821 in which they acquired approximately 804,000 acres of land, exclusive of major water areas. The land purchased was described as follows:

Beginning at the foot of the Rapids on Fox River, usually called the Grand Kaccalin; thence up the said River to the Rapids at Winnebago Lake; and from the river extending back, in the width on each side, to the North West and to the South East, equidistant with the lands claimed by the said Menominee and Winnebago nation of Indians.

The Menominees and Winnebagoes reserved the right to hunt and fish on the land ceded. The consideration was \$2,000.00 in money and goods. President Monroe approved the treaty on February 19, 1822 and stated that the lands were to be held by the New York Indians in the same manner as the Menominees and Winnebagoes had held them.

For various reasons the New York Indians were not satisfied with the purchase of 1821 and the Secretary of War approved their request to negotiate for more land and gave assistance again. On September 23, 1822 the deputies

of the New York Indians and the Menominees entered into a treaty under the supervision of John Sergeant, Jr. The area ceded was the one described above as being the area in which petitioners claim their interest in this case. The Menomonees reserved the right of occupancy and use in common with the New York Indians and the purchase price was \$3,000.00 in goods. The area of this cession was some 7,480,000 acres, exclusive of major water areas. President Monroe approved the cession on March 13, 1823 with the following qualifications:

The foregoing instrument is approved, so far as it conveys to the Stockbridge, Oneida, Tuscarora, St. Regis, and Munsee tribes or nations of Indians, that portion of the country therein described which lies between Sturgeon Bay, Green Bay, Fox River, that part of the former purchase made by said tribes or nations of Indians of the Menomonee and Winnebago Indians, on the 8th of August, 1821, which lies south of Fox River, and a line drawn from the southwestern extremity of said purchase to the head of Sturgeon Bay, and no further; that quantity being deemed sufficient for use of the first before-mentioned tribes and nations of Indians. * * * *

This approval covered about 1,557,000 acres. See petitioners' Exhibit 142.

When the New York Indians protested this partial approval the Secretary of War assured them that it in no way invalidated their title to all of the land acquired from the Menominees, including that to which the Government had not given its special sanction. The Secretary also offered two million acres of land in exchange for that which the New York Indians already had, but they did not accept the offer.

On January 8, 1825 the Brotherton Indians entered into a treaty with the Stockbridge, St. Regis, First Christian Party of the Oneida Nation, Tuscarora and Munsee Tribes under which they paid a consideration and acquired an interest in the land purchased from the Menominees.

On August 19, 1825 the Treaty of Prairie du Chien between the United States and the Sioux and Chippewa, Sac and Fox, Menominee, Ioway, Sioux, Winnebago, and a portion of the Ottawa, Chippewa and Potawattomie was entered into. This treaty was for the purpose of establishing boundaries between the signatory tribes. The Menominee area could not be described definitely, but only generally, because the Menominees were not sufficiently sure of their boundaries and because of "some uncertainty existing in consequence of the cession made by that tribe upon Fox River and Green Bay, to the New York Indians."

On August 11, 1827 the Treaty of Butte des Morts (7 Stat. 303) was held between the United States and the Chippewa, Menominee and Winnebago tribes for the purpose of settling the boundary question left unsettled by the Treaty of Prairie du Chien, and for the purpose of adding to cessions already made to the United States. The New York Indians were not a party to this treaty although the Brothertons had permission to send a delegation and the Munsees were present, according to the Journal. The claims of the New York Indians were placed before the Commissioners, however. The treaty set the boundaries between the Chippewas, Menominees and Winnebagoes. It also mentioned the existence of difficulties between the Menominee and Winnebago tribes and the New York Indians and the former tribes agreed to let the President of the United States settle the question of boundaries with the New York Indians. The third article of the treaty was a cession of land by the Menominees to the United States in the vicinity of Green Bay. There was a proviso added to the effect that if the lines of the cession interfered with the just claims of the New York Indians, then the President should be free to change the cession boundaries any way

he chose, just so the area of land remained the same. The New York Indians protested the action under the Treaty of Butte des Morts, alleging that the cession to the United States thereunder was a part of the land which the Menominees had ceded to them in 1822. The said treaty, however, was ratified by the Senate on February 19, 1829 with the proviso that "The said treaty shall not impair or affect any right or claim which the New York Indians, or any of them, have to the lands, or any of the lands, mentioned in said treaty."

In the meantime the New York Indians had requested of the Senate that commissioners be appointed to settle the boundary question. On June 9, 1830, pursuant to Article 2 of the Treaty of Butte des Morts, President Jackson appointed commissioners to investigate the alleged controversy between the Menominee and Winnebago tribes and the New York Indians. Secretary of War Eaton instructed the commissioners to select a suitable area of land for the New York Indians and establish its boundaries. He further stated that the President wanted any question as to the validity of the Treaties of 1821 and 1822 waived. He further instructed the commissioners that the New York Indians were an agricultural people and consequently needed a smaller area of land than the Menominees and Winnebagoes who were still in the hunter state.

During July and August of 1830 the commissioners met in council with the parties for the purpose of settling the dispute between them. After extensive hearings the commissioners established boundaries for about 300,000 acres of land for the New York Indians. At the conclusion of the Council on September 1, 1830 the Commissioners, certain Menominee chiefs and interested white settlers assembled in the quarters of Col. Stambaugh, the Indian Agent at Green Bay. It was decided, without the

presence of the New York Indians, that Stambaugh should take a delegation of Menominees to Washington for further negotiations. When the delegation arrived in Washington, Secretary of War Eaton and Col. Stambaugh were directed by President Jackson "to enter into some amicable arrangement with the Menominee Tribe of Indians now at the City of Washington for a settlement of their dispute with the New York Indians, and to obtain from them such cession of country as may appear just and reasonable and also such portion of their country as they may be disposed to cede to the United States."

Out of these negotiations, and over the protest of the New York Indians, came the so-called Stambaugh Treaty of February 8, 1831 (7 Stat. 342) between the Menominees and the United States. Under this treaty the Menominee ceded an area of 500,000 acres to the United States for the New York Indians. The Government paid \$20,000 for the land. The terms of the Treaty specified that the land should be for all New York Indians who wished to remove to and settle thereon within three years, at the end of that period the President was empowered to apportion the land among the actual occupants at the rate of 100 acres for each settler, with the remainder to revert to the United States. The Menominees also ceded all of their land on the southeast side of Winnebago Lake, Fox River and Green Bay. The area of this cession was estimated at 2,500,000 acres in the Treaty and it covered the greater portion of the area approved for the New York Indians by President Monroe in 1823. The Treaty also provided that if the New York Indians refused to accept the provisions made for them the President would direct their immediate removal from

the Menominee country. The President was given the right to extinguish the title of the Menominees to the remainder of their country for additional annuities in an amount to be set by the President.

On February 17, 1831, the Treaty was amended to eliminate the requirement of removal in three years and make it discretionary with the President and to make the apportionment of the land on a just and equitable basis, instead of 100 acres per individual. Another amendment said that the balance of the land should be the property of the United States should the New York Indians refuse or neglect to remove to it. It was also provided that the removal of those New York Indians who may not have settled on the Wisconsin land at the end of three years should be discretionary with the President.

On February 20, 1831 the Treaty was referred to the Senate Committee on Indian Affairs. Secretary of War Eaton had written a letter to President Jackson in which he stated that the treaties of 1821 and 1822 were invalid because not ratified by the Senate under the 12th Section of the Trade and Intercourse Act of 1802 and because he deemed the consideration paid by the New York Indians to have been inadequate. Based upon that reasoning he stated that in negotiating this Treaty, "It did not occur to me as proper to present the demand of the New York Indians as a matter resting upon right and justice." This letter accompanied the Treaty to the Senate Committee. The Senate adjourned without acting on the Treaty.

When Congress reconvened the next fall a delegation of New York Indians went to Washington to protest the ratification of the Treaty. Lewis Cass had been appointed Secretary of War and Governor Porter had

taken Cass' place as Governor of Michigan. Cass appointed Porter to negotiate with the delegates of the New York Indians and extensive meetings were held but without result because the New York Indians would not accept the 500,000 acres which they had been granted in the Treaty. They wanted to exchange 200,000 on the south side and this was refused on the grounds that the land belonged to the Menominees. On June 25, 1832 the Senate ratified the Stambaugh Treaty with certain amendments which granted three townships to the Stockbridge, Munsee and Brotherton Indians on the east side of Lake Winnebago. The Senate also altered the boundaries of the 500,000 acre tract granted to the Six Nations and St. Regis Tribe to conform to their demands.

Governor Porter was directed to obtain the consent of the Menominees to these changes or to the closest practicable arrangement possible and also to obtain the consent of the New York Indians to any arrangement made with the Menominees. This resulted in a supplementary Treaty on October 27, 1832 between the Menominees and the United States. After much persuasion Governor Porter finally obtained the consent of both parties.

The result of the Stambaugh Treaty of February 8, 1831, its amendment of February 17, 1831 (ratified June 25, 1832), and the supplementary Treaty of October 27, 1832 was to provide a total of 569,120 acres of land for the New York Indians; of which 46,080 acres, or two townships, were for the use of the Stockbridge and Munsee Tribes, 23,040 acres, or one township, were for the Brotherton Indians, and 500,000 acres were for the remainder of the New York Indians.

On January 15, 1838 the Treaty of Buffalo Creek (7 Stat. 550) between the New York Indians and the United States was concluded. Under this Treaty the New York Indians who remained in the State of New York relinquished their claims to the land in Wisconsin, except for a tract upon which the Emigrant New York Indians were then residing. In return for their relinquishment the United States granted all the New York Indians 1,824,000 acres in what is now the State of Kansas. The New York Indians since have been paid for the Kansas land under a special jurisdictional act. See New York Indians v. United States, 170 U.S. 1, 42 L. Ed. 927.

Based upon the foregoing essential facts the Emigrant New York Indians contend that defendant is liable to them under Sections 2(1), 2(2), 2(4) and 2(5) of the Indians Claims Commission Act (60 Stat. 1049). Defendant in its answer presents five defenses. The first challenges the jurisdiction of the Commission, the second is that of accord and satisfaction, the third is that of release, the fourth is a general denial and the fifth is that of offsets.

Defendant, in its attack on the jurisdiction of this Commission over the subject matter of the claim, alleges this to be a dispute between Indian Tribes and not between a tribe or group of Indians and the United States. Based upon this contention defendant says that the Indian Claims Commission Act does not confer such a jurisdiction upon the Commission.

Were this in truth a dispute between two Indian tribes, then this question of jurisdiction would be a serious one. However, this Commission does not interpret the present case as one between tribes, but it

is rather a case by a group of Indians against the United States for alleged wrongs committed against it by the United States, as the petition alleges. The fact of negotiations between tribes as the source of the land, for which claim is here made, cannot have an effect upon the jurisdiction of this Commission over parties and subject matter, falling within its statutory sphere, as alleged. In other words the jurisdiction of this Commission over the parties and subject matter involved cannot be defeated by the fact that plaintiffs' title, if any, was derived from another group of Indians. The crux of the case lies in the question as to the effect of the actions or lack thereof by defendant on the rights of plaintiffs. The dispute between plaintiffs' ancestors and the Menominee Indians becomes only a side issue to the basic question of whether or not defendant has acted properly in its course of dealings with plaintiffs before and during the negotiations of the series of treaties involved herein, or whether those actions were such as to give rise to a liability on the part of defendant as alleged. It must be borne in mind that whatever rights the plaintiffs' ancestors had were already in existence at the time the dispute between the Indians arose. Those rights grow out of the Treaty of 1822 and, as stated before, the question before us is the role played by defendant in its connection with the transactions narrated. The moment defendant became interested in the settlement of the difficulty between the Indians, it must account for its actions. In accounting for those actions the defendant brings itself and plaintiffs squarely within the jurisdiction of this Commission as set forth by Congress in the Indian Claims Commission Act.

The second point in the defense of lack of jurisdiction deals with the "Green Bay Settlement" and the consent given by the Menominees and Winnebagoes in the Treaty of Butte des Morts to the President to establish boundaries between them and the New York Indians. Defendant contends that the "Green Bay Settlement" resulted in settling the dispute whether it be called an arbitration under the Treaty of Butte des Morts or a modification by and between the tribes themselves and that this Commission has no jurisdiction over settled claims. This contention involves the actions of defendant throughout its dealings with these Indians. In other words, if the settlement was just and equitable, then the plaintiffs have no case, but on the other hand if it was not a just and equitable settlement, or if it was no settlement at all, then arises the question as to whether or not the defendant should be held liable. The question as to the section of the Indian Claims Commission Act under which that liability might accrue has been somewhat confused by plaintiffs in their reply brief. They have brought suit under Sections 2(1), 2(2), 2(4) and 2(5) but in the reply brief they appear to rely primarily on Section 2(5).

The first proposition to bear in mind in regard to this contention of defendant is that the facts in this case show plainly that the New York Indians who went to Wisconsin did so with the full approval and assistance of defendant. The dealings had between the Indians were supervised by officers of defendant and these officers witnessed the treaties. The defendant even canceled a purchase made by Col. Bowyer in the area so that the New York Indians could negotiate for the land. When

President Monroe approved only a part of the area purchased under the 1822 treaty with the Menominees, the New York Indians protested and the Secretary of War assured them that the approval of only a part of the area had no effect on their title and that the defendant acquiesced in the arrangement with the Menominee in its entirety. In every way the Secretary reassured the New York Indians as to their rights under the Treaty of 1822 with the Menominee. So far as the Treaty of 1822 is concerned it speaks for itself. It shows plainly what was agreed to between the Menominees and the New York Indians. The facts all show that the New York Indians acted in good faith and with the blessing of defendant. This conclusion is inescapable and carries with it the obvious connotation of bad faith on the part of defendant in its later actions which culminated in the Stambaugh Treaty Supplement of October 27, 1832.

After the winter of 1822 and 1823 there began to develop bad feeling between the Menominees and the New York Indians over the question of what the Treaty of 1822 had conveyed. During this period the defendant decided to have various tribes in Wisconsin set their boundaries and entered into treaties for that purpose. One of these was the Treaty of Prairie du Chien of August 19, 1825 (7 Stat. 272) with different tribes in the area of the Menominee. The boundaries of the Menominee were set by this treaty in general and it was recognized that the Menominees had made a cession to the New York Indians. In 1827 defendant decided to hold another treaty to finish establishing the boundaries left incomplete by the Prairie du Chien Treaty and to take a cession of whatever land it could get. On August 27, 1827 the Treaty of Butte des Morts (7 Stat. 303) was concluded

with the Chippewa, Menominee and Winnebago tribes. The New York Indians, although having their side of the story presented to the Commissioners, were not parties to the treaty. This treaty established the boundaries between the Indian parties thereto and noted the difficulties existing between the Menominees, Winnebagoes and New York Indians with regard to boundaries. The Menominees and Winnebagoes agreed with defendant in the treaty to accept the decision of the President with regard to the boundary question between them and the New York Indians. Defendant also took a cession from the Menominees and provided that the President could change the boundaries of the cession if it interfered with the just claims of the New York Indians, just so the land area remained constant.

In 1830 Commissioners Root, McFall and Mason were appointed under the *Butte des Morts* Treaty. Their instructions from Secretary of War Eaton were plainly detrimental to the interests of the New York Indians. Their "settlement" of the dispute consisted of granting the New York Indians some 300,000 acres. This was less than they had acquired under the 1821 treaty with the Menominees and Winnebagoes. While the Commissioners had instructions to ignore the question of the validity of the 1821 and 1822 treaties, they nevertheless concluded in a majority report that the treaties were valid.

Immediately following the decision of the Commissioners it was decided to take a delegation, excluding the New York Indians, to Washington. This was done and the *Stambaugh* Treaty of February 8, 1831 was entered into. Defendant took a cession of 2,500,000 acres from the Menominees and stated in the treaty that unless the New York Indians accepted the 500,000 acres set aside for them under the treaty they would be removed

from the Menominee country. Without going further into the facts, which are set forth completely in the findings made herewith and in less detail at the beginning of this opinion, it seems apparent that the ultimate acceptance by the Emigrant New York Indians of the final treaty as ratified by the Senate on June 25, 1832 and the Supplementary Treaty of October, 1832 was under duress, and that action of defendant through its officials did not comport with the standards of fair and honorable dealings required of it as a result of its previous actions toward the Emigrant New York Indians. It is the opinion of the Commission that defendant was under a duty to the Emigrant New York Indians to recognize the terms of the Treaty of 1822 with the Menominee Indians after it had promised to do so in the beginning and that having failed to do so by arbitrarily depriving them of their one-half interest in approximately 3,931,000 acres of land by exchange for 569,120 acres, 500,000 acres of which belonged outright to all the New York Indians, and not to the petitioners alone, must now be held accountable for these actions.

The third point in the defense consists of the allegation that petitioners lack the capacity to maintain this suit. This Commission feels that the facts do not warrant that conclusion. The original purpose of the purchase was to provide homes for those New York Indians who wished to participate in the purchase and remove to Wisconsin. The group presently bringing this action are the descendants of those New York Indians who paid the purchase price and emigrated to Wisconsin. The Brothertons are a part of this group because they entered into a separate treaty with the groups of New York Indians who had already removed to Wisconsin and

who had paid the requested price for the lands. The Brotherton Treaty of 1825 gave the Brothertons a share in the land when they paid their proportionate part of the consideration. What we have here is a group of plaintiffs who became an identifiable group by virtue of acquiring a common claim in the Green Bay lands under the arrangement approved by defendant. Unquestionably their group unity rests upon an agreement with defendant. It would seem that the deliberate act of bringing themselves together as a distinct group by their own actions back in the 1820's would make them as eligible to be classed as an identifiable group as some of the groups where it is necessary to depend upon ethnological facts which had been dimmed by the passage of years. We think it well within the intent of the Act to admit these plaintiffs into court as an identifiable group having a common claim. See Thompson v. United States, 122 C. Cls. 348.

Insofar as the matter of res judicata by virtue of the case of the New York Indians v. United States (30 C. Cls. 414, 170 U.S. 1) is concerned, it does not appear to have any bearing upon this claim or the parties asserting it in this litigation. That case arose from the Treaty of Buffalo Creek of 1838. The Treaties of 1821 and 1822 were involved only as facts and not otherwise. The 1838 Treaty was an entirely different transaction involving all the New York Indians and not petitioners only, and their claim to Kansas land gotten in exchange for the 569,120 acres granted them when defendant deprived the Emigrant New York Indians of their lands by the Stambaugh Treaty. Admittedly the ancestors of petitioning Indians were involved in this litigation, as a part of all the New York Indians, and they should have been, because they had an interest

in the land in dispute. It appears to this Commission that the plaintiffs herein are the descendants of those New York Indians who had interest in the land acquired under the Treaty of 1822 taken from them under the Stambaugh Treaty of 1832. The fact that they, along with others, were given an interest in 569,120 acres under that treaty and later litigated over the land in Kansas for which they exchanged most of the 569,120 acres does not wipe out the unlawful taking by defendant under the 1832 treaty. The Court of Claims held only that the nine New York Tribes were involved in the Treaty of Buffalo Creek, not that they were involved in the Treaties of 1821 and 1822. That was the finding upheld by the Supreme Court in the case of New York Indians v. United States, 170 U.S. 1

Defendant's contention in the second part of point three to the effect that the individual members of the Oneida and Stockbridge-Munsee groups cannot file the petition herein appears to have been disposed of by the admission of those groups as parties plaintiff. Defendant further contends that there are duplicate claims filed upon some of the land involved in this case. Should that be true those claims will be disposed of at the proper time.

The contract with the attorneys under which this claim is brought was entered into with the Oneida Tribe of Wisconsin and the Stockbridge-Munsee Community and has been approved by the Secretary of the Interior. So far as is known these two organized groups contain all of the descendants of those New York Indians who had a claim to the land purchased from the Menominee Indians, and constitute the Emigrant New York Indians, who have no tribal organization which is recognized by the Secretary of the Interior. It is stated by petitioners in their original brief and in their motion recently filed that the members of the Oneida Tribe and the

Stockbridge-Munsee Community are the same individuals as the Emigrant New York Indians. This being the case then it appears that the function of having the Secretary of the Interior approve the contract of the attorneys has been performed. No useful purpose would be served by having another contract with the same people and the interest of the Indians would be no better served. The primary purpose of having the attorney contracts approved was not to establish jurisdiction in this Commission but to safeguard the interest of the Indians. We feel that the purpose has been accomplished by the approval of the contract with the Oneida Tribe and the Stockbridge-Munsee Community, since they are the same people as the Emigrant New York Indians.

Under Point IV defendant maintains that the New York Indians had only a license or "float" and so acquired no compensable interest in the Green Bay lands. This is not compatible with the permission and assurances given them by defendant when they purchased the land; nor with language of the cession treaty. They were told that their title would be held in the same regard as that of their grantors. A description of the area purchased was furnished defendant in a copy of the treaty sent to the War Department.

The fact that the Menominee title was not recognized until 1825 and the purchase was made by the New York Indians in 1822 cannot affect the title acquired by the New York Indians as against both the Menominees and defendant. It has not been questioned that the title recognized was the same general area which the New York Indians had purchased in 1822. And petitioners limit their claim to the area which was recognized in the Treaty of Prairie du Chien in 1825 and the Treaty of Butte des Morts in 1827 when the Menominee boundaries were finally established. It is a fair

assumption that the Menominees had Indian title in 1822 to a certain area of land in Wisconsin, or the defendant would not have recognized their title in the Prairie du Chien Treaty in 1825. Upon the assurance of defendant that it would recognize the title of the Emigrant New York Indians as being the same as that held by their grantors, the Emigrant New York Indians acquired one-half interest in the Indian title had by the Menominees. When defendant refused to honor its promises to the Emigrant New York Indians, while at the same time it recognized the title of the Menominee, it was less than fair to petitioners' ancestors. The recognition by defendant of title in the Menominees renders it unnecessary for the petitioners to prove aboriginal title, because under the facts the Emigrant New York Indians acquired the recognized title of the Menominees by their purchase under the Treaty of September 23, 1822. Under this particular situation we held that the recognition of title in the Menominees in 1825 as evidence that they held aboriginal title at the time of the Treaty of September 23, 1822 and that as a result of that treaty a one-half interest in the aboriginal area of the Menominees passed to the Emigrant New York Indians and that defendant should have honored its promises to acknowledge that title in them.

The defendant also claims that the prior legislative action taken on this claim constitutes a bar to the recovery sought herein. Defendant presumably refers to the consideration received by the Stockbridge-Munsee Tribe and the Brotherton Tribe under the 1832 Treaty. That consideration went for improvements which the respective groups had placed on their land. Also in the Treaty of Buffalo Creek in 1838 the Oneidas in Wisconsin were

reimbursed \$35,500 and the Oneidas in New York were reimbursed \$6,000 for the expense of removal to Wisconsin. The Stockbridge and Munsee Tribes got \$10,000 in 1848 and 1849 and an additional \$20,000 which they were supposed to get was relinquished at a later date. The St. Regis Tribe was also reimbursed for their expenses in connection with the Green Bay purchases. There was also a release given by the Stockbridge and Munsees for the \$5,000 paid them in 1849.

The payments given the Stockbridges, Munsees and Brothertons were for their improvements and not for their interest in the land. The \$5,000 paid for the release by the Stockbridges and Munsees is unconscionable on its face and should be disregarded except as a possible setoff against any recovery. See Creek Nation v. United States, 2 Ind. Cl. Comm. 98, 113-114 (1952); McCauley v. United States, 1 Ind. Cl. Comm. 608, 617, 638-643 (1951). The reimbursements made for expenses were an attempt to make the Indians whole again but they cannot make up for the loss of their interest in the Green Bay land.

The Government also raises the question of accord and satisfaction. It alleges that the Green Bay Settlement was a matter in controversy within the meaning of U.S. Code, Title 28, Section 285 (2517) and 286 (2519) and that the payment of the judgment entered by the Court of Claims on the mandate of the Supreme Court (170 U.S. 1) constituted an accord and satisfaction at Common Law and a statutory bar to the present claim.

The facts upon which defendant relies to establish accord and satisfaction are not sufficient. An accord and satisfaction presupposes the voluntary action of both parties on entering into the arrangement in

good faith. The Emigrant New York Indians accepted the 569,120 acres under the Treaty of 1832 because they had no choice in the matter. The later litigation in Court of Claims No. 17861 (30 C. Cls. 413) did nothing to change the situation. The New York Indians had made the best of the situation as they were faced with it when they accepted the land in Kansas in exchange for the Wisconsin land. It was the Kansas land for which the judgment was ordered by the Supreme Court in reviewing the Court of Claims decision in No. 17861. The question of res judicata has already been disposed of and will not be discussed further.

The last point raised by defendant is that there has been no showing by petitioners that there was a lack of fair and honorable dealings on the part of defendant in its treatment of the Emigrant New York Indians. Based upon the findings of fact it is the opinion of this Commission that the petitioners have established that the actions of defendant throughout its course of dealing with the ancestors of petitioners were less than fair and honorable as demanded by the previous actions of defendant, as set out, which led to the purchase of 1822 by the Emigrant New York Indians.

It was also a contention of defendant during the trial of this case that the boundary of the southern line of the 1822 purchase from the Menominees was the Manitowoc River and not the Milwaukee River. Based upon the evidence in the record, as set forth in the findings, it seems far more likely that the Milwaukee River is, in fact, the Manawahkiah River and that the southern boundary of the Menominee lands extended to what is now the Milwaukee River. This being so, it is obvious that the

reference to the southern boundary of the purchase of 1822 in Article I of the Treaty between the Menominees and the Emigrant New York Indians as the Manawahkiah River was, in fact, to the present Milwaukee River.

Petitioners assert that their ancestors had one-half interest in the area described in the 1822 treaty. However, they disclaim anything outside of the area ultimately recognized as being Menominee lands. In the 1822 purchase there was estimated to be 7,480,000 acres as originally described in the treaty. When the area purchased was reduced to that part of said area which lay within the boundaries recognized, it was then estimated by petitioners' expert to contain 3,931,000 acres. That would mean that petitioners claim a one-half interest in a total estimated area of 3,931,000 acres. This land would all be within the boundaries of the Menominees as recognized in the Prairie du Chien and Butte des Morts treaties.

When the petitioners waived any question as to the northern boundary of the area they removed the contention concerning that boundary. The difference over the southern boundary has been decided in favor of petitioners on the evidence and it will be considered as being the Milwaukee River. This would make the grant under the 1822 treaty extend to the southeast to Lake Michigan as depicted on petitioners Exhibit No. 142 instead of stopping at Winnebago Lake as defendant alleges and as shown on its Exhibit "A." The area in the northwest would extend to the boundary of the area recognized as being Menominee land. (See the description in the Treaties of 1821 and 1822, petitioners' Exhibit No. 142 and defendant's Exhibit "A.") The Ellis map (defendant's Exhibit "B") is

contrary to the evidence in the record when it shows the line of the 1822 cession as being the Manitowoc River instead of the Milwaukee River and that is the line relied on by defendant in making its Exhibit "A."

By way of summation, it is the opinion of this Commission that the ancestors of petitioners who complied with the requirements of payment and removal to Wisconsin acquired a compensable interest in the lands purchased in 1822 from the Menominee Indians. That interest only can be described as a joint tenancy for the reason heretofore stated. In the face of the action taken by defendant when the New York Indians requested permission to purchase the land and remove and requested assurances of title, it cannot be denied that the later actions of defendant were for its own interest and that of the settlers. The Emigrant New York Indians reserved, and were entitled to, under the law as set out in the Indian Claims Commission Act (60 Stat. 1049), a better protection of their interests than was given them by defendant after its original assurances.

When defendant determined that it was necessary to enter the dispute over what was granted in the two treaties involved, it was its duty to follow its prior commitments to the New York Indians. Defendant used its superior position to acquire for itself at the expense of the Emigrant New York Indians, and without compensation to them, the very lands which it had assured them it would recognize as belonging to them under whatever title it was held by their grantors. Petitioners' ancestors were not entirely deprived of their lands because they received 500,000 acres for the whole of the New York Indians who wished to occupy it, plus three townships

or 69,120 acres to the Stockbridge and Munsee and the Erothertons. This, however, differed from the original understanding wherein the parties who paid and removed to Wisconsin were the only ones entitled to an interest in the lands. The same situation as to the taking would prevail with regard to the cession taken by defendant under the Treaty of Butte des Morts which was ratified on February 19, 1829, except for the express provisions placed therein by the Senate to the effect that the treaty should not impair any right which the New York Indians might have in any of the lands mentioned in the treaty. It seems evident that the actual deprivation of their interest in the 1822 lands took place entirely under the Stambaugh Treaty upon its ratification by the Senate on June 25, 1832.

The area of land in which petitioners' ancestors had acquired their interest under the 1822 treaty with the Menominees was much larger than the area which petitioners claim on the basis of recognition of title in the Menominee in 1825. The area to which they claim their one-half interest in this case is described as follows:

Beginning at the foot of the rapids on Fox river, usually called the Grand Kakalin (Kaukauna) and running southeasterly along the lower line (northerly) of the purchase made in 1821 by the New York Indians from the Menominee and Winnebago Indians, to a point thereon north of the town of Waukeca (Wauhaka) on the Milwaukee river, thence south to said Milwaukee river at said town of Waukeca (Wauhaka) and continuing down said river to where it empties into Lake Michigan; thence northerly along the shore of Lake Michigan to and across the mouth of Green Bay so as to include the islands therein as shown on Royce cession 160, Wisconsin 1; thence southerly on the Bay shore of said islands and the eastern shore of Green Bay towards the present city of Green Bay and continuing along the western shore of said Bay in a northerly direction towards the city of Escanaba,

so as to exclude the waters of Green Bay, to the point where the said shore intersects the northern line of Royce cession 219, Wisconsin 1; thence following said cession line along its length until it intersects the lower line of the land ceded under the aforementioned Treaty of 1821; thence southeasterly along said line to the point of beginning; and continuing approximately 3,931,000 acres. All as shown on Petitioner's Exhibit No. 142.

It is the opinion of this Commission that petitioners are the descendants and successors in interest of the Emigrant New York Indians, and that their ancestors were deprived of their one-half interest in the above described land and that defendant is liable for it under the provisions of the Indian Claims Commission Act. Said liability shall be subject to all proper credits and offsets which defendant may be able to show, including, but not limited to, all lands retained by or accruing to petitioners' ancestors under the Stambaugh Treaty of June 25, 1832 and its supplements.

An interlocutory order shall be entered in accordance with the above opinion.

Edgar E. Witt
Chief Commissioner

Concurring:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner