BEFORE THE INDIAN CLAIMS COMMISSION

THE CHINOOK TRIBE AND BANDS OF INDIANS, Plaintiffs,	)	
v.	)	Docket No. 234
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: November 4, 1970

Appearances:

E. L. Crawford, Attorney for Plaintiffs

W. Braxton Miller, with whom was Mr. Assistant Attorney General, Shiro Kashiwa, Attorneys for Defendant

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

This Commission has found that the Clatsop and the Lower Band of the Chinook Indians held Indian title to a certain tract of land lying in what is now the states of Oregon and Washington and that their title to these lands was extinguished on August 5 and 9, 1851, The Chinook Tribe and Bands of Indians v. United States, 6 Ind. Cl. Comm. 177 (1958). Hearings were held in January 1963, and in September 1968, to present evidence regarding the value of the tribal lands as of the dates of taking and the questions before the Commission now are the determination of the fair market value of the land in August 1851, the amount of consideration

paid by defendant to the plaintiffs for these lands, and whether the consideration so paid was unconscionable within the meaning of Clause 3, section 2, of the Indian Claims Commission Act (60 Stat. 1049, 1050).

The subject tract contains 76,630 acres of dry land. The evidence indicates that there were no sales of tracts of land of comparable size in the general area of the tribal lands on or prior to August 1851. In the absence of evidence of an "actual" market value, we must look to various factors which a hypothetical willing buyer and willing seller would consider in arriving at a fair market value for the lands in question. These factors would include the natural resources of the land ceded, including its climate, vegetation, including timber, game and wildlife, mineral resources and whether they are of economic value at the time of cession or merely of potential value, markets and transportation--considering the ready markets at the time and the potential markets. Otoe and Missouria Tribe of Indians v. United States 131 Ct. Cl. 593, 131 F. Supp. 265 (1955), cert denied, 350 U.S. 848 (1955). In addition one must look to the patterns of settlement in the vicinity of the lands in question, the demand for the land, the prices for which the land sold on or near the date of taking, and other actual and potential uses of the land. This Commission has considered these various elements and has described them in detail in the findings of fact numbered 32 through 66 issued concurrently with this opinion.

Although the parties are in general agreement concerning most of the basic facts of this case, their emphasis and interpretations have led to very divergent opinions as to the fair market value of the tribal lands

at the date of taking. The plaintiffs have valued the lands at $750,009.85 (almost $9.00 per acre) 1/ based on such highest and best uses as agriculture, townsites, timber, and fisheries. Defendant, on the other hand, valued the subject tract at $25,000 (about $0.33 per acre), contending only certain lands suitable for farms and settlement were of significant value and the timber had only nominal value. Both the plaintiffs and the defendant placed in evidence voluminous official documents, papers, historical reports, maps and appraisals by highly qualified appraisers, all of which were of great help to this Commission in determining the fair market value of the tribal lands. However, we cannot agree with either party as to the per acre value proposed. We find the plaintiffs' valuation too high and the defendant's somewhat pessimistic. The great discrepency between the parties' valuations arises primarily out of their treatment of the timberlands, improvements, and tidelands.

Plaintiffs' forestry expert, Mr. Jack Winn, evaluated the timberlands of the subject tract using a stumpage value method. From the timber cruises of 1908, 1909, and 1913, Mr. Winn calculated the acreage of timberlands and the volume of timber thereon as of 1851. Mr. Winn then categorized the timber as either "existing merchantable" or as "potential," ascribing a value of $0.40 per thousand board feet (MBM) to the former and $0.05 per MBM to the latter. (This was in addition to a $0.05 per acre valuation for the land on which the timber stood.) The stumpage values were based on the average selling price of

1/ The plaintiffs' figure has been computed on a basis of 7,165 acres of tidelands and 76,592.38 acres of uplands, for a total of 83,757.38 acres.

lumber in Oregon Territory between 1844 and 1852 and on the cost of felling, bucking, transporting and milling the logs using the known methods of 1851. It is, indeed, a very thorough analysis. However, it cannot stand primarily because it is based on the premise that loggers did not discriminate between the various species of timber and that all species were cut, milled, and sold on an equal basis and that the market value for Sitka spruce and western hemlock was the same as for Douglas fir in 1851. The basis of this contention is that no species designation is found in mill records, in customs records, or on ships' manifests.

In light of the fact that the concentrated stands of Douglas fir commenced to the east of the subject tract, that the intensive logging and milling operations were located east of the subject tract, that in 1851 Douglas fir was well recognized as the superior and preferred specie of timber for the manufacture of lumber, the more reasonable inference is that only Douglas fir was logged and exported and, for that reason, there was no need for a species designation in the various records.

A further reason we must reject the plaintiffs' proposed stumpage valuation is because the Commission has continuously rejected the determination of stumpage value as a separate item in arriving at the fair market value. Nooksack Tribe of Indians v. United States, 6 Ind. Cl. Comm. 578 (1958), aff'd, 162 Ct. Cl. 712 (1963), cert. denied 375 U. S. 993 (1964); Minnesota Chippewa Tribe v. United States, 14 Ind. Cl.

Comm. 226 (1964); Tillamook Band, et al. v. United States, 11 Ind. Cl. Comm. 1 (1962); Red Lake Band, et al. v. United States, 20 Ind. Cl. Comm. 137 (1968). Furthermore, at the date of taking forested lands were valued and sold by the acre, not by a calculation of the stumpage thereon. Tillamook Band v. U. S., supra.

This is not to say, however, that the spruce and hemlock on the subject tract had no value or even a value as low as $0.15 per acre as proposed by the defendant. In the Tillamook case, supra, most of the timber on the lands there in question was spruce and hemlock and we stated, at p. 40:

> [A]ny person inspecting the land in 1851 would realize that the area had a great potential value as a source of timber, although ..... there was no recognized use at that time for many of the species of timber found therein.

We recognize that a prospective purchaser of the subject tract would consider the timber thereon as having a potential commercial value and that the streams would provide good saw mill sites as well as an efficient method of transporting the logs to the mills. At the same time a purchaser would realize the present value of the timber for local consumption.

Plaintiffs contend they should be compensated for the improvements existing on the subject tract at the date of taking, relying heavily on Tlingit and Haida v. United States, 182 Ct. Cl. 130, 389 F 2d 778 (1968), to support this contention and have presented extensive evidence as to the value of the improvements made by the settlers on tribal lands

by August 1851. In the Tlingit case, the court did not give compensation for the value of the improvements themselves, located on the lands in question. The court did, however, acknowledge that a townsite might be a more valuable piece of land only because of the improvements made thereon by the settlers and the Indians who held aboriginal title to the lands should be compensated for the increased value of the land as a townsite, notwithstanding the fact that the increase in value was a result of and through the efforts of the settlers and not the Indians. Accordingly, the Commission has carefully considered the increment in the value of townsites within the subject area in arriving at its determination of the fair market value of the entire tract.

The plaintiffs urge that compensation should be given for 7,165 acres of tideland in the Washington portion of the subject area. They submit that 4,825 acres of tidelands on Bakers Bay in the Columbia River had a value of $1.50 per acre because of their importance in facilitating the taking of salmon from the river. Plaintiffs also value 2,340 acres of tidelands on Shoalwater Bay at $0.75 per acre, basing this valuation on the proximity to the oyster beds adjacent to the tribal lands and on the access to fishery in Shoalwater Bay. The defendant, on the other hand, contends that there can be no separate valuation of tidelands or separate compensation given therefor, that any special value of the tidelands is reflected in the valuation of the uplands.

The Columbia River tidelands were of great value primarily because they gave access to the excellent salmon fishing waters. In the Tlingit case, supra, the court emphasized that free swimming fish are not a resource to adjacent land, but at the same time an easement overland giving access to fisheries and the opportunity to exercise this common privilege does add value to the land (p. 784). Those tidelands of Shoalwater Bay which lay within the subject area, while containing no oysters in 1851, likewise had a special value as access routes to the oyster-bearing areas of that bay and for facilitating transportation between Shoalwater Bay and the Columbia River via portage routes. While not attaching a per acre value to these tidelands, the Commission has considered the increment to the value of the uplands because of the uses of the tidelands and this additional value is reflected in the total valuation of the subject tract.

The foregoing and other points are reflected in the Findings of Fact and Conclusions of Law on fair market value and consideration. Based on the record as a whole this Commission finds that the fair market value of the subject tract as of August 5 and 9, 1851, was $75,000.00. The payment of $26,307.95 for lands having a value of $75,000.00 is clearly unconscionable and the plaintiffs, for and on behalf of the Lower Band of Chinook and Clatsop Indians, will recover the difference.

As the defendant claims no gratuitous offsets, a final judgment in the amount of $48,692.05 is hereby awarded.

Jerome K. Kuykendall, Chairman

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner