BEFORE THE INDIAN CLAIMS COMMISSION

THE PONCA TRIBE OF OKLAHOMA, and WILLIAM OVERLAND, METHA COLLINS, and JOHN WILLIAMS, as representatives of the PONCA TRIBE and all the members thereof, Petitioners,	)	
v.	)	Docket No. 322
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: February 4, 1969

Appearances:
Edwin A. Rothschild, with whom was Louis L. Rochmes, Attorneys for Petitioners.

Bernard M. Newburg, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant.

OPINION OF THE COMMISSION AS TO VALUE

Yarborough, Commissioner, delivered the opinion of the Commission.

This proceeding involves the valuation of the lands which were the subject of our interlocutory order of July 26, 1963 (12 Ind. Cl. Comm. 292, 300) in which we decided that the Ponca Tribe of Indians of Oklahoma, et. al.,

held aboriginal title to 2,411,000 acres[1/] of land of north-central Nebraska and south-central South Dakota. This included 77,000 acres which were reserved to the Poncas. Thus the net with which we are concerned herein for valuation is 2,334,000 acres. This acreage reserved to the Poncas is the subject of our consideration in our Docket No. 323 (17 Ind. Cl. Comm. 162; 183 Ct. Cls. 673 (1968)). The date of valuation herein is March 12, 1858, which is the date of the Treaty which extinguished the petitioners' title to these lands (12 Stat. 997).

We have found that the highest and best use of the Ponca tract was for livestock; and that it had the necessary attributes. The land and the necessary environmental factors, including climate, precipitation, topography, etc., was such that livestock was afforded adequate pasturage for grazing during the growing season, and a sufficient crop of grain and hay crops could be grown for feeding during the balance of the year. Some additional cash crops, as for example wheat, could be grown. In addition, the land was such that gardens for the early settlers' subsistence could be maintained.

This was not an area of commercial timber. However, it was interlaced with streams and valleys along and through which timber abounded which was useful to the needs of the early settlers.

The area was so located that the transportation and access potential was apparent. At the date of taking, water transportation was possible from

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1/ This figure is based on the most recent planimeter figure furnished by the Bureau of Land Management, whose calculations have almost uniformly been accepted by the Commission.

the village of Niobrara on the Missouri River. Military roads were built and under construction.

This is a matter presenting legal and factual problems similar to others which we have decided and on which the Commission has been given guidelines by the Court of Claims. As we have found, the defendant obtained the cession of the land many years ahead of its practical availability for overall settlement by the westward migration. The great majority of the land of the tract was not surveyed until after 1870.

In 1834, Congress designated all land west of the Missouri River and north of Texas as Indian Country (4 Stat, 729). The allowed area, as part of this Indian Country, was officially closed to settlement until the Kansas-Nebraska Act of 1854 (10 Stat. 283) first opened Nebraska.

When the Poncas ceded their land in 1858 (12 Stat. 997), they were given a reservation in the northeast corner of the allowed area. In 1868, the defendant granted to the Sioux tribe a reservation consisting of a large part of the northern allowed area (15 Stat. 635) including the Ponca reservation. (See Docket No. 323, 17 Ind. Cl. Comm. 162; 183 Ct. Cls. 673 (1968)). The Sioux remained in possession of the northern part of the allowed area until the Act of March 2, 1889 (25 Stat. 94) confined them to two reservations and opened the surrounding land for settlement. The use of substantial portions of the allowed area for these Sioux reservations delayed settlement for many years after the treaty cession. Portions of the South Dakota land in the allowed area were not open for white settlement until the 1900's.

It is true that, as contended by the defendant, there was a period of time between the date of taking and the establishment of the Sioux reservation during which settlers could have moved in. It is also true, however, that although the Indians had ceded the land they continued to use and occupy it during this interim period. Therefore, from a realistic point, little settlement by whites could have been expected at that time.

Although there was no actual market of lands in the subject tract for many years, our valulation can look to the potential of the resources to determine what a purchaser might have paid in 1858, the year of our valuation date. There is a voluminous record of facts on the natural resources of the land ceded, including those pertaining to climate and precipitation, topography, streams, ground water and drainage, soil characteristics and uses, timber, ildlife and game, transportation, present and potential economic values, general conditions and such other items as a well-informed hypothetical purchaser would consider in determining what he could afford to pay for the land as of the valuation date.

To assist us in our determination we have had the benefit of official government records and studies, and many other valuable records. We have also had the benefit of the testimony of expert witnesses. The surveyors' notes and the Department of Agriculture Soil Surveys have been of particular value. The surveyors' notes were made at about the time of settlement; the soil surveys were made at a later date; our study and comparison shows that they tend in a general way to be mutually corroborative.

We have, therefore, as we have in other matters involving similar background settings, relied on the physical facts and the general market in constructing our evaluation. We have followed the criteria laid down by the Court of Claims in Otoe and Missouria Tribe of Indians v. The United States, 131 Ct. Cls. 593, at pp. 632-634, in which the Court stated:

> As noted by the Government in its appeal, the Commission obviously rejected the valuation method proposed by the Government and relied on the method urged by the Indian claimants in arriving at the determination that the land had a value of 75 cents per acre at the time it was ceded.
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> The method of valuation proposed by the Indian appellants is along the lines adopted by this court in many cases and in particular in Alcea Band of Tillamooks v. United States, 115 Ct. Cls. 463 (reversed as to interest, 341 U.S. 48), Rogue River Tribe of Indians, et al., v. United States, 116 Ct. Cls. 454, cert. den. 341 U.S. 902. The same method of valuation was followed by the Indian Claims Commission in the Osage case (3 Ind. Cl. Comm. 217). In those cases the court and the Commission rejected the notion that the value of Indian lands must be based on market value alone because the market for such lands was absolutely controlled by the only possible purchaser, i.e., the Government either direct or in trust for sale. Until Indian title to an area of land is extinguished and the land is surveyed no sales thereof or settlements thereon are possible.
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> In the instant case the surrounding lands were not open to settlement because the Government had not yet extinguished Indian title thereto. But that does not mean that such land was worth no more than the value of the subsistence it provided for the Indians. In the absence of a market at the time in question, and therefore the absence of evidence of "market value" in the conventional sense, this court and the Commission have taken into consideration numerous other factors in determining the value of lands ceded by the Indians. The Indian appellants' expert witness, Thomas H. LeDuc, took those other factors into consideration in giving his opinion of the value of the

> ceded lands. For the most part the factors were the same as those relied on by the Commission in its recent Osage findings, and follow, to some extent, the pattern laid down in the Alcea and Rogue River decisions in this court. This method of valuation takes into consideration whatever sales of neighboring lands are of record. It considers the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession, or merely of potential value, water power, its then or potential use, markets and transportation--considering the ready markets at that time and the potential market. LeDuc concluded that the land ceded in 1833 was worth not less than $1.50 per acre. .....
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> We think that the factors taken into consideration by claimants' expert witness were valid factors in the determination of the value of Indian lands under the circumstances of this case and similar cases.

Petitioners contend that since the defendant took the lands many years before they were actually available for white settlement, the "fair market value" should have been the statutory price at which public land was for sale at that time regardless of location. This price was $1.25 per acre. The Commission has regularly rejected this theory. (Pawnee Tribe v. United States, 8 Ind. Cl. Comm. 648, 724 (1960), aff'd as to value. 157 Ct. Cls. 135 (1962), cert. den. 370 U.S. 918; Miami Tribe v. United States, 9 Ind. Cl. Comm. 1, 14-15 (1960); Iowa Tribe v. United States, 12 Ind. Cl. Comm. 487, 525-540 (1963), aff'd as to value, 179 Ct. Cls. 8 (1967).

Where the record, as in this matter, includes the basis for making the valuation based on the characteristics of the land, in accordance with the guidelines laid down by the Court of Claims, there is no basis for reliance upon the statutory $1.25 price.

Petitioners' expert witnesses appraise the value of the land based on its characteristics as being no less than $1.25 an acre. Defendant's expert in his assessment of the same factors find the value of the land to be $.30 an acre. As is usual, the Commission finds that an objective evaluation of the factors affecting market value, recognizing the good features and the bad features but not only the one or the other, leads us to a conclusion as to market value between these extremes.

The parties agree that the United States, in consideration for the Ponca cession agreed to undertake these obligations (Article 2 of the Treaty, 12 Stat. 997):

> Clause 1: To protect the Poncas in possession of their reservation, their persons and property;
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> Clause 2: To pay $12,000 per annum for 5 years, $10,000 per annum for the next 10 years, and $8,000 per annum for 15 years thereafter;
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> Clause 3: To pay $20,000 for subsistence for the first year;
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> Clause 4: To pay not to exceed $5,000 a year for 10 years for education and training;
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> Clause 5: To pay not to exceed $10,500 for a mill, together with not to exceed $7,500 a year for 10 years, "or during the pleasure of the President" for aid and assistance in agricultural and mechanical pursuits;
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> Clause 6: To pay $20,000 to settle existing obligations of the Poncas, including depredations.

The stated obligations of the Treaty total $455,500. The Defendant contends that appropriations under Clause 5 continued in fact for 17 years, although payments during the last two years were reduced to $5,000 each. In addition,

because of spoliation committed upon the Indians, the defendant indemnified the Poncas to the extent of $15,080 under Article II, Clause 1, as provided in Article 3 of the Treaty of March 10, 1865, 14 Stat. 675, and in the Appropriation Act of July 27, 1868, 15 Stat. 198, 212. Thus appropriations specifically referring to the Treaty were listed by defendant by years for a total of $515,080.

We agree with petitioners that moneys paid the Poncas under Clause 5 over and above the treaty obligations do not fall within the classification of consideration. Rather, they are in the nature of gratuities subject to our consideration under Section 2 of the Indian Claims Commission Act as possible offsets.

Further, it appears to us that the $15,080 of indemnification by the United States for failure to protect the Ponca lands against incursions by the white man was not in the nature of consideration. Rather it was for failure to carry out a duty imposed upon the defendant by the 1858 treaty requirements, and was not a payment for the land ceded.

We, therefore, conclude that the consideration paid by the United States for the subject tract was $455,500.

Accordingly, based upon the Findings as to Facts entered herein and the record as a whole, we have found that the Ponca tract had a valuation on March 12, 1858, of $2,334,000, an average of $1.00 per acre. We have further found that the consideration paid in the amount of $455,500 was unconscionable within the meaning of the Indian Claims Commission Act.

The petitioners, therefore, are entitled to recover from the defendant the difference in the amount of $1,878,500, less such offsets, if any, that the defendant may be entitled to claim. An order will be entered accordingly.

Richard W. Yarborough, Commissioner

We Concur:

John T. Vance, Chairman

Jerome K. Kuykendall, Commissioner

Margaret H. Pierce, Commissioner

Theodore R. McKeldin, Commissioner