BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 175-B
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 14, 1969

Appearances:
Charles A. Hobbs, Attorney for Plaintiff. Wilkinson, Cragun & Barker, and Donald C. Gormley were on the brief on remand from the Court of Claims.

John D. Sullivan, with whom was Mr. Assistant Attorney General Clyde O. Martz, Attorneys for Defendant.

OPINION OF THE COMMISSION

Commissioner Pierce delivered the opinion of the Commission.

This claim of the Nez Perce Tribe of Indians of Idaho involves the tribe's reservation lands in northern Idaho, a part of which reservation it ceded to the United States by the Agreement of May 1, 1893, approved August 15, 1894 (28 Stat. 286, 326-332, 1 Kappler 536). Of the original reservation of some 762,000 acres, individual Indians were given first choice through allotment provisions of 180,657 acres, and the tribe received trust lands. There remained 549,559 acres which

were ceded to the United States for a consideration averaging $2.97 per acre. The plaintiff claimed additional compensation.

On April 7, 1964, the Commission determined that the ceded land had a value in 1894 of $4.00 per acre, that the discrepancy between such value and the price agreed upon and paid to plaintiff was not so gross as to be unconscionable, and that the plaintiff was therefore not entitled to recover under that proviso of section 2(3) of the Indian Claims Commission Act. The Commission further held that plaintiff had not established a right to recover on the grounds of fraud, duress or lack of fair and honorable dealings. 13 Ind. Cl. Comm. 184. Inasmuch as the Commission determined that the petition should be dismissed, it did not discuss or rule on plaintiff's claim for interest.

The plaintiff appealed the above decision to the Court of Claims which agreed that plaintiff had not established a right to recover on the grounds of fraud, duress or lack of fair and honorable dealings on the part of the United States, but disagreed with the Commission's view of the law of unconscionable consideration as applied to the facts and circumstances of this case, reversing and remanding the case for further proceedings. 176 Ct. Cl. 815 (1966), _cert. denied_ 386 U. S. 984 (1967). After examining the evidence relating to the 1894 fair market value of the ceded lands, the Court concluded that the $4.00 per acre value found by the Commission was the bare minimum figure which the record could support and was not necessarily the

appropriate figure nor the sole criterion to look to in resolving the unconscionable consideration issue. The Court then outlined certain additional factors which it felt should be considered in determining whether the consideration agreed to and paid was unconscionable. The Court stated that while it was not remanding the case with "express instructions to find a higher value, we do feel that it is appropriate to look to some higher unstated value in resolving the 'unconscionable consideration' issue". 176 Ct. Cl. 826.

In view of the Court's opinion we find no reason for revising or supplementing any of the basic or evidentiary findings previously entered.[1/] We must, of course, vacate the ultimate findings concerning the right of plaintiff to recover on its claim. We have also reconsidered the Commission's determinations concerning the fair market value of the subject area in 1894.

1/ The parties have made certain other arguments in their briefs on remand which we have considered but which we do not deem necessary or desirable to discuss in detail in this opinion. The plaintiff argues, for example, the correctness of the Court of Claims' application of a "discount for remoteness". Actually this discount was for "remoteness and inaccessibility". 176 Ct. Cl. at 825. These factors have been discussed in detail in the Commission's original decision and, we are confident, were carefully considered by the Court in reviewing the decision and the parties' contentions on appeal. The defendant argues that the Court failed to consider the questionable Van Valkenburg timber sale. This matter was likewise dealt with in the original Commission decision. We have noted all of the arguments presented on the remand before us. And we have noted too the fact that the Court's $5.00 to $7.00 figure resulted from an application of discount factors upon the plaintiff's agricultural sales data and not on the overall average sales figure.

As the Court of Claims stated, the Commission's previous finding of fair market value was a bare minimum at the "threshold" of value. We cannot permit such a valuation to stand as the measure of damages for which an Indian tribe will recover on its claim before this Commission. Clearly it is not right to fix fair market value at the least permissible figure. While we do not mean to intimate that Indian claimants are entitled to a maximum figure, we must in all fairness and justice revise the valuation figure to seek the middle ground of the permissible range. It is well recognized that determinations of fair market value cannot be the subject of precise, mathematical computations. As the Court of Claims observed in this case, "Property appraisal is an inexact science at best; this is particularly so when the valuation date is 70 years distant from the appraisal date." 176 Ct. Cl. at 825. The term "fair market value" in this instance really involves a range of value within which the evidence will support a determination of a dollars and cents valuation. We must seek the middle area of this value spectrum--neither the minimum nor the maximum.

Accordingly, we have carefully considered the Court of Claims' opinion and we have reviewed all of the various factors referred to in the Commission's opinion and the findings previously entered. Weighing all of this material in the light of the Court of Claims' reasoning in this case, we have concluded that the fair market value of the subject area, as of August 15, 1894, was $3,022,575.00, or

an average per acre value of approximately $5.50.

Since the consideration paid by the defendant for the cession was $1,634,664.00 this would leave a difference of $1,387,911.00 in the fair market value of the subject area and the amount paid for the cession. The lands were, therefore, worth about 80% more than the consideration which was paid the plaintiff. This discrepancy, considered with all of the circumstances involved in this case, has led the Commission to conclude that the consideration paid the plaintiff for the cession of its lands was so grossly inadequate as to make that consideration unconscionable. Accordingly, the plaintiff is entitled to recover under the provisions of clause (3), Section 2 of the Indian Claims Commission Act. The amount of the recovery is $1,387,911.00.

The plaintiff contends that it is entitled to interest on this amount. The right to interest, it is asserted, was granted by Article 3 of the 1894 agreement, which article reads as follows:

> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars, of which amount the sum of six hundred and twenty-six thousand two hundred and twenty-two dollars shall be paid to said Indians per capita as soon as practicable after the ratification of this agreement. The remainder of said sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars shall be deposited in the Treasury of the United States to the credit of the "Nes Perces Indians, of Idaho," and shall bear interest at the rate of five per centum per annum, which principal and interest shall be paid to

> said Indians per capita as follows, to wit: At the expiration of one year from the date of the ratification of this agreement the sum of fifty thousand dollars, and semi-annually thereafter the sum of one hundred and fifty thousand dollars with the interest on the unexpended portion of the fund of one million dollars until the entire amount shall have been paid, and no part of the funds to be derived from the cession of lands by this agreement made shall be diverted or withheld from the disposition made by this article on account of any depredation or other act committed by any Nez Perce Indian, prior to the execution of this agreement, but the same shall be actually paid to the Indians in cash, in the manner and at the times as herein stipulated. (28 Stat. 286, 329-330) [Italics supplied]

It is plaintiff's position that if the 1894 agreement were treated as "revised" pursuant to Section 2(3) of the Indian Claims Commission Act, i.e., for unconscionable consideration, to provide for the payment of a sum representing the fair market value of the lands ceded instead of the unconscionably low amount named in the agreement, then the "remainder" which the agreement required be placed in the Treasury of the United States to bear interest at the rate of 5% per annum, would have included the additional amount which we are awarding in this case, i.e., the difference between the unconscionably low amount agreed to and paid and the fair market value of the land at the time of cession. In addition to the language of Article 3 of the agreement, plaintiff relies on the decision of the United States Supreme Court in Peoria Tribe of Indians of Oklahoma, et al., v. United States, 390 U. S. 468 (April 1, 1968) reversing the decision of the Court of Claims affirming this Commission's denial of interest in the Peoria case under Article 7 of the Peoria Treaty of May 30, 1854 (10 Stat. 1082),

which Article 7 plaintiff herein contends is sufficiently similar to Article 3 of the Nez Perce agreement to warrant the same result. Peoria Tribe of Indians of Oklahoma, et al. v. United States, 15 Ind. Cl. Comm. 123 (1965), aff'd 177 Ct. Cl. 815 (1966). Plaintiff also relies on the decisions of the Supreme Court in United States v. Blackfeather, 155 U. S. 180 (1894), and on Menominee Tribe v. United States, 107 Ct. Cl. 23 (1946). Defendant relies entirely upon the decision of the Court of Claims rendered on the appeal of this case to the Court of Claims in which the Court expressed the opinion that the Nez Perce were not entitled to interest on any award which the Commission might make on the agreement as revised for unconscionable consideration pointing out that Article 3 of the agreement specified the precise sum which would bear interest, that is, $1,000,000, and that such sum apparently was paid to the Indians and did bear interest as provided in the agreement.

The issue of interest in this case is in a somewhat peculiar posture because of the sequence of events. The Indian Claims Commission rendered its decision in the Nez Perce case, dismissing the petition for failure to establish a claim under the unconscionable consideration clause of the Act on April 7, 1964, 13 Ind. Cl. Comm. 283, and did not make any ruling on plaintiff's claim to interest on an award. Approximately a year later in March of 1965, the Commission rendered its opinion in the Peoria case, 15 Ind. Cl. Comm. 123, in which it ruled that the plaintiff therein was entitled to a judgment