

BEFORE THE INDIAN CLAIMS COMMISSION

ABSENTEE DELAWARE TRIBE OF)
 OKLAHOMA, DELAWARE NATION, ex rel.,)
 W. E. EXENDINE AND MYRTLE HOLDER,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 337

Decided: August 5, 1963

Appearances:

Stanford Clinton and
 Louis L. Rochmes,
 Attorneys for Petitioners.

W. Braxton Miller, with whom
 was Mr. Assistant Attorney
 General, Ramsey Clark,
 Attorneys for Defendant.

OPINION OF THE COMMISSION

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

The Commission heretofore, under date of October 2, 1961, entered its Findings of Fact 1 through 12 and its opinion thereon in this case (9 Ind. Cl. Comm. 346, 353). The value of the lands in Indiana ceded by the Delaware Nation to the United States by Treaty of October 3, 1818, was determined at that time. It was further determined that the grant of land to the Delawares in the present State of Kansas under the supplemental treaty of September 24, 1829 (7 Stat. 327), was in fulfillment of the obligations of the Treaty of 1817 and that the acreage and value of these Kansas lands would have to be ascertained in further proceedings

to complete the total consideration received. An order was entered by the Commission in this case on June 22, 1961, which provided as follows:

IT IS THEREFORE ORDERED that this case shall proceed without delay with the presentation of evidence relating to acreage and fair market value of the land granted under the supplemental Treaty of September 24, 1829 (7 Stat. 327), said valuation to be fixed as the effective date of the treaty.

In accordance with the foregoing order a hearing was had on October 3, 1961, to determine the acreage and value of the lands in the present State of Kansas granted to the Delawares under the Treaty of 1829.

This case is now before the Commission for a determination as to the value of 1,884,160 acres of land constituting what is known as Kansas Royce Areas 316, 317, 425, 488, and 263 as of April 29, 1830.

The lands described by the Royce Areas set forth above were granted by the United States to the Delaware Nation by the Treaty of September 24, 1829 (7 Stat. 327). The lands contained 1,884,160 acres of which 924,160 made up the so-called Residence Lands and 960,000 acres made up the so-called Outlet Land. The land is more particularly described in Finding 5.

This land had been set aside for the use of Indian tribes such as the petitioners. The title of the indigenous tribes to the land had been extinguished by two treaties (Findings 14 and 15).

The dispute between the parties herein is the value of the land at the time it was acquired by the petitioners, the Commission having found that date to be April 29, 1830, the date of ratification of the Treaty of September 24, 1829.

By the decision of the Commission of June 22, 1961, the value of the land as of 1830 constitutes partial consideration for the cession.

Petitioners take the position that there was no actual land market for the lands in question in or about 1830 and therefore the only consideration that should be charged against the award, shown by Findings 2 and 3 herein, is the cost of the land to the defendant; that said land was valued at approximately 2 cents an acre, and therefore this figure should be used to ascertain the consideration paid to the petitioners herein.

To this argument the defendant takes exception, stating that there was a market value for the lands in question as of 1830. The defendant cites specific cases to prove that such evidence as introduced in this case should be considered as bearing upon the market value. (Def. Req. Fdgs. pp. 26, 27)

In the Omaha case, one of the seven cases referred to in Finding 19, Dr. Murray relied upon availability of timber, access to nearby settlements and distance from the nearest land market. In the Delaware case facts such as those presented in the Omaha case were the basis of valuation by Dr. Murray and one other Government witness, and again in the Pawnee case, also referred to in Finding 19, and in the Missouria case, the factors outlined immediately above were covered in great detail by Dr. Murray. Thus in the three cases cited, factors so similar as to be almost identical with those in the instant case were used by Dr. Murray to ascertain value. Thus the Commission is of the opinion that there was sufficient and adequate evidence on which to determine the fair market value.

of the lands in question on April 29, 1830, and that Dr. Murray's testimony and the evidence introduced as to value should be considered by the Commission in reaching its decision as to the value of the lands in question as of April 29, 1830.

The physical features of the land in question are fully set forth in Findings 16, 18, and 20 including access to water and timber, access to transportation, climate, type of soil, length of growing season and other relevant factors. All these factors were considered by the Commission in reaching its opinion.

Dr. Murray, in evaluating the Residence Lands, explained the basis of his valuation on pages 129, 130, and 131 of the transcript wherein he stated:

A. My valuation of the Delaware residence lands was based in large measure by comparing the situation in Missouri right to the east, but particularly the sales, the quality of the land, the population, the climate, all as it related to the Delaware Residence lands. In my general valuation, summing up all of the factors -- the sales, the preference of settlers, their interest in land near transportation on a river, their interest in timber, and their interest in having water with their timber, and the climate and the fact that it could be used for general purposes as farming, the economic conditions -- when I averaged those things altogether and took the Missouri area into consideration, I figured that a prospective purchaser of the Delaware residence lands in 1830 would have considered 40 cents an acre as a fair market value for the 924,160 acres at that time, May 29, 1830. (April 29, 1830)

In arriving at that valuation as a whole, 40 cents, I considered that the area was made up of three different parts. In other words, my valuation was of the area as a whole, but in thinking of that area as a whole I divided it into three parts, the number one part being the choice acres first along the Missouri River and then down along the south border along the Kansas River and back up a little ways on some of the streams that had timber. That would include roughly 300,000 acres.

As of 1830, my total value for those 300,000 acres would be 60 cents an acre. I then took the next third, which was back from the rivers -- the access-- areas that were near timber but didn't have much timber on the, but were close enough to timber to be next in value to the choice lands, and I valued those at 40 cents an acre.

I then took a third area, the prairie without timber and some distance from timber, particularly the areas that were away from the rivers and to the northwest, adjoining the outlet and to the east from the Outlet and south. There I valued those 324,000 acres at 20 cents an acre.

If we take then the three areas -- the choice at 60, the medium at 40, and the less desirable, least desirable of all, without timber, we come out with an average of 40 cents an acre.

As to the Outlet Land the witness testified that,

The Outlet is first located on the map, A-3a, 150 miles long and 10 miles wide, running from the northwest corner of residence Delaware lands. The major problem has to do with access. There is no question of the acreage. As I understand it I took 960,000 acres.

The major problem in the Outlet land was its distance from access. The Kansas River was south. In addition to that the climate was less favorable than it was on the Delaware residence land. As we come out to the extreme western end of the Outlet our climate is critical in that there are years when there is not enough rain fall for good crops. There is also a shortage of timber in the Outlet. In this connection, I went over all of the survey notes on timber and there are two things I noticed. First of all, the timber that is present is largely on the three rivers that go through this area, particularly the Republican and the Solomon, but the other thing is that what timber there is is indicated by the surveyors as of a relatively poor quality, mostly cottonwoods. In a number of cases they indicated there was not enough timber for fencing, which was important in that day.

The Outlet area with respect to its highest and best use would be that on the eastern end it could have been used for general farming as of 1830, if it had not been so far from access. The western end was so dry that it would have been considered at that time as useful for grazing purposes.

I went over the whole Outlet area when I made my appraisal of 1854 in this case. I reviewed all of that material and went over the surveyor's notes again in detail to establish the basis for a valuation of that land. The economic conditions were the same. The climate, as I pointed out, was less favorable. The timber was less favorable. The access was definitely a far less favorable factor. When I considered all of these factors and summed them up, I considered this area as having a value as of 1830 of 10 cents an acre. And over-all value of 10 cents an acre.

I want to express that value in relation to the Delaware residence lands on which I pointed out that the lowest one third had a value of 20 cents an acre. When we come to the Outlet we find that it as a whole is in general farther from the Missouri River, much farther; that it is farther along the Kansas, that is, the best part of the Kansas from a navigation point of view was up to Topeka and as we went farther west, of course, the river was less desirable, so that we had here a major problem of access.

A second major problem was climate, and a third major problem was deficiency of timber, so that settlers coming into Kansas, if they had been able to come in in 1830, would have first taken the better lands along the Missouri and the Kansas. Second, they would have gone up some of the streams and have gone in a little ways. Third, they would have gone up close to the eastern Outlet, the eastern part of the Outlet, and would have probably had no interest in or very little interest in the Outlet, particularly the west three-fourths of the Outlet. As illustrated by the fact that in Missouri, in the Missouri area as of 1830, much closer to access, we find that the north end of the area we studied, the area X north of Kansas City, that there were lands up there that had been on the market for ten years without selling; and the Outlet being much farther away, with much poorer climate and much poorer access and much poorer timber, would have less value.

So that in conclusion, my values for the Outlet, the farthest from access and the least in timber, and the poorest in climate, 10 cents an acre. * * * (Tr. pp. 133-136)

This evidence, together with the specific finding of sales as shown in Findings 19 and 20, and the Commission's consideration of all the factors enumerated above, together with all other relevant evidence, leads the Commission to the opinion that there is ample evidence to reach a sound basis of market value. Moreover, the recent and thorough decisions

of this Commission, including the Missouria case set forth in Finding 19 support the defendant's argument that the evidence introduced in the instant case as to the value was relevant, and was correctly used in arriving at a fair market value.

On June 22, 1961, this Commission found (Finding 12) that the petitioners herein had already received consideration for their land cessions by the Treaty of October 2, 1818, in the sum of \$124,674.73. The Commission is of the opinion that the Delaware Residence Lands, together with the Outlet Lands, totaling 1,884,160 acres in all, had a total value of \$465,664.00 as of April 29, 1830.

The consideration previously paid and the value of the granted lands constitute a total treaty consideration paid to the petitioners under the Treaty of October 2, 1818, of \$590,338.73.

As shown in Findings 2 and 3 herein, the petitioners have a recognized one-half interest in 3,859,000 acres of the land in question. The Commission found in Findings 2 and 3 that said amount of land had a fair market value of \$1.15 per acre. The petitioners' undivided one-half interest thus had a fair market value as of April 29, 1830, the agreed date of valuation, of \$2,218,925.00.

The sum of \$590,338.73 was the consideration paid by the United States for the cession. This consideration of \$590,338.73, paid to the petitioners by the United States under the Treaty of September 24, 1829, for the cession of the lands described in said treaty was so grossly inadequate an amount for lands having a value to the petitioners of \$2,218,925.00 as to make the consideration unconscionable.

The Commission is of the further opinion that the offsets claimed as set forth in Findings 26 through 29, should be allowed in the amount of \$1,341.63.

In summation the Commission is of the opinion that the petitioners' interest in the subject tract as of April 29, 1830, has a fair market value of \$2,218,925.00; that the sum of \$590,338.73 was the treaty date valuation of the consideration; that this latter amount constituted payment by the defendant on the claim; and that the sum of \$1,341.63 constitutes the proper allowable offsets against petitioners' claim.

Accordingly, the Commission finds that the consideration paid and the offsets allowed should be deducted from the fair market value of the land and net judgment should be entered herein in the sum of \$1,627,244.64 in favor of the petitioners for the benefit of the Delaware Nation. The award to the Delaware Nation is made in conformity with the recent decision of the Court of Claims in the case of Minnesota Chippewa Tribe, et al., v. The United States, made on April 5, 1963, Appeal No. 11-61 (slip opinion).

Arthur V. Watkins
Chief Commissioner

I concur:

Wm. M. Holt
Associate Commissioner

Associate Commissioner Scott concurs in a separate opinion.

Scott, Commissioner, concurring:

In view of the special circumstances of this case, involving the claim of the defendant to offsets, and in which the valuation evidence in the record was submitted solely by the defendant, I concur in the result. Each of these matters must stand on its own bottom. In the event there are future valuation proceedings in other cases involving this land or land in this general area, I herewith reserve further consideration of the question of fair market value thereof in the light of the record of evidence received therein.

T. Harold Scott
Associate Commissioner