BEFORE THE INDIAN CLAIMS COMMISSION

THE SEMINOLE NATION, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 150

Decided: December 5, 1955

Appearances:

Roy St. Lewis
Paul M. Niebel
Attorneys for Plaintiff

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

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission. The claim in this case as made by the evidence and plaintiff's requested findings of fact is for the alleged excess value of 320 acres of land in Oklahoma known as the Emahaka School Tract over and above the amount received for said land from the sale thereof made by the defendant for the benefit of plaintiff. Plaintiff alleges that said land was its property at the time the defendant in 1920 contracted to sell the same to one Walter Ferguson; that said sale for the benefit of the plaintiff had been authorized by Act of Congress of April 26, 1906 (34 Stat. 137) and Act of April 30, 1908 (35 Stat. 770); that contract for the sale of the land to said Ferguson was made on July 31, 1920 for the sum of $27,230.00;

that said sale was for a cash payment of one-fourth of total purchase price, to wit: $6,820.00 and that further payments together with interest thereon were to become due in one and two years; that the said Ferguson made no further payments thereon but that extensions were granted him by the defendant, and that his right of purchase was thereafter by him transferred to one V. V. Harris, who was on February 5, 1923 permitted to pay the full amount of the balance due; and that thereafter on December 22, 1924 a patent was issued and delivered to said Harris by the Secretary of the Interior for said land.

Plaintiff alleges that its chief and other members of the tribe protested the making of the original contract of sale at the time for the reason that oil prospects had developed in the vicinity of the land involved and that it would be to the best interest of the tribe for said land to be withheld from sale, and its value to plaintiff as oil producing property thereby be made to accrue to plaintiff. Plaintiff alleges that thereafter, through its chiefs and other members of the tribe, it protested the granting of extensions to the said Ferguson of time for making deferred payments and urged that by reason of the failure to make said deferred payments his original contract be cancelled and forfeited and the land reclaimed for the benefit of plaintiff. It is further alleged by the plaintiff that prior to acceptance of full payment on February 5, 1923 and prior to issuance of patent in December 1924 that the land had greatly enhanced in value by reason of the oil development in its vicinity and that defendant's failure to cancel said contract of sale as it had a legal right to do and resell said lands for the benefit of plaintiff, as was its duty as the

guardian of plaintiff and in keeping with fair and honorable dealings, caused a loss to plaintiff of not less than $41,220.00, for which said sum together with interest from December 22, 1924 plaintiff asked judgment.

The defendant contends first that the claim is res judicata by reason of prior suits involving the same claim in the Court of Claims; and that if its plea of res judicata be not sustained, that this Commission has not the jurisdiction to review the action of the Secretary of the Interior in disposing of the land; and that in any event the land was sold for its fair market value on July 31, 1920 and that it had no greater value at any time prior to December 22, 1924.

The claim of res judicata is based on several law suits in behalf of the Seminole Nation as to which defendant says that same "were sufficiently broad in the language of the petitions to include the 320 acre Emahaka tract itself." (Defendant's brief p. 24) It would take a very lengthy discussion to analyze the claims made in these several suits referred to and the decisions of the courts therein and this Commission thinks it will suffice to say that it has carefully examined the same and is of the opinion that the exact claim as now before this Commission was never made in the previous law suits and no decision was made therein in which same was involved; and that therefore the plea of res judicata cannot be sustained.

This Commission is further of the opinion that it has jurisdiction to review the action of the Secretary of the Interior of which complaint is made and which forms the basis of plaintiff's claim. The cases cited by defendant in support of its contention in this respect have been carefully considered and we think they do not sustain defendant's viewpoint.

In the case of Wagner, Whirler and Derrick Corporation vs. The United States (128 C. Cls. 382) the holding that the decision of the head of a

department was final and conclusive unless "it is fraudulent or arbitrary or capricious or so grossly erroneous as to imply bad faith" was based on a statute which required such a decision in that case. The case of Croghan vs. The United States (116 C. Cls. 577) involved the dismissal of an employee by a Government agency and is not applicable to the facts and the issues in the instant case. The case of Mole Lake Band vs. The United States (113 C. Cls. 16) we think holds in effect just the contrary of the contention made for it by the defendant. While the plaintiff was denied recovery in the case, the decision held that it was not entitled to a recovery because the court "found that the Government did not fail in its duty as a guardian." The obvious inference is that had the Government failed in its duty the plaintiff would have been entitled to recover any damages sustained thereby. There is not a hint in the opinion to the effect that the court did not have jurisdiction to consider the actions of the Government agency in respect to the matters of which complaint was made. (emphasis supplied)

Our viewpoint with reference to the above defenses brings us to the consideration of the merits of defendant's claim as asserted--that is whether the market value of the land involved was greater between July 31, 1920 and February 5, 1923 and December 22, 1924 and if it was, whether defendant was guilty of a failure in its duty to the plaintiff because it did not cancel the sale of July 1920 and make a resale of the property.

The evidence shows that the tract was appraised for $22,780.00 in 1920 before a producing oil well was developed in its vicinity; and that it was sold for $27,230.00 at an auction sale on July 31, 1920, the amount being in excess of the appraised value at that time. However, it is to

be noted that some of the Seminole Indians protested this sale on the ground that oil prospects justified holding the property off the market at the time. The sale was for a cash payment of $6,820.00, a like amount to be paid in one year and the balance in two years from the date of sale, deferred installments to draw 5 per cent interest. Said contract of sale further provided that "should any payment be not made when due, the sale thereof may be cancelled and the rights of the purchaser therein delcared forfeited in the discretion of the Secretary of the Interior." The purchaser made default in the payments of the first deferred installment when due and the second and full payment of the balance was not paid when due, but extensions of time were granted by the Secretary of the Interior to the purchaser, Ferguson, and to his assignee, V. V. Harris, and said Harris was permitted to make payment of the total balance on February 5, 1923.

The evidence shows that the Indians protested from time to time to the granting of extensions of time for the payments of deferred installments and that these protests were made not only by individual members but by action of the entire membership of the tribe, and that no tribal chief would ever join in executing a patent or deed to the purchaser; and that ultimately the patent was executed by the Secretary of the Interior alone on December 22, 1924. It is significant that in the letters passing between the Superintendent of Indian Affairs and the Commissioner of Indian Affairs and the Secretary of the Interior that they insisted on carrying out the contract as originally made in July 1920, and gave no consideration to the request of the Indians that the sale be cancelled because the market value had increased. In fact as late as November 1924, when the execution of the Deed to Harris over the protest of the Indians was being considered,

after he had been permitted to pay the original purchase price, the Indian Commissioner in a letter to the Secretary of the Interior with reference to the complaint as to the consideration said that same need not be considered and that the only complaint which was being considered was due to the extension given on deferred payments. The letter proceeded to give reasons for extending leniency to the purchaser. These communications all show a recognition of the fact that the contract of sale authorized its cancellation, at the discretion of the Secretary of the Interior, because of the failure to comply with the installment payments. In no communication was it indicated that the possible increase of value of the land was considered.

The oil activities in the vicinity of the land involved were beginning to be recognized as enhancing the value of the mineral prospects of the land prior to the sale in July 1920. The appraisal of the land in 1911 included $6.00 per acre for speculative oil and gas rights. Between July 1919 and 1920 an oil well was brought in about a mile and half north of the tract, and though production was light it brought about increased interest in the oil and gas possibilities of the land in the vicinity and the Government appraisal, by reason of oil possibilities, for the tract involved herein was increased from $6.00 to $25.00 per acre. It seems that the first substantial production of oil in the vicinity was the Betsy Foster well on March 17, 1923, which was some two and one-half miles distant from the land involved. There was much excitement and leasing of oil property in all directions from the Foster well. During this period of time the witness Collier testified to having leased land for oil development in the

vicinity of the tract involved for $100.00 per acre and of getting $200.00 per acre for lease and royalty. The witness Criswell testified to leasing for oil and gas and knowing of others doing so during the years 1922 and 1923 in the vicinity of the land involved in which the consideration was $100.00 per acre. The witness Jacobs testified to getting $500.00 per acre. The exact dates of these leases and sales are not definite but are testified to as being in the years 1922 and 1923. The purchaser of the land, V. V. Harris, in a letter dated May 22, 1924, some months after he had paid for the land, states that the value of the land at the time of his letter was between $30,000.00 and $75,000.00. While the defendant urges that little weight should be given to this statement for the reason that the writer is boosting the value of his own land and to that extent is self-serving, we nevertheless think it has some weight and entitled to consideration in connection with the other evidence of the values in the vicinity, and indicates that at the time the letter was written (which was sometime before the patent was executed) that the land had a far greater market value then than the price paid for it.

Witnesses David L. Dooly and C. V. Sidwell, who are petroleum engineers and geologists, testified as experts for the defendant, without ever having had any personal experience in the section of the country involved at the time in question, as to what they thought the value of the land in question for oil and gas was at that time, and it was their opinion that the land sold for its market value at the time of its sale and that it was not worth any more than that amount at any time up to December, 1924.

In view of the testimony of persons personally acquainted with the oil development in and about the land herein involved and during the period involved, it seems to us that the value of the property for oil and gas

development could not have failed to increase during these years. At the time of the sale in 1920 there had been no production in land adjacent to the property involved but within the next three or four years there was great activity—several producing wells were brought in on tracts adjacent or very near that involved and it seems to us that the preponderance of the evidence justifies a finding of increased value of the mineral possibilities between July, 1920 and February, 1923 and December, 1924, whichever later date might be said to be the final controlling date for fixing the value. Our great difficulty is determining just what the fair value should be fixed at as determining the liability of the defendant, if any, taking into consideration the unquestioned increase and fluctuations in value due to oil development and oil activity and the varying amounts for which mineral rights in lands similarly situated to that of plaintiff were selling for. The Commission thinks the value of the surface and minerals of the tract at periods between July, 1920 and February, 1923, and up to December, 1924, was not less than $200.00 per acre or a total of $64,000.00.

The evidence seems to us to show that the Government was derelict by reason of its failure to give consideration to the interests of the plaintiff Indians. In no one of the communications passing between Government officials discussing the protests of the Indians to the consummation of this sale was the question of whether or not the property had enhanced in value subsequent to the original sale date and prior to final payment of the purchase and the execution of the deed or patent to the purchaser given consideration. The sale contract provided that said sale could be cancelled and the rights of the purchaser declared forfeited at the discretion of the Secretary of the Interior should any payment not be made when due. The very first payment that came due was not paid when due, nor was the second payment paid when due. It seems to us that a proper consideration of the rights of the plaintiff Indians certainly required of the defendant that when these payments came due, or at least when

the second payment was due and not paid, and when the sale of the lands in the first instance had been protested by the Indians, and said protests were continuing, that some investigation should have been made as to whether or not there had been an increase in the value of the property and a realization had that the interests of the Indians would be best served by the cancellation or forfeiture of the sale and resale of same so as to get for the Indians the enhanced value that the evidence seems to us to well establish as having come about. The tenor of the communications to which we have referred seemed to have only in mind the question of the proper and fair treatment of the purchaser and the consideration due him. Had it been thought unfair to keep the money that he had paid, then it was well within the power of the Secretary of the Interior to return the payment. In the Mole Lake Band case, to which we have previously referred, the court held under very similar circumstances to that involved in the instant case, that the Government had undertaken the responsibility of a guardianship, and owed its ward "a high degree of diligence." Having failed in discharging its duty in the respect indicated, as we think it did, it is our opinion that the plaintiff is entitled to an award for the difference we find in the value of the surface and minerals of $200.00 per acre, that is $64,000.00, and the amount received, $29,786.34--a difference of $34,213.66.

The plaintiff contends that the valuation of the tract should be that on the date of the conveyance, December 22, 1924; the defendant in its brief (p. 30) indicates the highest value between 1920 and 1924 can be considered, but during the trial orally argued for a valuation between July, 1920 and February 5, 1923 (Oklahoma Hearing Apr. 29, 1954, p. 15). We have fixed the value as between 1920 and 1923, and 1924.

It is not thought that the character of the transactions involved by reason of which the aforesaid liability is found to accrue, entitles the plaintiff to interest.

Edgar E. Witt
Chief Commissioner

Concurring:

Wm. M. Holt
Associate Commissioner

DISSENTING OPINION

I cannot agree with the decision in this case because I believe the claim was tried and decided upon an erroneous legal theory.

The petition is confusing because it includes a claim for the loss of a school building for which claim was made in the amount of $50,000. This claim was abandoned during the trial (Transcript of March 31, 1954, p. 4), so there remains the claim for the value of the land sold, that is, the 320 acres described in paragraph XIII of the petition, known as the Emahaka Mission tract, which for brevity will hereafter be referred to as Emahaka tract.

The theory, as disclosed by the allegations of the petition contained in paragraph XIII to XIX, is that the Government is liable to the Seminole for the failure of the Secretary of the Interior to cancel the sale of the Emahaka tract to Ferguson, as he had the power to do under the conditions of the sale, and to resell the property at a higher price than the $27,280 paid by Ferguson and his assignee, Harris, which it is alleged "was in plain violation of its duties as guardian of plaintiff, and of fair and honorable dealings between defendant and plaintiff, its dependent Indian ward." As I understand the opinion in this case the Commission adopted the theory of liability in its decision.

As I view this claim the primary question before the Commission is: Did the Secretary of the Interior, in the sale of the Emahaka tract and in extending the time for making the deferred payments of the purchase price, act with the care, diligence and skill required of a fiduciary?

It is not, nor can it be, denied that in offering the Emahaka tract for sale under section 15 of the Act of April 26, 1906, 34 Stat. 137, or the Act of April 30, 1908, 35 Stat. 70, 71, the Secretary of the Interior was acting in a fiduciary capacity and his action in waiving the defaults of Ferguson and accepting the balance of the purchase price with interest from the date of sale from Ferguson's assignee, Harris, he was acting as trustee and that his action must be governed by the law applicable to trustees. By both acts mentioned above he was given possession of the tract and directed to appraise and sell it for the benefit of the Seminole. While he is referred to as guardian in the petition, it is clear he was acting as a trustee. In any event, the designation is not important, for the duties and liabilities would be the same under the acts cited.

The duties and obligations of a trustee are too well known to require extended discussion. They are that a trustee must act in good faith and exercise due care, diligence and skill in dealing with the trust property. The question of the good faith of the Secretary does not even remotely enter into this case, and when the trustee meets the required standard of care, diligence and skill no liability attaches to handling of trust property. (54 Am. Jur. 255, sec. 321). This standard is universally defined to be that of an ordinarily prudent man in the conduct of his private affairs under like circumstances, with a similar object in view. (54 Am. Jur. 256, sec. 322).

The published and posted notice of the sale was made on June 15, 1920, (Def. Ex. 15) and stated the appraised value to be $16,700. This

appraisement was apparently made in 1919 and as shown by it the land and improvements were appraised at $15,100 plus $5.00 per acre, or $1600, for oil and gas. (See appraisement of June 13, 1919, and letter of Superintendent, dated July 17, 1919, transmitting the appraisement, same being Def. Exs. 13(c) and 13(b)). But in subsequent correspondence referring to the oil and gas item in this appraisement it was erroneously stated to be $6.00 per acre. (See Superintendent's letter of January 28, 1920, part of Def. Ex. 13(h)). The sale was held as advertised on July 31, 1920, without tribal objection.

That the land had a value of $50.00 per acre for agricultural purposes is generally conceded, in fact that is the value placed upon it by Harris, the assignee of Ferguson (Plain. Ex. 39), so it is plain that the high bid of Ferguson of $27,280 or $85.25 per acre, included $35.25 per acre, or $11,280, for a potential oil and gas value, that is, a speculative value. It is this oil and gas value that forms the basis for this claim, as contended by the Seminole.

Now, it cannot be seriously denied that a valid sale had been made on July 31, 1920, and at a price that included a speculative value for oil and gas, so the inquiry must be as to what occurred between the sale and December 22, 1924, the date on which title passed to Harris, which would require or justify the cancellation of the sale and resale of the Emahaka tract.

The only ground stated in the Indians' objections was that because of oil drilling activities in the vicinity of the tract the value of the land, in so far as oil and gas are concerned, had increased (Plain. Ex. 40),

but the question before the Commission was, or should have been, whether the Secretary acted with the care, diligence and skill the law imposed upon him in the sale of the property and in extending time for making the deferred payments. This is to be governed by the evidence which is plain and undisputed.

As early as July 11, 1919 (Def. Ex. 13(a)), the United States Oil Inspector reported to the Superintendent of the Five Civilized Tribes that there had been drilling for oil to the north and east of the tract resulting in dry holes and that there was no production "in any of the townships adjacent to the one in which this tract of land is located." And again, on January 9, 1920, (Def. Ex. 13-d) the Assistant Commissioner of Indian Affairs requested an examination of the tract "with a view to a probable exploration for oil and gas," and on January 23, 1920, (Def. Ex. 13-f) the Inspector reported that within a distance of from 1-3/4 miles to 2-3/4 miles of the tract three "dry holes" had resulted from the drilling, stating further: "These failures may be considered conclusive tests of this general area." He also mentioned a well then drilling 1-1/4 miles north. This well came in before the sale, (Def. Ex. 16) causing the Inspector to increase his appraisement for oil and gas from $5.00 to $25.00 per acre to cover a speculative value. The accuracy of the Inspector's report was proven by subsequent developments, for as shown by the testimony of the witness Dooley (Trans. pp. 81-227) and the Map, Def. Ex. 48, dry holes resulted from drilling on all sides of the tract, as well as two holes within the tract, except that four wells of small production were brought in south of the tract in Section 18-7N-18E.