BEFORE THE INDIAN CLAIMS COMMISSION

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, ET AL.,	)	
THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL.,	)	
Plaintiffs,	)	
v.	)	Docket No. 153
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: February 4, 1970

Appearances:

George B. Pletsch, Attorney for Plaintiffs Sac and Fox Tribe of Oklahoma, et al. Robert S. Hunt, Schiff, Hardin, Waite, Dorschel & Britton were on the briefs.

Lawrence C. Mills, Attorney for Plaintiffs Sac and Fox Tribe of the Mississippi in Iowa, et al. Robert J. Garrett, Mills and Garrett were on the briefs.

Stanford Clinton, Attorney for Plaintiffs Sac and Fox Tribe of Missouri, et al.

Nicholas Conover English, Attorney for Plaintiff Iowa Tribe of the Iowa Reservation in Oklahoma, et al., McCarter & English were on the briefs.

Brian Sullivan, Attorney for Plaintiffs Iowa Tribe of the Iowa Reservation in Kansas and Nebraska. Thomas Munson, Dykema, Wheat, Spencer, Goodnow & Trigg were on the briefs.

Ralph A. Barney and Craig A. Decker, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the Opinion of the Commission.

The Commission has before it the question of the damages to which the Iowa Nation and the Sac and Fox Nation are entitled. In an earlier decision, 7 Ind. Cl. Comm. 98 (1959), we held that the Iowa Nation had recognized title to a tract of 3,184,000 acres in the southwest portion of Royce 262 ("Area 262 South"), and that the Sac and Fox Nation had recognized title to the remaining 8,592,000 acres of the Cession ("Area 262 North"). The valuation date of the Iowa tract is February 28, 1839, and the valuation date of the Sac and Fox tract is February 15, 1843.

As evidence of the value of the land, defendant relied primarily upon the report and testimony of Dr. William G. Murray. Dr. Murray valued 262 South at 40¢ per acre and 262 North at 50¢ per acre. However, he did not in any way consider private resale transactions either in the subject tract or in adjacent areas in eastern Iowa or northern Missouri. Dr. Murray indicated that such resales were not considered because he was unable to determine the amount of improved lands which were involved in such transactions. While we realize that it is impossible to determine with exactness the extent of improvements, methods of estimating them are available. We feel that actual resale data in comparable areas at the same or comparable times are of such probative value that we can give little weight to an appraisal which ignores such data.

Plaintiffs introduced voluminous evidence on rate of sales of public lands, resales of lands in eastern Iowa and in the cession area, and on land speculation in Iowa. Much of this information was tabulated by electronic data processing techniques.

Plaintiffs have made several tabulations of resale values of lands in the cession area and in eastern Iowa and have made various adjustments to take account of partial financing transactions and of improvements. These resale prices of course reflect the prices of individual sales of small tracts and not the price which a purchaser would pay for the large acreage in either 262 North or 262 South. A purchaser would also consider the length of time which would elapse until he could resell the lands to settlers.

Resales of land in the cession area, we feel, do not carry great weight since they would not have been known to a purchaser on the valuation dates and because they reflect a land market with far different patterns of settlement than existed on the earlier valuation dates. The resales in eastern Iowa from 1838 to 1843 are, we feel, of more relevance. Many of them would have been known to a purchaser, particularly as of the valuation date of 262 North. They reflect the settlement pattern in Iowa at the relevant valuation dates and thus indicate the market expectations which a purchaser might reasonably have in regard to Cession 262. The differences between the lands in eastern Iowa and Cession 262 are relatively minor, and we have examined those differences in our findings of fact.

Certain of plaintiffs' data was based on resales of particular areas when 75% of the government lands in that area had passed into private hands. Plaintiffs concluded that it was at this point that a normal or bona fide market in lands, unaffected by large amounts of public lands available at the minimum statutory price of $1.25 per acre, existed. We have previously held that, as a matter of law, a proper valuation must consider the effect of competing public land sales in the area. Sac and Fox Tribe of Indians of Oklahoma v. United States, 20 Ind. Cl. Comm. 439, 444-445 (1969); see also, The Miami Tribe of Oklahoma et al., v. United States, 150 Ct. Cl. 725, 733, 281 F. 2d 202, 207 (1960), cert. denied, 366 U.S. 924 (1961).

We have found that there was a significant difference in the potential for rapid settlement between the Iowa tract in 1839 and the Sac and Fox tract in 1843. In 1839, the Sac and Fox still hunted throughout the entire cession area, and while their eventual removal from the area could no doubt be assumed, the date of such removal was in the uncertain future. The public lands in eastern Iowa had begun to be offered for sale only in 1838, and much remained to be offered, even in the southern portion of the area.

In 1843, the Sac and Fox cession finally opened a large area in central Iowa, although by the Treaty of October 11, 1842, 7 Stat. 596, the Sac and Fox retained the right to occupy the western portion of the Cession until 1845. Over half of the entire Cession 262 and most of 262 South were included in this western portion. By 1843 much more land in eastern Iowa had been offered and sold.

Although much land remained for sale in eastern Iowa as a whole, 67% of the land that had been offered in 79 southern townships had been entered. Except for the land remaining to be offered in Cession 244, the natural route of settlement along the Des Moines and other rivers of the southeast would mean that land in Cession 262 would be the next to come into heavy demand.

The potential demand for land as measured by the likely path of settlement and the barriers to acquisition have been of particular concern to the Commission in valuing lands adjacent to Cession 262. Thus in the Iowa Tribe et al. v. United States, 12 Ind. Cl. Comm. 487, 512-513 (1963) affirmed in part and reversed in part 179 Ct. Cl. 8, 383 F.2d 991 (1967), cert. denied, 389 U.S. 900 (1967), in valuing two tracts of land in northern Missouri which had been owned by the same tribes as are plaintiffs in the present case we found:

> "We have concluded that the two tracts are reasonably comparable as to their physical and topographical characteristics, including such things as soil quality, terrain, availability of land, water, timber, and minerals, and also as to climate and rainfall....
>
> "There is, however, a marked difference with respect to the location of each tract relative to the path and direction of settlement and population growth that developed in the Missouri territory in the early 1800's."

The Commission there found separate values for each tract though their valuation dates were identical.

We have also had occasion to value the lands in eastern Iowa, The Sac and Fox Tribe of Indians of Oklahoma et al., v. United States, 20 Ind. Cl. Comm. 439 (1969). There too considerable attention was given to patterns of population movement and the

likely speed of settlement. These factors have been important in determining separate values for separate areas on different valuation dates. Likewise in the present case we find that these factors call for assigning a different value to each of the two portions of Cession 262.

In our findings of fact we have examined the evidence relating to the quality of the land being valued, climate, resources, population movement, economic conditions, resales of resonably comparable lands and other factors. Based on all the evidence, we have concluded that the land in the Iowa portion of Cession 262 was worth $2,865,600 or an average of 90¢ per acre, on its valuation date, and the land in the Sac and Fox portion of Cession 262 was worth $12,028,800 or an average of $1.40 per acre, on its valuation date.

Also at issue in the present case are the amounts paid by the United States as consideration for Cession 262 under each of the three treaties involved. The amount paid under the Iowa Treaty of October 19, 1838, 7 Stat. 568, has been settled by our finding No. 52 in Docket Nos. 158, 209, 231, The Sac and Fox Tribe et al., v. United States, 20 Ind. Cl. Comm. 439, 501 (1969). Similarly that decision plus an earlier stipulation by the parties has determined the consideration under the Treaty with Sac and Fox of Missouri dated October 21, 1837, 7 Stat. 543. Since the parties' stipulation discussed in finding of fact No. 3[4] provides that $140,800 "is to be accredited to the Government", we have credited in this case in addition to the $85,025 allocable to Royce Cession 262, the $1,056

allocable to Royce Cession 226 but not credited to the government in other dockets because it was found that full value had been paid for Cession 226.

More difficult problems are raised by the Sac and Fox Treaty of October 11, 1842, 7 Stat. 596, Article II provides in part that the United States is "to pay annually to the Sac and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars". The government claims that it should be credited with the total of its payments from 1843 to 1909, i.e. $2,640,000, plus $800,000 paid to the Sac and Fox Indians in 1909 pursuant to Congressional authorization, 35 Stat. 781, 803 (1909).

The computation of deferred payments and annuities as consideration has been much litigated. Most recently, the Court of Claims has faced the issue in Pawnee Indian Tribe of Oklahoma et al., v. United States, 157 Ct. Cl. 134, 301 F. 2d. 667 (1962), cert. denied, 370 U.S. 918 (1962). The Court held that deferred payments will be credited to the government in full. It also held that in the case of a perpetual annuity "the United States should be credited with that amount which, had it been paid to the tribe, could have been invested by it to yield the amount of the yearly payments required by the treaty." 157 Ct. Cl. 134, 140, 301 F. 2d. 667, 670 (1962). In the present case the government attempts to characterize the annual payments of "an interest of five percentum upon the sum of eight hundred thousand dollars" under Article II of the treaty as deferred payments. We think that the history of the treaty clearly indicates

that this provision was meant to provide for a perpetual annuity. The letter of September 3, 1841, from the Secretary of War to Treaty Commissioners Chambers, Doty and Crawford (Pet. Ex. A-22) makes this clear. The Commissioners were instructed as follows:

> "It is not thought that very large annuities are a blessing to Indians.... It seems to me it would be good policy to keep down the annuities and agree, if necessary, to pay a considerable sum in cash. Whatever of the consideration assumes an Annuity shape ought to be the calculated interest on such portion of the consideration money as may be agreed on - the principal to be invested, or retained in the Treasury, and the interest appropriated annually, at the option of the Government. Their land in Iowa is computed a near ten millions of acres - the price of it may equal one million or even more dollars--but I am deeply impressed with the idea that large annuities as money payments are a disadvantage to unclaimed savages - a proper proportion and the largest of the annuities ought to be furnished in goods if they will assent to it."

The minutes of the treaty negotiations further indicate that a perpetual annuity was intended. Governor Chambers presented the government's offer as follows (Def. Ex. 256: Minutes of council commencing October 4, 1842):

> "Your Great Father has told me to say to you now that he still wishes to buy the whole of your country....
>
> "I will now tell you what he offered. He will give you one million dollars (one thousand boxes of money). Out of that he expects you to pay all the debts you now owe. He will put a part of it in such a situation that it will never lessen and give you so much a year through all time; that is he will give 5% a year or fifty dollars on each box."
>
> **********
>
> "The council having reassembled...Governor Chambers proceeded to read the articles of the treaty to the

> Indians present and to have every part of it carefully interpreted to them...[T]here was a blank left for the insertion of the aggregate amount of their debts.... There was also a blank for the amount of the national fund which they proposed to retain each year out of their annuities...." (Emphasis added).

Thus we conclude that the payments described in Article II of the Treaty of October 11, 1842, were intended to be a perpetual annutiy and that credit should be allowed for consideration of $800,000 by reason of this provision.

A number of the expenditures listed in the report of the General Accounting Office were for expenses which under the treaty were to be paid from the annuities. The government, of course, should not receive additional credit for these expenditures. Under Article III of the treaty, it is possible to imply an obligation for the government to pay for moving costs of the tribe. However the G.A.O. Report lumps such costs together with subsistence payments which under the treaty were to be retained out of amounts due the tribe. Thus even if we were to find that payment for moving the tribe was additional consideration, the government has not shown that any particular amount was allocable to such expenditures. Absent such a showing, we cannot award any amount as additional consideration for expenses of removal.

Finally, the government contends that the Kansas Reservation lands were additional consideration. With this we agree, and have indeed previously so held, Sac and Fox Tribe v. United States, 18 Ind. Cl. Comm. 558, 559 (1967) (Docket No. 219), finding of fact No. 3. We have found the value of this reservation to be $282,880.00.

As our findings of fact indicate, we have determined that the consideration paid the Iowas and the Sac and Fox Indians was unconscionable as that term is used in Section 2 of the Indian Claims Commission Act.

Thus we have concluded that the total value of the Iowa portion of Cession 262 as of February 28, 1839, was $2,865,600 and that the government is entitled to a credit for payment on the claim of $81,900. We have also concluded that the Sac and Fox portion of Cession 262 was worth $12,028,800 as of February 15, 1843. The government is entitled to a credit for payment under the Treaty of October 21, 1837, of $86,071 and under the Treaty of October 11, 1842, of $1,341,446.34.

By stipulations the parties have agreed to offsets applicable and all such offsets have either been applied in full in other cases or reserved for assertion in later cases. Thus a final judgment will be entered for the Iowa Nation for $2,783,700 and for the Sac and Fox Nation for $10,601,282.66.

John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarbrough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner