

BEFORE THE INDIAN CLAIMS COMMISSION

THE THREE AFFILIATED TRIBES OF THE)	
FORT BERTHOLD RESERVATION, ET. AL.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 350-A
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: October 29, 1968

Appearances :

Donald C. Gormley of the law firm of
Wilkinson, Cragun & Barker, Attorney for
Petitioner

Walter A. Rochow, with whom was Mr. Assistant
Attorney General Clyde O. Martz, Attorneys
for Defendant

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the Opinion of the Commission.

The Three Affiliated Tribes of the Fort Berthold Reservation by an agreement in 1886, approved March 3, 1891, ceded a portion of their reservation to the United States. The cession, located in northwestern North Dakota, contains 1,782,831.64 acres and for it the petitioner Indians received consideration of \$800,000. This case involves the claim that the true market value of the lands ceded so exceeded the consideration received as to make the transaction unconscionable, and the petitioners should recover the difference.

Somewhat less than half of the land lies along the south bank of the Missouri River; the Indian's title to it derives from the Treaty of Fort Laramie. The larger tract is across the Missouri to the northeast and was made a part of the Fort Berthold Reservation by the Executive Order of July 13, 1880 (1 Kappler 883) in exchange for other of the petitioners' Fort Laramie lands south of the river. Undoubtedly, petitioners had "compensable" title to both tracts within the cession for the purposes of this claim.

Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 390 F.2d 686, 696 (C. Cls. 1968).

Negotiations for the cession were instituted by the United States in 1886 to reduce the size of the Reservation, it being decreed excessive in size for the 1322 Indians living there. Settlers were rapidly coming into the Northern Great Plains; wheat production in North Dakota was increasing greatly; two transcontinental railroads promised many new settlers coming in and much produce shipping out. An Agreement of cession was concluded December 14, 1886 and ratified by the Act of March 3, 1891, 26 Stat. 989, 1032-35. The issue thus becomes determining the fair market value of the ceded subject tract as of March 3, 1891.

At that time, the attractiveness of the grazing lands to the west of the subject tract were well known; the level wheat farms

east of the tract were becoming equally famed. This tract had somewhat less rainfall than eastern North Dakota, but sufficient to make agricultural prospects good on the level plains. The grass cover of the entire tract was generally good; the grass was deemed suitable for year-round grazing in the less severe winters. Streambreaks provided shelter for the cattle from the rigorous winter storms. The promotions of the Northern Pacific and the Great Northern had helped increase the population of the adjacent counties as of the evaluation date, the latter railroad passing through the subject tract. The Missouri River had long been used for steamboat transportation, and presented no great barrier to the passage of goods and cattle.

About one-third of the subject tract was considered good agricultural land; it was level and grass-covered, without rocks that would make tillage difficult. Perhaps a quarter of the land was fertile and level enough for good agriculture, but encumbered by glacially-deposited rocks that must be cleared away. The balance of the tract was rough lands, suitable for grazing.

The petitioner argues that the highest and best use of the tract in 1891 was for large grazing units. The defendant asserts that the highest and best use was for a combination of farming and stockraising. In our opinion, at the relevant date the highest

and best use was in large ranching operations, where huge contiguous acreages could be acquired and operated.

In the years prior to 1891, as the cattle industry developed in Montana, Wyoming and the Dakotas, the rancher's ownership of a relatively small acreage would give his cattle access to grazing on the open tracts of the public lands. Large tracts of railroad grant lands were purchased from the Northern Pacific; checkerboarded with intervening public lands, the purchased tracts would have doubled the effective grazing acreage. By 1891, however, homesteaders were moving into the public lands, denying the free range cattle choice watering and grazing spots. The states of the area had enacted herd laws making it unnecessary for the homesteader to fence his crops and the trespassing cattle's owners responsible for damages. By 1891 it was recognized that proper range management of large contiguous tracts was necessary to a continuing profitable cattle business of any magnitude. Because of the Homestead Laws, only in the subject tract could such acreages be acquired easily and quickly in that area.

Undoubtedly a purchaser would have knowledge of the agricultural potential of the subject lands, and it would enhance their value for long range potential. However, at the 1891 date the greater moisture to the east would focus demand for agricultural lands to that area.

An 1891 owner of the subject tract would anticipate a delay in disposing of his inventory of agricultural lands in smaller tracts; he would expect a demand for large units for grazing.

As there were no sales within the subject area as of the date of taking, the expert appraisal witnesses for both parties based their primary evaluation of the tract on other large sales at various dates and places in the Northern Plains. Their differing interpretations of the data led to petitioner's opinion of the tract's value being \$2.00 an acre while defendant's was \$.805 an acre. Much the same evidence was offered by the same appraisers for the respective parties in Docket No. 279-A, the Blackfeet case, and the Commission's evaluation of that comparable sale evidence is incorporated herein by reference. The Blackfeet and Gros Ventre Tribe of Indians v. United States. 18 Ind. Cl. Comm. 241, 328-341 (1967). After elimination of the sales where the consideration is uncertain, and those clearly remote in time and place, it will be seen in our Finding No. 19 that only a small number of sales can be considered reasonably comparable to the subject tract. Even these are in years well before and after 1891, but is the Commission's opinion that there were relatively stable prices for large grazing tracts in the Northern Great Plains during the 1880's and 1890's, so that even 'hindsight sales' have some relevance.

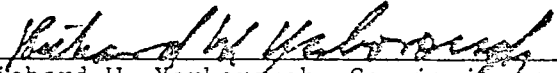
The acceptable comparable sales were at figures from \$1.00 to \$2.00 average per acre, and no exact comparison can be made of any of them with the subject tract. Neither can we accept uncritically the other appraisal approaches offered by the parties, which have been criticized before for their speculative nature.

Reviewing the record as a whole, the Commission would not be inclined to a higher value for these unimproved grazing lands but for several enhancing factors. It had lush grass, excellent transportation, adequate rainfall and surface water, a large percentage of ultimately more valuable agricultural land, and was available in large contiguous blocks (and thus is not subject to the discounting factors applicable when small tracts must be vended over a period of years).

The defects apparent to an informed purchaser of the time must be recognized: that there were many acres of land available in the area, that the climate could cause a loss of cattle or crops in any given year, that other investments were available with attractive rates of return.

Considering all of these factors detailed in our Findings of Fact and found in the record as a whole, it is the opinion of the Commission that the subject tract had a fair market value on March 3, 1891 of an average \$1.45 an acre, a total of \$2,585,105.88.

For the cession of the subject tract, petitioner received consideration of \$800,000, which is unconscionable on its face in comparison with the value of the land. The Commission will enter an order of judgment for the petitioner of \$1,785,105.88, subject to further proceedings for the determination of offsets, if any.


Richard W. Yarborough, Commissioner

We concur:

