

## BEFORE THE INDIAN CLAIMS COMMISSION

THE KIOWA, COMANCHE and APACHE )  
 TRIBES OF INDIANS, )  
 )  
 Petitioners, )  
 )  
 v. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 32

Decided: December 13, 1955

## Appearances:

W. C. Lewis, J. Roy Thompson, Jr.  
 and Frank Miskovsky,  
 Attorneys for Petitioners.

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

OPINION OF THE COMMISSION

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

The Commission has previously determined in this case that the petitioners had sustained the issues of fact and law relating to their right to recover (1 Ind. Cl. Comm. 520, 523) and on April 9, 1951 entered an interlocutory order to that effect and ordered the case to proceed for the purpose of determining the difference, if any, between the value of petitioners' land as of June 6, 1900, and the purchase price paid petitioners therefor.

The lands to be valued were part of a tract set aside as a reservation for petitioner tribes by the Treaty of October 21, 1867, 15 Stat. 581. On October 6, 1892, the petitioners concluded an agreement with the United States by which petitioners for a consideration of \$2,000,000 agreed to cede to the United States their reservation lands, subject, however, to the allotment of lands in severalty to the individual members of the tribes.

The 1892 agreement which was to be effective only when ratified by Congress was not finally acted upon by Congress until 1900 when Congress passed the Act of June 6, 1900, (31 Stat. 672) approving the agreement. This Commission determined, however, (1 Ind. Cl. Comm. 520, 527, 528) that the 1900 Act created no contractual obligations on the part of petitioners, for Congress had substantially changed the terms and provisions of the 1892 agreement and that by virtue of the Act of June 6, 1900, the Government acquired the land without the consent of the Indians, upon its own terms and conditions and in disregard of the rights of the Indians under the Treaty of October 21, 1867.

The lands to be valued are within the lands described in Finding 1 (1 Ind. Cl. Comm. 505, 506). The Kiowa, Commanche, Apache Reservation was located, generally speaking, south and west of Oklahoma City and was bounded on the east by the 98th Meridian and the lands of the Chickasaw Nation, on the south by the Red River, on the north by the Washita River and on the west by the north fork of the Red River. (Finding 8). The reservation consisted of 2,991,933 acres. Of this acreage, 958,350 acres were reserved by the Indians under the Act of June 6, 1900, for

allotments, pastures, agencies, schools, etc., and the United States acquired 2,033,583 acres from the petitioners. (Finding 6).

Oklahoma Territory was organized in 1890. Much of the lands of the Territory was opened to settlers by "runs" between the years 1889 and 1895. The development and settlement of the Territory was rapid. The population of the Territory increased from 60,417 in 1890 to 396,904 in 1900. Of some 20,215,575 acres of lands made available for settlement during the same period the record shows a total of 14,481,000 acres had been filed on or reserved. As of June 30, 1900, there were 5,733,385 acres still available for homestead entry in the Territory, with 3,211,931 of these acres being located in Beaver County. The Governor of the Territory in 1900 reported most of the land remaining open for homesteads as being broken and rough and unfit for farming. (Findings 9-10).

The ceded lands were in an area characterized as a humid area with an average annual precipitation from 1891 to 1900 of approximately 30 inches. The growing season of the area usually lasts from April 1 to November 1. The elevation of the area is approximately one thousand to fifteen hundred feet above sea level, with the exception of the Wichita Mountains in the west central portion. The area is well watered. Although the area is subject to periodic drought years, the climate thereof is favorable to agricultural uses. (Finding 11).

Although as of June 6, 1900, the ceded area had no railroads through the area, there were parts thereof so located as to be within reach of rail transportation. Along the entire eastern boundary of the area a railroad, the Chicago, Rock Island and Pacific, was offering service. By

March 31, 1900, the same railroad had constructed a branch line westward from Chickasha across the entire northern border of the ceded area and it cut across the northwestern corner of the area into Greer County and terminated at the town of Magnum. (Finding 13). A small number of trails and roads also criss-crossed the ceded area. (Finding 14).

The reservation itself, as of June 1900, was, generally speaking, in an undeveloped state. There was some farming, the census (including the Wichita Reservation) reported 21,763 acres as being improved, and the Indians were raising crops of corn, wheat, oats, millet and kaffir corn. The principal use being made of the reservation in June 1900, however, was for grazing. There were some 40 leases of land covering about 2,130,000 acres, which were made with cattle ranchers for annual rentals of a sum of \$210,632.60. The surrounding areas of land, however, were generally being utilized for agricultural purposes. Greer County on the west was reported to have agriculture and stock raising as the principal occupation of its people and its products included wheat, cotton, corn, cane, cattle and sheep. In Washita County to the north of the ceded area the principal occupation of the people was agriculture, and the products of the county were cotton, wheat, corn, castor beans, cattle and hogs. Roger Mills County to the northwest, however, had stock raising as the principal occupation of its inhabitants and its products included cattle and cattle feed, corn, cotton and wheat. To the east of the reservation was Indian Territory. The lands of the Chickasaw adjoined the ceded area on the east. The census reported the Chickasaw Reservation contained 16,374 farms in 1900, with 3,246,187 acres in these farms, of which 1,111,631 acres were reported to be improved lands.

All of the evidence pertaining to the highest and best use of the ceded area and as to its market value has been thoroughly reviewed and weighed, but it is necessary in deference to the magnitude and impracticality of discussing all the evidence of such a large and conflicting record to review only such evidence as is pertinent to the ultimate conclusions herein.

There is much conflicting evidence pertaining to the question of the highest and best use of the ceded area and this is undoubtedly the result of the differences between the cattlemen who hoped to retain their grazing privileges and the settlers who wanted the land homesteaded. In the annual report of the Commissioner of Indian Affairs for 1900, there is a report by Indian Agent Randlett in which the agent reported the reservation lands not to be generally well adapted to agricultural purposes. He further stated: "The soil of bottom lands is excellent for farming purposes, but crops often fail to mature on account of irregularity of rainfall. Wheat on the river bottom lands usually matures, but often suffers injury by rainfall at harvest time. Indian corn if planted early generally matures, but if not planted early, is liable to failure of production on account of the hot winds that usually prevail from the middle of July to the first of October. These winds dry out all vegetation except in case of kaffir corn. All vegetable seeds must be planted early to secure any returns. The country is well adapted to stock raising, the native grass being abundant and of the class that withstands drought well." Agent Randlett was of the opinion that those who settled the area expecting to profitably farm the surplus land after

the Indians had taken their allotments would suffer much disappointment. He based this opinion on the fact that he believed that after the Indians were given their choice of the best lands which were reasonably suited to agriculture there would be but a limited amount of desirable land for homesteaders. (Def. Ex. 16).

As early as 1887, however, the Acting Secretary of the Interior wrote to the President of the United States that the Kiowa, Comanche reservation "contains 2,968,893 acres of land, of which 2,654,000 acres are estimated to be tillable. \* \* \*" (Pet. Ex. 60). In 1892, the agent in charge in his annual report stated, "The Lands on the South Side of the Washita River occupied by the Kiowa, Comanche, and Apache Tribes along the streams are very fertile and adapted for agriculture persuits, but the larger part of their lands are best adaptable to stock raising." In January 1900, Agent Randlett wrote to the Commissioner of Indian Affairs "This is not good agricultural country. The soil of the valleys is good generally, but rainfalls and climate are irregular and so variable that crops are uncertain even in best locations, with almost certainty of failure if attempted on uplands." Randlett said the lands were remarkably adapted for stock raising. Others living on, or in the country adjoining, the reservation heartily disagreed with the view that the lands were not adaptable to agriculture. A large number of affidavits were obtained from people well acquainted with the reservation lands and the adjoining lands to the effect that said lands were fine agricultural lands for the most part and these affidavits were forwarded to Congress. (Pet. Ex. 46). That many others believed these lands suitable for farming is evident in reading the Report of the Governor of Oklahoma Territory for 1900. Although the Governor was

of the opinion that only about one-half of the land left for settlers (after allotment) would be desirable for farming land, he reported that for years the whites of the Southwest had looked "upon this beautiful and picturesque reservation with longing eyes \* \* \*. The rich bottom lands of the Washita Valley, producing magnificent crops of wheat and corn, the fertile lands bordering many other streams, the beautiful undulating plains stretching away to the Red River on the south and west, and the magnificent mountain parks indeed offer an inviting field for the agriculturist; but a thorough inspection of the entire reservation shows much land is alone suitable for grazing, and much more that is absolutely waste, while many thousands of acres on the mountains will be absolutely valueless except for such minerals as may be found there." (Finding 17).

A careful study of the field notes of survey of the reservation land made in 1872 and other evidence of record indicates that much of the land in the ceded area was adaptable to farming. The utilization and adaptability of the lands in the surrounding areas for farming also support the conclusion that the highest and best use for which the lands were adaptable and needed in 1900 was as farm lands with stock husbandry as the most likely branch of farming to be undertaken. (Findings 12, 16, 17, 18).

The parties agree that the criterion of value to be applied in this case is the market value of the ceded area on June 6, 1900. Market value is defined in *Sacramento v. Heilborn*, 156 Cal. 408 (cited by petitioners) as

\* \* \* the highest price estimated in terms of money which the land will bring if exposed for sale in the open market

with a reasonable time allowed to find a purchaser buying with knowledge of all uses and purposes for which it is best adapted and for which it is capable of being used.

In order to determine the market value of the ceded area, the parties have introduced the written appraisal reports of two recognized and qualified appraisers of long experience and the Commission has had the benefit of their testimony. In addition, a number of additional witnesses who were living near the area at about the time of the valuation date and were acquainted with the soil and conditions of the area, also appeared for both parties.

Mr. W. D. Davis, a recognized appraiser, appeared for petitioners as an expert witness. The main part of his valuation study is contained in petitioners' exhibits 69 and 70. The Davis report (and the report submitted by defendant's appraiser, Mr. Hall) contains a world of data pertaining to the history, topography, soils, economic and climatic conditions, etc., of Oklahoma Territory and the ceded area itself. All of these facts have been carefully analyzed and are bases of many of the findings of fact made herein.

Mr. Davis placed principal reliance on the "Market Data Approach" because, he states, "in this approach, the conclusions are found in the actual market transactions occurring on or somewhat before the time to which the value pertains." Since the market data approach involved an analysis of sales of small undoubtedly improved tracts of an average size of 260 acres, the petitioners' appraiser found it necessary to adjust the consideration indicated by these sales to properly reflect the difference in market price that would be paid by a typical purchaser for a tract of land the size of the ceded area. Mr. Davis was of the



opinion that what people were paying for land immediately adjacent to the ceded area was the best guide to the market value of the ceded area. (Tr. 451).

In order to determine what lands were selling for in the areas immediately adjacent to the reservation, petitioners' appraiser had all free sales of lands abstracted (Pet. Ex. 71-78) beginning with the first sales of record in Jackson, Washita, Greer and Beckham Counties, Oklahoma Territory, but in the Texas counties of Clay, Wichita, and Wilbarger, the sales were abstracted beginning with the year 1894. (Pet. Ex. 70, pp. 139-142). These sales of small improved tracts for the years 1894 through 1900 numbered 1986 transactions involving 628,541 acres at an average sale price per acre of \$5.92 (Pet. Ex. 69, p. 35). If the sales in the Texas counties which had been under development for a longer period of time are eliminated, then there would be 277 transactions in Oklahoma Territory alone involving 47,761 acres of land at an average consideration of \$4.92 per acre. Mr. Davis concluded that the average price of \$5.85 (adjusted) per acre paid in the year 1900 in adjacent counties for lands "in the open market on free transactions averaging about 260 acres in size was the most reliable indication of the free market at that time." (Tr. 451-452). The average price per acre (before adjustment to be discussed shortly) in all adjacent counties in 1900, was \$6.49, while for the Oklahoma counties alone it was \$5.62 per acre.

Petitioners' appraiser recognized that these were sales of small improved tracts and therefore adjustments would have to be made for buildings, other improvements and size. To make the adjustment for

buildings, he utilized the United States Census of 1900 to obtain a percentage relationship figure which could be applied to show the value of land itself. The census, in other words, gave separate figures for land and improvements (except buildings) and for buildings. These two figures were added together to get the total value of land, improvements and buildings. Then to ascertain what percentage land and improvements, except buildings, bore to the total of land and improvements, including buildings, witness Davis divided the latter total into the former. (Tr. 444-446). This percentage relationship was applied in each county according to the percentage ascertained for each county to the sales in each county for the years 1894 through 1900. By applying this method to said sales, petitioners' appraiser determined that the average consideration per acre of \$5.92 for the 1,986 sales should be reduced to \$5.34 to compensate for any improvements on the lands in the nature of buildings. For the year 1900 only the average consideration per acre of \$6.49 would be reduced to \$5.85 per acre for the land alone. (Pet. Ex. 70, p. 142; Pet. Ex. 69, p. 35). Petitioners' appraiser also pointed out that the study of the census reports indicated that such improvements as ponds, wells, plowing and fencing would be included in the estimated and reported value of land itself. For this reason he determined a further adjustment of the average per acre price was necessary to ascertain the value per acre of the raw land. (Pet. Ex. 69, p. 35; Tr. 447, 452). In determining the cost of improvements such as fencing, plowing, wells, etc., the petitioners' appraiser testified that probably 88 acres of the farms sold were in cultivation at 50¢ an acre for plowing, that probably only the

pasture was fenced, and that probably the cost to fence the entire outside of the 160-acre pasture would not exceed \$80, or approximately 31 cents per acre, that each farm probably had either a well or some sort of pond probably costing the farmer about \$50.

Based on these calculations, Mr. Davis determined it would be necessary to deduct about 68 cents an acre for these improvements. (Tr. 452).

Applying the adjustments to the average of the total sales in 1900 in adjacent counties, petitioners' appraiser presented the following figures: (Pet. Ex. 69, p. 38).

Average price per acre paid for land alone	\$5.85
Probable cost of fencing	0.31 per acre
Probable cost of well or pond	0.20 " "
Probable cost of plowing	0.17 " "
Total probable cost of improvements other than buildings	<u>0.68</u>
Probable actual price paid for unimproved land per acre	\$5.17

Mr. Davis also recognized that a further adjustment would have to be made because the price paid for a large tract would be less than that paid for a small tract. The reduction, he believed, would not exceed 33-1/3 percent, and these adjustments of the average per acre price of sales in 1900, he found, indicated a market value of the entire ceded area of approximately \$3.45 per acre in 1900. (Pet. Ex. 69, p. 38).

Defendant objected to the introduction of the appraisal report (Pet. Exs. 69, 70, 71-78, incl.) prepared by petitioners' expert witness, on several grounds, among which were that the exhibits contained data relating to events subsequent to the valuation date of June 6, 1900,

and that in so far as the evidence relates to the sale of small tracts it is not proper evidence to determine the value of a tract consisting of more than 2,000,000 acres. (Tr. 572-577).

The Court of Claims and this Commission have considered the sale of small tracts in and adjoining an area for which a value must be determined as a factor to be weighed in establishing the fair market value. Alcea Band of Tillamooks v. United States, 115 C. Cls. 463; Rogue River Tribe v. United States, 116 C. Cls. 455; Seminole Nation v. United States, 102 C. Cls. 565; Pottawatomie Tribe of Indians, et al. v. United States, 3 Ind. Cl. Comm. 10, 59-61; The Quapaw Tribe of Indians v. United States, 1 Ind. Cl. Comm. 469, 502-504. In the absence of evidence of more probative value with respect to comparability such sales of small tracts may be the best evidence available to assist the Commission in determining a market value. Cf. Osage Nation of Indians v. United States, 3 Ind. Cl. Comm. 217, 354, 355. The sale of small tracts in determining value have been carefully weighed, however, especially where they involve improved lands as compared to raw land, Pottawatomie Tribe of Indians v. United States, supra, at page 58, and Osage Nation v. United States, supra, at pages 337-342, and as they differ in comparability because of size, Pottawatomie Tribe of Indians, supra, at pages 60-61.

In the Osage case, supra, this Commission was of the opinion that the use of the 1900 census figures to arrive at a percentage of the value of improvements as compared to the value of raw land was not a proper method to be followed, for the Census never attempted to separate the















