

BEFORE THE INDIAN CLAIMS COMMISSION

THE OTTAWA TRIBE and GUY JENNISON,	)	
BRONSON EDWARDS and GENE JENNISON,	)	
AS REPRESENTATIVES OF THE OTTAWA TRIBE,	)	
	)	
Plaintiffs,	)	Docket No. 305
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: March 15, 1972

Appearances:

Allan Hull and Louis L. Rochmes,  
Attorneys for Plaintiffs.

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

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

The Ottawa Tribe of Oklahoma, pursuant to the Indian Claims Commission Act (60 Stat. 1049, 1050), claims additional compensation for the cession by the Blanchard's Fork, Little Auglaize River, Roche de Boeuf and Wolf Rapids Bands of Ottawa Indians of four parcels of land in northwestern Ohio ceded under the provisions of the Treaty of August 30, 1831, 7 Stat. 359. In addition, the plaintiff seeks an accounting of the proceeds acquired by the defendant from the sales of such land. The two claims are

considered together herein. Plaintiff's claim for additional compensation is based upon an alleged failure to carry out certain provisions of the 1831 Treaty - principally in that the defendant violated its treaty obligations by failing to obtain for the benefit of the Ottawa Tribe "full market value" for the ceded lands when offered for public sale. Two of the parcels, Royce 167 and 168 respectively, consisted of a tract of five miles square at Blanchard's Fork on the Great Auglaize River in what is now Putnam County and a tract three miles square on the Little Auglaize River in Paulding County that were reserved to the Ottawa Indians residing thereon by the terms of the Treaty of September 29, 1817. The other two parcels, Royce 169 and 170, were a tract six miles square near Roche de Boeuf and a tract three miles square at Wolf Rapids. These tracts were contiguously located, fronting on the north side of the Maumee River about 25 miles southwest of Toledo. Royce 169 and 170 had been reserved to the Ottawa Indians by the terms of the Treaty of November 17, 1807, 7 Stat. 105. The Government does not contest the title of the Ottawa Indians to the ceded land as of the 1831 treaty date, and the parties are in agreement that the subject lands contained 50,613.46 acres.

Of immediate concern to the Commission is whether the record herein supports plaintiffs' claim that the defendant breached its 1831 Treaty obligations by the manner in which it disposed of the subject lands.

The Treaty of August 30, 1831, supra, was made pursuant to the Act of May 28, 1830, 4 Stat. 411, for the purpose of extinguishing Indian land

claims in Ohio and providing lieu land west of the Mississippi River. Under the terms of this treaty, the Ottawa Indians, as consideration for the outright cession of their Ohio land, received what was to amount to 74,000 acres of land <sup>1/</sup> in an area west of the Mississippi River. In addition, the United States agreed to defray the expense of removal, supply provisions during the first year after removal and an advance of \$2,000.00, pay Indians' debts, and give them presents of blankets and other gear. It was further agreed that the United States would ". . . expose to sell to the highest bidder, in the manner of selling the public lands, the tracts ceded . . ." and deduct from the proceeds, seventy cents per acre sold, monies for the payment of debts, and the advance of \$2,000.00. In the event there was any residue remaining it was intended by the parties that it should be placed in government stock to effect a yield of five percent per annum.

Following the completion of the surveys, the subject lands were made available by Presidential proclamation for sale at public auction to be held December 2, 1833, and December 16, 1833. Public sales of the land within Royce 169 and 170 and Sections 16 within Royce 167 and 168 were either not offered for sale in the public sale proclaimed for December 2, 1833, and December 16, 1833, or were withdrawn prior to the

---

<sup>1/</sup> The Commission adopts the figure of 75,000 acres as reflecting more accurately the amount of land the Ottawa Indians actually received under the 1831 Treaty (See Ottawa Tribe v. United States, Docket 303, 8 Ind. Cl. Comm. 831 (1960)).

the date of the contemplated public offering. These lands, constituting all of the remaining land in the four parcels, were offered for and put on public sale for a two-week period beginning August 29, 1842.

Sales to the highest bidder of Royce 167 and Royce 168 during the prescribed two-week period of public auction indicate a total of 5,404.03 acres being sold for \$10,081.31, or an average of \$1.86 per acre. Prices ranged between \$1.25 to \$6.31 per acre with one sale at \$17.56 per acre. The results of the 1842 public sale of Royce 169 and Royce 170 indicate a total of 15,862.16 acres being sold for \$22,438.08 or roughly \$1.41 per acre. Prices ranged from \$1.25 to \$9.00 per acre with one sale at \$15.00 per acre.

Following the close of the public sales, the remainder of the subject lands were disposed of through private sale, said private sales continuing until 1895 when the last remnants were sold. The final tabulation of all sales, public and private, shows that 50,613.46 acres were sold for \$69,204.47 or roughly \$1.36 per acre.

In the Commission's judgment the record shows that the defendant did sell the subject tracts in the manner prescribed by law for the selling of public lands, and, therefore, conformed to the requirements of Article VII of the 1831 Treaty. The manner of selling the public lands in effect at the time these lands were offered at public sale was dictated by Section 3 of the Act of April 24, 1820, 3 Stat. 566, which stated in part:

"[A]ll the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sale, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre . . ." (emphasis supplied)

The offer at public sale, according to section 5 of the act, required, "That the several public sales authorized by this act, shall, respectively, be kept open for two weeks, and no longer . . ." (emphasis supplied).

Here, the ceded lands were offered to the highest bidder at public sale for periods of two weeks and the defendant was prohibited by statute from holding the public sales for a longer period or from re-offering the lands at a later public sale. This method of sale, relative to the requirement of a sale to the highest bidder in the manner of selling the public lands, was examined by the Supreme Court in United States v. Blackfeather, 155 U.S. 180 (1894). The defendant in that case was found to have violated the treaty provision to sell to the highest bidder by reason of its failure to hold open the public sale for a period of two weeks. Consequently, the sale of the remainder of the treaty land at private sale was not according to law. The court, in reviewing the procedure for compliance with the 1820 Act, stated at page 190:

"In view of the act of 1820, above cited, permitting land which remained unsold after having been offered at public sale, to be sold at private sale at \$1.25 per acre, . . . it may admit of some doubt whether the government can be held by this court to have been guilty of a violation of its trust in selling these lands at private sale. If it had appeared that the government had 'exposed' these lands to public sale, to the highest bidder, and failing to find a bidder above the statutory price of \$1.25 per acre, had then sold them at private sale at that price, its obligation would have been completely discharged." (emphasis supplied)

In contrast to the manner of selling the treaty land in the Blackfeather case, in this case the government scrupulously followed the demands of the 1820 Act and its action, in disposing of the subject lands, is free of the suggestion it had violated the provisions of the 1831 Treaty.

The fact some portions of the subject land were either not put up for sale or withdrawn from the sale proclaimed for December 3, 1833, and December 16, 1833, does not in this case establish a violation of the 1831 Treaty. There were no treaty provisions qualifying or conditioning the sale of the land, which the Ottawa Indians had irrevocably ceded under the Treaty of August 30, 1831, other than to "expose" the land to the possibility of sale. Under such circumstances, the defendant was entitled to determine when the land should be offered for sale. Furthermore, the record shows that the delay in exposing the land for sale was occasioned by the possibility of obtaining a higher price when the canal routes were finally determined and construction had commenced.

While the plaintiff may no longer pursue a claim based on a breach of defendant's 1831 Treaty obligations, we note that recovery is sought generally under Section 2 of the Indian Claims Commission Act and that the 1832 fair market value of the subject lands has been put in issue. More specifically, we find that the plaintiff has alleged that the defendant "failed to obtain for the benefit of the Ottawa Tribe the full market value of the lands contained in the four reservations." Since the proceeds from the sale of the lands in the four reservations constitute a substantial portion of the 1831 Treaty considerations, plaintiff has stated sufficient grounds upon which to pursue an unconscionable consideration claim under section 2, clause 3 of our act, supra, for the lands ceded under the treaty.

The ceded tracts were located within a large segment of Ohio historically known as the Maumee Valley and had many similar physical characteristics that conditioned their market value. The general area was dominated by a region known as the Black Swamp which was made up of old lake plains with outcroppings of ancient beach ridges and eroded glacial moraine. The subsurface, for the most part, was sandy limestone covered by clay and vegetable mold. A primeval forest of massive dimensions grew out of swampy waters with openings or clearings usable for subsistence farming. The precise perimeter of the Black Swamp is not known, but it was said to stretch for 25 to 50 miles east from the Maumee River and for more than 140 miles southwest from Lake Erie. Royce 167 and 168 were actually located within this belt, although it is not known whether the physical characteristics of these ceded tracts were substantially similar to those of the general swamp region. Most of the land of Royce 169 and 170 was within Lucas County which was also characterized as being low-lying and wet.

The swamp retarded the economic development of the area because it curtailed access into the region for trade and homesteading and denied the settlers a means of transporting their products to the eastern markets. In 1832 almost all of the roads in the northwest region of Ohio were little more than "traces" raised above the elevation of the surrounding morass. Steamboats were the available transportation from the east across Lake Erie to the towns surrounding Maumee Bay at the mouth of the Maumee River. By 1832, this mode of transportation was increasing because of available

boats, the amount of cargo and passengers carried and revenue realized. However, travel southwest from Maumee Bay necessitated overland carriage beyond the falls and rapids of the Maumee River, located about 12 miles downstream from the bay.

The physical characteristics of the Black Swamp were also a deterrent to farming. In order to farm it was necessary to clear the forests and drain the land. However, the prevailing use of land in northwest Ohio was for farming purposes, and despite the foreboding features of farming in the Black Swamp, there was a steady stream of settlers willing to endure the prevalence of diseases, clear and drain the swamp, and build homes.

The negative physical factors affecting the value of the subject tracts were balanced by the economic happenings in the nation and particularly in northwest Ohio during the early 1830's. By the 1831 treaty date, most of Ohio was open for settlement and its population was increasing, although land to the west--in Michigan, Illinois and Indiana--was readily available at the government's minimum entry price of \$1.25 per acre. Ohio's population increased to 1,519,467 persons in 1840 from 937,903 persons in 1830, and the state was raised from the fourth to the third most populous state in the nation during that decade. Likewise, the population in the counties where the subject tracts were located increased substantially during this period.

The greatest single factor that stimulated outside interest in the ceded tracts was the planning and construction of the Ohio canal system.



The opening of the Erie Canal in 1827 was responsible for a great economic surge in Ohio, benefitting the northwest region as well. The Ohio canals were intended to provide arterial links between the eastern commercial centers and the agricultural and manufacturing areas in the then western United States. Great enthusiasm was engendered for the project in Ohio because it would open up the northwest region where economic retardation was most directly linked with the lack of roads.

The planning of the canal and waterway system began in 1825. Although the Wabash-Erie and Maumee-Erie portions of the canal system, which were routed through Royce 168, 169 and 170, were among the last completed, during its planning stage the prospects of the project created great speculation in land along its proposed and presumed routes. During this period many "paper" towns were established and the price of town lots, land suitable for townsites, and general acreage increased drastically. The speculative boom of this early 1830 period was reflected in other economic indicia, such as increases in commodity prices, which in turn fueled the speculation for land for general purposes other than to be near a canal route or terminal. It was during the early stage of this era of increasing business expansion and land speculation that the cession of the subject tracts was accomplished. It is possible to conclude that on the valuation date, April 6, 1832, the fever of land speculation was high and that the price for which land could be purchased did not solely reflect its minimum economic value. The prices for which land was sold were inflated by the belief of its greater future sale value in a rising economy.

The United States granted to the State of Ohio alternate sections of land along the proposed canal routes which were to be sold to assist in financing the canals. In 1836, the Ohio Canal Commission appraised sections of the land in the vicinity of Royce 168, 169 and 170 at values ranging from \$3.00 to \$25.00 per acre. In the Commission's 1836 report of sales to the Ohio General Assembly, land near Wolf Rapids and Roche de Boeuf was shown to have sold for \$3.00 to \$6.00 per acre and some sales, actually including portions of the former reserves, sold for an average of \$8.62 per acre.

Debts created to fund the canal building and easy credit were factors that caused a business decline beginning in 1836. The canals failed to prosper as expected and general business conditions deteriorated causing failure of many state and local banks. The issuance of the Specie Circular requiring buyers of public land to pay in hard money accelerated the recession into a nation-wide depression by 1837. Land prices in the region of the subject tracts, as elsewhere, fell sharply.

Evidence of resales occurring within two years of the original sales is acceptable as being reasonably contemporaneous with the original sales, reducing to a minimum the possibility that improvements affected the resale prices. Land in Royce 167 and 168 disposed of within two years by the original purchasers shows an average price paid on resale of \$2.90 and \$6.98, respectively. The resale prices of land in Royce 169 and 170 averaged \$5.03 per acre.

In the opinion of the Commission, the evidence of resales contradicts the conclusions of the defendant's expert witness even as to the fair market value of the subject lands in 1833 and 1842. The resales show that land near or bordering the canals routes and terminals had an unique value relative to the construction and operation of the canals. The influx of settlers into the area during the treaty period indicates that even land somewhat removed from the canal routes was available for farm production above that necessary for mere subsistence purposes. History shows that a market for surplus farm products existed at this time and was brought about for the most part by the demand of the labor contingents engaged in the construction of the canals. These factors suggest a contemporaneous market value for the subject lands in excess of the minimum values assigned by the defendant's appraiser in 1833 and 1842. Furthermore, the record of sales of the subsidy land by the State of Ohio to finance the building of the canals confirms that in 1831 the subject lands were undoubtedly worth considerably more than the minimum government price for public lands.

Therefore, from the record we conclude that, as of April 6, 1832, the effective date of the 1831 Treaty, the highest actual and potential best use of those parts of the subject lands bordering the Great and Little Auglaize Rivers, and the Maumee River, were for commercial

activities related to the proposed canal system, while the remainder further inland could be best utilized for agricultural purposes. We further conclude that the then fair market value of the 50,613.46 acres within the subject areas was \$190,000, or slightly more than \$3.75 per acre.

According to the defendant, it agreed to pay and in fact paid to the plaintiff tribe for the 1831 cession of the subject lands \$71,786.02 under the 1831 Treaty and \$17,950 under the provisions of the Treaty of February 18, 1833, 7 Stat. 420. Defendant also claims the grant of 75,000 acres of reserve lands in Kansas under the 1831 Treaty as additional consideration. The plaintiff has made no effort to determine the 1831 Treaty consideration, being content to charge the defendant with an improper accounting of all monies received and paid out under the treaty.

As indicated earlier, the United States sold 50,613.46 acres of the subject lands for \$69,204.47. Pursuant to Articles VII and XII of the 1831 Treaty, there was to be deducted from the above amount the sum of seventy cents per acre, or a total of \$35,429.42, which amount, according to the defendant, represents ". . . estimated reimbursement for the grant of 75,000 acres in Kansas . . ." <sup>2/</sup> Net proceeds remaining to the plaintiff tribe, amounting to \$33,775.05, were subject to the following deductions

---

<sup>2/</sup> Footnote 20, page 12 - Defendant's Requested Findings of Fact

under the 1831 Treaty: \$2,000 covering a reimbursable advance for improvements under Article V, \$21,242.25 for payment of debts under Article XVI, \$400 for payment of debts under Article XIX, and \$100 as a bonus to a deserving Ottawa Indian under Article XX. Of the \$10,032.80 overplus, the United States invested \$9,690.86 in bonds, leaving a balance of \$341.94. Since the defendant has accepted the \$35,429.42 as the correct sum which should have been deducted from the proceeds of the sales of the subject lands as a reimbursement to the United States for the Kansas reserve lands, the Commission has adopted the same figure in evaluating the Kansas lands as part of the 1831 Treaty consideration.

In addition to the proceeds from the sales of the subject lands and the Kansas reservations, the defendant promised and did provide as further consideration under the 1831 Treaty \$38,734.52 for relocating Ottawa Indians on the Kansas lands pursuant to Articles IV and XI of the treaty, and \$1,475.25 for gifts, plows, blankets, etc., as stipulated under Article X.

The defendant would also have the Commission include as additional consideration to the plaintiff tribe under the 1831 Treaty, \$6,408.46 paid out to cover Ottawa tribal debts pursuant to the Act of March 1, 1843, 6 Stat. 887, and \$17,950 that was disbursed for the benefit of the plaintiff tribe out of an \$18,000 appropriation made to carry out the provision of Article 3 of the Treaty of February 18, 1833, 7 Stat. 420. In our judgment, neither of the above sums qualify as part of the 1831 Treaty consideration.

The 1843 Act was intended to expedite the payment of \$7,302.78 in accumulated debts to certain creditors of the Ottawa tribe. The plaintiff had requested the payment of these debts in 1839, and the above act authorized the Commissioner of Indian Affairs to pay this tribal indebtedness ". . . out of any moneys due or that may hereafter become due, from the United States to the Ottawa tribe of Indians, by existing treaties . . . ."<sup>4/</sup>

Apart from the fact that the payment of this indebtedness was not to be made out of any specific treaty fund, it was also not the same indebtedness specified in the 1831 Treaty. Hence, payment of these tribal debts under the 1843 Act could not qualify as being part of the 1831 Treaty consideration.

Under Article 3 of the Treaty of February 18, 1833, supra, the United States authorized the appropriation of \$18,000 to satisfy a claim of the Ottawa Indians based on an alleged misunderstanding on the part of the Indians that this sum was due under the 1831 Treaty. However the obvious text of the 1831 Treaty affords no basis whatsoever upon which to predicate a claim for this additional amount of money. On the other hand, evidence in the record indicates that the United States appropriated the money simply to quiet the controversy. On February 18, 1833, Commissioner George B. Porter, who was then in the process of negotiating the 1833 Treaty with the Ottawa Indians, addressed a letter to Elbert Herring, Commissioner of Indian Affairs, in which Commissioner Porter doubts that the Indians misunderstood the terms of the 1831 Treaty.

---

<sup>4/</sup> 6 Stat. 887

Commissioner Porter also indicated that he anticipated difficulty in concluding the 1833 Treaty unless the disputed claim was settled.

Accordingly, he recommended that:

To end the matter the Government should pay them the money, so as to comply with the Treaty as they supposed it was made. 5/

While the defendant paid this further sum pursuant to the 1833 Treaty, it did not acknowledge any liability to the Ottawa Indians under the 1831 Treaty. Under these circumstances the defendant cannot now claim this additional \$18,000 as part of the 1831 treaty consideration.

The Commission has concluded that the 1831 treaty consideration was \$109,414.24, and consisted of the entire proceeds from the sales of the subject lands, \$69,204.47, relocation expenses of \$38,734.52, and \$1,475.25 expended for gifts, plows, and other sundry items. We have also concluded that payment of \$109,414.24 for lands worth \$190,000, or roughly 57% of their then fair market value, was payment of an unconscionable consideration, and that the defendant is liable to the plaintiff tribe for the difference, or \$80,585.76.

The plaintiff would also have the Commission add interest to any award entered herein on the basis that, the defendant having violated its treaty obligations, the payment of five per cent interest is guaranteed under the 1831 Treaty. The 1831 Treaty did require the United States to invest for the benefit of the plaintiff tribe at five per cent interest the surplus proceeds realized from the sales of the subject lands.

---

5/ Def. Ex. 4 - Letter of February 13, 1833, of Governor Porter to Commissioner Herring.

Contrary to the plaintiff's position, the Commission has found that the defendant did not violate its 1831 Treaty obligations with respect to the manner in which it sold the subject lands and accounted for the proceeds. The defendant did invest the surplus proceeds and apparently has paid the interest earned thereon.

If we have correctly viewed the Court of Claims' most recent expression on the question of interest, in the case of United States v. Nez Perce Tribe of Indians, 194 Ct. Cl. 490 (1971) (rev'g Docket 175-B, 22 Ind. Cl. Comm. 53 (1969)), then the plaintiff is not entitled to interest on the award herein. The Nez Perce case involved an unconscionable consideration claim, a statutory provision to pay interest on a portion of the proceeds from the sales of the Nez Perce reservation lands, and the question of whether or not the Commission could allow interest on the award for additional compensation. In denying interest, the Court of Claims in Nez Perce concluded that the United States had obligated itself to pay interest to the Nez Perce Indians only in the manner specified in the controlling statute, and further, in the absence of a breach of treaty or statutory obligations, the Commission is not at liberty under Clause 3, Section 2 of the Indian Claims Commission Act, supra, to rewrite interest provisions so as to allow additional interest on an unconscionable consideration award.

We think the matter now before us is substantially identical with what confronted the Court of Claims in Nez Perce. While it might be





argued that the interest provisions in the 1831 Treaty are more loosely worded than those appearing in the Nez Perce statute, since interest was to be paid to the Ottawas on the surplus proceeds rather than a predetermined fixed amount, this argument reduces itself to a distinction without a difference once all the subject lands were sold and the actual surplus proceeds accounted for.


The plaintiff, on behalf of the several bands of Ottawa Indians, shall recover from the defendant the sum of \$80,585.76, less allowable offsets, which matter shall be the subject of further proceedings.

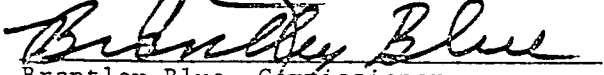
  
John T. Vance, Commissioner

We Concur:

  
Jerome K. Kuykendall, Chairman

  
Richard W. Yarborough, Commissioner

  
Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner