BEFORE THE INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,	)	Docket No. 158
THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, et al.,	)	Docket No. 209
THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al.,	)	Docket No. 231
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: November 23, 1973

Appearances:

Aaron J. Kramer and George B. Pletsch, Attorneys for the Sac and Fox Tribe of Indians of Oklahoma. Schiff Hardin Waite Dorschel & Britton were on the brief.

Lawrence C. Mills, Attorney for the Sac and Fox Tribe of the Mississippi in Iowa. Mills and Garrett were on the brief.

Stanford Clinton, Attorney for the Sac and Fox Tribe of Missouri.

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

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

These cases are before us again on remand from the Court of Claims. In its per curiam opinion of November 12, 1971, the court stated that

it was "unable, on the present opinion and findings of the Indian Claims Commission in Docket Nos. 158, 209, 231 . . ., to determine if the Commission's ultimate conclusions as to valuation of the tracts involved are adequately supported by substantial evidence and untainted by legal error . . . ." Sac and Fox Tribe of Indians v. United States, 196 Ct. Cl. 548, 549 (1971). Accordingly, the court remanded these cases to the Commission "for further proceedings in conformity with this order, to supply more specific findings and reasoning as to the valuations adopted for the tracts involved in Docket Nos. 158, 209, 231." Id. at 550. We shall attempt in this opinion to provide additional reasons to support the conclusions we have reached on the values of the subject tracts on the dates they were acquired by the defendant.

In our decision of May 12, 1969, in these dockets, 20 Ind. Cl. Comm. 438, we determined the fair market value of four land cessions. We valued the interests of the Sac and Fox Nation in Royce Areas 175, 226 and 244, which it ceded to the United States under the treaties of September 21, 1832, 7 Stat. 374, September 28, 1836, 7 Stat. 517, and October 21, 1837, 7 Stat. 540, respectively, and the undivided one-half interest of the Iowa Nation in some 2,345,133 acres in Royce Areas 175, 226 and 244, which it ceded to the United States by the Treaty of October 19, 1838, 7 Stat. 568. The Commission concluded that the per acre value of Royce Area 175 was $0.90 in 1833 (plus an additional $240,000 for lead deposits), that Royce Area 226 was

worth $1.25 per acre in 1837, that Royce Area 244 was worth $1.10 per acre in 1838, and that the value of the 2,345,133 acre Iowa tract was $1.60 per acre in 1839. We entered final awards totalling $4,474,378.00 for the Sac and Fox plaintiffs and $1,795,506.40 for the Iowa plaintiffs. On May 11, 1970, the Sac and Fox plaintiffs filed a notice of appeal from our 1969 decision. The Iowa plaintiffs chose not to appeal our decision, and by the Act of July 6, 1970, 84 Stat. 376, Congress appropriated funds to satisfy our judgment in their favor.

The opinion of the Court of Claims is quite brief and gives us few clues as to what the court found lacking in our decision. The court merely states that

> the Commission's reasoning is too summary, and too lacking in detail and specificity to comply fully with 25 U.S.C. §70r(3) and to enable the court properly to exercise its review function; in this connection, the court cannot properly determine, from the present opinion and findings, whether there is a significant and unwarranted inconsistency between the valuations (or the theories underlying them) adopted in Docket Nos. 158, 209, 231, and that adopted, some nine months later, in closely related Docket No. 153.

196 Ct. Cl. at 549. The Commission has carefully examined its opinion and findings, in light not only of the majority and dissenting opinions of the Court in this case but also of the per curiam and concurring opinions in Seminole Indians v. United States, 197 Ct. Cl. 350, 455 F.2d 539 (1972) (remanding, Dockets 73 and 151, 23 Ind. Cl. Comm. 108 (1970)), and the order in United States v. Ponca Tribe of Indians,

197 Ct. Cl. 1065 (1972) (remanding, Docket 323, 24 Ind. Cl. Comm. 339 (1970)), in an attempt to discover what changes or additions would be necessary to satisfy the requirements of 25 U.S.C. §70r(3) as the Court of Claims sees them. Our conclusions make up the remainder of this opinion.

EVIDENTIARY FINDINGS

The Commission is of the opinion that its evidentiary findings adequately and accurately relate the facts as established by the evidence, and that more specific evidentiary findings are not necessary to satisfy the mandate of the Court of Claims. In findings 1 through 8 we described the parties and found they had standing to bring these claims, identified the subject lands, indicated the acreages of the subject tracts and their respective dates of cession, and listed the present-day Iowa counties which are included in the tracts. In finding 9 we described the climate of the subject tracts and found their temperatures, rainfall and growing season to be ideal for agricultural purposes. Finding 10 describes the six rivers which drain the subject tracts.

In finding 11 we found the topography of the subject tracts to be generally favorable to agriculture. In finding 12 we found that the soils of the area were excellent, and in finding 13 we described the crops which were grown by the early settlers. In finding 14 we indicated that there was adequate grazing for livestock within the subject areas as well as ample surface water both for human and animal consumption. We found, in finding 15, that there was adequate timber

to satisfy the needs of early settlers, and, in finding 16, that water power was sufficient to operate mills both for the sawing of timber and the grinding of grain into flour. In finding 17 we indicated that the subject tracts had adequate stone for building purposes, and coal for local consumption. In finding 18 we found that the subject tracts were readily accessible to new settlement by means of water transportation.

Findings 19 and 20 describe the entry of squatters onto the subject tract prior to the land being opened for public sale, the development of government within the area, the surveying of the area and establishment of land districts, and the enactment of the Pre-emption Law. Findings 21 and 22 describe the growth of population both within Iowa and in the neighboring areas of Illinois and Missouri. Finding 23 describes the effect of the Pre-emption Law and the operation of the "claims" clubs.

In findings 24 and 25 we found that at the time of the cessions there was a vast expanse of public lands in neighboring states available for purchase at the uniform price of $1.25 per acre. In finding 26 we described the public sale of lands within the subject tracts after they became open for settlement in 1838. In finding 27 we described the private sales of land which took place in the subject tracts between 1839 and 1849. We found that the average transaction during that period was of a tract of 70.2 acres at a price of $2.46 per acre. We further found that the continued availability of public land at $1.25 per acre prevented any rapid increase in land prices. In finding 28

we indicated the costs that a settler would face in improving his land, and in finding 29 described business conditions during the 1833 to 1839 period. In finding 30 we found that the highest and best use for the subject tracts was subsistence homestead farming including the raising of livestock for local consumption.

In finding 31 we discussed the views expressed by the plaintiffs' expert witnesses, Drs. Hammer and Barlowe. We found that the opinion expressed by these experts was based on a "bona fide market" approach, which we found to be unacceptable as not reflecting the actual conditions which would have affected the land market in the subject tracts as of their respective dates of cession. In finding 32 we discussed the views expressed by the defendant's expert witness, Dr. Murray. We found that Dr. Murray's opinion was based on a "market value" approach, which we found to be acceptable, although we found Dr. Murray's conclusions to be too conservative.

CONCLUSIONS OF VALUE

The Commission's conclusions on value appeared in findings 33, 42, 47, 50, and 53. We have decided that, with the exception of our findings and conclusions with respect to the Dubuque lead district (findings 34 through 42), some elaboration on the method we used to reach our conclusions is needed to satisfy the requirements of 25 U.S.C. §70r(3) as the Court of Claims interpreted them.

We valued the Sac and Fox interest in Royce Area 175 as of February 8, 1833, the effective date of the 1832 treaty. In finding 33 we indicated the various factors which a prospective purchaser of this tract would have taken into consideration in deciding on the price he would be willing to pay for the tract. We then stated our conclusion that the fair market value of the tract was $.90 per acre. The method we used to reach this result was as follows:

As a starting point for our evaluation we used the $1.25 per acre price at which public lands were being sold. We chose this price because the record contained no evidence of comparable private land sales prior to the date of taking. The prospective willing purchaser in 1833 would have had only the public land sales in Illinois and Missouri as a reference point to use in calculating the value of the subject tract.

We then considered the factors which a prospective purchaser might have found favorable and which would have increased the price he would have paid for Royce 175. These included, among others, the excellent soils of the area, its ideal climate, including both temperatures and rainfall, the presence of adequate water and building materials, and the availability of water transportation. In sum, the prospective purchaser would have realized that the lands of Royce 175 were superior to the public lands available for sale in Missouri and Illinois, and would have concluded that he could resell them for a price in excess of $1.25 per acre.

We then considered the various discounts that the prospective purchaser would have applied in his calculations. The primary discount would have been the size of the tract. Royce 175 contained more than 5 1/3 million acres of unimproved land. For the prospective purchaser to adapt the tract to its highest and best use he would have to subdivide it and resell it over a period of time. He would be faced with the costs of surveying, managing, and selling the land, as well as the interest payments on his investment money. Another discount factor would have been the remoteness of the greater portion of the tract. The mainstream of population growth was in Illinois and Missouri, and much of Royce 175 was far removed from these population centers.

Finally, we balanced the discount and plus factors and concluded that the 1833 purchaser of Royce Area 175 would have expected an overall discount of $.35 per acre from the $1.25 starting price, and therefore would have been willing to pay an average of $.90 per acre for the entire tract.

We valued the Sac and Fox interest in Royce Area 226 as of October 13, 1837, the effective date of the 1836 treaty. The factors we considered and our conclusion that the tract was worth $1.25 per acre are set out in finding 47. The method we used to reach this result was similar to that we used in valuing Royce 175. As the record contained no comparable private land sales that would have been known to an 1837 prospective purchaser, we again chose $1.25 per acre as a starting point. Among the positive factors we then considered were the excellence of the

soil and the climate, the good location of the land, and the political organization in adjacent southeastern Iowa. The negative factor we considered was the imminent opening of Government lands in Royce Area 175 to public sale. The prospective purchaser would have realized that the presence of millions of acres of public lands, comparable in quality to the lands of the subject tract, available for purchase at $1.25 per acre, would greatly depress the private land sales market. We concluded that the positive and negative factors would cancel each other and that the prospective purchaser would be unwilling to pay more than an average of $1.25 per acre for the entire tract.

The Sac and Fox interest in Royce Area 244 was valued as of February 16, 1838, the effective date of the 1837 treaty. In finding 50 we indicated the various factors which we considered in reaching our conclusion that the tract was worth $1.10 per acre. In reaching this result we again began our calculations with a base price of $1.25 per acre, as there were no comparable private sales in the record which would have been known to an 1838 purchaser. The positive factors we then applied to this base price related to the excellence of the subject tract for subsistence farming.

We then considered the negative factors that the prospective purchaser would have applied in calculating the price he would be willing to pay for the tract. We applied a small discount for the size of the tract. Because of the availability of millions of acres of public lands of comparable quality, the prospective purchaser would have expected to

hold the tract for a long time before he could sell it. Thus he would have faced the costs of surveying, management, and resale. An additional negative factor would have been the remoteness of the northern half of Royce 244.

Considering both the positive and negative factors we concluded that the 1838 prospective purchaser would have expected a $.15 per acre discount from the base price, and therefore would be willing to pay an average of $1.10 per acre for all of Royce Area 244.

We valued the Iowa interest in Royce Areas 175, 226 and 244 as of February 28, 1839, the effective date of the 1838 treaty. The factors which we considered in reaching our conclusion that this interest was worth an average of $1.60 per acre are indicated in finding 53. The method we followed in reaching our conclusion was similar to that we had used in valuing the Sac and Fox tracts.

We again used a basic price of $1.25 per acre as a starting point for our calculations. Although the record did contain evidence of some private land sales within the subject tract prior to the date of cession, the prospective purchaser would have considered these to be too few to serve as a basis for his calculations. He would have relied instead upon the $1.25 per acre price of public land.

We then considered the many positive factors which the prospective purchaser would have applied in deciding on the price he would pay for the Iowa interest. The Iowa tract contained excellent farmland; its soil and climate were ideal for subsistence farming. Much of the

area had already been settled, and local and territorial government existed within the tract. Public land sales were progressing at a rapid rate and it would have been evident to the purchaser that the population of southeastern Iowa was expanding rapidly. Furthermore the tract was favorably located, being situated along the path of westward migration. The prospective purchaser would have examined the limited private resale data available to him and discovered that land was being sold within the tract at an average price in excess of $2.30 per acre.

We then considered the discounts that the prospective purchaser would apply. The sole discount would have been for size. The Iowa tract contained in excess of 2 1/3 million acres. In reselling the tract the prospective purchaser would have to hold the tract for some time and incur the costs of management and sale. The size discount would have been somewhat reduced because most of the tract had already been surveyed and the purchaser could have thus avoided that cost.

We balanced the discount and plus factors and concluded that the 1839 purchaser of the Iowa interest in Royce Areas 175, 226 and 244 would have expected to pay $.35 per acre in excess of the base price, and therefore would have been willing to pay an average of $1.60 per acre for the entire tract.

DOCKET 153 DISTINGUISHED

The brief opinion of the Court of Claims in these cases appears to indicate that the court saw some inconsistencies between our valuation

in these cases and our valuation in Docket 153, Iowa Tribe v. United States, 22 Ind. Cl. Comm. 385 (1970). In Docket 153 we valued the respective interests of the Iowa Nation and the Sac and Fox Nation in Royce Area 262, a nearly 12 million acre tract to the west of and adjacent to Royce 244. We concluded that as of February 28, 1839, the Iowa interest had an average value of $.90 per acre, and that as of February 15, 1843, the Sac and Fox interest had an average value of $1.40 per acre. An examination of plaintiffs' appellate brief has led the Commission to believe that the apparent inconsistency which the court might have seen in our two decisions is that in Docket 153 we used as primary evidence of value the identical private land sales data which we refused to use in these dockets. We have reexamined our decision in Docket 153 and conclude that there is no inconsistency between the two valuations.

The valuation dates in the present cases were February 8, 1833, October 13, 1837, February 16, 1838, and February 28, 1839. The records of private land sales placed in evidence by the plaintiffs covered the period 1839 through 1849. Thus, it is clear that, with the exceptions of the few sales which had taken place prior to the 1839 Iowa cession, these private land sales would not have been known to a prospective purchaser on the valuation dates. The prospective purchaser could not have considered these sales in calculating the price he would be willing to pay for the subject tracts. For the same reason, when we valued these tracts we did not use this sales data as primary evidence of value.

In Docket 153, on the other hand, the valuation dates were February 28, 1839, and February 15, 1843. Therefore, much of the private sales data placed in evidence by plaintiffs would have been known to a prospective purchaser, especially at the 1843 valuation date. Such a purchaser would have taken these sales into account in calculating his purchase price for the subject tracts. In valuing these tracts, therefore, we did consider, as primary evidence of value, the records of private sales during the 1839 to 1849 period.

That our methods of valuation in the two decisions are consistent is illustrated by the manner in which we handled evidence of postcession land sales in Docket 153. In that case plaintiff not only introduced evidence of 1839 to 1849 private land sales in Royce Areas 175, 226 and 244, but also evidence of postcession sales in Royce 262, the subject tract in that docket. In rejecting such data as primary evidence of value we stated, "Resales of land in the cession area, we feel, do not carry great weight since they would not have been known to a purchaser on the valuation dates and because they reflect a land market with far different patterns of settlement than existed on the earlier valuation dates." 22 Ind. Cl. Comm. at 387. It seems clear that our treatment of evidence of postcession private resales within

the subject tracts was identical in Docket 153 and in the present cases.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner