BEFORE THE INDIAN CLAIMS COMMISSION

THE PONCA TRIBE OF INDIANS OF OKLAHOMA, WILLIAM OVERLAND, MARTHA 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: August 23, 1972

Appearances:

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

Richard L. Beal, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This case is now before the Commission on remand from the Court of Claims, United States v. Ponca Tribe of Indians, App. No. 7-71 (Ct. Cl., Feb. 25, 1972), following an appeal of our decision found at 24 Ind. Cl. Comm. 339 (1970). The Commission is directed "to supply more specific findings and reasoning as to the valuation of the land involved and the

rate of interest to be allowed as a part of just compensation." The Commission is referred to the recent decision in Seminole Indians v. United States, 197 Ct. Cl. ___, 455 F.2d 539 (1972) (remanding Dockets 73 and 151, 23 Ind. Cl. Comm. 108 (1970)), for an explication of the standards of specificity expected.

The Commission herein will attempt to cure any defect of elision, and supply facts and reasoning as a supplement to the findings and opinion previously entered, but we shall not seek to restate every finding or conclusion encountered there. In addition, we shall take note of the questions briefed on the appeal as an aid to analysis.

I

The first question presented is the value of the 96,000-acre Ponca Reservation as of March 16, 1877. The parties have offered no new evidence or briefs bearing on this issue on remand. The evidence on value, therefore, remains the reports and supporting documents offered by the respective parties' expert witnesses.

The valuation problem is one of valuing a moderate-sized tract in a frontier area at a time when any sales from within the subject tract were far in the future, and no evidence of sales of a tract comparable in size and location was offered. There were placed in evidence records of private sales contemporary to the valuation date in an area immediately adjacent to the subject tract. These sales, we think, provide the best evidence toward finding the imputed market value.

The parties have submitted much information about the general characteristics of the subject area, which has been summarized in our Findings 43 through 49 previously entered. Elaboration of detail of these findings is not felt necessary to aid in the analysis. In general, these facts are not disputed, although each party would draw conflicting inferences from them, e.g., that rivers are highways, to the plaintiff, or barriers, to the defendant. The parties' ultimate contentions as to value do not rest on these facts.

Defendant's expert witness, Mr. Hall, rested his opinion of value of the subject tract on a system of discounts from a retail price of $1.25 per acre. He testified that the United States Government fixed price of $1.25 for disposing of the public domain set the market so that no retailer could hope to get more, and to make a profit at that figure would have had to acquire the tract at $.40 per acre. Mr. Hall makes a series of assumptions as to the expected costs to the purchaser before resale, the correctness of which we find it unnecessary to determine. His theory is made untenable by the fact that many sales of land were made at prices substantially in excess of $1.25 per acre. As previously found, during this period the Union Pacific was disposing of its grant lands at an average of $4.46 per acre, and the Burlington Railroad was selling Nebraska lands at an average of $5.47 per acre, while sales adjacent to the subject tract were at an average price of $4.02 per acre (Finding 52). That millions of acres of public domain were available at $1.25 may have

depressed land prices, but that figure did not set a maximum. Mr. Hall's opinion is not founded on fact and must be rejected in whole.

The contention of the plaintiff as to value, $4.02 per acre, is founded not on an opinion, but on Dr. Chisholm's calculation of the average consideration paid on some 21 sales of tracts in the townships abutting the subject area. While these sales represent the most cogent evidence of market value, they require analysis, and we cannot accept the raw average price as the market value we seek to determine.

The sales are offered as being all those transactions in the Nebraska townships adjacent to the subject tract in the 2 1/2 years before the valuation date and the 2 1/2 years after that date that reflect valid market transactions. As we understand the defendant's position, it is not suggested that these sales are not correctly abstracted or are unrepresentative of the then market, but that they are not comparable to land in the subject tract. We feel that with proper adjustments a comparison can be made, even though the limited number of sales introduces greater uncertainties than if a greater range of marketplace transactions could be studied.

The sales were of tracts from 10 acres to 163.1 acres in size. The smaller tracts sold likely were acquired because of some advantage of location or to expand an adjacent holding, as they likely would not

independently be considered of subsistence size. Therefore the smaller tracts probably commanded premium prices as being of particular interest to special buyers. We find the smaller tract sales to be not comparable for purposes of finding the value of the subject tract. The larger tracts sold, however, are of a size that allow comparisons to be made. For these reasons casting aside all the sales under 100 acres, we find that the remaining seven sales total 1,066 acres in tracts ranging from 120 acres to 163.1 acres in size. For these, considerations ranging from an average $.92 per acre to $5.62 per acre were paid, with a weighted average price of $2.95 per acre (the median sale of this series was at $2.97 per acre). This average will serve as a sales index of prices paid for lands comparable to the subject tract at the valuation date.

To translate this index into a value for the Ponca tract as a whole, certain adjustments must be made. The sales index represents "retail" sales of tracts of about 160 acres, while the subject tract contains 96,000 acres. A purchaser would certainly expect to obtain a lower unit price on a purchase of a large quantity than one smaller, so some adjustment downward is required, even though some has been effected by choosing the larger sales. However, this size of tract is not like those of millions of acres sometimes valued, so a large adjustment for size does not seem indicated.

The defendant has urged that the sale tracts are unrepresentative in being better located with respect to towns, streams, and rich bottom land than the subject tract generally. With the selection of the larger tracts, most of any possible influence of town values on the sales was removed (and much of the subject tract would be near the same towns). If location on a stream increased any sale tract values, an equal increase could be attained in the subject tract, where proper subdivision could create most tracts with frontage on Ponca Creek or the Niobrara or Missouri Rivers. Not so comparable is the general quality of the land in the subject tract and the area of the sale tracts, the latter being more level and suited to cultivation. A substantial downward adjustment in the sales index figure is warranted to reflect the more broken terrain of the subject tract.

Although there is no evidence to support the existence of any improvements on the comparable tracts sold, these were sales in a settled area, and some factor must account for the fact that these lands attracted purchasers while most did not. While there were some improvements left on the Ponca lands to offset this factor, some downward adjustment in the sales index is justified.

Considering these and all other elements of comparison between the subject tract and the comparable sales, we feel that a reduction of about 25% in the sales index figure of $2.95 per acre would best approach the true market value of the subject tract if sold as a whole on the valuation date to an informed purchaser. We find the value of the subject tract as a whole to be $211,200, or $2.20 per acre.

At the risk of being tedious, two other matters should receive comment. Defendant takes exception to the Commission's finding of highest and best use for the subject tract as cattle grazing and the growing of feeder crops, and especially to the Commission's finding that "feeder farms" were then developing. The evidence fully supports the existing finding. Defendant urges that the highest and best use of the tract was for grazing, but the Commission cannot ignore that about half of the tract was considered cultivatable. The characteristics of the area dictate a mixed farming and grazing use. In this case it is difficult to conceive that a change in the wording of the finding would have any impact on the value determination. The subject tract and the comparable sales tracts are adjacent, for practical purposes, and suitable for the same uses, so far as the evidence goes. Whatever exact use was intended by the purchasers of the sale tracts, their purchases provide evidence of a market from which the value of the similar subject tract can be imputed. No special value is made inherent here by the wording of the highest and best use determination where the value determination rests on a comparison of adjacent similar tracts.

Defendant suggests in its brief on appeal that hindsight sales of lands on the Ponca Reservation, if used as a check, deny the validity of the Commission's value determination. The sales of the surplus Ponca lands beginning in 1891 are said to show an average consideration of $1.31 per acre. Although the Commission eschews the use of hindsight

sales where as here there is more timely data available, a gross inconsistency requires examination. Such examination shows that the evidence offered on the hindsight sales completely fails to show that these were market transactions rather than government disposals, and indeed does not show the actual consideration paid in any transaction. Defendant properly did not request a finding on these "facts" when the issue was before the Commission.

II

This case is remanded to us, in part, for the Commission to give reasons for its selection of a rate of 5% interest per year from 1877 to the present in awarding just compensation. In remanding for further proceedings, the Court of Claims pointed out that:

> ... As a nisi prius tribunal, the Commission has the authority to fix the rate by which just compensation is measured on the basis of the evidence and other material submitted to it on the question.
>
> On remand, the Commission may supply the more specific findings and reasoning required by this order, or in its discretion, it may open the record for further evidence. . . . (United States v. Ponca Tribe of Indians, supra, Slip Order at 2.)

The Court of Claims has not expressed an adherence to any particular rate of interest to be added as part of that just compensation to which plaintiff is entitled for the taking of its lands. And since the court has instead confirmed this Commission's authority to make such a determination, the Commission has concluded from the evidence submitted by the parties on remand that from 1877 to the present 5% per annum is the

appropriate rate to express the measure of just compensation when it is owing over the whole period.

In a recent case, Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-F, 28 Ind. Cl. Comm. 264 (1972), this Commission examined very closely both the history and requirements of just compensation recovery and, also, economic data relevant to the issue of a "proper" or "reasonable" interest increment in Indian cases. In that case as here the defendant initially urged that this Commission continue to apply the interest standard used in Alcea Band of Tillamooks v. United States, 115 Ct. Cl. 463 (1950), rev'd on other grounds, 341 U.S. 48 (1951), which allowed 5% up to 1934 and 4% thereafter. The plaintiff there argued, in essence, that the drastic change in economic conditions since Alcea warranted either a rate of 6% during the last decade, or a restoration of the 5% rate from 1934.

The Commission deemed it appropriate there to reexamine fully the interest rate issue, given the mandate from the Court of Claims in this case after our earlier finding here. The fundamental motivation for an alteration of the interest rate as was done 20 years ago in Alcea (i.e., a significant change in economic conditions) has become operative again.

Evidence relating to this inquiry into a proper rate of interest was submitted, and judicial notice was taken of complementary and supplementary statistical material. Based on the factual foundation of this economic data, the Commission concluded from its measurements of various components of the money market, especially the average annual yields on long term

United States Government bonds, that the most appropriate rate of interest for just compensation recovery over the whole period is 5%. Three Affiliated Tribes, supra, at 298-301, and Finding 50(d), at 323.

In determining the reasonable rate of interest in the case before us today, the Commission relies on the factual determinations and legal conclusions it made in Three Affiliated Tribes. Everything said there is applicable to the issue and evidence here, and the Commission concludes 5% should be the appropriate rate for the whole of the period in the case now before us.

The plaintiff here articulates in its evidence a "prudent investor" test which, when traced historically, gives another perspective into the interest rate problem. In approaching just compensation, the plaintiff argues that recovery should amount to the principal owed plus a return, measured in terms of interest, which could be reasonably expected from investing in a balanced portfolio of investments containing both the safest and lower yielding investments and the more dangerous and higher yielding ones. The rate of interest, as so devised from a broad spectrum of interest data, would then reflect the income lost to the Poncas since 1877. This very competently compiled statistical evidence of the plaintiff's expert Dr. Roger K. Chisholm leads the Commission further to the conclusion that a 5% interest rate is the simplest and most nearly accurate guide available to an average return on investments over a long period.

The defendant would have us maintain the Alcea 4% rate for the years after 1934, and also depart from the traditional 5% awarded and approved by the Court of Claims and substitute 4% for the period prior to 1934. This pre-1934 rate of 5% accepted by the Court of Claims in such cases as Alcea had a foundation in the economic data of that time as well as common use in the text of various Indian treaties dealing with the matter.

The defendant's argument for this rate reduction is based on its construction of a "prime rate of interest" which depends on selecting the lowest yield and safest bonds and improperly excluding possible investments which involve a somewhat greater risk as well as a greater return. This construction illogically strains the fundamental concept of just compensation. The Commission prefers the greater accuracy of the plaintiff's balanced portfolio - "prudent investor" test, and for the same reasons as given in Three Affiliated Tribes, supra, rejects the defendant's argument.

Therefore, the Commission reaffirms previous determinations of a 5% interest rate for the period prior to 1934, and, on the basis of the evidence submitted here and the decision in Three Affiliated Tribes, supra, sets 5% as a reasonable rate of interest to measure just compensation from the date of the taking here to judgment.

The award in this case, calculated from March 16, 1877, to June 30, 1972, for convenience, is $1,004,589.49, plus an additional amount measured at interest of 5% on the principal sum of $174,327.06 from June 30, 1972, until the date of payment of the principal sum.

Richard W. Yarborough, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner