

BEFORE THE INDIAN CLAIMS COMMISSION

THE OMAHA TRIBE OF NEBRASKA, AND
AMOS LAMSON, CHARLES J. SPRINGER
JOHN F. TURNER AND HENRY F. FREEMONT,
EX REL. OMAHA TRIBE OF NEBRASKA,
OMAHA TRIBE AND NATION, INCLUDING
ALL GROUPS, BANDS AND MEMBERS OF
SAID OMAHA TRIBE AND NATION,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 225-A

Decided: November 28, 1958

Appearances:

David Cobb, with whom were
I.S. Weissbrodt, Abe W. Weissbrodt,
James E. Curry, Jay H. Hoag, and
Harry Lamberton,
Attorneys for Plaintiffs.

William O. Chatterton, 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 questions for determination are the proper date for valuation of the land involved, its fair market value on that date, and whether the amount paid for it by the defendant was unconscionable.

Defendant acquired the land under a treaty which provided that it should become obligatory upon the parties thereto when it was ratified by the United States. Under the precedent of Kootenai vs. United States, Ind. Cl. Com. Dkt. 154, the ratification date of April 7, 1854, becomes the date of valuation.

The real estate involved is a 4,982,097.87-acre tract in northeastern Nebraska bounded on the south by the Platte River and on the north and east by the Missouri River. It has a good growing season, fair rainfall and nominal temperature extremes. The terrain is principally rolling with an elevation of from 1,000 to 2,000 feet and there is some overflow land along the rivers. It has 3,622,549.39 acres of agricultural land and 697,337.94 acres which should be cropped only intermittently, 533,553.13 acres of good grazing land and 128,647.41 acres with but sparse vegetation according to 1942 surveys conducted by the Nebraska Experimental Station. Ten acres have not been classified. In 1854 the soil would have appeared less subject to erosion and more productive than its recent classification due to an undisturbed residual deposit of native grasses then upon it.

Petitioners claim the tract was worth \$1.50 per acre in 1854. The defendant's valuation witness divided it into five parts: choice tracts lying along the Missouri and Platte rivers, worth \$2 per acre; high quality land near the choice tracts, near timber and water transportation, \$1.25 per acre; medium quality land near streams, with some timber but removed from water transportation, 70¢ per acre, poor quality land with little or no timber and soil unsuited to settlement,

25¢ per acre; and very poor land, with no timber, removed from water transportation, and hilly, 10¢ per acre, or an overall average of 55¢ per acre.

As we stated in Miami Tribe of Oklahoma vs. United States,

4 Ind. Cl. Com. 346,401:

The weight to be given to opinion evidence depends upon the qualifications of the witness in the field in which he testifies and whether he takes all relevant factors into account and the correctness of the facts upon which the opinion evidence is based; and whether the assumptions made by the witness are proper and supported by facts. The appraisal can only be properly evaluated by giving consideration to the qualifications of the witness in the light of the true facts upon which based.

See, also, 20 Am. Juris., Sec. 1206, 1207, 1208.

The parties agree that the proper valuation method is the fair market approach. They seem agreed that fair market is that price agreed upon by a willing seller and a willing purchaser who are each well informed and under no compulsion to perform. The material variation between the two conclusions of the valuation witnesses appears primarily due to the limited material taken into consideration by Mr. Murray and to Mr. Davis' insistence upon giving consideration to the sales history of the Omaha cession land as it is reflected in deed records over a period extending more than twenty years after the appraisal date, with no consideration given to changing conditions in that period which would contribute to a higher land value. The fair market value of the Omaha cession land as of the appraisal date lies between the respective valuations of these witnesses.

Mr. Davis has partially relied upon actual sales involving the Omaha cession land which occurred from 1853 through 1875, which sales he has broken down into various types over varying periods. Upon the reasoning that the first transfers between individuals conveyed some improved land, he compared the recited consideration in a series of railroad sales starting in 1867 with that of non-railroad sales occurring in the same period and determined therefrom that since the railroad sales had a weighted average consideration of 24.26% less than the non-railroad sales, this percentage represented an added consideration for improvements. By comparing the weighted average consideration recited in 27 deeds conveying in excess of 10,000 acres each and averaging 3,362 acres in size with 1,077 deeds recorded during the same period and averaging 229 acres in size, and checking his findings against the fact that the amount listed in the 1900 census reports as the total value of buildings on Omaha cession land equalled but 15% of the total value reported for both buildings and real estate, Mr. Davis determined that large tracts brought an average 42.39% less than smaller units.

With these percentages Mr. Davis reduced all recited considerations to a "bare land value" upon which he rested his final conclusion in part without respect to other factors contributing to the land market values at the time of these later sales and which factors may or may not have been within the knowledge or reasonable anticipation of a prospective purchaser in 1854.

If the consideration for sales averaging 3,362 acres in size amounted to 42.39% less than that for units containing one-seventh as much land, the use of the "bare land value" of the smaller units to arrive by mathematical equation at a fair market "bare land value" for a 4,982,097-acre tract becomes quite impractical. In any event, this procedure would result in assigning to the land in 1854 the increased values flowing from a heavier settlement, the existence of a railroad, the presence of new roads, churches, schools, an established system of government, the existence of law and order and other developments occurring within Nebraska between 1854 and the various dates of these later sales. Obviously fair market value can not be determined by such mathematical computation to the exclusion of other factors.

Data concerning several sales of large tracts has been placed in evidence. For such data to be beneficial in valuing another tract there must be some reasonable relationship in time, location, size and character of the tracts involved. The sales occurring between 1790 and 1866 in New England, the Great Lakes States and in Georgia as well as the Cherokee Neutral land sale in Kansas which Mr. Davis took into consideration in arriving at his valuation, have no elements of comparison except possibly that of size. Two other large sales are those of 99,996.34 acres in Platte County and 99,973.08 acres in Stanton County, both counties containing Omaha cession land, which the Midland Railroad Company sold to one Converse in 1871 for \$125,000 or \$1.25 per acre in one instance and for \$1,000 or but 1¢

per acre in the other. These are not included in the railroad sales used by Mr. Davis in his computations. The largest of those sales was one of 5,943.97 acres. However the two Converse sales conveyed over 50% of all the railroad land sales. They occurred 16 years after the appraisal date, have a weighted averaged consideration of 65¢ per acre, involve part of the same territory, and are the nearest in point of time to the appraisal date of any large sales except the Cherokee Kansas land which sold on credit for \$1 per acre in 1868. The Converse sales suggest that 17 years after the appraisal date that portion of the Omaha cession which was removed from the trade centers along the Missouri River was selling in unlimited quantities upon the open market in an unimproved state for an average of 65¢ per acre when not supported by the Government's minimum statutory price of \$1.25 per acre, and when acreages of extraordinary size were involved.

What a prospective purchaser would willingly have paid for the Omaha cession land in 1854 depended upon several factors. He would have given consideration to the size of the tract, the incidental expense of surveying, advertising, managing and promoting a resale program, the carrying expense such as taxes and interest upon any financing required by him in the original purchase or required of him in its subsequent resale. He would have considered the highest and best use of the land, the markets for its produce, the prevalent demand for land and possible period of resale. He could look back on a well formulated pattern of settlement in the prairie states west of the Mississippi River and know the preference for a site along the banks

of a stream affording some timber but with prairie land attached; that the distance from established settlements was material but more important still was the location with respect to water transportation and the western overland traffic lands; he would know the lure of western gold which swept the emigrant trains past available public land in Missouri and Iowa and on far to the west. He would consider the economic recession of 1853, that financing would cost him at least 8% interest; that the railroad terminated east of the Mississippi River and could not be expected to reach the Omaha cession for several years; that passage of the Graduation Act was imminent and would increase the competitive value of the bulk of the unsold public domain in the east; that 1,360,000,000 acres of unsold public land was on the market as of June 30, 1853, of which 22,700,000 acres were in Missouri and 22,800,000 acres in Iowa; that public land in Iowa was moving rapidly but that approximately 2/3 of the land in Iowa passing into private hands during 1852 was paid for with military scrip which was selling on the stock markets in the east at discounts as low as \$1.08 per acre; that the demand for Iowa land by both speculators and settlers had not yet reached the extreme western portion of the state as is evident from the fact that in the five Iowa counties of Pottawatomie, Harrison, Mills, Monona and Plymouth bordering the Missouri River there had been only 89 land transfers between private parties in 1853, conveying less than 100 acres per sale on an average, for a weighted average consideration of \$3.82 per acre, and that only 17 such sales occurred within those counties during the whole of 1854, although this land was considered slightly preferable to the Omaha tract and was only 9% disposed of. Such purchases

... have also acquainted himself with the vast amount of land in Nebraska to which Indian title had been extinguished and which would be expected upon the public market within a reasonable time in competition with the Omaha cession land.

Evidence concerning the rate of disposition of the Omaha cession land by the Government is not in the record, but the demand existing for it is shown by private sales made of it. In 1853, 1854, and 1855 there were 71 such sales, including sales of identical tracts, all confined to Dodge, Douglas or Washington counties. Land in other counties bordering upon the Platte and Missouri rivers was sold by individuals before 1861, and in Cumings and Stanton counties such sales first occurred in 1861 and 1866, respectively. Within ten years after the appraisal date the first such sales were recorded in Pierce and Wayne counties and two years later in Antelope county. Boone County had no such sales until 1872, eighteen years after the appraisal date. During 1871, 99,996.34 acres sold in Stanton County for but one cent per acre. These transfers disclose that any demand for the Omaha cession land existing in 1854 was confined to the immediate vicinity of the Missouri and Platte rivers, along the emigrant traffic lands to the west. A prospective purchaser in 1854 would have discounted this demand as one resulting from the emigrant trade in that restricted area. We think the consideration for the early sales in this vicinity must be heavily discounted, both on account of the inflated currency in Nebraska Territory at the time and the small tracts conveyed.

From all the evidence before us, and those items of which the Commission takes judicial notice, we believe the record supports a finding that the 4,982,097.87 acres here involved had a market value of 75¢ per acre or \$3,736,573.40 on April 17, 1854; that the consideration paid of \$975,739.54 was unconscionable, and that petitioners are entitled to recover of the defendant the difference of \$2,760,833.86 less such offsets as may hereafter be determined to be due it.

Edgar E. Witt
Chief Commissioner

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner