

BEFORE THE INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF OKLAHOMA)
 ET AL.,)

Petitioners,)

v.)

Docket No. 220

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: November 28, 1962

Appearances:

George B. Pletsch, with whom
 was Guenther M. Philipp,
 Attorneys for Petitioners

Walter J. Muir, with whom
 was Mr. Assistant Attorney
 General, Ramsey Clark,
 Attorneys for Defendant.

OPINION OF THE COMMISSION

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

This is a claim for additional compensation for the 1890 sale to the United States of all the surplus lands of the former Sac and Fox reservation in Oklahoma. The claimants are the Sac and Fox tribe of Oklahoma, or Oklahoma Sac and Fox, and the Sac and Fox tribe of Mississippi in Iowa, or the Iowa Sac and Fox. Each of the tribal petitioners has the right and capacity to bring suit on behalf of their respective members under the provisions of the Indian Claims Commission Act.

In this case, however, there is a dispute between the petitioners over the ownership of the claims asserted herein. The Oklahoma Sac

and Fox contend that they have an exclusive interest in the subject lands. To this the Iowa Sac and Fox take exception. The dispute is occasioned by the fact that the 1890 sale of surplus lands on the Oklahoma reservation took place many years after there was a division in the overall entity known as the Sac and Fox Nation. As set forth in our detailed findings, the Commission has found that the facts and circumstances surrounding the creation and continued existence of the group known as the Iowa Sac and Fox fail to support an Iowa Sac and Fox tribal interest in the subject lands. Accordingly, we concluded that the Iowa group, not being the real party in interest, had no right to maintain this suit.

The Commission found that in the year 1842 there was a single entity known as the Confederated or United Tribes of Sac and Fox Indians, also called the Sac and Fox Tribes of the Mississippi. In that year the confederated tribes sold all their Iowa lands to the United States and moved to a new reservation in Kansas. Around the year 1854 or '55, and continuing on through 1862, various members of the Confederated Tribes, singly and in small groups, voluntarily left the Kansas reservation and returned to their old homesites in Iowa. These Indians were able to purchase from their own funds a small tract of land near Tama, Iowa. The Iowa Legislature gave them permission to remain there, whereupon they became better known as the Sac and Fox Tribe of the Mississippi in Iowa, or simply the Iowa Sac and Fox. The withdrawal of the Iowa Sac and Fox Indians from the Kansas reservation was done without the consent of either the Confederated Tribes or the United States.

In the years that followed, the Iowa Sac and Fox increased the size of their Tama reservation, but steadfastly refused to rejoin the Confederated Tribes on the Kansas reservation, although invited to do so. By Congressional approval the Iowa group was permitted to share in the Sac and Fox tribal annuities at the Tama reservation.

In 1867 the Confederated Tribes on the Kansas reservation sold all their Kansas interests to the United States, and in consideration of the improvements, which they had made on the Kansas reservation, they were given a new reservation in the then Indian Territory. There they lived until said lands were sold to the United States in 1890.

Since the Iowa group had voluntarily withdrawn from the Confederated Tribes without the consent of the parent group, or the consent of the United States, they effectively forfeited all communal rights to the tribal property belonging to the Confederated Tribes. At no time prior to the sale of these lands did the Iowa Sac and Fox acquire any new tribal rights to the property belonging to the Confederated Tribes, or Oklahoma Sac and Fox. Even though the Iowa Sac and Fox were permitted by Congress to share in the Sac and Fox tribal annuities, such action did not invest them with any additional tribal rights. The United States gave to the Confederated Tribes a reservation in Oklahoma in exchange for the tribal improvements made by the Confederated Tribes on the Kansas reservation. Thus, there was in fact an exchange of communal property which at all times belonged to the Confederated Tribes.

The Commission has purposely determined in detail this question of the extent of the interest of the Iowa Sac and Fox in the subject lands

because on June 16, 1961 we denied the joint motion of the two tribal petitioners asking us to approve a stipulation between themselves whereby they sought to fix their respective interests in this suit as well as in Docket 219. Docket 219 involves a claim to the Kansas reservation and has yet to be tried. Under the stipulation the Iowa Sac and Fox were to forego a claim in this case in exchange for a guaranteed interest in the claim in Docket 219. The Commission was not so much concerned with the possibility that the Iowa Sac and Fox could rightfully give up a possible interest in this case, but we thought it would be improper for the Commission to sanction, without any judicial examination, a tribal interest in Docket 219 where such interest might not actually exist. The Commission shall determine the issues in Docket 219 only when they are properly before us.

We reach now the issue of the fair market value of the surplus lands on the Oklahoma reservation, and the resultant liability, if any, of the United States to the Oklahoma Sac and Fox for allegedly having purchased these lands for an unconscionable consideration.

The Oklahoma reservation lands were acquired by the United States from the Oklahoma Sac and Fox under an agreement concluded between the said tribe and the "Cherokee" or "Jerome" Commission acting on behalf of the United States. Due to the mounting demands to open up more western lands to white settlement under the homestead laws, Congress, under the provisions of the Indian Appropriation Act of March 2, 1889 (25 Stat. 900), authorized the creation of a Commission for the purpose of negotiating with the Cherokee Nation and all other Indian tribes claiming or

owning lands west of the 96^o west longitude in the Indian Territory for the purchase of their lands or interests therein. It was the intention of Congress that the Indian tribes treated with by the Commission should take allotments on the reservation for each member of their tribe, and then sell all the surplus land to the United States. This surplus land would then be made available for white settlement under the homestead laws.

The Jerome Commission began negotiations with the Oklahoma Sac and Fox on May 31, 1890. After the usual exchange of pleasantries, and after the Commission had advised the Indians of the desire and the need for the United States to purchase their surplus lands, both sides got down to the business at hand of fixing the number and size of the allotments to be selected by the tribe, and the price to be paid by the United States for the excess over and above the total acreage needed for the allotments. The highest price demanded by the Sac and Fox was \$2.00 per acre for all their surplus lands. They also asked for the allotments to be 200 acres each with the privilege of making a selection anywhere on the reservation. The best offer the Commission could make was 160 acre allotments for each member of the tribe and \$1.23 per acre for the surplus lands provided all the allotments were selected south of the Deep Fork of the Canadian River. As finally agreed upon, the Indians were to select 160 acre allotments anywhere on the reservation, and the United States would pay \$485,000 or \$1.23 per acre for the surplus lands. The agreement was concluded on June 12, 1890 and thereafter submitted to Congress for its approval. The 1890 Sac and Fox agreement was finally ratified on February 12, 1891 (26 Stat. 749), which date is the effective date of the cession, and the evaluation date herein.

On September 4, 1891, the Interior Department approved the final Sac and Fox allotment schedules. In all there were 548 Indian allotments totaling 87,680 acres, the bulk of which were selected along and near the north fork of the Canadian River. Because there was an excess of 20 allotments over the number agreed upon, \$4,000 was deducted from the price paid for the surplus lands. The net acreage ceded to the United States was 391,188.05 acres for which it paid \$481,000 or approximately \$1.23 per acre.

We have found nothing in the recorded proceedings surrounding the negotiations for the cession of the Sac and Fox lands indicative of sharp practices or unfair conduct on the part of the Commission members. There is no evidence that the members were dealing unfairly with the Indians, or that they withheld vital information peculiarly within their knowledge that would definitely place the Indians in a bargaining disadvantage in agreeing upon a price comparable to the actual value of their lands. In other words, if the price agreed upon was in fact unconscionable, it is because we might now find it to be so from all the evidence, and not because of anything the Jerome Commission did or did not do or say during the course of the negotiations with the Indians.

Geographically the ceded lands on the Sac and Fox Reservation were situated in the central part of the Indian Territory. The reservation was rectangular in shape, being about 43 miles from north to south and 17 miles wide from east to west. It was bounded on the north by the Cimarron River and on the south by the north fork of the Canadian River. On the eastern boundary line were lands belonging to the Creek Nation and to the west were

the Iowa and the Kickapoo lands. Below the north fork of the Canadian River was the Pottawatomie-Absentee Shawnee reservation. The Sac and Fox reservation had already been surveyed prior to the date of cession.

The topography of the Sac and Fox lands shows generally a rolling upland with an abundance of open prairie. There are patches of timber and other areas are covered with fragmented rocks. The bottom lands along the rivers and streams were level. There were not too many running streams through the reservation, but the area appeared to have an adequate water supply, and on the whole it was well drained. The elevation of the subject lands ranges from between 800 and 1500 feet above sea level.

The average rainfall for this area is 34 inches a year with the heaviest precipitation occurring in the spring. During the hot summer months, periods of drought are experienced, particularly when the temperature exceeds 100°. Ordinarily the temperatures in this area would not run to extremes. The average minimum temperature was near 48°, and one could count on approximately 216 frost-free days between March and October.

The upland soils of the Sac and Fox lands consisted of sandstone, shale and some limestone. While subject to erosion, it could be productive if properly cultivated. It supported a heavy growth of native grasses as well as scrub timber. The Indians, who were not inclined to the agricultural pursuits, found it more to their advantage to lease the bulk of these upland areas to the cattle interests for grazing purposes. The alluvial soil of the bottom lands along the creeks and rivers was fertile but subject to periodic overflow.

The subject area was fairly well timbered, although it consisted mostly of the scrub variety and had no genuine commercial value. The burr and blackjack oak of the uplands could be used for posts, fences, wagon-wheels and firewood, while some of the bottom land timber, consisting mainly of elm, cottonwood, pecan, walnut and sycamore, could be sawed into lumber for building houses. There were no known mineral deposits of any value in the area as of the date the United States acquired the subject tract.

Considering all factors the highest and best use for these lands by white settlers would be for subsistence homestead farming.

As of the date of evaluation a prospective purchaser of a homestead on the Sac and Fox lands would find that it was truly virgin country completely surrounded on three sides by more undeveloped lands. He would also find that the Indian allottees had already selected a goodly portion of the best bottom lands. What Indian improvements there were on these lands would be of little or no value to him. Apart from a few frame dwellings that had been constructed by the more progressive Indians, he would find only the traditional Indian bark house or "wickiup." He might be fortunate enough to have selected an upland area, that may have been partially fenced by a former Indian lessee.

What roads there were would be primitive, merely wagon trails. There were, of course, no bridges. The nearest railroad line was the Santa Fe at Guthrie, Oklahoma, some thirty miles to the west. Guthrie and Oklahoma City would be the nearest supply center as of the date of evaluation. These two towns had only been in existence about two years.

It is the contention of the tribal claimants that, after considering all the pertinent facts, the Sac and Fox reservation lands in their raw and unimproved state, had an 1890 fair market value of \$7.19 per acre. As the most important element in support of this figure, the tribal claimants cite the impressive demand for these and the neighboring lands, as evidenced by their rapid disposal under the applicable homestead laws. For in their own words the claimants say,

The most impressive single factor in this 1890 land market, and the one that should be kept at the forefront in evaluating the Sac and Fox Oklahoma lands was the existence of a tremendous pent-up demand and a ready market for the entire Indian acreage. *

The Commission would have to agree with the claimants that there was a tremendous demand for the Oklahoma lands to be opened for settlement under the homestead laws. This demand for "free land" had been building up during the decade preceeding the first great land run in the Indian Territory in 1889 involving the "Unassigned Lands." The 1889 land run was the culmination of many years effort on the part of the various groups in neighboring Kansas to force white settlement in the Indian Territory. Aside from the railroad, banking and real estate interests, who certainly played their part in accomplishing this objective, the most vociferous and active agitators for free land in the Indian Territory could be found in the "boomer" movement. This group enjoyed peak popularity in the 1880's in southern Kansas, and the members made several illegal entries into the Indian Territory in order to dramatize their cause.

* Pet. Reply Brief, p. 23

In 1889 Congress extinguished the Creek and Seminole interests to that area in the central part of the Indian Territory known as the "Unassigned Lands." Immediately thereafter these lands were opened for white settlement under the homestead laws. Under the applicable law, a white settler could acquire a 160-acre homestead tract free of all charges except the payment of nominal filing fees. Before obtaining full title to his homestead he was required to maintain a five year residency on his lands. This had its advantage though, as the settler's lands could not be taxed or levied upon during this five year period.

If he so desired, the homesteader could acquire full title in less than five years, if he availed himself of the commutation privilege of paying \$1.25 or \$1.50 per acre for his lands.

The immediate settlement of the "Unassigned Lands" was accomplished by a "run" whereby the thousands who desired free land poured into the area at the appointed hour and staked out their claims. By nightfall of the opening day all the available homestead claims in the "Unassigned Lands" had been taken.

It could be reasonably foreseen that this same demand for free land would undoubtedly be carried over when the subject lands, some two years later, would be opened under a similar run, although settlers on the Sac and Fox lands would be required to pay a \$1.25 per acre at the end of the five year period.

As the events proved, the 1891 run for the Sac and Fox lands was also a success, with all available homestead sites being taken up in short order. The additional requirement that a bona fide settler pay

\$1.25 per acre for his lands at the end of the five year period proved no deterrent to even the poorest homesteader. His original entry cost nothing apart from the filing fee, and he had in effect a five year option to buy his land if so desired. In the meanwhile it was tax free and judgment proof, and he was under no contractual obligation to complete his transaction with the Government. He could abandon his 160-acre tract without legal consequence if he so desired.

The claimants would have us believe that the 1891 demand for homestead sites on the subject lands would also support a ready market for these same raw unimproved lands at a \$7.19 per acre price. This, of course, presupposes the existence of sufficient buyers willing and financially able to meet that price, if in fact it is reasonable.

In arriving at the \$7.19 per acre figure, the petitioners placed in evidence certified title abstract taken off the deed records of Payne and Lincoln counties beginning in the year 1892, and on up to and including the year 1900. In all there are listed 898 transactions covering land sales of approximately 40 acres or more in the Sac and Fox portion of these two counties. Since the original entries were made under the homestead laws, which required the entrymen to make certain improvements before receiving his "patent", these sales are presumably of improved properties. In these 898 transactions, a total of 108,578.40 acres were conveyed for a total consideration of \$851,879.65 or at an average price of \$7.85 per acre for that nine year period.

In order to establish a hypothetical per acre price for the Sac and Fox lands for the year 1890, the claimants made dubious application of the Wholesale Price Index for all commodities for the period 1890-1910. They concluded that the market value for improved Sac and Fox lands in 1890 was

activity than has been indicated. During the five year period 1892 through 1896, slightly more than thirty-one thousand acres changed hands through private sales, while it was during the four year period 1897 through 1900, which is six² nine years after the date of evaluation, that more than 70% of the listed sales took place. It should also be noted that claimants' list of private sales include many multiple sales, there being instances of some properties being sold five or six times. If, according to the claimants, a 160-acre tract was worth \$1150.00 in 1890, a homesteader could have profited handsomely by commuting his property for \$200.00 and putting it up for sale. Apparently the average homesteader made little use of his commutation privileges. The evidence in the record shows that just over 31% of the Sac and Fox lands were ever paid for and patented at \$1.25 per acre, either after commutation, or after the expiration of the five year residency requirement.

Included in that \$7.85 per acre average price reflected in the compilation of the 898 private land sales listed by the claimants, are found many increments of value to the land in the nature of improvements. Besides the obvious physical improvements which the owner of the property places thereon, such as buildings, fencing, digging wells and cultivating portions thereof, there are the intangibles, which include such things as proximity to towns, schools, and other urban influences as well as accessibility to good roads, bridges and railroads. There must also be considered the normal political, social and economic growth and development in a newly settled area which affects the value of lands located therein whether physically improved or not. It is most difficult, if not impossible, to assess individually

the specific value of these tangible and intangible improvements in order to establish the value of said lands in an unimproved state. The Commission has found as judicially unacceptable the practice of indulging in such mathematical formulas and relying on the U.S. Census data in order to evaluate improvements separately. Osage Nation of Indians v. United States, 3 Ind. Cl. Comm. 217, 338; Kiowa, Comanche and Apache Tribes of Indians v. United States, 4 Ind. Cl. Comm. 95, affirmed 143 Ct. Clms. 535; Pawnee Indian Tribe of Oklahoma v. United States, 7 Ind. Cl. Comm. 721, affirmed 301 F. 2d, 667. We, therefore, reject the petitioner's use of such methods in this case.

Besides the abstracted list of private land sales taken off the deed records of Payne and Lincoln counties, the tribal claimants have asked this Commission to consider as valuation factors in this case the appraisals made in 1894 by Indian Agent Shelby of 126 tracts of land that were sold to white settlers by Indian allottees on the former Pottawatomie and Absentee Shawnee reservations. The 126 transactions involved 16,171.97 acres to which Agent Shelby assigned an average value of \$8.97 per acre. The Commission finds it difficult to give much weight to Agent Shelby's appraisals in the absence of other evidence of value with respect to the same lands. The Commission has no way of determining Agent Shelby's qualifications as a land appraiser. His appraisal figures cannot properly be tested, and they stand uncontroverted. We note, however, that in his report he states that the Indian allottees had selected the best lands which were situated along the rivers and streams, and that his highest appraisals were given to certain tracts because of the number of acres in cultivation and their nearness to the principal towns of Shawnee and Tecumseh, as well as the Choctaw Railroad which ran through the Canadian Valley. All of these tracts are located south and outside of the Sac and Fox lands.

There is also in evidence fifteen appraisals made between 1900 and 1910 of Sac and Fox and Pottawatomie lands; they being, however, small improved tracts totaling only 1,547 acres. The small acreage involved as well as the remoteness of the appraisal dates to the evaluation date herein, are of no genuine assistance to the Commission in evaluating the subject lands as of 1891. The Commission also found lacking in probative value, a schedule of damages for certain lands to be taken for a proposed railroad right-of-way. The particular transactions involved a total of only 124.16 acres, and of course, "right-of-way" lands have a peculiar and unique value to a railroad company.

There is also in evidence a list of 39 private sales of small tracts of land taken of the deed records of Canadian County, Oklahoma, for the years 1890 through 1892. Canadian County is 80 miles to the west of the subject lands, with the greater part thereof located on the original "Unassigned Lands" that were first opened for settlement in 1889 under the homestead laws. There are only eight sales recorded in 1890 totaling 1,236.92 acres, which were sold at an average price of \$4.19 per acre. In 1891 there were 17 sales amounting to 2,754.13 acres which were sold at an average price of \$5.22 per acre, and in 1892 there are listed only 14 sales totaling 2,213.18 acres which sold at an average price of \$8.22 per acre. The extent, quality and value of improvements is unknown. Apart from demonstrating a very limited market for the private sale of small improved tracts in Canadian County from 1890 through 1892, the probative value of these few sales is inconsequential in fixing an 1891 fair market value for the subject lands.

The Commission agrees with the tribal claimants that it is impossible to determine with mathematical exactness the 1891 fair market value of the

Sac and Fox lands. We also find it impossible to accept the claimant's view that if the Indians had been permitted to dispose of their surplus lands on a free market they would have realized an average of \$7.19 per acre for each of the 391,188.05 acres. Query: Who was willing and financially able to buy all this land in its raw and unimproved state at such a price? An Oklahoma homesteader of the 1890's?

The economic condition of the average white settler who populated the Indian Territory in the 1890's is hardly one that would support a \$7.19 per acre land market for unimproved homestead sites. The largest group of settlers interested in farming Oklahoma homestead sites were from the South where the farm economy had been severely depressed since the end of the Civil War. Even the earliest group of new comers, the original "boomers" who made the 1889 run to Unassigned Lands, consisted chiefly of poor farmers from Southern Kansas, who crossed over into the Indian Territory with all their earthly possessions in the back of a wagon. Oklahoma history is replete with accounts of the privation and poverty of the early settlers. Included in this influx of native American farmers could be found many poor immigrant Europeans, who, having despaired of finding work and a decent living in the great eastern seaboard cities, moved westward in expectation of better things.

The first two or three years of the new life in Oklahoma Territory after the 1889 opening were economically rough for the settler. There were excessive droughts and the inadequate farm equipment limited crop growing in many sections. Despair and frustration afflicted many, who in disgust abandoned their claims or traded them off for next to nothing.

The lack of ready cash among the 1890 homesteaders was evident by the fact that Congress found it necessary to enact a series of relief measures designed to postpone the dates of final payment on homestead claims. But this alone was not enough. Without clear ownership of his lands in the form of a patent, the homesteader was unable to borrow money on his property; money that was sorely needed for farm equipment and supplies.

The economic plight of the Oklahoma homesteader gave important impetus in the "free homes" movement that finally culminated in the passage of the Free Homestead Act of May 17, 1900 (31 Stat. 179). This act provided in part for the cancellation of all payments due on homestead entries, and the issuance of patents to all homesteaders upon completion of the statutory residence requirements. It did not apply to those individuals who wished to commute their entries. It has been conservatively estimated that the passage of this legislation saved the Oklahoma homesteaders some \$15,000,000 in payments that would have gone to the United States.

If a prospective 1891 purchaser of the subject lands had in mind their resale as homestead sites, he would not only have to take into consideration the feeble buying power of the Oklahoma homesteader of 1890, but also the prevailing government land policies that would in the years to follow dispose of, at public sale and at the government price, the many millions of acres from the surrounding reservations. Certainly the highly publicized work of the Jerome Commission in arranging for the purchase by the United States of millions of acres of surplus Indian lands would put any prospective purchaser of the subject lands on notice that, he would not only have to compete with the government price, but also with the liberal terms available under the public land laws.

During the 9 years following the opening of the Sac and Fox lands, there was thrown open for settlement in the Oklahoma Territory over 12,000,000 acres of public lands. Beginning in 1892 some 3,500,000 acres of surplus Cheyenne-Arapahoe reservation lands were opened by a "run". In like fashion there followed in 1893 an opening of over 5,000,000 acres of the Cherokee Outlet and 130,000 acres of surplus Tonkawa and Pawnee reservation lands, and in 1895, the last "run" was made for the 85,000 acres of surplus Kickapoo lands. In 1901, the Kiowa, Comanche, and Apache surplus lands and the Wichita Caddo surplus lands, in all over 2,000,000 acres, were opened by a lottery. Apart from the Indian reservation lands, there was opened for settlement in 1897, under the public land laws, nearly 1,500,000 acres in Greer County, which area had officially been separated and annexed to Oklahoma the year before.

The defendant offered the testimony of two real estate appraisers, Messrs. Henry J. Garrett and Roscoe H. Sears of Oklahoma City, Oklahoma, as expert witnesses on the question of the 1890 fair market value of the subject lands. These gentlemen also co-authored the appraisal report (Def. Ex. 16) which the Commission found contained much useful data. Both of these appraisers adopted the market data or comparable sales approach in evaluating the Sac and Fox lands. Generally speaking they considered all those valuation factors which the Commission detailed in its findings and discussed herein. Their conclusion was that the Sac and Fox surplus lands had an 1890 fair market value of \$0.40 per acre.

The Commission believes, however, that the evidence does in fact support

a higher value. We note particularly that both government appraisers calculated their \$0.40 figure on the basis that the maximum resale price for the Sac and Fox lands, if placed on the open market and disposed of in small tracts, would be \$1.25 per acre, which is the equivalent price for government lands. This seems to be an arbitrary figure that does not reflect the fact that the Sac and Fox reservation is a mixture of good, bad and indifferent land, which, if divided up and disposed of in small tracts on an open market, would certainly command many different prices. Indeed it is our judgment, based on the record in this case, that the choicer lands would sell for more than \$1.25 per acre.

Taking into consideration all factors that could possibly influence the 1891 market value of the subject tract, such as the location of the area, its physical characteristics, climate, timber, development of surrounding areas, markets, transportation, as well as the private sales of small improved tracts within and without the tract, and the general economic outlook, which matters we have set forth in detail in our findings of fact, the Commission concludes that the Sac and Fox surplus lands as of February 12, 1891, were worth no more than \$1.75 per acre.

Since the Oklahoma Sac and Fox actually received \$1.23 per acre from the United States for the subject lands, or 70% of the then fair market value as determined herein by the Commission, we conclude that the consideration paid, although to a degree inadequate, was not unconscionable within the meaning of Section 2 of the Indian Claims Commission Act. We have also found no evidence of fraud, deceit, or other sharp practices on the

part of the government officials who negotiated for the purchase of the subject lands. Therefore, in the absence of any evidence of unfair and dishonorable dealings, the petitioner tribe is not entitled to recover under our Act where there is only a mere inadequacy of consideration that falls far short of "shocking the conscience." See The Miami Tribe of Oklahoma et al, v. United States, 6 Ind. Cl. Comm. 552, 575, and cases cited therein, reversed on other grounds, Ct. of Cl. appeal No. 2-59, July 15, 1960.

Accordingly, the claim asserted herein is denied.

Arthur V. Watkins
Chief Commissioner

I concur:

Wm. M. Holt
Associate Commissioner

Commissioner Scott dissenting in part
and concurring in part.

SCOTT, Associate Commissioner, concurring in part and dissenting in part:

There are three ultimate issues presented in this matter:

(1) Whether or not the Iowa Sac and Fox by the Treaty of 1867 acquired any rights or interests in the Sac and Fox Reservation of Oklahoma;

(2) Whether or not the United States paid an unconscionable consideration for its purchase in 1891 of the unallotted or surplus tracts of the reservation lands of Oklahoma Territory; and

(3) Whether or not the Jerome Commission dealt fairly and honorably with the Sac and Fox in negotiating the purchase of subject lands.

As to the first issue, I concur in the decision of the Commission, but for different reasons. I dissent as to the questions of valuation and fair and honorable dealings.

Prior to the treaty of October 11, 1842 (7 Stat. 596) both tribes in question, the Oklahoma and Iowa bands of the "Sacs and Foxes of the Mississippi," then a unified tribe, held certain lands in the territory of Iowa, which were therein ceded to the United States and the tribe was assigned a tract of land in what is now Kansas, and most if not all, were removed thereto in 1845 and 1846. After between ten to twenty years, from 1855 to 1866, certain members returned and purchased by private sales a part of their former habitat in Tama County, Iowa, with the knowledge but not formal consent or permission of the United States' Indian Agent. The latter band became known as the Iowa Sac,

and Fox Tribe.

Thereafter, on February 18, 1867, the United States also took by cession from "the Sacs and Foxes of the Mississippi" their "diminished reserve" in Kansas (15 Stat. 495, II Kapp. 951) at the rate of \$1.00 per acre. By Article 6 of said treaty the United States agreed, in consideration of the improvements upon the said (Kansas) reservation, to give to the Sacs and Foxes for their future home, a tract of land to be selected in what is now Oklahoma. The selection of the new reservation in Oklahoma was therein agreed to be made by Commissioners appointed by the Secretary of the Interior, with delegations from all tribes proposing to remove thereto; Article 21 of said treaty expressly provided that absent members of the tribe of "Sacs and Foxes of the Mississippi" would be notified of the treaty and for efforts "to induce them to come in and unite with their brethren" on the new reservation. Article 21 further provided that the Sac and Fox residing in the State of Iowa should participate "in the advantages to be derived from sales of lands, and so forth."

In 1910 the Court of Claims decided an action brought by the Iowa Sac and Fox, under a special jurisdictional act, against the Oklahoma Sac and Fox and the United States, co-defendants. In that action the Iowa Sac and Fox sought recovery of certain money alleged to be due the Iowa Sac and Fox as their pro rata share of certain treaty annuities that were allegedly paid in an unjust proportion by the United States to the Oklahoma Sac and Fox, 45 C. Cls. 287. The Court of Claims

found that the Iowa Sac and Fox voluntarily in 1855, and at intervals thereafter to 1866, left the Kansas reservation and returned to their former habitat in Iowa (Finding III, p. 289). The Court held, inter alia, that the petitioner, Iowa Sac and Fox, held no vested interest in unallotted tribal lands and undistributed tribal funds since it had been their plain and unqualified duty to return to the Kansas reservation agency and claim their rights as members of the legal tribal entity. Instead, the Court said, they became simply individual Indians living in Iowa. The Iowa Sac and Fox appealed the Court of Claims decision to the Supreme Court of the United States (220 U. S. 480). Mr. Justice Holmes, in the majority opinion affirming the judgment, rested the decision on strictly legal grounds, stating:

The plaintiffs contend that, as the (jurisdictional) act authorizing the suit gave the Court of Claims full legal and equitable jurisdiction, the appeal opens the findings of fact for reconsideration, as was held in United States v. Old Settlers, 148 U.S. 427, 464, 465. That, however, was a suit in equity, whereas the present case is more analogous to an action at law, to recover a fund, from parties to whom it was paid under mistake of law or fact, or from the original contractor by whom the payment was made. -- The counsel for the plaintiffs treats the statute giving jurisdiction as intended to open the case from the beginning, without regard to inconsistent statutes, and to provide for an arbitration of what may seem fair. --- . A merely moral claim is not made the foundation of a possible recovery. Something must be shown that amounts to a right. ---- Whether the plaintiffs might get an award in a free arbitration, irrespective of treaty or statute, we cannot say, but in our opinion they have failed to establish such rights as can be recognized by this court.

In a dissenting opinion, Mr. Justice McKenna maintained the cause should have been remanded for further consideration because (1) the Court below had erred in refusing to consider certain evidence made competent by the jurisdictional act; (2) the Court should go behind the findings, under authority of the Old Settler's case, because the government might thereby be shown to have committed error in prorating the annuities on the basis of taking the fixed unvarying sum of 317 for the Sac and Fox in Iowa and 505 for those in Oklahoma.

The Commission's legal conclusion in this matter stated in Finding of Fact No. 19 purports to find that the Iowa Sac and Fox "By voluntarily and permanently absenting themselves from the confederated tribes of Sac and Fox on the Kansas reservation, the members of the Sac and Fox forfeited all their tribal benefits and communal rights to said tribal lands, improvements and other property belonging to the confederated tribes."

It is clear from the foregoing summary of the 1910 litigation that the Supreme Court reluctantly imposed a legal forfeiture upon the Iowa Sac and Fox claims solely as a matter of contract law, without consideration of the equities involved. This Commission, although clothed by the Congress with the powers and duties of determining the equitable rights of American Indian tribes, groups and bands, has summarily based its decision herein, so far as concerns the claims of the Iowa Sac and Fox, upon the all-encompassing legalistic barrier of forfeiture, thus refusing to consider what equitable rights, if any, the Iowa Sac and Fox may have held in "the tribal lands, improvements and other property of the confederated tribes."

It is true that the Iowa Sac and Fox have herein failed to establish their claims of an equitable interest here in the Oklahoma lands. There is no evidence tendered by them to show the value of improvements its members made upon the Kansas reservation in the ten to twenty-four years its members resided there prior to the 1867 treaty. Although such improvements constituted the recited consideration for the Sac and Fox grant in Oklahoma lands, yet such treaty recitation is not so sacrosanct that this Commission may not reserve its judgment on this question until it has heard the evidence in the Kansas claims, Docket 219. To be sure, the majority opinion also states the Iowa's interest in the Kansas lands should be deferred until that case is considered. However, as I view it, the language of the findings and opinion are negative pregnant to this.

Therefore, I concur that the Iowa Sac and Fox have herein failed to establish that they ever held any equitable rights in subject Oklahoma lands. However, my reasoning is not based upon any legal forfeiture arising from their physical abandonment of the antecedent Kansas reservation, but merely because they have herein failed to offer proof of such rights.

I will now discuss the ultimate issue of fair market value of subject Sac and Fox lands in Oklahoma. In the Commission's Finding 46 it is concluded that as of February 13, 1891, subject lands "had an overall fair market not in excess of \$1.75 per acre," and therefore, the agreed compensation of \$1.23 per acre received was not unconscionable.

Subject lands are separated on the northwest corner by less than fifteen miles from the lands of the Cherokee Outlet upon which this Commission in Docket 173, 9 Ind. Cls. Comm. 162, Finding 46, recently found had a fair market value as of March 3, 1893, "of approximately \$3.75 per acre."

Thus, there is a disparity of twice the fair market per acre value found for said Cherokee lands than is found for the subject lands in this case. The valuation dates of the respective lands are only two years apart, 1891 and 1893.

It cannot be supported, and I would not contend that a fair market value found in one case becomes a controlling precedent for another case. However, since no private sales market in fact existed for such Indian lands on the date of the cession herein, it is my opinion we should follow the well settled practice in such cases of considering evidence of such private sales as appear to be of probative value in determining the issue of fair market value. In other words, the Commission should look to the best evidence available to assist the Commission in determining market value of Indian lands (Kiowa, Comanche and Apache Tribes v. U. S., 4 Ind. Cl. Comm. 96; Choctaw and Chickasaw v. U. S., 1 Ind. Cl. Comm. 291, 326) and the Commission should to a large extent examine transactions involving comparable land sales in or near the area near the time at which the value must be determined. (Quapaw v. U. S., 1 Ind. Cl. Comm. 469, 500)

Subject Sac and Fox lands are both in nearness of area and in nearness of dates of valuation very comparable to those involved in

the Cherokee Outlet decision at the nearest point, separated only by about fifteen miles in distance and two years in time. Did market conditions, other than the prime considerations of time and distance, cause the respective market conditions to be properly found to differ so substantially? I find no substantial evidence that supports such conclusion.

If the market conditions were substantially alike, then can it be fairly concluded that the Cherokee lands are so greatly superior in intrinsic qualities to the subject lands as to support such wide disparity in fair market value? In other words, would a prospective homesteader, the class of purchaser who provided this market demand, find the Sac and Fox lands only forth-seven percent as valuable as the Cherokee Outlet lands? Subject lands had ten inches greater average rainfall, a longer growing season, a far greater supply of firewood and available timber for construction of settlers' homes, greater proportions of fertile bottom lands, smaller but comparable rates of revenues realized from tribal leases of large tracts of grasslands, comparable soils in uplands, and a comparable proximity to produce markets. Moreover, a comparison of density of settler population at any given subsequent date reveals subject lands, then as now, supported more people per square mile than the more arid Cherokee Outlet lands, and this was true prior to the discovery and development of oil made after the turn of this century.

The foregoing comparison of subject lands of the Cherokee Outlet are herein made to show in fairness and equity that such ultimate issue or finding of fair market value is neither equitable nor predicated upon

the primary findings made. In their report of June 12, 1890, to President Harrison of their negotiations of the purchase agreement with the Sac and Fox of subject lands, U. S. Commissioners Jerome, Wilson, and Sayre concluded with these remarks:

The Sac and Fox Reservation contains 479,688 acres of land, and is said to be better land on the whole than the Cherokee Outlet. If the whole acreage of the reservation is counted -- and it should be, for it all becomes farm land -- the price becomes a trifle over \$1 per acre. But if the land retained for Indian farms shall be deducted, and the residue only considered, then the price is about \$1.23 per acre, or less than the price given to the Creeks and Seminoles for Oklahoma, and also a less price than that which the Commission was directed to offer for the "Outlet".

We do not suggest this for the purpose of claiming to have made a good bargain, but rather to show that we are guided as to prices by precedents of Congress and the price that generally obtains for public lands.

(Pet. Ex. 40, p. 5; Sen. Exec. Doc. 172, 51st
Cong., 1st Session)

Some 90 of the 528 allottees chose their allotments on almost contiguous tracts of relatively poor land, and some 40 others were assigned allotments almost overnight in order to prepare the way for the settlers' opening "run" on the surplus lands. Nevertheless, it appears that at least some thirty to forty thousand acres or more of the superior quality fertile bottom lands were assigned allottees prior to the government's purchase of surplus lands. In this important respect the Sac and Fox surplus lands were of diminished value compared to other transactions such as the Cherokee Outlet lands. The Jerome Commission, in its negotiations, calculated this factor as a possible reduction in value of \$85,000 (about 18% of the total value) as related in the above cited letter.

Aside from comparisons of Cherokee Outlet lands, the evidence of private sales in the general region and period in question is well summarized in Findings 38 through 42, showing that values in recorded sales transactions ranged from about \$4.19 to \$8.97 per acre between 1891 and 1900. However, it is erroneously concluded that such evidence is denuded of all probative value because, as stated in Finding 38, "It is not possible to determine the extent, quality and the value of the improvements." The rationale of this conclusion appears in six pages, beginning at the middle of the Opinion. Its apparent premises are: (1) all recorded private sales were or must be assumed to be only of improved lands; (2) such improvements were all made by hand labor (without capital outlay); (3) claimants' mathematical formula for separating the value of improvements from land values "is not judicially acceptable;" and (4) therefore, all evidence of private sales transactions, if not incompetent, are "inconsequential", "interesting but of little probative value in convincing the Commission" of the value of raw lands, or were lands appraised by a (presumably) incompetent government Indian agent for the peculiar and unique purposes of a railroad company.

It is a well known and undisputed historical fact that the settlers' demand for subject lands was of such tremendous proportions that every acre was taken by homesteaders in a matter of hours after the opening run.

It is true the average homesteader was a poor man with extremely limited cash resources. He took subject lands for his home on the government terms, the only terms available by which it was offered to him. Then, is it fair and equitable to the rights of these Indian

claimants, by the process of inductive reasoning, to now determine that such government sales of subject lands were the conclusive, or at least the substantially controlling factor, in determining fair market value? We did not decide that it was so in the Cherokee Outlet case, Docket 173; and, if the evidence of private sales which are recited in Findings 38 through 42 in this matter was appropriately considered, it would in my opinion likewise be determined here that the government public land price did not reflect the true or fair market value.

Finding 38 reflects private land sale values of from \$4.19 to \$8.74 per acre in 1890-1892 in Canadian County.

More importantly, Finding 39 shows that in the nine year period, 1892-1900, within subject land area of Lincoln and Payne Counties, that in 898 transactions recorded in the public land records, not counting any transaction involving less than 40 acres, that 108,576 acres were conveyed at an average per acre price of \$7.85 in farm size average tracts of 118.8 acres. With the falling wholesale price index, can such handmade improvements of log cabins and split rail fences (Finding 41) or an above average fertility and location be reasons accounting for such a substantial differential between such prices actually made and recorded of subject lands at \$7.85, and the "not in excess of \$1.75 value" ultimately found in Finding No. 46? I think not, and yet this seems the only reasonable deduction possible to reconcile the \$6.10 differential. Of course should one, by inductive reasoning, conclude the government's price constitutes the approximate fair market value, then I would be forced to agree that such evidence is indeed impossible

and cannot be considered. But "a prospective purchaser (in determining market value) would certainly be interested in knowing the status of sales of lands surrounding an area which he was interested in buying. Such an analysis of these sales would give him an idea of market value of land." Kiowa, Comanche and Apache Tribes v. United States, 4 Ind. Cl. Comm. 95, 124.

Aside from the evidence of private land sales, which must be taken in retrospect since the government permitted no sales prior to the openings of Indian lands, Finding 44 correctly hypothesizes that in 1891 the bona fide (?) settler would have well known the activities and future plans of the Jerome Commission to purchase additional lands for settlement, and without the slightest judicial reluctance the period from 1892-1901 is then examined and it is found some 12 million acres were in fact opened for settlement in this period. Here the hypothesis becomes fatally defective because it omits to find that such settler, without any forecasting whatever, would most certainly know of the thousands who had been unsuccessful in the 1889 runs. Moreover, after the negotiations of the Jerome Commission in the settlers' forecasts of vacant lands to come on the market at some unknown and undetermined future date they would just as reasonably and with more certainty be able to predict that such unknown future openings would likewise attract teeming thousands of settlers already streaming to the new frontier. An increasing demand for new lands was found by this Commission to have continued throughout the coming decade in the new Oklahoma Territory, and even after the passage of the free homestead law in 1900. (See Fdg. 20, Kiowa, Comanche and Apache Tribes v. United States, 4 Ind. Cl. Comm. 95. 107)

Moreover, the prospective buyer would reasonably know in 1891, as an historical fact, not as hypothetical supposition, that Oklahoma City had sprung up overnight from the raw prairies with a population in excess of 5000 with over 800 buildings, as had the new territorial capital of Guthrie with a population of over 8000, both of which new cities were less than fifty miles from subject land. He would also know the Congress had created a new territorial government with courts and counties, and had recently granted railroad construction permits in every direction in the new territory. He would know of the actual recent construction of nearby railroad transportation and would predict the natural development of access roads thereto. All of these events were also facts upon which he might reasonably and accurately suppose that when such vacant and more arid lands to the west were opened that these lands also would be met with similar demands of land-hungry settlers.

Finally, I disagree with the ultimate finding (last paragraph of Finding No. 21) that the United States dealt fairly and honorably with the Sac and Fox in the purchase of subject land. Commissioners Jerome, Wilson and Sayre negotiated the purchase of subject lands from the Sac and Fox on behalf of the government and the purchase agreement was signed June 12, 1890. Eighteen months later these same Commissioners also concluded the previously mentioned purchase of the Outlet lands from the Cherokee Nation. The form and pattern of these respective negotiations appear to have been shaped in all essential respects with the similar offers and counter offers. Although the Jerome Commission had reported to the President before either purchase agreement had been finally closed that it considered subject Sac and Fox lands were on the whole better than the Outlet lands (Pet. Ex. 40),

yet the respective agreements provided payments to the Sac and Fox of \$1.23 per acre and of \$1.25 per acre to the Cherokees. To each, the Jerome Commission in its closed market or government negotiations, declared it would not discuss a price in excess of \$1.25 per acre. This constituted duress. This Commission has found such negotiations, as to the Cherokees, constituted duress and a failure to deal at arm's length (9 Ind. Cl. Comm. 162, 235) but as to the Sac and Fox in this matter this conduct has been characterized by this Commission as free of fraud, coercion and duress. Chief Keokuk and the Sac and Fox were illiterate Indians who required interpreters while Chief Mayes, E. C. Boudinot and the Cherokee representatives were able, astute and literate men.

Upon the foregoing considerations, it is my opinion that the claimants herein have established by all of the evidence contained in the record that the Sac and Fox surplus lands, as distinguished from the tract as a whole were worth on February 12, 1891, at least twice the consideration paid, and if I had the valuation to find I would find not less than \$3.00 per acre; that the consideration actually paid therefor was \$1.23 per acre; and was, therefore, unconscionable. For the reasons stated above, I dissent.

T. Harold Scott
Associate Commissioner