

BEFORE THE INDIAN CLAIMS COMMISSION

THE WINNEBAGO TRIBE AND NATION OF)
 INDIANS, THE WINNEBAGO TRIBE OF)
 NEBRASKA AND FRANK BEAVER, MOSES)
 WHITEBEAR, JOHN LITTLE WOLF, JAMES)
 SMOKE, AND JOSHUA SANFORD, EX REL)
 WINNEBAGO TRIBE AND NATION AND THE)
 WINNEBAGO INDIANS OF WISCONSIN,)
 MINNESOTA, NEBRASKA, AND THE WINNE-)
 BAGO TRIBE OF NEBRASKA.)

Plaintiffs,

vs.

Docket Nos. 243, 244, 245

UNITED STATES OF AMERICA,

Defendant.

Decided: August 10, 1959

Appearances:

Jay H. Hoag with whom were
 Vern R. Edwards, Rodney J.
 Edwards, G. Arthur Johnson,
 Austin Lather, Clarence G.
 Lindquist, J. Allan Lind,
 Attorneys for Plaintiffs.

David M. Marshall with whom
 was Mr. Assistant Attorney
 General, Perry W. Morton,
 Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

These three cases, Docket Nos. 243, 244 and 245, were filed
 separately by the same plaintiffs. Defendant filed an answer in each
 case, and thereafter the Commission ordered the three cases consolidated
 for purposes of trial. Since the issues are the same in each case,

except as to the description of the land claimed and treaty involved, this opinion will apply to each of the three cases.

In each of the three cases, plaintiffs seek to recover for the value, less the amount paid, of a tract of land ceded to the United States by the Winnebago Tribe or Nation of Indians under a separate treaty. The three tracts involved are shown on Royce's Map 1 of Wisconsin and Map 2 of Illinois as areas 149, 174 and 245. Royce Area 149 in Docket No. 244 was ceded by the Treaty of August 1, 1829 (7 Stat. 323). Royce Area 174 in Docket No. 243 was ceded by the Treaty of September 15, 1832 (7 Stat. 370), and Royce Area 245 in Docket No. 245 was ceded by the Treaty of November 1, 1837 (7 Stat. 544). The three tracts are contiguous, forming one large area located principally in what is now southern Wisconsin with a small portion extending down into northern Illinois, and is the area which was circumscribed by boundaries defined in Article 7 of the Prairie du Chien Treaty of August 19, 1825 (7 Stat. 272) and designated "Winnebago Country."

The parties have agreed that the present proceedings would be limited to a determination of the issues of whether the plaintiffs have the capacity under the provisions of the Indian Claims Commission Act to maintain these actions, and whether or not the Winnebago Tribe or Nation held title to the lands described in each of the three petitions at the time of the cessions under the Treaties of 1829, 1832 and 1837 referred to above (Tr. pp. 2 and 3).

The plaintiffs herein are the Winnebago Tribe of Nebraska, a tribal organization incorporated under the provisions of the Wheeler-Howard Act of June 18, 1934 (48 Stat. 984) as represented by individual member

plaintiffs Frank Beaver, Moses Whitebear, and John Little Wolf, and individual plaintiffs James Smoke and Joshua Sanford who are Winnebago Indians living in Wisconsin. This action is brought in a representative capacity by the above plaintiffs and in behalf of all descendants of Winnebagoes who were members of the Winnebago Tribe and Nation of Indians as originally constituted and at the time said Tribe or Nation participated in the aforementioned treaties of cession and the important 1825 Prairie du Chien treaty.

The identity of the Winnebagoes as a tribe of American Indians living within the continental United States has been known since 1634 when Jean Nicollet, a Frenchman, made the first recorded contact. At that time they were living around the Green Bay area in Wisconsin. They have always been associated with the State of Wisconsin throughout their tribal history until comparatively recent times when a reservation was created for them in Nebraska. They are further identified as being of the Siouan linguistic family.

After Nicollet's initial encounter the Winnebagoes enjoyed more frequent contact with the Jesuit missionaries and the French traders throughout the 17th and 18th centuries. When France finally lost its colonial foothold in Canada to Great Britain, the Winnebagoes quickly allied themselves with the British. So strong did their bonds of allegiance grow, that, during both the American Revolution and the War of 1812, they actively joined the British forces in fighting the American troops.

After cessation of hostilities in 1814, the United States sought to conclude a peace treaty with the Winnebagoes. This was not accomplished however until 1816, when the first of a series of treaties was concluded at St. Louis, Missouri. Thereafter, the United States negotiated some nine treaties with the Winnebagoes, ending with the Treaty of March 8, 1865 (14 Stat. 671).

Having ceded all their lands east of the Mississippi in prior years, the majority of the tribe removed to the reservation which had been set aside for them in Nebraska under the provisions of the 1865 treaty. At the same time many Winnebagoes refused to leave their ancestral homes in Wisconsin and join their tribal brethren on the Nebraska reservation. After a highly unsuccessful removal attempt, attended with great hardship and suffering to the Indians, the United States never again made any serious effort to displace the Wisconsin Winnebagoes. Today many of their descendants in significant numbers are still residing in Wisconsin.

The individual plaintiffs are descendants of members of the Winnebago Tribe and Nation of Indians as originally constituted and as existed during treaty times pertinent to the issues herein. As such these plaintiffs satisfy the jurisdictional requirements of Section 10 of the Indian Claims Commission Act and may maintain this suit in a representative capacity on behalf of the descendants of all members of the Winnebago Tribe or Nation as constituted at the time of the 1829, 1832 and 1837 treaty sessions.

The Winnebago title to the ceded lands is asserted on the basis of either a recognized title under the provisions of the 1825 Prairie

du Chien Treaty, or else upon good Indian title perfected by aboriginal use and occupancy until ceded by treaty. The question of a recognized or reservation title, as this Commission has pointed out on prior occasions, is fundamentally a legal proposition. It involves a correct interpretation of some treaty, statute, or agreement which would demonstrate Congressional intent to make such a grant. If such be the case and the question is resolved in favor of the Winnebagoes, the burden of proving aboriginal title to the same area is, of course, eliminated.

The Iowa Tribes, et al., v. United States, 7 Ind. Cl. Comm. 98.

This Commission has on at least three occasions passed upon the title recognition aspects of the 1825 Prairie du Chien Treaty. The Indians involved in those three cases were the Iowa Tribe and the Sac and Foxes. In each case the question was resolved in favor of the Indians and against the government. Iowa Tribes, et al., v. United States, supra; Sac and Fox Tribes of Indians of Oklahoma, et al., v. United States, 5 Ind. Cl. Comm. 367; Otoe and Missouri Tribe of Indians, et al., v. United States, 5 Ind. Cl. Comm. 316. Viewing the language in the 1825 Treaty as it pertains to the Winnebagoes' claim of title recognition in light of our prior decisions and the reasoning behind them, it is the Commission's considered opinion that a stronger case for recognized title can be made out in favor of the present plaintiffs.

There is little doubt that the prime purpose of the 1825 Prairie du Chien Treaty was the establishment of boundary lines between the participating tribes which the Indian tribes and the United States would and did recognize. Of those Indians who knew their boundary

claims, the areas so described were set down with reasonable accuracy and incorporated into the treaty. If a tribe had serious doubts of the extent of its claim, no definition was attempted or forced upon the Indians. Instead a provision was made for settlement at some future date. Witness the situation of the Menominee Tribe whose territorial claims were left open for further settlement. (Article 8, 7 Stat. 272).

In the case of the Iowa Tribe and the Sac and Foxes, Article 3 of the 1825 treaty provided for joint occupancy of a large defined area "until some satisfactory arrangement can be made between them for a division of their respective claims." (Art. 3; 7 Stat. 272). Nevertheless, the Commission found that failure to define the specific area which each tribe occupied did not defeat the respective claims of title recognition. In the instant case the bounded area of the Winnebago, with one exception, which we will discuss hereafter, was clearly defined and agreed upon by the signatory tribes.

Looking first at Article 5 of the treaty in which we find an agreement between the Sioux and Chippewas relative to Sioux boundaries, there is established indirectly the northwest boundary line of the Winnebago claims within Royce Cession 245. The Sioux Tribe are situated immediately northwest of the Winnebagoes, and the common boundary line between these two begins at the mouth of the Black River and runs to a point estimated to be a half day's march below the Chippewa Falls. (Art. 5, 7 Stat. 272, Commission's Finding 13)

Then in Article 6 of the treaty there is an agreement between the Winnebagoes and their northern neighbors, the Chippewas, as to the common boundary line between their respective countries, which line is more

accurately represented as the extreme northern line of Royce Cession 245. (Art. 6, 7 Stat. 272, Commission's Finding 14)

Finally, in Article 7 of the treaty, as set out below, agreement is reached among all the tribes (with the exception of the Menominees), and the limits of what is appropriately termed "Winnebago Country" are fixed in great detail consistent with the preceding articles, except for an indeterminate line running from the Black River:

It is agreed between the Winnebagoes and the Sioux, Sacs and Foxes, Chippewas and Ottawas, Chippewas and Potawatomies of the Illinois, that the Winnebago country shall be bounded as follows: south easterly by Rock River, from its source near the Winnebago lake, to the Winnebago village, about forty miles above its mouth; westerly by the east line of the tract lying upon the Mississippi, herein secured to the Ottawa, Chippewa and Potawatomie Indians of the Illinois; and also by the high bluff, described in the Sioux boundary, and running north to Black river; from this point the Winnebagoes claim up Black river, to a point due west from the source of the left fork of the Ouisconsin; thence to the source of the said fork, and down the same to the Ouisconsin; thence down the Ouisconsin to the portage, and across the portage to Fox river; thence down Fox river to the Winnebago lake, and to the grand Kan Kanlin, including in their claim the whole of Winnebago lake; but, for the causes stated in the next article, this line from Black river must for the present be left indeterminate.

This area encompasses the three contiguous tracts, Royce 149, 174 and 245 (Commission's Finding 15).

With the participating tribes having agreed generally to abide by and recognize the treaty lines so fixed, only the assent of Congress to bind the United States in like manner is needed to complete the recognition picture. Keeping in mind the overall purposes of the 1825 treaty, the Commission is of the opinion that the requisite Congressional intent to

give recognition is clearly manifested in the plain and unequivocal language in Article 10 of the treaty which reads in part:

" . . . And the United States agree to, and recognize, the preceding boundaries, subject to the limitations and restrictions before provided. . ." (Art. 10, 7 Stat. 272)

The Commission therefore believes that the Winnebago Tribe, being a party to the 1825 Prairie du Chien Treaty and having its territorial boundaries fixed with reasonable accuracy and agreed upon by the other participating tribes as well as the United States, is entitled to share in the recognition benefits conferred by the said treaty, and we therefore find the Winnebago Tribe had a title recognized by the United States to the two tracts designated as Royce Cession 149, which it ceded under the Treaty of August 1, 1829 (7 Stat. 323) and Royce Cession 174 which it ceded under the Treaty of September 15, 1832 (7 Stat. 370).

In addition we find that under the 1825 Prairie du Chien Treaty the United States recognized Winnebago title to all of Royce Cession 245 with the exception of that area which we have designated in our findings as the "Menominee Overlap." This area involved the indeterminate portion of the Winnebago boundary line established under Article 7 of the 1825 Treaty.

Briefly the situation was as follows. The Menominee, who occupied a region northeast of the Winnebagoes, were unprepared at the 1825 Treaty to define the extent of their territorial claims, particularly those westward. In order not to do them an injustice or foment any future trouble, it was thought best at the time to subject the areas already fixed to a future determination of the extent of the Menominee territorial

claims, when a more accurate description could be supplied. This provision was peculiarly applicable to the adjoining Chippewa and Winnebago lands. Since the Menominee Tribe entertained a general claim westward to the Black River, both the Winnebagoes and the Chippewas were put on notice that there existed a genuine Menominee overlap within their respective areas, subject to a more accurate determination at some future date.

Six years later on February 8, 1831, the United States concluded a treaty (7 Stat. 342) with the Menominee in which the territorial claims of the Indians were set out. The extent of the "Menominee Overlap" within Royce 245, was then fixed, knowingly or unknowingly, insofar as the 1825 Prairie du Chien Treaty was concerned. As far as can be determined the Winnebagoes made no visible protest as to the extent of the Menominee claims within their territory, nor was this in issue when the Winnebago, in 1837, ceded all of Royce Cession 245 without further description of its metes and bounds. Generally speaking, this "Menominee Overlap" within Royce Cession 245 includes all of that area north of the "Manoy" or Lemonweir River, a more accurate description of which is set out in the Commission's Finding 21.

On October 18, 1848, the Menominee Tribe ceded to the United States all its lands in Wisconsin wherever situated (9 Stat. 952). Four years later the Senate of the United States inquired into the adequacy of the consideration paid to the Menominees for their lands acquired under the 1848 Treaty. The Senate concluded that the total acreage of the Menominee owned lands was grossly underestimated, since there was a failure to

include all that area west of Plover Portage to the Black River, which area the Menominees had set forth in great detail in the prior Treaty of February 8, 1831 (7 Stat. 342). This, of course, involved the "Menominee Overlap" within Royce Cession 245. As set out in detail in the Commission's Finding 24, the Senate in its report concluded that the Menominee exhibited a better title to the area north of the Lemonweir than the Winnebagoes, and that the Winnebagoes were well aware of the conflicting Menominee claim at the time of the 1825 Prairie du Chien Treaty, said claim being respected thereafter by the Menominee without protest from the Winnebagoes. It concluded that, consistent with the 1825 Prairie du Chien Treaty, the Menominee were entitled to additional compensation for their lands reaching west to the Black River. The Senate report then recommends additional compensation in the sum of \$613,515.36 which sum . . . is the very least . . . which will discharge the claims of justice in favor of the Menominee Indians." (Sen. Rep. 410, p. 9 - 39th Congress, 2nd Session (1852-53)).

The Winnebago Tribe, of course, having been found to own a greater portion of Royce Cession 245 under a recognized or reservation title, is entitled to have its claim of aboriginal or Indian title considered with respect to the "Menominee Overlap." This was done in some detail in the Commission's Findings 28 through 31, and it is the conclusion that plaintiffs have failed to establish that the Winnebagoes exclusively occupied and used the "Menominee Overlap" area.

There is hardly more than a scintilla of evidence indicating Winnebago use and occupancy of any part of Royce Cession 245 prior to 1800. What there is shows the establishment of one village just within the extreme southeastern part around 1793. The evidence from 1800 to 1825 of Winnebago use and occupancy, including alleged hunting activity, falls far short of even the minimum proof which might be considered adequate for establishing aboriginal title to any part of Royce 245. As to that portion involving the "Menominee Overlap" north of the Lemonweir River, no Winnebago villages can be found, and any other tribal use of the area relative to hunting at least up until a few years before the 1837 treaty of cession, is purely conjectural.

Therefore, the Commission concludes that the plaintiffs have the right and capacity under our Act to bring and maintain this suit for and in behalf of all the descendants of the Winnebago Tribe and Nation of Indians as originally constituted and as it existed during the pertinent treaty years, and that by virtue of the 1825 Prairie du Chien Treaty, the Winnebago Indians had a recognized title to those lands set forth in Article 7 thereof exclusive of the "Menominee Overlap," a more accurate description of which is set forth in the Commission's Finding 32. Further, we find that the United States acquired all of the plaintiffs' right, title, and interest in the subject lands under three separate treaties, concluded in 1829, 1832, and 1837.

Having ruled favorably on plaintiffs' title claims to the subject lands as set forth in the Commission's Finding 32, we shall reserve further judgment until proof has been offered as to the consideration

paid for each tract, the acreage involved and the fair market value as of the date each was acquired by the defendant.

Wm. M. Holt
Associate Commissioner

I concur:

Edgar E. Witt
Chief Commissioner