

BEFORE THE INDIAN CLAIMS COMMISSION

THE YAKIMA TRIBE,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 162
)	
THE UNITED STATES,)	
)	
Defendant.)	

Decided: June 5, 1956

Appearances:

Paul M. Niebell
Attorney for Plaintiff

Leland L. Yost and W. 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 now before the Commission is only that of whether or not the defendant adequately compensated the plaintiff Indians for the lands ceded to it by the Treaty of January 8, 1894. The location and amount of said acreage has been agreed upon by the parties and the question of title is not involved, nor is the capacity of the plaintiff tribe of Indians to prosecute the claim. Therefore, the sole question now before this Commission is the determination of the fair market value of the lands, when they were ceded to the defendant and whether the amount

paid by the defendant to the Indians was an unconscionable consideration for said lands.

The language of this Commission as to market value as used in the decision of Docket No. 239 is:

"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' (in its strictest sense). 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' (in its strictest sense) 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. * * * 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 other sales which would not have affected the hypothetical buyer whose hypothetic 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."

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 Court of Claims in its recent decision in the Otoe and Missouri Tribe of Indians vs. the United States with reference to the determination of value says 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 economic 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.)

Rather than be concerned over the terms to be used in a valuation, it seems to us that the important thing is to have a clear statement of the factors that may be properly and fairly considered and the determination of value based thereon can well be considered "fair market value."

The lands involved in this case almost entirely are what are called timber lands; i.e., the real value of the land was because of its timber. Therefore, under what is called the Timber and Stone Act of Congress, enacted in 1878, these lands, as public lands, were legally marketable at not less than \$2.50 per acre. A portion of the lands were agricultural and were probably subject to being homesteaded at a less price per acre. This Timber and Stone Act fixed the minimum value of public timber lands. The record in this case shows that the lands involved were covered with unusually heavy timber, and, therefore, we think, entitled to be given a higher valuation than the minimum valuation fixed by law.

The plaintiff relies primarily on the valuation given by its witness, Carlo D. Henze, and the defendant on the valuation of its witness, Norman D. Plummer.

The appraiser, Henze, was an experienced forester--his entire education and training for years had been in forestry and in timber appraisal. He had been used by the outstanding lumber firms of the country for years. He based his appraisal of the value of the timber on the land on cruises made of the same, acre by acre, in 1914, by the owner of the land at the time, the accuracy of which cruises had been confirmed, by the later cutting of more timber off the land, than the cruises had found. In valuing the timber on the land as shown by said cruises and the later examination of the land itself by the appraiser, he used standard methods used in valuing timber. He applied the values of the timber as found by the recognized works of Mason and Steer, which

were the basic available sources of information as to timber values during the period in question. The value of the timber on the land in 1894 amounted to \$6.00 per acre, as calculated by Henze.

Defendant's appraiser, Plummer, in reaching his estimate of the value of the land at the time, disregarded entirely the cruises made by the owners who cut the timber or any estimate of the quantity of timber on the land. He relied solely on sales made by the Northern Pacific Railroad Company and probably other small sales as shown in his testimony; and upon general information as to timber and economical development. Many of the small sales relied on by him were not in the vicinity of the land in question and many were made before the railroad was constructed near the involved tract and, as he admitted, before economic conditions had changed by reason of the construction of the railroad and other developments. Moreover, the witness admitted that his appraisal experience had been chiefly in appraising lands in the State of Oregon--and that he had had no particular education or training, or experience in valuing timber lands. He admits much confusion in evaluating the factors he considered.

The only sale of consequence of lands in the tract was that made by the Northern Pacific Railroad in 1902 of 10,000 acres to the Lamb-Davies Lumber Company for \$2.00 per acre. These were of lands given the railroad by the Government. While this price per acre was largely in excess of the amount paid by the Government to the Indians for the land, it should in our judgment be given little weight in determining the actual value of the timber on the land. The lands were certainly

given to the railroad company in order that they might be used by it in financing the construction of its railroad and not for the business of engaging in lumbering; and the financial situation of the railroad at the time is not disclosed. The sale at this price might well have been because of its doubtful validity in view of the Act of Congress of May 31, 1870 (16 Stat. 378, 379), which provided that lands of the Northern Pacific Railroad Company should be sold to settlers only.

In addition to the value of the land for its timber, it had some value as cut-over land and added value for the fish in its lake and streams.

Mr. Plummer makes his appraisal in a lump sum without a single word of explanation as to how he arrived at such an amount, other than that it is based on the information which he has assembled and which is in evidence. It is significant that he placed the total value of the tract at \$20,350.00, which is just \$350 more than the Government paid the Indians for the land. The Commission thinks that this appraisal is made the more significant by reason of a similar appraisal made by the same appraiser in Docket No. 239, in which he appraised in a lump sum 191,798.80 acres with a difference of only one-tenth of a cent per acre between said appraisal and the consideration paid by the Government for the land involved.

Taking into consideration all the factors mentioned by the Court of Claims in its holdings as to the elements to be considered in determining value and all the evidence in the record in this case, it seems to us that the land had a value in 1894 of at least \$3.00 per acre; and

thinking that it had the value of \$3.00 per acre in 1894, the consideration of approximately 87¢ per acre paid by the defendant for said land was an unconscionable consideration. Therefore, plaintiffs are entitled to an award of \$3.00 per acre for 23,000 acres less the amount heretofore paid them therefor, and less such other offsets or counter claims as defendant may show it is entitled to.

Edgar E. Witt
Chief Commissioner

Concurring:

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner