BEFORE THE INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA,	)	
THE SAC AND FOX TRIBE OF MISSOURI,	)	
THE SAC AND FOX TRIBE OF MISSISSIPPI IN IOWA,	)	
EDWARD MACK, ET AL., EX REL., THE SAC AND FOX OF THE MISSISSIPPI AND THE SAC AND FOX NATION OF INDIANS OCCUPYING A RESERVATION IN THE TERRITORY OF OKLAHOMA, AND	)	Docket No. 95
CHARLES W. ROBIDOUX, ET AL., EX REL., THE CONFEDERATED OR UNITED TRIBES OF SAC AND FOX INDIANS,	)	
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: December 27, 1971

Appearances:

George B. Pletsch, Attorney of Record
for the Oklahoma Sac and Fox.

Lawrence C. Mills, Attorney of Record
for the Iowa Sac and Fox.

Stanford Clinton, Attorney of Record
for the Missouri Sac and Fox.

Robert J. Garrett was on the briefs;
Louis L. Rochmes, of counsel.

James E. Clubb, with whom was Mr. Assistant
Attorney General Shiro Kashiwa, Attorneys
for the Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

This suit was brought by Sac and Fox Indians in Iowa, Missouri, and Oklahoma to compel the defendant to account for various sums which the plaintiffs allege were due, but not paid, under various treaties and acts of Congress. The collective claim is brought under Clause 1 of Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049, 1050).

The plaintiffs collectively contend that they received less than their due in two categories of treaties and acts: (1) Where the Congress failed to appropriate; and (2) Where the Congress did appropriate but payment of the appropriations was frustrated by action within the executive branch of the Government (Pl. Br., p. 37). The defendant would have the Commission consider separately those situations where treaty obligations were affected by the defendant's change in 1843 from a calendar year system to a July 1 fiscal year system (Def. Br., p. 3). Additionally, the defendant contends that this Commission should take judicial notice of the very common practice of appropriated money being returned to surplus each year, to the end that the United States should not be required to account for surplus appropriations (Def. Br., p. 8).

Respecting the plaintiffs' second contention (above) and the defendant's point that appropriated money is frequently returned to surplus, the plaintiffs contend that United States v. Commissioners

of the Sinking Fund of the City of Louisville, 169 U.S. 249 (1893), is controlling. The Commission views the cited decision as inapposite. The question whether Indians can compel the government to pay to them monies where the appropriation was in excess of the amount required to carry out the provisions of the treaty has been determined. In Shoshone Tribe of Indians of the Wind River Reservation v. United States 82 Ct. Cl. 23 (1935), the plaintiff sought to recover the difference between the amounts appropriated and the amounts expended to satisfy treaty obligations. Under the treaty, the defendant did not undertake to expend sums certain for the various items and there was no contention that the treaty obligations were less than wholly satisfied. The court observed (id., at 86):

> . . . The fact that it appropriated more money for the purpose of carrying out the provisions of the treaty of 1868 than was found necessary to be disbursed for the articles, and facilities and employees agreed to be furnished in the treaty does not entitle the plaintiff to recover any portion of the unexpended balance appropriated for these various purposes unless it is shown that there was a failure on the part of the United States to furnish the provisions, facilities, or employees specified in the treaty. Even in the latter event it would be necessary for plaintiff to show wherein the United States had failed to fulfill its obligation under the treaty.

In Seminole Nation v. United States, 316 U.S. 286 (1942), aff'g in part, remanding in part, 93 Ct. Cl. 500 (1941), the Court affirmed the lower court's rejection of a claim for the difference between $10,000 appropriated to construct a building "at an expense not exceeding ten thousand dollars" and the amount actually expended. The

Court observed (316 U.S. 286, at 293):

> . . . Since the government's promise was not to expend $10,000, but to erect suitable buildings at a cost not in excess of $10,000, it follows that there was no violation of the treaty provision, and hence no right of recovery.

This Commission views the cited Shoshone and Seminole decisions as controlling. Hence, the plaintiffs may not recover, in this accounting action, the difference between sums actually appropriated and lesser sums actually expended to accomplish the aims for which the appropriations were made, in the absence of proof that the treaty obligations were less than wholly satisfied.

The other major issue is whether the plaintiffs may secure an accounting for sums which were due under a treaty but not appropriated, either wholly or in part. The failure of Congress to make an appropriation to pay compensation provided for by statute does not affect the right to recover the compensation so provided. Leonard v. United States, 80 Ct. Cl. 147, 150 (1935); treaties have the same stature as acts of Congress. They are both the "Supreme law of the land." Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 10 (1936); Whitney v. Robertson, 124 U.S. 190, 194 (1888); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 196 (1876). Hence, even though Congress did not appropriate enough money to satisfy a treaty obligation, or did not appropriate any money to satisfy a treaty obligation, nevertheless these plaintiffs are entitled to a judgment in this accounting suit for any and all sums which would have been their due had Congress completely funded its treaty obligations with them.

The Commission notes that while the plaintiffs' proposed Finding No. 3 relates to monetary deficiencies in an educational fund, the parties' arguments on this point seem to center upon whether a want of education of children is actionable (cf. Def. Br., p. 53; Pl. Rep. Br., p. 5). In the context of the case at bar, the Commission views this point as no more than a demand for accounting for an ascertainable sum, and intimates no view concerning whether there was a consequent want of education or, if there was, whether that want is actionable. The Commission also notes, in passing, plaintiffs' proposed Finding No. 18, and the second half of the plaintiffs' proposed conclusory Finding No. 19, to the effect that the plaintiffs are entitled to a judgment which would extract from the Treasury of the United States some $68,089.43 which, as of June 30, 1951, stood to the plaintiffs' credit on the books of the United States. Such sums owned by the plaintiffs which are in the defendant's custody are beyond the reach of the jurisdiction of this Commission.

The only remaining issue not falling under any of the principles set out above concerns 17,000 acres of land which, the plaintiffs contend, were owed them under article 2 of the treaty of September 17, 1836 (7 Stat. 511). The defendant pointed out that these 17,000 acres were involved in, and compensated for by, the judgment in Sac and Fox Tribe v. United States, Docket 195, 13 Ind. Cl. Comm. 295 (1964). In that decision, the Commission did determine as a fact (Find. No. 4, id., at 296) that the defendant added 17,000 acres to make up the deficiency in acreage

uncovered by survey. The Commission notes that the plaintiffs in their reply brief did not pursue this issue. We conclude that the plaintiffs have conceded that their claim for a deficiency of 17,000 acres is without merit. The Commission agrees.

In view of the several foregoing discussions, the Commission has this date entered a number of findings of fact which reflect the dollar deficiencies and overpayments between the parties under the treaties at issue, plus a conclusory finding establishing the sum due on balance after these various deficiencies and overpayments are reconciled.

This suit will proceed to a determination of offsets, if any, to be deducted from the gross award herein.

Brantley Blue
Brantley Blue, Commissioner

We Concur:

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Margaret H. Pierce
Margaret H. Pierce, Commissioner

Commissioner Vance dissenting:

The burden of proof must be on defendant to show that it satisfied its obligation under the treaty. It makes no more sense to place this burden on the plaintiff than it would were the law to place the burden of showing neglect on an infant in a proceeding for child neglect.

Here the defendant failed utterly to prove that it fulfilled its obligation under the treaty and specifically its responsibility as a fiduciary.

Judgment should be entered in favor of the plaintiff in the amount of the prayer, $293,878.

John T. Vance, Commissioner