BEFORE THE INDIAN CLAIMS COMMISSION

THE PILLAGER BANDS OF CHIPPEWA INDIANS IN THE STATE OF MINNESOTA,

Plaintiffs,

v. Docket No. 144

THE UNITED STATES OF AMERICA,

Defendant.

Decided: May 20, 1969

Appearances:

Robert C. Bell, Jr., Attorney for Plaintiffs

Craig A. Decker, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for the defendant.

OPINION OF THE COMMISSION

Chairman Vance rendered the Opinion for the Commission.

This case is now before the Commission on plaintiffs' motion, filed on October 21, 1968, requesting the Commission to reconsider its Finding of Fact 12 (19 Ind. Cl. Comm. 500, 510) and the conclusion on the last page of its Opinion (19 Ind. Cl. Comm. 511, 513) to the effect that the proclamation date for the Treaty of August 21, 1847 (9 Stat. 908, 2 Kappler 569), namely April 7, 1848, will suffice as the date of taking of the lands involved.

Since plaintiffs have chosen to raise this issue for the first time by means of this motion to reconsider, the Commission feels it necessary to enter findings of fact and this brief opinion dealing specifically with the matters now presented. In his motion plaintiffs' attorney contended that the lands involved (Royce Area 269, Minnesota I) were not taken until February 16, 1911, and that the lands were "merely loaned and not taken" by the 1847 Treaty.

After defendant responded to the motion, plaintiffs' attorney then filed a 67 page brief "in support of motion for reconsideration," which brief set forth a new theory in support of his motion. In that brief it was conceded that the plaintiffs did "sell and cede" Royce Area 269 to the United States under the Treaty of August 21, 1847. However, Article 3 of that treaty provided:

> It is stipulated that the country hereby ceded shall be held by the United States as Indian land, until otherwise ordered by the President.

This, it is contended, established a trust, and the lands were not "taken" by the United States until February 16, 1911, when President Taft issued an Executive Order declaring that the country ceded by the 1847 Treaty was no longer to be held by the United States as Indian land.

We have considered all of plaintiffs' contentions, and we have concluded they are without merit. The Treaty of August 21, 1847, was a clear, unequivocal treaty of cession. By its express terms the lands herein involved, Royce Area 269, were "sold and ceded" to the United States by the illager Band of Chippewa Indians. The cession was in accordance with the

instructions given the treaty Commissioners. There was no indication that there was to be a "loan" or a conditional conveyance or a trust created for the Pillagers. In fact the stated purpose for securing the treaty was to remove the Chippewas to other lands still owned by them and to place the Menominees on the ceded lands. When the treaty was transmitted by Commissioner Verplank he referred to the "lands purchased." And there is no evidence that the Indians were led to believe otherwise at the time the treaty was executed.

Whatever may have been the precise purpose for inserting the language in Article 3 of the Treaty we are satisfied it was not intended to create any form of a "trust" for the plaintiffs. It possibly was included to indicate the then intended purpose of resettling other Indians on the ceded lands thereby retaining a "status" of "Indian land" for Royce Area 269. There would then be no opening of the area for white entry, and all federal regulation of liquor traffic in Indian country might be deemed to apply. Such a provision, albeit in more precise language, was commonly inserted in Indian treaties during this period. In a Sioux treaty it was provided, "The laws of the United States prohibiting the introduction and sale of spiritous liquors in the Indian country shall be in full force and effect throughout the territory hereby ceded and lying in Minnesota until otherwise directed by Congress or the President of the United States" Treaty of August 5, 1851, Article 6, 10 Stat. 954, 2 Kappler 591. But we see no real purpose in speculating on such matters since we have concluded that the provision in the 1847 Treaty was not intended to be and did not create

the "trust" as contended by plaintiffs.

And, as defendant has stated, if there were to be any "trust", it would have been for the Menominees, to whom Royce Area 269 was given by the Treaty of October 18, 1848. That treaty also included a phrase similar to language in Article 3 of the 1847 Treaty, to wit " . . . for a home, to be held as Indians' lands are held . . ." (emphasis added). The Menominees, however, refused to move to Minnesota. In 1854 the United States took a cession of the area from the Menominees and gave them in exchange a portion of their previously held land in Wisconsin. The lands in Royce Area 269 were then opened for white settlement and were in fact substantially cupied by whites.

Thereafter difficulties arose involving the sale of liquor in Minnesota. This gave rise in 1911 to the desirability of having Congress and/or the President modify the "stipulations" in various Indian treaties with respect to the introduction and sale of liquor in "Indian country." The 1847 Treaty was one involved in the series of Congressional and Presidential orders. The 1911 Executive Order providing that the country ceded (Royce Area 269) should no longer be held by the United States as Indian land was for the sole purpose of clarifying the application of laws relating to the introduction and sale of liquor in Indian country. There was no intent to clarify any supposed Indian right to the lands or to terminate any "trust for plaintiffs."

Plaintiffs have asserted that the placing of the Menominee Indians on yce Area 269 was intended to serve as a buffer between the hostile Sioux

and Chippewa Indians. Therefore, the plaintiffs contend they were aggrieved when this purpose was not achieved. However, it appears that when the United States found that its efforts to relocate the Menominees were not to be successful, it obtained a cession of the lands from the Menominee. And in 1855 a treaty was executed whereby the Pillagers were granted permanent reservations to the north, far removed from any Sioux, and the Pillagers were located on those reservations. In any event the plaintiffs had no right to have Menominees placed between them and the Sioux as a buffer. And if the plaintiffs did in fact agree to accept an unconscionably low consideration because of a desire to have friendly Menominees on the lands, they will now receive the full fair market value for the lands ceded (less the payments actually made by defendant). Thereby the plaintiffs' will be fully compensated for any overreaching which they may feel occurred at the treaty negotiations.

The cause of action in the subject case involves an alleged unconscionable consideration paid by the United States for the cession in 1847 by the Pillagers of Royce Area 269. The wrong which was done to plaintiffs (assuming that the consideration paid is found in fact to have been unconscionable) will entitle them to recover for the true fair market value of their lands as of the date of their taking. The cases in point on the date of such taking where a treaty of cession is involved are numerous and concordant. The effective date of a treaty of cession is the "date of taking", and that is the date upon which the ceded lands are to be valued for purposes of determining the extent of the Indians' recovery, if

..ny. Sac and Fox, et al., v. The United States, 7 Ind. Cl. Comm. 675, 712 (1959) aff'd 161 Ct. Cl. 189 (1963), cert. denied 375 U. S. 921; The Kikiallus Tribe of Indians v. The United States, 7 Ind. Cl. Comm. 456, 476 (1959); The Confederated Salish and Kootenai Tribes of the Flathead Reservation v. The United States, 8 Ind. Cl. Comm. 40, 75 (1959).

While the subject treaty by its terms was to have become effective as of its date of ratification, we have been unable to find an official recording of that date. Therefore, we have, in the absence of the recorded ratification date, designated the proclamation date of April 7, 1848, as the date of taking of the lands involved.

Plaintiffs' counsel has cited one case on which he relies as precedent for finding that there was a trust established by the 1847 Treaty. That ..se involved a cession by the Klamath and Moadoc Tribes and the Yahooskin Band of Snake Indians under the Treaty of October 14, 1864 (16 Stat. 707, 2 Kappler 865). Under the terms of that treaty, the Indians ceded lands in Oregon to the United States with a proviso which read:

> " . . . provided, that the following described tract, within the country ceded by this treaty, shall, until otherwise directed by the President of the United States be set apart as a residence for said Indians, and held and regarded as an Indian reservation."
> (Article 1)

The case relied upon by plaintiffs involved the title of a land company to a road grant of land within the described area. The court held that the quoted proviso in the article of cession in the treaty operated as a reservation of the rights held by the Indians at the time the treaty was entered into. California and Oregon Land Co. v. Rankin, ..al., 85 Fed. 94 (1898), motion for rehearing denied 87 Fed. 532.

The proviso is not the same as that in the treaty in question in this case. There was no trust question involved. We do not consider it any precedent in support of plaintiffs' contention.

Accordingly, we are denying the motion to reconsider, and our finding with respect to the date of taking (Finding No. 12) will stand. We are entering the following findings of fact for the sole reason that, since this issue was not previously raised, there were no findings deemed necessary with respect to the treaty instructions and purposes underlying the 1847 Treaty as well as the subsequent treaties and the 1911 Executive Order.

John T. Vance, Chairman

We concur:

Jerome K. Kuykendall, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner