BEFORE THE INDIAN CLAIMS COMMISSION

THE KLAMATH AND MODOC TRIBES and YAHOOSKIN BAND OF SNAKE INDIANS,	)	
Plaintiffs,	)	
v.	)	Docket No. 100-A
THE UNITED STATES,	)	
Defendant.	)	

Decided: May 14, 1969

Appearances:
Glen A. Wilkinson, Attorney for Plaintiffs. Wilkinson, Cragun & Barker, Donald C. Gormley and Richard A. Baenen were on the briefs.

Charles H. Hobbs, Wilkinson, Cragun & Barker, Donald C. Gormley and Frances Horn, Attorneys for Nez Perce Tribe, amicus curiae.

Keith Browne, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Commissioner, delivered the Opinion of the Commission.

The above-captioned case, severed, was brought to recover of and from the defendant "Additional compensation" for 621,824.28 acres of land in Klamath and Lake Counties, Oregon, which acres were omitted by the defendant's surveyors in 1871 and again in 1888 when the defendant undertook to survey the exterior boundaries of the plaintiffs' reservation. When the surveying errors were resolved, the plaintiffs ceded the aggregate omitted

acreage to the United States on June 21, 1906, and Congress appropriated $527,007.20 [$0.8636 per acre] which was paid to the plaintiffs. The latter now contends that a mere eighty-six cents per acre was unconscionable consideration when compared to fair market value as of June 21, 1906. Those questions - what the fair market value was as of June 21, 1906, and whether the paid consideration was unconscionable when compared to that fair market value - are the issues now before this Commission. A trial on valuation was held in September and October, 1961. Oral arguments were had on October 21, 1968. The parties' respective positions being fully briefed, the case is now ripe for a decision.

Before coming to grips with the central issues there are a few preliminary matters which merit comment.

It will be noted that the precise acreage involved terminates in a fractional figure of .28. Since this fractional figure is inconsequential, and since this Commission traditionally values property on a whole-tract basis and not acre-by-acre, no further mention of that .28 acre will be made. The defendant's separate and affirmative defenses include the point that prior litigation bars prosecution of the instant case before this Commission. The defendant's theory of res adjudicata is bottomed upon a suit reported as The Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians v. United States, 86 Ct. Cl. 614 (1938). In that suit, the now plaintiffs claimed extra compensation for the same 621,824 acres involved in the case at bar. The Court denied relief, holding that the

June 17, 1901, agreement between the United States and the plaintiffs, ratified by the Act of June 21, 1906 (34 Stat. 325, 367, 368), estopped the plaintiffs from claiming any additional sum for the omitted acreage: 86 Ct. Cl. 614, at 625. The Court's reasoning was that when Congress enacted a special jurisdictional act to bring the plaintiffs' case to the attention of the Court of Claims, Congress did not intend thereby to confer jurisdiction upon the Court of Claims of any cause barred by the 1901 agreement. From this point, that Court reasoned that the special jurisdictional act did not confer jurisdiction upon the Court of Claims to consider the claim for extra compensation for the acreage now under consideration. This line of reasoning led the Court of Claims to conclude that it lacked jurisdiction of that particular controversy.

This point - among others - that the case at bar was foreclosed by reason of prior litigation was raised by the defendant in its February 24, 1960, motion for summary judgment. That motion was denied by this Commission by an order issued on March 14, 1960. The defendant has adduced no new and cogent arguments which would now lead the Commission to conclude that the order overruling motion for summary judgment was erroneous. It follows that the defense of res adjudicata is not available to the defendant.

Apparently anticipating this conclusion, the defendant urges alternatively that if this Commission is to decide the case at bar on its merits, then it would be desirable to enter some findings relative to the basic issue of liability. The Commission does not infer from this

suggestion that the defendant questions whether liability exists (that is, whether the plaintiffs have a cause of action to maintain), but simply urges that in the interests of a complete record, pro forma findings be made. The Commission agrees, and has this day entered among the findings of fact those necessary to a determination that if the consideration was in fact unconscionable, the defendant would be liable to the plaintiffs for extra compensation for 621,824 acres of land which were the plaintiffs' until erroneously omitted from survey and subsequently ceded to the defendant for about 86 cents per acre.

A brief amicus curiae which was filed by the Nez Perce Tribe by leave of the Commission, has been received and considered.

The parties herein have been able to limit the issues by agreeing that the lands involved consist of two noncontiguous parcels and that the larger eastern tract comprises 467,644 acres and the smaller western tract comprises 154,180.28 acres. The parties' respective expert witnesses on value found themselves in substantial agreement as to the highest and best uses, viz. timbering where there was timber and grazing where there was no timber. The timbering would support a lumber industry; the grazing would support a year-around livestock economy. It is not surprising that the parties do not agree on the precise figures of how many acres of commercial timber, how many of noncommercial timber, and how many nonforested; it is of interest that the defendant's expert witness argues for 14,000 more acres of commercial timber and 25,000 more acres of

noncommercial timber, to the consequent reduction of nonforested acreage. Also, and predictably, the parties disagree vastly as to just what our traditional hypothetical willing buyer might have paid for each tract, all things considered.

The issues, then, are these: What acreages, when the tracts were in their pristine state, contained commercial timber, noncommercial timber, or were not forested? What were the contemporaneous circumstances which would aid a prospective buyer in setting his offers? And what would those offers be?

The Commission believes that these issues are fully dealt with through the findings of fact this day issued in the case at bar. Since it is apparent that the fair market value of the six-hundred-thousand-plus acres, as of June 21, 1906, was far in excess of the consideration paid by the defendant, it is equally apparent that the plaintiffs may recover the difference, less allowable offsets.

Finally, there is the question of whether the plaintiffs may have interest at 5% from June 21, 1906. The plaintiffs may not. The Commission is aware that a recent decision enforced a treaty obligation to pay interest where in fact the United States failed to deposit a portion of a specified sum in an interest-bearing account. The Peoria Tribe of Indians of Oklahoma, et al., v. United States, 390 U.S. 468 (1968). But that is not the posture of the instant case. Where there is neither a Constitutional taking to warrant just compensation nor an agreement or treaty which provided for interest generally (as opposed to a specific sum to be put at interest), there

can be no recovery of interest on an award of further compensation. Nez Perce Tribe of Indians v. United States, 176 Ct. Cl. 815 (1966), cert. den. 386 U.S. 984 (1967).

The case at bar will proceed to a determination of allowable offsets, if any.

Jerome K. Kuykendall, Commissioner

Concurring:

John T. Vance, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner