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 PARKER ON BEHALF OF THE PIANKESHAW NATION,	)	
Petitioners,	)	
v.	)	Docket No. 65
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: March 17, 1965

Appearances:

Jack Joseph and Louis L. Rochmes, Attorneys for Petitioners.

Craig A. Decker 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.

On September 12, 1962, we entered our decision in this case with respect to Claim I. Concerning Claim II the Commission, at that time, noted that the record was "practically devoid of any proof concerning the various elements which this Commission and the courts have taken into consideration in evaluating land." 11 Ind. Cl. Comm. 171, 179. The record was reopened, and petitioners introduced some additional evidence.

The Commission has, by order dated February 5, 1965, further supplemented the record with certain additional evidence as therein described. We now have the matter of Claim II before us for decision.

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

The lands involved were owned by petitioners, having been granted to them under previous treaties in 1832. By the terms of the 1854 Treaty the lands were ceded to the United States with provisions for certain reservations and selections to be made therefrom. The remaining lands were to be sold by the United States at public auction and, in consideration for the cession, the net proceeds were to be paid to the petitioners. It was also provided in Article 8, 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.

On the same day that the Peoria treaty was executed the territories of Kansas and Nebraska were organized, and one month later the provisions of the pre-emption law were extended to lands in Kansas and Nebraska to which the Indian title had been extinguished. White settlers,

investors, and speculators began to enter the ceded lands. They located on lands in the area believing, it appears, that they were entitled to pre-emption rights, the lands having been ceded to the United States. However, while there is much evidence concerning the entry of whites upon the subject lands, there is no evidence that they interfered with the Indian selections.

In the months following there was, it appears, increasing turmoil. The white settlers were desirous of obtaining lands at the lowest possible price. There arose a real controversy concerning the application of the pre-emption law provisions to the area in question. On August 14, 1854, the Attorney General of the United States had published an opinion that to grant pre-emption rights to the subject lands, which were by terms of the treaty to be sold at public auction for the account and benefit of the Indians, "would be a violation of the treaties, a breach of trust, a fraud upon the Indians." (Pet. Ex. 166J 1, p. 26).

However, the settlers remained, and others continued to enter the area. The white men were determined to claim the lands upon which they had "squatted." It appears obvious that only concerted military action by the United States could have dissuaded the pioneering settlers and land speculators. In many instances, entire families were living on the lands. Some were from distant eastern states. Forcible removal would have often times endangered lives of women and children. In any event the United States made no persistent or meaningful effort to remove the whites from the ceded lands.

By Act of March 3, 1855, Congress appropriated money and provided for the public sale of the "Peoria lands." It was provided that the

tract should first be classified and appraised. Appraisal commissioners were appointed in April, 1856, and their instructions are set forth in our finding of fact number 23. The appraisal inspections were made in June, 1856. The United States Indian Agent filed objections to the manner in which the inspections were made. The Commission believes that to some extent, at least, the objections were valid. We note for example that the public surveys in a number of the townships had not been made when the June appraisal inspections were conducted. The commissioners themselves reported that the survey plats were not available to them when the land was inspected and, in fact, they were forced to suspend their duties until the survey plats were available. But, as the commissioners stated, ". . . a fair and open competition in the sale of those lands, will best secure to the Indians their just value, and as we believe, the only means of carrying out in good faith the trust those Indians have confided to the Government." (Pet. Ex. 122, p. 3). The appraisals were finally submitted. However, noting the results of the public sales of the nearby Delaware lands (eastern portion), the President found the Peoria appraisals unsatisfactory, and the commissioners were directed to review and increase their appraisal rates. The rates were adjusted by adding twenty-five cents per acre to all of the lands appraised.

As the time for the public sales approached, the United States officials were aware of the many settlers who had already entered the area, and a number had been living with their families and farming quarter sections upon which they had squatted. Land speculators were

in the area. There was a tense atmosphere, and the possible necessity for military intervention at the sales was even anticipated.

The instructions to the special commissioner to superintend the sale, as set forth in our finding of fact number 25, provided that "bona fide settlers who have made lasting and valuable improvements on the lands and who resided therein" should be permitted to claim such lands at the appraised price which would "be considered the fair value of the land." Although prior to the sales objections were made to the proposed procedures by both Indian Agent McCaslin and by the Chiefs and Headmen of the Confederated Kaskaskias, Peorias, Piankeshaws, and Weas, the sales were so conducted, and it appears that a substantial number of the tracts were not subjected to public bidding but rather were sold to "settlers" at the appraised prices.

We have referred to the difficult circumstances which had arisen prior to the sales. Undoubtedly, to have forcibly removed the white settlers or to have allowed land speculators or others to bid on settled lands, thereby possibly depriving settlers' families of the fruits of their labors, would have turned the public sales into chaos. At the same time the presence of the whites had stimulated a great interest in the sales and undoubtedly assured the rapid disposition of the lands at the prices obtained.

But we are not really concerned here with a detailed examination of the motives behind the action taken or in an attempt to balance the equities. The fact is that circumstances conspired to prevent the Indians from receiving that which had been promised them under the

1854 Treaty -- that is that the lands would be sold at public auction and the Indians would receive the net proceeds of such sale. The evidence is complete and virtually uncontradicted on this issue. We are satisfied that not only were bona fide settlers allowed to claim lands at the appraised prices but land speculators were permitted to circumvent the bidding procedure and qualify as "settlers" by building "pole shanties" or mere foundations.

By the express terms of the 1854 Treaty the defendant assumed a fiduciary capacity with respect to the petitioner tribe in the sale of the subject lands. By its actions in not causing all the lands to be offered for sale at public auction but rather permitting "settlers" to purchase much of the land at the appraised prices the defendant breached its duty to the petitioners.

Accordingly, 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.

We turn now to the issue of the fair market value of the subject lands. Upon this issue depends the measure of the damages, if any, suffered by petitioners.

However, before discussing this issue, we feel constrained, although reluctantly so, to refer to another matter--namely the state of the record presented in this case on the question of value. While we find the record well assembled and complete on the question of the defendant's alleged "breach of trust," we find a serious

deficiency respecting the valuation issue. As previously mentioned, we referred to this problem in our opinion of September 12, 1962, and notified the parties that we would not make findings of fact on petitioners' Claim II until additional evidence on the fair market value of the land had been presented.

In response petitioners introduced into evidence a detailed listing of all the first resales of the lands involved. Defendant has not introduced any evidence on any issue involved in Claim II. We have therefore been faced with the problem of attempting to determine value on the basis of the resale listing presented by petitioners.[1/] There was not even a map of the subject area in evidence in the case. The resales, particularly the 1857 resales of the same lands in question are of course of great importance to the issue of value. However, a mere statistical compilation is of little value unless material is furnished to enable the Commission to fairly analyze it and determine the weight to be accorded such evidence. For this purpose we have plotted the 1857 resales on a detailed map of the area; we have determined where the Indian selections were made; we have obtained the surveyors' general descriptions of the townships involved; we have also examined the surveyors' detailed notes within those townships; and we have examined evidence concerning the nature of the land involved within the boundaries of the subject tract. Consideration of all of this

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1/ There was also some evidence of limited value which had been initially presented by petitioners, such as a general description of the Kansas Territory and a description of Miami County.

material was necessary before we could properly weigh the resale evidence and determine the issue of value. Without further belaboring this point we will state simply that the Commission expects that all parties will diligently attempt to present a record in the cases before us which will fairly reflect all the evidence reasonably available which bears on all the issues involved. We do not expect that we will be placed in the position of detailing in each instance that which is required of the parties or of preparing our own record to dispose of these cases.

The public sale of the Peoria lands was conducted during the period from June 24, 1857, to July 13, 1857. That period then covers the dates upon which we must determine the fair market value of the lands. The tracts were generally sold in 160 acre parcels except in a few instances involving fractional quarter sections. The parcels sold are described in petitioners' exhibit number 175, which shows the land classification, appraised valuation, and the price for which each parcel sold. We have determined the fair market value on the basis of the total of each of the separate quarter sections or smaller tracts as indicated in petitioners' exhibit 175.

The lands involved are located in eastern Kansas within the present day counties of Miami and Franklin. The land was well suited for farming. Most of the area is comprised of uplands with a small portion of more desirable bottom land located principally in the southwestern part of the tract along the Marais des Cygnes River valley.

The timbered areas were principally along the creeks and limestone was present in almost every locality. There were no railroads in the

area in 1857. Transportation was on overland roads to navigable rivers. The tract was located just 25 miles south of the important Kansas River-Missouri River junction at Kansas City.

The subject tract possessed land which was sought after by the settlers in the 1857 period. In June and July of 1857 there was great activity and interest in lands in eastern Kansas.

The resales data presented by petitioners serves to provide the best indication of the market value of the parcels involved. There were in 1857, following the June-July 1857 public sales, some 120 resales within the area. These sales, involving as they did the same identical lands which are to be valued and occurring during a period extending to only about 6 months after the valuation dates involved, serve to provide a sound basis for determining fair market value in this case. Defendant has argued that these sales comprise hindsight evidence and should be rejected as representing occurrences which, having taken place after the valuation date, could not have been known to a prospective purchaser. We do not agree. Granted the actual dollar consideration paid for the tracts involved in the 1857 resales would not have been "known" at the public sales in June and July, 1857. But the undeniable fact is that virtually every single factor which would have been weighed by a purchaser at a land auction sale in June-July 1857 would have been the same identical factors which were considered by the actual purchasers just a few months later. As petitioners have pointed out the purchasers involved in the 1857 resales were the same purchasers who would, undoubtedly, have been bidders at the public auction sales in June and

July. Between the June-July valuation period and the remaining six month resale period there were practically no changes in any of the various factors which affect market value.

Petitioners have argued that the resale data, i.e. the 1857 resale data from July to December, 1857, indicates the best evidence of what prospective purchasers would have paid at a June-July, 1857, public auction. That data as compiled by petitioners shows: (a) in Miami County 10,701.58 acres sold for $36,830.70 or an average price of $3.44 per acre; (b) in Franklin County 3,385 acres sold for $18,066.96 or an average price of $5.34 per acre; (c) overall 14,086.58 acres sold for $54,897.66 or an average price of $3.90 per acre. Therefore, petitioners contend, the lands were worth $3.90 per acre, some 2.318 times the average consideration received at the public sale.

While the 1857 resale data does, we believe, serve to indicate the best evidence of market value, the data must be carefully examined to determine the validity of the conclusions which petitioners urge us to draw. We have examined all of the 1857 resales in detail. In our finding of fact number 36 we have assembled all of the sales in both counties in ascending order by the average consideration paid. We find that with respect to both the Miami and Franklin County computations, and the combined averages as well, the arithmetic averages are greatly affected by a few sales at relatively large average per acre prices. For example we find that the median average for all of the resales in 1857 was $3.03 while the arithmetic average was $4.01. While we do not consider that the median average is to be preferred in all instances

over the arithmetic, it is helpful to test the statistical validity of one average by comparison with another method. The median average has the well recognized advantage of not being as easily affected by extreme values while the arithmetic is greatly affected by extremes. In this case we believe the arithmetic average of the resales is, to an extent, distorted by the few sales at high average consideration figures. We have, for example, eliminated those fourteen transactions which averaged $10.00 per acre or more and we found that the arithmetic average was reduced from $4.01 per acre to $3.11 per acre (a figure quite close to the $3.03 median). It is interesting to note that this elimination would reduce the median average by only three cents, from $3.03 to $3.00.

Examination of the locations of the 1857 resales reveals that of the fourteen resales at average considerations over $10.00, eight were located in one township. That township (Township 17 South, Range 21 East) possessed more bottomland than any other township in the area and was quite generally settled one year prior to the June-July, 1857, valuation period. The village of Stanton was located in that township (although outside the subject tract) and was, in May, 1856, surrounded by settlers. The surveyors' notes in May, 1856, referred to gardens, cornfields, wheat fields and other evidences of extensive farming operations in that township. We believe that many of the sales within that township reflected higher considerations paid for lands which had been substantially improved. Petitioners are not entitled to recover on the basis of an average per acre computation which was inflated by the improvements on some of the resold tracts.

Petitioners have argued that "in most cases the improvements, where there were improvements, had no value of consequence." (Petitioners' Reply Brief on Supplementary Proposed Findings, p. 8). Petitioners contend that defendant's argument concerning the effect of the improvements is entirely speculative. On the other hand petitioners engage themselves in speculation when they argue that those buyers at the public sale who bought for resale would not have made improvements and that settlers, interested in homes and farms, would not have been prompt to resell. Consequently, petitioners argue the resales were more likely to be of the unimproved lands than of the improved lands. We cannot accept this as any basis for disregarding the obvious fact that improvements had been made by settlers in the area and that some of the resales in 1857 involved improved properties.

We note that petitioners have also contended that to the extent that improvements were included, such improvements would have belonged to the Indians and not the white trespassers. We cannot accept such a contention. The lands after the 1854 cession did not belong to the Indians. All their former right, title and interest had been ceded to the United States, and the United States was the owner of the lands when the white settlers entered and made the improvements involved. While the treaty did provide that the lands would be sold by the United States and the net proceeds paid to the Indians, this fact would not have entitled the Indians to have been further enriched by according them additional compensation for improvements made by the white settlers under the circumstances as we have hereinbefore set forth.

When we have a situation such as existed in this case in which it is known that farmers had made settlements in the area at least a year prior to the valuation date, and a great number of the resales were in the area which had the most settlement, and the 1857 resale data indicates that a few sales averaging $10.00, $15.00 and up to $31.18 were contiguous or closely adjacent to sales at but a fraction of such prices ($1.25 to $4.00 an acre for example), we can safely presume that those sales at unusually high prices represented the more improved parcels. Further, we believe that some of the other sales, particularly some of those ranging upwards of $5.00 per acre, to a limited extent reflected improvements. Accordingly, we must weigh this factor in applying the 1857 resale "average" to the fair market value issue to be determined.

We also find from an examination of the locations of the 1857 resales that a greater number occurred to the west of Paola where the better lands were located. As indicated on our Commission Exhibits 1, 2 and 3 the Indians selected the best lands in the central and eastern areas along Big Bull and Wea Creeks. The best available lands for the whites was to the west of Paola, particularly in the broad valley of the Marais des Cygnes River. The inclusion of more resales within this better area also has served to accord this area a greater weight in the averaging than it in fact bore to the entire area involved. This is another factor which must be considered in determining the weight to be accorded the 1857 resale averages.

We have also noted that petitioners have complained that the appraisals made in 1856 failed to find special values for the townsite of Paola or for nearby lands. The fact is that the lands surrounding Paola were selected by the Indians and were not included in the lands appraised and sold at the public sales.

The Commission considers that the 120 resales in the last half of 1857 are sufficiently representative of the entire tract to provide a sound basis for our valuation determination. For the reasons we have given we believe that those fourteen sales at prices averaging ten dollars per acre and over should more properly be eliminated from the averaging computation. Petitioners have correctly omitted those resales in 1857 which were made for nominal considerations since they do not reflect market value. Similarly, those resales at ten dollars and over do not, we believe, reflect market value of the unimproved land. We consider that a more statistically valid average of the 1857 resale data would be about $3.00 per acre. We also consider that this $3.00 per acre figure is affected by lesser improvements on some of the remaining 106 resales and also by the fact that the average is weighted by a greater percentage of sales in the area which possessed the best land.

After considering the entire record in this case, as supplemented by the Commission's exhibits, and for the reasons we have set forth, we have concluded that a fair market value for the parcels which were sold in June and July, 1857, would have avergged $2.50 per acre. Accordingly, petitioners are entitled to recover the difference in that value

($2.50 x 207,758.85 acres = $519,397.13) and the sum originally received for the lands, $346,671.09. That difference amounts to $172,726.04.

Petitioners claim that they are entitled to interest since the 1854 Treaty provided that the President "may, from time to time, and upon consultation with said Indians, determine how much of the net proceeds shall be invested in safe and profitable stocks, the interest to be annually paid to them, or expended for their benefit and improvement." (Article 7). We find that the petitioners are not entitled to interest on any award in this case. The rule is well established that the United States is immune from the burden of interest, in the absence of a contractual or statutory requirement. The claim presented in this case is not one arising under the Constitution. There is no contract or statutory requirement for the payment of interest in this case.

The case will now proceed to a determination of the gratuitous offsets, if any, allowable against the award to be entered.

Wm. M. Holt
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

T. Harold Scott
Associate Commissioner