

## BEFORE THE INDIAN CLAIMS COMMISSION

TILLAMOOK TRIBE OF INDIANS, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Docket No. 239
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: November 23, 1955

## Appearances:

Garland A. Ferguson, III with whom were E. L. Crawford and Joseph W. Creagh, Attorneys for Plaintiffs.

Walter A. Rochow, with whom was Mr. Assistant Attorney General Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The issue in this case has become only the question of whether or not the defendant adequately compensated the Indians for the land ceded to it by the Treaty of October 31, 1892. The question of title is not involved as the land was reservation land, nor is the capacity of the plaintiff Confederated Tribes of Siletz Indians to prosecute the claim questioned. The defendant contends that the Confederated Tribes of Siletz Indians is the only party entitled to prosecute the action and that the suit in behalf of the other plaintiffs should be dismissed. It has been agreed by the other plaintiffs to consent to a dismissal,

therefore in the Findings of Fact we find that the claim is being prosecuted solely by the Confederated Tribe of Siletz Indians and that the claim of other plaintiffs is being dismissed. (Defendant's Brief, p. 85: Plaintiff's Reply, p. 14).

There has been some confusion as to the acreage involved. At the inception of this litigation both parties apparently thought the acreage involved was 178,840 acres; however, the evidence as disclosed by the records of the Bureau of Land Management, establishes the acreage to actually consist of 191,798.80 acres and this is the figure we find to be correct by our findings. Therefore, the question now before this Commission is--"What was the fair 'market value' of these lands when they were ceded to the defendant"--October 31, 1892 (Defendant's Brief, pp. 58, 59).

Ordinarily, market value is what a willing buyer would pay to a willing seller in the open market at the date of the transaction involved. However, peculiar circumstances may make it impossible to determine a "market value." There may have been, for example, so few sales of similar property that it cannot be predicted with any assurance that same are determinative of the value of the property considered. It is then conceded that there is no "market value" for the property in question. But that does not put out of consideration the bearing which scattered sales may have on what an ordinary purchaser would have paid for claimant's property at the time in question. Nor will it deny the consideration of sales of similarly conditioned and located property made not too remotely prior to or subsequent to the sale date in question; but it does require that the appraiser be wary as to the weight to be accorded the few sales contemporary with that of the transaction involved and the

sales of the same or similar property at prior or subsequent times. The appraiser must take into consideration the special circumstances surrounding the other sales which would not have affected the hypothetical buyer whose hypothetical price must be considered as the value of the property involved at the date of the transaction involved. Under these circumstances additional evidence must also be considered in determining what a prospective purchaser would have paid (Defendant's Brief, p. 60).

Mr. Justice Holmes expressed himself in the following language in *New York vs. Sage*, 239 U. S. 57, at page 61: "What the owner is entitled to is the value of the property taken, and that means what it fairly may be believed a purchaser in fair market conditions would have given for it." And later Mr. Justice Clark in 338 U. S. 396, at page 402 said: "Perhaps no warning has been more repeated than that the determination of value cannot be reduced to inexorable rules. Suffice to say that the balance between the public's need and the claimant's loss has been struck, in most cases, by awarding the claimant the monetary 'market value' of the property taken. \* \* \* \* \* At times, however, the peculiar circumstances may make it impossible to determine market value." The defendant requests by its requested finding No. 34 that this Commission find that "There were no comparable land sales of large tracts within the vicinity of these lands at or near the time of this cession. There is, therefore, a complete lack of actual sales data as of that date with respect to the value of large tracts of timber lands in this general area. This tends to indicate the absence of a market at or about the time these lands were ceded to the defendant." (Defendant's Brief, pp. 35-36).

The Court of Claims in its recent decision in the Otoe and Missouri Tribe of Indians vs. The United States of America (decided May 3, 1955) says with reference to the determination of market value that "In the absence of a market at the time in question, and therefore the absence of evidence of 'market value' in the conventional sense, this court and the Commission (Indian Claims Commission) have taken into consideration numerous other factors in determining the value of lands ceded by the Indians." Reference is made to the findings of this Commission in its recent decision in the Osage case and also the decisions of the Court of Claims in the Alcea and Rogue River cases. The court then in reference to the principles and the factors taken into consideration in the cases to which reference is made and which valuation methods are approved says: "This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including its climate, vegetation, including timber, game and wild life, mineral resources, and whether they are of economical value at the time of the cession or merely of potential value, water power, its then or potential use, markets and transportation--considering the ready markets at that time and the potential market." (Underscoring ours).

The evidence and our findings show that contemporary sales of the land or neighboring lands are quite few; however, the few that are available show a recognition of a valuation much greater than the price paid by defendant to plaintiffs for the land. Twenty-two early deeds recorded in Lincoln County, in which county the ceded land lies, show that from January 1872 to March 1875 these conveyances of 2219.92 acres were made for a total consideration of \$14,872.88, an average price of

\$6.70 per acre. It is presumed that these were farm lands upon which there were very little, if any, improvements. Too much weight cannot be given to the values indicated, but certainly the evidence is of value very much greater than the 82 cents per acre paid by defendant. We also refer to the 21 homestead entries involved in the prosecution of W. N. Jones, et al., for conspiracy to defraud. Petitioners' Exhibit 5, Appendix H, is a letter from Acting Commissioner of the General Land Office, dated September 19, 1904, in which he refers to 21 entries on the ceded land having been made by homesteaders for 160 acre tracts each, which had been transferred to another after patents had been issued for from \$1500 to \$4400 each. These, of course, indicate values far in excess of 82 cents per acre. Defendant in its brief refers to the Weyerhaeuser purchase of 900,000 acres of timber land in Washington, West of the Cascades, in the year 1900, at \$6.00 per acre.

It is strange that the ceded land being almost wholly timbered land should have been opened up as public lands for homesteading when there was a statute, called the Timber and Stone Act, enacted in 1878, providing that timbered lands were marketable at not less than \$2.50 per acre; which enactment evidences a congressional viewpoint that no timber land was worth less than \$2.50 per acre in 1878. That the homesteading was a mistake is shown by letter of Commissioner of the General Land Office to the Secretary of the Interior, dated January 26, 1893, stating that these lands being unsuitable for cultivation and being timbered lands ought to be disposed of at not less than \$2.50 per acre. (Defendant's Exhibit 19).

In addition to the value of the land and its timber, its value was enhanced by reason of its streams for transportation and its harbors, their fish, its mountains and forests with their wild life, its water power available for later development, and its scenic beauty--all certainly contributing to its value and desirability for occupants as well as for visitors.

That it was so long in being settled and acquired for private use is due largely, we think, to the fact that it wasn't put on the market as a whole compact tract or certainly in larger tracts than mere homesteads, and without residential and other homestead requirements. The conditions under which it was available to the public were such as to make its occupancy almost impossible. Its clearing was too expensive for the usual homesteading applicant and the tracts were available in too small an acreage to justify the expense of exploiting the timber thereon.

We cannot give much weight to either the appraisal of Mr. E. O. Fuller for the plaintiff or to that of Mr. Norman B. Plummer for the defendant. Mr. Fuller's appraisal is entirely theoretical and unrealistic. It is based on sales made many years later, even sales made as late as 1953 and 1954; and these sales figures were converted to 1894 dollars by applying the value of the dollar in 1894 to the value of the 1954 dollars. However, the information as to conditions at the time and the record of such sales as were made whose dates were not too remote for consideration--the statistics as to timber and other natural resources of the land--as to which the two witnesses differed little--are all valuable information for the consideration of this

Commission in arriving at its appraisal of the value of the land at the time Mr. Plummer makes his appraisal in a lump sum for the entire tract of 191,798.80 acres without a single word of explanation as to how he arrives at this amount, other than that it is based on the information which he has assembled and which is in evidence. While Mr. Plummer has insisted that the price paid by the defendant to the plaintiffs of 82 cents an acre in no wise influenced him in his lump-sum valuation which amounts to 81.9 cents per acre, it seems to the Commission to be a rather unusual coincidence that in the lump sum valuation of 191,798.80 acres that there should only be a difference of one-tenth of one cent between such valuation and the price paid by the defendant.

The land involved herein is a part of the land involved in the Alcea Band of Tillamooks, et al. vs. The United States, decided by the Court of Claims on January 3, 1950 (115 C. Cls. 463 to 519). The lands involved in that decision were valued by the Court of Claims as of 1855 at \$1.20 per acre. The total acreage involved in that litigation covered the acreage involved in the present law suit and lands north and south of same--all of which were bound on the west by the Pacific Ocean and on the east by the coast range of mountains, and consisted largely of timber lands. The total was found by the Court of Claims to have the same average value per acre. The conditions in 1855, as found by the Court of Claims, as to resources of ceded lands in the way of timber, minerals, waters, wild life, etc., of course, were practically the same then as they were in 1892--as were the land transactions considered--and the findings of the court as to same are entitled, we think, to be given great consideration by us. We refer

especially to findings 19 to 25 inclusive, and 32, 33, and 34.

The court in its findings and opinion, stated that most of the acreage involved in the law suit consisted of valuable timber land and referred to the fact that railroad grant land in the area had sold at an average price per acre of \$4.23, (p. 504-505), and expressed the opinion "that if the timber-lands in the tribal area had been available and offered for sale at or around 1855 in tracts of sufficient size to attract the interest of lumber companies, much of this timber-land would have been sold for at least as much as the agricultural land brought, and possibly more." (Emphasis supplied) (p. 509-510).

The court goes on to say "under the facts and circumstances \* \* \* we believe we are justified in considering the potential value of this timber, particularly since we are convinced the people generally knew that the lumber industry was a promising one and that the timber in Oregon was valuable." (p. 510)

Taking into consideration all the factors mentioned by the Court of Claims in the Alcea case and in the Otoe case, and all the evidence in the record, it seems to us that the land involved would have brought in 1892 at least \$3.00 per acre if it had been made available in large blocks. Notwithstanding the primitive facilities for the utilization of its timber, even in 1892, it is in evidence that saw mills were numerous in the general territory and had been for some years, and that the timber-lands of the Northwest, of which those involved constituted a part, had already attracted the attention of large operators, who, of course, were aware of the existing opportunities and the potential market and value in the near future.



We think the value of \$3.00 per acre, as of 1892, is fair and reasonable; and that 82 cents per acre was an unconceivable consideration, and that therefore plaintiffs are entitled to an award of \$3.00 per acre for 191,798.80 acres, less the \$142,600 heretofore paid, and less such offsets as defendant may show itself entitled to.

Edgar E. Witt  
Chief Commissioner

Concurring:

Louis J. O'Marr  
Associate Commissioner

Wm. M. Holt  
Associate Commissioner