

BEFORE THE INDIAN CLAIMS COMMISSION

THE DELAWARE TRIBE OF INDIANS, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 27-A

ABSENTEE DELAWARE TRIBE OF OKLAHOMA, )  
 )  
 DELAWARE NATION, EX REL., W. E. )  
 )  
 EXENDINE AND MYRTLE HOLDER, )  
 )  
 Petitioners, )  
 )  
 vs. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 241

Decided: December 4, 1959

Appearances:

Wesley E. Disney, Attorney of Record  
for Petitioners in Docket No. 27-A.

Stanford Clinton, Attorney of Record  
for Petitioners in Docket No. 241.

W. Braxton Miller, with whom was  
associated Mr. Assistant Attorney  
General Perry W. Morton, Attorneys  
for the Defendant.

OPINION OF THE COMMISSION

WITT, Chief Commissioner, delivered the opinion of the Commission.

The land involved in this case is 960,000 acres located in what is  
now the State of Kansas, and known as the Delaware Outlet. It is a 10 mile

wide strip extending for 150 miles across northeastern Kansas 30 miles below the Kansas-Nebraska state line, and embraces land in present Jackson, Pottawatomie, Riley, Cloud, Clay, Mitchell and Osborne Counties.

We have for consideration the value of said Outlet as of May 6, 1854. The defendant has questioned the clarity of the opinion of the Court of Claims rendered upon an appeal in this case on February 8, 1955 (130 C. Cls. 782) concerning the interest which that Court determined the Delaware Indians acquired in the Outlet under their treaty of October 3, 1818 (7 Stat. 188) and has presented opinion evidence as to the value of a full title on May 6, 1854, and the value of the tract if held for certain restricted purposes. It is the opinion of the Commission that there exists no ambiguity in the Court's language and that the Delaware Indians were found to have acquired a full title to this land. The Commission has, therefore, proceeded to a consideration of the evidence and to an evaluation of the tract upon the basis of a complete title in the petitioner Indians.

The petitioner has submitted alternate theories for the measurement of any recovery to which it may be entitled. One is that the recovery should be the minimum realized or which might have been realized by the government in the disposition of the land, less selling and surveying costs of approximately 6¢ per acre. The second is for the fair market value of the land as of the date of its acquisition by the defendant. In view of the numerous former decisions by this Commission to the effect that when Indian land has been acquired outright by the Government and it is claimed the consideration was less than fair and just, that the fair market value of the land becomes the yardstick by which the transaction is measured, we feel a further discussion of these theories would only be redundant.

The petitioner requests a valuation of \$1.25 per acre, and in support thereof it has placed in evidence the record of the defendant's disposition of the Outlet from its acquisition in 1854 to as late as 1909; sales of three tracts known as the Delaware trust land, the Iowa trust land, and the Peoria trust land; railroad sales and a few other transactions. It called as a witness one John Francis Wilson, a cartographer with 18 years' experience in map making, who testified to the acreages within the various soil classifications referred to in our Finding of Fact No. 33, according to planimeter readings and approximations on a percentage basis as necessitated by the acceptable margin of error for such readings. It did not offer the testimony or opinion of an appraiser and neither party presented evidence touching second party transfers within the Outlet other than with respect to certain railroad sales which we shall discuss later. The defendant relies primarily upon the testimony of two appraisers and their accumulated data which it maintains establishes a value on May 6, 1854, on the basis of a full fee title of not in excess of \$126,000.00, or slightly more than 13¢ per acre.

Since, in the accepted sense of the word 'market', we cannot say that a market existed for the Outlet land in 1854 (Otoe and Missouri Tribe v. United States, 131 C. Cls. 593), we must look to those factors such as the type of soil and the natural resources of the land, their present and potential economic values, ready and potential markets, general economic conditions and such other items as a well informed hypothetical purchaser would consider in determining what he could afford to pay for this land as of its valuation date. Sales occurring within a reasonable radius of

the Outlet land and not too remote in time to the valuation date may properly be considered. The weight which may be accorded such sales in arriving at a value for the Outlet is dependent upon a careful analysis of their comparability and a careful consideration of all circumstances surrounding those sales which would have had a bearing upon the prices realized. The opinion evidence of the expert witnesses is for consideration in the light of the circumstances shown to exist on the valuation date and the factors shown to have been given consideration by those witnesses, as well as their personal qualifications, experience and procedural methods. From a careful consideration of all evidence properly before us, and a careful weighing of all factors involved, the Commission must reach its ultimate determination of value.

The elongated narrow strip we must value had no white inhabitants on the valuation date. A few whites were employed at various Indian missions and at trading posts in Kansas, the nearest being St. Mary's on the Kansas river. Troops were quartered at Fort Leavenworth, 35 miles to the east, at Fort Riley, about 25 miles to the south, and at Walnut Creek Post Office on the Santa Fe trail and Arkansas river. A few settlers were living along the Santa Fe trail and along the Blue river south of the Outlet, as well as in northeastern and southeastern Kansas. Westport (Kansas City) and St. Joseph on the Missouri river, each over 35 miles to the east, were important outfitting posts on the principal trails to the west. At about a fourth of its length westward the Outlet was bisected by the Oregon Trail from Kansas City, the only road servicing the Outlet. The construction of railroads into St. Joseph and Kansas City was anticipated and it was thought that

one line would thereafter be extended into Kansas following up the Kansas river 16 to 25 miles south of the Outlet or along the Santa Fe Trail. Both proposed routes were too far removed from the Outlet to affect its market value when once constructed. The Blue river, the Vermillion and the Republican each flowed across the Outlet. River transportation to a limited extent reached to Fort Riley on the Kansas river, but not up to the Outlet. The forks of the Solomon converged just inside its western limits and flowed southeastward through the southern half of the western quarter of the Outlet. The soil in the eastern part of the Outlet was preferable to that in the central and western sections. About 17,400 acres lying in two tracts along each side of the Blue river valley and approximately 10% of an adjacent 96,384 acre tract to the west are classed as grazing land. The balance is classed as agricultural. The eastern end of the Outlet and the bottoms of the Blue river and Fancy creek were well timbered with considerable hardwood but as one moved westward cottonwoods predominated and timber was found in diminishing quantities only along the stream beds. Considerable limestone was available but neither limestone nor timber possessed a present or potential commercial value apart from the land. There were no known minerals. The land was best suited for subsistence farming and for grazing.

As early as 1840 Congress expressed concern at the slow rate of disposition of the public domain. It had reduced the price per acre of the public land to a minimum of \$1.25 per acre and permitted whole sections or less to be purchased at that price at private sale after the land had been offered at public sale. It had adopted the Pre-emption Act of September 4, 1841, permitting any person to enter upon the public domain before survey, register a claim within three months of its survey, and

purchase up to 160 acres for \$1.25 per acre upon showing actual residence and erection of a dwelling of specified dimensions. When the Outlet land under valuation was ceded May 6, 1854, it had pending before it the Graduation Act (adopted August 4, 1854) which reduced the price of public land from \$1.25 per acre to as little as 12-1/2¢ per acre, depending upon the number of years such land had remained upon the public market.

The annexation of Texas in 1845 and the Mexican cession of 1848 had stimulated overland traffic with the southwest. The discovery of gold in California during 1848 had also given added impetus to western migration, and these emigrant and merchant trails led through the Indian country west of Iowa and Missouri. It was thought that contact with the traffic along those trails, with whites about the military posts to guard the routes, and settlers along them, was detrimental to the welfare of the Indians, and their removal from Kansas was advocated by the Indian Department. Frontier settlements had also reached the western limits of Iowa and Missouri and there was a growing demand for opening the adjacent Indian territory to settlement. There were in May, 1854, from 18 to 44 persons per square mile residing in Missouri in an area extending from a point slightly north of Fort Leavenworth southward to a point south of Kansas City, although the balance of the state was much more sparsely settled. Under these circumstances Congress had authorized the extinguishment of Indian title in Kansas and Nebraska and on May 6, 1854, there was pending before it the Kansas-Nebraska Territorial Bill which was adopted August 4, 1854. The imminent passage of this pending legislation and that the government intended negotiating a series of treaties (of which the Delaware cession of May 6, 1854, was the first) for the extinguishment of Indian title within the country adjacent

to Iowa and Missouri was readily ascertainable to any interested person by May 6, 1854. With this background we shall discuss the evidence bearing upon the fair market value of the Outlet land on May 6, 1854.

We shall first consider the evidence of subsequent sales both within and near the Outlet which petitioner relies upon to establish an 1854 value for the Outlet land. The first of these are a series of "trust land" sales. They involve three tracts, all lying east of the Outlet, each ceded to the United States in trust for survey and sale at tribal expense and for tribal benefit in like manner as sales of the public domain were held. Included is the tract ceded by the Delaware Indians for that purpose in their May 6, 1854 treaty, the Iowa cession of May 17, 1854, and the Kaskaskia, Peoria, Piankeshaw and Wea cession of May 30, 1854, the latter being referred to as the Peoria cession. The Delaware tract was divided into eastern and western divisions. The East Delaware tract and the Iowa tract bordered on the Missouri river; the Delaware river bisected the Iowa tract. The Peoria tract was on the Osage river, which was navigable part of the year. All three were adjacent to the states of Iowa or Missouri. All four tracts had better rainfall, timber coverage and on the whole better soil than the Outlet according to the Kansas State Board of Agriculture (Pet. Ex. V-6). The Peoria and Eastern Delaware tracts each had an important settlement which were points of origin for the overland routes west and where there were ready markets for farm produce. All four tracts were appraised in 1856 and offered for sale in 1856 or 1857. Appraisal values for the Eastern Delaware Tract averaged \$180 per acre and sales averaged \$2.09 per acre. Appraisal values of the Western Delaware tract averaged \$1.65 per acre and the average sale price was \$1.45 per acre. The Iowa

tract appraised for an average \$1.89 per acre and sold for an average \$1.92 per acre. The Peoria tract was appraised for \$1.66 per acre and sold for an average \$1.67 per acre.

Generally the references found to these several "trust land" sales are misleading in that they suggest the appraisal or sale of substantial acreages whereas the land was both appraised and sold in units of 160 acres or less, and as such the sales are unrelated in size and shape to the elongated 10 mile wide Outlet strip which began at their western limits and extended for 150 miles westward out into Indian country. We said in Pottawatomie Tribe v. United States, 3 Ind. Clms. Comm. 40, 60:

It is well established that a sale of a large tract of land as a unit brings far less than when sold in small tracts.

Furthermore, as quickly as these lands were ceded in trust, settlers who were without legal right to do so, who were known as "squatters" and who included both persons seeking a permanent residence and speculators interested only in acquiring some apparent right to the land which they might later transfer at a profit, rushed into the trust areas, so that by the time of their sale most of these tracts were claimed by and some were occupied by such persons. So even the brief time between the valuation date, May 6, 1854, and the dates of these appraisals and sales is of grave importance. It is true that these bona fide settlers and speculators conspired together and formed associations to hold down the price when the sales were held, and that letting squatters acquire the land at the appraised value served to prevent the land selling for what could have been realized at open competitive sales. Still the very presence of these squatters gave

an air of permanency, of the arrival of settlements, law and order, which would in itself contribute to a demand for land in those vicinities.

While it was realized in 1854 that there was a demand for land in Kansas, the actual size of the influx of whites in eastern Kansas far exceeded all anticipation. and a hypothetical purchaser of the Outlet on May 6, 1854, would not have anticipated any such demand for land as was in existence at the time of these trust land sales. The prices at which these small units sold must be heavily adjusted to allow for these conditions. Also the location of the trust tracts were in each instance preferable to that of the Outlet. All were adjacent to the Missouri, the main artery of transportation, except the Western Delaware tract, and it was between that river and the Outlet. They were nearer settled communities of Iowa and Missouri and outside the reach of hostile Indian raids. Their timber coverage was better and their soils were on the whole more productive than those of the Outlet (Pet. Ex. V-6). Again, the small tracts formed compact units, vastly different than the elongated 10 mile wide Outlet strip reaching out into country frequented by hostile Indian tribes.

It appears to the Commission that there is little comparison between the Outlet sale and the sales of other Indian lands which the petitioner offers for comparative purposes. The Christian Indian tract of 2,571 acres in a compact unit adjacent to the State of Missouri bordered on the Missouri river, was heavily timbered, and was within two miles of Fort Leavenworth where a ready market existed for farm produce. One of the most important emigrant roads to the west ran through it. Its second sale occurred over five years after the appraised date, during which time a rapid settlement in Kansas had taken place.

Both the 148 separate Indian allotment sales and the Kansas half-breed sales were actually separate sales of 160 acres each. They were each of allotments, and in the absence of any evidence to the contrary, it may be presumed that as allotments they had been improved to some extent. Unquestionably they were select tracts strategically located and in a settled community, whereas in 1854 the Outlet had no settlements upon it and none near that portion west of the Blue river. The 148 Indian allotments sold between 1859 and 1861. This period of time after 1854 encompasses one of heavy settlement within eastern Kansas, and of an improvement in economic conditions not yet disturbed by the Civil War and the strife between pro and anti-slavery factions in Kansas had been settled. So we find little comparison between these sales and the Outlet sale of 1854 either in relation to size, location or time. We have, however, given due consideration to them as well as to the "trust land" sales in arriving at a determination of the May 6, 1854 value of the Outlet land.

Petitioner also relies upon a showing of sales by the Kansas Pacific Railway Company and the Central Branch of the Union Pacific Railway Company. Other than that the sales occurred prior to 1880 and conveyed at least some land within the Outlet there is no information concerning these Union Pacific sales. The Kansas Pacific tract ran from Wabaumsee, Kansas, up the valleys of the Kansas and Smoky Hill rivers. The company offered 1,000,000 acres lying east of Ellsworth, Kansas, in 1869 and sold 384,185 acres that year. These were sales of valley land made 15 years after the appraisal date and 8 years after Kansas became a part of the Union, when there existed the added advantages of established government, educational facilities, and settled communities with roads, schools, churches, law and order. By the very nature of the railroad grants every acre was within 20 miles of the

track of an operating railroad with settlements at reasonably close distances along its route. Only a fourth were cash sales and the average price was but \$2.62. Whether the sales included townsites, the acreages involved in the separate sales, the terms and conditions of the credit sales, the percentages of defaults, if any, and whether there were other considerations entering into the transactions, such as free transportation to the site of the purchased tract, as was frequently offered during their construction period by railroad companies eager to increase their traffic load by populating the country along their routes, are all proper elements for consideration in assessing the comparative value of these railroad sales and these are matters on which the record is not enlightening. However, the element of time alone covering that strategic period when eastern Kansas was converted from an Indian country to a settled civilized state, is such that these sales must be heavily adjusted in their relation to the 1854 fair market value of the Outlet tract.

Petitioner has presented quite detailed information respecting the manner and rate of disposition by the government of the Outlet land. It has extracted from the original plat books the acreages and rate of disposal by homestead, timber culture and pre-emption claims, grants to the state for internal improvements, to railroads in aid of constructing transportation lines, and of sales occurring up to and including 1909 within all of the whole Townships 6 South within the Outlet. The Commission has found such data of material assistance in assessing the strength of the demand for land in and about the Outlet as of the valuation date, and in determining the attractiveness of that land to the early Kansas settlers. Sales occurring 20 to 50 and more years after the valuation date are, however, of little

use for comparative purposes, particularly where there has been such an advance in settlement as is reflected here.

All of the Outlet tract was open to pre-emption after July 22, 1854. Entry could be made before or after survey and payment of the price was not required until such time as the land entered upon was offered for public sale. Nevertheless at no time were there any pre-emption claims within Ranges 1 to 10 West, inclusive. With the exception of one such claim filed in Range 13 East during 1855 and one in Range 14 East during 1857, there were no pre-emptions predating 1858, or for four years after the land became available for acquisition in this manner. In Ranges 5, 7, 11 and 12, the first such filings occurred during 1858, and the first filings in Ranges 1, 2, 6, 8, 9 and 10 were made during 1859. Range 3 East had no pre-emption filing until 1872.

Within the first five years after the Homestead Act made this land available for mere filing fees and a 5-year residence period, and between 8 and 13 years after the valuation date, only 11,768.91 acres in the whole Townships 6 South within the Outlet were filed upon. On the basis of the Townships 6 South representing 60% of the Outlet it appears that the demand for free homesteads within the Outlet absorbed only 1/5th of the tract, even as much as 13 years after the valuation date.

An examination of the sales record discloses that the first sale within whole Townships 6 South in the Outlet occurred in Range 14 East during 1857. First sales occurred in four other East ranges during 1858 and in eight others during 1859. There were no sales in the West ranges until 1857, and only 3.68 acres were sold that year. One 160 acre sale occurred in each

range 3 and 4 West, in 1866, and an 8.29-acre sale occurred in Range 3 East in 1869. In 1870, 16 years after the valuation date, the first sales occurred in three other western ranges, two of them being less than six acres in size. Seventeen years after the valuation date, in 1871, Ranges 2, 6, 7 and 8 West, each experienced their first sale. None of the land sold for more than \$2.50 per acre. In six ranges none of it sold for more than \$1.25 per acre, and in six other ranges only one tract in each brought more than \$1.25 per acre. This is true with respect to the recited consideration and does not take into account what part may have been paid for with scrip obtainable at less than its face value.

Even the most casual examination of the record discloses that petitioner's requested 1854 value of \$1.25 per acre for land selling for \$1.25 per acre as much as 17 years later is not justified. We think the pre-emption, homestead and sales data clearly indicate that the 1854 demand for land in Kansas was not sufficiently strong to reach 35 miles into the interior to the Outlet land. An intelligent prospective purchaser would certainly have investigated the extent of that demand. He would have acquainted himself with the fact that a belt of land some 35 miles in width extended north and south along the eastern border of Kansas between the Outlet tract and the settled states of Iowa and Missouri, and that the government's announced policy of extinguishing Indian title and opening Kansas land to settlement could be expected to bring this strip into the market in the immediate future in competition to the Outlet land. He would have considered, we think, that land lying nearer to established states and developed areas, river transportation and overland routes.

would prove more attractive than a narrow strip extending out into undeveloped country. The evidence discloses that Indian raids occurred in 1864 and as late as 1870 in Clay, Cloud, Mitchell and Osbourne counties, and any informed prospective purchaser in 1854 would surely have considered that settlement within or even surveying the Outlet land west of the Republican river was fraught with peril, and would probably have concluded that the hostility of the Indians effectively precluded for many years to come the successful resale of that portion of the Outlet tract.

A prospective and informed person contemplating the purchase of the Outlet strip would have been aware that the pending Graduation Act would affect thousands of acres of the public domain which, although not attractive at \$1.25 per acre, would become highly competitive with the Outlet land at the proposed reduced prices going as low as  $12\frac{1}{2}$  cents per acre. He would have ascertained upon making an investigation of this matter that over 13,850,000 acres of public land subject to reduction laid within the adjacent state of Missouri. We think in considering the competitive value of the public domain he would also have taken into consideration the fact that military-bounty warrants were obtainable upon the eastern markets for less than face value, and by using such warrants or scrip the statutory price of the public domain would be accordingly reduced.

To advantageously resell the Outlet land it was clearly necessary that it be surveyed and platted. To make the whole tract accessible at least one 150-mile road needed to be constructed within it with bridging across three rivers. It was apparent from federal experience that a land donation would probably be necessary to attract railroads to service the

tract, that other land contributions would be necessary for schools, churches and other civic purposes; that a promotional and sales program must be set up and sales facilities maintained until the tract was disposed of. A prospective developer of the tract would have also taken into consideration the item of taxes which became assessable against the land upon its passing into private ownership and that by reason of its 150 mile length the land could be expected to fall within 5 counties, with the attendant expense of contributing to the organizational expense and maintenance of 5 separate county systems. An examination into the economic conditions prevailing in 1854 would have shown the country in a general recession, and that interest at from 8% to 10% could be anticipated upon any financing necessary, particularly since the elongated shape of the Outlet placed much of the land far out in unsettled territory, and its width made the development of its western portion particularly dependent upon the development of the land adjoining it, over which a prospective purchaser of the Outlet would have no control. Taking all the elements peculiar to this tract into consideration, we think it is apparent its development was attendant with more than the usual risk and that a prospective purchaser in 1854 would never have considered willingly paying the \$1.25 per acre for this tract which petitioner contends was its fair market value. We think, however, that he could have, and would have concluded that he could, afford to pay more than the values placed upon this land by the defendant's appraisers, and still realize the fair amount of profit to which he was entitled.

We have studied Mr. Hall's report and the testimony given by him and Dr. Murray. Much of the factual information reflected in our Findings of

Fact this day entered of record was presented by them. In arriving at an overall valuation each considered the Outlet as falling within three classifications. We are of the opinion that it more readily falls into three slightly different groupings, that is, approximately 599,040 acres of agricultural land west of the Republican river, two tracts of grazing land, one on each side of the Blue river valley, and containing in all about 170,000 acres, and the remainder of about 190,960 acres of agricultural land east of the Republican river. Taking into consideration all of the elements referred to hereinabove and the facts found to exist as reflected in our Findings, together with the entire record before us, we believe that the fair market value of the Outlet tract on May 6, 1854, is more accurately expressed by assigning to the approximate 599,040 acres lying west of the Republican river the value of 50 cents per acre, the value of 75 cents per acre to the two tracts of grazing land lying on each side of the valley of the Blue river and containing approximately 170,000 acres, and the value of \$1.00 per acre to the remaining approximate 190,960 acres comprising the Outlet tract, this making a total value as of May 6, 1854, of \$617,980, or an average of slightly in excess of 64 cents per acre.

Having determined the fair market value of the Outlet tract as of May 6, 1854, it remains to be determined whether the consideration passing to petitioner was adequate in the light of Section 2 of the Indian Claims Commission Act of 1946 (60 Stat. 1049). Article 3 of the treaty of May 6, 1854, (10 Stat. 1048) reads in part:

The United States agreed to pay to the Delaware tribe of Indians the sum of ten thousand dollars; and, in consideration thereof, the Delaware tribe of Indians hereby cede, release, and quit-claim to the United States, the said tract of country hereinbefore described as the 'Outlet.'

Actually, this was the only tract purchased by the United States under this treaty, the remainder of the land conveyed to it passing in trust for the purpose of survey and sale at tribal expense and for tribal benefit. So the consideration for the Outlet tract was \$10,000, according to the treaty.

The payment of but \$10,000 for a tract worth \$617,980 was so grossly inadequate, in the opinion of this Commission, as to constitute an unconscionable consideration within the meaning of the 1946 Act, (supra), and the petitioner is entitled to recover the difference between that sum and the fair market value less such offsets and credits as the defendant may hereafter show itself entitled to have applied thereto. The Commission has so found, and this docket will now be advanced for the determination of such offsets and credits as may be properly allowed the defendant.

Edgar E. Witt  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner

Arthur V. Watkins  
Associate Commissioner