

BEFORE THE INDIAN CLAIMS COMMISSION

THE PEORIA TRIBE OF INDIANS OF	)	
OKLAHOMA, on behalf of the	)	Docket No. 99
Piankeshaw Nation, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
THE KICKAPOO TRIBE OF KANSAS, et al.,	)	Docket Nos. 317 and
THE PEORIA TRIBE OF INDIANS OF	)	314-C
OKLAHOMA, on behalf of the Wea	)	
Nation, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: December 5, 1969

Appearances:

Jack Joseph, Attorney of Record for the Peoria Tribe of Indians of Oklahoma.

Allan Hull, Attorney of Record for the Kickapoo Tribe of Oklahoma and the Kickapoo Tribe of Kansas.

James E. Clubb, with whom was Mr. Lester Reynolds and Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This proceeding involves the valuation of three parcels of land. One of these parcels, designated as Royce Area 63, consists of 2,622,000 acres lying next to the Ohio and Wabash Rivers in what is now the southeast corner of the state of Illinois. In Peoria Tribe of Indians of Oklahoma, et al. v. United States, 16 Ind. Cl. Comm. 574 (1966), the Commission determined that the Piankeshaw Indians had recognized title to Royce Area 63 at the time it was ceded by them to the United States under the Treaty of December 30, 1805 (7 Stat. 100), ratified May 23, 1807, and that the Peoria Tribe of Indians of Oklahoma, plaintiff in Docket No. 99, was entitled to bring this suit on behalf of the Piankeshaws.

The other two parcels of land, designated as Royce Areas 73 and 74 and consisting of 405,000 and 91,000 acres respectively, are relatively small areas straddling the Illinois-Indiana border north of Royce Area 63 on the west side of the Wabash River. Royce Area 73 was ceded under the Treaties of September 30, 1809, ratified January 2, 1810 (7 Stat. 113), and December 9, 1809, ratified March 5, 1810 (7 Stat. 117). Royce Area 74 was ceded under the Treaties of December 9, 1809, supra, and October 2, 1818, ratified January 7, 1819 (7 Stat. 186, 187).

In Kickapoo Tribe of Kansas, et al. v. United States, 10 Ind. Cl. Comm. 271 (1962), aff'd. 174 Ct. Cl. 350 (1966), as amended by order of March 1, 1964, the Commission determined that the Kickapoo and Wea Tribes each had recognized title to an undivided one-half interest in Royce Areas 73 and 74. The Commission also determined that the Kickapoo Tribe of Kansas, et al. and the Peoria Tribe of Indians of Oklahoma, et al., plaintiffs in consolidated Docket Nos. 317 and 314-C, had the right to bring this suit on behalf of the Kickapoo and Wea Tribes.

The hearing on value for the three claims was set on the same date by the Commission because the same plaintiffs were involved and because of the interrelation of relevant materials due to the closeness of the valuation dates and the contiguity of the three Royce areas involved. The hearing before the Commission to determine the fair market value of the three tracts and the liability of the defendant was held on January 13 and 14, 1969.<sup>1/</sup>

The consideration for these lands was nominal. The consideration given for Royce Area 63 was approximately one-fourth cent per acre. The consideration given for Royce Areas 73 and 74 was less than three cents per acre. Thus, the consideration given for the subject lands was clearly unconscionable on its face, a conclusion not disputed by the defendant.

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<sup>1/</sup> The Report of the Commissioner on his preliminary determination of value was issued January 21, 1969.

The areas involved herein belonged to the Indians as of the valuation dates, which dates were those on which the aforementioned treaties were ratified and the cessions became effective. Defendant has argued that the taking or valuation date for Royce Area 74 should be the date of the Kickapoo cession of that area under the Treaty of December 9, 1809, supra. However, under Article 2 of that Treaty, Royce Area 74 was ceded by the Kickapoo with a condition subsequent, that Wea consent be obtained. The condition was fulfilled making the cession complete when, under Article 4 of the Treaty of October 2, 1818, ratified January 7, 1819, supra, the Weas for certain consideration, acceded to and sanctioned this Kickapoo action. The Kickapoos and Weas each having been determined to have held an undivided one-half interest in Royce Area 74, the taking by the United States did not become effective until the 1818 Treaty was ratified on January 7, 1819.

There was no market for these lands and, therefore, no evidence of "market value" in the conventional meaning of that term. Accordingly, various other factors have been considered by the Commission in determining their fair market value as of the valuation dates. Otoe and Missouriia Tribe v. The United States, 131 Ct. Cl. 593, 633 (1955), 131 Fed. Supp. 265, 290, cert den 350 U.S. 848.

Plaintiffs presented two expert witnesses during the hearing, Dr. John S. Long and Dr. Roger K. Chisholm, who submitted written

reports and gave testimony concerning the various types of land in these cessions. They referred to the original surveyors' notes and modern soil studies, contemporary opinion, immigration into the areas, population growth, transportation facilities, markets, the presence of the minerals on the subject lands, comparative sales, public land policy, the economic history of the period, and other historical factors affecting the fair market value of the subject lands as of the valuation dates. As of the respective valuation dates Dr. Chisholm estimated the fair market value of Royce Area 63 to be \$2.00 per acre, Royce Area 73 at \$2.15 to \$2.25 per acre, and Royce Area 74 at \$2.50 per acre. The defendant presented Mr. Richard B. Hall as an expert witness. Mr. Hall submitted a written report and gave testimony concerning the same factors affecting the fair market value of the subject lands as did the experts for the plaintiffs but with different emphasis and ultimate conclusions. As of the respective valuation dates, Mr. Hall appraised Royce Area 63 at \$.50 per acre and Royce Areas 73 and 74 at \$.40 per acre.

Much of the parties' argument is addressed to the competency and credibility of the opposing expert witnesses. We do not feel these objections to be helpful. The Commission has not attempted to prescribe the qualifications of expert witnesses testifying as to their opinions on land values at remote times -- no witness is qualified by direct experience in ancient land markets. The

Commission's expert witness must bring before it historical facts as foundations for his opinion, and any reasonable academic or practical qualifications for historical research will establish the competency of the witness. The weight to be given his ultimate opinion as to value can be tested by the Commission by looking to the foundation of historical fact on which it is based. The Commission will weigh the evidence and the opinions by its standards of relevancy and materiality, attempting to assess the effect of the various items of historical information before it. Since opposing experts usually rely on differing selections of facts, while the Commission attempts to assess it all, only rarely would the Commission's ultimate opinion coincide with that of any one expert witness.

Although located on the western frontier of the then United States, the subject lands were in the general path of western migration and, for the most part, were readily accessible for settlement because of their proximity to the Ohio and Wabash Rivers. Contemporary opinion, as evidenced by the notes of the surveyors and other writings of the period, rated the subject lands on the whole as desirable for farming purposes. During this period and in this area farm land was the type of land in greatest demand. Typical of the comments made concerning nearby comparable lands are the following made by Mr. D. Buck in 1817:

I have seen a great deal of excellent land; the prairies on the Wabash in the vicinity of fort Harrison, exceed everything for richness of soil and beauty of situation, I ever beheld. The prairies are from one to five miles wide, bordering on the river, and from one to twelve in length; the streams which run into the Wabash, divide one prairie from another; on these streams are strips of woods from half a mile to a mile wide, the timber of which is excellent; the soil of the prairies in a black vegetable mould, intermixed with fine sand, and sometimes gravel. In choosing a situation for a farm, it is important so to locate a tract, as to have half prairie and half wood land; by which means you will have a plantation cleared to your hand. (Plaintiff's Exhibit 26, p. 145)

Plaintiffs have valued the lands at from \$2.00 to \$2.50 per acre for the three tracts as a whole which tracts aggregate over three million acres. We think this value is too high, though some of the more choice sections along the Ohio and Wabash Rivers and other waterways or near towns were worth considerably more than this. The evidence is clear that some of the subject lands were considered unsuitable for farming and therefore would be less desirable to the land-seeking settlers. Much public land was still available at that time in the same general area at the statutory price of \$2.00 per acre or \$1.64 for cash in advance. Speculators also had some lands for sale at much less than the \$2.00 minimum statutory price for public lands. During the period in question and in the general area of the subject lands, John Bradbury observed that

Besides the land belonging to the United States, there are large tracts in the hands of speculators from whom it sometimes may be purchased upon as good terms as from the government, and as liberal in

point of credit; but in this case, care should be taken to examine if the title is good. Many of the speculators are anxious to sell, as the land-tax, though comparatively light, becomes heavy on very extensive purchases; it amounts to one dollar, twenty cents, per annum, on one hundred acres of first-rate land; one dollar on one hundred acres of second-rate; and sixty cents on third rate.... Some districts of upland may be purchased of the speculators at half a dollar, or 2s, 3d per acre:... No land tax is expected until five years after the purchase, when land becomes liable. (Plaintiff's Exhibit 44, p. 282)

We also reject defendant's appraisal of the subject lands at from forty to fifty cents per acre. Though the evidence indicates certain difficulties inherent in the settlement of new areas, such as the subject lands were at that time, similar unimproved lands were valued nearby at a much higher price. As we have already noted, public lands were selling for the minimum statutory price of \$2.00 per acre. For the payment of cash in advance these same lands still cost \$1.64 per acre. Some private unimproved land in nearby areas were valued at considerably higher than \$2.00 per acre depending on the location and quality of the land. In 1819 Dr. Richard Lee Mason, who was traveling in this general area in Indiana, remarked that "Thousands of acres of land of the first quality are unsettled and to be purchased at from \$2.50 to \$5 an acre." Tracts containing mill sites and those near townsites or close to the Ohio and Wabash Rivers were particularly valuable. Other examples of land prices in the general area of the subject lands during this period are given in Finding of Fact No. 19 herein. These examples bear out the

conclusion that defendant's appraisal is too low.

Therefore, based on the evidence received in this case and the record as a whole, we have concluded that the fair market value of Royce Area 63 as of May 23, 1807, was \$3,277,500 or \$1.25 per acre. We have also concluded that the fair market value of Royce Area 73 as of March 5, 1810, was \$567,000 or \$1.40 per acre and that the fair market value of Royce Area 74 as of January 7, 1819, was \$136,500 or \$1.50 per acre.

Defendant has suggested that consistency requires the Commission to put a lower valuation on the subject lands than the \$1.15 per acre valuation placed on the 7,036,000 acre tract which was the subject of Miami Tribe of Oklahoma v. The United States of America, 9 Ind. Cl. Comm. 1, 2 (1960), because of the advantageous location of that tract and its 1818 valuation date.

It is sufficient to note that the determinations of value in this matter have been decided on the record in these consolidated cases. There is no necessity for entering into any involved detailing of the distinctive characteristics of the lands involved in this case vis-a-vis those in the Miami or any other cases. In the absence of a careful comparison of all the factors bearing on market value, any attempt to relate determinations in other cases to the instant case are of little value. However, in passing we may note that since it is the defendant's usual argument in value cases that a "discount for size" must be applied, reducing the per acre value of large



