

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, et al.,)
 and COLUMBUS KEAHNA, appearing)
 as the representatives of and)
 on the relation of the CON-)
 FEDERATED OR UNITED TRIBES OF)
 SAC AND FOX INDIANS and as)
 representatives and on behalf)
 of all of the MEMBERS thereof,)
)
 Petitioners,)
)
 vs.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 83

Decided: June 12, 1959

Appearances:

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;
 Louis L. Rochmes and Margaret H.
 McDowell,
 Attorneys for Petitioners

Curtis C. 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.

On November 3, 1804, the United States concluded a treaty of cession at St. Louis, Missouri, with certain chiefs of Sac and Fox Nation in which the latter tribes ceded and relinquished forever to the United States all their right, title and interest to a vast area of land officially designated as Royce Cession 50 (7 Stat. 84). Royce Cession 50 embraces lands lying adjacent to, and bordering both sides of the Mississippi River.^{1/} They are located generally in southwestern Wisconsin, in practically all of the Illinois Territory northwest of the Illinois River, and in a sizeable portion of northeastern Missouri situated between the Mississippi and Missouri Rivers.

The petitioner, Sac and Fox Nation, or Confederated Sac and Fox and its constituent bands, as the representative of and successor in interest to those members of the Sac and Fox Tribes who negotiated the 1804 treaty, seeks additional compensation for its ceded interest within Cession 50, which claimed area includes all of Cession 50 west of the Mississippi River and all east of the Mississippi River except for a large section in northeast Illinois. Petitioner contends that, at the time defendant acquired the lands in Cession 50, it had either a recognized or reservation title to the claimed area, or it held a perfected Indian title through exclusive use and occupancy.

The Commission on previous occasions has passed favorably upon the legal capacity of the petitioner to present and maintain claims of similar nature under the Indian Claims Commission Act; and in the instant case we find no reason to reach a different result. In addition we find that the

^{1/} Commission's Finding 3.

Sac and Fox Nation, as presently constituted, is the proper representative of and successor in interest to those members of the Sac and Fox tribes who ceded their interest to the United States under the 1804 Sac and Fox Treaty.^{2/}

In making the above finding that the defendant acquired all of petitioner's interest, whatever it may be, in Cession 50 under the 1804 Treaty, the Commission is of course upholding the validity of this instrument. The Commission is well aware of the stipulation entered into between the parties on May 11, 1953, with respect to the validity per se of the 1804 treaty.^{3/} We think the stipulation is ineffective in this regard and not binding on the Commission; the reason being that any question concerning the validity of a properly executed treaty is not open for ordinary judicial inquiry under any law or statute, or as regards the Commission under any of the provisions of the Indian Claims Commission Act. A treaty is fundamentally a political act initiated by Executive action in negotiating its terms, and then followed by Congressional approval through Senatorial concurrence or ratification.^{4/} It is the latter act of ratification that imparts legal effect to treaty and makes it together with the Constitution and all laws made in pursuance thereof the supreme law of the land. A properly executed treaty is binding on the courts, and only its interpretation and not its validity is open for judicial inquiry. (An exception not pertinent here lies when there is a conflict between a treaty

^{2/} Commission's Finding 2.

^{3/} Commission's Finding 5 - ". . . that the treaty of 1804 of itself has no validity but . . . that the treaty set forth in paragraph 20 of the defendant's answer validated said treaty of 1804 . . ."

^{4/} Article 2, Section 2 - U. S. Constitution - . . . He (President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

provision and constitutional rights and guarantees). There are numerous cases in support of this view, some of which are cited in the Commission's Finding 4.

Petitioner's chief complaint against the validity of the 1804 Treaty is centered around the claim that the Sac and Fox chiefs who negotiated the cession lack authority to convey the tribal interests in Cession 50 or else they were subjected to undue influence and duress by the defendant in procuring their signatures to the document. In any event similar contentions with respect to the execution of other treaties have been rejected by the courts. Appropos to the instant case is the opinion of the Supreme Court in the case of Fellows v. Blacksmith, (1857), 15 L. Ed. 684, 685, in which the following is stated:

"An objection was taken, on the argument, to the validity of the Treaty, on the ground that the Tonawanda band of the Seneca Indians were not represented by the chiefs and head men of the band in the negotiations and execution of it. But the answer to this is, that the Treaty, after executed and ratified by the proper authorities of the government becomes the supreme law of the land, and the Courts can no more go behind it for the purpose of annulling its effect and operation than they can behind an Act of Congress."

This Commission, as do the courts, considers all treaties as valid and binding even though the Commission may at times look behind a treaty to consider the circumstances under which it was accomplished. But this is only for the limited purpose of determining whether a cause of action has been spelled out under Section 2 of our Act, and if we should find that a treaty has been executed under such circumstances, such a finding has no effect on the actual validity of the treaty.^{5/} Congress alone has

^{5/} 60 Stat. 1059 Sec. 2 ". . . (3) claims which would result if treaties . . . were revised on the ground of fraud, duress, unconscionable consideration, etc. . . ."

the authority to abrogate or invalidate a treaty in whole or in part, and as far as this Commission can determine Congress has taken no steps to invalidate the Sac and Fox Treaty of 1804. It is therefore the Commission's view that the 1804 Sac and Fox Treaty is a valid treaty, and on the effective date of that treaty, which is the "date of taking" in this case, the Sac and Fox Nation ceded its interests in Cession 50 to the defendant.

We now reach the question of petitioner's claim of "recognized title" to the claimed area. According to the petitioner recognition of Sac and Fox interest in the subject lands was accorded by the United States under the provisions of the Fort Harmar Treaty of January 9, 1789 (7 Stat. 28) and/or the Greenville Treaty of 1795 (7 Stat. 49).

The Fort Harmar Treaty of January 9, 1789 was concluded with six Indian tribes, the Wyandot, Delaware, Ottawa, Chippewa, Pottawatomie and Sac tribes. Just four years before the United States had concluded a treaty at Fort McIntosh with the first four tribes by which certain boundary lines were established between the United States and the aforementioned Indian tribes.^{6/} According to Article I of the Fort Harmar Treaty its avowed purpose was "to renew and confirm all the engagements they (the Wyandots, Delawares, Ottawas, and Chippewas) had made with the United States of America, at the before mentioned treaty (Fort McIntosh), except so far as are altered by these presents."^{7/} There then follows a renewal and reaffirmation of the former boundary lines

^{6/} 7 Stat. 16 - Jan. 21, 1785: "Articles of a treaty concluded at Fort M'Intosh, the twenty-first day of January, one thousand seven hundred and eighty five, . . . and the Sachems and Warriors of Wiandot, Delaware, Chippawa and Ottawa Nations of the other."

^{7/} Commission's Finding 8(a).

plus a cession of lands to the United States by the "said tribes".^{8/}
Not until the Fourteenth Article of the treaty is there any mention of the Sac Tribe, and then in that article both the Sac and Pottawatomie nations are taken into the protection of the United States and peace established with them. Included in the same article is language making applicable all provisions of the Treaty to the Sac and Pottawatomie nations "so far as they apply to these nations."^{9/}

Even considering the language of the Ft. Harmar Treaty most favorably to the petitioner, we are convinced that those articles in the treaty, namely Articles I through IV, which might lend some support to petitioner's contention, do not apply to Sac Nation. Indeed Sac participation in the Fort Harmar Treaty was relatively minor when viewed in light of the overall purpose of the said treaty. It amounted to little more than a mutual exchange of peaceful intentions with the defendant. No land cessions were taken, reservations created or boundaries fixed. Therefore, the Commission rejects petitioner's claim of recognized title to the claimed area by virtue of the provisions of the 1789 Ft. Harmar Treaty.

With respect to the 1795 Greenville Treaty petitioner claims recognition of title thereunder even in the role of a nonparticipating tribe. While the argument is rather unique in support of this position, the Commission finds it is without merit, and concludes that the petitioner, not being a party to the Greenville Treaty, has no standing upon which it may seek its benefits in this case. It is our view that the clear and unmistakable language of the Greenville Treaty evidences an

^{8/} Commission's Finding 8(b).

^{9/} Commission's Finding 8(c).

intent by the United States to be obligated only to the signatory tribes. If this Commission should strain treaty language and award a recognized title to the petitioner, it would unduly penalize the signatory tribes, who, while receiving the treaty benefits, also accepted its accompanying burdens.

Petitioner also suggests that under our decision in the Miami case,^{10/} this Commission "reserved and did not pass upon the question of whether the United States by the Treaty of Greenville recognized the title of tribes to lands in the Northwest Territory which were not signatories to the Treaty."^{11/} Petitioner then cites page 221 of our opinion in Docket 253 in support of this proposition.^{12/} We think petitioner has misread the language contained therein. What the Commission had reference to was a possible future conflict between the recognized title holdings of the signatory tribes to the Greenville Treaty and the aboriginal rights of the non-signatory tribes within the same general area. What the Commission actually determined in the Miami case is adequately set out in the Commission's Finding 6 therein:

"6. By Articles IV and V of the Greenville Treaty, the United States recognized the title of each of the tribal signatories to the territory each had a right to, which the United States relinquished by Article IV . . ." 13/

10/ The Miami Tribe of Oklahoma, et al., v. United States, 5 Ind. Cl. Comm. 180.

11/ Petitioner's Brief, p. 4.

12/ 5 Ind. Cl. Com. 180, 221 - "It must be remembered that the General (Wayne) was dealing with groups of hostile Indians whose territorial rights were unknown and could not be ascertained, so he fixed overall boundaries within which the signatory tribes would be protected as to the separate lands each had a right to. Such arrangement would not seem to change or affect the aboriginal rights of non-signatory tribes within the Northwest territory, but that is a question to be settled when needed for its determination arises." (Emphasis supplied.)

13/ 5 Ind. Cl. Com. 180, 188.

The Commission therefore rejects petitioner's proposition that the 1795 Treaty of Greenville extended to the Sac and Fox Nation, a non-signatory tribe, the benefits of a recognized title to the claimed area within Royce Cession 50.

We now turn our attention to the difficult problem involving petitioner's contention of aboriginal title to the claimed area. Because of the early 1804 "date of taking" the documentary evidence is meager. With this in mind the Commission took upon itself the task of re-examining the documentary evidence and testimony in the Sac and Fox cases involving adjoining areas, principally Dockets 158, 153, and 135, with the hope that such an effort would prove helpful in filling in the overall picture of Sac and Fox tribal movement and activity, beginning around 1730 when the two tribes became closely affiliated, up until the 1804 Treaty.

It was during the period of the French-Fox Indian war, from about 1712 to 1735 that the Sac and Fox tribes formed their close alliance. Both tribes were then situated around the Green Bay and Fox River area in Wisconsin. The Fox tribe had been in control of the Fox-Wisconsin River portage and the French in their attempt to extend their trade routes westward had repeatedly clashed with these Indians. The continued friction between them precipitated an all out war marked by bitter and bloody fighting. French superiority in men and material finally overcame the stubborn Indian resistance and Foxes were forced to retreat southwestward down the Wisconsin River toward the Mississippi River. At the same time the Sac Tribe of Indians had become sympathetically

involved with the Fox cause, and in like manner was forced to retreat in a body from the French pursuers. Both tribes in a concerted effort reached the Mississippi River together and, crossing over into Iowa, sought refuge along the Wapsinipicon and Des Moines River. The year was about 1735 and, according to Dr. Anthony Wallace, who testified as an expert in behalf of the petitioner, the Sac Tribe established its famous village near the mouth of Rock River in Illinois approximately three miles from the Mississippi River. Dr. Wallace also testified that, with the cessation of hostilities with the French, large segments of the Sac tribe began to drift back into northern Illinois and Wisconsin where they established village sites along the Wisconsin River and even further north.

Around 1764 the Sac tribe returned to its Rock River village and continued to occupy it up until 1804 and for some years thereafter. About the same time the Fox Indians were establishing an important village site west of the Mississippi near Dubuque, Iowa. There they set about developing the rich lead deposits which were concentrated in this area as well as on the east side of the Mississippi River near the present town of Galena, Illinois.

Before 1765 the Illinois confederacy, consisting of the Cahokia, Kaskaskia, Michigamea, Moingwena, Peoria, and Tamaroa tribes of Indians controlled the greater part of Cession 50 east of the Mississippi. The Illinois were almost constantly harassed by the tribes from the north and this ever increasing pressure, coupled to their new found attachment to the white man's vices, decreased their numbers to an alarming extent and resulted in their withdrawal southward down the Illinois River toward the

Mississippi River and into the area around Kaskaskia, Illinois. As the Illinois retreated southward the northern tribes moved into their country. Of these tribes, besides the Sac and Foxes, who for the most part concentrated in the northwest portion around the Rock River area, could be counted principally the Kickapoo, Pottawatomie, and Winnebago.

On the west side of the Mississippi River the Iowa tribe of Indians by 1765 had moved eastward from their village sites near the present city of Council Bluffs, Iowa, and established a principal village on the Des Moines River near the present site of Selma, Iowa. A second important Iowa village was located on the Iowa River, while two other Iowa villages, as of 1804, were reported on the east side of the Mississippi River within the claimed area. With the arrival of the Iowa Nation into eastern Iowa, the Sac and Fox tribes drew closer to it, and both groups began to share the usage of a large portion of Eastern Iowa adjacent to the Mississippi River. Both nations frequently hunted together, and each extended their hunting excursions west, south and southwest into Iowa, Missouri and over toward the banks of the Missouri River.

By 1800 the greater part of Sac and Fox tribal activity was west of the Mississippi. With the exception of the principal Sac village on the Rock River, there were no other Sac and Fox villages of any significance east of the Mississippi River prior to 1804. Besides the Fox village near the lead mines at Dubuque, Iowa, other Sac and Fox villages west of the Mississippi during the period in question were reported at the mouth of the Turkey River above Dubuque, and at the mouths of the Iowa and Des Moines Rivers.

Apart from subsistence hunting, which was conducted within close proximity of the village sites, the principal Sac and Fox hunting grounds at the beginning of the 19th century lay west of the Mississippi River in Iowa and eastern Missouri and across to the Missouri River. From the latter part of the 1790's until the 1804 Treaty bitter and continuous fighting raged between the Osages and the Sac and Fox for control of the adjacent hunting areas north of the Missouri river.

This brief outline of Sac and Fox movement through the claimed areas east and west of the Mississippi touches only upon the highlights, the full development of which the Commission has set out in considerable detail in Findings 13 through 20. Nevertheless it does give some insight to the extent of the movement and actual use of the claimed area upon which the Sac and Fox seek to impress an Indian title. We stress actual use, for this Commission had occasion in its recent decision, in the Northern Paiute case, to reaffirm the principle of "actual exclusive use and occupancy" as a prime element in perfecting Indian title.^{14/} In that case we stated:

"Any determination of Indian title to an area of land must be based on affirmative evidence establishing actual exclusive use and occupancy of the area from time immemorial. Constructive possession is not sufficient to establish Indian title. The law in this regard is clear and well settled." (citing cases). ^{15/}

Looking now at the Sac and Fox picture in Cession 50 east of the Mississippi at the time of the 1804 Treaty, the Commission finds the Sac and Fox Nation had perfected Indian title to the northeast portion of the

^{14/} The Northern Paiute Nation, et al., v. United States, 7 Ind. Cl. Com. 322.

^{15/} ibid, p. 409.

claimed area, which would include those sections delineated as Areas "B" and "C", and a small portion of Area "D" on the petitioner's exhibit 409. A more accurate description of the bounded area is set out in Commission's Finding 21(a). Actual exclusive control from time immemorial to sustain Indian title was demonstrated to the Commission's satisfaction; the evidence showing a long history of traditional Sac and Fox land use within the Rock River and Wisconsin River area, the early and prolonged existence of the famous Sac village near the mouth of the Rock River, the adjacent Sac and Fox villages at Dubuque, Iowa, and on the Wisconsin River, as well as the history of Indian lead mining activities at nearby Dubuque and around the Galena area in Jo Davies County, Illinois.

As to the balance of the claimed area lying between the Mississippi River and the Illinois River which coincides with the rest of Area "D" as shown on petitioner's Exhibit 409, the Commission is unable to sustain petitioner's claim of Indian title thereto. The evidence failed affirmatively to show actual and exclusive use and occupancy over this vast area. Reports of the extent and frequency of Sac and Fox hunting prior to 1804 are vague to say the least. The eastward extent of Sac and Fox hunting efforts was particularly conjectural. No Sac and Fox village of any significance can be located within this region prior to 1804. Subsistence hunting alone as conducted within the close proximity of villages could not support a claim for this entire area. Expert testimony in behalf of Sac and Fox claims of exclusive occupancy and possession cannot be tied to any independent affirmative evidence in the record. Reports of the extent other tribes hunting within this area are as reliable as Sac and

Fox versions, and those accounts of Sac and Fox hunting therein subsequent to 1804 are only consistent with privileges reserved under the 1804 Treaty.^{16/} The Iowa Nation had at least two villages within the claimed area. From all the evidence in this case, the Commission pictures this area in 1804 as one of nonexclusive use, subject to the conflicting claims and usages of neighboring tribes, and that this condition was created by the withdrawal of the Illinois tribes below the Illinois River.

As to those lands within the boundaries of Cession 50 west of the Mississippi River in eastern Missouri, which are shown as Area "A" on petitioner's exhibit 409, the Commission finds that as of the effective date of the 1804 Treaty, the Sac and Fox had perfected Indian title to all of that area north of Cuivre River, a more accurate description of which is set out in the Commission's Finding 21(b).

While the Sac and Fox had no village sites within this area at the time of the 1804 Treaty, the evidence reflects consistent Sac and Fox hunting activity for many years prior thereto. In addition, the reports of Sac and Fox fighting to keep the Osage Indians confined to the Missouri River demonstrates Sac and Fox tribal efforts to maintain its exclusive possession of these hunting grounds.

Having reached a determination of the title question in petitioner's favor as to those areas set out in the Commission's Finding 21, judgment shall be reserved until proof is offered relative to the consideration paid for the ceded lands, the total acreage of the area involved, and the value of the same as of the date title passed to the defendant.

Edgar E. Witt

Chief Commissioner

Wm. M. Holt

Associate Commissioner