BEFORE THE INDIAN CLAIMS COMMISSION

THE SHOSHONE TRIBE OF INDIANS OF THE WIND RIVER RESERVATION, WYOMING, Petitioner,	)	
v.	)	Docket No. 63
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: August 20, 1954.

Appearances:

George M. Tunison,
Attorney for Petitioner.

Donald R. Marshall, with
whom was Mr. Assistant
Attorney General
Perry W. Morton,
Attorneys for Defendant.

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The claim here under consideration is for the value of 700,642 acres of land located in what was then the Territory of Wyoming and which was ceded by the Shoshone to the United States by the Agreement of September 26, 1872, 18 Stat. 291. The ceded area is described in Finding 3(a) and was part of a reservation comprising 3,054,182 acres ceded the Shoshone by the Treaty of July 3, 1868, 15 Stat. 673.

The claim is founded upon the charge that the price paid the Indians for the cession was so grossly inadequate as to amount to an unconscionable consideration. There is no dispute that the consideration agreed to and paid by defendant to the Shoshone was $27,500, or less than 4 cents per acre.

In substance, the defendant's answer is a denial of the allegations of the amended petition essential to recovery; affirmative allegations to the effect that the Treaty of July 3, 1868, was not intended to cede all of the 700,642 acres claimed by the 1872 cession but (according to the defendant's brief and its proposed findings of fact) only 500,642 acres; that the consideration paid was in compromise and settlement of the petitioner's rights to said land and that it was not unconscionable.

Area Ceded in 1872

The defendant agrees that there were 700,642 acres described in the 1872 agreement (p. 179 of Government's brief). This area lies between the east-west line described in the 1872 agreement and the southerly line of the reservation fixed by the Treaty of July 3, 1868, 15 Stat. 673. There is no contention as to the identity or location of the boundary line of the reservation extending south of the termini of the east-west line referred to above. This line was definitely described in the 1868 treaty and was not changed in any way by the 1872 agreement.

There is some evidence to the effect that it was not intended by the 1868 treaty to include an undefined area lying north of the described southerly line of the reservation, roughly, the lands south

and east of Beaver, Twin and Cottonwood creeks and the gold-bearing lands. We deem it unnecessary to analyze this evidence for the fact remains that the boundary in question was definitely located by the 1868 treaty and was never disputed by the Government. On the contrary, the Government confirmed its accuracy by recitals contained in the 1872 agreement, next to be referred to.

The 1872 agreement expressly referred to the boundaries of the reservation as delimited by the 1868 treaty by setting them out exactly as stated in that treaty, and following this boundary description, the agreement reads —

> "And whereas, previous to and since the date of said treaty, mines have been discovered, and citizens of the United States have made improvements within the limits of said reservation, and it is deemed advisable for the settlement of all difficulty between the parties arising in consequence of said occupancy, to change the southern limit of said reservation: * * *"

Here is shown a desire on the part of the Government to settle the difficulties between the Shoshone and the Government arising from the occupation by the whites of lands "within the limits of said reservation." Plainly, the reservation referred to was that described in the 1868 treaty and again in the 1872 agreement. Here is a clear recognition of the Shoshone rights to an area which had been unlawfully occupied by unauthorized white miners and settlers, both before and after the 1868 treaty. One would hardly use such language in a solemn agreement if it was not intended to recognize the Indian rights to the lands purchased. We see no alternative but to hold that the Shoshone had Indian title to the entire 700,642 acres ceded by the 1872 agreement.

Date of Purchase

The agreement by which the Government obtained the relinquishment of the Shoshone lands was consummated on September 26, 1872. It contained a clause (Art. IV) that it was made subject to the approval of the President and the ratification of the Congress. The act ratifying the agreement was not passed by the Congress and approved by the President until December 15, 1874, over two years after the conclusion of the agreement.

The Shoshone would have us fix the value of the ceded lands as of December 15, 1874. It has been held by the Court of Claims that an Indian treaty, in the absence of a clause fixing a different time, becomes effective as of its date although ratified at a much later date. Roy vs. United States, 45 C. Cls. 177, 183; cf. Bush v. United States, 29 C. Cls. 144, 147. But the agreement here was made after the treaty system was abolished. Beam v. United States, 43 C. Cls. 61. We deem it immaterial which date is considered because the parties concede that there was no material change in the value of the Brunot land between September, 1872 and December 1874.

Value of the Brunot Land.

In view of the fact that we have made findings in considerable detail as to the factors affecting value, such as history, settlement, climate, population, transportation, natural resources, sales of both public and privately-owned lands in or near the Brunot land, and the like, we shall discuss rather generally, for the most part, and in a limited way the basis for our conclusion as to value.

The witnesses for the parties have such widely diverent views as to the value of the lands as of September 26, 1872, even though they were based entirely on acceptable theories, cannot be reconciled. Their testimony varies from a nominal value of not exceeding ten cents per acre, fixed by the Government's witnesses, to $2.50 per acre, (apparently not including oil) fixed by the petitioner's witnesses. It must be said, however, that the witnesses in this case were faced with the problem of trying to arrive at a valuation of lands for which in 1872 there were no comparable land sales in Wyoming at or near the valuation date. There was no demand for these lands except by the handful of hardy settlers already upon the Brunot lands. Indian hostilities until 1876 discouraged settlement in Wyoming north of the railroad. Wyoming was a "free range" state and as a result the early disposal of public domain lands therein was slow and offers little insight into the market value of lands. The witnesses, therefore, being without primary evidence as to value were forced to unearth secondary material which might tend to shed light on the question of value. The record is voluminous, consisting of historical material with respect to the growth and development of Wyoming; the disposal of public lands within the area and the state; contemporaneous accounts of the early views of the country; adaptability and utilization of the Brunot lands and surrounding areas; and various and sundry documents pertaining to every item that was thought to have a bearing on value, including the history of minerals in the area and the demand for the same.

Much of the testimony and material offered by the Shoshone has

been stremuously objected to by the Government on grounds involving the qualifications of the witnesses and the methods used by them in arriving at a value and we must admit there is a substantial basis for many of the objections, however, the witnesses have assembled facts which we deem helpful in arriving at a value without giving much, if any, credence to the value they fixed as of 1872, for such values are shown to be, and in some cases admittedly, speculative and arbitrary and based upon erroneous theories. Furthermore, some of the factors relied upon by the witnesses as having a bearing upon the price a prospective purchaser would pay for the land under the conditions existing in 1872, are unrealistic and of little help to support the $2.50 per acre price fixed by the witness Fuller. It would be a laborious and non-rewarding task to analyze each factor Mr. Fuller considered as affecting the value because, as we have said above, there is evidence in the record, much of which was assembled by Mr. Fuller, upon which to reach the determination of value.

One factor largely relied upon by the Shoshone as fixing a high value of the Brunot lands was the existence of oil in part thereof evidenced by an oil seep or spring known to and to some extent used by the early settlers for lubrication purposes and treatment of sores on horses' backs and some human ailments. They offered Thomas S. Harrison, who testified as an expert. Mr. Harrison's testimony was presented to show an "oil value" for the Brunot lands as of 1874. To do this he made his appraisal as of 1949. He assumed there had been no production of oil. In order to arrive at the value of the oil in

place he took the past production figures plus the estimated future production. Totaling these he had what he called the ultimate (total) reserve. Then to reach a gross ultimate value he multiplied the ultimate reserve figure by the going price for crude oil on December 31, 1949 — that is, $1.40 per barrel. From this gross ultimate value he deducted the royalty (12½%), the cost of well drilled or to be drilled and the "lifting costs." This gave him what he called the net ultimate value. To reach Present Worth value he reduced the net ultimate value to 60%. Then he determined the Indian royalty on the gross value and he reduced the royalty for Present Worth to 60% and to secure an equitable and fair value of the amount as of the date of the Brunot cession, 1872, he further reduced the figure by 50 per cent. The net value of the Indian royalty as of 1872 he concluded was $5,535,170.

On cross-examination, he testified he had no knowledge of the cost of production in 1872; or of the price of oil in the area in 1872, or of transportation rates at that date, or of the demand for oil in the early days. He stated that it was correct to say that his approach in this appraisal takes the present value and discounts it back to 1872, and that his report includes oil and gas fields not known in 1872. He testified he did not think any one else figuring the reserve would arrive at the same figure and that in 1872 no one could have determined the reserve; that the presence of an oil seep does not conclusively show there is oil in commercial quantities; that he considered wells discovered after 1872 in reaching his oil reserve total figures; that although the price per barrel of oil sold at a much lower price than $1.40 he used the $1.40

figure since he felt if the Indians still had the land they would probably have received that amount; that he agreed with Commissioner Holt that his method of finding a value in 1872 was arbitrary; and that he was assuming a potential speculative value in 1872.

Admittedly, the witness' method of valuing the oil as of 1872 is arbitrary. It is also speculative and based upon improper factors such as considering oil fields discovered after the date of taking. cf. Warm Springs Tribe v. U. S., 103 C. Cls. 741.

The only question with respect to the presence of coal or oil or other minerals on the Brunot land that is pertinent is what weight should be given to evidence of their presence thereon as of the date of the cession. Such evidence as to quantity and quality of these resources may be considered only in so far as they reflect the fair market value of the property in 1872, which necessarily depended upon whether the land was reasonably suited for their exploitation and whether a market existed for them or was so reasonably probable as to affect the market value of the land at the time of the cession. U. S. v. 620 Acres of land, 101 F. Supp. 686.

In Cameron Development Co. v. U. S., 145 F. 2d 209, testimony that deposits of shell marl greatly enhanced the property was properly stricken when no evidence was offered to prove that any market existed for shell marl or was reasonably likely to exist in the near future at which it could be profitably sold, or that any purchaser was willing to pay any more for the land because of its shell deposits. To warrant admission of testimony as to value of land for purposes other than that for which

it is actually used, regard must be had for existing conditions and wants of the community or such as may reasonably be expected in the immediate future. Olson v. U. S., 292 U. S. 246, 78 L. ed. 1236, U. S. v. Foster, 131 F. 2d 3, cert. den. 318 U. S. 767, 87 L. ed. 1138.

The record in this case amply supports the conclusion that although the Brunot lands were known to contain oil and possibly coal deposits, they were in an undeveloped stage, their quality and quantity were unknown; there was no market for them at the date of the cession and that the commercial development of these deposits necessarily had to await the building of the railroad into the area in 1906.

The basic rule with respect to sub-surface deposits such as oil and coal is set forth in 156 ALR 1416 as follows:

> With remarkable unanimity the courts hold that in determining the compensation in eminent domain proceedings for the land to be condemned, the existence of valuable mineral deposits in the land taken constitute an element which may be taken into consideration if and in so far as it influences the market value of the land. * * *
>
> Occasionally the rule has been expressed by the negative statement that the award may not be reached by separately evaluating the land and the deposits, since the latter being only one element among many in determining the market value of the land, cannot be considered as an independent factor the value of which is to be simply added to the value of the land. (Underscoring supplied).

The method of appraising the oil lands by Witness Harrison was based upon an erroneous and highly speculative theory. As stated in 156 ALR 1423, the general rule is:

> * * * * that in ascertaining the amount of compensation to be awarded for taking property containing mineral deposits in eminent domain, the amount of mineral deposits cannot be estimated and then be multiplied by a fixed price per unit. The reason for this rule is said to be that the estimate as

to the quantity and quality of the minerals in the land constitute mere speculation and that, furthermore, even if such amount could be exactly ascertained, the costs of mining and the profits made therefrom would still be uncertain, since the contingencies of business could not be estimated with any fair degree of certainty."

The rule is stated by a noted authority in 1 Nichols, Law of Eminent Domain, 2d Ed. § 226, as follows:

> "When a tract of land taken by eminent domain contains ore, stone, coal, * * *, oil or gas or other valuable deposits, which constitute part of the realty, or is covered with growing crops, or with trees capable of being converted into lumber, the existence of these features can be taken into consideration in determining the compensation so far as they affect the market value of the land; but the market value of the land remains the test, and there can be no recovery for any of the foregoing elements, valued separately as merchandise as items additional to the value of the land."

In other words, this Commission may receive evidence with respect to the existence of, or indications of, deposits upon the lands in question but it is an element of value to be taken into consideration if and in so far as it influences the market value of the land. The weight and authority of judicial decisions hold it is improper to value a tract of land by a method whereby the deposits thereon have been valued separately from the land. Olson v. U. S., 292 U. S. 246, 78 L. ed. 1236; U. S. v. Meyer, 113 F. 2d, 387, 397; U. S. v. Indian Creek Marble Co., 40 F. Supp. 811, 822; U. S. v. Certain Lands in Town of Highlands, 45 F. Supp. 216; Morton Butler Timber Co. v. U. S., 91 F. 2d., 884, 888; U. S. v. 620.00 Acres of land, 101 F. Supp. 686; Nedrow v. Michigan-Wisconsin Pipe Line Co., 61 N. W. 2d 686; U. S. v. 5 Acres of Land, 50 F. Supp. 69, 71.

Conclusions as to Value.

We have considered all the competent and relevant evidence offered by the parties to this case on the question of value as of the date of the cession in 1872, and our finding (No. 19) of eighty cents per acre, or $560,513.60 for the tract, represents the fair market value of the Brunot lands as of September 26, 1872.

Unconscionable Consideration.

Our finding (No. 20) to the effect that the purchase price of $27,500 for land of the value of $560,513.60 on September 26, 1872, was unconscionable under the provisions of the Indian Claims Commission Act requires no extended discussion. A purchase price of less than four cents per acre for lands worth twenty times that amount was shockingly low and plainly constituted an unconscionable consideration.

Accordingly, an interlocutory order will be entered herein awarding petitioner the value of said lands at eighty cents per acre, less the sum of $27,500 paid therefor.

LOUIS J. O'MARR
Associate Commissioner

I concur:

WM. M. HOLT
Associate Commissioner

Chief Commissioner Witt took no part in the decision of above case.