

BEFORE THE INDIAN CLAIMS COMMISSION

THE KLAMATH AND MODOC TRIBES)
 and YAHOOSKIN BAND OF SNAKE)
 INDIANS,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES,)
)
 Defendant.)

Docket No. 100-A

Decided: May 14, 1969

FINDINGS OF FACT

The Indian Claims Commission makes the following findings of fact:

1. The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians are tribes, bands, or other identifiable groups of American Indians situate in the continental United States and, as such, have the capacity to maintain a suit in this forum, consonant with Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a). This suit, before severance, was timely filed on March 9, 1951.

2. The particular issue of this case, whether the defendant paid "unconscionable" consideration within the contemplation of Section 2 of the Indian Claims Commission Act, has not heretofore been adjudicated by any court and is not now pending before any other court for adjudication. However, a claim by the same plaintiffs involving the same land was brought before the Court of Claims and dismissed by that Court for want of jurisdiction.

The Klamath and Modoc Tribes and Yahooskin Band of Snake Indians v. United States, 86 Ct. Cl. 614 (1938).

3. When the defendant undertook to survey the boundaries of the plaintiffs' reservation in 1871 and again in 1888, a substantial number of acres were omitted. When the surveying errors were resolved in the year 1900, it was determined that 621,824 acres had been omitted. On June 17, 1901, an Agreement between the plaintiffs and the United States (34 Stat. 325, 367) pertaining to the question of the omitted acreage provided:

Article I. The said Klamath and other Indians belonging to the Klamath Agency, Oregon, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Klamath Indian Reservation lying between the boundaries described in the treaty with said Indians concluded October fourteenth, eighteen hundred and sixty-four, and proclaimed February seventeenth, eighteen hundred and seventy, as confirmed by the Klamath boundary commission in their report to the Secretary of the Interior, dated December eighteenth, eighteen hundred and ninety-six, and the reservation boundary lines as established by the survey approved in eighteen hundred and eighty-eight by the General Land Office, the tract of land hereby ceded and relinquished comprising six hundred and twenty-one thousand eight hundred and twenty-four acres.

Article II. In consideration of the land ceded, relinquished, and conveyed by Article I of this Agreement, and in full of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the out-boundaries of their reservation in eighteen hundred and seventy-one, the United States stipulates and agrees to pay to and expend for said Indians, in the manner hereinafter provided, the sum of five hundred and thirty-seven thousand and seven dollars and twenty cents (\$537,007.20), being at the rate of eighty-six and 36/100 (.86 36/100) cents per acre . . .

The specified sum was appropriated and paid to the plaintiffs (Klamath & Moadoc, supra, Special Findings numbered 14, 17, 18, 19).

4. The Agreement was approved on June 21, 1906. The plaintiffs now contend that consideration amounting to only about \$0.86 per acre was

unconscionable within the contemplation of Section 2 because as of June 21, 1906, the land, in the aggregate, was worth \$6,521,500 (\$10.48+ per acre). The defendant argues for an aggregate worth, as of the same date, of \$2,410,000, which comes to \$3.87+ per acre.

5. The parties agree that the consideration was unconscionable; the issue is how much the plaintiffs may recover. That, in turn, depends upon the fair market value of the omitted aggregate acreage as of June 21, 1906.

6. The lands upon which the instant claim is predicated lie in two noncontiguous parcels, the larger [467,644 acres] embracing the east and north edges of the Klamath Reservation in Oregon, and the smaller [154,180 acres] lying wholly to the west and north of that reservation. Hereinafter, references to the "eastern" tract or to the "western" tract will be understood to mean the respective tracts identically denoted on the parties' maps.

Both tracts are located within the Klamath Basin of south central Oregon, except that a small portion of the eastern tract edges over the Fremont Mountains to the east and barely into the Goose Lake Basin west of Summer Lake. The use of the term "basin" denotes, for the purposes of this suit, an area of valleys at about the 4,000-foot elevation and rolling hills peaking at upwards of 7,000 feet of elevation.

7. The basins are well watered areas with much of the valleys being flooded, so to speak, with lakes and marshes. The easternmost edge of the eastern tract, being in the Goose Lake Basin and comprising a portion of the Fremont Mountains drainage pattern, does not partake of the standing waters characteristic of a marshy area. Apart from the numerous lakes and marshes, the areas under consideration enjoyed an abundance of rivers and streams.

Around the marsh areas and in the flood plains in the lower reaches of the streams were found nearly all of the agricultural lands of the Klamath Basin. Aside from the flat valley floors, and lower reaches of streams, the basin areas were broken and somewhat rugged, without being generally precipitous. No part of either of the tracts could be said to be inaccessible by reason of topography.

8. The typical climate of the Klamath and Goose Lake Basins could be characterized as variable without implying such extremes of temperature as would preclude animal or plant life. For instance, the defendant's expert witness on valuation testified that the land on the Sprague River [which bisects the southern portion of the eastern tract] was suitable for agriculture "although you might have frost almost any month out of the year."

In 1941, a local historian observed:

Situated far from the sea with an elevation of 4100 feet, surrounded by high mountains, snow covered much of the year, the Klamath Basin would be subject to great extremes of temperature were it not for two factors: The presence of great bodies of water, and the numerous hot springs in the vicinity . . .

* * *

Notwithstanding the hot springs and large lakes, the temperature ranges really low in winter, with a mean annual reading of about 47° F. Frost occurs eleven months out of the year and crops are restricted to the hardier varieties. Mountains to the west catch the moisture and only about 13 inches of rain is expected in a normal year. In spring comes most of the precipitation and the summers are dry, dusty, and really warm.

There is no evidence of record to suggest that the foregoing description of climate around 1941 is distinctly different from that which prevailed in 1906.

The plant growth which this climate produced could be visually divided into two categories: Open, unforested land supporting bunch grass and other forage, and forested uplands. In total acreage, forested lands exceeded non-forested land.

9. The western tract consists of portions of townships 28 to 33 south, ranges 6 to 10 east, Willamette Meridian. When an Executive Order was issued on September 28, 1893, establishing the Cascade Forest Reserve, all of the western tract lands in townships 28, 29, 30, and 31 south, range 6 east, and in townships 28, 29, and 30 south, range 7 1/2 east, were withdrawn from public entry. Such lands were not available for entry through the valuation date.

By an Act of May 22, 1902 (32 Stat. 202), the Crater Lake National Park was created. In addition to much of the Cascade Forest Reserve land of the western tract which became part of the Crater Lake National Park, all of the western tract falling in township 32 south, range 7 1/2 east, was also withdrawn for the Crater Lake National Park, as was that part of township 31 south, range 7 1/2 east, west of the 122nd Meridian.

And on July 31, 1903, the withdrawals for the Warner Mountain Forest Reserve, lying principally in the eastern tract, picked up most of the remainder of the western tract, leaving in private hands only the small fragments, totalling but a few sections, which were restored to public entry in January of 1905 or entered before withdrawal was consummated.

The effect of these several withdrawals of, substantially, all of the western tract at least until 1908 was to render it impossible to determine

fair market value of the western tract by examination of sales of that land itself on or close to the valuation date. Likewise, there is a substantial inhibition of the ordinary inferences relating to desirability.

10. The eastern tract consists of portions of townships 29 to 38 south, ranges 12 to 17 east, W.M. The withdrawal for national purposes patterns are neither so distinct nor so conclusive as those affecting the western tract. The Warner Mountain Forest Reserve (July 31, 1903) affected township 29 south, range 12 east; township 30 south, range 12 east; township 29 south, range 13 east; township 30 south, range 13 east; township 29 south, range 14 east; township 30 south, range 14 east; township 31 south, range 14 east; township 32 south, range 14 east; township 33 south, range 14 east; township 34 south, range 14 east; township 35 south, range 14 east; township 37 south, range 14 east; township 38 south, range 14 east; township 30 south, range 15 east; township 31 south, range 15 east; township 32 south, range 15 east; township 33 south, range 15 east; township 34 south, range 15 east; township 35 south, range 15 east; township 36 south, range 15 east; township 37 south, range 15 east; township 30 south, range 16 east; township 31 south, range 16 east; township 32 south, range 16 east; township 33 south, range 16 east; township 37 south, range 16 east; and township 33 south, range 17 east. However, the Warner Mountain Forest Reserve was a temporary solution and various of the enumerated townships or portions thereof were restored to the public entry on January 5, 1905, and in some instances, diverted to, for instance, the Fremont Forest Reserve which was once estimated to include 468,704 of the 621,824 acres comprising the Klamath Reservation Excluded

Lands, Such diversions to Fremont were accomplished on September 17, 1906 - just after the valuation date herein.

Of the remainder, townships 34 and 35 south, range 16 east, together with township 34 south, range 17 east, were withdrawn from entry on May 16, 1903, restored on January 13, 1905, and diverted to the Goose Lake Forest Reserve on August 21, 1906.

Apart from these seemingly erratic acts of a government striving to preserve a potential forest reserve against rapid occupation, a number of other facts combined to limit the accumulation of data from which reliable sales evidence could be derived.

Entries on comparatively small tracts could be initiated and consummated under the Preemption Act until 1891 [160 acres per entryman]; under the Homestead Act [also a quarter-section per entryman]; under the Timber Culture Act until 1891 [a maximum of four noncontiguous 40-acre lots]; and the Timber and Stone Act [160 acres per entryman]. Hence, given the right combination of land and circumstances, a diligent entryman might put together a tract consisting of one whole section [640 acres]; but most of the few entries in the eastern tract were of less than a section. The total effect, again, even without considering the further fragmentizing resulting from purchases from the State of Oregon and private companies, is to reduce the reliability of data procured from sales records of the particular lands now being valued.

11. Lake County, originally extending west to about five miles west of Crater Lake in the north and Lake of the Woods in the south, was organized on October 24, 1874. As then constituted, it included what is now Klamath

County. The latter was organized from the western portion of Lake County on October 17, 1882. Thus, Lake County's original boundaries comprehended all of the Klamath Reservation Excluded Lands.

The permanent [white] population of the Klamath and Goose Lake Basins was, around the critical date and for long thereafter, sparse. As of 1888, the nonforested areas were assessed:

The altitude of the country on the east slope of the Cascade Mountains makes this a grazing rather than an agricultural country. . .

And a local historian opined:

For years cattle grazing was the only industry and it was believed that the area was good for little else.

To the end of the nineteenth century, Klamath and Lake Counties continued to constitute a backwater area as far as new towns, new schools, new transportation, and sophisticated government were concerned. There was nothing which would attract an investor whose interests focused on the inflationary opportunities available when a burgeoning permanent population may be immediately anticipated.

12. In the year 1900, one of the negotiators of the Klamath treaty estimated that, in the eastern and western tracts considered together, a round-numbers estimate of commercial timber could be set at 350,000 acres. The plaintiffs' valuation experts agreed that the two tracts comprised 316,115 acres of commercial timber, 147,065 acres of noncommercial timber, and 158,644 acres which were not forested, all figures as of June 21, 1906. The defendant's expert witness testified that, "following closely" the classifications of the Soil Conservation Service, there were 330,254

acres of commercial timberland, 172,173 acres of noncommercial forest land, and agricultural, open dry grazing, and waste lands aggregating 119,397 acres.

The experts are in substantial overall agreement as to reasonable classification of the tracts for the two highest and best uses: Commercial lumbering from more than 300,000 acres, and livestock grazing on at least 100,000 acres. The lands which supported noncommercial timber included stands of commercial timber and extensive areas suitable for grazing. Land which absolutely could not be categorized as lumbering or grazing land was suitable for subsistence for the projected lumbermen and stockmen.

The fortuitous combinations of lumbering plus subsistence lands, or grazing plus haying plus subsistence lands, would have added to the attractiveness of the lands in 1906 and would have enhanced their potential for resale in large, as opposed to smaller, pieces.

13. Both parties' experts used the comparable sales approach to arrive at an appraisal of the worth of the Klamath Reservation Excluded Lands as of June 21, 1906. This is not to say that the data utilized are identical, or that all of the historical factors which were of interest to the defendant's expert were considered by the plaintiffs' summation expert. Likewise, the plaintiffs' expert relied more heavily upon the purchases of one firm - Weyerhaeuser Timber Company - while the defendant's expert secured a more balanced panoply of sales.

14. The plaintiffs' expert testified: "Well, I would say on the subject property itself, there were 389 purchases by Weyerhaeuser. One hundred and eighty-three such purchases were in the Klamath area, and 206 were in

the Lake County area. Within the subject area, buyers other than Weyerhaeuser bought a total of 65, 48 of them were within Klamath County and 17 were in Lake County, and immediately adjacent to the property. * * * Did you take any sales data outside of these two counties at all? None whatever, no. * * * These aggregated 92,000 acres, I believe, or in other words, Weyerhaeuser purchased, in 18 months, as much as everyone had in about 60 years prior to that in the subject area, or had entered upon."

The comparable sales which influenced this witness' appraisal of the Klamath Reservation Excluded Lands consisted of 53 sales of marsh land averaging 325 acres and \$3,248 per sale, for an average of \$10 per acre; 79 sales of grazing land averaging 311 acres and \$1,462 per sale, for an average of \$4.69 per acre; and an aggregate 709 sales of timberland averaging 3,274 acres and \$2,393 per sale, for an average of \$13.68 per acre.

The plaintiffs' chief expert, having compared sales of various types and sizes of tracts within and without the Klamath Reservation Excluded Lands, but almost exclusively within Klamath and Lake Counties, Oregon, concluded that if a hypothetical buyer were to purchase all 621,824 acres in a single transaction, he might anticipate being faced with a purchase price which, mathematically, would work out to \$16.72 per acre for land having a highest and best use of timber production; \$4.69 per acre for land having a highest and best use of grazing; \$10.00 per acre for land ancillary to grazing by reason of being marshland producing hay; and \$0.94 per acre for non-commercial timber land having a highest and best use of subsistence. Multiplying the number of acres in a given category by the per acre price for

that category gave this witness four dollar-figures which, when totalled, represented his estimate of fair market value of the total acreage as of June 21, 1906, i.e., \$6,282,000.

The Commission finds this witness's collection of back-up data useful in resolving the central issue; however, the Commission has not been able to agree with all of his conclusions. The reports of the plaintiffs' other expert witnesses were considered by the Commission; such reports were also integrated into the plaintiffs' summation report on valuation. It follows that there is no occasion to discuss those supplementary reports in any detail.

15. The defendant's expert witness on valuation abstracted nearby land sales in periods running forward through 1901 and from 1903 to June 21, 1906. Visual examination of his pictorial evidence disclosed that the clear majority of the sales relied upon by this witness for comparison purposes occurred in the later period. This witness testified that after abstracting the sales, he classified them according to the uses set down by the classifications of the Soil Conservation Service (Fdg. 12, supra) which he had followed closely: "Where I found sales of agricultural land, that is land in an agricultural area, I then inspected the Assessor's records, to see if the Assessor had that land on his assessment rolls, to show whether the land was improved or not, and where that land had been improved, the improvements assessed on the land, I eliminated those sales from my farmland, agricultural land list. That is also true of the grazing lands. But that is not true of the timberlands, because I found no improvements on the timberlands." This witness's wasteland, aggregating 7,640 acres in one compact mass, was in an irregular and

semicircular band where the western margin of the western tract impinges upon Crater Lake: "It is the high area around Crater Lake. The elevation is of about 7,000 feet or more. It is a very rugged, rough piece of land. Scott Mountain is about in the center of it. And it is a land which produces nothing of value. *** The soil classification of it is in that class. I think, Mr. Browne, that there is other wasteland within the tract, like the rocky areas along the eastern edge, and like some of the area to the east, immediately east of the Sycan Marsh, but I have classified that not as wasteland, but as open range land."

After categorizing various segments of the Klamath Reservation Excluded Lands by uses, and comparing such segments to tracts outside of the Excluded Lands where sales occurred, this witness was able to correlate a number of representative and comparable sales which would suggest what comparable property was selling for - and why - in the time vicinity of the valuation date. One factor considered important by this witness but ignored by the plaintiffs' expert witness in summation was a pattern of private sales bordered on both sides by National Forest timberland. This witness was of the view that privately-owned timberland providing immediate access to land of the Forest Service would command a premium price because of the advantage which the situation would confer over others bidding for the right to log specific trees on Forest Service lands. According to the figures of one of the plaintiffs' experts as interpreted by the defendant's expert, the spread conferred by the advantageous location would be as much as \$7.00, ranging from \$9.00 per acre for less-favored locations to \$16.00 per acre for most-favored locations; a spread resulting solely from the fortuitous prior

purchases of private citizens. Disagreeing with the plaintiffs' expert as to the significance of the several sales to Weyerhaeuser by entrymen or their grantees, this witness utilized the same solution as he had to the possibility that sales of improved property might generate erroneous inferences. He omitted the Weyerhaeuser sales from his calculations, thus avoiding any inflated figure caused by Weyerhaeuser purchases at premium prices. However, this witness did include in his calculations the fact that the Weyerhaeuser purchases reflected, to some extent, some degree of demand.

Respecting the commercial timberlands, this witness in the interests of pinpoint accuracy differentiated between slightly less than a third of the commercial timber and the remaining two-thirds-plus of the commercial timber covering 330,254 acres of the Klamath Reservation Excluded Lands. While this witness used "better", "best", "good", "really good", "first class" and similarly laudatory terms interchangeably in describing the lesser quantity, and "poor", "poorer", "inaccessible", "poorer grade" and similar terms interchangeably in describing the greater quantity, and while this witness specifically denied that he might be held qualified to assess timber stands on a qualitative basis, he does conclude that exactly 230,254 acres of the commercial timber lands supported timber of such ordinary quality that the average per-acre worth was \$5.00, and that exactly 100,000 acres of the commercial timberlands supported timber of such exceptional quality that the average per-acre worth was \$10.00.

The comparable sales which influenced this witness's appraisal of the Klamath Reservation Excluded Lands consisted of 43 sales of timberland

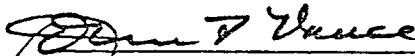
averaging 711 acres and \$4,860 per sale, for an average of \$6.83 per acre; nineteen sales of agricultural land averaging 190 acres and \$2,762 per sale, for an average of \$14.50 per acre; eighteen sales of grazing land averaging 178 acres and \$246 per sale, for an average of \$1.39 per acre; and 69 sales of mixed agricultural and grazing lands averaging 565 acres and \$9,263 per sale, for an average of \$16.39 per acre.

The defendant's expert witness on valuation, having compared sales of various types and sizes of tracts within and without the Klamath Reservation Excluded Lands, and having made the downward adjustments which he deemed warranted by the circumstances, concluded that if a hypothetical buyer were to purchase all 621,824 acres in a single transaction, he might anticipate being faced with a purchase price which, mathematically, would work out to \$10.00 per acre for the timberland bearing preferred quality timber (whatever the designation and wherever located), \$5.00 per acre for agricultural land or other timberland, \$1.50 for grazing land, and \$0.25 per acre for non-commercial timberland. The waste lands would be thrown in free for the purchaser of the entire tract. Multiplying the number of acres in a given category by the per acre price for that category gave this witness five dollar-figures which, when totalled, represented his estimate of fair market value of the total acreage as of June 21, 1906, i.e., \$2,410,000.

16. The Commission adopts the figures of the defendant's expert witness regarding the respective quantities of commercial timberland (330,254 acres),

noncommercial timberland (172,173 acres), marshland (20,160 acres), grazing land (99,237 acres including "wasteland"), but cannot accept the differentiation between commercial timberlands proposed by this witness. Likewise, the Commission cannot accept the particular dollar valuations proposed by this witness because of his tendency to minimize or discard any data which might tend to elevate the overall valuation to a realistic figure when compared to the going prices of the time and region.

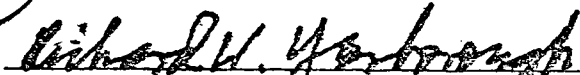
17. Considering the several appraisal reports and the testimony in support, or contradiction, thereof, together with the other evidence of record, this Commission concludes that Klamath Reservation Excluded Lands, taken as a whole, had a fair market value on June 21, 1906, of \$4,700,000.



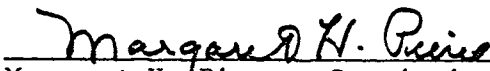
John T. Vance, Chairman



Jerome K. Kuykendall, Commissioner



Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner



Brantley Blue, Commissioner