BEFORE THE INDIAN CLAIMS COMMISSION

THE STOCKBRIDGE MUNSEE COMMUNITY, THE STOCKBRIDGE TRIBE OF INDIANS AND THE MUNSEE TRIBE OF INDIANS BY ARVID E. MILLER AND FRED L. ROBINSON,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 300-A

Decided: April 28, 1971

Appearances:

Marvin S. Chapman, Attorney for Plaintiffs, Aaron, Aaron, Schimberg and Hess were on the brief.

M. Edward Bander, with whom was Mr. Acting Assistant Attorney General Walter Kuchel, Jr., Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This claim is brought under Clauses 3 and 5 of Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, and seeks additional compensation for lands in Madison and Oneida Counties, New York, acquired by the State of New York by means of fifteen separate transactions occurring between 1818 and 1847. Plaintiffs contend that by its passage of the Trade and Intercourse Act of 1790, 1 Stat. 137, the United States assumed an affirmative obligation to protect the property of Indian tribes, including that of the Stockbridge Tribe of Indians, and to assure that

Indian tribes were dealt with fairly by third parties and received conscionable consideration when disposing of their lands. Plaintiffs claim that they received unconscionable consideration for the sale of their lands to the State of New York and that the defendant is therefore liable for failing to fulfill its obligations under the Trade and Intercourse Act. For the reasons indicated below, we hold that if the plaintiff did not receive conscionable consideration for their lands the defendant is liable under the Indian Claims Commission Act.

Late in the 18th century, the Oneida Nation invited the Stockbridge Tribe, predecessor in interest to the Stockbridge Munsee Community, to move from its ancestral home in Massachusetts and settle on a tract of land in New York State. Later, by treaty entered into with the Oneida Nation in 1788, and by an act of the legislature in 1813, the State of New York acknowledged that the Stockbridge Tribe had a permanent right to use and enjoy the six mile square tract of land, known as New Stockbridge, on which it had settled. By a series of so-called "treaties" with the State of New York, entered into between 1818 and 1847, the Stockbridge Tribe relinquished its interest in New Stockbridge. These transactions are the subject matter of plaintiffs' claim.

The Indian Claims Commission Act states that this Commission shall hear and decide "claims against the United States" by Indian tribes or groups. It follows that this Commission cannot redress all wrongs committed against an Indian tribe but only those for which the United States can be held responsible. Six Nations v. United States, 173 Ct. Cl. 899, 904 (1965). Both the plaintiffs and the defendant agree, and we

have so found, that the United States did not participate directly in any of the transactions by which New York State acquired plaintiffs' land. The issue before this Commission, therefore, is whether, despite this lack of participation, the United States can be held responsible for the failure of New York State to pay conscionable consideration to plaintiff in exchange for their interest in New Stockbridge. 1/

It is no longer open to question that under the Indian Claims Commission Act the United States may be held liable for the acts of others. The Court of Claims has suggested two possible bases for such a holding. "The required nexus for liability could rest upon the Government's 'true concert, partnership, or control' with, or of, the party dealing with the Indians . . ., or an established special relationship between the Government and claimant Indians affecting the controverted subject matter." Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 502 (1967). It is undisputed that the United States neither exercised any control of, nor was in concert or partnership with the State of New York with regard to the purchase of New Stockbridge. However, it is clear that there did exist between the United States and the Stockbridge Tribe an established special relationship affecting Stockbridge land. This relationship was established by means of Congress' enactment of the Trade and Intercourse Act. The Court of Claims has held "that the Trade and Intercourse Act

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1/ For the purposes of this discussion, the Commission will assume that the plaintiffs are able to prove that they did not receive conscionable consideration for New Stockbridge. This assumption, however, does not imply a finding by the Commission that the Stockbridge did not in fact receive conscionable consideration from New York.

created a special relationship between the Federal Government and those Indians covered by the legislation, with respect to the disposition of their lands, and that the United States assumed a special responsibility to protect and guard against unfair treatment in such transactions." Seneca Nation of Indians v. United States, 173 Ct. Cl. 917, 925 (1965). It would appear that under the criteria set out in Lipan Apache, supra, the Trade and Intercourse Act would be a sufficient basis for finding Government liability in this case. The defendant, however, presents two arguments which it claims precludes its liability in this case.

The defendant first argues that it can be liable under the Trade and Intercourse Act only if it actually participated in the negotiations leading up to the transaction complained of, or expressly approved of the transaction. This contention of the defendant is clearly without merit. In Seneca Nation of Indians v. United States, 173 Ct. Cl. 917 (1965), the Court of Claims discussed the nature of the relationship created by the Trade and Intercourse Act:

> This responsibility was not merely to be present at the negotiations or to prevent actual fraud, deception, or duress alone; improvidence, unfairness, the receipt of an unconscionable consideration would likewise be of federal concern. . . . The concept is obviously one of full fiduciary responsibility, not solely of traditional market-place morals. When the Federal Government undertakes an "obligation of trust" toward an Indian tribe or group, as it has in the Intercourse Act, the obligation is "of the highest responsibility and trust," not that of "a mere contracting party" or a better-business-bureau. Cf. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942).
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> It necessarily follows, we think, that wherever this Act applies the United States is liable, under the Indian Claims Commission Act for the receipt by the Indians of an unconscionably low consideration. * * * (173 Ct. Cl. at 925-26).

Under the Trade and Intercourse Act the United States has the obligation to assure that an Indian Tribe receives conscionable consideration for its land. Defendant cannot avoid liability by claiming it did not participate in the transactions with New York. Under the Trade and Intercourse Act it had the duty to participate in such transactions and to protect plaintiffs' interests. A fiduciary can be held liable not only for taking improper action with regard to the property in its care, but also for failing to act when action is called for. See, e.g., Quinn v. Post, 262 F. Supp. 598, 603 (S.D.N.Y. 1967); Schuster v. North Am. Mort. Loan Co., 139 Ohio St. 315, 40 N.E. 2d 130, 142 (1942); Chicago Title & Trust Co. v. Chief Wash Co., 368 Ill. 146, 13 N.E. 2d 153, 157 (1938); 4 J. Pomeroy, A Treatise on Equity Jurisprudence § 1079 (S. Symons ed. 1941); 3 A. Scott, The Law of Trusts § 201, at 1650 (3d ed. 1967). That the court in Seneca Nation intended to find the United States liable under the Trade and Intercourse Act whether or not it actually participated in the transaction is made clear in Six Nations v. United States, 173 Ct. Cl. 899 (1965). In rejecting claimants' contention in that case the court stated:

> At its broadest, their position seems to be that the central union was, even in 1784, a fiduciary toward these Indians, with the affirmative obligation to prevent an unequal or unfair exchange of their lands, even though the United States may have played no material role in the transaction. In a companion case (Part II of the opinion in Seneca Nation v. United States, Appeal No. 14-63, decided today, post 917, 921) we hold that, in and after 1790, the Federal Government did assume such a responsibility, but we discern no basis for imposing that status on the United States, as of 1784, with respect to lands within the states. * * * (173 Ct. Cl. at 904, 905. Emphasis added).

Thus, the responsibility assumed by the United States under the Trade and Intercourse Act was that of "a fiduciary toward these Indians, with the affirmative obligation to prevent an unequal or unfair exchange of their lands, even though the United States may have played no material role in the transaction." Id. This Commission has already held that the United States can be held liable under the Trade and Intercourse Act even when it did not participate in the transaction complained of. See Seneca Nation of Indians v. United States, Docket Nos. 342-B, 342-C, 342-D, and 368, 20 Ind. Cl. 177, 184, 208 (1968). It follows that we must reject defendant's contention.

Defendant's second contention is that the Trade and Intercourse Act does not apply to transactions between the State of New York and its resident Indians. Therefore, argues defendant, the United States had no power to supervise the subject transactions and should not be held liable for any failure of plaintiff to receive conscionable consideration. Defendant's argument is based on the court's dicta in the Seneca Nation case. The Court of Claims there said:

> Some relatively recent decisions, at war with the circuits' rulings in the Tuscarora litigation, suggest that the legislation is inapplicable to purchases or condemnations by the State of New York itself . . . . (173 Ct. Cl. at 927)

The court cited three cases for this proposition: United States v. Franklin County, 50 F. Supp. 152 (N.D.N.Y. 1943); United States v. Cattaraugus County, 71 F. Supp. 413 (W.D.N.Y. 1947), and St. Regis Tribe of Mohawk Indians v. State of New York, 5 N.Y. 2d 24, 152 N.E. 2d 411 (1958 cert. denied, 359 U.S. 910 (1959). Initially, it must be recognized that

the Court of Claims did not express any adherence to the rule expressed in these cases, the issue of purchases by a state not being before it. The court merely stated that there were two conflicting rules; one that held that the Trade and Intercourse Act was not applicable to purchases by New York, and one, pronounced by the Courts of Appeals for the Second Circuit (Tuscarora Nation of Indians v. Power Authority, 257 F. 2d 885 (2d Cir.), cert. denied, 358 U.S. 841 (1958), appeal dismissed, 362 U.S. 608 (1960)) and the District of Columbia Circuit (Tuscarora Indian Nation v. F. P. C., 265 F. 2d 338 (D. C. Cir. 1958), rev'd on other grounds, 362 U.S. 99 (1960)), that the Intercourse Act applied to purchases and condemnations by the states. Because the court did not adopt either of these views, we are free to rule on this issue.

This issue has been considered by the Commission twice before. In Seneca Nation of Indians v. United States, Docket No. 342-H, 12 Ind. Cl. Comm. 552 (1963), aff'd on other grounds, 173 Ct. Cl. 912 (1965), we held that the provisions of the Trade and Intercourse Act did not apply to purchases or condemnations by the State of New York. In that opinion the Commission relied upon the holdings in United States v. Franklin County, supra, and St. Regis Tribe of Mohawk Indians v. State of New York, supra.[2/] On the other hand, in Seneca Nation of Indians v. United States,

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2/ In its opinion affirming the decision of the Commission, the Court of Claims noted that the Commission had disallowed plaintiffs' contention regarding the alleged violation by the United States of the Trade and Intercourse Act "on the broad and controversial ground that the Trade and Intercourse Act is not applicable to transfers to the State of New York." 173 Ct. Cl. at 915. The Court stated that it was affirming the Commission's decision on two narrower footings without reaching the Commission's views concerning the applicability of the Trade and Intercourse Act to the taking of Seneca lands by New York State. Thus, although the Court of Claims affirmed the result reached by the Commission in Docket No. 342-H, it did not affirm the Commission's reasons for reaching that result.

Docket Nos. 342-B, 342-C, 342-D, and 368, 20 Ind. Cl. Comm. 177 (1968), we held the United States potentially liable on two purchases of land by the State of New York. With respect to the Trade and Intercourse Act, that opinion stated:

> In testing whether the United States is responsible in damages under the Indian Claims Commission Act, it is of no concern whether the Indians' vendee was a private party, a State, or what actual powers the United States may have possessed or exercised or failed to exercise in supervising a particular sale. The United States has made itself responsible under the Indian Claims Commission Act for any failure of the Indians to receive a conscionable consideration for their lands. (Id. at 182.)

It would appear that the second of these two Seneca decisions impliedly overruled the first. However, an examination of the briefs in that case indicates that the defendant did not present any argument on the applicability of the Trade and Intercourse Act to purchases by the State of New York. Because the Government has briefed the question in this docket, we feel constrained to reexamine the authorities and reach a conclusion that, hopefully, will end the ambiguity in this area of the law.

In its brief defendant relies primarily upon the opinion of the United States District Court for the Northern District of New York in United States v. Franklin County, supra, for its contention that transactions between the State of New York and its resident Indians are exempt from the provisions of the Trade and Intercourse Act. In Franklin County the issue was whether certain purchases by the State of New York from the St. Regis Indians were void because they were not approved by the United States as required by the Trade and Intercourse Act. The district court found these transactions to be valid despite the absence of federal approval. The court stated that

a change in language appearing in the second and subsequent enactments of the Intercourse Act showed a congressional intent to make exempt from the provisions of the act purchases by a state which had the right of preemption. We are unable to agree with this conclusion. As originally enacted the relevant section of the act read as follows:

> And be it enacted and declared, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States. (Act of July 22, 1790, ch. 33, §4, 1 Stat. 137, 138).

It is clear, of course, that under this first version of the act purchases by any state, including New York State, were not made exempt. In 1793, a new version of the provision was enacted as follows:

> And be it further enacted, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; . . . Provided nevertheless, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty. (Act of March 1, 1793, ch. 19, §8, 1 Stat. 329, 330).

The court in Franklin County reasoned that the absence from the second version of the act of the language referring to states with or without the right of preemption indicated that Congress no longer intended the act to apply to purchases by the states. The language of the declaration in the first sentence of this version, however, is absolute. It states that no

purchase of Indian lands is valid unless made by and with the approval of the Federal Government. This declaration does not allow for any exemptions. It is only the proviso which allows state participation and its provisions are quite specific. The state may deal with the Indians only at a treaty held under the authority of the United States, and only in the presence of and with the approval of the United States commissioner. The mere presence of the proviso in the act makes the construction by the court in Franklin County untenable. If purchases by the states were to be exempt from the provisions of the act, there would be no need for the proviso. We think that on its face the act was clearly meant to apply to all purchases of interests in land from the Indians whether the purchaser was an individual or a state. It follows, therefore, that the defendant can be liable under the provisions of the Indian Claims Commission Act and the Trade and Intercourse Act for the receipt by an Indian tribe of unconscionable consideration from New York State in exchange for its lands. To the extent that Seneca Nation v. United States, Docket No. 342-H, 12 Ind. Cl. Comm. 552 (1963), is in disagreement with this ruling, it is overruled.

One further question needs to be dealt with. In their proposed findings of fact and brief, plaintiffs attempted to establish that they had reservation title to New Stockbridge, alleging that the United States had recognized their title under the Treaty of November 11, 1794, 7 Stat. 44. The defendant objects to a finding of United States recognition of Stockbridge title. It is unnecessary for us to resolve this conflict, however. In our finding number 3 we have found that the Stockbridge had

a compensable property interest in New Stockbridge. We hold that this was sufficient interest in the land to require federal protection under the Trade and Intercourse Act. In Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960), the Supreme Court stated that "[t]he obvious purpose of that statute [Trade and Intercourse Act] is to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them . . . ." Id. at 119, emphasis added. Such language indicates that there is no requirement that the Indian tribe have recognized title to the land. In Tuscarora Indian Nation v. United States, 23 Ind. Cl. Comm. 140 (1970), we held that the conversion of a possibility of a reverter into an absolute reversion was a sufficient taking of interest as to bring the Trade and Intercourse Act into play. In short, the Trade and Intercourse Act applies regardless of the nature or extent of the Indians' title in the land, so long as the tribe has some property right in the land. Cf. 18 Op. Atty. Gen. 235 (1885). Nor does it matter how the tribe may have obtained its interest in the land. See Tuscarora Indian Nation v. F. P. C., 265 F. 2d 338, 339 (D. C. Cir. 1958), rev'd on other grounds, 362 U.S. 99 (1960). The Stockbridges received an interest in New Stockbridge from the State of New York under a treaty entered into September 22, 1788, and under a law of the New York State Assembly enacted April 10, 1813. The interest created was a right to permanent use and occupancy. Notwithstanding, defendant's contention that the Stockbridge had a very limited and restricted "title", it is clear that their interest

in New Stockbridge was no less compensable than is the interest possessed by a tribe holding land under aboriginal title or by federally recognized title, and was an interest that the United States was under a duty to protect under the Trade and Intercourse Act.

For the reasons above stated we hold that the United States will be liable under the Indian Claims Commission Act if the Stockbridges received less than a conscionable consideration for the lands they transferred to New York. Questions of value and consideration will be determined after further proceedings.

Margaret H. Pierce, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner