BEFORE THE INDIAN CLAIMS COMMISSION

PUEBLO DE ZIA, PUEBLO DE JEMEZ, AND PUEBLO DE SANTA ANA, Plaintiffs,	)	
v.	)	Docket No. 137
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: December 17, 1970

Appearances:

Claud S. Mann and M. J. Clayburgh, Attorneys for Plaintiffs.

Bernard M. Newburg and Rembert A. Gaddy, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Commissioner Yarborough delivered the opinion of the Commission.

The claims of the three Pueblos of Zia, Jemez, and Santa Ana were brought under Clause (4), Section 2, of the Indian Claims Commission Act (60 Stat. 1049, 1050), seeking to recover for the uncompensated taking by the United States of some 520,000 acres of land to which the Indians claimed title. The Indians' ownership was asserted in part by aboriginal title and in part by virtue of a Spanish grant in 1766.

The issues of title having been adjudicated,[1/] this matter is now before the Commission for determination of the fair market value of some 282,000 acres of land which the Commission found had once been held jointly by these three pueblos in Sandoval County in north-central New Mexico north of the city of Albuquerque and between the Rio Grande and the Rio Puerco.

On August 27, 1968, the parties jointly filed a stipulation with the Commission whereby they agreed:

(a) That of plaintiffs' 298,634 acres of Indian title lands certain tracts were never taken from the plaintiffs, and that the remaining total acreage to be valued is 282,415.73 acres;

(b) That 34,900.27 acres of national forest lands within plaintiffs' Indian title lands were taken on October 12, 1905 (hereafter referred to as Tract A) and that the fair market value should be determined as of that date;

(c) That 16,811.74 acres in homestead or preemption entries were taken at various dates between 1887 and 1934, (hereafter referred to as Tract B) and that 1920 is a fair average date for determining the fair market value of such lands; and

(d) That the remaining 230,703.72 acres of plaintiffs' Indian title lands were taken on April 4, 1936, (hereafter referred to as Tract C), and that the fair market value should be determined as of that date.

1/ The Commission dismissed plaintiffs' petition in this case (11 Ind. Cl. Comm. 131 (1962)). The Court of Claims partially reversed (Pueblo de Zia v. United States, 165 Ct. Cl. 501 (1964)), and the Commission then determined that certain lands were taken from plaintiffs at varying dates between the late 1800's and 1936 (19 Ind. Cl. Comm. 56 (1968)). An order was later issued concerning the appraisal of offsets of real property (21 Ind. Cl. Comm. 316 (1969)).

We accept these facts stated in the stipulation.

The hearing before the Commission to determine the fair market value of the three tracts, as well as permissible offsets, was held on August 19 and 20, 1969, in Albuquerque, New Mexico.[2/]

The plaintiffs relied on reports and testimony from four expert witnesses to establish the value of the lands in question. Mr. Dewey Dismuke summed up for the others and relied on their expert specialized knowledge in appraising the three tracts. The most important single factor considered was grazing capacity, but other factors were also analyzed. By an arithmetic process, which is set out in detail in Finding No. 48 attached hereto, Mr. Dismuke concluded that the value of this land for grazing is $326.00 for each cow it can support for one year. This unit he utilized as the primary value criterion.

The defendant relied on two expert witnesses, Mr. Ernest Oberbillig, a geologist, and Mr. R. Howard Sears, a real estate appraiser. Mr. Oberbillig analyzed the mineral deposits, and Mr. Sears appraised the land at issue, primarily on the basis of market data.

Tract A

This section of the subject area consists of 34,900.27 acres of generally mountainous timbered land and was taken in 1905.

2/ The Report of the Commissioner on his preliminary determination of value was issued September 3, 1969.

The plaintiffs relied on two expert witnesses to establish the value of Tract A. Mr. Dahl Kirkpatrick submitted a report and testified concerning the nature and value of the timber. In summary, he calculated that 29,061 acres contained commercial timber which was worth $438,725, or about $12.57 per acre in 1905. He arrived at the value largely by using stumpage price records of the United States Forest Service for the 1910 - 1920 period and projecting his calculations back to 1905, on the ground that there was insufficient direct evidence available of 1905 values of timber cut or sold.

Mr. Dismuke accepted and adopted Mr. Kirkpatrick's estimate of timber value at $438,725. In addition, he states, ". . . I have concluded the subject land to have an estimated carrying capacity for livestock use of two cattle per section . . . plus watershed and recreational values totaling $1.50 per acre." There is no breakdown here between the grazing value of the land and the value assigned for watershed and recreational purposes, all of which total $1.50 per acre. On the basis of his estimates for the other tracts, the two cattle per section grazing capacity would have been worth about $1.00 per acre, leaving about 50 cents per acre for watershed and recreational value. There is no indication as to how the latter figure was derived.

We are also unable to accept the estimated value of the timber on this tract. The estimate is based on the assumption that the

timber could have been marketed in 1905, but it has been conceded that there was no available transportation and no market for timber in this immediate area on the valuation date. The timber valuation also involved the multiplication of an average stumpage value ($2.20 per thousand board feet) by the estimated total stumpage (199,420,462 board feet) for the entire tract. Such a procedure to determine fair market value by separately valuing the timber on the land through a process of multiplying the total number of units (board feet) by a given price per unit cannot be accepted, although the stumpage gives some indication of the magnitude of potential production. The Yakima Tribe v. United States, 158 Ct. Cl. 672 (1962).

Plaintiffs' final estimate of the fair market value of Tract A involved the simple addition of the timber value to the grazing value and the watershed and recreational value. Fair market value requires evaluation of the land as a whole. The summation of values of various individual components cannot be accepted as a basis for our determination of fair market value. Citizen Band of Potawatomi Indians, et al. v. United States, 179 Ct. Cl. 473, 491 (1967), cert. denied 389 U.S. 1046 (1968), 390 U.S. 957 (1968).

Mr. R. Howard Sears, a real estate appraiser and consultant, also prepared an evaluation report and testified as an expert witness

for the defendant. Mr. Sears estimated the value of the land at issue on the basis of the market data approach, and used essentially the same data in valuing the three tracts. He examined records of private land sales in this and adjacent counties for the time period involved. Twelve of the large acreage sales were considered to be the most comparable to the land which is here in issue. These twelve sales were for tracts ranging from 4,106 acres to 99,289 acres. They occurred between 1889 and 1920, and the prices paid ranged from $0.23 per acre to $2.49 per acre. By eliminating certain of these sales which he did not consider reliable indicators of market value, Mr. Sears arrived at a value range from $1.00 to $2.49 per acre.

The timber potential of the Tract A forest area Mr. Sears considered restricted due to the topography and precipitous terrain. He assigned the timber no measurable commercial value as of the valuation date because of the inaccessability of the area and the absence of nearby railroad transportation. Nevertheless, he did recognize that the more elevated, more densely vegetated areas (with recreational and wildlife uses) did have a higher market value than the lower and more arid lands. On this basis, Mr. Sears evaluated Tract A at $87,250, or about $2.50 per acre.

We agree in general terms with defendant's method of evaluation, but believe too little weight is given to the evident potential value of the commercial timber. We have concluded that Tract A in 1905 was worth $125,000, or about $3.50 per acre.

Tract B

The 77 homestead and preemption entries which make up the 16,811.74 acres of Tract B were scattered throughout the areas of Tract A and Tract C. They were selected parcels, and presumably the best of their type within their area.

In evaluating Tract B, Mr. Dismuke, the plaintiffs' witness, estimated a grazing capacity of 8 cattle per section, or 210 "cattle-units year long" for the entire tract. He then multiplied the 210 cattle units by $326.00 per head grazing value, and arrived at a value of $68,460 for the entire tract. Mr. Dismuke has thus evaluated Tract B solely on the basis of grazing capacity. He has stated that the records of the Albuquerque Office of the Bureau of Land Management for Grazing District 2 were examined relative to livestock carrying capacity on the land in this category.

Because we are unable to accept Mr. Dismuke's mechanistic calculation that the capability of grazing one cow for one year is worth $326.00 (explained in detail in Finding No. 48), we do not consider this opinion of fair market value to be fully supported by the evidence offered in behalf of it. Even if the $326.00 figure per cow were accepted for the year 1936, as it is purported to be calculated, there is little likelihood that the same value would have applied in 1920, the date of valuation of Tract B.

The defendant's witness, Mr. Sears, has valued this tract at $50,450, or about $3.00 per acre. Although aware that these homestead and preemption entry sites were choice locations in the area,

he has reasoned that small tracts of land located within sizeable range-land areas are worth less per acre than more economically suited ranching units. We believe this estimate fails to adequately recognize that many of these 69 parcels within the grazing district and 8 parcels within the forest area were well situated in respect to streams, roads and settlements, and were the more valuable parcels in the area. We have concluded that Tract B in 1920 was worth $63,000, or about $3.75 per acre.

Tract C

The 230,703.72 acres of Tract C are almost all grazing lands, but also contain a large gypsum deposit. Mr. Henry Birdseye is a geologist and he submitted a report and testified for the plaintiffs concerning the extent and value in 1936 of the gypsum deposit in Tract C. His estimate of the value was based on projections of population growth and building material usage from 1900 to the present time.

To evaluate the gypsum on Tract C, Mr. Dismuke accepted the report of the geologist, Mr. Birdseye. He then assumed that 1,900,000 short tons could be produced, and that this would have been worth ten cents per ton to the landowner as a royalty, or $190,000. We consider this type of mathematical computation of little assistance in arriving at the fair market value. We think the evidence establishes that in 1936 there was not a sufficient market for gypsum and gypsum products in New Mexico to allow setting any specific commercial

value on these deposits. Furthermore, even if, as Mr. Dismuke assumed, $190,000 could have been earned over the next 20 years, the 1936 value of such future installments, even if assured, would have been far less, the exact amount depending upon what rate of interest is assumed.

Mr. Ernest Oberbillig, a geologist who appeared as an expert witness for the defendant, prepared a report and testified concerning the mineral resources of Tract C. Although Mr. Oberbillig believed the gypsum did have some value in 1956, he testified that it had no value as of 1936. He based this conclusion on the assertion that there was in 1936 essentially no present or foreseeable future gypsum industry in the state. Although the industry did develop after World War II, his opinion is that this resulted from such developments as the increased use of gypsum in housing and the very rapid growth of Albuquerque and other New Mexico population centers, and could not have been foreseen in 1936.

Mr. Sears considered that none of the inherent mineral potential of the property contributed to the value of the land as of the valuation date. In so doing, he accepted Mr. Oberbillig's conclusion and reasoning that the future development of the gypsum industry in New Mexico could not be foreseen in 1936.

We agree with the defendant that there was no immediate market for gypsum in 1936, and we cannot, therefore, accept plaintiffs'

appraisal of $190,000 for gypsum in addition to the value of the land for grazing. However, we do consider that the gypsum deposit in Tract C added value to the land. The presence of the huge deposit adjacent to a highway convenient to the state's largest city was of such obvious commercial potential as to enhance the market value of the tract as a whole.

Because the highest and best use of all three tracts was for grazing, plaintiffs have relied on grazing capacity for cattle as a primary measure of value. We agree that this is the most relevant factor to be considered.

The purchase prices paid by the Government for three large tracts in late 1934 are considered by plaintiffs the most valid indications available of the fair market value in 1936 of Tract C. Both plaintiffs and defendant agree that the prices paid represented the fair market value at that time; and all three grants were primarily grazing areas, as is Tract C. These three Government purchases are more fully described as follows:

1. November 27, 1934 -- Ojo del Borrego Grant, 16,602.40 acres for $48,239.40, or about $2.90 per acre.

2. November 27, 1934 -- Bernabe M. Montano Grant, 44,070.66 acres for $132,211.98, or $3.00 per acre.

3. December 27, 1934 -- Ojo del Espiritu Santo Grant, 113,141.15 acres for $282,852.87, or about $2.50 per acre.

Mr. Franklin D. Shannon, an Area Real Property Management Officer for the Bureau of Indian Affairs, testified concerning the relative

value of the subject land and other land which had been sold in the area. Specifically, he testified that the land in Tract C was superior for grazing purposes to an adjoining tract for which there was sale price data, the Ojo del Borrego Grant.

In evaluating Tract C, Mr. Dismuke relied on his comparison based on local experience and examination of the records of the subject tract to the three comparable sales tracts listed above as to grazing capacity. He estimated that 6.6 cattle per section could be grazed on the 230,703.72 acres of Tract C. Rating the grazing capacities of the three comparable sales tracts at lower figures, he used the 1934 sale prices per acre of these tracts and the acres needed per cow to calculate a figure of $326.00 as the value of the grazing for one cow. Applying this index figure to Tract C at its grazing capacity, he calculated its value at $775,554, or $3.36 per acre.

However, we reject the mechanistic, arithmetic method utilized in assigning to the grazing land a value of $326.00 for each head of cattle it will carry. We believe other factors may have affected the price of the transactions used in the calculations (see Finding No. 48). Merchantable timber constituted a substantial part of the Ojo del Espiritu Santo Grant. A small town was located on the Bernabe M. Montano Grant. The Ojo del Borrego Grant had been in existence about 100 years, and, although there is no direct evidence concerning this in the record, it is reasonable to assume

this grant also included substantial improvements.

For the foregoing reasons, we are unable to accept Mr. Dismuke's method of reaching an evaluation of $965,164.50 for Tract C, although his ultimate opinion on value would otherwise seem supported by his direct comparison of the subject tract with the three comparable sale tracts.

Mr. Sear's research of market data was largely limited to private sales of large parcels of land. Certain sales of small tracts were not included because the details of the sales were not known, and because some tracts, at least, included improvements which could result in misleading indications of value. Neither were the several sales to the United States mentioned above included in his study. Mr. Sears considered it improper to include these sales because the United States, the defendant here, was also the purchaser in those transactions. We would share a hesitancy to rely completely on sales to which the Government is a party as reflecting free market values, but there is testimony in the record that such sales did reflect market value. The latest private sale cited as comparable by defendant occurred in 1920; these sales are too remote in time from the 1936 valuation date of Tract C. We do not accept defendant's valuation of $2.00 per acre.

We have concluded that Tract C in 1936 was worth $750,000, or about $3.25 per acre.

The evidence introduced by both plaintiffs and defendant is substantial, and the record as a whole has been carefully considered. We have determined that the highest and best use of all the tracts as of the respective valuation dates was for grazing. However, some factor in addition to grazing use enhanced the value of each tract. The value of Tract A was enhanced by the presence of a stand of timber of commercial potential. The value of Tract B was enhanced by the fact that the parcels were selected lands in relation to water and transportation. The value of Tract C was enhanced by the presence of large gypsum deposits of potential commercial value.

In summary, we have concluded that the lands held by plaintiffs under aboriginal Indian title which were taken by defendant totaled 282,415.73 acres, and that the fair market value of said lands as of the date of taking was $938,000, reached as follows:

Tract A	34,900.27 acres	(1905)	$125,000.00
Tract B	16,811.74 acres	(1920)	63,000.00
Tract C	230,703.72 acres	(1936)	750,000.00
Total	282,415.73 acres		$938,000.00

We have further concluded that because these lands were taken without payment of compensation, the plaintiffs are entitled under Clause (4), Section 2, of the Indian Claims Commission Act to recover $938,000 from the defendant subject to deductions for such offsets

as may be allowable. The defendant's offset claims having been tried and briefed, the Commission will proceed to a determination as to what offsets, if any, defendant is entitled under the Act.

Richard W. Yarborough, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner