

BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 175-B
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: April 7, 1964

Appearances:

Donald C. Gormley and Charles A. Hobbs of the firm of Wilkinson, Cragun & Barker, Attorneys for Petitioner

John D. Sullivan, with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

This case is before the Commission for a determination of the claim brought by the Nez Perce Tribe of Indians seeking additional compensation for that part of its reservation which it ceded to defendant by the Agreement of May 1, 1893, approved August 15, 1894. Prior to the Agreement, the petitioner owned a treaty reservation in northern Idaho which contained some 762,000 acres. Part of the reservation was allotted to individual Indians and the checkerboarded remainder, containing 549,559 acres, was ceded in 1894 to the United States. The

parties have agreed upon the acreage involved and that the consideration paid by the defendant for the cession was \$1,634,664.00 or \$2.97 per acre. It has also been agreed that date for valuation purposes is August 15, 1894. The petitioner seeks additional compensation on the ground that the price paid was an unconscionable consideration when compared to the market value of the land ceded.

After a thorough examination of all the evidence of record, the Commission has entered detailed findings of fact concerning the various factors which have been considered in arriving at our ultimate determination. As detailed in those findings of fact, the Commission has found that the Nez Perce 1863 reservation, which included the subject land, was located in northern Idaho just east of Lewiston. The area consisted mainly of a high and gently undulating plateau cut into blocks by canyons. The rainfall and the climate was generally favorable for the raising of cereal crops, especially wheat. The area was an extension of the Palouse country and had similar soils. The Commission has found that slightly over one-half of the ceded area had a highest and best use for agriculture while the remaining area had a highest and best use for grazing and as timberland. Of this remaining area slightly over half was suitable only as rangeland.

In 1853 the Territory of Washington was created, which included the reservation and what is now northern Idaho. In 1863 Idaho Territory was created, and Lewiston was its first capital. Lewiston, which was founded in 1861 at the confluence of the Snake and Clearwater Rivers, was reported in 1862 to have a population of 1200. In 1867 the population center of the general region was the Walla Walla Valley. According to 1870 census,

the population of Walla Walla County was 5,300. We have detailed in our findings population figures for the surrounding counties which indicate that the general area had been well settled prior to the valuation date. In 1890 Nez Perce, Shoshone and Idaho Counties contained 48,339 acres under cultivation and in Whitman, Garfield, Columbia and Asotin Counties there were 237,558 acres under cultivation.

We have found that there were generally good transportation facilities to serve the subject area. River transportation existed a short distance into the subject area on the Clearwater River. Rail transportation was available a short distance to the north. There were wagon roads across the reservation.

The Indian allotments, which totaled 180,657 acres, were scattered throughout the reservation, with some concentration around the Indian settlements at Lapwai and Kamiah. We have found that in selecting their allotments the Indians generally selected the better lands. About two-thirds of the lands selected by the Indians was in the most favorable land classification. They took a substantial amount of the better lands north of the Clearwater River, which area was more accessible to the railroads, and they selected a large portion of the area in the western portion of the reservation closest to Lewiston and the better river transportation.

The ceded lands were opened to the public on November 18, 1895, and the best lands were taken quickly. There were 507 homestead filings in the first thirteen days after the reservation was opened. The provisions of the agreement opening the land provided that settlers should

pay \$3.75 per acre for agricultural lands and \$5.00 per acre for stone, timber and mineral lands. The number of entries which eventually went to patent are set forth in Finding of Fact No. 12. During the first five years 68% of the land had been taken and by 1905, ten years after the lands had been opened, 87% had been taken. A total of 449,160 acres was acquired free under the homestead laws; 14,800 agricultural acres were bought or commuted for the statutory \$3.75 per acre; 9,320 timber acres were bought for the statutory \$5.00 per acre; 27,200 acres were reserved for state schools; 7,880 acres were retained by the United States for public use or leased for grazing; 4,240 acres were placed in public water reserve; and the remaining 36,400 acres were for miscellaneous uses such as for churches, power sites, etc.

We have found that the agricultural lands within the ceded area were well suited for the raising of cereal crops, especially wheat. We have also found that the areas classified as timber contained a good commercial grade of timber and that there was a demand for timberland to supply the expanding local market for lumber products. The areas classified as range land were well suited for livestock grazing.

There was a depression during the years 1893 and 1894 and this had an effect on the prices for farm products and, in our opinion, would have had a depressing effect upon land sales during the period.

Both parties have introduced the testimony and reports prepared by expert appraisers, and we have found that the testimony and reports together with the documentary material introduced in support of the experts' opinions have been of great assistance in reaching our ultimate

determination. However, there was a great disparity between the figures arrived at by the experts in their final conclusions of the fair market value of the subject area on August 15, 1894. Defendant's appraiser concluded the land was worth only \$1.29 an acre while petitioner's appraiser concluded that the lands were worth \$11.89 an acre. We have entered detailed findings of fact concerning the various matters which were considered by the experts in arriving at their conclusion, and for reasons which we shall now set forth the Commission is unable to accept the ultimate conclusions of value expressed by the experts.

The petitioner's expert appraiser was William C. Brown who engaged or consulted with a number of other experts in specialized fields. Mr. Brown's opinion of value of the subject area was based entirely upon his study of some 847 "valuation sales." The sales which he selected occurred during a period from 1890 through 1894 within an area extending fifty miles from the reservation. Each of the sales used was classified as to land use, i.e., as agricultural, timber, range or mixed.

In our Finding of Fact No. 17(a) we have set forth the summary data concerning 411 agricultural sales and some mixed sales which were used by Mr. Brown in reaching an estimate of the fair market value of the agricultural lands. All of the agricultural land sales in the tract counties (by the term tract county Mr. Brown has referred to the three counties, Idaho, Latah and Nez Perce which included part of their areas within the subject tract) and the comparable counties (which consisted of those neighboring counties to the west in the State of Washington) averaged \$15.42 per acre. The figures in the table in Finding of Fact No. 17(a)

reflect two adjustments made by Mr. Brown. The first was a discount of 20% for all sales in the agricultural sales analysis for presumed improvements. Further, all sales not made during 1894 were adjusted to an 1894 "value" based on the difference in the purchasing power of the dollar.

The Commission has noted that the highest average per acre sales occurred in Latah County, which sales averaged \$22.62 per acre. Latah County is the county located north of the Clearwater River which area had been well settled fifteen to twenty years prior to the valuation date and which area had excellent access to established railroad lines. The Latah County sales included in the agricultural land analysis were undoubtedly some of the most improved farms in the area. While Mr. Brown has applied a discount factor to compensate for "improvements," the Commission does not agree that his 20% discount is sufficient to permit the application of the resulting average per acre price to the acreage figures for the raw agricultural lands located within the subject area.

In our Finding of Fact No. 20 we have set forth the three factors which were considered by Mr. Brown in arriving at his 20% discount for improvements factor. Mr. Brown has presented figures in his report which he refers to as "value land only." The figures which he has used, however, do not reflect values of land only but are rather the figures taken from the 1900 census report under the classification "land and improvements except buildings." He has then used figures which he identifies as the value of all improvements which are in fact the total of census values under the heading of "buildings" and "implements and machinery." Thus

the figures which Mr. Brown has compared are the census reported values for buildings plus the reported values for implements and machinery compared to the reported values for land and improvements (except buildings). We do not believe that this computation provides a sound basis for estimating what portion of the purchase prices paid for agricultural land may have been attributable to improvements on the land. The computation would not reflect the value of any fencing, wells, orchards, or the state of cultivation of the land involved. It is further complicated by including valuation figures for implements and machinery which have no bearing on land values. Further, census figures are of doubtful value in estimating values or even relative values of farm land and buildings. We note, for example, the statement contained in the introduction to the U. S. Census of Agriculture, 1954 (Vol. 1, part 28 of which happens to be in evidence in Docket No. 175-A) with respect to the reported value of land and buildings. "The value to be reported was the approximate amount for which the land and the buildings on it would sell But the estimation of the value of land and buildings is based largely upon opinion. In the event a farm had been recently purchased, answers could be based on that experience. But many farms have not changed hands for many years, nor are they currently for sale. In such cases, farm operators may have no clear basis for estimating the value. In making an intelligent estimate, a respondent needs, first, to estimate the prevailing market value in the community. Secondly, he must in some way add to or subtract from this base to allow for his farm's special characteristics. In many cases, a farm operator who would not sell his place under any circumstances may be inclined to give a 'market value' that is unreasonably high. Some

operators who had purchased their real estate during periods of relatively low prices may give an estimate that is unduly influenced by that experience. Furthermore, the extent of variation known to exist in real-estate values makes it difficult to establish checking procedures that will disclose inaccurate estimates." (Pet. Ex. 108, Dkt. 175-A, page XV)

Mr. Brown also considered the Lombard Investment Company Report concerning the percentage ratio of farm land to improvements. Mr. Brown indicated that he considered that the Lombard report had separately appraised land values and the value of all improvements. The Commission has studied this report (which is an exhibit in Docket No. 175-A) and we find nothing in that report to indicate even a possibility that any improvements other than buildings were included in the appraisal figure which is entitled "buildings". The figure is not, as Mr. Brown has stated in his report, the "value of improvements." We have concluded from reading the Lombard report that most of the mortgages held by that company were on improved land, and many were upon some of the most productive farms in the Washington and Idaho Territories. They were in areas which had been well settled for a considerable period of time and involved land which had been greatly improved.

Finally, we do not consider the testimony of Mr. Spekker is very persuasive in his estimate that improvements did not amount to much, representing only about 10% of the total value. We have noted that among the transactions listed for Nez Perce County in the defendant's record of deeds and tax assessments there was one transaction involving a sale by a Staas Spekker to Frank L. Moore of some 280 acres for a

consideration of \$4,000. The tax rolls indicated that the land had been assessed at \$1,080 and the improvements assessed at \$1,200. In that instance it appeared that property owned by a man who very probably might have been related to the witness in this case had improvements which represented about 52% of the land value.

The Commission has also noted a number of instances in which contemporaneous reports have indicated that improved farm land sold at about twice the price for unimproved farm land. Many of these reports were used by Mr. Brown for other purposes. We have noted, for example, in Finding of Fact No. 23 some of the factors which Mr. Brown considered corroborated his opinion of value. In Finding of Fact No. 23(e) some of the contemporary comments which had been considered are quoted. Those comments indicate, for example, that "wild" land brought about \$20.00 an acre and improved land \$30.00 to \$50.00 an acre and that "wild and unimproved prairie land" can be sold from \$5.00 to \$8.00 an acre while the finest ranches under fence and with the usual farm improvements could be bought for from \$10.00 to \$20.00 an acre. In the Cottonwood Report of March 8, 1895, it was reported "lands are still cheap; improved \$10.00 to \$30.00 per acre; unimproved, \$2.50 to \$5.00" (Def. Ex. 29-J). We believe that many of the agricultural land transactions used by Mr. Brown, and in particular those in such areas as Latah County, involved highly improved farm lands and that the across the board 20% discount when applied to such land does not adequately compensate for that portion of the purchase price represented by the improvements.

It appears to have been Mr. Brown's opinion that building improvements on the agricultural lands represented the only real enhancement to

the value of the lands involved in the comparable sales analysis. He testified that improvements such as plowing, fencing, wells, orchards, etc. were not of primary importance and, in any event, were balanced by the value of the hay crop growing on the virgin land (which value he stated was \$8.00 to \$10.00 a ton with a yield of up to a ton and a half an acre). A further compensating factor was Mr. Brown's opinion that the land in its virgin state was more fertile and therefore more valuable than the land which had been in continuous production for many years. The only evidence which petitioner cites for the conclusion that settlers within the subject area could have sold the wild hay crop for \$10.00 an acre is the Lombard Investment Company's report to its stockholder wherein it was reported that in Latah County "wild bunch grass hay brings \$10.00 per ton, one ton to the acre" (Pet. Ex. 47, Dkt. 175-A, p. 9). This report concerned a well developed area described in the report as being the best general scope of farming country seen on the inspection trip. We do not believe a prospective purchaser of the subject area in 1894 would have considered that the wild hay on the agricultural lands could be marketed for \$10.00 an acre. We cannot agree that a well developed farm was not more valuable than raw agricultural land. We also note in the Lombard report (which obviously was a glowing account designed to encourage investment in the company) that in Walla Walla it was reported "much of the land here has raised wheat for 25 years, and the last crop was even better than the first" (Pet. Ex. 47, Dkt. 175-A, p. 7). Throughout the evidence we have noted indications that the price of farm land appreciated greatly in proportion to its state of cultivation and

related improvements. In our opinion farmland in the well populated portions of the adjoining counties, which farms had been in operation for 15 to 20 years, had many improvements which were reflected in the prices paid for those lands.

The Commission has noted that a large number of the agricultural land sales used by Mr. Brown were located in areas which possessed land of a better land classification than that within the subject area. In the case of Latah County, for example, we have noted that a significant portion of the county possessed land classification Type II, whereas the subject tract had only 12,876 acres or 2.34% of Class II land. Examining the location of the agricultural sales in Idaho County, south of the subject area, we find that a great number of the sales were located in an area to the southeast of Cottonwood and north of Grangeville which area has a land classification Type II. That area had been well settled long before the 1894 valuation date in this case. In his report in Docket No. 175-A Mr. Brown wrote that "During the decade of the 1860's, considerable settlement had occurred on Camas Prairie. In 1862, the town of Mount Idaho [just two miles southeast of Grangeville] was founded to serve the general area. By 1878, the town had reached a population of 200, but from that time on, the rival town of Grangeville, two miles distant, had commenced to attract attention. As time progressed, it became the leading community of the county, and finally Mount Idaho was abandoned in favor of Grangeville." (Pet. Ex. 238, Dkt. 175-A, pp. 87, 88). We have also noted that precipitation in Latah County was much higher than in the subject area. Examination of the maps submitted in

Docket No. 175-A (Pet. Ex. 225) indicates that rainfall in Latah County generally ranged between 20 and 35 inches annually which was substantially higher than the average annual precipitation in the subject area.

Mr. Brown has included 32 sales of railroad grant land located in Whitman County. Since the railroad companies were not engaged in farming operations it can be safely assumed that all of these sales involved unimproved land. The sales averaged \$6.73 per acre. While petitioner has argued that these sales lay in the northwestern part of Whitman County, which county has been described by petitioner as "arid", an examination of the Whitman County railroad sales reveals that at least half of the sales were located in the eastern half of the county which area is in the Palouse area annual cropping zone and which area has an average annual precipitation of from 16 to 20 inches and in that respect appears very similar to the subject area. The Lombard Report described Latah and Whitman Counties as the Palouse country which had a reputation second to none in the territory and was fine farming country. From Steptoe Butte in Whitman County it was reported "we could see for 50 miles around, the rolling hills looked like waves of the sea. The hills were covered with verdure, fields of wheat and other grains, with farm houses and granaries at frequent intervals" (Pet. Ex. 47, Dkt. 175-A, p. 10). This panorama would have included most of the Whitman County railroad sales. We have made an attempt to roughly divide the 32 railroad sales between the two zones (the eastern annual cropping and the western fallow zones) and in so doing we found that those sales that were in fact in the western portion of the county and therefore involved land which might not be

cropped annually and which had a slightly lower average annual precipitation than the subject area sold for considerations which average \$5.73 per acre. That portion of the sales which were located in the eastern portion of the county in an area which would appear to be substantially comparable to the subject area sold at considerations which averaged \$7.05 per acre. While we realize that this computation of \$7.05 per acre involved a relatively small number of sales, and it is difficult to precisely allocate each of the sales to either the eastern or western portion because of the lack of detail in the small land classification maps which are in evidence, we do believe that this figure of \$7.00 per acre is an important factor to be considered since it represented the average price paid for these agricultural lands in an unimproved state and in small parcels of an average of approximately 220 acres. In contrast to this \$7.00 per acre figure for unimproved agricultural land in Whitman County we note that Mr. Brown's other Whitman County comparable sales (which obviously included many highly improved farms) averaged \$21.60 per acre. We realize, of course, that most of the other comparable sales which averaged \$21.60 were to a certain extent more favorably located than some of the railroad sales, but this factor would not account for such an overwhelming increase in the average prices. In Whitman County there are "comparable" agricultural sales which averaged about \$72.00 (Serial No. 268); \$60.00 (Serial No. 272); \$53.00 (Serial No. 274); \$50.00 (Serial No. 279); and \$52.00 (Serial No. 300). Such values certainly reflect many substantial farm improvements, and perhaps livestock, machinery, crops or other factors which make it impossible

to relate such values to the fair market value of raw, unimproved agricultural land.

The timberland sales which Mr. Brown used in his analysis totaled some 29,218 acres at an average consideration of \$13.01 per acre. There were considerably fewer timberland sales in the analysis than there were agricultural lands used in that study. The Commission has noticed that the largest proportion of sales came from Latah County--in fact over 50% of the acreage involved in the analysis was located in Latah County. In all some 29,218 acres included in the study included 16,808 acres in Latah County, and of that acreage a total of 8,336 acres were involved in the one transaction from Pacific Investment Company to Van Valkenburg. We have in Finding of Fact No. 22 referred to this transaction and to the subsequent transaction which occurred about four months later, on September 26, 1894, when Van Valkenburg sold the identical 8,336 acres to Kinkaid for a consideration of \$7,000 or an average of 84 cents per acre. And further in the next year, on June 17, 1895, Kinkaid sold all of the same land to DeGrush for a consideration of \$8,000 or an average of 96 cents per acre. Under the circumstances and in the absence of any further evidence concerning the circumstances surrounding the transactions referred to, the Commission does not believe that the transactions can be relied upon as evidence of a bona fide, arm's length transaction between a buyer and seller. While we do not consider that the transaction from Van Valkenburg to Kinkaid at 84 cents an acre is any more reliable than the one from the Pacific Investment Company to Van Valkenburg, we do note that if the latter transaction had been used

in place of the one four months earlier at \$13.22 per acre the resulting average for timberland sales would have been reduced from \$13.01 per acre to \$9.68 per acre.

We believe that the timberland sales analysis also includes a number of transactions which did not involve raw timberland. We have set forth in Finding of Fact No. 17(b) a few of the transactions in Latah County which involved considerations ranging from \$30.00 per acre to \$59.69 per acre. In our opinion it is unreasonable to consider that these transactions involved only virgin timber. We do know that a number of the sales are resales of land which had been settled for some 15 to 20 years; we know that the timberland sales used in the analysis in Latah County involved land which is all fenced today; 23 of the 59 sales possess building improvements; and 39 of the 59 sales were found by Mr. Brown to be in a "good state of cultivation and production." We conclude that many of the Latah County timberland transactions involved improved land some of which was probably being farmed. We cannot agree that Mr. Brown's computation of average per acre prices can be applied to an acreage figure of timberland within the subject area to arrive at a true fair market valuation of the timbered portions of the subject area.

We note that Mr. Brown has stated that he physically inspected all of the sales transactions which he utilized. With respect to the timberland he found that in those instances in which the timber had not been cut, he could tell what the timber status had been on the date of the particular sale transaction by examination of the standing mature trees. However, in those instances in which he found that the timber had been

cut, he was not able to fix the date of such cutting, and it was necessary to employ the services of a forestry expert. While he testified that he only found 35 such instances in which it was necessary to use the services of the forestry expert, we cannot believe that Mr. Brown meant that there were only 35 tracts on which there had been any timber cut. This would tend to indicate that the remaining transactions could not have involved land which had a highest and best use for commercial timber operations if no timber had ever been cut on such land to the present time. In any event the forestry expert, Mr. Clifton, did examine 35 tracts. However, in Latah County, where the largest proportion of timberland sales were used, Mr. Clifton only examined four tracts. While Mr. Clifton chose to express his conclusion in the rather odd language "all except two of the four tracts examined were found to have had their highest value in timber" the fact remains that half of the tracts examined had a highest value in timber while the other half did not. Of course, we do not know what the findings might have been had Mr. Clifton examined other of the 59 transactions in Latah County. However, we do know from other evidence that many of the timberland sales involved land which was highly valuable as agricultural land and which had been put into a high state of cultivation. We have noted that in the U. S. Department of Agriculture Forest Statistics for Lewis County, Idaho, it was reported "in 1895 the forest area in this locality was larger than it is now, owing to the fact that forest lands more desirable and valuable for farming than for growing trees have been cleared. This transition is still going on. Waving fields of grain may yet be found in the open stands of virgin pine." (Pet. Ex. 94, p. 6)

In Docket No. 175-A Mr. Brown reported that the comparable sales used in his analysis involved timberland which he described as "first accessible." Since the timberland to be valued in that case was not all first accessible, he had classified all the timberland into three accessibility groups. He applied a discount of 50% to the "next accessible" group and a 75% discount to the "last accessible." We have noted that in this case Mr. Brown does not apply any discount based on accessibility. It would appear obvious from examination of the subject area that at least a percentage of the timberland involved would not be "first accessible" as Mr. Brown defined that in Docket No. 175-A. In fact it appears that Mr. Brown himself would consider 20% of the timberland in the subject area was not "first accessible" because in his report he stated that of the commercial timberland involved "approximately 80% was either adjacent or immediately accessible by rivers rising to the areas where timber was used." (Pet. Ex. 89, Vol. II, p. 78)

In arriving at his opinion of the fair market value of the subject area, Mr. Brown has applied the average per acre prices of the small tract comparable sales with no discount for the size of the area. In Docket No. 175-A he applied a discount of 20% to the comparable sales of small tracts in relating them to the agricultural acreage involved in that case. In arriving at his 20% figure in Docket No. 175-A Mr. Brown compared the average per acre prices for transactions involving small tracts, which averaged 126 acres to the "large transactions," which averaged 54,536 acres. It would seem to follow that if tracts averaging slightly over 100 acres sold a reduction of 20% (actually it was computed

to be 17.9% in Docket No. 175-A) when compared to transactions which averaged slightly over 50,000 acres, then in this case which involves a sales analysis of agricultural land which sales averaged less than 200 acres per sale there should be a discount in applying the average per acre prices to agricultural acreage which in this case totaled 287,630 acres (based on Mr. Brown's figures).

In explaining why he did not discount his timberland valuation because of its size, Mr. Brown compared the average price per acre which a Mr. Kincaid paid for a series of ten purchases of timberland with the price paid by Mr. Van Valkenburg for one purchase involving 8,336 acres. Findings concerning these two sales are set forth in Finding of Fact No. 22. Since it appeared to Mr. Brown that Mr. Kincaid has paid an average of \$11.66 per acre for a series of purchases while Mr. Van Valkenburg had paid a price averaging \$13.22 per acre in one timberland transaction, Mr. Brown concluded that the purchaser of a large lot of timberland would actually pay more than he would for smaller parcels of timberland. Of course if Mr. Brown instead of considering the sale by the Pacific Investment Company to Mr. Van Valkenburg had considered the sale four months later by Mr. Van Valkenburg to Mr. Kincaid for a consideration averaging only 84 cents an acre, his reasoning would have led him to the opposite conclusion. In Docket No. 175-A Mr. Brown did, in fact, reach the opposite conclusion and in that case he applied a discount of 33 1/3% to the value of the commercial timberland to be valued in that case. Of course, we recognize that that case involved in excess of 3,000,000 acres of commercial timberland and that is, of

course, an entirely different situation when compared to this case which involves 114,699 acres of timberland (based on Mr. Brown's estimate). However, the comparison which was made between large and small acreages in Docket No. 175-A did involve one "large sale" which contained only 53,391 acres. While we certainly do not believe that as great a discount is indicated in the subject case in comparison with a case involving millions of acres of timberland, we do believe that a prospective purchaser in 1894 would not have paid the same average per acre price for over 100,000 acres of timberland as a purchaser would pay for smaller tracts. The history of the lumber industry throughout the general area prior to the valuation date had indicated that timber was being cut and taken to a number of very small sawmills which were located close to the areas where the local demand existed for timber products. Apparently these small mills were dismantled and moved. This was an area where any lumber operations would be carried on solely to the extent that the local demand required. In 1894 a prospective purchaser would not have anticipated that any large scale commercial lumbering operations would be conducted in the subject area.

Mr. Brown has also stated in this case that a prospective purchaser in 1895 would have paid more for assembled acreage of grazing land because it was economically more desirable to have a large grazing area. In Docket No. 175-A Mr. Brown applied a discount of 33 1/3% in comparing sales transactions which involved small acreages of grazing land to the large area of grazing land involved in that case. In this case the area classified by Mr. Brown as range land was 147,230 acres, and we do not

believe that a prospective purchaser would have paid a price per acre which was equivalent to the average prices which were paid for smaller tracts of range land. In this regard we might also note that the economic desirability which is achieved in certain cases by the acquisition of larger tracts of contiguous timber and range land was not present in this case since the Indian allotments which had been selected throughout the entire area served to dissect the tract and a prospective purchase would not have had contiguous areas of range land, timberland and agricultural land.

Under questioning by the then Chief Commissioner Witt concerning Mr. Brown's hypothesis that a prospective purchaser of the subject area would have considered its value in resales to farmers, timber operators and stockmen, Mr. Brown testified that it would have taken 10 years to dispose of the tract. Assuming that the purchaser would have expected to receive five per cent on his investment during the period required to sell the land, Mr. Brown stated that such purchaser should pay 25% less for the tract than its resale value. But Mr. Brown testified that such a discount should not be taken in this case because the prospective purchaser would have leased the land pending the time it took to sell it. We do not consider that such an assumption is warranted. Considering the length of time required to dispose of the tract in resales, the cost of such disposal, and the risks involved in such an undertaking, we believe a prospective purchaser would not have paid a price equal to the prices at which he would hope to sell the land over a period of up to 10 years.

We conclude that Mr. Brown's opinion of the fair market value of the subject area is not supported by the evidence. In his computation of comparable sales he has used transactions which occurred in well settled areas, where in many instances the lands were of better quality, where transportation facilities were superior and where rainfall was more plentiful. A great number of his sales were of highly improved farms and the sale prices included valuable improvements such as fencing, cultivation, orchards and wells which Mr. Brown did not adequately discount. The evidence also indicates that many farms were sold with stock and farm implements. Obviously many sales of producing farms must have included valuable farm crops either growing or stored. We do not believe the timberland sales analysis represents a reliable estimate of the fair market value of raw timberland on the valuation date. The evidence indicates that many of the sales involved valuable agricultural land and some sales were probably of improved lands. Mr. Brown failed to adequately reflect the accessibility factors of the subject area's timberland or the limited demand for timberland on the valuation date.^{1/} Many of the range land sales also involved agricultural land and were generally in choice locations.

We have also noted that many of the discounting factors overlooked by Mr. Brown in this case were recognized by him in his appraisal in

^{1/} We note that Mr. Brown found only one confirmation timberland sale in the subject area and that sale was in 1902, almost 8 years after the valuation date, at an average price of \$11.25 per acre which was \$1.76 per acre less than his timberland valuation for the subject area in 1894.

Docket No. 175-A and applied in reaching his opinion of value in that case.

We should like to briefly comment on the contention made by counsel for petitioner that great weight should be accorded the expressed opinion by the Commissioners who negotiated the agreement that the agricultural land was worth \$8.00 to \$10.00 per acre. In the course of the oral argument held on January 14, 1964, defendant's counsel stated that this expressed opinion by the Commissioners indicated a little "puffing" of the value to make their negotiated agreement appear to be a "good deal" for the government. Counsel for petitioner argued that such a contention was untenable since the remark had been made "before he made the deal" (Tr. 66). We note that the statement was, in fact, made after the \$3.00 per acre figure had been agreed upon. The statement was included in the report of the negotiations dated February 13, 1893. It was made in connection with an explanation for the agreed price of \$3.00 per acre.

The entire paragraph reads as follows:

The price which we agreed to pay is \$3 per acre, or \$1,626,222, of which \$626,222 is to be paid per capita in cash upon the ratification of the agreement, and the remainder in semiannual installments, with interest, within four and one-half years. The price per acre is in excess of that heretofore paid for any considerable body of Indian land, so far as we are advised. Much of the land, however, is fine agricultural land, worth, perhaps, \$8 or \$10 per acre, while from one-third to one-half is of little value. We therefore think that this price, while liberal, is fair and equitable, both to the Indians and the Government. The commission was strenuously opposed to the payment of the entire purchase money in so short a period, but could not remove the objection of the Indians to smaller payments covering a longer period. The Nez Perce Indians, however, have been practically self-sustaining for some years, and we do not think the Government need fear that it will be called upon to assist them. (Pet. Ex. 36, pp. 14, 15)

This Commission believes that the opinion of value expressed by the Commissioners who negotiated the agreed cession may well have been colored by a desire to make the "agreement" appear acceptable to the government. Of course a price of perhaps \$8.00 to \$10.00 an acre for the fine agricultural land with the remaining one-third to one-half being "of little value" would greatly reduce the overall average for the entire tract. And considering even a small discount for the size of the tract as a whole the opinion of the Commissioners appears quite close to the conclusion which we reach for the fair market value of the entire tract.

While we have concluded that Mr. Brown's opinion of value was overly optimistic we find that defendant's expert, Dr. Hoyt, was overly pessimistic in arriving at his opinion of value. Dr. Hoyt considered relatively few sales in his analysis. In a number of instances the facts do not support his contentions or his conclusions drawn from the sales upon which he has relied. His Whitman County railroad sales were not made on the dates indicated in his report but were in fact transactions entered into many years prior to the valuation date. The sales which he described as involving only the highest quality soils included land which was of lesser quality. Two sales upon which he placed great reliance were in Adams and western Whitman Counties where the lands were not comparable to any land in the subject area.

Therefore we cannot agree with Dr. Hoyt's conclusion that the comparable sales reflect a top value for Class II land and that all lower classed land must be substantially discounted as he has done. While

the settlers in the 1890's did not classify lands by the same system as later used by the U. S. Department of Agriculture, we do believe that the settlers in 1894 would have had a limited and general awareness of the superiority of the lands later classified as Class II over those in the Class III or Class IV categories. And while this would have been reflected in slightly higher prices for the superior agricultural lands we would not agree with the price differentials as indicated by Dr. Hoyt.^{2/}

We cannot agree either that grazing and timberland would have had only a "slight speculative value" in 1894. There was, we believe, a demand for both grazing and timberland (although not to the extent contended for by petitioners).

We do not agree either with the emphasis placed by defendant on the "serious obstacle" to transportation created by the Clearwater River. We recognize that the northern and western areas of the subject tract were the more favorably located with respect to transportation. And while this is a factor to be considered, we would not place the significance on this that Dr. Hoyt did.

In general we believe that Dr. Hoyt has overemphasized the depressing factors in reaching his opinion of value. We must also comment on

^{2/} For example the agricultural land north of the Clearwater was discounted by Dr. Hoyt as follows:

	<u>Average per acre</u>	<u>Percentage Reduction</u>
Class II	\$8.00	
Class III	5.00	37½%
Class IV	3.00	62½%

Dr. Hoyt's sixth "principal factor" affecting his conclusion -- namely our decision in the Coeur d'Alene case which involved lands to the north in Idaho and Washington. The decision in the Coeur d'Alene case was, of course, based upon the record in that case. No part of that record has been considered by the Commission in reaching the decision in this case, and we have not in any manner used that decision as any basis for our determination in this case.

Upon consideration of the record in this case, including Docket No. 175-A which record was by stipulation made a part of this case, we have concluded that the subject area was located in an area which had been well settled for a number of years; it was favorably located with respect to transportation facilities; the climate, the precipitation, and the agricultural soils were advantageous for the raising of crops, especially wheat and other cereal grains; there was commercial grade timber within the tract which was a valuable source to supply a growing local demand for lumber products; the range land was well suited for livestock grazing.

A prospective purchaser of the tract in 1894 would have realized that the greatest demand for land within the subject area would have been for the agricultural lands, which comprised slightly over half the area. Such lands, especially those of the better quality and most favorably located, would have had the highest average per acre price. Timberland would also have been in demand but not to the same extent as the agricultural lands and only to the extent that it was required to serve the local demand. Grazing land was also in demand but at a much lower price than that suitable for farming or lumbering.

A prospective purchaser would also have been aware of the depressed economic conditions in 1894. He would have realized that the Indians had generally selected the better quality lands in the more favorable locations. He would have considered that the best agricultural lands would have been resalable in a short time but that the less desirable would take longer to dispose of. Timberland which was the most accessible could have been sold within a short time but there was less accessible timberland which could be sold only over a longer period and at lower prices. Similarly the grazing land possessing the best natural resources such as water would have commanded the best prices within a short time while that not as favorably located could only have been resold over a longer period. A small part of the most precipitous and undesirable land would have brought little if any return.

We agree with both of the experts for petitioner and defendant that the best evidence of the fair market value of the subject area is that obtained from the sales of the adjacent lands close to the valuation date. However, we cannot agree with many of the assumptions, interpretations and conclusions of the experts in their application of the sales data to a determination of the fair market value of the subject tract. The comparable sales were obtained from adjacent areas which had been settled for 15 to 20 years. Many of the sales were of well improved farms. The building improvements, the state of cultivation, the wells, the orchards, the growing crops, and fencing were all factors which greatly enhanced the values of those properties. Their location in well settled areas near established towns and the presence of community

facilities also enhanced the value of the land involved in the comparable sales analyses. Many of the sales were of lands possessing a higher quality soil than that in the subject area. Precipitation was greater in some areas than it was within the subject tract. Transportation facilities were better in some of the areas where "comparable sales" were obtained. All of these factors must be considered as greatly discounting any average per acre computations of the small "comparable sales" in attempting to relate their average values to the fair market value of one large half million acre tract of raw, unimproved land.

The Commission does not believe that petitioner has proven that the fair market value of the subject area was so grossly in excess of the \$2.97 paid for the cession that such consideration was unconscionable. To recover on the grounds of unconscionable consideration it must be shown that the disparity of the price paid and the then fair market value of the land was "very gross." We cannot conclude that there was any great disparity between the price paid and the fair market value of the subject tract. Any slight disparity which we feel might be indicated certainly does not shock our conscience.

We believe the evidence in this case would support a finding that the fair market value was slightly higher than the average per acre price of \$2.97 per acre. In fact we believe a figure as high as \$4.00 per acre might be indicated. But in no event do we conclude that the fair market value could have exceeded \$4.00 per acre. Thus it appears that the defendant paid a figure which was at least 75% of the indicated fair market value and this is not even a great disparity--and certainly not a "very gross" disparity.

We have found that the evidence does not support any finding that

there was any fraud or duress on the part of defendant in connection

with the negotiations and execution of the Agreement of May 1, 1893.

The petitioner is not entitled to a recovery based on a claim under

Clause 3, Section II of the Indian Claims Commission Act.

The petition filed in this case alleges causes of action under both

Clauses 3 and 5 of Section II of the Indian Claims Commission Act.

However, petitioner has proceeded on the basis that the right to a

recovery arises from the alleged unconscionable consideration paid for

the cession. Petitioner has not proposed any findings respecting "fair

and honorable dealings" (Clause 5, Section II of the Act) nor argued

the same in its briefs. However, counsel for petitioner did in his oral

argument request the Commission to consider the claim under the "fair

and honorable dealings" provision. We have considered the record of

the negotiations leading to the 1893 Agreement and the related cor-

respondence and other documents. We have in Finding of Fact No. 10 set

forth the principal facts surrounding the negotiations and the obtaining

of the signatures of the members of the tribe to the agreement. The

negotiations extended over a period from December 5, 1892, through

December 15, 1892. (There were council meetings on nine days. Although

the minutes identify the meeting, on December 15th as the tenth day's

council, it appears to have actually been the ninth meeting.) In our

opinion the Nez Perce Tribe was ably represented by its negotiators, who

vigorously contended for the highest price they could obtain for the

cession and for agreements and methods of payment most favorable for their

tribe. The petitioner secured, as a result of the negotiations, an average price of \$2.97 per acre (actually it was then thought to amount to \$3.00 per acre) for the cession of the reservation after the members of the tribe had selected their individual allotments, and after the setting aside of other lands reserved for the tribe. The agreement provided that the ceded lands should not be opened for public settlement until trust patents for the allotted lands had been duly issued and recorded and the first payment made to the Indians. The tribe also was successful in obtaining the consideration payments in the manner which it favored. We believe that the price agreed upon was a fair one and that the negotiations and execution of the Agreement of May 1, 1893, was completely fair and just. We find no evidence of any fraud, duress, undue influence or any unfair or dishonorable action on the part of defendant in connection with the negotiations and execution of the Agreement.

In the Proposed Findings of Fact submitted by petitioner certain matters discussed at the negotiations were emphasized. At the fifth day's council it was noted that George Moses, a Nez Perce Indian, questioned Commissioner Beede concerning a newspaper article. We do not consider that this discussion indicated an effort by defendant to coerce the Nez Perce Tribe into agreeing to the proposed cession. We find nothing to indicate any unfairness or dishonorable action on the part of the defendant. As a matter of fact we would view this brief discussion as providing the treaty commissioners with an opportunity to reaffirm the United States position with respect to the Nez Perce

We note that the defendant's brief contains no evidence to support its contention that the price agreed upon was not fair and just.

reservation. Commissioner Beede did respond to George Moses stating that the reservation would not be opened without the Indians' consent and further promised that "if the Indians would consent to the opening, we would incorporate in the agreement that it be not opened until the first payment be made to the Indians" (Pet. Ex. 36, p. 40). And such a provision was included in the agreement.

Petitioner has also referred to a statement made by James Reuben, a Nez Perce Indian, as follows:

That part of my country which is asked at your offer is not half price, and the whites all around us know it is very good country.^{2/} It would be worth \$50 an acre if plowed and fenced, and from what the Lewiston Teller says it is as rich a country and as deep a soil as any in the United States. It is already given out in the Teller, and all the North, South, East, and West know it, and the paper wants all to come and settle on it as it is a very rich country. (Pet. Ex. 36, p. 51, 52)

In our view this statement made at the seventh day's council, reflects the persistent efforts of the Nez Perce negotiators to obtain the best possible "price" for ceding the unallotted portion of the reservation. Of course the \$50.00 per acre figure was an exaggeration. At the fifth day's council meeting the same James Reuben stated that he would be willing to consent to a sale if the government would pay \$2,250,000.00, or about \$4.15 per acre.

Again another Indian, Captain John, stated that the land to be ceded should be \$12.00 an acre and Commissioner Schleicher stated that personally he would like to see the Indians receive \$10.00 an acre --

^{2/} We note that James Reuben recognized that there was a substantial enhancement in land value after it had been plowed and fenced.

Scott, Associate Commissioner, concurs with the following opinion.

My personal conscience as to the relationship of the consideration of \$2.97 per acre in this matter to \$4.00 per acre value would permit recovery of the difference to the Nez Perce Tribe of Indians. For example, the \$1.03 difference multiplied by the acreage involved amounts to \$566,045.77, a rather substantial sum. If the agreement was considered as revised on the basis of unconscionable consideration, and it could be assumed this amount was deposited in the Treasury in 1894 and left there by the Nez Perce at the rate of 5% provided in the agreement until 1964, and compounded annually, they would have \$17,222,749.47 to their credit.

In this instance it was the defendant which sought the transaction; and, although we find no fraud or unfair or dishonorable dealings, the very fact that this agreement was actively and persistently sought by the defendant and agreed to by the Nez Perce reluctantly after long and extended conferences and personal solicitation of the members of the tribe by agents of the defendant followed by charges by these Indians of fraud and duress (later investigated by the defendant and charges cleared) is another factor which disturbs my conscience.

However, I feel bound by the precedents which have been established both as to "very gross" differences as between consideration and value and as to fair and honorable dealings and feel it necessary to write this separate opinion.

In Osage Tribe of Indians v. U. S., 113 C. Cls. 666, the Court held the price and value must be "very gross" to support a conclusion of

unconscionable consideration without evidence of fraud or overreaching. In the Otoe and Missouri Tribe of Indians v. U. S., 131 C. Cls. 593, the Court held that a disparity of more than 50%, if not conclusive of unconscionable consideration, is evidence of same if coupled with evidence of lack of fair and honorable dealings in the negotiation of the treaty.

As to fair and honorable dealings, the Court of Claims in the Otoe case (supra at pp. 641-643), held that the belief of the Federal agent conducting negotiations with the Indians that he was acting in their best interests in obtaining consent to modification of contracts for the purchase of tribal land from individuals instead of in open council indicates fair and honorable dealings. The Court stated (id. pp. 642, 643)

* * * The Indians did not agree to the settlement at that council which was accordingly adjourned for a few days. Being persuaded that the settlement represented the best terms for the Indians that the delinquent purchasers would agree to, and also that the Congressional representatives of the delinquent purchasers would never permit a forfeiture of the lands held by them, the Government inspector spent several days talking to individual Indians and procuring their signatures. The Act of March 3, 1893, does not specify that the consent of the Indians had to be obtained "in open council in the usual manner" as had the acts discussed in the fifth and sixth causes of action, and the Commission concluded that the inspector's method of obtaining the consent was a sufficient compliance with the 1893 Act. In view of the fact that the record establishes that the terms of the settlement were explained to and understood by the Indians in open council, we agree that the inspector's method of securing signatures was not illegal or irregular to such a degree as to nullify the effect of the consent.

Although not raised by the petitioner in the proposed findings, I have also considered whether the fact that the land was worth \$4.00 per acre instead of the \$2.97 paid might be construed under Clause 3 of

section 2 of our organic act to fall within the provision providing for claims which would result if the relevant agreement was revised on the ground of unilateral mistake. The petitioner has included this allegation in paragraph 8 of the severed petition. I find no precedent on this point. However, if there was no fraud and no unfair or dishonorable dealings by the defendant, and, therefore, it may be assumed defendant was honestly attempting to determine the fair value of this land, the question might very well be relevant as to whether the value arrived at was the result of unilateral mistake. Personally, this is the type of question I would favor certifying to the Court of Claims under Section 20(a) of our organic act. Perhaps, in the event this matter is appealed to the Court we may get the answer to this question.

T. Harold Scott
Associate Commissioner