BEFORE THE INDIAN CLAIMS COMMISSION

THE NEZ PERCE TRIBE OF INDIANS, Plaintiff,	)	
v.	)	Docket No. 175-B
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: Nov. 1, 1972

Appearances:

Charles A. Hobbs, Attorney for Plaintiff. Wilkinson, Cragun & Barker, and Donald C. Gormley were on the brief on remand from the Court of Claims.

John D. Sullivan, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

This claim is once again before the Commission on remand from the Court of Claims. The claim involves the Nez Perce Tribe's reservation lands which it ceded to the United States by the Agreement of May 1, 1893, ratified August 15, 1894, 28 Stat. 286, 326-32. Under the agreement, part of the tribe's reservation was allotted to individual Indians, part was allotted to the tribe for trust lands, and the remaining 549,559 acres were ceded to the United States for a purchase price of $2.97 per acre. The Nez Perce Tribe has claimed additional compensation for the ceded lands.

In its initial decision the Commission found that the 1894 fair market value of the ceded area could not have exceeded an average of $4.00 per acre. The Commission concluded that the discrepancy between such value and the price agreed upon was not so gross as to be unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, and that, therefore, the tribe could not recover under the Act. 13 Ind. Cl. Comm. 184 (1964). On appeal by the tribe the Court of Claims disagreed with the Commission's conclusion as to the unconscionability of the consideration as applied to the facts and circumstances of this case, and the case was reversed and remanded for further proceedings. 176 Ct. Cl. 815 (1966), cert. denied, 386 U.S. 984 (1967). The court also concluded, after considering all the facts, that the $4.00 per acre figure was supported by the evidence as a minimum figure only. Determining that a $4.00 maximum figure was unsupportable, the court suggested that the Commission reconsider the evidence and look to "some higher, unstated value in resolving the 'unconscionable consideration' issue." 176 Ct. Cl. at 828.

The Commission, in compliance with the remand, reconsidered the evidence and, after carefully considering the Court of Claims' opinion and all of the various factors set forth in the Commission's previous opinion and findings, concluded that the fair market value of the subject area averaged $5.50 per acre. The Commission also determined that the difference between the $5.50 per acre value and what was actually paid ($2.97) was so gross as to be unconscionable, and, therefore, pursuant to clause 3, section 2 of the Act, supra, the tribe was entitled to

recover additional consideration in the principal amount of $1,387,911. A majority of the Commission also found that the tribe was entitled to recover interest on the principal amount at the rate of five percent per annum from August 15, 1894, the date the lands were originally ceded by the tribe to the defendant. 22 Ind. Cl. Comm. 53 (1969).

Once again the case was appealed to the Court of Claims, this time by the defendant. There was no cross-appeal by the tribe. The defendant's appeal was directed to the determination that the Nez Perce Tribe was entitled to interest on the principal sum of the award and to the method by which the Commission arrived at the $5.50 per acre valuation. The court reversed the Commission on the interest question and remanded the case with instructions to supply specific findings or reasons in support of the Commission's conclusion with respect to the $5.50 valuation figure. 194 Ct. Cl. 490 (1971).

In findings 1 through 25 entered in this case on April 7, 1964, 13 Ind. Cl. Comm. 184-235, the Commission made basic or evidentiary findings dealing with the valuation issue. We believe that those findings adequately and accurately reflect the evidence in this case and the conditions which existed in 1894 with respect to the market value of the ceded lands. The Court of Claims has not indicated any area of disagreement or dissatisfaction with those findings. In fact the substance of those findings are summarized by the court in its statement of the pertinent factors bearing on market value. We therefore reaffirm findings 1 through 25.

Finding 26, as amended on November 14, 1969, 22 Ind. Cl. Comm. 53, set forth the Commission's ultimate finding of value. The Court of Claims likewise had no disagreement with the $5.50 per acre valuation. However, the court perceived a gap between the first 25 findings and the ultimate conclusionary finding. Missing, admonished the court, were specific findings or reasons which lead to the ultimate conclusion. Without a more detailed and specific display of analysis the court found itself unable to determine if the ultimate conclusion was supported by substantial evidence.

We shall now supply the specific analysis by which the Commission reached its decision. As previously stated, findings 1 through 25 deal with the basic facts in this case. That portion of the accompanying opinion which relates to those 25 findings sets forth the Commission's analysis of the evidence and indicates the weight which we believe should be accorded that evidence.

As indicated in the initial decision, the principal evidence on value was supplied by the parties' two expert witnesses. The plaintiff's expert was William C. Brown, and in findings 14 through 23, 13 Ind. Cl. Comm. at 199-229, we set forth the important details of his appraisal of the Nez Perce tract. We likewise entered detailed findings concerning the appraisal presented by defendant's expert, Dr. Homer Hoyt, 13 Ind. Cl. Comm. at 229-35. Concluding that plaintiff's expert was overly optimistic while defendant's expert was overly pessimistic, we rejected both expert opinions and looked to the basic data which they supplied and upon which

they relied. We considered a great variety of factors, all of which have been detailed in our previous decision. But the most important evidence in this case centered around the "comparable sales" data. The sales data compiled by Mr. Brown was, in our opinion, more meaningful, and we chose it as our starting point in determining the tract's fair market value.

While we used Mr. Brown's sales data as our takeoff point, we found that the sales were of lands which were not strictly comparable to the subject area. As detailed in our previous findings and opinion there were transactions in well settled areas involving lands of better quality and in more favorable locations. There were sales of highly improved farms and transactions which even included stock and farm implements. The timberland and grazing land sales did not reflect the values of such land in its raw condition. Some sales included valuable agricultural land, some with improvements, and the accessibility factors were not comparable to the subject area. Therefore we found it necessary to adjust or discount the sales data to relate them to a fair market value of the 549,559 acre Nez Perce tract.

We considered the sales data in each of the three categories of land use, i.e., for agriculture, for timber operations, and for grazing. Mr. Brown used 411 straight sales and some mixed sales to compute his estimated value of $15.42 per acre for unimproved agricultural land in the tract. His agricultural sales, after the "time adjustment" for sales made before and after the valuation date, averaged $19.18 per acre.

Recognizing the inclusion of improvements in many of the sales, he applied a 20 percent discount to reach his $15.42 valuation.[1/]

We agreed with Mr. Brown that a discount for improvements should be applied to the agricultural sales. But we felt that a 25 percent figure would have been more realistic than the 20 percent reduction which he applied. The difficulties with Mr. Brown's 20 percent figure are set forth in finding 20, 13 Ind. Cl. Comm. at 215-20, as further analyzed in the opinion at 243-48. The Court of Claims also considered that ". . . . something in the range of 25 percent may better take into account the premium which 'improved' land in the other areas could have commanded over the ceded lands." 176 Ct. Cl. at 824.

Many of the agricultural sales used in the analysis involved lands which were more favorably located with respect to soil, natural resources, transportation, and settlement. To use such sales as an indication of the fair market value of agricultural land in the Nez Perce tract a discount should also be applied for these factors. The Commission considered a reduction of about 20 percent as adequately taking into account the more favorable location of the agricultural land sales.

Finally we applied an appropriate discount for size. The agricultural sales used in the Brown analysis averaged 180 acres per transaction. The

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1/ Actually we compute this figure to be $15.34. The slightly larger value resulted, apparently, from mathematical errors in Mr. Brown's Appraisal Report, Vol. 11, Schedule 9, pp. 31, 32 (Pl. Ex. 89):

1. Whitman County improvement discount should be $75,298 instead of $68,390, on page 31.

2. Whitman County improvement discount should be $43,407 instead of $42,795, on page 32.

agricultural lands in the subject area totaled about 275,000 acres. In relating sales of small tracts to a large, undeveloped area a discount for size is warranted. We considered a 20 percent discount for size to be proper in this case.

In summary then we took Mr. Brown's sales data for agricultural land and, applying the above discounts which totaled 65 percent, reached a figure of about $6.70 as an average per acre value of the agricultural lands within the subject area.[2/]

In similar fashion we analyzed Mr. Brown's timberland sales data from which he computed the average per acre value at $13.01. Other than his "time adjustment" for sales before and after 1894, he did not apply any discount in reaching this figure. Mr. Brown's timberland sales are dealt with in the Commission's finding 17b (13 Ind. Cl. Comm. at 206-12) and in the opinion (13 Ind. Cl. Comm. at 251-56).

We first considered the question of improvements. While in the ordinary situation there would not be improvements on lands having a highest and best use for commercial lumbering, the evidence in this case indicates that some improved lands were included in the timberland analysis. Some of the transactions included land which had been fenced

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2/ The Court of Claims reasoned that the range of reasonable discounts in this case would be 25 percent discount for improvements, 20-25 percent discount for remoteness and inaccessibility, and a 20-25 percent discount for size, or a total discount of 65 to 75 percent. 176 Ct. Cl. 815, 825.

and was in cultivation. We did not believe that as great a discount was warranted as in the case of the agricultural sales. We concluded that a 15 percent discount would adequately serve to compensate for improvements in relating the timberland sales to the value of raw timberland in the Nez Perce tract.

We also considered accessibility to be an important factor in valuing the timberland. Mr. Brown did not apply any discount in this case although in his analysis in Docket 175-A[3/] he classified the timberland in three accessibility groups and applied substantial discounts to his index or comparable sales. He used a 75 percent discount to relate comparable sales of first accessible timber to the Docket 175-A's "last accessible" timber. In his appraisal in this case Mr. Brown used a large number of timberland sales in easily accessible areas. However, the timbered portions of the subject tract were not generally as accessible. In the south and along the western border the lands were dissected by canyons, transportation was inferior, and the area was not favorably located with respect to the local markets. The Commission considered that a discount of about 25 percent would compensate for these factors in relating the comparable sales to the timberland in the subject tract.

Finally, we discounted the timberland sales by 20 percent to take into consideration the relatively small size of the comparable transactions (which averaged 171 acres). We noted that in the Docket 175-A case

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3/ Docket 175-A involved lands completely surrounding the tract in this case. Those lands were valued as of April 17, 1867, 8 Ind. Cl. Comm. 220 (1959). It was stipulated that all evidence introduced in that case should be a part of the record in the instant case, and the Commission did rely on that evidence in its findings and analysis of Mr. Brown's sales data.

Mr. Brown applied a 33 1/3 percent discount for size to relate the small sales to the timberland to be valued in that case. However, since that case involved over 3 million acres of commercial timberland, a greater discount would be indicated than in the instant claim.

The total of the discounts to be applied to the timberland sales data was 60 percent. This reduced the average per acre figure to $5.20. This we believe represents a reasonable approximation of the fair market value of the timberlands within the subject area.

We applied the smallest discount in the case of grazing land sales. We did not consider that improvements were involved in the comparable grazing land sales--at least not to any significant degree. We did note that the comparable sales were of highly desirable range land including a number wherein the land was capable of good cultivation and production. Most of the sales included natural water sources. The sales were of relatively small size averaging 139 acres per transaction. Considering all of these factors the Commission concluded that a discount of 25 percent would properly relate the comparable grazing land sales to the value of the range lands within the Nez Perce tract. This resulted in a $3.10 per acre valuation for the grazing lands.

Slightly more than one-half of the subject tract had a highest and best use for agriculture. Somewhat less than one-quarter of the area had a highest and best use as timberland, while the remaining area constituted the grazing lands. Applying our estimated land values to each of the land use areas, we reached a figure of about $5.50 per acre

as the average value of the entire tract. Thus, we concluded that the subject area had a fair market value, as of August 15, 1894, of $3,022,575.00, or an average per acre value of approximately $5.50.

The consideration paid for the cession was $1,634,664.00, leaving a balance of $1,387,911.00 which the tribe is entitled to recover under clause 3, section 2 of the Act, supra. In our decision of November 14, 1969, the majority further found that the tribe was entitled to recover interest on the principal amount at the rate of 5 percent per annum from August 15, 1894, to the date of payment. The Court of Claims reversed the Commission on the interest question, holding that there was no authority for the awarding of interest in this case. 194 Ct. Cl. at 494-99. Since there are no gratuitous offsets to be claimed in this case, the Nez Perce Tribe is entitled to entry of a final award in the amount of $1,387,911.00.

There is one additional matter which plaintiff has presented in its proposed findings of fact on remand. Plaintiff has argued that only $2.50 per acre, or $1,359,884.50, was the true consideration for land cession. It is plaintiff's contention that the additional payment of $.50 per acre was intended as compensation for the failure of the United States to keep trespassers off the tribe's land and for the damages caused thereby. This same issue was presented by the plaintiff in its oral argument before the Court of Claims. The court did not include this question in its remand to the Commission, and we do not consider it to be an issue before us. The court's statement on the matter is dispositive of plaintiff's claim on this consideration question. The court ruled:

It is, therefore, the opinion of this court that only after the total consideration was increased did plaintiffs restructure the argument concerning the damages for trespass and at that point it was much too late. Consequently, we are of the opinion that the Tribe, having raised this argument in its present form only after the second opinion of the Indian Claims Commission from which they do not appeal, did not make a timely claim and are, therefore, not entitled to recover on this issue. McCauley ex rel. Kaw Tribe of Indians v. United States, 125 Ct. Cl. 628, 113 F. Supp. 689 (1953); Snake or Piute Indians of Former Malheur Reservation in Oregon v. United States, 125 Ct. Cl. 241, 112 F. Supp. 543 (1953); Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554 (1938), cert. denied, 305 U.S. 613 (1938). [194 Ct. Cl. at 501.]

A final award in the amount of $1,387,911.00 will be entered in this case.

Jerome K. Kuykendall, Chairman

We Concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner