

BEFORE THE INDIAN CLAIMS COMMISSION

THE CROW TRIBE OF INDIANS,)	
)	
Petitioner,)	
)	Docket No. 54
vs.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: February 12, 1958

Appearances:

Ralph G. Wiggernhorn, with whom
was Wilkinson, Cragun, Barker
and Hawkins,
Attorneys for Petitioner

Maurice H. Cooperman, with whom
was Mr. Assistant Attorney General,
Perry W. Morton, Attorney for
Defendant.

OPINION OF THE COMMISSION

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

Petitioner, the Crow Tribe, filed its petition with this Commission setting forth a claim under Section 2(3) of the Indian Claims Commission Act, alleging therein that the Crow Tribe had, on May 7, 1868, 15 Stat. 649, ceded 30,530,764.8 acres of land to the United States, being allegedly part of the lands the ownership and right of occupancy, possession and use of which were acknowledged, ratified and confirmed to be in said Crow Tribe by the Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749. Petitioner

further alleged that the consideration paid to the Crow Tribe as stipulated in the 1868 treaty was grossly inadequate and unconscionable.

Defendant in its answer set forth several affirmative legal defenses which, by stipulation of the parties and order of the Commission, were made the issues involved in a prior hearing limited to a determination of the defenses thus raised by defendant. The Commission made findings of fact upon these issues and rendered an opinion thereon which was adverse to the defendant (3 Ind. Cl. Comm. 147, and see Explanatory Statement, Findings of Fact herein made). The Commission, having in 3 Ind. Cl. Comm. 147, determined that the United States had recognized Indian title in the lands of the Crows by the Treaty of Fort Laramie, supra, ordered (Order of October 12, 1955) the parties to proceed to a final hearing to determine all issues not previously disposed of, including the question of the consideration paid for the cession and the value of the land as of the date of the cession of May 7, 1868, leaving for further consideration the question of offsets, if any.

The lands involved are a part of the reservation set aside for the Crow Tribe by the Fort Laramie Treaty. The parties are agreed that the lands ceded by the 1868 treaty by the Crows to the United States amounted to 30,530,764.8 acres. Petitioner agrees that the consideration paid for the cession amounts to \$1,644,585.49 (Pet. Ex. 211, G. A. O. Reports and Pet. Br., page 68). The ceded area lies partly in Montana and partly in Wyoming. The Crow Tribe reserved from the cession as a reservation a tract of land of 8,000,409.2 acres within the boundaries of the area set aside by the Fort Laramie Treaty.

The ceded tract consisted of a large and diverse area with prairie lands, mountain lands, intermountain valleys and basins and low mountain and foothill lands. The climate of the ceded area was likewise diversified with considerable precipitation in the rugged and high mountains and quite arid regions in the basins. Most of the area, however, was climatically well suited for stock raising and parts of the ceded lands were adaptable to agricultural production. The tract was watered principally by the Tongue, Powder, Big Horn and Yellowstone rivers.

As of the date of the cession, Crow Territory was virtually surrounded by other Indian lands held as reservations or hunting grounds by other tribes. Crow Territory itself was hunted over by other tribes such as the Sioux, Arapahoe and Shoshone. Vast herds of buffalo roamed the area.

The character of the lands within the ceded area was fairly well known by the date of the cession. Fur trappers and traders, prospectors and both official and unofficial expeditions reconnoitering for wagon roads had criss-crossed their way over the region. It was generally known by 1868 that parts of the ceded area were adaptable to stock raising and that some areas in the river valleys were suitable for irrigated agricultural pursuits. It was principally the belief that the mineral resources of the Crow Territory were valuable, however, that caused officials of Montana Territory and mineral prospectors in both Montana and Wyoming to urge that a cession be obtained from the Crow Tribe. It was the mining prospector and the discovery of minerals, especially gold, that brought about the settlement of lands adjoining the Crow Territory and the first white settlement within the ceded area.

The discovery of gold in northern and western Montana in 1862 and 1864 resulted in the settlement of the valleys in the mountainous region adjoining the western boundary of Crow Territory while discovery of gold in 1867 in the vicinity of South Pass, Wyoming, resulted in the establishment of a small mining town, Miner's Delight, just within Crow Territory and the settlement also of a few settlers in the Popo Agie valleys who raised crops to supply the mining communities. It was the establishment of the mining camps in western and northern Montana that led to the laying out of wagon roads across Crow Territory to connect these communities with the transcontinental routes running across the plains of southern Wyoming. The Bozeman and Bridger trails were established in 1864 and 1865 for this purpose.

The westward tide of immigration, the construction of these roads from the transcontinental routes to the mining communities in Montana, with the resulting travel to and fro, the establishment of military forts to protect the routes and the prospecting for and discovery of minerals upon Indian land were among the many causes leading to the outbreak of Indian hostilities with the Sioux and their allies in 1866, which was to continue until at least 1877. Attempts to peacefully terminate these hostilities in 1868 resulted in the closing of the wagon roads across the ceded area and the abandonment of the military forts.

In 1868, the white population of Wyoming Territory was small and found for the most part in temporary mining camps and along the line of the Union Pacific Railroad which by that year had been completed to Cheyenne, some 175 miles southeast of the ceded area. Settlement in Montana

found also for the most part in and near the mining communities in western and northern Montana. The Federal Census for 1870 gave the population of Wyoming Territory as 9118 and of Montana Territory as 20,595. As of 1868, the inhabitants of Montana optimistically looked forward to the coming of the Northern Pacific Railroad through that territory but it was known that such an event would be a number of years in the future. The Northern Pacific was chartered and received its grant in 1864 to construct a railroad from Lake Superior to Puget Sound. The route ultimately followed through Crow Territory along the Yellowstone was under active consideration prior to the date of the 1868 cession. Construction of the railroad did not commence until 1870 and due to the financial panic of 1873 it did not reach Montana until 1881.

In support of its contention that the consideration paid for the 1868 cession was grossly inadequate, petitioner presented two expert witnesses, Doctor Merrill G. Burlingame, historian, who is head of the Department of History and Government, Montana State College, and Mr. Mont H. Saunderson, a real estate appraiser and ranch economist of Bozeman, Montana. Mr. Norman B. Plummer, a professional real estate appraiser of Portland, Oregon, testified as an expert witness for defendant and Doctor A. F. Vass, a ranch economist from the University of Wyoming, also testified for the United States. Mr. Saunderson and Mr. Plummer also submitted written reports containing much information pertaining to the elements or factors normally considered in fixing a valuation such as the topography, climate, soils, settlement, accessibility, and adaptability of the ceded area.

The appraisers for both parties agree that the value of the ceded area as of the date of the cession is to be determined by its fair market value as of that date. Their opinions as to its value are based principally on the application of the market data, or comparable sales approach. Both Mr. Saunderson and Mr. Plummer recognized that because of the remote date of valuation it was necessary to consider sales within and outside of the ceded area for some years following the date of valuation. The appraisers also were of the opinion that ^{the} ceded area was adaptable to a number of economic uses. Mr. Saunderson arrived at his opinion that the ceded area had a value as of May 7, 1868, valued as a unit, of \$25,870,025.00, or approximately \$.85 per acre on the average, by assigning values based upon market data analyses to the land in terms of its highest and best use as applied to natural range and resource types, as follows:

	Land <u>Acreage</u>	Value <u>Per Acre</u>	Total <u>Value</u>
1. The foothill grasslands	1,572,998	\$1.25	\$ 1,966,248
2. Plains grasslands	10,200,656	1.00	10,200,656
3. Sagebrush grasslands	9,152,957	.70	6,407,070
4. Desert shrub rangelands	3,668,168	.35	1,283,859
5. Valley irrigable lands	638,000	2.50	1,595,000
6. Gallatin National Forest	239,130	1.12	267,826
7. Custer National Forest	518,128	1.30	673,566
8. Big Horn National Forest	1,113,597	.80	890,878
9. Shoshone National Forest	2,430,028	.55	1,336,515
10. Shoshone Ind. Res. forest	400,000	2.30	920,000
11. Yellowstone N.P. lands	597,103	.55	328,407
Totals	30,530,765		\$25,870,025

It was the opinion of defendant's witness, Mr. Plummer, that the ceded area as of May 7, 1868, had a value of \$2,425,000, or about 8 cents per acre. This witness arrived at this opinion by assigning values to each of the several large classes of land which he considered existed in the ceded area, as follows:

Acres

1,530,000.00--Forest Woodland Ungrazed.....	at \$.17	\$ 260,100.00
4,825,000.00--Forest Woodland Grazed.....	at .17	820,250.00
1,775,000.00--Open Woodland.....	at .17	301,750.00
1,014,000.00--Potential Pasture.....	at .10	101,400.00
8,165,000.00--Desert Shrubland.....	at .04	326,600.00
11,590,429.80--Sub-humid Grassland and Semi-arid Grazing	at .04	463,617.00
738,335.00--Potential Irrigable Agricultural	at .10	73,833.00
755,000.00--Potential Cropland.....	at .10	75,500.00
138,000.00--Sub-Alpine Areas.....	at .01	1,380.00
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30,530,764.80--Total.....		\$2,424,430.00
	Adjusted	2,425,000.00

30,530,764.80 acres

\$2,425,000.00

or .079428 per acre

Although the appraisers seem to agree that the market data approach is the proper one principally to apply in determining the value of the ceded area, they differ greatly not only in their ultimate opinions of value but also as to the use of the market data material. Mr. Saunderson, petitioner's appraiser, used the analyses of comparable sales data, most of which sales data is set forth in our findings of fact, as the primary approach to value. Because of the limitations on available market data resulting from the remoteness of the valuation date, the absence of any sales within the ceded area prior to that date, and the absence of any large sales in the region prior to the railroad land grant sales, this witness considered it necessary to use sales of small areas of land within and nearby the ceded area, and also to take into consideration sales for some years following the valuation date. Mr. Saunderson was of the opinion that a study of these early sales showed

a definite rangeland value level and scale developed during the 1860's and continued with but little change until around 1900. The early sales of small 160-acre ranch claim pre-emptions, were important, he believed, in the development of the general level and of the scale of rangeland values and that the large-tract rangeland sales of the 1880's and of the 1890's were important in fixing the scale and consistent with the early small-tract sales on a rangeland capacity basis. Mr. Saunderson testified that he believed it possible to determine reasonably well the grazing capacity of the early sales of small selected lands as of the valuation date, and to make an interpretation of their price on a grazing capacity basis and then to relate the values indicated to other types of land within the area. The results of his interpretation of rangeland sales and the application of the value level and scale to the rangeland types he estimated to be found within the ceded area are shown in the table he prepared hereinabove set forth.

Defendant's appraiser on the other hand gave a consideration only to large-tract sales, mostly railroad sales, during the period 1868-1903, as a guide to his opinion of value. These sales he discounted at a rate of 8% interest back to the 1868 valuation date in order to determine what the buyers could have afforded to pay for the properties and carry them to the date of the sales.

Little weight can be given in the valuation of an immense tract of 30,530,764.8 acres to the consideration paid in the sales of a small number of 160-acre pre-emption claims within and nearby the ceded area. These small sales used by petitioner's appraiser, some 68 in number, comprising

a total of about 11,000 acres, and in part but a 10% random sampling of early sales, were for the most part select locations in river valleys. The land sales by the Northern Pacific and Union Pacific Railroads many years after the 1868 cession are entitled to greater weight in determining the value of the ceded area but due allowance must be made for the fact that these sales followed construction of the railroads bringing transportation to the areas in which the sales were made and also followed the ending of Indian hostilities and the destruction of the buffalo on and near the ceded area. It is apparent that land values would be far greater after the occurrence of those three events than they were in 1868.

The appraiser for petitioner was of the opinion that his conclusion as to value based on the market data approach was corroborated by two supplemental analyses. The first such supplemental study was based upon what he said was the historical relationship between land values and livestock values in stock raising, which, according to the theory, indicate that in the long run the land had a one-to-one value ratio to the livestock supported on it. The one-to-one ratio is not always constant according to Mr. Saunderson, being closer at some periods than at others. On cross-examination this witness admitted that the use of this formula usually consists of three elements -- raw land 35 per cent, improvements 15%, and range animal 50%. Such ^{an} approach to value regarding raw lands, even if the correct formula was used and the ratio was constant, would be theoretical and arbitrary if applied to a large area at a remote time when there had been no long-run/^{ranch} operations in the region, few sales of raw land, and open range operations in the region.

Mr. Saunderson's second supplemental approach was based upon capitalization of the probable rent which would have been yielded by the land of a typical pioneering livestock operation. Mr. Saunderson admitted that not much, if any, of the ceded area could have been rented in the early years following the cession (Tr. 328). The use of the capitalization method of valuation under circumstances such as appear in this case is not a recognized method of valuation where there has been no rental income of the property and especially where no such income could be expected in the foreseeable future.

The ceded area was adaptable in 1868 to several uses. The principal one and the use most likely to be foreseen for the greater part of the tract in the immediate future was stock raising. Other uses to which parts of the area were adaptable at that time were irrigated farming, timber operations and mineral development. Mr. Saunderson, petitioner's appraiser, did not separately classify any of the lands within the tract as mineral lands and did not add any specific value increment to those lands which might have been desired for mineral development in 1868. Petitioner's appraiser did appraise the timber lands of the ceded area, some 4,700,000 acres according to his estimate, at prices ranging from \$.50 to \$2.30 per acre as of 1868 for their combined forestry and rangeland uses. This witness stated in his report (Pet. Ex. 209, pp. 48-49) that the appraisal of the timber lands rested primarily upon the early stumpage value of the stands, discounted for fire and other risk losses. On cross-examination, Mr. Saunderson testified that the sale of timber lands to the Bigfoot Milling Company was "probably the most important thing" that he looked at and studied in appraising the timber lands. The sale thus re-

1890 and 1901, consisting of some 150,432 acres in the Missoula and Flat-head drainages for \$316,975.02, located approximately 175 miles west of the western border of the Crow ceded lands. The lands sold to the Company were situated near the railroad.

The timber areas were substantially better than the timbered portions of the ceded area but the range resources were not as good as the range-lands in the Crow timbered area, according to the witness. There is no substantial evidence that the timbered area of the ceded tract at the time of the cession or for a long period thereafter was ever in demand except for local use. The timber was predominantly lodgepole pine which for years was to remain without commercial value. The timber of the ceded area was largely inaccessible at the time of the cession and for many years thereafter until transportation became available to the various parts of the ceded area. The sale of the timber lands to the Big Blackfoot Milling Company, many years after the cession following the construction of the railroad, and many miles distant from the ceded tract consisting of timber substantially better than that on the ceded lands, is hardly comparable. Any increment to the value of the lands because of the presence of timber as of the valuation date would be speculative and nominal.

Petitioner urges as one helpful guide in determining value in this case the value set in prior decisions of the Court of Claims and this Commission in cases involving other Indian tribes. The lands involved in those cases were parts of the subject tract or nearby areas. In Shoshone Tribe v. United States, 3 Ind. Cl. Comm. 313, the Commission determined the value of 700,642 acres of land in the southwestern part of what had

been the Crow ceded area to be at an average of \$.80 per acre in 1872 or 1874. The Court of Claims in Shoshone Tribe v. United States, 85 C. Cls. 331, set a value of \$1.35 per acre for 2,343,940 acres of the Wind River Reservation as of 1878. This land was also part of the area ceded by the Crow Tribe in 1868. In the case of the Assinboine Indian Tribe v. United States, 77 C. Cls. 347, 372-3, the Court of Claims determined the value of over 6,000,000 acres in northern Montana adjoining the northeast boundary of the Crow ceded area to be \$.50 per acre, the valuation covering a range of dates from 1868 to 1882. The Court of Claims in Fort Berthold Indians v. United States, 71 C. Cls. 308, 338-340, allowed \$.50 per acre for 9,846,186.93 acres of land in eastern Montana and North and South Dakota, part of which adjoined the Crow ceded lands on the northeastern corner. The dates of valuation range over a period of 1868 to 1880. In Blackfeet, et al. Nations v. United States, 81 C. Cls. 101, 132-136, the Court of Claims determined the value of 12,261,749.76 acres of land lying immediately north of the Crow ceded area to be at the rate of \$.50 per acre in 1874. While these valuation determinations are not controlling as far as the present case is concerned, they are, of course, to be considered along with the record in the instant case. In considering these judicial valuations it is also necessary to keep in mind the difference in valuation dates, the size of the areas involved as compared to the Crow ceded area and the conditions existing in 1868 as shown by the record herein.

The record discloses that as of 1868 the principal use to which the tract was adaptable to a purchaser was that of stock raising but that such use was limited because of conditions then existing such as Indian

hostilities, the roaming buffalo, the open range operation, and lack of transportation. Because of its size the purchaser of the tract would have known it would require selling off all or most of the ceded area in smaller units which would have taken a long period of time, estimated at 30 to 35 years and that a large part of the tract, estimated at 20%, would be unsaleable unless these lands were included with more desirable lands in disposing of the large tract to subsequent purchasers.

Taking into consideration the remote date of the cession, the enormous size of the ceded area, the conditions then existing in and near the ceded area, the lack of sufficient comparable sales or market data at and near the date of the cession to indicate any actual market value for the tract, and all of the evidence and testimony of record, the Commission concludes that as of May 7, 1868, the fair market value of the ceded area consisting of 30,530,764.8 acres was \$12,212,305.00, or at the rate of 40 cents per acre. The Commission further concludes that the consideration of \$1,644,585.49 paid for the cession was unconscionable.

As to the consideration for the cession, \$1,644,585.49, the parties agreed in their briefs that that amount was actually paid the Indians for the cession of their lands. Recently, however, and without questioning that the above sum was paid for the lands, the petitioner, by amendment to its proposed findings of fact, would have us take a reduced figure, \$1,111,768.07, as the consideration, that is, the amount we should accept as having been paid on the claim under the Treaty of May 7, 1868.

The method by which the reduced figure is arrived at is best shown by a statement contained in the accountants' report which has been submitted to the Commission. It reads:

* * * * On the basis of an assumption of an interest rate of 5% simple interest per annum, and treating expenditures as made on an average date in the fiscal year (December 31), the precise date of particular payments not being disclosed, we find that the value of the future payments on May 7, 1868, was \$1,111,768.07. That is to say, the sum of money which, if put at 5% simple interest on May 7, 1868, would have amounted, with ^{the} interest earned, to the entire \$1,644,585.49, if disbursed in each of the fiscal years involved in the varying amounts expended (taking the same average date in each year) would be \$1,111,768.07.

The figures used in the accountants' report were obtained from the G.A.O. report, Petitioner's Exhibit 211, which show disbursements under treaty provisions extending from fiscal year 1869 through fiscal year 1932, a period of 64 fiscal years.

The difference between the amounts expended under the treaty for the cession, \$1,644,585.49, and the reduced amount, \$1,111,768.07, which the petitioner now claims should be taken as the consideration for the cession, is \$532,817.42; this sum, as the accountants' computations show, is for interest on the annual disbursements under the treaty from the date of the treaty to each fiscal year in which the expenditures were made and deducting such interest on each from each annual total. The same result would be reached if the interest were added as part of the claim, but in either case it would be interest. In United States v. Alcea Band, 341, U.S. 48, 49, the Supreme Court said: " * * * interest on claims against the United States cannot be recovered in the absence of an express provision to the contrary in the relevant statute or contract." See also the case cited in that opinion and Kiowa, et al. v. United States, 5 Ind. Cl. Comm. 297, 312.

The Treaty of May 7, 1868, contains no provision for payment of interest on the deferred disbursements nor does the Indian Claims Commission Act provide for interest, hence, it follows the interest item now claimed by petitioner must be denied.

Defendant's counsel in his brief urges that the petitioner is not entitled to the fee value of the ceded lands on the basis that Indian title does not include the value of timber or subsurface rights but only the use value. It is sufficient to point out that the Commission in its prior decision in this case held that the Crow Tribe had recognized title to the subject lands. In any event, this Commission has determined in Coeur d'Alene Tribe v. United States, our Docket No. 81, 6 Ind. Cl. Comm. 1, that Indian title includes full beneficial ownership of the value of timber and mineral rights. Defendant further contends that the consideration paid the Crows should include the 8,000,409.2 acres in the reservation which defendant urges was granted to the Crow Tribe by the 1868 treaty. This reservation was part of the lands aboriginally possessed by the Crow and recognized as such by the Treaty of Fort Laramie, in 1851.

s/ Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner