

BEFORE THE INDIAN CLAIMS COMMISSION

THE OSAGE NATION OR TRIBE OF INDIANS, )

Plaintiff, )

v. )

Docket No. 105

THE UNITED STATES OF AMERICA, )

Defendant. )

Decided: 6-18-69

Appearances:

Delmas E. Martin, Warren Watkins, and Paul M. Niebell, Attorneys for Plaintiff. George E. Norvell was on the briefs.

Clifford R. Stearns, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

In a hearing regularly scheduled for that purpose, the parties herein have presented their testimony and exhibits related to the valuation of the subject lands as of April 28, 1810, the consideration paid to plaintiff by the United States for such lands, and whether or not such consideration was unconscionable under provisions of the Indian Claims Commission Act (60 Stat. 1050).

The area awarded to the plaintiff tribe on previous order of the Commission is a solid block of land located in the southwestern portion of

what is now the State of Missouri and the northwestern portion of what is now the State of Arkansas. Said tract contains 12,113,000 acres, of which 10,302,000 acres lie within the present State of Missouri and 1,811,000 acres lie within the present State of Arkansas.

In addition to the historical documents, reports and maps, separate appraisal reports were presented by each of the parties and oral testimony was provided by their respective appraisal experts: for plaintiff, M. J. Williamson, M.A.I., of Birmingham, Alabama, and for defendant, Dr. William G. Murray, M.A.I., of Ames, Iowa.

It is the plaintiff's contention, as supported by its expert, Mr. Williamson, that the subject tract was worth \$1.02 per acre in 1810 or a total of \$12,355,260; that the United States paid the Osages an unconscionable consideration of \$56,833.79 under the 1808 Osage Treaty (7 Stat. 107); and that the plaintiff is therefore entitled to recover from the defendant additional compensation amounting to \$12,298,426.21.

The defendant, on the other hand, seeks to impose a nominal \$0.15 per acre valuation on the Osage lands while at the same time denying it owes any additional compensation for the subject lands. The defendant admits payment of only \$56,833.79 under the 1808 Osage treaty, but contends that the plaintiff tribe was more than adequately compensated for this ceded area by other considerations flowing from the treaty.

Looking at the record we can see that in 1810 the ceded area was surrounded by raw, unsurveyed lands not available for public entry or sale.

No land market was operating within striking distance of the Osage tract in 1810. The nearest public land sales were taking place in Ohio and Indiana, a considerable distance from the subject tract. Public lands during this period were being sold at \$2.00 per acre in 160 acre tracts and on very liberal terms. There is no evidence that the land offerings in Ohio or Indiana were at all comparable with the subject tract.

The only pre-1810 private sales noted in the record were some 54 sales in St. Genevieve County, Missouri during 1802-1809 where the average price per sale was about \$0.56 per acre, hardly a figure that would support plaintiff's value conclusion.

In the absence of comparable sales as a prime factor in establishing "market value" in the conventional sense the Commission must consider other factors upon which to determine the 1810 market value of the Osage lands. We have, of course, done this in numerous cases following for most part the criteria adopted by this Commission and the Court of Claims in such cases as Otoe and Missouri Tribe of Indians v. United States, 131 Ct. Cl. 593 (1955) and the United States v. Emigrant New York Indians, 177 Ct. Cl. 263 (1966).

Thus, we have considered the natural resources of the subject tract, including its climate, vegetation, the timber, game and wildlife, and the mineral resources, and whether these resources are of real value at the time of cession or merely of potential value. We have also considered the topographical features of this area, particularly those that control accessibility. In addition, we have reviewed the general economic and

market conditions in 1810, contemporary population data and settlement patterns, and the political development of the Missouri area.

Applying the criteria as set forth above, we have concluded that neither of the positions advocated by the parties in valuing these Osage lands reaches an acceptable result. We cannot agree with Mr. Williamson's view that the prevailing \$2.00 per acre government price of land should be considered as the basic per acre value of the Osage lands before adjustment. His \$1.02 per acre determination is the result of certain allowances and discounts that he applied to the \$2.00 figure for survey costs and the time needed to market the entire area. And as for Dr. Murray, his low \$0.15 per acre estimate as the 1810 value of the subject lands is largely controlled by an estimate made by Alexander Hamilton in 1795 of lands north of the Ohio River that were still in Indian hands, largely unexplored, and of course far removed in both time and distance from the Osage tract.

From the evidence we have found that in 1810, a prospective or hypothetical purchaser of the Osage lands would have found himself acquiring a huge tract of over 12 million acres which for the most part could be best utilized by subdividing into smaller parcels of 80 acres or less for subsistence homestead farming. Other portions particularly in the higher elevations were better adapted to a combination of general farming and stock raising. He would have found a favorable agricultural climate, adequate timber along the water courses, surface coal available in some areas but no known minerals of commercial value, limited access

into the area by water except along the major rivers such as the Osage, Gasconade, Arkansas, and White rivers, some Indian trails but no roads, and certain inaccessible and unproductive mountainous regions of no real value.

The 1810 prospective purchaser would have seen that there had been only limited settlement of the adjacent lands to the east along the Mississippi River. The movement of white settlers westward across the Mississippi River had scarcely begun, and a substantial influx of settlers to the Osage lands could not be anticipated in 1810. In fact major migration to Missouri and Arkansas commenced much later. Missouri's 1810 population was roughly 20,000 people, most of them living along the Mississippi River and on and above the Missouri River. In 1810 there were no settlements near the Osage tract either on the Missouri River to the north, or the Arkansas River on the south.

The prevailing economic conditions in 1810 would have influenced the thinking of the prospective purchaser of the Osage lands. The money centers were in the large cities along the eastern seaboard, and, while business conditions had slackened and the wholesale price index had declined somewhat following passage of the 1807 Embargo Act, interest rates still remained fairly consistent around the 8% level. His immediate problem however was one of selling off a huge block of land in an area where hard money was scarce, and the ability of the new settlers to purchase lands in relatively small tracts would undoubtedly depend on the liberal use of credit. Thus, it would probably take a 20 year minimum to substantially market the Osage lands at a competitive price and on terms that

would meet the ability of the prospective settlers coming into the area. In considering all these factors, and all the evidence of record, the Commission has concluded that in 1810 the 12,113,000 acres in the Osage tract had a fair market value of \$7,000,000.

For the lands ceded under this 1808 Osage treaty the United States paid the Osages a total of \$56,883.79 which the Commission has found to be payment of an unconscionable consideration for lands worth \$7,000,000.

In its brief the defendant would have us believe that, as additional consideration for the cession of the subject tract, the Osage Nation under Article 8 of the 1808 Treaty was

" . . . permitted to live and to hunt, without molestation, on all that tract of country, west of the north and south boundary line, on which they, the said Great and Little Osage, have usually hunted or resided . . . "

In Docket Nos. 106 and 107, Osage Nation of Indians v. United States, 19 Ind. Cl. Comm. 447 (1968), that "tract of country" west of the 1808 north and south treaty line was the subject of extensive Osage aboriginal title claims, and the Commission ultimately found that the Osage Nation did in fact have Indian title to a substantial area west of the 1808 north and south treaty line which they ceded to the United States under the treaties of September 25, 1818 (7 Stat. 183) and June 2, 1825 (7 Stat. 240).

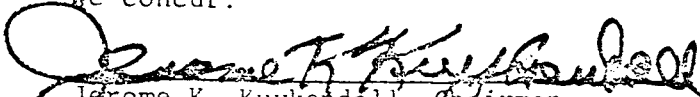
At the time of the treaty of 1808 the Osage Indians were already living and hunting in tribal fashion over a substantial part of the area west of the 1808 north and south treaty line, and had been doing so for a long time in exercise of their aboriginal rights. Merely agreeing to permit these Indians to do something, which we have already found they had an aboriginal right to do, hardly qualifies as consideration for relin-

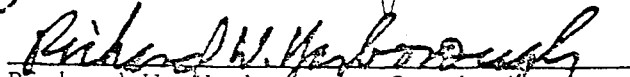
quishment of a part of their aboriginal holdings. The defendant's contentions in this regard are without merit.

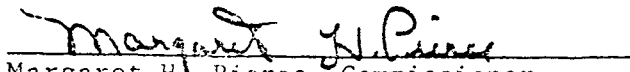
The plaintiff therefore is entitled to recover from the defendant an additional \$6,943,166.21 subject to allowable offsets. The question of offsets and all other matters bearing upon defendant's liability herein to the Osage plaintiff, shall be the subject of further proceedings as provided under the Commission's rules of procedure.

  
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John T. Vance, Commissioner

We concur:

  
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Jerome K. Kuykendall, Chairman

  
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Richard W. Yarborough, Commissioner

  
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Margaret H. Pierce, Commissioner

  
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Brantley Blue, Commissioner

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ADDITIONAL FINDINGS OF FACT ON VALUE

The boundaries of the lands to which The Osage Nation was decreed to have held aboriginal title are described in our Finding No. 112 issued previously in this matter (11 Ind. Cl. Comm. 733, 808-809). Date of taking was decreed to be April 28, 1810, the date of ratification by the United States of the Treaty of November 10, 1808 (7 Stat. 107) by which the Great and Little Osage Tribes ceded subject lands to the United States.

The Commission makes the following findings of fact that are supplemental to findings of fact Nos. 1 through 115 previously entered herein:

116. The subject tract contains 12,113,000 acres of which 10,302,000 acres are located in the southwestern portion of the State of Missouri and 1,811,000 acres in the northwestern part of the State of Arkansas. It includes all or part of present Barry, Barton, Bates, Benton, Camden, Cass, Cedar, Christian, Cole, Cooper, Dade, Dallas, Douglas, Green, Henry, Hickory, Jackson, Jasper, Johnson, Laclede, Lawrence, McDonald, Miller, Moniteau, Morgan, Newton, Ozark, Pettis, Polk, Pulaski, St. Clair,



Stone, Taney, Texas, Vernon, Webster and Wright Counties in Missouri; and all or part of Benton, Boone, Carroll, Crawford, Franklin, Madison, Newton and Washington Counties in Arkansas.

117. A great deal of the value data in the record was contained or cited in the appraisal reports and testimony of two expert witnesses, Mr. M. J. Williamson for the Osage plaintiff and Dr. William G. Murray for the defendant. As part of their value presentations both witnesses considered in varying degrees such value criteria as the topographical and environmental features of the subject tract, its soils and natural resources, the ease of access into Osage land in light of the contemporary means of transportation, pertinent population figures and settlement patterns, relevant economic and political facts, the prevailing government land policy as well as information and tabulations with respect to public land sales extending for the most part well beyond the 1810 evaluation date, observations made by government surveyors in Missouri as reflected in their notes, and finally the highest and best use for the subject lands.

Mr. Williamson in the process of arriving at his 1810 evaluation of the Osage lands, accepted the \$2.00 per acre 1810 government price of land as the basic per acre value of subject lands. From this figure he subtracted survey costs and then applied a 7% discount to cover both the size of the area and the fact that in his judgment it would take a minimum of 20 years to market the entire tract. He concluded that as of April 28, 1810 the Osage lands were worth \$1.02 per acre.

In marked contrast Dr. Murray affixed a nominal \$0.15 per acre valuation to the same lands. In our judgment his low figure is directly the result of his almost unqualified acceptance of Alexander Hamilton's 1795 estimate that the lands north of the Ohio River were worth between fifteen and twenty cents per acre. Dr. Murray admitted that this 1795 Hamilton estimate played an important role in his 1810 valuation of the Osage tract. Apart from the question of comparability, these Ohio lands are a considerable distance from the subject area, and in 1795 they were largely unexplored and occupied by numerous Indian tribes.

118. The Missouri portion of the subject area can be divided into four topographical soil regions:

(1). Southwestern Prairie Region. This region contains approximately 3,096,334 acres and represents the smoothest portion of the state. This region is characterized by level to rolling topography.

(2). Ozark Region. This region contains approximately 4,229,440 acres in the eastern part of the subject tract. It is slightly higher and more dissected than the adjoining prairies to the north and to the west. The stream valleys are usually deep and narrow and are bordered by belts of rough dissected country. Only a small part of the area can be called smooth. In that area along the Osage and Niangua Rivers in Camden and the northern part of Dallas and Laclede counties it is almost an uninterupted series of narrow branching valleys and sharp ridges. Such a topography, together with the large amount of stone in the soil, makes cultivation practically impossible. Further south in that area drained by the White River near the Arkansas state line is another hilly region of

similar topography.

3. West Ozark Border Region. This area adjoins the Ozark Region on the west and contains approximately 2,776,269 acres in central part of the subject tract. It is not as rough as the main body of the Ozark Region and its soils are less stony.

4. East Ozark Border Region. This relatively small area in the extreme northeastern part of the subject tract embracing approximately 143,304 acres thereof is principally river country that is intersected by numerous streams of irregular course.

Generally speaking the elevation within the Missouri portion of the subject tract ranges from 900 to 1500 feet above sea level with the rise and fall of the contour lines following a gentle sloping change.

The topography in that part of the Osage tract in northwestern Arkansas can be characterized as simply an extension of the hilly area found in that region drained by the White River along the Missouri-Arkansas line. The soils vary with the topography, and the area is well drained and well supplied with water.

119. There are four main soil groups in the Osage tract - - the Summit and Grundy groups in the northwest, the Clarksville-Lebanon group in the northeast and east, and the Baxter-Lebanon group in the southwest. The Clarksville and Baxter groups comprise nearly 85% of the entire Osage tract.

In the Summit and Grundy areas, the dark brown surface soils permit both general farming as well as livestock and dairy farming. Trees grow along the stream valleys and the soils are productive for hay grasses and































