BEFORE THE INDIAN CLAIMS COMMISSION

TUSCARORA INDIAN NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 321
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: November 29, 1972

Appearances:

Paul G. Reilly, Attorney for the Plaintiff. Earle & Reilly were on the briefs.

William F. Smith, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Kuykendall, Chairman, delivered the opinion of the Commission.

The Tuscarora Indian Nation has claimed damages, compensable under the Indian Claims Commission Act, 60 Stat. 1049, resulting from the rental and subsequent sale of its equity in 41,113 acres of land located in Bertie County, North Carolina, for an alleged unconscionable consideration. The Commission previously concluded, inter alia, that the Tuscarora Indians were not adequately compensated in 1802, when, by an act of the North Carolina legislature, they were deprived of their reversionary right in such land, and that the United States is liable if the subsequent sale in 1829 of the reversionary interest and payment in 1832 of the proceeds to the Tuscarora Indians was not fair and adequate compensation for such interest. Tuscarora Indian Nation v. United States, 23 Ind. Cl. Comm. 140, 163 (1970).

By order dated May 14, 1970, 23 Ind. Cl. Comm. 169, the Commission ordered this case set for a hearing on all the issues involving: (1) the fairness and adequacy of compensation paid for the reversionary interest of the land in suit; (2) any discrepancies in the rental accounts for which the United States would have responsibility; (3) any failure of the Tuscarora Nation to receive full consideration under the leases to their expiration dates in 1916; and (4) any other matters, consistent with the opinion, relating to the defendant's alleged liability and amount thereof under the claims presented in this case.

Plaintiff declined to offer evidence on the valuation issues set for trial and on August 27, 1971, filed a Motion to Close the Record and Direct Filing of Brief. The Commission on September 15, 1971, entered an order closing the record and directing the parties to file briefs covering the issues involved. Our decision now is based on the record and the briefs filed accordingly by the parties.

Prior to 1802, 38,351 acres of the Tuscarora tract had been leased to private persons in violation of state statute. The leases were due to expire at various times between 1874 and July 12, 1916. Pursuant to an act of the North Carolina legislature in 1778, such leases were validated, and provision was made for title to the land to revert to the state if at any time the Tuscarora Nation should become extinct, or if all members should entirely abandon or remove themselves from every part of the tract. 1/

1/ Plaintiff's interest is described herein as a possibility of reverter owing to this condition.

Under the Treaty of December 4, 1802, between the United States and the Tuscarora Indians, 2/ all the existing leases were renegotiated and extended to July 12, 1916. The period of the extensions averaged 41 years, and the Tuscarora Indians received as compensation the sum of $8,381.66. A portion of the land not previously leased, totalling 2,917.5 acres, was also leased until July 12, 1916, for the sum of $20,966.60. In addition, the parties to the treaty agreed that the Indians' interest in the entire tract would ". . . cease and determine and shall be held and deemed extinguished forever" as of July 12, 1916, in favor of the State of North Carolina. In 1829, a committee appointed by the state legislature concluded that the consideration received in 1802 did not constitute compensation for the surrender to the State of the possibility of reverter, whereupon the state advertised and sold, mostly to the lessees in possession, the said interest. The sum of $3,220.71 was paid to the plaintiff in 1832, who in exchange conveyed all its estate, right, title, interest, claim and demand in said land to the state.

In order to value the possibility of reverter, one must first determine the market value of the unencumbered fee on the date the reversionary interest was alienated. In our prior opinion we refrained from deciding whether the reversionary interest should be valued as of 1802 or 1829. After further consideration we now conclude that the valuation date is March 1, 1803, the date the Treaty of December 4, 1802, was approved by the United States Senate. Tuscarora Indian Nation,

2/ Defendant's Exhibits No. 30 and 34.

supra, at 144. The 1802 treaty provided for the present conveyance by the grantor of all rights in the land as of the date of the termination of its estate for years. Where divestment of Indians' rights occurs as a result of a treaty, the date of ratification or other manifestation of approval by the Government is the date of valuation. Saginaw Chippewa Indian Tribe v. United States, Docket 57, 22 Ind. Cl. Comm. 504 (1970). Although the release given in 1829 was in the form of a deed of conveyance, the Tuscarora Indians possessed no compensable interest then or at any time after March 1, 1803. The grantee's accumulated rights of ownership in the land, whether present or certain to vest at a future date, could not be enlarged by the form of the release which was given or the date thereof. Since the state did not receive any new or additional rights by virtue of the 1829 document, said document, despite its terminology, cannot be construed to be other than a formality and release of a pre-existing claim.

The plaintiff has construed the sales of leases in June 1803, with no annual rental reserved, for a term of 113 years at an average price of $7.19 per acre for 2,916.5 acres, as reflecting ". . . the then market estimate of what would be pragmatically acceptable fee title" for the entire tract of 41,113 acres. The defendant has agreed, and, in the absence of any other means available for determining the 1803 value of the land, the Commission concludes the fair market value of the 41,113 acres of the plaintiff's land on March 1, 1803, to be the sum of $295,602.47.

It is conceded by the parties that the 1803 value of a reversionary interest which would not vest for 113 years was slight.[3/] Undoubtedly the land had a definite value in 1803, and were there established markets at that time and place for ground rentals, the value of a possibility of reverter could be measured as being a percentage thereof. The value of an absolute right to the reversion may be measured as the difference between the present value of the property and its value at the end of the term. Chicago Ry. v. Chicago Mechanic's Institute, 239 Ill. 197, 87 N.E. 933 (1909). When the land is burdened by a long term lease, the possibility of its value increasing during the term is so speculative that where, as here, the rental approximates the fee value, the reversion is not considered an item of value should the property be lost, as, say, through condemnation, during the term. Chicago Ry. v. Chicago Mechanic's Institute, supra. How much less then is the value of a mere possibility of reverter to vest in 113 years when an absolute reversion is without material value when appended to a long term lease? The defendant proposes the use of compound interest and annuity tables which show the present worth of one dollar to be paid 113 years from date, with interest compounded at the rate of 6 percent annually, to be $0.00138. This factor multiplied by the agreed market value of the unencumbered

---

3/ Plaintiff discounts $7.30 ($7.19 per acre paid as rental of 2,917.5 acres in 1803 and the $0.108 per acre paid for the possibility of a reverter in 1831) from the years 1916 and 1876 and finds the 1803 value of the possibility of reverter to be ". . . concededly . . . miniscule".

fee, in the opinion of the defendant, establishes the maximum value the possible reversionary interest of plaintiff in 1803. While this calculation is not supported by evidence that six percent was or ever could have been the prevailing discount rate applicable to the year the plaintiff's interest was lost, or that the interest rate should be six percent compounded annually, we must agree it confirms the lack of substantial value of a possibility of reverter. 4/ The conditional character of the interest, and the time required before title or possession could revert under any circumstances would have materially reduced, if not destroyed, the marketability of the interest. The value of it, if any, was limited in the main to the persons already in possession under the leases, and as stated in the 1917 Reeves' Report to the Commissioner of Indian Affairs, 5/ its value ". . . even to them must have appeared remote."

Without evidence in the record which would enable us to compute the actual value of the possibility of reverter, the record nevertheless demonstrates that such value is, in fact, miniscule and less than the sum received by the Tuscarora Nation as proceeds of the land's sale by the State of North Carolina. Because the payment in 1832 of $3,220.71

4/ A difference in the rate of interest causes a considerable difference in the value of a reversion. The discount factor of $1.00 to be paid 113 years from date at 6 percent compounded annually is $0.00138, and the value of the reversion in that case would be $407.93, whereas at 5% compounded annually, the discount factor is $0.00403 and the value of the reversion would be $1,191.29.

5/ Defendant's Exhibit No. 2, p. 8.

to the Tuscarora Nation by the State of North Carolina constituted fair and adequate compensation for the surrender of the reversionary interest in the land, it follows that the United States incurred no liability under the Indian Claims Commission Act for having participated in that part of the negotiations of the Treaty of December 4, 1802, which resulted in the alienation of such interest.

Inasmuch as the parties have agreed that the sum of $7.19 per acre, which was the consideration for a lease of 113 years, is tantamount to the market value of the fee, there is no question as to the adequacy of the rental paid for the 2,917.5 acres first leased subsequent to the 1802 treaty. There remains, however, the question of the adequacy of the consideration received by the Tuscarora Nation for renegotiating and extending the leases covering 38,351 acres for an average period of 41 years. The United States participated in the negotiations which resulted in the Treaty of December 4, 1802, whereby the Tuscarora Nation was authorized to renegotiate the existing leases. We previously determined that this involvement imposed an obligation upon the United States to assure that the Tuscarora Nation was fairly and justly treated. 23 Ind. Cl. Comm. 140, 142 (1970). The 38,351 acres referred to were leased for $8,381.66 for 41 years, or an average of $0.0053 per acre per year. By comparison, the rent for the 2,917.5 acres leased for 113 years was $20,966.06, or $0.0636 per acre per year. The market value of the entire tract is agreed upon and nothing appears in the record to establish that one part was more or less valuable because of location, geographical characteristics, or any other reason.

We find, therefore, that the United States is liable, under the Trade and Intercourse Act, for the disparity between the rents received for the extensions of the existing leases and that received from similar and adjacent lands. The Tuscaroras should have received rentals at least equal to those they received for the portions of the 3,411 acres first leased after the 1820 treaty, namely, $0.0636 per acre per year. We find the amount the plaintiff should have received to be $99,790.46. (38,351 (acres) times $0.0636 (per acre) times 41 (years).)

An additional issue presented to us is the alleged failure of the plaintiff to proceed timely with the trial of its claim. Trial was commenced on February 1, 1967, and thereafter several continuances were requested by both parties and granted by the Commission. On September 9, 1970, continuation of the trial was rescheduled for May 3, 1971, ". . . subject to the provisions of Section 27(b) of the Indian Claims Commission Act". (Act of April 10, 1967, 81 Stat. 11.) At a hearing held May 10, 1971, the plaintiff was unable to proceed. The defendant then moved that the case be dismissed for lack of prosecution. On June 9, 1971, the case was reset for November 1, 1971, and the defendant's oral motion to dismiss was continued to the date of hearing. On August 27, 1971, the plaintiff moved that the record be closed and that the remaining issues be submitted on the briefs. On September 9, 1971, the defendant filed a response to the plaintiff's motion, agreeing to resolve the remaining issues upon the submission of briefs and renewed its motion for dismissal for want of prosecution.

Section 27(b), 25 U.S.C. § 70(v), supra, requires that a trial should commence on the date set forth in the trial calendar and that commencement of a trial be delayed no longer than one year for the reasons enumerated in the statute. Here trial had commenced in 1967 before this statute was enacted. In our opinion the statute does not require dismissal of plaintiff's case on this set of facts.

In view of the procedure suggested by the plaintiff to bring the trial to an early conclusion, and the absence of material harm to the defendant attributable to the delay, we will deny the defendant's motion of May 10, 1971, renewed on September 9, 1971, to dismiss this cause for want of prosecution.

In recapitulation, we determine that the Tuscarora Indian Nation was fairly and adequately compensated by the State of North Carolina for the relinquishment of a possibility of reverter, and that no liability attaches to the United States by reason of its participation in the negotiations which resulted in the alienation of that interest. We further conclude that the sum of $8,381.66 which was the consideration paid to plaintiff for the extension of leases of 38,351 acres of plaintiff's land was grossly inadequate and unconscionable within the meaning of Clause 3 section 2 of the Indian Claims Commission Act. The fair rental value of such land at the time of the extension of the leases was $99,790.46. Therefore, the plaintiff is entitled to

recover from the defendant under the Indian Claims Commission Act the sum of $99,790.46, less the consideration of $8,361.66 received, for a net amount of $91,428.80, subject to deductions for such gratuitous offsets as may be allowable.

Jerome K. Kuykendall, Chairman

Concurring:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner