

BEFORE THE INDIAN CLAIMS COMMISSION

ABSENTEE DELAWARE TRIBE OF OKLAHOMA, et. al.,)	Docket No. 72
)	
and)	
)	
THE DELAWARE TRIBE OF INDIANS,)	Docket No. 298
)	
Plaintiffs,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: September 10, 1969

FINDINGS OF FACT

1. Plaintiffs, Absentee Delaware Tribe of Oklahoma, et. al. in Docket No. 72, and the Delaware Tribe of Indians in Docket No. 298, are entitled under the Act of August 13, 1946, 60 Stat. 1049, to jointly represent the entire Delaware Tribe in its claim against the United States.

2. The Treaty of May 6, 1854, 10 Stat. 1048, ceded Delaware lands in Kansas, Royce Area 316 (Kansas 2), with certain exceptions, to the United States. The land was comprised of the so-called "outlet" extending westward into mid-Kansas (see Docket No. 27-A & 241) and the "residence lands." Of the residence lands, part was reserved to the tribe (Article 1), four sections were to be conveyed to the Christian Indians who had been living with the Delawares (Article 13), and the remaining area, hereafter referred to as the "trust lands," were ceded subject to the following provisions:

"Article 2

The United States hereby agree to have the ceded country (excepting the said 'outlet') surveyed, as soon as it can be conveniently done, in the same manner that the public lands are surveyed--such survey to be commenced and prosecuted as the President of the United States may deem best. And the President will, so soon as the whole or any portion of said lands are surveyed, proceed to offer such surveyed lands for sale, at public auction, in such quantities as he may deem proper, being governed in all respects, in conducting such sales, by the laws of the United States respecting the sales of the public lands; and such of the lands as may not be sold at the public sales, shall thereafter be subject to private entry in the same manner that private entries are made of the United States lands; and any, or all, of such lands as remain unsold, after being three years subject to private entry, at the minimum government price, may, by act of Congress, be graduated and reduced in price, until all said lands are sold; regard being had in said graduation and reduction to the interests of the Delawares, and also to the speedy settlement of the country.

"Article 3

...And as a further and full compensation for the cession made by the first article, the United States agree to pay to said tribe all the moneys received from the sales of the lands provided to be surveyed in the preceding article, after deducting therefrom the cost of surveying, managing, and selling the same.

* * * * *

"Article 7

It is expected that the amount of moneys arising from the sales herein provided for, will be greater than the Delawares will need to meet their current wants; and as it is their duty, and their desire also, to create a permanent fund for the benefit of the Delaware people, it is agreed that all the money not necessary for the reasonable wants

of the people, shall from time to time be invested by the President of the United States, in safe and profitable stocks, the principal to remain unimpaired, and the interest to be applied annually for the civilization, education, and religious culture of the Delaware people, and such other objects of a beneficial character, as in his judgment, are proper and necessary.

"Article 8

As the annual receipts from the sales of the lands cannot now be determined, it is agreed that the whole subject be referred to the judgment of the President, who may, from time to time, prescribe how much of the net proceeds of said sales shall be paid out to the Delaware people, and the mode and manner of such payment, also how much shall be invested, and in distributing the funds to the people, due regard and encouragement shall be given to that portion of the Delawares who are competent to manage their own affairs, and who know and appreciate the value of money; but Congress may, at any time, and from time to time, by law, make such rules and regulations in relation to the funds arising from the sale of said lands, and the application thereof for the benefit and improvement of the Delaware people, as may, in the wisdom of that body, seem just and proper.

* * * * *

"Article 16

It is agreed by the parties hereto, that the provisions of the act of Congress, approved third of March, one thousand eight hundred and seven, in relation to lands ceded to the United States, shall, so far as applicable, be extended to the lands herein ceded."

3. The trust lands were in the easterly portion of Royce Area 316 (Kansas 2). The eastern boundary was the Missouri River. The western boundary between the trust lands and the Delaware outlet is a north-south line through Range 15 East. Fort Leavenworth was located adjacent to the northeast corner of the trust lands. The lands contained 557,955 acres,

exclusive of the townsites of Leavenworth City, Jacksonville, Delaware City, Hardville and Lattaville.

4. It is conceded by the defendant, and we find, that the United States did not carry out the treaty provision calling for the sale of the trust lands at public auction. The principal issue tried was how much the trust lands would have brought if they had been offered for sale at public auction in accordance with Article 2 of the Treaty of May 6, 1854. Also at issue is the date or dates from which damages for failure to invest such proceeds should run.

5. In April 1856, the United States appointed three commissioners to certify and appraise the trust lands with the direction that the land should be offered at public sale in legal subdivisions of not more than one-fourth section in area or by townlots at a price not less than the appraised value with a minimum price established at \$1.25 per acre. No value was to be returned for any part of the lands considered to be of less value than \$1.25 per acre.

For the purposes of appraisal and sale, the trust lands were divided between the eastern lands (Ranges 19, 20, 21, 22 and 23 East) and the western lands (Ranges 15, 16, 17 and 18 East). The appraisal of most of the eastern trust lands was completed in June 1856, with the remainder appraised in December 1856. The appraisal of the Western trust lands was completed in September 1856.

Subsequent to the sale of the eastern trust lands in November and December 1856, the Commissioner of Indian Affairs advised the appraisers that

their evaluation of the western trust lands was unsatisfactory to the President, particularly in view of the experience at the sales of the eastern trust lands. In response, the appraisers increased their figures for some but not all the tracts by 25¢ per acre in some instances and 50¢ per acre in others. The appraisal values averaged \$1.80 per acre for the eastern lands and, after adjustment, \$1.65 per acre for the western lands.

6. A special commissioner to supervise and direct the sale of the subject lands was appointed. His instructions included the requirement that the lands were to be offered in the same size parcels in which they were classified and appraised and were to be sold for cash at a price not less than the appraised price of each parcel.

The sales of parcels in the eastern area were conducted in November and December 1856. The sum of \$438,982.54 or an average of \$2.09 per acre was realized. The western area lands were sold in July and August of 1857, realizing \$587,773.35, or \$1.68 per acre on the average. The townlots in Leavenworth were sold on February 7, 1857 for \$27,012.65. Amounts realized for the other townsites were as follows: Delaware \$1,365.05; Hardville \$620.10; Jacksonville \$544.50; Lattaville \$1,600.00. Thus the total receipts from the sales of the trust lands were \$1,057,898.19.

7. The Delaware Trust Lands were sold just before the sharp financial crisis which started in the late summer of 1857. This crisis brought a halt to the economic boom which had continued for several years. The collapse was started by the failure of the Ohio Life Insurance Trust Co. in the late summer of 1857. Many business failures followed throughout the country.

Fourteen railroads went into bankruptcy in one month, bank loans sharply declined, interest rates jumped to new high marks, credit was not available and most banks suspended specie payments. An immediate consequence of the crash was the collapse of the speculative land boom. Thus land prices prevailing after the summer of 1857 likely do not reflect the higher prices which could have been obtained for the same land prior to the 1857 depression.

8. We find that plaintiffs are entitled to compensation for the amounts that would have been realized by sale of the subject lands at public auction on the following dates: Eastern trust lands except Leavenworth City, November and December, 1856; Leavenworth City, February 7, 1857; and Western trust lands, July and August, 1857.

9. We find that the highest and best use of the subject lands outside of the townsites was for general farming.

The lands lie in the region classified as the "Kansas-Nebraska loess-drift hills." The most productive land lies in a six to eight mile strip along the Missouri River. The topography includes river flats, creek bottoms and level to steep hilly rolling uplands. The average annual precipitation in the trust lands ranges from 32 to 36 inches with a growing season of 170 to 180 days. Average annual temperature is from 53 degrees to 56 degrees.

The Delaware Trust Lands were accessible from the Missouri River. St. Joseph, Missouri, 50 miles upstream from Fort Leavenworth, and Kansas City, Missouri, 30 miles downstream were the two most important points of

commercial activity on the Missouri River in the time period nearest to the sale of the subject lands. At this time boat traffic was limited on the Delaware and Kansas Rivers. The main land travel routes through the Trust Lands originated at Fort Leavenworth, one running northwest to meet the St. Joseph-Oregon Trail, and the other, the Fort Riley Military Road, running through the main section of the subject lands. As of 1856-1857 there were no railroads within or near the subject area.

10. Plaintiffs' expert witness, Dr. Roger K. Chisholm, tabulated sales transactions in the trust lands for areas other than townsites for the fourteen month period from November 1856 through December 1857. He excluded from his computations transactions in which the parties had the same surname, where one or both parties were not individuals, transactions in which the consideration given was not indicated or was indicated as a nominal amount and transactions indicating that a mortgage was involved. He also excluded transactions for consideration equal to or less than the amount paid the government at the trust land sales on the assumption that these represented distress sales and thus were not representative. Dr. Chisholm, finding different price patterns in different areas, divided the subject lands into four tracts and computed the average and median sales price per acre as follows:

	<u>Average</u>	<u>Median</u>
Northwest	\$ 3.50	\$ 3.00
Southwest	4.31	3.53
Central	5.90	4.57
Eastern	9.80	8.75
Total tract excluding townsites	6.66	

11. Over half of the resales tabulated by plaintiffs occurred within three months of the close of the trust sales for the parcels involved. Such resales therefore probably included a larger than average amount of land which had not been improved if we are to believe the statements in Andreas, History of Kansas, introduced by defendant.:

"With the belief that the land had been opened for white settlers, and with a full knowledge of its value, the citizens of Platte County fairly swarmed onto the 'Delaware Trust Lands.' They could do little more than to stake their claims, but under the belief that the lands were, under the existing pre-emption laws of the United States, open for occupation, they took possession. At the close of June, 1854, there was scarcely an acre of what is now Leavenworth County that had not been claimed by some enterprising citizen just over the Missouri border."

"A few who really desired to settle in the country, put up cabins and removed their families onto their claims. These, so far as can be ascertained, held their claims through all the changing vicissitudes of the succeeding years, and many of them with their descendants still hold the lands then claimed."

"But, by far the largest part of the claims were speculative, made...by a class of men living conveniently near in Missouri, but having no intention of establishing a permanent home in Kansas." At 419. (emphasis added)

Similarly a letter in 1856 from Special Commissioner Relfe, one of the appraisers appointed by the government, to the Commissioner of Indian Affairs in referring to the sale of land to settlers at its appraised value stated:

"Squatters sell their claims fifteen and twenty miles from this City [Leavenworth] at from two to five hundred dollars per 1/4 Section above the appraisalment to the non

resident, and some of them take two or more claims. So soon as they have sold out, they rush on the lands, of the Delawares or some of the other Indian trust lands to take up new locations and be ready for the sales under a new proclamation..."

However, certain factors, as discussed in our opinion, inflate plaintiffs' valuation figures to an amount higher than the amount which would have been realized had the lands been sold in accordance with the provisions of the Treaty of May 6, 1854.

12. Defendant's expert witness, Mr. Richard B. Hall, tabulated the first resales of the subject lands other than townsites by patentees for the five year period following the trust sales. The average prices per acre were as follows: Jackson County (in the northwest portion of the lands) \$3.49; Shawnee County (in the southwest portion of the lands) \$4.51; Atchison County (in the northcentral portion of the lands) \$4.29; Jefferson County (in the southcentral portion of the lands) \$4.70; and Leavenworth County (in the eastern portion of the lands) \$11.04. In making the tabulation he excluded transactions between persons with the same surnames, deeds covering fractional interests, those in which the consideration was listed as a nominal amount and is thus unknown, and sales of less than forty acres. Over the Delaware trust lands as a whole, Mr. Hall found that first resales of the sectional tracts for a five year period averaged \$6.07 per acre for the five counties and \$4.35 per acre for all counties except Leavenworth.

Mr. Hall discounted the average prices in the Leavenworth area from \$11.04 per acre to \$8 and in the other counties from \$4.35 per acre to \$2.50 to take account of improvements which were present on the subject lands at

the time of the tabulated resales and of other factors which would affect the price received at public auction.

The extent of improvements which existed outside the townsites can be gauged roughly from the following facts. The 1860 population of all the five counties located in part in the subject lands was slightly over 30,000. In Jefferson and Jackson Counties, the population had more than doubled between 1857 and 1860. Assuming a similar trend in the other counties, the total population of the lands in 1857 would have been under 15,000. Several thousand of these persons lived in the towns, Leavenworth having a population of 2,000 as early as April 1855. Since the trust lands included almost ,000 acres, it seems likely that large amounts were unsettled and undeveloped.

We find that defendant has not sufficiently justified his discounts from resale prices for the trust lands outside the Leavenworth area.

13. The public domain, including extensive Indian lands in eastern Kansas acquired by the Government in 1854, represented competition at the time of the sale of the Trust Lands. The lands held in trust were however not subject to pre-emption in the opinion of the Attorney General. Squatters nevertheless asserted the right to pre-empt these lands as well.

The minimum price of \$1.25 per acre for lands in the public domain had long been established. In addition the Graduation Act of August 4, 1854, 10 Stat. 574, established lower rates. The issues of military bounty warrants under the Bounty Land Act of March 3, 1855, 10 Stat. 701, also provided

competition since the bounty warrants were freely assignable and sold at fluctuating prices according to the demand.

However, at least two factors placed the subject lands in greater demand than lands in some other areas. First, the site of the future city of Leavenworth, immediately south of Fort Leavenworth, had been attracting interest for more than thirty years as a terminus for westbound traffic. The commercial prospects of the site were enhanced by the adjacent fort, which at the time was expending \$600,000 per year for services and supplies.

Second, since the passage of the Kansas-Nebraska Act of May 30, 1854, 10 Stat. 283, Kansas had been embroiled in a bitter controversy between free-state colonists and partisans from southern slave states. In 1856, Indian Agent McCaslin wrote from the Osage River Agency to Superintendent Cumming as follows:

"...extraordinary influences out of the Territory, as well as in it, have operated in such a way, as to induce some to remain, and others to return who would have entirely abandoned the lands otherwise.

The same influences are running to an extraordinary extent in inducing as many as possible of the innumerable immigrants, that are daily arriving [sic] here, to occupy their lands at every hazard. It seems to be a push for precedence, by the opposite conflicting parties, who are contending for the ascendancy in the Territory..."

This, plus the publicity given to Kansas because of the slavery question, produced a greater demand for lands in Kansas than elsewhere.

14. Under the Delaware Treaty of 1854 the Christian Indians were sold 2,571 acre tract in the northeast corner of the Delaware trust lands for

\$2.50 per acre. The Commissioner of Indian Affairs referred to this price as a "mere nominal sum." This well-timbered land was bisected by the chief commercial route into interior Kansas, and was located on the Missouri River within two miles of Fort Leavenworth, thus having a readily available market for local produce.

15. Based upon all the evidence and the considerations set out above, we find that had the lands outside of townsites been sold at public auction pursuant to the Delaware treaty, they would have been sold for the following amounts:

Western lands (348,810 acres)	\$2.75 per acre
Eastern lands adjoining and near Fort Leavenworth (26,655 acres)	8.00 per acre
Remaining Eastern lands (182,490 acres)	4.00 per acre

Thus the total value of the trust lands other than townsites if sold at public auction would have been:

Western lands	\$ 959,228
Eastern lands adjoining and near Fort Leavenworth	213,240
Remaining Eastern lands	<u>729,960</u>
Total	\$1,902,428

16. In June 1856, the commissioners appraised Leavenworth City lands at \$8,793. The commissioners also appraised four other townsites, none of which they felt were of much consequence, as follows: Jacksonville \$544.50; Delaware City \$1,365.00; Hardville \$470.00; and Lattaville \$1,600.00.

Subdivision plats were not available to the commissioners for the town-site locations in the western area which included Grasshopper Falls, Osawkee, Jefferson City, Pleasant Hill and Indianola. These sites were appraised in quarter section tracts without distinction from the remaining rural area.

17. During the sale of the eastern trust lands, on December 9, 1856, Special Commissioner Eddy who was conducting the sale announced new instructions that vacant lots in the city of Leavenworth were to be sold at competitive bidding rather than sold to their claimants at the appraisal figures. Speculators who had purchased lots from the town company or from members of the company protested this decision.

On December 12, 1856, Commissioner Eddy wrote to the Commissioner of Indian Affairs that he proposed to adjourn the sale of Leavenworth City lands since most, if not all, the nonresident "capitalists" had left the territory. He indicated that he thought that the resident settlers would be willing to buy the Leavenworth City lots for 30 to 35 thousand dollars rather than see the sale adjourned. Referring to his instructions to sell Leavenworth City lots at their true value, Commissioner Eddy wrote:

"...As an instance--A naked lot on Main Street fronting the Levee is held at \$1200. I may think its real value about \$800. Under the competition of a 'bona fide' sale it could not fail to bring less than \$600: and my valuation and sale figures would be pronounced by good and sound judges of real estate, much too low--and so they are. But I do not hesitate to say that any competition likely to arise if the sale is continued would not bring such a lot up to one third of the smallest sum named. If correct in my interpretation of your instructions... then, as there are no competing bidders on the ground to follow an adjourned sale to St. Louis or Else where, [sic] and no liklihood of obtaining by public sale prices for lots 'approximating their true value,' ...I shall adjourn the sale without day."

Commissioner Eddy returned to Washington to present the view of the town company and speculators. Governor Geary wrote President Pierce on behalf of these interests. In Washington on January 8, 1857, Commissioner Eddy responded to an inquiry by the Commissioner of Indian Affairs as to Eddy's views on the matter as follows:

"...in my judgment the City of Leavenworth should be sold at the earliest practicable day--and therefore should favor continuing the sale. The aggregate sum for which [sic] the City site should bring at such sale ought not be less than two and a half times its appraisement, which would be very near \$24,000. That sum with all deference to the opinions of others who may differ with me, I would regard as alike just to the Indians concerned--the Government and the settlers."

18. The Leavenworth City lots were sold on February 7, 1857. The increase in value between the original appraisal and the \$24,000 valuation was prorated upon the unimproved lots, while the improved lots were sold at the original valuation.

Defendant's expert in valuing the Leavenworth City land prorated the increased appraisal to all of the lots both improved and unimproved. He found its value to be \$30,498. The Commission rejects this valuation. As we read the history of the Leavenworth City sales, the increased valuation made in 1857 resulted from pressures exerted by land speculators and did not reflect the actual value of Leavenworth City.

19. Defendant's expert witness concluded that 1,929 lots in Leavenworth City sold for more than their original appraised value, indicating that these were unimproved lots. (Improved lots were sold for their original value.) According to defendant's calculations this would mean that there

were 563 improved lots in Leavenworth City. Taking plaintiffs' higher number of 2,905 total lots, a computation would lead to the conclusion that the city contained 976 improved lots. This range appears accurate in light of the city's population of somewhat over 2,000. Thus 20% to 35% of the lots in the city contained improvements.

20. Plaintiffs' expert witness made several computations from figures available for 753 resales of lots in the city during ten months following the trust sales. These computations were intended to minimize the influence of improved property on the sales figure for lots in Leavenworth City.

- (a) The median of all these resales was \$393.00 per lot.
- (b) The median price of resales of lots outside the business district (the area of most concentrated development) was \$320.00 per lot.
- (c) The average price of resales involving eight or more lots in a single transaction was \$354.00 per lot.
- (d) The average price of lots in sales to and from nine persons who were parties to numerous transactions was \$370.00.

21. We find that the City of Leavenworth contained 2,492 lots, the number found by defendant's expert. The resale data furnished by plaintiffs is useful evidence of value. Some discount is in order to reflect improvements which plaintiffs' computations did not eliminate and the discount that might be necessary in disposing of such a large number of town lots at public sale. In addition, it is likely that these resales involved the better lots in the town since they were the first to be sold. We find that had the lots in Leavenworth City been disposed of in accordance with the terms of the

Treaty of May 6, 1854, they would have sold for an average of \$200 per lot or a total of \$498,400.

22. The town of Lattaville, considered by Commissioner Eddy to be an "appendage of Leavenworth City," contained 160 acres. Considering all the evidence, including the location of Lattaville, the Commission finds that the land in Lattaville would, if sold at public auction, have brought \$25,000.

The town of Delaware was located on the Missouri River, three or four miles south of Leavenworth. It contained 320 acres. Considering all the evidence including the relative value of Delaware City in the original appraisal, we find that had the townsite been sold at public auction, it could have returned \$15,000.

Hardville was the location of a trading post on the military road between Fort Leavenworth and Fort Riley. In September 1856 it had a store, a hotel and a blacksmith shop. It contained slightly under 312 acres. No evidence appears which convinces us that we should value Hardville at anything other than the \$4.00 per acre value given the other land in the Eastern area of the subject tract. Therefore we find the value of Hardville, had it been sold in accordance with the Delaware treaty, to be \$1,248.

Likewise Jacksonville, containing 360 acres, would, we find, have sold for \$4.00 per acre or \$1,440. Jacksonville was not developed into an actual town, but existed only on paper as such a site.

We find that none of the other townsites in the trust lands would have sold at public auction for other than the price of the farm lands surrounding each of them.

23. It is concluded that, had the Government carried out the obligation it assumed under the Delaware treaty of 1854, it could have realized from the sales of the trust lands the following amounts:

Lands other than townsites	\$ 1,902,428
For Leavenworth City	498,400
For Lattaville	25,000
For Delaware City	15,000
For Hardville	1,248
For Jacksonville	<u>1,440</u>
TOTAL	\$ 2,443,516

The total amount realized and duly credited for the sale of the trust lands was \$1,057,898.19. The difference between the amount that could have been realized and the actual amount realized totals \$1,385,617.81.

24. For failure to invest the proceeds of the trust land sales, the Government is liable for damages measured by simple interest on the deficiency owed. We find 5% to be an appropriate rate.

The sales of the eastern lands was held in November and December, 1856. The western lands were sold in July and August, 1857. Leavenworth City was sold in February, 1857. As indicated in our opinion, when sales are made in separate and distinct time periods, the Government may not refuse to invest the proceeds of the earlier sales until the later sales are completed.

In the interest of convenient computation, we feel rather than computing damages from separate dates, that it is appropriate to set an average date from which interest on the full amount of the judgment should run.

We find that in this case it is appropriate to use an average date of April 30, 1857 (the middle of the 8 months span between conclusions of the sales) for the computation of the damages.

Therefore plaintiffs are entitled to recover the principal sum of \$1,385,617.81, plus simple interest at the rate of 5% per annum on the principal sum from April 30, 1857 to the date of payment of the principal sum.

The computation of damages to August 31, 1969, is:

Interest period: April 30, 1857 to August 31, 1969 =
112 years 4 months

Principal sum:	\$ 1,385,617.81
Interest	.05
Interest per year	<u>\$ 69,280.89</u>

\$69,280.89 + 12 = \$5,773.41 interest per month.

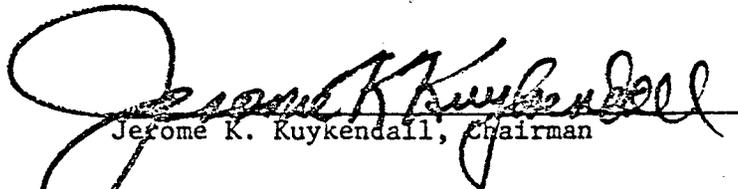
112 years X \$69,280.89 =	\$ 7,759,459.68
4 months X \$5,773.41 =	<u>23,093.64</u>

Interest to August 31, 1969	\$ 7,782,553.32
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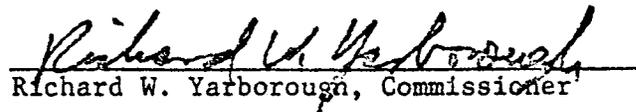
Principal Sum:	\$ 1,385,617.81
Interest to 8/31/69	<u>7,782,553.32</u>

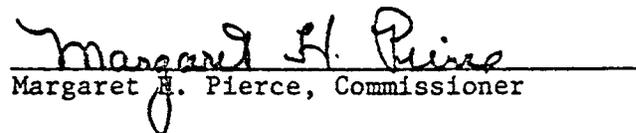
Total	\$ 9,168,171.13
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Accordingly, our award is for the sum of \$9,168,171.13 together with an additional amount of damages, measured by simple interest at the rate of 5% per annum on the principal sum of \$1,385,617.81 from August 31, 1969, to the date of payment of said principal sum.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner