

BEFORE THE INDIAN CLAIMS COMMISSION

THE PONCA TRIBE OF INDIANS OF)
OKLAHOMA, WILLIAM OVERLAND,)
MARINA COLLINS AND JOHN WILLIAMS,)
AS REPRESENTATIVES OF THE PONCA)
TRIBE AND ALL OF THE MEMBERS)
THEREOF,)

Plaintiff,)

v.)

Docket No. 323

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: December 30, 1970

Appearances:

Edwin A. Rothschild and Thomas C. Homburger,
Attorneys for the Plaintiff, Louis L. Rochmes
was on the brief.

William H. Donham, with whom was Assistant
Attorney General Shiro Kashiwa, Attorneys
for the Defendant, Richard L. Beal was on
the brief.

OPINION OF THE COMMISSION

Commissioner Yarborough delivered the opinion of the Commission.

This cause of action involves a claim by the Ponca Tribe for just compensation under Section 2(1) of the Indian Claims Commission Act (60 Stat. 1049, 1050) for the "taking" by the United States of the Ponca Indian Reservation in Nebraska without the consent of the tribe and without the payment of any compensation.

As the Commission indicated in an earlier 1966 decision, the United States committed an ineffable mistake when, by the Treaty of April 29, 1868, 15 Stat. 635, it included the 96,000 acre Ponca Indian Reservation within the boundaries of the newly created Sioux Reservation.^{1/} The Poncas were not a party to the 1868 Sioux Treaty, nor did they have any knowledge of the government's action in this regard. The extraordinary blunder by the United States ultimately compelled the Ponca Tribe to remove from the Nebraska reserve and relocate in the Indian Territory on land purchased from the Cherokee Nation. To accomplish this purpose and to indemnify the Poncas for all the calamity that had befallen them, the United States appropriated \$150,000, of which amount \$48,389.46 was expended to purchase the Cherokee land.

The issues now before the Commission are the fair market value of the Ponca Indian Reservation as of March 16, 1877, the date of the Ponca removal to the Indian Territory, and the extent of the defendant's liability, if any, to the plaintiff tribe for the loss of its Nebraska Reservation.^{2/}

^{1/} The Ponca Tribe of Indians v. The United States, 17 Ind. Cl. Comm. (1966), affirmed in part with modifications, reversed in part, and remanded, 183 Ct. Cl. 673 (1968).

^{2/} The Report of the Commissioner on his preliminary determination of value was issued on June 9, 1969.

The 96,000 acre Ponca Indian Reservation was located in the northeastern part of present-day Nebraska at the confluence of the Niobrara and Missouri Rivers and extended westward about 25 miles. Approximately 12 miles of its northeast boundary fronted on the Missouri River. Most of the reservation was situated in Knox County and the remainder in Boyd County.

The upland sections of the subject tract, where the land surface varies from hilly plains to extremely rough, are covered by soil layers of geological decompositions of varying thicknesses. There is a prevailing cover of loess soil deposits in the higher elevations, except where weathering has eroded the peaks. Alluvial soil is found in the lower terraces and the nearly level flood plains along the tributaries. There is severe erosion in parts of the area, and this erosion has created numerous water courses in both the plateau and terrace land. In 1877, there were large expanses of grass cover throughout the area with timber stands rising along the rivers and in the bottom land.

The climate of the Ponca land reflects distinct seasons and was well suited for growing grain crops and for cattle production. Rainfall averages 23 inches annually and about 77 percent of the total annual precipitation falls during the 150 day growing season. The area is subject to a shortage of water during the late summer months, and in some years drought conditions can prevail.

In 1877 the Ponca lands were still a part of the Sioux Indian Reservation that had been created in the Dakota Territory under the Treaty of April 29, 1868, supra. Other than the resident Indian population the subject area was inhabited by a few trappers and hunters. It was not until 1889 that any part of the reservation was opened up for white settlement, and some of it remained in Indian hands until 1905.

Following the end of the Civil War, Nebraska experienced a rapid population growth. The mainstream of new settlement coming from the east generally crossed the Missouri River at Omaha, Nebraska, and then spread westward along the river valleys south of the Platte River and below the Ponca Indian Reservation. Census figures in 1870 record a Nebraska population of 122,000 which by 1880 grew to over 452,000. The village of Niobrara, which is located a few miles east of the Ponca Reservation on the Missouri River, was founded in 1856. By 1857 there were at least 60 people living in and around the village area. Across the Missouri River and about twenty miles upstream from the Ponca Indian Reservation was the town of Yankton which had been founded in 1859 and later became the capital of the Dakota Territory.

While the Missouri River was the main avenue of access into eastern Nebraska and the Dakota Territory, there were also wagon roads that led northward toward the reservation area but provided

no direct access into the Ponca Indian Reservation. In 1866 a military road had been completed that began at Niobrara, ran westward along the south bank of the Niobrara River for some 200 miles, and eventually terminated at Virginia City, Montana.

River travel during this period was limited to the more navigable parts of the Missouri River, primarily between Sioux City, Iowa and Omaha, Nebraska. Boats seldom traveled above Yankton, although there was some traffic as far north as Fort Pierre, South Dakota, when the Missouri River was at flood stage. The cost of shipping by river transport was expensive, and often involved transshipping.

There was only limited railroad penetration into Nebraska in the early 1870's. The Dakota Southern Railway Company line from Sioux City, Iowa to Yankton was opened in 1873. For a time it made Yankton an important river port, and it was the only railroad in the vicinity of the Ponca Reservation in 1877. From Yankton the village of Niobrara could be reached by steamer.

The cattle industry played an important part in the initial settlement of the Ponca reservation area. As early as 1859 the open ranges of Nebraska had been used to graze cattle, and by the 1870's cattlemen had moved their herds into Holt County just south of the subject tract. The Cook and Tower Ranch had been established in 1873 on Bone Creek near Ainsworth west of the Ponca Reservation, and the Tunken Ranch was founded in Boyd County west of the subject tract in

1877. Even though the cattle industry soon moved further to the north and west, it had already determined the early economy of Nebraska.

The pioneer settler, who moved into Nebraska in the 1860's and 1870's, soon adjusted his agricultural efforts in order to complement the cattle industry. Thus, there evolved "feeder farms" wherein the prime consideration was the raising of food crops for use in fattening cattle for market. These feeder farms required a combination of pasture and crop land. The lands in northeastern Nebraska, including the Ponca reservation area, were well suited for this cattle based agricultural economy, and we have so found the highest and best use of the subject area.

Following the close of the Civil War, the United States experienced a short-lived economic boom that lasted into the early 1870's. The lure of free land in the west under the 1862 Homestead Act (12 Stat. 392), the rapid expansion and thrust of new railroad construction that was matched with speculative excesses, and an unprecedented extension of bank credit, precipitated a financial crisis by 1873 that lasted through the rest of the decade. The effects of the depression were felt in Nebraska and throughout the frontier country. Along with economic woes, the people of Nebraska were subjected to serious grasshopper infestations in 1873, 1874, and 1876. Since this was a period when ready cash was scarce, homestead and pre-emption commutations practically ceased by 1877. At the same time there was a marked decline in the number of original homestead entries.

Despite apparent economic adversity, white settlement in Nebraska by 1877 had proceeded to the very boundaries of the Ponca Indian Reservation. While the lands in the Ponca tract were not for sale in 1877, the record shows a few contemporary private land sales in the immediate vicinity.

An examination of some 21 private land transactions taken off the deed records in Holt and Knox Counties, Nebraska, for the years 1876 - 1880, shows that a total of 1,788 acres were sold in the price range of \$.92 to \$14.00 per acre, for a weighted average of \$4.02 per acre. It is not known whether any of the sales involved improved property, but likely some did. Some of the transactions included lot sales, tracts near towns, and sales of oddly shaped parcels that reflected a unique value and were not representative of the average land purchase. Nevertheless, these sales are reasonably relevant in location, time and quality to indicate retail values for the lands of the subject area. Most of the private sales involve bottom land tracts lying just south of the Niobrara River.

The record also shows during this same period that there was considerable activity in the sale of railroad lands. Between 1850 and 1880 the United States had granted over six million acres of Nebraska land to the railroad interests. Sales by the Union Pacific Railroad between 1869 and 1880 totaled over 1.7 million net acres for an average price of \$4.46 per acre. During the mid-1870's depression the average price per acre fell to \$3.00. Credit terms

offered by the Union Pacific were one-quarter down with the balance in three equal annual installments at 6% interest. The 6% interest rate was about one-half the prevailing Nebraska legal rate. Sales in Nebraska by the Burlington Railroad for the period 1870 - 1880 totaled approximately 1.8 million net acres at an average price of \$5.47 per acre. The Burlington offered a ten year credit plan with interest of 6% or 10% required only for the first two years.

The expert testimony offered by the parties in this case shows that, in the absence of an actual market for the Ponca reservation lands in 1877, the respective witnesses did consider the value factors recited in this opinion. However, the 1877 value conclusions of the parties, which by and large are based upon the testimony and reports of these expert witnesses, range from the defendant's \$.40 per acre minimum to the plaintiff's \$4.02 per acre maximum. We feel that the record more accurately reflects a value figure somewhere between these extremes.

It is the judgment of the Commission that, as of March 16, 1877, and consistent with its highest and best use, the 96,000 acre Ponca Indian Reservation as a whole was worth \$211,200, or \$2.20 per acre.

Inasmuch as the defendant's acquisition of the Ponca's reservation land amounted to a taking within the meaning of the Fifth Amendment of the Constitution, the plaintiff tribe is entitled to "just compensation." Given such a taking, "just compensation"

includes interest or the fair equivalent thereof from the date of taking. Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937).^{3/} In this case, "just compensation," and the measure of defendant's liability to the plaintiff tribe, is the 1877 fair market value of the Ponca Indian Reservation, less any monies received in payment for the land, plus interest at a reasonable rate from the date of taking. United States v. Klamath Indians, 304 U.S. 119 (1938). The \$48,389.46 which the United States expended on June 14, 1883, to purchase the Indian Territory land, and which ". . . represents a payment on the Ponca's 'taking claim' within the meaning of the Indian Claims Commission Act.",^{4/} must be deducted from the Ponca claim as it existed in 1883 when payment was made.

In computing the proper deduction as a "payment on the claim", the parties differ as to whether all the payment should be applied against principal or against the 1883 accrued interest. The Commission has adopted the method utilized by the Court of Claims in a very similar situation, the case of Uintah and White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1, 152 F. Supp. 953 (1957). Thus, we have applied the \$48,389.46 payment in a manner that would reduce proportionally the principal and the interest that had accrued at 5% from March 16, 1877 to June 14, 1883, a period of 6 years, 2 months, and

^{3/} As stated in Shoshone, at p. 497 ". . . Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages."

^{4/} The Ponca Tribe of Indians of Oklahoma v. United States, supra, p. 688.

