BEFORE THE INDIAN CLAIMS COMMISSION

SAC AND FOX TRIBE OF THE MISSISSIPPI IN IOWA, )
THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, )
AND KENNETH YOUNGBEAR, CHARLES DAVENPORT, )
HARRY LINCOLN, ALBERT DAVENPORT, EDWARD DAVENPORT, )
PERCY BEAR, COLUMBUS KEAHNA, EDWARD MACK, PAULINE )
LEWIS, WILLIAM NEWASHE, AND AMOS BLACK, appearing )
as the representatives of and on the relation of )
the SAC AND FOX OF THE MISSISSIPPI, and as representa- )
tives of and on behalf of all the members )
thereof, and appearing as the representatives of )
and on the relation of the CONFEDERATED OR UNITED )
TRIBES OF SAC AND FOX INDIANS, and as representa- )
tives and on behalf of all of the members thereof, )

Petitioners, )

v. )

THE UNITED STATES OF AMERICA, )

Docket No. 219 )

Defendant.

Decided: Sept. 29, 1967

Appearances:

Lawrence C. Mills and George
B. Pletsch, Attorneys for
Petitioners,

W. Braxton Miller, with whom was
Mr. Assistant Attorney General
Edwin L. Weisl, Jr., Attorneys
for the Defendant.

OPINION OF THE COMMISSION

Commissioner Watkins rendered the opinion for the Commission.

The tribal petitioners herein are the Sac and Fox Tribe of the Missis-
sippi in Iowa and the Sac and Fox Tribe of Indians of Oklahoma. The claims
asserted herein arise out of the provisions of two treaties that were con-
cluded by the United States with the Sac and Fox of the Mississippi. The
petitioners have the right and capacity under the Indian Claims Commission
Act, 60 Stat. 1049, to bring and maintain this suit in a representative
capacity for and on behalf of the Sac and Fox of the Mississippi. We shall have occasion to refer to the Sac and Fox of the Mississippi as simply the Sac and Fox or the Sac and Fox Indians.

The two treaties with which we are concerned are the Treaty of October 1, 1859, 15 Stat. 467, the "1859 Treaty" and the Treaty of February 18, 1867, 15 Stat. 495, the "1867 Treaty." The subject lands are those that comprise the former Sac and Fox reservation in Kansas (Royce Areas 419, 494), that had been given to the Sac and Fox of the Mississippi pursuant to the terms of the Treaty of October 11, 1842, 7 Stat. 596. This Kansas Reservation forms a rectangular tract of land in east central Kansas 34 miles long from east to west, and 20 miles wide from north to south. It contained 435,200 acres, and, if located on a modern day map, it would occupy most of Osage (then Weller) County, with some overlapping into Lyon County to the west and Franklin County on the east.

In the middle 1850's there arose a strong and vociferous clamor for the opening to white occupancy of the Indian lands in Kansas. The initial white settlements were made in northeastern Kansas in the area around Fort Leavenworth. A string of Indian settlements along the eastern frontier of Kansas had thwarted any immediate white expansion westward. However, the increasing white agitation and encroachment of settlers and squatters upon the Indian lands greatly alarmed their tribal owners, and the prospect of an outbreak of bloody warfare was becoming more of a reality each passing day. In his Annual Report in 1854, the Commissioner of Indian Affairs summed up his views on the situation as it existed in Kansas:
"Already the white population is occupying the lands between and adjacent to the Indian reservations, and even going west of and beyond them; and at no distant day all the country immediately to the west of the reserves which is worth occupying will have been taken up... It is therefore, in my judgment, clear, beyond doubt or question, that the emigrated tribes in Kansas Territory are permanently there -- there to be thoroughly civilized, and to become a constituent portion of the population, or there to be destroyed and exterminated."

The 1856 official survey of the Sac and Fox reservation lands had the deleterious effect of encouraging further encroachment by squatters in anticipation that before long the Government would quiet the Indians' title thereto. By 1858 the Indian Agent for the Sac and Fox was complaining bitterly of the depredations committed by the whites, detailing to his superiors the many instances of horse thievery and illegal timber cutting on the reservation.

Yielding to the inevitable, as had the other Kansas Indian tribes, the Sac and Fox Chiefs in the September of 1858 sought to counsel with the defendant's officials in hopes of bettering their conditions. Immediate action was not forthcoming, but in the fall of 1859 Commissioner Greenwood finally negotiated a treaty on October 1st with the Sac and Fox at the agency on the Marias des Cygnes River in Kansas.

The 1859 Treaty contemplated a reduction of the present Kansas Reservation into a smaller "Diminished Reserve." The excess land would be sold off by the defendant for the benefit of the Indians, and the proceeds therefrom would be used to retire existing tribal indebtedness as well as being plowed back into the Diminished Reserve by making necessary improvements thereon. Specifically, the 1859 Treaty provided that the United States would become the trustee for the sale of this surplus or "trust land" and these lands
would be sold in parcels not to exceed 160 acres,

"... to the highest bidder, for cash; the sale to be made upon sealed proposals, to be duly invited by public advertisement..." (Art. 4, 15 Stat. 467)

Shortly after the ratification of the 1859 Treaty on July 9, 1860, three Commissioners were appointed to appraise the trust lands that would be sold pursuant to Article 4 of the treaty. The three appraisers made their report on February 21, 1861, classifying and evaluating the trust lands as follows: 35,891.91 acres of 1st class land at $2.75 per acre; 191,015.38 acres of 2nd class land at $1.10 per acre, and 51,425.31 acres of 3rd class land at $0.80 per acre. In all some 278,332.6 acres of land was valued at $349,959.92 which is approximately $1.27 per acre.

With the outbreak of the Civil War in the spring of 1861, sale of the trust lands was deferred until a more favorable climate prevailed. Although the trust sales were postponed, improvements were authorized to begin on the Diminished Reserve. To secure creditors for the cost of improvements, "scrip" was issued, which paper would eventually be redeemed out of proceeds realized from the sale of the trust lands.

The sale of the Sac and Fox trust lands was finally scheduled in the fall of 1864. Preparatory thereto the Indian Office, in August, 1864, arranged for the placement of advertisements in six newspapers calling for submission of sealed bids prior to October 15, 1864, the date of sale. However, the Indian Office thought it wise to review the original appraisal of the trust lands, and with this in mind, one Edward Woolcott was assigned the task of reappraising the subject lands. Woolcott conducted a rather haphazard and hasty appraisal of the trust lands and submitted his official
report on October 11, 1864, just four days prior to sale. In it he recommended a reduction in the value of "1st class" lands from $2.75 per acre to $2.00 per acre, and a $0.15 increase from $1.10 to $1.25 per acre in the value of "2nd class" land, and no change in the $0.80 per acre value of "3rd class" land. As was the case with the first 1861 appraisal, the Woolcott appraisal was intended for the sole use of the Indian Office as a guide to aid the authorities in passing upon bids that would be submitted at the sale.

The first sale was conducted on October 15, 1864, as scheduled. The results, however, were somewhat disappointing, with the majority of accepted bids consuming the bulk of the "1st class" lands. A second sale was advertised and concluded on December 23, 1864. In the second sale, the bulk of the "2nd class" lands were successfully bid upon. Because the proceeds from the first two sales fell far short in discharging the existing Sac and Fox indebtedness, a third and final sale was authorized by the Indian Office. This third sale took place on March 29, 1865, and, besides trust lands, additional acreage was included from the Diminished Reserve. In these three sales a total of 285,658.20 acres of land was sold at a total price of $282,557.48, or an average of $0.99 per acre. Patents for those lands sold and paid for were issued principally in 1864 and 1865.

As it turned out, the 1859 Treaty failed to produce the desired results, namely, the economic improvement of the Sac and Fox Indians and their adjustment to a new agricultural way of life. Still saddled with a tribal indebtedness, and constantly harassed by an ever increasing white population that coveted their remaining lands, a disillusioned Sac and Fox literally
threw in the towel. After several abortive attempts in seeking further relief through treaty negotiations, a treaty council was convened in February, 1867, in Washington, D. C. Assembled together were the officials and headmen of the Sac and Fox Indians and representatives from several of the other Kansas Indian tribes. The purpose of these negotiations was the outright cession of all Indian lands in Kansas, and the eventual removal of the tribes to new reservations in Indian Territory (Oklahoma). The predominant theme of this council as repeated by the Government officials was that the Indians must either give up their communal way of life in Kansas, or else remove to the Indian Territory:

"... Arrangements will be made in these treaties, in all cases, for the Indians to have a choice as to whether they will go to the new country and continue as Indian tribes there, or whether they will remain in Kansas and become citizens of the U.S. under the laws of the U.S. The troubles that you are constantly having with the whites all around you, and who are going into that country very rapidly, are such that you all see you cannot remain in Kansas as Indian Tribes and be comfortable. You cannot stay and be half Indian and half white; you must be one thing or the other, in Kansas or some other country." (Pet. Ex. 155)

On February 18, 1867, the United States concluded a treaty of cession with the Sac and Fox Indians wherein the Indians ceded all their remaining lands in Kansas. Said treaty was ratified by the United States Senate on July 25, 1868 (15 Stat. 495). As partial consideration for the cession of their lands the United States agreed to compensate the Indians at the rate of $1.00 per acre. For the improvements on the lands, the United States agreed to give the Sac and Fox a new reservation in the Indian Territory in Oklahoma. After subtracting that land subject to individual allotments under both the 1859 and 1867 treaties, as well as the small tracts that were
deeded by the Sac and Fox chiefs, a total of 132,718.80 acres was ceded under the 1867 treaty.

In this proceeding the tribal petitioners are seeking to recover the difference between the 1864-65 fair market value of the trust lands sold under the 1859 Treaty less the proceeds realized from the sales thereof, plus the difference between the fair market value of the residue lands ceded outright under the 1867 Treaty and the consideration paid by the United States for said ceded lands. It is the petitioners' contention that the evidence of record submitted for evaluation purposes shows that, as of 1864-65, the trust lands sold pursuant to the 1859 Treaty were worth at least $4.50 per acre on the open market, while the lands ceded under the 1867 Treaty had a minimum value of $5.00 per acre as of July 25, 1868, the effective date of the treaty. Thus, argues the petitioners, under both treaties the Indians received an unconscionable consideration and the defendant is liable under the Indian Claims Commission Act for the difference between the actual fair market value and the consideration received.

The petitioners are also claiming additional compensation under the 1859 Treaty on the grounds that defendant breached certain fiduciary obligations in the handling of the sales of petitioners' trust lands. Petitioners have alleged fraudulent conduct on the part of responsible Government officials in connection with these sales and they seek to impress a trust on certain profits alleged to have been reaped by these officials and other "insiders."

On the other hand, the defendant insists that the petitioners received full value for their trust lands, said lands being sold in 1864-65 at their
then fair market value of $0.99 per acre. In addition the defendant denies any breach of fiduciary duties owed to petitioners by the defendant acting in its role as trustee for the sale of the Sac and Fox trust lands. According to the defendant, it fully and faithfully carried out the provisions of the 1857 Treaty insofar as the sale of petitioners' lands are concerned. The defendant also contends that the residue of the Sac and Fox lands, that were ceded outright to the United States under the 1867 Sac and Fox Treaty, were worth no more than the $1.00 per acre the United States agreed to pay for them.

In fixing the evaluation date for the subject lands, the Commission agrees with the petitioners that the trust lands sold under the 1857 Treaty are to be valued as of the dates of their sale, that is, October 5, 1864, December 23, 1864, and March 29, 1865; but in view of the relatively small time lapse between the first and third sales, the entire 6 month period, 1864-65, should be considered as giving rise to a single evaluation date. The evaluation date for the Sac and Fox lands that were ceded under the 1867 Treaty is July 25, 1868, the date of ratification, and, therefore, the effective date of the treaty.

The Commission's findings of fact on value are rather extensive, and need not be repeated to any degree in this opinion. We found more than ample evidence in the record upon which to base a reasonable judgment. In making our decision, the Commission has sought to apply the value criteria that has repeatedly been followed in the past by this Commission and the Court of Claims. In so doing we have carefully considered all the evidence of record dealing with the following general and specific elements of value
that relate to the issues in this case: the size and location of the
subject lands, particularly the location with respect to potential buyers;
existing and potential avenues of transportation, and markets; the physical
characteristics of the subject lands including the value of such natural
resources as timber, minerals, and water; the general historical, economic,
and political developments of the surrounding areas and the Kansas Territory
during the 1850's and 1860's; the prevailing policy of the United States with
respect to the management, acquisition, and disposal of Indian tribal lands
in Kansas during this same period; the Federal laws bearing upon the sale of
public lands in Kansas; and the private sale and resale of reasonably compar-
able lands, whether improved or not, both within and near to the subject
lands during the 1850's and 1860's.

As the Commission views petitioners' claim arising out of the provisions
of the 1859 Treaty, recovery of additional compensation really depends upon
whether or not the defendant was derelict in carrying out an essential
fiduciary obligation toward the Sac and Fox Indians. Having assumed the
responsibility of selling the Sac and Fox trust lands for the benefit of
the Indians, the defendant had the inherent duty of taking reasonable and
prudent measures to obtain the highest selling prices possible, that is
a price equivalent to or at least approaching the then actual fair market
value of these lands. This does not mean that we hold the defendant in
the role of an insurer. However, should there be found a large disparity
between the proceeds realized from the sales of their lands and their
actual fair market value, albeit, an unconscionable disparity, then it would
appear that petitioners have at least made out a *prima facie* case of
the defendant failing to take reasonable and prudent measures to obtain
the best price available.

The Sac and Fox Reservation was located in east central Kansas. On
the plus side it was blessed with predominately good soil that more than
adequately supported an agricultural economy. It enjoyed a relatively
mild climate during the six months growing season. Rainfall was adequate,
although drought conditions, such as that which occurred in 1860, were at
times experienced. Numerous streams flowed through the subject area, the
principal ones being the Osage or "Marias de Cygnes," the Dragoon, 110 Creek,
Salt Creek, Long Creek, Coal Creek, and Wakarusa. Generally speaking the
Sac and Fox Kansas lands could be described as comprising gently rolling
prairie land interspersed with some broken and rough areas, and enjoying
excellent water supplies and drainage.

On the negative side, the supply of good construction timber was scarce,
and was confined in relatively small belts in the valleys and along the
streams. The ordinary timber stand was suited principally for fuel and
fencing. Contemporary reports confirm the scarcity of timber and those
lands upon which a good stand could be found were eagerly sought by the
majority of new settlers. To compensate for the lack of good construction
timber, the area abounded with valuable deposits of limestone and sandstone
that proved highly suitable for building purposes. In addition, there was
a more than adequate supply of surface coal throughout the area. These coal
deposits were subject to early commercial exploitation. The principal benefi-
factors of the existing coal supply proved to be the railroad interests,
but the prospective settlers also benefited from a relatively inexpensive.
source of heat and power. Considering all the physical attributes of this area, the Sac and Fox lands in the late 1850's and the 1860's were best adapted to general farming and the raising of livestock on family size units of 80, 120, or 160 acres.

Access into the Sac and Fox reservation in 1860 was strictly by wagon trail. Neither the Osage nor any other of the rivers were considered navigable. The nearest navigable stream was the Kansas River, some twenty-five miles north of the reservation. However, the Sac and Fox lands were only three to five miles south of the famous Santa Fe Road, perhaps the most vital overland trail from east to west during this period. It had been opened to vehicular traffic as early as 1821 with regular coach service along the trail beginning in 1849. There were several other well known roads close by, and a review of the original survey plats confirmed the existence of numerous local trails within the reservation itself.

Although no railroads were in actual operation in the near vicinity of the Sac and Fox lands during treaty times, the prospect of a solid expansion in railroad construction was certainly there. As early as 1859 the Atchison, Topeka, and Santa Fe Railroad had been chartered, and by 1869 had completed a track from Topeka, Kansas, to Burlingame, which is just north of the subject lands. Further construction on this line was completed in 1870, and other railroad lines had been extended south of the reservation. Projected railroad construction had been well publicized at treaty times, and the average settler certainly knew the value of acquiring land in the vicinity of good rail transportation.
Between 1855 and 1860 Kansas underwent a tremendous spurt in population growth. By 1860 some 107,206 people had been counted in Kansas. The outbreak of the Civil War in 1861 slowed matters down, but with the cessation of hostilities in 1865, the Kansas population rose rapidly, and by 1870 the Federal census showed a new population of 364,369.

The most calamitous event during the 1860's was, of course, the great Civil War. It affected the political, social, and economic growth of the entire country. It necessitated the postponement of the Sac and Fox trust land sales until a more favorable climate could be obtained.

In the early part of 1860-61 the prices of farm products were consistently low in the midwest. Thereafter the prices climbed slowly but when the Civil War finally ended they rose significantly and remained relatively high for the next few years.

Interest rates experienced a marked fluctuation during the same period, generally ranging between 5 and 7 percent for large investors. However, the small borrowers faced higher rates, even at times paying higher than 12 percent which was the legal maximum in Kansas.

In addition to the above value factors the Commission has given strong consideration to the evidence of private sales of relatively small tracts of land, 40 acres or more, situated within the Sac and Fox Reservation. These resales of the trust lands were recorded between 1866 and 1880. In 1866 some 10,575.77 acres of land were sold for $23,191.20, or $2.19 per acre, and for the five year period 1866 through 1870, 105,161.62 acres were sold for $413,318.35, which is an average of $3.92 per acre. Petitioners' tabulations for the entire 23 year period show that a total of 249,944.02
acres of land were sold for $1,206,046.72 or an average of $4.83 per acre. For the first ten years, petitioners' tabulations show that a total of 147,374.73 acres were sold for $667,014.68, or an average of $4.53 per acre. Petitioners then contend that the Commission should find that,

"... this record of sales is a reliable measure of the market value of the Sac and Fox Trust Lands as of the time of their sale in 1864-65 and of the Diminished Reserve as of the time of its cession in 1868." (Pet. Pro. Fdg. 23)

On the contrary the Commission believes the tabulation for the first five years to be a more reliable guide than for the extended later period suggested by the petitioners. During these first five years of recorded private sales nearly 42% of the land had been resold through private hands. In addition, the earlier time factor involved is certainly more relevant to the events surrounding the 1864-65 trust sales and the 1868 cession; the early improvements to the lands should be of less value than those of later years; more private resales of the same land are necessarily found in the tabulation for later years, and the subsequent events affecting land prices ten, fifteen, or twenty years after initial disposition of the Sac and Fox lands are too remote in time to weigh heavily in any evaluation of lands in 1864-65 and again in 1868, particularly when there is other more pertinent value evidence in the record. Apart from the fact that the specific value of any improvements that might be involved in these private sales is impossible to ascertain, we note the inclusion in petitioners' tabulations of a few sales involving minimal acreages at unusually high prices. The explanation for these uniquely valuable properties is unavailable, but their inclusion tends to distort the overall arithmetical average for the periods involved.
As the petitioners have pointed out, several of the successful bidders at the 1864-65 trust land sales were able to garner the lion's share of the total acreage sold. These men were undoubtedly speculators and land developers but not necessarily both. It is petitioners' contention that there would be a minimum amount of improvements, if any, on the lands sold by these large purchasers, so that the prices paid for their lands more accurately reflect the then fair market value of small unimproved tracts situated within the Sac and Fox reservation. The largest individual purchaser, John McManus, who successfully bid upon or acquired through his own efforts as well as by assignment more than 142,000 acres of Sac and Fox trust lands, managed to sell off, between the years 1867 and 1889, 112,164.29 acres of land for $544,192.70, or at an average of $4.85 per acre. Robert S. Stevens was another large purchaser of Sac and Fox trust lands. Between the years 1868 and 1889 he sold 26,897.81 acres of his holdings for an average of $4.48 per acre. Again we find that the sales occurring in the 1870's and 1880's lose their relevancy through remoteness of time.

Where vacant unimproved land has been held over an extended period of time its value is enhanced by the development of the tracts adjacent thereto. The construction of roads, railroads, bridges, and towns, plus the normal political development in a general area are external improvements that must be considered in evaluating any tract of land whether it has been improved or not. However, the Commission does accept the proposition that these sales involved tracts of land with little or no improvement to the land itself.

It is interesting to note the contrasting sale experiences of Stevens and McManus for the year 1868, which is the evaluation date for the lands.
ceded under the 1867 Treaty. In that year Stevens sold 10,511.65 acres of land, nearly one-half of his total sales, for $22,687.00, which averages out to nearly $2.16 per acre. On the other hand, McManus sold about half as much, some 5,364.01 acres, but realized $18,999.63 or $3.54 per acre for these lands. With respect to the McManus sales in 1868 the petitioners would have this Commission draw the following conclusion relative to the 1868 value of the ceded lands:

"The substantial sales of Trust Lands were being made by McManus in 1868 at average prices of $3.54 per acre provided direct and uncontrovertible evidence of the 1868 value of the lands ceded outright to the Defendant under the 1867 Treaty. The valuation established by these 1868 resales of these unimproved lands should be accepted by the Commission without adjustments as conclusive evidence of the 1868 value of the 138,261.88 acres ceded under the 1867 Treaty." (P. 68, Pet. Pro., Fdg. of Fact)

If this is the petitioners studied conclusion of the 1868 value of the lands ceded under the 1868 Treaty, it certainly detracts from any further suggestion by the petitioners that they were worth considerably more, especially their initial contention of $5.00 per acre.

Besides evidence of sales of small tracts within the Sac and Fox lands from 1866 on, the petitioners have cited events and happenings during the time relevant to the issues in the case that have some bearing on land values with respect to certain other Kansas Indian reservation lands such as the Peoria Trust Land, the Ottawa Indian Lands, the Miami Indian lands, the Kansas Indian lands, and Christian Indian lands. According to the petitioners:

"The lands comprising these former Indian reservations enjoyed the same climate as the Sac and Fox and had similar soils, topography, mineral resources, access to transportation
and markets. Accordingly, evidence of the value of such other former Indian lands confirms the value of the Sac and Fox Kansas reservation."

Besides those reservations cited by the petitioners, the Commission added two of its own, the neighboring Pottawatomie Indian lands, and the Osage lands in southeastern Kansas. Needless to say, the Commission has already dealt with evaluation of most of these other Kansas Reservations in other cases. Our "Finding 35" herein deals extensively with this particular subject. For the most part petitioners rely primarily on the recorded private sales in the Peoria lands as establishing similar market values for the Sac and Fox lands. Private sales in the Peoria tract cover the period 1857-1870, and show that a total of 128,384.57 acres were sold for $660,564.26 or an average of $5.14 per acre. In Docket No. 65, Peoria Tribe of Oklahoma v. United States, 15 Ind. Cl. Comm. 123 (1965) this Commission valued the Peoria trust lands as of 1857 at $2.50 per acre. The same sales data involving the Peoria trust lands now in evidence was before the Commission in Docket No. 65. In that case a detailed study of these sales showed, among other things, that settlers had been living in the Peoria tract for many years prior to the first sales in 1857, and that these sales reflected the value of these improvements. Furthermore, the tabulations of the Peoria sales included several instances of small acreages being sold at unusually high prices, thus distorting the simple arithmetical average.

Besides the Peoria lands, the Commission evaluated the Miami lands just 18 miles east of the Sac and Fox Reservation at $1.25 per acre in 1854. Miami Tribe of Indians, et al v. United States, 6 Ind. Cl. Comm. 513, reversed on other grounds 150 C. Cls. 725 (1960). We valued the Osage reservation
lands in 1865 at $1.50 per acre. The Osage Nation of Indians v. United States, 3 Ind. Cl. Comm. 217 (1954). The Pottawatomi Indian lands which are located about 16 miles north-northwest of the Sac and Fox Reservation were valued by the Commission as of 1868 at $2.00 per acre. While there is general comparability among all these reservations, different circumstances affected their valuations, and none of them are conclusive with respect to the value of the Sac and Fox lands.

The Commission has found that some consideration must be given to the value of improvements to that land subject to private sale within the Sac and Fox Reservation. Our "Finding 34" covers the matter of improvements, and we have concluded from the evidence that, for a normal 160 acre tract of unimproved farm land situated in the Sac and Fox reservation in the 1860's it is reasonable to assume that ordinary improvements thereto would tend to produce a minimum 20-25 percent increase in the value of the land. See also Docket No. 175-B, Nez Perce Tribe of Indians v. United States, 13 Ind. Cl. Comm. 184, affirmed 176 C. Cls. 815.

Besides deed records the Commission considered other source material that reflected to some degree certain land values within the Sac and Fox Reservation contemporaneous with the events surrounding the 1859 and 1867 Sac and Fox Treaties. Local newspaper advertisements offering lands for sale showed a marked disparity in the asking price of farm land near or adjacent to the urban areas, and those only a few miles away. Generally speaking, unimproved prairie land within 5 to 10 miles of towns were advertised in the range of $2.00 to $5.00 per acre. Those tracts upon which there was a good stand of timber fell in the range of $10.00 per acre, and in a few instances as high as $25.00 per acre. Tracts of less than 100 acres
adjoining or within one mile from town were being offered at $30.00, $50.00, and even $75.00 per acre.

Of great interest to the Commission was a document entitled "Hand Book to Kansas Territory." Published in 1859, it was intended to acquaint the new settlers with pertinent facts and figures about Kansas. Included was information about the existing towns in the Kansas territory and the latest quotations on land prices in those areas. Around the larger and better known towns, such as Lawrence, Kansas, land at private sale commanded prices from $3.00 to $10.00 depending on location. At Topeka, Kansas, improved farms of unspecified acreage in the immediate vicinity were valued as high as $3,000.00. Thus, a 160 acre improved farm would be worth $18.75 per acre. A few miles out of town a 160 acre improved farm would go for $2.50 to $5.00 per acre. Other price quotations near towns show the following:

Ossawatomie - "Farming Lands" could be purchased from $3.00 to $20.00 per acre, the higher prices going for those with good timber stands;

Burlingame - land brings $5.00 to $8.00 per acre; Emporia - land within 5 to 10 miles of town is from $3.00 to $10.00 per acre; Brownville - 160 acre farms contiguous to town have sold for $12.50 per acre, while two miles out from town 160 acre farms can be purchased as low as $300.00 or about $1.88 per acre.

One significant conclusion can be drawn from these advertised sales with respect to the location of land in relation to urban areas. The importance of a town within a given area as affecting over-all land values cannot be overlooked. Towns mean people; people mean further urban development and improvements to land; and, improvements raise the over-all value.
The Commission also gave consideration to the amount of public lands on
the market in Kansas and in neighboring Missouri in the 1860's. We find that
available public land within the vicinity of the Sac and Fox Reservation is
certainly competitive with the private land sales, and has the tendency to
hold down the prices asked for comparable land at private sales. As late
as 1868 there was a considerable quantity of public lands still available for
homestead and preemption in Kansas, although quite a bit of it had not yet
been surveyed. Out of some 42,795,590 acres of Kansas public land only
23,906,087 acres had been surveyed. Pottawatomi Tribe of Indians, et al.,

In fixing the fair market value of the Sac and Fox trust lands as of
the 1864-65 period, and the 1868 fair market value of the residue lands ceded
under the 1867 Treaty, the Commission finds that the evidence does not
support the optimistic contention of the petitioners in this regard. In
fact, after digesting petitioners' Proposed Findings of Fact and Brief, we
find statements therein that lead us to believe that petitioners cannot be
serious in pressing for their $4.50 to $5.00 per acre figures. On the
other hand, we believe that the defendant's position relative to the value of
these lands is wholly untenable. Considering the over-all demand of these
lands during the 1860's the contemporaneous prices of comparable lands both
within and without the Sac and Fox Reservation, including allowances for
improvements thereon, the quality and physical attributes of the subject area,
the general economic and political conditions that existed in Kansas during
this period of our history, and all the other elements of value which are de-
tailed in our findings of fact, the Commission concludes that there is substantial
evidence in the record to support a finding that, in 1864-65 the 285,658.20
acres of Sac and Fox trust lands that were sold under the terms of the 1859
Treaty, had a minimum fair market value of $3.00 per acre, or $856,974.60. The residue lands, which were ceded to the United States approximately three years after the 1864-65 trust land sales, became more valuable as a consequence of the normal growth and development that occurred in that 3-year period. The Commission therefore finds that by June 25, 1868, which is the effective date of the 1867 Sac and Fox treaty, the 132,718.80 acres of land ceded thereunder had a fair market value of $3.50 per acre, or $464,515.80.

Turning now to the question of defendant's liability, if any, to the petitioners for claims arising under the 1859 Treaty, we find that the defendant, acting as trustee for the sale of the Sac and Fox trust lands, sold 285,658.20 acres of their lands for $282,557.48 or approximately $0.99 per acre. Thus, for lands worth $3.00 per acre the petitioners received approximately one-third their value. If under these circumstances the defendant had purchased these same lands for $0.99 per acre, it would have paid to the Sac and Fox Indians an unconscionable consideration, and, consequently, would have been liable to the petitioners for the difference under the Indian Claims Commission Act.

Although not the purchaser, the defendant was trustee for the sale of said trust lands, and in assuming such a fiduciary role it was obligated to take all reasonable and prudent measures to obtain the best price available, one that equalled or at least approached the fair market value as of the date of sale. In this case we find that the gross disparity between the 1864-65 fair market value of the trust lands, and the over-all per acre price realized from their sale makes out a prima facie case of a failure on the
part of the defendant to fulfill its trust obligation. The Commission also finds that there is strong evidence to support a finding that the defendant followed a course of action which effectively foreclosed the possibility of the petitioners ever obtaining a fair price for these lands.

As indicated in our findings of fact, defendant's officials, shortly before the trust sales were to commence, decided to reappraise these lands, they having been first appraised in 1861. The reappraisal job was assigned to one Edward Woolcott who undertook an admittedly cursory examination of the trust lands and a hasty review of the previous appraisal report. He filed his own report just four days prior to the October 15, 1864 sale. In his report Woolcott recommended reducing the initial appraisal figure for the 1st class lands of $2.75 per acre to $2.00 per acre, increasing the 2nd class lands from $1.10 per acre to $1.25 per acre, and making no change in the original $0.80 per acre appraisal of the 3rd class lands. He justified his substantial reduction in the value of the 1st class lands on the basis that emigration to Kansas had tapered off due to the Civil War. However, the Civil War was not going to last forever, in fact it was approaching its final stages when Woolcott filed his report. (The formal surrender of the Confederacy taking place April 9, 1965).

What should have raised a question in the minds of defendant's officials concerning the efficacy of Woolcott's appraisal report was his subsequent and successful participation in the bidding upon the lands he had just reduced in price. Although his acquisitions were relatively insignificant, the defendant made no effort to set them aside or review his appraisal of the 1st class lands.
Furthermore, we find that, contrary to the announced intentions of the Indian Office, the Woolcott appraisal was not made for the exclusive use of that office, but apparently its contents became known to most of the successful bidders. It is indeed remarkable how, in many cases, the accepted bids were identical with or within a few pennies of the minimum appraised values assigned the particular tracts of land.

We therefore conclude that defendant's use of this highly questionable and apparently well known Woolcott appraisal report as guide for the sale of the Sac and Fox lands, when coupled with the sealed bid method of disposal, effectively prevented the Sac and Fox from realizing an adequate consideration from the sale of their trust lands. Thus, defendant breached its assumed fiduciary obligation toward the Sac and Fox Indians under the 1859 Treaty by failing to take those reasonable and prudent measures to obtain the highest market price available. Accordingly, the Commission finds that the defendant is liable to the petitioners in the amount of $574,417.12, which is the difference between the 1864-65 fair market value of said trust lands, as determined by the Commission, and the actual proceeds realized from their sale.

As indicated earlier in this opinion, the petitioners have charged fraudulent conduct on the part of responsible government officials in connection with the 1864-65 sales. Specifically they alleged that these officials, along with certain private citizens, who are depicted as "insiders", and in a conspiratorial manner, effectively manipulated the bidding in order to acquire the bulk of the trust lands. According to the petitioners, these fraudulent acts, including alleged dealing in Sac and Fox "scrip", constituted
a breach of trust by the defendant. This being the case, the petitioners seek to impress a trust on the proceeds realized from the resale of these trust lands by three individual purchasers, namely, John McManus, Robert S. Stevens, and Hugh McCulloch.

Petitioners have argued strongly on this particular point throughout their proposed findings of fact and brief. We have therefore carefully considered all the evidence cited by the petitioners in support of their strong allegations, and have concluded that the petitioners have not carried the burden in proving a case. In fact, to sustain the petitioners' contentions it is necessary to make many broad assumptions, accept unsupported allegations as fact, and in general fill in the gaps.

With respect to the manipulation of the bidding the petitioners charge that bids as high as "... five to seven dollars per acre" were made by Kansas settlers and subsequently diverted by the responsible Government officials for their own personal gain. There is no evidence in the record to support this particular charge, but, because it was originally made by Governor Crawford of Kansas, his observations, according to the petitioners, "should be conclusive and binding on the defendant." (P. 102, Pet. Prop. Fdgs. Fact) This, of course, is no reason at all to accept the allegations as true.

An examination of all the bidding on the Sac and Fox trust lands shows very few bids in excess of the appraised values. The highest accepted bid was one for $4.00 per acre on a 40-acre tract. There were two bids at $3.00 per acre for 278.01 acres, one bid of $2.75 per acre for 80 acres, one bid of $2.51 per acre for 160 acres, 3 bids at $2.50 per acre for 560 acres, and two bids of $2.25 per acre covering 595.60 acres. In absence of any evidence
to the contrary it appears that only the highest bids made at the time of the 1864-65 sale were the ones that were finally accepted.

Of the three individual purchasers cited by the petitioners as being part of a sinister conspiracy, John McManus was by far the largest individual purchaser of the Sac and Fox lands. McManus was a private investor and developer of obvious means who exercised his privilege of bidding upon all the Sac and Fox trust lands he desired. He entered successful bids in his own name on 132,146.45 acres of land, and acquired an additional 10,619.95 acres on assignment. The fact that McManus may have had knowledge of the Government's appraisal of these lands is really immaterial since it apparently was common knowledge at the time of sale. There is no evidence that in making his successful bids upon such a large quantity of Sac and Fox trust lands, McManus conspired with any Government official or in any way violated the law. There is some evidence following the second sale, that he was willing to purchase some trust land that Commissioner Dole had acquired by assignment. Considering the enormous holdings that he already enjoyed, that fact standing alone, does not indict him as an active participant in a sinister conspiracy. The record is clear that McManus occupied no fiduciary relationship to the petitioners. He had nothing to do with the control, management, sale, and ultimate disposition of the Sac and Fox trust lands.

Robert S. Stevens was the private contractor who had been awarded the contract to construct the improvements on the Diminished Reserve. In order to secure Stevens for the improvements he had made on the Diminished Reserve, pending the sale of the trust lands, scrip was issued to him as evidence of the Sac and Fox indebtedness. Petitioners have made much ado about the subsequent market that was created for Sac and Fox
scrip.* The fact that Stevens may have sold some of his scrip to others, including Government officials at a discount, instead of waiting to redeem them at face value, does not in and of itself impute illegality or fraud. Likewise, the fact that such Sac and Fox scrip was used to pay for Sac and Fox lands does not indicate a fraud against the Indians, since this scrip represented the very indebtedness that was to be retired out of the proceeds from the sale of the trust lands. The Commission is of the opinion that the alleged dealings in Sac and Fox scrip are a collateral matter, and not germane to the real issues in this case.

Mr. Stevens acquired in his own name, or on assignment from others, some 52,689.31 acres of trust lands. Apart from a 480 acre assignment from Hugh McCulloch, none of his assignors were in the Government service at the time of the 1864-65 sales. Stevens ultimately sold some 26,897.81 acres of land between 1869 and 1889 for which he grossed $120,429.80 or $4.48 per acre.

Again, we find no evidence linking Robert Stevens with others, including Government officials, in any conspiracy or collusive action relative to the 1864-65 sales of the Sac and Fox trust lands.

Hugh McCulloch, at the time of the 1864-65 trust sales, was the Comptroller of the Currency. His Government position in no way connected him with the control, management, sale or disposal of the Sac and Fox trust lands. He, therefore, occupied no fiduciary position insofar as the Sac and Fox Indians were concerned. There being no conflict of interest, McCulloch was free, in the absence of any law to the contrary, to bid on

* Besides the "Stevens scrip", other scrip had already been issued to secure the debts of other creditors of the Sac and Fox. The scrip was known as "traders scrip."
the Sac and Fox trust lands. He did ultimately acquire the patents to 8,930.10 acres. He successfully bid on an additional 1919.52 acres, all of which he disposed of by assignment to others. According to the petitioners, McCulloch, for the years 1866 through 1869 sold 9,570.18 acres for $37,764.00 or at an average price of $3.95 per acre. As with Messrs. McManus, and Stevens, there is insufficient evidence to link Hugh McCulloch with any alleged illegal or dishonest act on the part of the responsible officials in connection with the 1864-65 trust sales that would make the defendant liable to the petitioners. Indeed we find all three purchasers to be bona fide purchasers for value in the 1864-65 trust sales.

Having determined the 1868 fair market value of the 132,718.80 acres of land ceded under the 1867 Treaty to be $464,515.80, we turn next to consideration agreed to be paid by the United States for said lands. Under the provisions of Articles 3, 7, and 10 of the 1867 Sac and Fox Treaty, the United States agreed to pay to the Sac and Fox Indians for the outright cession of the residue of their reservation lands a consideration calculated to be worth $204,677.81.

The Commission also finds that the proposed grant of a new reservation to the Sac and Fox Indians in the Indian Territory under Article 6 of the 1867 Treaty was not part of the consideration for the lands ceded thereunder, but was specifically granted "...in consideration of the improvements thereon." (Art. 6, 1867 Treaty) As pointed out in our findings, the defendant was well aware of the improvements that had been made on the Diminished Reserve following the conclusion of the 1859 Treaty, and it dealt with them separately
in the 1867 Treaty, both in the matter of their acquisition from the
Indians, and their ultimate sale. (Comm. Fdg. 41) As a result of the
separate treatment given to the improvements on the Diminished Reserve
under the 1867 Treaty, the Commission's determination of the 1868 fair
market value of lands ceded under the 1867 Treaty was made strictly on the
basis of it being unimproved land.

When $204,677.81 is measured against an 1868 fair market value of
$464,515.80 for these lands, it results in the United States agreeing to
pay an unconscionable consideration. Therefore, under the Indian Claims
Commission Act, the defendant is liable to the petitioners for the difference
between the 1868 fair market value and the consideration actually paid
by the defendant. The latter we have found to be in the sum of $139,524.38.

For the claims arising under the 1867 Treaty, the petitioners are entitled
to an award of $324,991.42 less any offsets. However, there are no
gratuitous offsets chargeable against any award made herein, said offsets
having been stipulated and set off against the judgment rendered in the
compromise settlement in Docket Nos. 138 and 232. The Iowa Tribe et al.,
v. United States, 15 Ind. Cl. Comm. 42.

Petitioners are therefore entitled to a final judgment against the
defendant encompassing all the claims arising under the Sac and Fox treaties
of October 1, 1859, 15 Stat. 467, and February 18, 1867, 15 Stat. 495, in
the sum of $899,408.54.

/s/ Arthur V. Watkins
Arthur V. Watkins
Commissioner

/s/ Wm. M. Holt
Wm. M. Holt, Commissioner

/s/ T. Harold Scott
T. Harold Scott, Commissioner