

BEFORE THE INDIAN CLAIMS COMMISSION

THE SNAKE OR PIUTE INDIANS OF)
 THE FORMER MALHEUR RESERVATION,)
 IN OREGON,)

Petitioners,)

vs.)

Docket No. 17)

UNITED STATES OF AMERICA,)

Defendant.)

Decided: April 15, 1959

Appearances:

Mr. C. B. McConnell, with whom
 was Mr. Bernard J. Long,
 Attorneys for Petitioners.

Messrs. Ralph A. Barney and
 Leland L. Yost, with whom was
 Mr. Assistant Attorney General
 Perry W. Morton,
 Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Commissioner, delivered the opinion of the Commission.

In our decision, filed December 28, 1956, (4 Ind. Cl. Com. 571a) we found that the petitioners' ancestors, the Snake or Piute Bands or Tribe who were parties to the unratified treaty of December 10, 1868, held original Indian title as of January, 1879, to an area of land consisting of the former Malheur Indian Reservation in Oregon as it was defined and described in the Executive Order of January 28, 1876. The

boundaries of the tract have been described in Finding No. 3 and in the amended Interlocutory Order of this Commission, dated February 4, 1957. This case is now before the Commission for determination of the acreage of the described tract and the value thereof as of January, 1879.

The parties have stipulated that after deducting 120,019.43 acres in wagon road grants, 17,541.96 acres in allotments to Indians after 1879, and 10,000 acres because of the question raised by defendant as to the proper location of the southern boundary of the tract, the correct net acreage to be valued is 1,449,305.77 acres.

Petitioners contend that the land in the subject tract had a value in January, 1879, of \$3,000,000. It was defendant's contention that said land in January, 1879, had a value of \$390,076.95.

The evidence, as outlined in our findings of fact, discloses that the subject tract is located largely (approximately 75%) in what is now Harney County in southeastern Oregon. The tract extends on its eastern border some 12 miles into Malheur County and on its northern boundary an area in the shape of a triangle extends about 19 miles north into Grant County. The tract extends in its greatest dimensions east and west about 60 miles and north and south approximately 65 miles.

The northern portion of the tract is largely mountainous and covered with timber. Along the northern border the Blue Mountains are at an elevation of 6,000 to 7,000 feet with Strawberry Butte at the northern tip reaching an elevation of more than 9,000 feet. At the present time an estimated 353,976 acres in the northern portion of the tract lie within the boundaries of the Malheur National Forest.

The southeastern portion of the tract is in the eastern part of Harney Basin which is an area of nearly level land between the foothills on the north and the Malheur Lake at the southwestern corner of the tract. The Silvies River flows southerly from the high lands through the center of Harney Basin and empties into Malheur Lake. Neither Malheur Lake nor Harney Lake, which adjoins it to the west and outside the tract, has an outlet, both lakes being saline, extremely shallow, and subject to a wide fluctuation in size from year to year. There are also several small streams to the east of Silvies River which flow from the highlands in the north into Harney Basin.

The remainder of the tract was, for the most part, open range land consisting of wide valleys and rolling hills on which the growth was largely bunch grass interspersed with sagebrush. Both the North and Middle Forks of the Malheur River head in the mountains on the north and flow south and easterly through the eastern portion of the tract to join the main Malheur River at the eastern border, with the south fork of the Malheur River forming the southeastern boundary.

The climate of the area is arid, particularly in the non-timbered portion. The area has a short growing season. At least half the annual precipitation, which ranges from 10 to 12 inches on the lower portion to 12 to 15 inches on the higher elevations, occurs as snow during the months of November through February. The rapid spring run-off from snow tends to prevent most of the land from receiving the maximum benefit of precipitation with the possible exception of Harney Basin.

White settlement of the area did not commence until 1860 with Camp Steele, later renamed Fort Harney, being set up in 1866. The first post office was established in Harney County at Fort Harney in 1876. The area was sparsely populated in 1879 with most of the settlers engaging in ranch operations.

As of the valuation date, transportation facilities were virtually non-existent. The nearest railroad facilities were at Winnemucca, Nevada, 250 miles to the southeast. The early settlers made their way to the territory by overland trails. It was 1916 before the Oregon Short Line extended a branch railroad line to Crane, near the southern border within the tract, and in 1924 that line was extended to Burns on the western edge of the tract.

Both parties agree that in 1879 the highest and best use for the subject tract was for cattle ranches.

The evidence establishes that by 1879 there were a number of cattlemen who had become permanent settlers in the general area, and stock raising was well under way toward becoming a substantial industry in the area. By 1879 the ranchers had become aware of the growing competition for choice range areas, and there was an active demand for lands which contained stock water or were sources for winter feed for the cattle. Therefore, the areas consisting of swamp, flood and overflow lands, the sub-irrigated natural meadow regions and small amounts of land susceptible to use through irrigation were in demand for winter feed, and the areas along the streams and about the few springs were sought after as sources of water.

In 1879 the principle of the "free range" was well established. Under this practice an individual, partnership, or corporation could run privately owned cattle on the public domain without cost. This principle of the "free range" was recognized by no less an authority than the Supreme Court of the United States, which said in Buford v. Houtz (1890) 133 U.S. 320, 326, "We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use." In the early days of the cattle industry it was not only the practice of ranchers to graze their herds on the public domain but also to permit them to run at large over unenclosed grazing areas which might be owned by private individuals. Thus it was the practice of the cattlemen to acquire sources of stock water and lands for winter feed and thereby to gain control of the large surrounding areas of grazing land, under the "free range" practice.

The winters were mild enough to permit the herds to survive with little or no shelter and requiring but small amounts of winter feed. The bottom lands of the area were ideally suited for raising winter feed while the vast areas of bunch grass provided excellent summer grazing.

The stockmen in 1879 found ready markets for their cattle in the immediate area at the mining camps, military outposts and small settlements. Large herds were also driven over the open prairies to markets

in the Pacific Northwest and California as well as to eastern markets. The lack of immediately available transportation was of not too great an importance to the cattle industry.

The expert appraisers for both the petitioners and defendant have classified the land within the subject tract in substantially the same proportions. Petitioners' expert appraiser, Henry T. Murray, broke the best bottom land down into two categories consisting of the irrigable (90,000 acres) and the non-irrigable (39,125.04) acres, resulting in a total of 129,125.04 acres of bottom land. Defendant's expert appraiser, C. Marc Miller, placed 116,204 acres in his bottom land category. From these figures we have concluded that the sought after bottom land comprised between 8 and 9 percent of the total acreage of the subject tract. A much larger percentage of the area was in timbered lands of which the ponderosa pine was the predominant tree. Petitioners' expert forester reported that 228,201 acres of the tract contained timber, but his estimate appeared to be based more upon a consideration of the acreage which contained timber of a commercial value. Defendant's expert appraiser found 346,903 acres of the subject tract to be forest land. Petitioners' expert appraiser included the timbered land in his category entitled, "Mountainous and Timbered Grazing" for which he assigned 450,000 acres. Since the ponderosa forests of the area were of an open nature and were generally at the higher elevations, the snow in the area melted later in the spring and, as a result, there was a fine growth of forage grass which made excellent summer grazing. The remainder of the tract was grazing or range land, estimated by petitioners' expert to be 870,179.73 acres and

by defendant's expert to be 986,198 acres. The grazing land was the generally dry area which was covered with excellent bunch grass suitable for grazing cattle.

Most of the forested portions of the subject tract contained timber which today has a very high commercial value. Approximately 91 percent of the forest was ponderosa pine and it constituted an excellent stand of timber both as to quantity and quality. However, in 1879, there was a very limited local market for timber products and consequently little demand for land to be used for logging purposes.

The saw mills in the area during the period immediately before and for some time after the evaluation date were generally portable mills set up for the purpose of cutting lumber and shingles to be used for local construction and in some instances to cut timbers for the local mines. Since there was no available transportation it would have been impossible in 1879 to profitably export any lumber products to outside markets. As petitioners' timber expert testified, no records were found that the early mills owned or purchased any timber or timber lands. They cut timber off public lands. The development of the lumber industry did not begin until railroads were constructed in the area, and it was not until the 1930's that the timber industry began to take on the important position it presently maintains in the area.

The petitioners have submitted much evidence concerning the timber volume by counties and by species, as well as evidence concerning the operations of the famous Edward Hines Lumber Company. Based on these figures the petitioners argue that there was a substantial "potential

value" for the timbered areas which should be reflected in the value placed on the subject tract as of 1879. The Commission considers it unnecessary to make detailed findings of fact concerning the lumber volumes and stumpage values for the subject tract in view of the fact that in 1879 it could not be foreseen that the timber on the tract would have any great commercial value. Any potential value of land is important only to the extent that it may affect the fair market value on the date the property is being valued.

The Commission has found that the subsequent development of the lumber industry, which did not occur until about the 1930's, was far too remote in time from the valuation date in this case to be considered as any basis for computing an 1879 value for timber lands as such. Accordingly, the Commission has found that the forested areas in the subject tract were valuable primarily as a fine summer grazing area for stock, and the timber in itself had a value only to the extent that lumber was required in local construction. This very limited demand for lumber did not give any appreciable value to the forested areas in 1879 by virtue of the timber on it.

There were no known minerals in the subject tract in 1879. The choice bottom land was used for raising winter feed for the cattle and for raising subsistence crops for the ranch homes in the area. The growing season limited the type of crops which could be produced, and there was no evidence of any commercial farming in the area.

As detailed in our Finding 56, individuals could, in 1879, acquire federally owned land under the Presumption Act, the Homestead Act, the

Timber and Stone Act of 1878, and the Desert Land Act of 1877. State owned land was also sold to individuals as common school land, university and agricultural college grant land, swamp land, and internal improvement lands.

While today less than 28% of the subject tract is privately owned, it must be remembered that 353,976 acres of the tract lie within the boundaries of a National Forest. From the evidence which has been submitted it appears that there were no sales in the surrounding area at or prior to January, 1879, of a tract comparable to the subject area. However, evidence was introduced of a number of sales, and the Commission's findings with respect to those sales are detailed in our Findings 58, 59 and 60.

It appears that most of the early ranch operators acquired choice range lands from Oregon under the state's "Swamp Act." Under that Act swamp land could be acquired for \$1.00 an acre with \$0.20 paid at the time of selection and the remaining \$0.80 within 10 years and after proof of reclamation. There were sales of school land in tracts up to 640 acres at prices averaging \$1.25 to \$1.87½ per acre.

The parties also introduced evidence of a number of private sales in the general area. However, a great majority of the sales were made subsequent to the valuation date in this case; virtually all were small tracts and many included improvements.

Two of the largest private sales of land close to the subject tract were made in 1883 and 1884 to Riley & Hardin, the owners of the large Double-O Ranch, which was located just northwest of Harney Lake about

20 miles from the subject tract. While a discrepancy occurs concerning the exact acreage of the first sale, it was, in any event, about 7,700 acres and the second tract contained 2,450.90 acres. They sold for average per acre prices of \$2.50 and \$2.49, respectively. Both tracts were watered by the Silver Creek, and the land extended between Silver Creek and Harney Lake. It is quite obvious that the land was especially valuable to a cattleman because it provided the much sought after water for the stock and, having control of the water, permitted the Double-0 stock to graze upon the adjacent open range.

There were two sales in 1879, involving tracts of 320 acres each, sold to rancher W. B. Todhunter. The adjoining tracts were adjacent to the Silvies River, were less than four miles south of Burns, Oregon, and involved land of the same classification as the best bottom land in the subject tract. The average per acre price for each of the tracts was about \$1.70 per acre.

Defendant's expert appraiser has tabulated some 34 private sale transactions in Harney County covering a period from 1879 through 1888. Most of the sales were to ranch operators (13 sales were to W. B. Todhunter and 10 sales were to Riley & Hardin). Most of the sales were of the choice locations and involved bottom land or land controlling sources of water. The average per acre price for the 34 transactions was \$2.23½ per acre.

Mr. Murray, petitioners' expert appraiser, has tabulated a far greater number of private sales and, it appears, placed most, if not all, his conclusions of value on his tabulations of the private sales. As detailed

in our Findings 59 and 60, Mr. Murray's categorizing and tabulations of the private sales are in many instances misleading and are questionable as a basis upon which to compute mathematically the fair market value for the subject tract as of January, 1879.

While it appears that there were two sales in 1879 of tracts of 320 acres each, less than four miles from the subject tract, it does not appear that Mr. Murray has included the sales in his tabulation of Harney County "bottom land sales" although he includes a total of 24 sales, none of which involved more than 161.53 acres and 10 of which occurred in 1886, seven years after the evaluation date. Mr. Murray also included in his tabulation of 79 transactions involving Harney County, "grazing land," 10 sales of tract located within the subject tract involving lands which he classified bottom lands. As detailed in Finding 60(b) there were an additional 19 sales of so-called grazing land which it appears involved tracts which were well watered and could not be considered typical of the 870,000 acres classified by Mr. Murray as non-timbered grazing land. Further, many of these sales adjoined or were in the immediate vicinity of other sales which Mr. Murray included in his "bottom land" sales computation. In checking the location of the Harney County sales which Mr. Murray has placed in either the bottom land or grazing land category, it would appear that his classification was based more on the average per acre consideration paid for the tract than on its actual location and the obvious factors such as improvements and availability to water which would have affected the prices paid.

Petitioners' expert appraiser, Mr. Murray, has set forth in his detailed report the various factors which he stated must be considered in arriving at the fair market value of the subject tract as of January, 1879. Mr. Murray has stated that "the problem in this appraisal is to estimate a price which the hypothetical investor would be justified in paying, after having acquired full knowledge of the property and of the market as a one-unit or 'wholesale' transaction taking the entire property in one purchase." (Pet. Ex. 91, p. 86). While the Commission agrees that this is a fair statement of the proper approach to an appraisal of this type, it appears that Mr. Murray, while detailing most of the factors which the hypothetical investor would have considered, has paid little attention to them, preferring to rely on factors arrived at by averaging his tabulations of various private sales and adjusting these figures by certain factors based on assumption and speculation.

The Commission has found that, in addition to the questionable process by which the various per acre figures were computed, Mr. Murray's analysis of the averages and his mathematical adjustments of the figures render his ultimate conclusions of little value in assisting the Commission in its determination of the fair market value of said lands in 1879. Mr. Murray has reported that all sales of \$10.00 per acre or more cannot fairly be considered as representing the price for the land alone since there was a strong possibility that such sales included improvements. However, he did not exclude such sales but rather included them with a 20% adjustment which he claims represents the average ratio of improvements as reflected in some tax assessment records which he has

not tabulated or otherwise referred to. While such an adjustment is entirely speculative, as applied to any specific sales in his report, it must also be recognized that evidence of tax assessments on real estate fail to provide any true indication of the property's actual worth, and they are judicially non-acceptable as evidence of the market value of property. If the table of Harney County bottom land sales, consisting of some 24 transactions of small tracts, all but two of which occurred subsequent to the valuation date, had excluded those sales which were for more than \$10.00 per acre, the resulting per acre average of the 16 remaining sales would have been about \$5.72 as compared to the \$6.76 computed by Mr. Murray. Further, had Mr. Murray included in his bottom land table the Harney County "grazing land sales" which it appears from petitioners' own land classification were in fact bottom land sales (see Finding 60(a)), the average per acre figure for the Harney County bottom land sales would be further reduced to \$4.11 per acre.

Mr. Murray has then taken the average per acre prices from his tabulations and applied certain adjustments which he claims will convert the so-called "retail sales" values of the small sales to a "wholesale figure." His adjustments are based on his assumption that a buyer would be able to dispose of the entire tract in 10 years and would be satisfied to recover his capital investment plus a return of but 6% on his investment, after deduction of taxes, which he estimates were \$0.01 per acre per year. Therefore, Mr. Murray has multiplied all his average per acre tabulation figures by .5584 (the value of a dollar to be returned with 6% interest in 10 years) and subtracting therefrom \$0.10 (the taxes

per acre for 10 years). Applying this factor to the \$4.11 per acre figure referred to above, the result would have been \$2.19 per acre.

A similar adjustment could also be made with respect to the Harney County grazing land sales and would have resulted in a lower figure than the one upon which Mr. Murray has based his conclusion. Having computed his average per acre price for bottom land and grazing land, Mr. Murray was faced with the problem of placing an average per acre value on the mountainous and timbered land. Since he was unable to find any evidence of any similar sales of such land, he has resorted to a different method of computing this value. He has detailed reasons why the mountainous and timbered land was valuable for summer grazing and has arbitrarily concluded that such land had a cattle carrying capacity of twice that of the non-timbered grazing areas. Assuming that, therefore, timbered and mountainous grazing land must have been twice as valuable as non-timbered grazing land, he has doubled the grazing land price to reach the timbered and mountainous grazing land price. In so doing, however, he has increased the \$2.11 per acre grazing land price to \$4.50 per acre for the mountainous and timbered grazing land, an amount which is \$0.28 more than twice the \$2.11 grazing land figure. And when his figures are further adjusted to "wholesale figures," the mountainous and timbered grazing land appears as \$0.21 more than twice the grazing land figure. This completely unexplained \$0.21 difference times the 450,000 acres of mountainous and timbered grazing land adds \$94,500.00 to his appraisal.

To further boost his estimate Mr. Murray has added another \$500,000 for "timber potential." On the basis of his estimate of timber land acreage of 228,201 acres, this would be an additional \$2.19 per acre for the timbered area. This figure added to the \$2.41 for timbered grazing land results in a \$4.60 average per acre value for the timbered acreage. Of course, the addition of the \$500,000 for "timber potential," while not justified by the facts, is not in accordance with legally approved standards for appraising land. In U. S. v. 13.40 Acres of Land, etc., 56 F. Supp. 535, the court stated that "the separate valuation of timber or rock attached to land, or valuations arrived at by process of multiplying the number of cubic feet or yards by a given price per unit, are not approved bases for evaluation." The method of proving separately the values of various uses to which the land is adapted and then adding the separate items of value to find the value of the land was rejected in Morton Butler Timber Company, et al., v. U. S., 91 Fed. 2d 884.

The Commission has found that the addition of \$100,000 to the value by virtue of the value of so-called existing excess water of the Malheur River has no basis in law or fact.

In summary, Mr. Murray's final conclusion of value is no more than a mathematical computation based on tabulation of small land sales adjusted by assumption and speculation and applied to his acreage classifications of the subject tract. Such mathematical processes cannot provide a judicially acceptable basis for arriving at the fair market value of the subject tract. Ascertainment of value in cases of this

type cannot be made by such artificial rules. The problem of evaluating land on the frontier of the United States in 1879 is not subject to solution by application of formulas and equations.

Defendant's expert appraiser, Mr. C. Marc Miller, has submitted a detailed report from which he has based his ultimate conclusion of the value of the subject tract in January, 1879. The Commission has found Mr. Miller's report and his conclusion to be, in general, a realistic and fair appraisal of the area involved. In his summary Mr. Miller has stated:

"After a careful consideration of all the factors affecting the value of the lands of the Snake-Piute Tract here being valued, it is my opinion that a well-informed hypothetical purchaser of these lands of January 1879, would have recognized that for the swamp, overflow, flood, natural meadow, and potentially irrigable lands of the Tract there existed a substantial demand and a brisk market. That for the dry range land there existed no demand and no market, but that this range land was vital to the livestock economy of the region and had a very high use value. That the forest lands of the region had an equally high use value for grazing purposes but that for the timber growing thereon no market existed and no present nor foreseeable future demand existed. The purchaser would have felt that he could dispose of the swamp, overflow, flood, natural meadow, and potentially irrigable land without undue delay, and that he could probably dispose of the dry range land, inclusive of the forest area, with the hay and sub-irrigated pasture lands in a package deal. But he would also have realized that the additional sum which he could hope to secure for the grazing lands (inclusive of the forest area) would be small. To the value of the forested land as a range area, he could have afforded to add nothing more than a nominal sum by reason of the timber growing thereon. * * *"

The Commission considers that Mr. Miller has included in his report the factors which a well-informed hypothetical buyer would have considered, and we are in substantial agreement with the above quoted statement by Mr. Miller of his opinion of the market value of the tract.

The Commission does feel, however, that Mr. Miller's conclusion that there existed no demand and no market for the dry range land was an overstatement of the true situation. It appears that there were a number of sales of tracts within the large area classified as dry grazing land indicating that there was a demand, particularly for those areas within the dry range land which included springs or small creeks. It further appears that in 1879 and thereafter the cattlemen experienced difficulty in acquiring legal title to areas large enough upon which to operate a successful ranch. There was an active competition for lands and in the 1880's there were numerous legal and physical fights over land rights in the area. In fact, the owner of one of the largest ranch operations in the area, John S. Devine, had many of his patents to swamp land declared illegal by the State of Oregon and he suffered a great loss when he had to rebuy them from land speculators. The Commission believes that, had large tracts been available in the area, the cattlemen would have been willing to purchase a large area which would have included the variety of lands necessary for a successful ranch operation, including choice bottom land, open grazing land and timbered grazing land. However, a buyer would not have been able to pay very much for the grazing land and remain in competition with the other livestock men who were grazing their herds on the free open range.

In their brief, petitioners' attorneys have argued that Mr. Miller's report and testimony has erroneously shown fair market value as of January, 1879, when he should have considered the land's inherent and potential value as of January, 1879. It is the opinion of this

Commission that such terms as inherent and potential as applied to the value of land can only be considered to the extent that they affect the fair market value. This Commission has considered potential value in cases where it appeared that a prospective purchaser of land would have been willing to pay a price in anticipation of a potential use for the land to which it could have been put within the foreseeable future. As the courts and this Commission have stated upon numerous occasions, the test for valuation of land is the fair market value of the land.

After considering all of the evidence of record and the various factors as outlined in our findings of fact, the Commission has concluded that the Snake-Piute tract, consisting of 1,449,305.77 acres had a value as of January, 1879 of \$579,722.00 or an average per acre value of \$0.40 per acre.

As the lands were taken by defendant without payment to petitioners' ancestors of any compensation therefor, the petitioners are entitled under Clause 4 of Section 2 of the Indian Claims Commission Act to an award in the sum of \$579,722.00 less such offsets as may be allowable under the Indian Claims Commission Act.

Wm. M. Holt
Associate Commissioner

I concur:

Edgar E. Witt
Chief Commissioner