

BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION,)	
Plaintiff,)	
and)	
)	
THE CHEROKEE FREEDMEN, et al.,)	Docket No. 173-A
Intervenors,)	
v.)	
)	
THE UNITED STATES,)	
Defendant.)	

Decided: February 4, 1970

FINDINGS OF FACT

Preliminary statement.

The case at bar is for decision on the issue of valuation. Respecting valuation, the parties disagree as to the determinative date: the plaintiff (and the intervenors) contending for a date in 1883; the defendant contending for five dates from 1872 to 1881, depending upon the particular tract. The Commission has resolved this issue by selecting the date of June 14, 1883, as to each of the six tracts (Royce Area Nos. 534, 535, 591, 606, 627 and 628, Oklahoma, Plate 3), for reasons which appear in the concurrent opinion. However, the physical features of the land, the assets and liabilities, and the climate are not shown to be significantly different as between the five earlier dates and the proper date. Hence, the appraisals of the defendant's expert witnesses on valuation proved of appreciable value to the Commission. The Commission now makes the following Findings of Fact:

1. The lands herein involved, being 2,121,928.74 acres in one

compact mass, are located on the extreme north of the now State of Oklahoma and comprise approximately the eastern quarter of the rectangle heretofore known as the Cherokee Outlet.

2. The prevailing climate of the subject area presented a pattern of rather mild and short winters with prevailing north and northwest winds; mostly southerly, moisture-laden winds during the spring, summer, and fall months; some killing frosts in the north to few killing frosts in the south; rains heavy from mid-March to moderate in mid-October; and rainfall averaging about 34" annually in the western portions to 38" annually in the eastern reaches. The resultant growing season usually exceeded 200 days per year.

3. The subject area was comparatively well-watered by portions of the Arkansas River, the Caney River, the Chikaski River, and the Salt Fork of the Arkansas, as well as by Bird, Black Bear, Clark, Red Rock, and Two Mile Creeks. The waters of these rivers and creeks were suitable for watering crops and stock; they were not uniformly suitable for drinking, for which residents would tend to depend upon dug wells.

4. The roughest lands, rugged and broken, containing the poorest soils, comprised but a minor fraction of the entire tract, most of which was made up of medium-textured soils which were comparatively fertile and well-supplied with the plant nutrients necessary for the production of crops. The eastern portions of the tract presented rolling or undulating uplands; westward progression revealed a flattening landscape with greater fertility and deep soils.

Very fertile bottomlands could be found on the margins of the many watercourses. The strips and patches of better lands, concentrated in the stream terraces and the level, undulating, and hilly uplands, accounted for no more than a third of the overall acreage. Those better lands were suitable for general farming. The remainder, more than 1,400,000 acres, were best suited for large-scale grazing operations.

5. Native (uncultivated) vegetation included prairie grasses interspersed with thickets and forests. Native grasses were chiefly big and little bluestem. Native timber consisted of various oaks, some walnut and pecan, and much ash, cottonwood, hickory, elm, and sycamore. While the native grasses were eminently suitable for large-scale grazing operations, the native woods were usable only for on-site needs; principally fuel and fences, partly construction and furniture. The native timber represented no commercial asset in 1883.

6. On June 14, 1883, oil had not been discovered on any of the subject lands. Any potential these lands may have had for mineral development would then have been too speculative to admit of more than a nominal value to an individual contemplating purchase of the entire mass of subject lands.

7. The population was officially wholly Indian and the land transactions between Indians for portions of the subject tract were at government-set prices: 70¢ per acre for Royce 534, 535, and 591; 47.49¢ for Royce 606, 627, and 628.

Article XVI of the Treaty of July 19, 1866, between the United

States and the Cherokee Nation provided in part that the United States might settle friendly Indians in any part of the Cherokee country west of a specified line and that (14 Stat. 799, 804):

Said lands thus disposed of to be paid for to the Cherokee nation at such price as may be agreed on between the said parties in interest [the Cherokee Nation and whatever tribes of friendly Indians were to be resettled there], subject to the approval of the President; and if they should not agree, then the price to be fixed by the President.

The parties did not agree; the prices were fixed by the President.

8. The Osage reservation of 1,570,196 acres (Royce 534 and 535) was confirmed by an Act of June 5, 1872 (17 Stat. 228). The price was \$1,099,137.41 (70¢ per acre).

The Ponca reservation of 101,894.31 acres (Royce 628) was confirmed by an Act of May 27, 1878 (20 Stat. 63, 76). The price was \$48,389.46 (47.49¢ per acre).

The Pawnee reservation of 230,014.04 acres (Royce 591) was set apart by Executive Order on June 23, 1879. The price was \$161,009.82 (70¢ per acre).

The Joseph's Band of Nez Perce reservation of 90,710.89 acres (Royce 606) was authorized by an Act of May 27, 1878 (20 Stat. 63, 74). The price was \$43,078.60 (47.49¢ per acre).

The Otoe and Missouri reservation of 129,113.20 acres (Royce 627) was confirmed by an Act of March 3, 1881 (21 Stat. 380, 381). The price was \$61,315.85 (47.49¢ per acre).

By Act of March 3, 1883, an additional sum of \$300,000.00 was appropriated (22 Stat. 603, 624), said sum to be put to the credit

of the Cherokee Nation after its conveyance of the above six Royce areas to the United States in trust for the benefit of the Nez Perce, Osage, Otoe and Missouriia, Pawnee, and Ponca tribes. The requisite deeds of conveyance terminating the plaintiff's interest in the subject lands were executed on June 14, 1883, after which the agreed-upon \$300,000.00 was paid over to the plaintiff.

9. The total consideration was made up of the \$48,389.46 paid for the Ponca reservation and the \$1,099,137.41 paid for the Osage reservation; plus \$300,000.00 credited to the plaintiff under the Act of June 16, 1880 (21 Stat. 238, 248); plus the other \$300,000.00 which was paid over to the plaintiff when it transferred its interest in the reservation lands by deeds in 1883; plus \$80,000.00 paid in 1888 and 1889; plus \$799,884.13 which this Commission determined was a proportionate share for the reservation lands of the consideration paid pursuant to an Act of March 3, 1893 (27 Stat. 612, 640). Cherokee Nation v. United States, 9 Ind. Cl. Comm. 162 (1961), at 232, 233. The aggregate of \$165,404.27 owed for the other three reservations was included in the \$300,000.00 credited to the plaintiff in 1880.

The total amount of consideration detailed in the paragraph immediately preceding comes to \$2,627,411.00. The plaintiff concedes \$2,547,411.00, but disputes \$80,000.00 which, the plaintiff contends, was incorrectly attributed by this Commission to the proportionate share segment of the consideration decision cited immediately above. In view of the finality of that decision, the point is not disputable; the total consideration for the subject lands is \$2,627,411.00.

10. Up to the valuation date and for several years thereafter, the subject tract was not directly accessible by rail although the Missouri-Kansas-Texas Railroad penetrated Indian Territory (i.e., Oklahoma) in 1870. As of the valuation date, land transportation within the subject area was wholly by trail roads -- the cattle driving trails from Texas to Kansas markets, such as the East Shawnee and West Shawnee Trails -- some suitable for wagons and carts, some not. Transportation by water was quite feasible by the standards of the day, and no portion of the subject tract would have been regarded, on June 14, 1883, as inaccessible by reason of failure or impossibility of transportation.

11. The defendant's expert witness contended, unequivocally, that "there were no markets in or close to the subject area". There were no markets in the area, and no customers, but markets in Kansas, for instance, were "close" in the sense that they were accessible to potential sellers and potential commodities within the context of the times.

12. The economy of the country in 1883, which would have a bearing upon the attitude of a potential purchaser, was well into a downward trend which prevailed generally from 1882 through 1896. During this period there were minor recoveries in the economy, but they passed quickly and did not stem the general trend toward recession.

During the same period, population of the states bordering the Indian Territory was increasing, railroads were expanding their

trackage, industrial production trended upward and real estate transactions varied inconsistently with the general state of the economy.

13. The defendant's expert witness on value, Mr. Roscoe H. Sears of Oklahoma City (since deceased), concentrated his comparisons of sales which would lead to a market data conclusion upon three areas: land available in the United States generally; land sales in Texas; and land sales in Kansas. This witness concluded a dollar per acre would be a realistic valuation as of June 14, 1883, the date heretofore selected as the proper date of valuation. Therefore, this witness would set the fair market value as \$2,121,928.00.

In support of this conclusion, this witness examined the land available generally in the United States and pointed out that the land was generally available, quite easily, under the Homestead Act of 1862, the terms of which prevailed until 1891, long after the subject valuation date. The witness remarked upon the "graduation" feature of the Homestead Act which resulted in land prices being progressively depressed over the years that land remained on the market. In 1883 alone, this witness observed, more than twice as much land as comprised the subject tracts was sold by the United States, and on the average brought less than \$1.75 per acre.

This witness was able to analyze a number of Texas transactions comparable in magnitude and not too far removed in time. An 1879 sale by a railroad of three million plus acres at \$1.52 per acre was noted. The witness rationalized a sale of another three million acres in 1882 for nonmonetary consideration which, the witness

contended, worked out to about 50¢ per acre. The actual consideration was construction of the State Capitol building at Austin, Texas, the contract for which was let in 1882.

This witness lumped together a large number of fragmentary purchases in Texas by Charles Goodnight, purchases which were noncontiguous in either time or space. The Goodnight prices ranged from 22¢ to 75¢ per acre. The witness concluded his Texas analysis with a small purchase of only 631,408 acres in 1883 at \$1.40 per acre, not all of which was paid in cash at the time of purchase.

The witness did not infer a competitive price certain from these several Texas transactions; the fact that large quantities of Texas land could be purchased at a price "as low as 20¢ an acre" did enter into his value conclusions.

Respecting comparable sales in Kansas, this witness remarked first upon the numerous railroads penetrating Kansas, all of which received some degree of subsidy in the form of salable state lands. He observed that all public land in Kansas had been surveyed by 1875, and that by 1884 there were filings upon more than three million acres.

The witness concentrated on the sales of land in the Kansas Cherokee Strip, originally the northern portion of the Cherokee Outlet. While not analyzing any specific sales, large or small, the witness did observe that in 1869 an offer from 20¢ to 50¢ per acre was rejected as too low, while by 1877 there were strenuous efforts being made to sell Cherokee Strip land at \$1.25 per acre, with the Kansas government obviously willing to go as low as \$1.00 per acre to make a sale.

Again, the witness did not infer a competitive price certain from these data, but did consider them in arriving at an overall valuation of the subject lands.

14. The plaintiff's expert witness on value, Mr. Elbridge A. Tucker, relied upon 2,700 warranty deed transfers which occurred between January 1, 1873, and December 31, 1893, in Southern Kansas as "the most dependable indicators of value of the land of the Subject Property for the periods under consideration", and concluded that as of June 14, 1883, the fair market value of such lands was \$15,000,000.00.

In support of this conclusion, this witness discussed the "editing" procedure which resulted in his discarding ostensible transactions in a number of categories. Two deletions of particular interest to this valuation, which, however, may to some extent be regarded as mutually cancelling, were "sales at abnormally high prices" and sales with a recited "price of under \$1 per acre".

The witness contended that "deletions of sales for reasons of erratic price indication" resulted in no significant reduction in total quantity of sales; but that elimination of sales bearing the same family name did result in significant reduction. Absent firm information, the witness arbitrarily allocated 70% of the price to the land and used that price in his analysis; he allocated the remaining 30% of the price to improvements and discarded it.

This witness's detailed study disclosed that none of the sales in Township 35 upon which his chief reliance was based were comparable

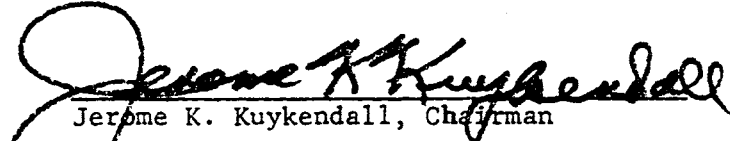
in size to the subject lands as a whole, and there is little suggestion that the sheer size of the subject land was taken into consideration when this witness compared his selected sales to arrive at an overall value of the subject land.

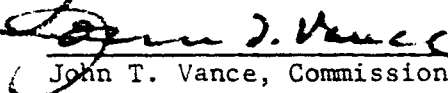
The witness correlated land sales with soil types to reach the conclusions that no comparable land sold in Kansas at any time between 1873 and 1893 at less than \$1.94 per acre; that per-acre prices ranged during that period from that low to \$37.85 per acre; and that from 1873 to 1889 the per-acre price trended steadily upward from \$4.36 to \$19.81, with 1883 showing \$9.08 per acre for "comparable sales".

15. The witnesses expressed sharply differing views respecting the cost of the amenities of civilization which the prospective purchaser might be expected to consider. Mr. Sears felt any prospective purchaser would be forced to take into account that the purchaser would have to stand the cost of taxes on real estate, school land, interest on investment, sales expense, costs of resurveying, promotion and advertising, abstracts and other legal burdens, organizational expenses, and profit. Mr. Tucker regarded the sales of comparable lands - Kansas Township 35 - as carrying in the price the land plus improvements. Thus the 30% allowance expressed by this witness includes not only such man-constructed structures as might be visible on the individual tracts, but also land clearing, roads, surveying, and subdividing costs.


16. On June 14, 1883, the highest and best use of the better grade lands of the subject tract (not more than 700,000 acres) was general agriculture; the highest and best use of the remainder was for large-scale stock raising.

17. In view of the entire record of the case at bar, the value of the entire tract of subject land, taken as a whole, was on June 14, 1883, \$6,896,000.00, or an average price of \$3.25 per acre. The payment to the plaintiff of \$2,627,411.00 for land which had a fair market value in 1883 of \$6,896,000.00 was unconscionable. The plaintiff is therefore entitled to recover of and from the defendant the sum of \$4,268,589.00, less allowable offsets, if any.


Jerome K. Kuykendall, Chairman


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner