

BEFORE THE INDIAN CLAIMS COMMISSION

THE IOWA TRIBE OF THE IOWA RESERVATION)	
IN KANSAS AND NEBRASKA, THE IOWA TRIBE)	
OF THE IOWA RESERVATION IN OKLAHOMA, et al.,)	
)	
Petitioners,)	
)	
v.)	Docket No. 79-A
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: February 17, 1969

FINDINGS OF FACT

The Commission makes the following findings of fact.

1. The petitioners herein include two groups of the Iowa Tribe of Indians, one known as the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, and the other as the Iowa Tribe of Oklahoma. These two groups compose the membership of the original Iowa Tribe of Indians. As a tribe of American Indians residing within the territorial limits of the United States, the Iowa Tribe is entitled to have its claims against the United States determined under the Act of August 13, 1946, 60 Stat. 1049.

2. Claims were timely filed by the subject petitioners under Docket No. 79. On February 28, 1966, the Commission ordered that two of the claims be severed from that docket and considered in a docket to be numbered 79-A. They are the two claims now under consideration.

3. By Article 2 of the Treaty of September 17, 1836, 7 Stat. 511, the United States set aside for the Iowa Tribe of Missouri and the Sac and Fox Tribe of Missouri 400 sections (256,000 acres) of land in what

are now the States of Kansas and Nebraska, the lower 200 sections for the Sac and Fox Tribe and the upper 200 sections to the Iowa Tribe. These areas are shown as Royce Areas 323, 427, 428, 429, and 430, Kansas 2; Nebraska, Eastern Portion, for the Iowas and Area 324, Kansas 2, for the Sac and Fox.

By the Treaty of May 17, 1854, 10 Stat. 1069, the Iowas ceded to the United States its 200 sections, except lands reserved therefrom by metes and bounds, as its future reservation. The reserved lands comprise Royce Areas 427, 428, 429 and 430, Kansas 2; Nebraska, Eastern Portion. The ceded lands (Royce Area 323) were to be sold at public auction and the proceeds held for the benefit of the Iowa Tribe. The treaty further provided that if the Sac and Fox should select and occupy a tract of land from the Iowa ceded lands, that a quantity of land "equal to that which may be thus occupied by the Sacs and Foxes, and of as good quality" shall be set apart for them (Iowas) out of the Sac and Fox ceded lands and sold for the benefit of the Iowas. The Sac and Fox did locate on a portion of the Iowa lands (Royce Area 427, Kansas 2; Nebraska, Eastern Portion) and compensatory acreage was added to the Iowa trust lands from the adjacent Sac and Fox ceded lands.

4. In the earlier proceedings involving Docket No. 79, it was stipulated by the parties that the lands sold for the benefit of the Iowa Tribe pursuant to Article V of the 1854 Treaty, hereinafter referred to as the trust lands, comprised 94,451.25 acres. The trust lands formed an irregular triangular shaped tract in the extreme northeastern corner of

Kansas. It occupied parts of Tps. 1 S. in Rs. 15 through 20 E. and Tps. 2 S. in Rs. 17 through 20 E. From its northeasterly corner on the Missouri River the tract extended about 31 miles across the extreme northerly portions of Doniphan and Brown Counties, Kansas, to the west tip of the triangular tract.

It was further stipulated by the parties that there was a shortage of 4,798 acres in the Iowa lands, for which the government had failed to account, and that said acreage should be deemed to be located at the western extremity of the Iowa lands, west of and adjacent to Royce Area 427 in Nebraska. The shortage area is a noncontiguous tract lying immediately west of Royce Area 427 and in the southwestern corner of Richardson County, Nebraska. It is an irregular tract including four whole and nine partial sections in T. 1 N., R. 14 E.

These stipulations were embodied in the Commission's order of February 28, 1966, in Docket No. 79 (16 Ind. Cl. Comm. 568), and it was also ordered that the lands be valued as of June, 1857.

5. Under Article 3 of the 1854 Treaty, the trust lands were to be surveyed and, after the approval of the township surveys, sold at public auction in accordance with the law relating to the sale of the public lands.

Article 5 of the Treaty provided:

As the receipts from the sales of the lands cannot now be determined, it is agreed that the whole subject shall be referred to the President of the United States, who may, from time to time, prescribe how much of the proceeds thereof shall be paid out to the Ioway people, and the time and mode of such payment, and also how much shall be invested in safe and profitable stocks, the principal of which to remain

unimpaired and the interest to be applied annually for the civilization, education, and religious culture of the Ioways and such other objects of a beneficial character as may be proper and essential to their well-being and prosperity: provided, that if necessary, Congress may, from time to time, by law make such regulations in regard to the funds arising from the sale of said lands, and the application thereof for the benefit of the Ioways, as may in the wisdom of that body seem just and expedient.

6. The Act of May 30, 1854, known as the Kansas-Nebraska Act (10 Stat. 277), organized the lands into the territories of Kansas and Nebraska. The Act of July 22, 1854 (10 Stat. 308, 310) extended to the lands in these territories ceded to the United States, but not including the lands ceded in trust, the provisions of the pre-emption law of 1841 (5 Stat. 453). The right of pre-emption gave the first settler the right to settle on a quarter section or less of public land before public survey and to acquire title thereto at the minimum Government price of \$1.25 per acre at any time prior to the public offer of lands.

7. On July 13, 1854, a number of prospective settlers or land buyers met at Iowa Point, on the eastern boundary of the Iowa trust lands. This meeting addressed a memorial to the Secretary of the Interior requesting the early survey and sale of the Iowa trust lands, declaring that "it will further not only our individual interests, but also it will be greatly to the interest of the country at large to have said land brought into market as soon as practicable". (Pet. Ex. 12)

Agent Vanderslice, transmitting the memorial to the Commissioner of Indian Affairs, declared: "I have no doubt that a speedy survey and sale of this land will be productive of much good, and save much trouble. Thousands are awaiting on the Missouri side of the river for the action

of the government; and it will be difficult if possible, to restrain them much longer. It is my opinion that the request of the memorialists is reasonable, and an assurance from government to this effect may be of service in aiding the government officers in preventing intrusions and trespasses on the Iowa and other lands ceded in like manner." (Pet. Ex. 46, p. 5, Doc. D 1).

However, the surveys were delayed and the lands were not appraised until November 1856. In the meantime Agent Vanderslice was concerned with the need to define the line between the Iowa trust lands and the Sac and Fox ceded lands, so as to keep squatters, who were permitted by law on the ceded lands, from entering the trust lands.

8. With the opening of Kansas Territory, many emigrants entered upon the Delaware trust lands, located about twenty-five miles south of the Iowa lands, requesting either pre-emption rights under the Act of July 22, 1854, or modification of the Delaware treaty so as to authorize pre-emption "at a stipulated price," without competitive bidding. This raised the question whether the Act of July 22, 1854 superseded the treaties with the Delaware, Peoria, and Iowa Indians, all of which provided for sales at auction. Upon the request of the Commissioner of Indian Affairs for a legal opinion, the Attorney General rendered an opinion that the treaty provisions were controlling. That opinion stated in part:

By these treaties, the lands ceded are to be sold at public auction, upon the account, and for the benefit, of the Delawares, Ioways, and Weas, respectively, they paying the cost of surveying, managing, and selling...

* * * * *

Now, the difference between sales at public auction and sales to pre-emptioners is essential and notorious;

and the taking up of land by pre-emption under the provisions of the act of 1841, applied by that of 1854 to the Territories of Nebraska and Kansas, is inconsistent with the particular stipulations for public sale in the treaties with the Delawares, Ioways, and Weas.

* * * * *

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.

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. 46, Doc. J-1, pp. 24, 25, 26)

9. The Commissioners who appraised the Iowa trust lands made their report in November, 1856. On January 22, 1857, Indian Agent D. Vanderslice wrote the Superintendent of Indian Affairs that the Commissioners had made their appraisal upon only a "cursory reconnoissance", viewing only a portion of the lands in the immediate vicinity of the agency.

Subsequent to the first Delaware trust sales, the commissioners were advised by letter dated January 3, 1857, that their appraisals were unsatisfactory to the President and they were directed to review them and report the result. With respect to the Iowa trust lands, two of the commissioners responded by a letter dated January 8, 1857, which stated their recommendation that twenty-five cents be added to the appraised value of each acre. The third commissioner concurred.

As thereby increased, the appraisals, in quarter section tracts, ranged from \$1.75 per acre to \$2.75 per acre, and averaged \$1.92 per acre for the entire acreage.

10. On May 14, 1857, Commissioner of Indian Affairs I. W. Denver issued instructions to Special Commissioner Norman Eddy, who had been appointed to superintend the sale of the Iowa trust lands. Commissioner Eddy was advised that the government had "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; 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 thereon, the price fixed by the Commissioners will be considered the fair value of the lands, 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"

(Pet. Ex. 40, pp. 4,5)

11. The sales began on June 3, 1857, and they were completed by June 16, 1857. The total acreage sold (94,451.25 acres) brought a total of \$184,446.85, which was an average price per acre of \$1.95.

12. Most of the sales were made at the appraised prices. Commissioner Eddy reported that he did not know of a tract that had not been claimed by "settlement" with "lasting and valuable improvements" thereon. He wrote, "with the Exception of a small part of the 19th and all of the 20th Ranges, where settlement and improvement was notorious, the claimant to every tract was required to show not only by his own declaration, but

by those of others, that he was the actual and bona fide settler upon the same, - that he held it for himself, and not for others, and that he had a good and sufficient dwelling house or other improvements of equal value thereon - yet in spite of all these asseverations of principals and witnesses, out of 687 tracts sold, 290 were transferred by assignment upon the receipts of purchases to venders, before the close of the sale." (Pet. Ex. 41)

In Fifty Million Acres: Conflicts over Kansas Land Policy 1854-1890,

Paul Wallace Gates wrote:

On June 3, 1857, the second sale of trust lands in northeastern Kansas was opened at Iowa Point. Sol Miller, the territory's most scurrilous editor, wrote that every quarter had its claimant who secured his land at the appraised price; but after the sale was over, all the "settlers" left by boat for their residence elsewhere. Brown County had a big population through the sale but after it was over and all had departed there was nothing left but deserted cabins. Money lenders and speculators here connived with claim grabbers to get control of much of the land, to the distress of those intending to remain in the community. (Def. Ex. H-20, p. 68)

13. Under the provisions of Article 3 of the Treaty of May 17, 1854, the United States became obligated to "offer said surveyed land for sale, at public auction." In undertaking to thus sell the lands and to pay the net proceeds to the Indians (Article 5) the United States became a fiduciary with respect to the Iowa Tribe. By its actions in permitting "settlers" to purchase much of the land at the appraised prices, the defendant breached its duty to the Iowa Tribe.

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.

14. All of the subject lands were located in the region classified as the "Kansas-Nebraska Drift--Loess Hills Region" common to northeastern Kansas and southeastern Nebraska. By a further subdivision, a strip varying in width from about 6 to 15 miles along the Missouri River has been classified as the Loess Hills Region and considered the most productive in Kansas with the Drift--Loess Hills region as the second most productive.

Most of the lands in question were described by the original government surveys, taken in the fall, 1855, as "rolling upland or prairie, either 'fine,' '1st rate' with good or 'rich' soil, or 'good 1st and 2nd rate', and in the Nebraska parcel, considerable bottomland was noted in the Nemaha Valley and along smaller streams, and rich bottoms on Cedar and Roys Creeks in the Kansas parcel were mentioned."

Claude R. Fry, in the Natural Agricultural Resources Areas of Kansas Soil Conservation in Kansas, Report of the Kansas State Board of Agriculture, Vol. LXV, No. 271, February, 1946, summarizes some characteristics of the Loess Hills Region as follows:

Average annual rainfall ranges from about thirty-three to thirty-seven inches, growing seasons from 175 to 190 days, and average annual temperature from 53-1/2 to 55 degrees. Growing seasons are longer on the lower lands close to the river than in the higher areas at the western edge. Crop failures are few and there has

been a high percentage of good yields. (Pet. Ex. 47, p. 4, Def. Ex. H-9, p. 168)

Lands not suitable for cultivation include excessively steep slopes, areas which are deeply gullied, frequently flooded narrow stream valleys with deeply gullied channels, and occasional outcrops of limestone, shale and sandstone bedrock on breaks along major stream valleys. About seventy-five percent of these lands are covered with a fair growth of native mixed hardwood timber and twenty-five percent is grassland, chiefly bluegrass. (Pet. Ex. 47, p. 5, Def. Ex. H-9, pp. 126, 169).

15. As reported in the 1880's sixteen percent of Doniphan County was wooded in belts averaging a mile in width along the Missouri River and a quarter to half a mile on smaller streams. About eight percent of Brown County was wooded. Those timbered areas enhanced the value of the tract to the settlers who required such areas for local use in building, fencing, and for fuel. Brown County also had an abundance of limestone which was valuable for local building purposes.

15. The Iowa trust lands were bordered on the east by the Missouri River, and it was there that two of the three towns developed prior to the sale.

Iowa Point was located on the Missouri River adjacent to the trust lands in the northeast corner of Section 36. Township 1 South, Range 19 East. As of the time of survey (November and December, 1855), Iowa Point had about one hundred inhabitants.

The town of Highland was situated in the trust lands in part of Sections 22 and 23, Township 2 South, Range 19 East, and adjacent to the trust lands in part of Sections 26 and 27. The surveyors reported "some 4 to 6 houses" contained therein.

The site of the town of White Cloud was located on the Missouri River in Township 1 South, Range 19 East, primarily in Section 9. Since the surveyors made no reference to the town in 1855, it evidently was established between December 1855 and the time of the trust sales in June 1857.

17. The most important transportation facility for the trust lands was the thirteen miles of frontage on the Missouri River, along the eastern boundary of Doniphan County. That river was a major avenue for transportation. The two nearest river ports were St. Joseph and Kansas City, Missouri. St. Joseph across from the new town of Elwood, Doniphan County, was about twenty miles from the east end on the subject lands and some thirty-five miles by water from Iowa Point. Kansas City was about seventy five miles down river from St. Joseph.

The emigrant road to California that originated at St. Joseph wound in and out along the border of the trust lands in Doniphan County. In Brown County for about ten miles it ran a mile to three miles to the south of the trust lands before swinging away to the southwest. Another road led up from Leavenworth to the Indian mission and on north as far as Iowa Point on the Missouri River.

As of the valuation date there were no railroads within or near the subject area.

18. Both the trust lands and the shortage area had a highest and best use for farming, a use for which both areas were well suited.

19. The sale of the trust lands, in June 1857, was held at a most propitious time. Defendant's expert witness, Richard B. Hall, called it "the peak of the boom" and agreed that this was the period at which the highest prices would be realized.

20. The petitioners and the defendant have both introduced abstracts of resales of the trust lands.

The petitioners' tabulations show a total of 16,455.11 acres sold at an average price of \$5.64 per acre. This exhibit lists the resales in 1857 excluding transactions in which the family name of the grantor and grantee is the same, and transactions for which the consideration per acre is not ascertainable. The resale prices used in their calculations range from \$0.87 per acre to \$50.00 per acre. The median price per acre was \$5.00.

The defendant's abstract was compiled and evaluated by its expert witness, Richard Hall. The resales studied by Mr. Hall for the year 1857 totaled 10,155.07 acres and sold at an average price of \$5.75 per acre. However, Mr. Hall reduced this figure because of improvements and other factors to arrive at his estimated fair market value of \$2.50 per acre.

21. The petitioners' resales are plotted on their Exhibit 75. Most of the sales were located in ranges 19 and 20, the two eastern-most townships. Those sales in Doniphan County were located on the most desirable lands. In fact of the 140 sales involved in the analysis, a total of 82, or about 60%, were in Doniphan County. The remaining 58 sales were in the less desirable Brown County. Thus the analysis was more heavily weighted by a

concentration of sales in the most desirable areas. Whereas only 40% of the tract was within Doniphan County, in the sales data 60% of the transactions were from that County. Doniphan County possessed the especially productive "loess hills", and it was bounded on the east by the Missouri River.

The analysis also included several transactions for unusually high consideration figures. For example there were three sales which averaged \$50.00 per acre; another at \$44.69 per acre; and two sales at an average of \$25.00 per acre. (All of these transactions were in Doniphan County) In Brown County the highest average consideration transactions were at \$12.50 and \$10.00 per acre. All the others averaged under \$10.00 per acre - in fact all the others were under \$8.12 per acre.

22. Based on all the evidence of record in this case and upon the findings of fact entered herein, the Commission finds that the trust lands sold by defendant in June 1857 would have brought a greater price if they had been sold at public auction without provisions permitting "settlers" to claim tracts at the appraised valuations. The Commission finds that all of the separate tracts of the trust lands had fair market values, as of June 1857, which would have averaged \$4.00 per acre.

That average per acre figure times the total acreage involved (\$4.00 x 94,451.25 acres) would have amounted to \$377,805.10. The difference between that fair market value and the sum realized at the public sales (\$377,805.10 - \$184,446.85) is \$193,358.15.

23. The shortage area of 4,798 acres located at the western extremity of the Iowa lands was not as valuable on the average as the trust lands. The shortage area did not include lands as valuable as the eastern part of the trust lands along the Missouri River. It was, however, comparable to that portion of the trust lands located in Brown County.

The Commission finds that the shortage area, if sold in small parcels at public auction in June, 1857, would have had a fair market value averaging \$3.00 per acre, or a total value of \$14,394.00.

24. Accordingly, the petitioners are entitled to recover from the defendant the sum of \$207,752.15 (\$193,358.15 + \$14,394.00). Further defendant is liable on account of its failure to invest these proceeds which would have been received had the United States not violated the Treaty of May 17, 1854. Under the provisions of Article 5 of the Treaty that part of the proceeds which was not paid out to the Iowas was to "be invested in safe and profitable stocks, the principal of which to remain unimpaired and the interest to be applied annually for . . . the Ioways..." The Commission finds that the damages for the failure to invest can most properly be measured by the application of an interest computation on the principal sum. Further, the Commission finds that use of a straight 5 percent per annum simple interest rate is reasonable and proper in this case as a means to compute the measure of damages. The Commission finds that June 16, 1857, (when the sales were completed) should be the starting date for the computation, and it shall continue until the principal sum of \$207,752.15 shall be paid.

The computation of damages to February 16, 1969, is:

February (2),	16, 1969
June (6),	16, 1857

Interest period 8 months - 111 years.

\$207,752.15	principal sum
<u>.05</u>	interest
\$10,387.6075	

\$10,387.61 interest per year

\$10,387.61 ÷ 12 = 865.63

\$865.63 interest per month

\$10,387.61 X 111 years = \$1,153,024.71

865.63 X 8 months = 6,925.04

Interest to 2/16/69 - \$1,159,949.75

\$ 207,752.15	principal sum
1,159,949.75	interest to 2/16/69

\$1,367,701.90 Total

Accordingly, our award is for the sum of \$1,367,701.90 together with an additional amount of damages, measured by simple interest at the rate of 5% per annum on the principal sum of \$207,752.15 from February 16, 1969, to the date of payment of said principal sum.

Theodore R. McKeldin
 Theodore R. McKeldin, Commissioner

John T. Vance
 John T. Vance, Chairman

Jerome K. Kuykendall
 Jerome K. Kuykendall, Commissioner

Richard W. Yarborough
 Richard W. Yarborough, Commissioner

Margaret H. Pierce
 Margaret H. Pierce, Commissioner