

BEFORE THE INDIAN CLAIMS COMMISSION

THE PEORIA TRIBE OF OKLAHOMA, AND)
GUY FROMAN ON BEHALF OF THE PEORIA)
NATION, FRED ENSWORTH ON BEHALF)
OF THE KASKASKIA NATION, AMOS)
ROBINSON SKYE ON BEHALF OF THE)
WEA NATION, AND MABEL STATON BARKER)
ON BEHALF OF THE PLANKESHAW NATION,)

Petitioners,)

v.)

Docket No. 65

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: March 17, 1965

FINDINGS OF FACT

The Commission makes the following findings of fact:

Claim II

16. The cause of action presently under consideration, designated as Claim II, involves the allegation that defendant failed to comply with the provisions of Article 4 of the Treaty of May 30, 1854 (10 Stat. 1082) requiring that the petitioners' land be sold by the United States on a freely competitive market, with the proceeds to be paid to the Indians but rather permitted non-Indian citizens to trespass upon the land and to purchase the land at artificially low appraised values, far below market price.

17. The lands involved are located in eastern Kansas and were owned by petitioners having been granted to them under the Treaties of October 27, 1832 (7 Stat. 403) and October 29, 1832 (7 Stat. 410). The

lands involved have been described by Charles C. Royce on his Kansas Map 2 in the 18th Annual Report of the Bureau of American Ethnology (Part II) Indian Land Cessions as areas 326, 327 and 328.

18. The Treaty of May 30, 1854, provided for the cession to the United States of the tracts granted and assigned under the 1832 Treaties, reserving therefrom 160 acres for each member of the tribe and ten sections additional to be held as the common property of the tribe. There was also a grant of 640 acres to the American Indian Mission Association. The treaty provided for a survey of the lands ceded and selection of the allotments to the individual Indians and to the tribe.

Article 4 of the treaty provided:

After the aforesaid selections shall have been made, the President shall immediately cause the residue of the ceded lands to be offered for sale at public auction, being governed in all respects in conducting such sale by the laws of the United States for the sale of public lands, and such of said lands as may not be sold at public sale, shall be subject to private entry at the minimum price of United States lands, for the term of three years; and should any thereafter remain unsold, Congress may, by law, reduce the price from time to time, until the whole of said lands are disposed of, proper regard being had in making the reduction to the interests of the Indians and to the settlement of the country. And in consideration of the cessions hereinbefore made, the United States agree to pay to the said Indians, as hereinafter provided, all the moneys arising from the sales of said lands after deducting therefrom the actual cost of surveying, managing, and selling the same.

Article 8 of the Treaty provided that citizens of the United States, or other persons not members of the petitioner tribe, should not be permitted to make locations or settlements in the ceded area until after the selections had been made by the Indians.

The treaty was duly ratified on August 2, 1854, and proclaimed August 10, 1854.

19. On the same day that the Peoria treaty was executed, May 30, 1854, legislation was enacted organizing the two territories of Kansas and Nebraska (10 Stat. 277).

The Act of July 22, 1854, (10 Stat. 308) extended the provisions of the pre-emption law to lands in Kansas and Nebraska "to which the Indian title has been or shall be extinguished." The right of pre-emption meant that the first settler on a quarter section or less of public lands acquired a priority right to the tract and could acquire title thereto at the minimum government price, \$1.25 per acre, at any time prior to the public sales.

20. Following the execution of the Peoria treaty a number of settlers, investors, and speculators "squatted" on the ceded lands. On December 7, 1855, Indian Agent McCaslin reported on the settlers located within the Peoria area, and the evidence contains a number of references to the extensive "settlements" being made and difficulties encountered by the government officials. However, it does not appear that the settlers interfered with the Indian selections or settled on any of the lands to be taken by the Indians. Agent McCaslin wrote on May 20, 1856, "it is true that none I believe, remain, or occupy the lands intended to be selected by the Indians" (Pet. Ex. 117).

21. Following the extension of the pre-emption laws to Kansas lands, July 22, 1854, there arose a controversy concerning the possible application of those laws to the Peoria lands as well as to the lands ceded under similar treaties by the Delaware and Iowa Indians. The settlers were, of course, desirous of obtaining the lands under the

pre-emption laws. At the request of the Secretary of the Interior the Attorney General of the United States entered an opinion, dated August 14, 1854, in which he stated:

The right of pre-emption, accorded by the act of 1854, does not extinguish by repeal reservations belonging to the United States; no more does it extinguish any special rights reserved to the Delawares, Ioways, and Weas Peorias.

Beyond this, to grant pre-emptions of the lands ceded by the Delawares, Ioways, and Weas, with condition, and upon trust, to be sold at public auction for their account and benefit, would be a violation of the treaties, a breach of trust, a fraud upon the Indians. * * *
(Pet. Ex. 166 J-1, pp. 25, 26)

22. By Act of March 3, 1855 (10 Stat. 686) Congress appropriated \$20,000.00 to "enable the President of the United States to carry out, in good faith, the recent treaties with the . . . Peorias." The money was to provide for the required surveys and to classify and value all lands to be offered. After such classification and valuation had been made to the satisfaction of the President, "he shall cause said lands to be offered at public sale, by legal subdivisions or town lots, at such times and places, and in such manner and quantity, as to him shall appear proper and necessary to carry out faithfully the stipulations in said treaties; and said lands shall not be sold at public or private sale for a less price than that fixed by the valuation aforesaid, nor shall any land be sold at a less price than one dollar and twenty-five cents per acre, for three years, and thereafter as may be directed by law pursuant to the treaty." (10 Stat. 686, 700)

23. On April 11, 1856, commissioners were appointed to make the appraisals. By letter dated April 16, 1856, the commissioners were

instructed to consider the eligibility and quality of the lands, their proximity to water courses, timber, roads and other advantages, position with reference to town sites, and any other causes which would add to the value. However, the lands were to be appraised without any improvements which had been made on them, although improvements on adjacent, non-trust lands were to be considered. If any lands had deteriorated in value by acts of the settlers, such lands were to be appraised as if in their original condition.

24. The lands were inspected by the commissioners in June, 1856. The Indian Agent at the Osage River Agency, Mr. McCaslin, reported specific objections concerning the appraisals. Among his objections were the failure of the appraisers to have plats of the trust lands, lack of an opportunity for the Indian agent and Batties (Baptiste) Peoria (U. S. interpreter) to check the appraisals, the slight view given the tract (allegedly 350,000 acres ^{1/} were appraised in 6 hours), and reliance by the appraisers on surveyors' classifications.

The appraisal of a total of 208,585.69 (after removal of the Indian selections) showed the following classifications:

<u>Classification</u>	<u>Acreage</u>	<u>Value</u>
1st Class	119,662.17	\$1.50 - \$2.00
2nd Class	76,563.52	\$1.25 - \$2.00
3rd Class	12,360.00	\$1.25

(Pet. Ex. 173)

1/ It appears that since all the Indian allotments had not been selected at the time of the appraisals the entire area was appraised and those parcels later selected by the Indians were then deleted.

On January 3, 1857, the appraisal commissioners were advised that the appraisements were not satisfactory to the President, and the commissioners were directed to review and increase the rates. The commissioners adjusted their figures by adding twenty-five cents per acre to all of the lands appraised.

25. Robert S. Stevens was appointed a special commissioner to superintend the sale and, by letter dated May 15, 1857, received his instructions. All tracts were to be offered in the same sized parcels in which they had been classified and appraised and were to be sold for not less than the appraised value. The government was, of course, well aware of the many settlers who had already entered the area and expected to obtain the lands upon which they had "squatted." It was obvious too that many land speculators were awaiting the sale and it was clear that the sale was likely to occur in a tense, emotional atmosphere. The instructions indicated that troops at Fort Leavenworth were to be ready to provide military assistance should they be necessary for the safe and proper conduct of the sales. Commissioner Stevens was instructed that:

* * *

If it shall come to your knowledge that combinations or arrangements have been entered into by speculators or other class of persons, calculated to obstruct a fair sale of these lands, or if you shall have reason to suspect such combinations, it will be your duty to make proper enquiries in regard to the same, and to endeavor by firmness and discretion to meet and overcome them.

The government can have no sympathy with the speculator who would seek by bidding more than a fair value for the land without its improvements, to possess himself of the earnings and labor of an individual who may have entered

upon a quarter section of these lands and made lasting and valuable improvements thereon; but all persons thus situate and having such improvements should be slow to enter into combinations with a view to their own protection with the class of persons referred to.

It is to be presumed that in all cases where bona fide settlers have made lasting and valuable improvements on the lands and who reside therein, the price fixed by the commissioners will be considered the fair value of the land, unless such persons shall have before claimed the benefits of a settlement and improvement upon Indian lands of a similar character, in which case they are not to be treated as bona fide settlers, nor are their claims entitled to any more respect than would be extended under the preemption laws to persons who should for the second time claim the benefit of them, which is expressly forbidden. But with reference to all unimproved lands, a fair and lively competition should be encouraged, and if you have reason to believe that any combinations exist to prevent such competition, you will, in the exercise of a sound discretion postpone the sale from day to day until the cause ceases, and if this does not occur within a reasonable time, you will postpone the sale indefinitely, and report the facts without delay to this Office. It is however to be observed that every effort and all diligence should be used in order to have the sale proceed, and continue without interruption, until all the lands have been offered for sale. * * (Pet. Ex. 146, pp. 4, 5)

26. Prior to the sale, by letter of June 4, 1857, Indian Agent McCaslin informed his superior of his concern, stating "almost every quarter section of the lands to be sold, has an improvement of some discription (sic) on it, for the purpose of fending off competition to get the land at the appraisment (sic). There are a few bonafide Settlements -- houses built -- ground fenced and occupied by families; but the great majority of the improvements are mere foundations, and little temporary Shanties built of poles without any person occupying them. By this means those persons expect to be the exclusive bidders by means of a combination." (Pet. Ex. 148, p. 2)

The Indians likewise expressed their concern in a letter dated June 11, 1857. Referring to the sale of the trust lands the letter, signed by 26 Indians, Chiefs and Headmen of the Confederated Kaskaskias, Peorias, Piankeshaws and Weas, stated:

* * *

You will see by reference to that Treaty that it is expressly and distinctly stipulated in the Act that the residue of the lands after the special and national reservations shall have been selected are to be sold at "Public Auction" and when the Commissioner on the part of the Govt assured us and pledged the honor of the Govt that this stipulation should be faithfully carried out we believed him, we believed that our Great Father the President would not deceive us or think it worth while to take the trouble to use any stratagem to induce us to put our signatures to a Treaty when we knew that he had the power to take all of our lands from us by force without any compensation whatever. all that we wish or have a right to ask is that the land may be sold at Public Auction as stipulated, not by such solemn mockeries as were enacted at the sales of Delaware and Ioway trust lands. But if such must be the case, it will be evident, that it would be much better for us that there be no public sales whatever of the lands but that every person who desires to obtain any of these trust lands should be allowed to take them by paying the valuation which the Govt has seen proper to fix upon them, as it would thereby save us of all the heavy costs of a public sale without giving us the remotest chance of being in the least benefited by it. -

* * *

It may be our fault and partly our misfortune that our once numerous people have now dwindled to a mere handful and it certainly is not our fault that the lands upon which we were placed and which were pledged to us as a permanent home forever have become valuable and desired by our white neighbors. We are even willing to concede that those families or persons who have built houses and made farms with an undoubted intention of making it their permanent future home should be allowed to take one quarter section upon which they reside at the valuation fixed by the Govt at the same time we deny that they have any right whatever under the Treaty which we conceive to be the only

law governing this case. But we are willing to make this concession only upon the condition that such person and family shall have been residing there on the 1st day of June 1857 the number of such settlers even up to this date within fourteen days of the sales is but small, whilst a large proportion of the lands proposed to be gone through by the formalities of a Public Auction, are claimed by non resident speculators, who have no intention of becoming settlers any longer than they can find purchasers of the four poles, or stakes with names on them.

* * *

(Pet. Ex. 149, pp. 2-4)

27. The sale of the Peoria lands was conducted from June 24, 1857, to July 13, 1857. The total acreage sold was 207,758.85 acres for a total sum of \$346,671.09. This was an average per acre consideration of \$1.67.

28. Under the provisions of Article 4 of the 1854 Treaty the defendant became obligated to cause "the residue of the ceded lands to be offered for sale at public auction." In undertaking to thus sell the lands and to pay the net proceeds to the Indians the United States became a fiduciary with respect to petitioners. By its actions in permitting "settlers" to purchase much of the land at the appraised prices, the defendant breached its duty to the petitioners.

The Commission finds that the petitioners are entitled to recover from defendant the difference in the prices paid for the lands sold in 1857 and the fair market value which could have been obtained if each of the parcels had been sold at public auction.

29. The lands involved are located in eastern Kansas within the present day counties of Miami and Franklin. The eastern border is the Kansas-Missouri state line. The tract is generally rectangular extending

some fifteen miles north and south (along the Kansas-Missouri line) and some thirty miles east and west.

30. The Marais des Cygnes River flows through the southwest corner of the subject area and enters it again for a short distance along the middle of the southern boundary. Big Bull Creek flows southerly through the center of the tract with South and North Wea Creek watering the northeastern portion of the area.

31. Most of the area is comprised of uplands with gently rolling hills. The area is included within the "east central prairies section" classification with a small area of "river flood plains and low terraces" classification in the valley of the Marais des Cygnes River. The "east central prairies section" is described by Claude L. Fly in the Natural Agricultural Resource Areas of Kansas, Soil Conservation in Kansas, Report of the Kansas State Board of Agriculture, Vol. LXV, No. 271, February, 1946, as follows:

"Average rainfall ranges from thirty-five to thirty-nine inches west to east, growing seasons range from 180 to 190 days, and average annual temperatures from fifty-five to fifty-seven degrees. Extended dry summer periods with temperatures of 100 degrees or more are common. Summer nights are warm. Winters are moderate. Extremely heavy down-pours cause frequent floods in late spring and early summer, and occasionally at other times.

"The dominant soils suitable for cultivation are on smooth to gently rolling uplands. They have brownish gray to nearly black granular silty clay loam surface soils with dark tight clay, and claypan subsoils

which are derived from shales and shaly clays. Similar soils are on nearly level terraces and slowly drained areas along the outer river bottoms. Their fine texture and heavy consistency make them very slowly permeable and the subsoils restrict the plant root growth. They have high water storage capacity, but release water slowly to plants ... In the eastern part, native mixed hardwoods occupy most of the rugged slopes and breaks and the bottomlands which have not been cleared for cultivation ... The likelihood of wells going dry during dry summer periods makes storage of surface water almost imperative" (Commission's Ex. 7, pp. 180-183).

The valley of the Marais des Cygnes River, the widest of the valleys, averages about two miles in width and most of the bottom land in the area is located in that valley. The native timber grows along the creeks in belts averaging about one-half mile in width. Timbered areas occupy about 10% of the surface and open prairie the remaining 90%. The area contains good limestone in almost every locality.

32. In 1857 there were no railroads in the area. The Fort Leavenworth-Fort Scott Military road passed through the eastern portion of the tract running north and south. The northern boundary of the area was about 25 miles south of Kansas City where the Kansas River joins the Missouri River. The Santa Fe Trail running east and west was just to the north of the area.

33. The highest and best use for the tract was for farming, a use for which the entire area was well suited.

34. At the time of the sales of the subject lands, June and July, 1857, there was great activity and interest in lands in eastern Kansas. Kansas was in a period of rapid population growth and land values were rising.

35. Petitioners have placed in evidence a record of all first resales of the lands involved. Petitioners have tabulated those sales by year (from 1857 through 1860 and by 10 year periods through 1900 and, finally, all sales after 1900) for both Miami and Franklin Counties. By petitioners' calculations the sales for 1857 through 1860 were as follows:

<u>Miami County</u>			
<u>Year</u>	<u>Acres Resold</u>	<u>Average Price per acre</u>	<u>Original Average price per acre</u>
1857	10,701.58	\$ 3.44 ^{2/}	\$ 1.65
1858	12,496.06	4.49	1.62
1859	13,612.74	4.58	1.67
1860	5,463.14	5.01	1.67
<u>Franklin County</u>			
1857	3,385.00	5.34 ^{2/}	1.80
1858	5,619.71	6.03	1.79
1859	3,885.40	4.11	1.79
1860	1,556.83	5.13	1.76

(Petitioners' Supplementary Proposed Findings of Fact . . . pp. 5, 6)

For those parcels resold in 1857 the original average per acre sales price had been \$1.68 (approximately the same as the \$1.67 average price

^{2/} We have calculated the 1857 figures and they differ slightly from petitioners, though not to any significant degree. We have not checked the figures for sales after 1857.

for which all the lands originally sold). For the year 1857, 14,086.58 acres were resold for a total consideration of \$54,897.66. This was an average per acre price of \$3.90 or approximately 2.318 times the average consideration received at the public sales.

The Commission has calculated the 1857 resales data as follows:

Miami County

10,515.06 acres
\$36,458.00
Average \$3.46 per acre

Franklin County

3,658.70 acres
\$20,400.00
Average \$5.57 per acre

Total

14,173.73 acres
\$56,858.00
Average \$4.01 per acre

For purposes of analyzing the 1857 resale data we have utilized, by necessity, our figures, which in any event are slightly higher than ^{3/}petitioners.

^{3/} We are aware of some of the reasons for the different figures. For example petitioners list one Miami County sale on August 1, 1857 as 160 acres for \$120.00 or an average of \$0.75 per acre. The property involved was an undivided $\frac{1}{2}$ interest in the southwest quarter section 26 Township 17 South, Range 21 East -- Book A, p. 192 (Pet. Ex. 176). The acreage computation should have been 80 acres. We found one transaction on September 25, 1857, involving 160 acres for \$400.00 or an average of \$2.50 per acre, listed twice.

36. The average per acre prices paid for the resales made in 1857 in both Miami and Franklin Counties, arranged in ascending order from \$1.17 to \$31.18, were as follows:

<u>Miami</u>	<u>Franklin</u>	<u>Miami</u>	<u>Franklin</u>	<u>Miami</u>	<u>Franklin</u>	<u>Miami</u>	<u>Franklin</u>
\$1.17		\$2.13		\$3.13		\$5.00	\$4.98
	\$1.25	2.19		3.13		5.00	
1.50		2.25		3.13		5.00	
1.50		2.25		3.13			5.00
1.50		2.28		3.13			5.00
1.50		2.34		3.13			5.00
1.50		2.36		3.13			5.63
	1.50	2.37		3.13		6.13	
	1.50	2.50		3.16			6.25
	1.63	2.50		3.22		6.25	
	1.63	2.50			3.23	6.25	
1.75		2.50		3.44			6.66
1.75		2.50			3.50	6.89	
1.75			\$2.50	3.50			7.00
1.75		2.56		3.50		7.29	
1.75		2.65		3.50		7.50	
1.75		2.66		3.50			10.00
1.75		2.69		3.50			10.00
	1.75	2.71		3.50		10.00	
1.81		2.75			3.53	10.00	
1.81		2.81			3.75 (Franklin	10.00	
1.81		2.88			County Median)	10.27	
1.86		2.97		3.75		11.00	
1.87		3.00		4.00			12.50
	1.88	3.00			4.00		12.50
	1.88	3.00- Miami County		4.04			12.50
	1.88	median		4.06			15.00
	1.88	3.00		4.20			15.00
	2.00	3.00		4.21			25.00
	2.00	3.00		4.21			31.18
		(Median all					
		resales)					
		3.06					

Miami County 1857 sales

Franklin County 1857 sales

Arithmetic average - \$3.46
 Median average - \$3.00

Arithmetic average - \$5.57
 Median average - \$3.75

All 1857 sales

Arithmetic average - \$4.01
 Median average - \$3.03

37. The Commission finds that the median average consideration per acre for all the 1857 resales was \$3.03. It is apparent that the higher arithmetic average of \$4.01 per acre resulted in large from the few sales at relatively large average per acre prices. For example the elimination from the analysis of the fourteen transactions for prices averaging \$10.00 per acre or more would have reduced the acreage and consideration figures as follows:

<u>Acres</u>	<u>Consideration</u>	<u>Average Consideration</u>
40	\$ 600.00	\$ 15.00
120	1,500.00	12.50
80	800.00	10.00
160	2,000.00	12.50
96.32	3,000.00	31.18
30	300.00	10.00
80	2,000.00	25.00
20	300.00	15.00
50	625.00	12.50
160	1,600.00	10.00
160	1,600.00	10.00
50	550.00	11.00
14.61	150.00	10.27
<u>160</u>	<u>1,600.00</u>	10.00
Total	1,220.93	\$ 16,625.00

14,173.73	\$56,858.00
<u>- 1,220.93</u>	<u>-16,625.00</u>

12,952.80 acres \$40,233.00

Average per acre -- \$3.11

These fourteen transactions at prices which would indicate that the sales probably included substantial improvements had the effect of raising the arithmetic average from \$3.11 per acre to \$4.01 per acre.

38. The Commission has examined the locations of all the 1857 resales within the subject area. There are resales located, in general, in all portions of the tract. There is, however, a heavier concentration of sales to the west of Paola and, in particular, in the Marais des Cygnes River valley (Commission's Exhibit No. 1).

It also appears that most of the transactions at considerations averaging \$10.00 per acre or more were located in the southwestern portion of the tract through which the Marais des Cygnes River flowed. Of the fourteen such sales, eight were located in Township 17 South, Range 21 East. That township was surveyed in May, 1856, slightly over a year prior to the sales of the subject tract. The surveyor found the land to have been "first rate" with wide, rich bottom lands along the river. The village of Stanton was located in the northwest corner of the southeast quarter section of Section 26.^{4/} The surveyor noted "the Village of Stanton is situated in this Township and contains a population of about 50 souls, a very respectable store, a blacksmith shop and other Machanics (sic) and is a general trading place for the settlers of the surrounding country" (Commission's Exhibit No. 5). Further, the surveyor made a number of references in his detailed notes to the presence of such improvements as cornfields, wheat fields and gardens. (Commission's Exhibit No. 6). And the survey map contains sketched

^{4/} Actually the southern halves of Section 26 and all sections in that tier and the entire lower tier of sections in Township 17 South, Range 21 East were outside the subject area.

outlines of such improvements throughout Township 17 South, Range 21 East (Commission's Exhibit No. 4).

The Commission also finds that frequently those sales at prices averaging over \$10.00 per acre were close to (and often contiguous to) other contemporaneous sales at but a fraction of such prices. For example there were contiguous sales in 1857 at average prices of \$15.00 and \$3.13; at \$10.00 and \$4.00; at \$12.50 and \$1.25; at \$12.50 and \$2.00. The sale at the largest average per acre price was in Township 15 South, Range 21 East, Section 34, near the northern border of the area. The average per acre price for that 80 acre sale was \$31.18. In the same section a 160 acre tract sold for an average consideration of \$12.50. But about a mile and a half to the east a 160 acre tract sold for an average per acre consideration of \$2.50. And about 3 miles to the east another quarter section brought an average per acre price of \$2.75. About 3 miles to the southeast a quarter section sold for an average of \$4.00 per acre while a quarter section about 3 miles to the southwest sold for a consideration averaging \$1.88.

The Commission has little doubt that the sales for relatively large average per acre prices included improvements by the settlers who had been in the area for some time prior to the 1857 public sales.

39. The Commission has also observed that there are relatively fewer resales in the 1857 analysis which were located in the less favorable eastern portions. For example in Township 17 South, Range 24 East, there were only five sales, at prices averaging \$2.25, \$2.36, \$2.50, \$2.81 and \$3.00 per acre. There were, however, some Indian

