BEFORE THE INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, THE SAC AND FOX TRIBE OF MISSOURI, SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA, ET AL.,	)	
Petitioners,	)	
v.	)	Docket No. 143
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: May 19, 1965

Appearances:

George B. Pletsch, on behalf of the Sac and Fox Tribe of Indians of Oklahoma,

Stanford Clinton, on behalf of the Sac and Fox Tribe of Missouri,

Lawrence C. Mills, on behalf of the Sac and Fox Tribe of Mississippi in Iowa,

Attorneys for Petitioners

Ralph A. Barney and Daniel G. McGrath, with whom was J. Edward Williams, Acting Assistant Attorney General,

Attorneys for Defendant

OPINION OF THE COMMISSION

Scott, Associate Commissioner, delivered the opinion of the Commission.

Petitioner herein, The Sac and Fox Nation, is composed of three bands represented by individual petitioners: (1) the Sac and Fox Tribe

of Indians of Oklahoma, represented by individual petitioner members, Edward Mack, Pauline Lewis and William Newashe; (2) the Sac and Fox Tribe of Missouri, represented by individual petitioner members, Charles W. Robidoux, John Connell, Dorothy Gilfillian, Thomas Green, and Thomas Herrick; and (3) the Sac and Fox Tribe of the Mississippi in Iowa, represented by individual petitioner members, Kenneth Youngbear, Charles Davenport, Percy Bear, and Columbus Keahna. Said petitioner bands are identifiable groups of American Indians residing within the territorial limits of the United States and are successors in interest to the Sac and Fox Nation. As such they have been held by this Commission in previous cases to be entitled to represent the Sac and Fox Nation and to have the capacity to maintain suits before this Commission.

The tract of land involved herein lies in the northern and northeastern part of the present State of Iowa and is designated as Cession 152 on the map Iowa 1 appearing in the 18th Annual Report of the Bureau of American Ethnology, 1896-1897, Part 2, compiled by Charles C. Royce.

The Sac and Fox Nation ceded all its right, title and interest to Cession 152 by the Treaty of July 15, 1830, ratified February 15, 1831 (7 Stat. 328). The cession is described in Article II of the Treaty as:

> * * * a tract of Country twenty miles in width, from the Mississippi to the Demoine; situate south, and adjoining the line between the said confederated Tribes of Sacs and Foxes, and the Sioux; as established by the second article of the Treaty of Prairie du Chien of the nineteenth of August one thousand eight hundred and twenty-five.

Royce Cession 152 involves lands embraced within the general area between the Mississippi and Missouri rivers below the boundary line separating the Sioux and Sac and Fox tribes as fixed under Article 2 of the Treaty of August 19, 1825 (7 Stat. 272) at Prairie du Chien.

This Commission has previously determined as a matter of law that the language of the Prairie du Chien Treaty of 1825 amounted to a recognition by defendant of Iowa and Sac and Fox title to that general area described in Article 3 of said treaty, even though the specific areas actually owned were never described. (Otoe and Missouria Tribe of Indians, et al v. United States, 5 Ind. Cl. Comm. 316, 351).

Cession 152 lies wholly within that general area described as stated above and so the Sac and Fox Nation has recognized title to Cession 152. The primary purpose herein is to determine the value of Cession 152 as of the date upon which the Sac and Fox Nation was deprived thereof by defendant.

It would be well at this point to consider the petitioners' contention with regard to the proper date of taking of Cession 152 by defendant as well as certain other matters.

Petitioners state that the proper date of taking and consequently, of valuation, should be March 23, 1843, the ratification date of a treaty between defendant and the Sac and Fox negotiated on October 11, 1842 (7 Stat. 596). Petitioners base this contention upon the assertion that the Sac and Fox Nation retained the right to hunt and occupy Area 152 and that this interest existed until the Treaty of 1842 when they ceded

everything west of the Mississippi River. Petitioners then insist that this right to hunt and occupy was a compensable interest and reach the conclusion that the Treaty of 1842 having ceded everything west of the Mississippi must then have ceded this compensable right, thereby creating a valuation date of February 15, 1843, the date of ratification of the 1842 treaty.

In support of their position with regard to the compensability of the right to occupy and hunt, petitioners cite two cases.

The first case cited is Cherokee Nation or Tribe of Indians v. United States, 1961, 9 Ind. Cl. Comm. 162. The only point decided in this case to the present time is that the Cherokees did not have title to the assigned lands at the time of the 1891 agreement. The question for which the case is cited remains to be determined in Docket No. 173-A. For this reason the case, Docket No. 173, is not in point.

The other case cited is The Delaware Tribe of Oklahoma v. United States, 1955, 130 C. Cls. 782. In this case the Court of Claims upheld the claim of the Delaware Tribe to the "outlet" lands created under the Treaty of September 24, 1829 (7 Stat. 327) and ceded by the Delawares under the Treaty of May 6, 1854 (10 Stat. 1048).

In this case the Court of Claims found, among other cogent facts, that the language of the treaty wherein defendant pledged its faith "* * * to guarantee to the said Delaware Nation forever, the quiet and peaceable possession and undisturbed enjoyment of the same, against the claims and assaults of all and every other people whatever" was sufficient to invest the Delawares with a full right of Indian ownership.

This conclusion was bolstered by the fact that defendant had enforced its promise to the Delawares by purchasing from the Pawnees and Otoes their lands which were included within the area promised the Delawares.

The question in the Delaware case was whether the Delawares had anything more than an easement or right of way over the "outlet" lands. The Court of Claims found that they had all of the usual rights of Indian ownership. However, this was simply a part of the Court's reasoning in explanation of its holding. The true basis of the "Indian ownership" in the Delaware case rested upon the language of the treaty under which the defendant had granted and guaranteed the lands, including the "outlet," to the Delawares.

The case before us presents the opposite situation. In this instance the Sac and Fox had made a cession instead of receiving a grant. The language of Article II of the Treaty of July 15, 1830, reads as follows:

> The confederated Tribes of the Sacs and Foxes, cede and relinquish to the United States forever, a tract of Country twenty miles in width, from the Mississippi to the Demoine; situate south, and adjoining the line between the said confederated Tribes of Sacs and Foxes, and the Sioux; as established by the second article of the Treaty of Prairie du Chien of the nineteenth of August one thousand eight hundred and twenty-five.

This language appears to the Commission to be an unequivocal cession of all rights of the Sac and Fox to this 20-mile-wide strip of land. It divested the Indians of all rights rather than investing them with full rights as found in the Delaware case. This conclusion as to divestment is supported by the letter of the Treaty Commissioners to Secretary of War Eaton that the cession of Area 152, as well as the similar cession from the Sioux, was an "unqualified purchase."

However, even accepting the contention of petitioners that the Sac and Fox retained the right to hunt and occupy Cession 152 until the 1842 treaty, it is still not possible to accept the latter treaty as the date of valuation.

In the case of The Blackfeet, et al v. The United States, 81 C. Cls., 101, 121, it was held that hunting rights were not compensable. The reason for this holding was that it was impossible to establish damages with any degree of accuracy. The Court stated at page 121 of the opinion that "The Court under the law could not award a money judgment upon proof conjectural and uncertain as to facts."

If we were to hold that the non-divestment, real or supposed, of the right to hunt and occupy served to advance the date of taking, we would be giving value to the right to hunt and occupy as opposed to the right of full Indian ownership. For this reason the argument of petitioners must be denied and the date of taking held to be February 15, 1831, the ratification date of the Treaty of July 15, 1830.

Petitioners comment on the use of certain criteria for valuing land in the absence of an actual open market as set forth by the Court of Claims in the case of Otoe and Missouria Tribe of Indians v. United States, 131 C. Cls. 593, 633 (1955). They suggest that should the Commission be of the opinion that the evidence of value introduced in this case be insufficient to establish a value, that the statutory minimum price of $1.25 should be the price used. However, the Commission is of the opinion that the economic and physical factors

established by the evidence furnish an ample basis for establishing a fair market value for Area 152 as of February 15, 1831.

Another contention of petitioners concerns an alleged right to recover the consideration which defendant received upon disposal of Area 152. This theory is based upon petitioners' assertion of a fiduciary relationship between petitioners' ancestors and defendant and a resulting constructive trust when defendant purchased Area 152 for an unreasonably low price and resold it for $1.25 per acre thereby profiting as a result of its fiduciary relationship.

This argument has been answered by this Commission on several occasions and has been rejected each time. One of the reasons for this rejection is the lack of a fiduciary relationship between petitioners' ancestors and defendant in the absence of a treaty, agreement, or Act of Congress wherein such relationship is specifically created. See Sioux Tribe of Indians v. United States, remanded for further evidence, 146 F. Supp. 229; Gila River Pima-Maricopa Indian Community v. United States, C. Cls. 140 F. Supp. 776, 780. There is no language in the Treaty of July 15, 1830, which would create such a relationship.

A second reason is that such a theory constitutes a substitute method of measuring damages or compensating petitioners. It is settled law that the only measure of damages in a case under Section 2, Clause 3 of the Indian Claims Commission Act based upon unconscionable consideration, is the difference between what was paid by defendant and the fair market value of the land on the date of taking.

As was stated in the Sioux case, supra:

> A reference to the Treaty of Fort Laramie, supra, or the Treaty of 1868, supra, upon which this claim is based will show no provision whereby the United States assumes the status of guardian of the Sioux Tribe of Indians in relation to the land in question. Accordingly, appellant cannot properly base this claim for conscionable consideration on the amount it would have received had the Government been required to manage the appellants' property as a legal guardian for the benefit of its ward.
>
> The appellant does not, and well it cannot, question the power of the Government to take the property in question upon the payment of just compensation. It asserts its guardian-ward argument only as a means of substantiating its theory of compensation on a royalty basis.
>
> It is a long established rule that just compensation must be based on the value of the property as of the time of its acquisition by the Government, in this case February 28, 1877; United States v. Miller, 1943, 317 U.S. 369, 373-375, 63 S. Ct. 276, 87 L. Ed. 336. * * *

This rule has been followed by this Commission in many cases, among which are: Delaware Tribe of Indians v. United States, 8 Ind. Cl. Comm. 150, 179 (1959) and Absentee Shawnee Tribe of Oklahoma v. United States, 6 Ind. Cl. Comm. 377, 405 (1958), aff'd, 151 C. Cls. 700.

Petitioners' final point raised in their brief on damages is that they are entitled to recover under the fair and honorable dealings clause, Section 2, Clause 5 of the Act, the profit which defendant realized upon the sale of Cession 152 lands.

Their contention is without merit. The petitioners are entitled to recover only for the value of the land as a whole, which was the way defendant took it, and not for what it would have brought if sold in small parcels for their benefit. See Absentee Shawnee Tribe of Oklahoma v. United States, supra.

Petitioners alleged a cause of action under Clause 1 of Section 2 for just compensation but have not pursued the claim in their briefs. Since this is not a constitutional taking, the claim will be considered to be abandoned.

The expert witness who testified for defendant in this case was Dr. William G. Murray, a qualified land appraiser who has appeared before this Commission on many occasions and to whom we are indebted for the factual information embodied in the findings. While we do not agree with Dr. Murray's ultimate value we nevertheless appreciate the material contained in his report.

The petitioners did not present expert evidence concerning land value. They did have a soil expert, Dr. F. F. Riecken of Iowa State College, who testified and submitted a report as to the composition and quality of the soil and its distribution in the ceded area. Dr. Riecken and Dr. Murray were in substantial agreement with each other as to these facts.

Valuation:

Area 152 lies in northeast Iowa. It contains 2,294,400 acres and is 20 miles wide by approximately 170 miles long. It cuts across parts of 14 counties in the present State of Iowa. The eastern boundary is the Mississippi River and the western boundary is the Des Moines River. It runs in a northeast-southwest direction between these two rivers.

The climate in the area was well suited for agricultural pursuits and white habitation. The annual average temperature was about 50° with a frostfree growing season of 150 to 160 days between May and

October. The annual average rainfall varied from 30 to 34 inches with most of this falling during the growing season.

The topography of the area may be described as "gently sloping" in the western four-fifths and the eastern one-fifth as "more strongly rolling." Eighty-two percent of the western four-fifths of the area had a slope gradient of less than 5% and 91% had a slope gradient of less than 8%. Seventy-five percent of the eastern one-fifth of the area had a slope gradient of less than 14% with the area immediately adjoining the Mississippi River having a slope gradient exceeding 25%.

In 1831 the quality and distribution of soils in the area were substantially identical to those of the present. The dominant parent material in the subsoils of the western four-fifths of the area is glacial in origin. Here the predominant subsoils are friable to slightly firm loam, generally of good drainage characteristics. Soil experts classify the western portion of this area as predominantly a Clarion-Nicollet-Webster soil association, and the central and eastern portion of the area as predominantly a Kenyon-Floyd-Clyde soil association.

The topsoils of the western four-fifths of Area 152 are mostly twelve to eighteen inches in depth, dark and permeable, and have a high to very high fertility.

The dominant parent material in the subsoils of the eastern fifth of the area is loess, a windblown deposit, which is found resting upon limestone bedrock, and may vary in thickness from fifteen feet on level areas to thin or absent deposits on steep slopes. The soils of this

area are classified as Tama and Tama-Downs soil association and Fayette and Fayette-Dubuque-Stony soil associations.

The topsoils of the eastern fifth of the cession are prairie-formed and tree formed soils, with the Tama prairie-formed soils having a high capacity for crop productivity and the Fayette soils having a medium to high capacity. Roughly three percent of Area 152 is considered as having low productivity.

The water-laid materials occurring in the bottomlands of the streams and rivers of the area is a loamy texture, permeable and friable, as a rule. However, some of the water-laid materials may have coarse sand subsoil at shallow depths.

The first-class soils were almost evenly distributed throughout the tract. The exception was chiefly in the center of the area and near the Mississippi where second-rate soils predominated.

There were no minerals of any commercial value in Area 152 as of 1831, although coal and limestone were mentioned by the surveyors. Both of these would have been of value to the settlers.

Timber was found along the streams in the area and there was a rather dense forest in the eastern fifth of the area toward the Mississippi River.

The timber would have been fairly plentiful because of the number of streams in the area. Beginning with the Des Moines River on the western border a major stream or its tributary could be found at intervals of thirty to fifty miles across the cession to the Mississippi River on the eastern border. These rivers were the Boone, Iowa, Cedar,

Upper Iowa, Wapsipinicon, and the Turkey. These streams furnished power sites as well as drainage for the area.

Transportation in Area 152 was good for the times. There were no railroads yet, but both the Mississippi and Des Moines Rivers were navigable by steamboats and the flatboats and keelboats of the day.

On the east side of the Mississippi River there were a number of roads and trails in Illinois and Wisconsin leading to Dodgeville and Prairie du Chien, Wisconsin, which was just across the Mississippi from the eastern border of Area 152.

While there were no roads as such in the area, the prairie formed a good wagon road for travel within Area 152.

As of 1831 the present State of Iowa had not been opened to settlement. The closest settlements were in Illinois and Missouri. By 1820 the Federal census shows that settlement had expanded along the Ohio and Mississippi rivers and westward along the Missouri River.

The census of 1830, just prior to the date of valuation, shows the population moving up the Illinois River into west-central Illinois and continuing along the Missouri River to the west. There was a large population at Kansas City. The population growth of the period was moving westward of St. Louis rather than north towards Area 152. However, the west-central position of Illinois was also increasing. The lead mining operations around Galena, Illinois, and Mineral Point, Wisconsin, was attracting an increasing population. In 1830 there was a concentration of 2-6 persons per square mile around these areas.

The 1830 census shows that there had been an increase of some 58,000 people in the northern two-thirds of Illinois since 1820, and in the five counties of Missouri along the Missouri River the population had more than doubled to 66,211.

Typically, the population trend followed the navigable streams which led westward through Missouri and northward up the Mississippi and Illinois rivers.

There was no census in Iowa in 1830 because it had not been opened for settlement. However, in 1836 the population was estimated at 10,531. By 1838 it had increased to 22,859 and by 1840 there were 43,000 people in Iowa Territory.

As was usual during this period of time, the settlers chose wherever possible to be near water and timber. The settlement pattern in Illinois and Missouri shows the spread of population along the rivers which afforded transportation and had timber near their banks from which the settler could construct his house, barn, furniture, fences, and obtain firewood.

The classification during the period in question of certain of the available lands near Area 152 as "unfit" for cultivation because of lack of timber and water points up this preference rather strongly.

The land sales in nearby areas prior to 1831 show a relatively light sales pattern. In the Springfield area of Illinois, which was some distance from a stream, the sales from 1823 through 1830 amounted to 27% of the total sales for all years. In the northeast Missouri

area, which was at the confluence of the Des Moines and Mississippi rivers and nearest of the sample areas to the subject tract, there was sold from 1819 through 1830 some 5% of all of the lands eventually sold. In the northwest Missouri area, which lay at the site of Kansas City, there was sold from 1821 through 1830 about 26% of the total lands for sale in the sample area. It will be noted, however, that for the sales period of these three areas from 1831 through 1840, that the northeast Missouri area nearest Area 152 sold 439,481 acres as compared with a combined total of 323,147 acres in the other two sample areas.

The total land sales from 1825 through 1831 increased considerably going from 999,000 acres in 1825 to 1,244,900 acres in 1829 and to 2,777,900 acres in the year 1831.

The increase in land sales in the period from 1829 through 1831 was a reflection of the general prosperity of this period. There was a population increase from 1829 through 1831 of almost 800,000 people. There were some 31 million acres of public lands available in the States of Illinois and Missouri in 1831. This represented an increase over earlier years as more land became available through the negotiation of treaties and the completion of surveys.

The government was able between 1829 and 1831 to build a surplus in the Treasury and to reduce the national debt.

Public interest rates were running around 5½% on short term paper and were as high as 7% in late 1831. State bonds carried a rate of 5 and 6% during this period.