

BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 74
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: July 15, 1976

Appearances:

Arthur Lazarus, Jr., William Howard Payne, and Marvin J. Sonosky, Attorneys for the Plaintiffs.

Craig A. Decker, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

Docket 74 is before us again after being appealed to the Court of Claims. Prior to the case being appealed, the Commission decided (1) that under the Treaty of Fort Laramie of September 17, 1851, the "Sioux or Dahcotah Nation" possessed recognized title to a large tract of land in North and South Dakota, Montana, Wyoming and Nebraska (Sioux Fort Laramie land), 21 Ind. Cl. Comm. 371 (1969), amending 15 Ind. Cl. Comm. 575 (1965); (2) that the "Sioux or Dahcotah Nation," as that term was used in the 1851 Fort Laramie Treaty, consisted of the Teton (Docket 74) and Yankton (Docket 332-C) divisions of Sioux, and that the Teton Sioux possessed an undivided 83% interest in the Sioux Fort Laramie land and the Yankton

Sioux an undivided 17% interest in that land, 24 Ind. Cl. Comm. 147 (1970); and (3) that the Teton and Yanktonai Sioux (Docket 74) possessed aboriginal title to a tract of land in North and South Dakota, which interest was extinguished by the Treaty of April 29, 1868, 23 Ind. Cl. Comm. 419 (1970). We also denied defendant's motion to dismiss Docket 74 for lack of jurisdiction, 28 Ind. Cl. Comm. 204, 217 (1972).

In its decision on appeal, 205 Ct. Cl. 148 (1974), the Court of Claims affirmed nearly all of the Commission's rulings. However, the court did remand to the Commission for further proceedings the question of the respective interests of the Teton and Yankton Sioux in the Fort Laramie land.^{1/} The court instructed us to determine whether there is sufficient evidence to ascertain the respective interests of the Teton and Yanktons on the basis of use of the land rather than population. Trial on this issue was held on January 20, 21, and 22, 1976, and we will decide it in a later decision.

In this decision we are concerned with valuing the land which the United States obtained from the plaintiffs by means of the Treaty of

^{1/} The court also reversed the Commission's decision allowing the plaintiffs to amend their petition to include a claim for lands lost under the 1851 Fort Laramie Treaty.

April 29, 1868, 15 Stat. 635. This land consists of two adjacent areas separated by the Missouri River. The area east of the Missouri River, in North Dakota and South Dakota, contains 14,273,000 acres. The plaintiffs had aboriginal title to this area. The area west of the Missouri, in North Dakota, Montana, Wyoming, and Nebraska, contains 33,869,000 acres. This area consists of all of the Sioux Fort Laramie land outside of the Great Sioux Reservation (which was created by the 1868 treaty, supra). The plaintiffs owned an undivided share of recognized title in this area.^{2/}

In its entirety the Sioux tract contains 48,142,000 acres. The date of valuation is February 24, 1869, the effective date of the 1868 treaty.

Although covering a fairly extensive area, the Sioux tract possesses a uniform topography which is not marked by sharp variations. With the exception of mountain ranges in the extreme west, the tract is characterized by gently rolling plains and moderate hills, occasionally broken by deeper canyons.

^{2/} Under articles XI and XVI of the 1868 treaty, the plaintiffs retained the right to hunt over most of the Sioux Fort Laramie land, and acquired the right to hunt on lands outside that area. These rights were extinguished by the Act of February 28, 1877, 19 Stat. 254. The Commission has previously determined that, in order to compensate the plaintiffs for the loss of these hunting rights, the portion of the subject tract west of the Missouri River would be valued without deduction for hunting rights retained by the Sioux. See Sioux Tribe v. United States, 23 Ind. Cl. Comm. 358, 367-68 (1970); Sioux Nation v. United States, 24 Ind. Cl. Comm. 98, 101-02 (1970).

The subject tract has a four season temperate climate with hot summers and cold winters. Mean annual temperatures range from 36° to 50° F. The growing season ranges from a low of 100 to 120 days in North Dakota to a high of 140 to 160 days in Nebraska. In the eastern unit of the tract the annual precipitation is between 16 and 24 inches, which falls mainly during the growing season. In the western part of the tract annual precipitation is between 14 and 22 inches, with the bulk of the rain again falling during the growing season.

In general the Sioux tract was adequately watered. Several major rivers and many lesser streams and creeks traversed the tract. However, there were some areas where water supplies were intermittent, and where storage dams or wells would have had to be constructed to provide adequate water for year-round stock raising.

The soils in the subject tract were uniform over extensive areas of the prairie and are dominated by Chestnuts, Browns, Lithosols, Chernozems, and Regasols. The soils in the river and stream valleys were generally of high fertility. At the valuation date the tract was covered with a rich growth of native grasses.

The Union Pacific Railroad passed immediately to the south of the subject tract. At the valuation date the line had been constructed from

Omaha, through North Platte, Nebraska, as far west as Cheyenne, Wyoming. The Northern Pacific Railroad was chartered by Congress to build a line from Lake Superior through Minnesota and Dakota and farther west. The projected route of the line was to pass through the subject tract. By the date of valuation the line had been constructed to a point about 150 miles east of the tract.

The Missouri River was a major avenue of commercial traffic at the valuation date. It flowed for 240 miles through the center of the subject tract. The Oregon Trail, the major route to the West before the construction of the railroads, was located along the southern boundary of the Sioux tract.

Plaintiffs' appraisers were Mr. Frank R. Kleinman, Jr., and Mr. Donald D. Meyers. Mr. Kleinman and Mr. Meyers are qualified land appraisers and members of the American Institute of Real Estate Appraisers. In their appraisal report Messrs. Kleinman and Meyers divided the Sioux tract into two highest and best use areas. They assigned 8,496,000 acres to agricultural land and 39,646,000 to grazing land. Plaintiffs' appraisers concluded that on the date of valuation the agricultural land in the Sioux tract had a fair market value of \$20,000,000, and the grazing land had a fair market value of \$42,000,000. They thus arrived at an appraisal of \$62,000,000 for the entire tract.

Defendant's appraiser was Dr. William G. Murray. Dr. Murray is a qualified land appraiser and a member of the American Institute of Real Estate Appraisers. In his appraisal report Dr. Murray divided the Sioux tract into three use areas. He classified 14,000,000 acres as farming or tillable lands, 32,000,000 acres as grazing lands, and the remaining 2,142,000 acres as nonproductive lands. Dr. Murray concluded that on the valuation date the farmland in the tract had a fair market value of \$6,300,000, the grazing land had a fair market value of \$5,600,000, and the nonproductive lands had a value of \$135,000. His appraisal for the entire tract was \$12,035,500.

Agricultural Land.

The agricultural potential of the eastern portion of the subject tract was well known on or near the valuation date. Contemporary reports praised the excellent farmland of eastern Dakota. Although the western portion of the tract was not as well known at the date of valuation, there was some indication that a substantial number of acres of farmland were present west of the Missouri.

Although the parties' expert witnesses disagree concerning the extent of the agricultural land in the Sioux tract, the defendant, in its proposed findings of fact, has adopted the estimate of the plaintiffs' appraisers. After weighing the evidence, including the expert opinion of Messrs. Kleinman and Meyers, we have found that on the valuation date the Sioux tract contained 8,496,000 acres of farmland, of which 5,709,000 acres were located east of the Missouri, and 2,787,000 acres were located west of the Missouri.

The nearest sales of farmland to the agricultural land in the Sioux

tract around the valuation date occurred in Bon Homme, Clay, Union, and Yankton counties, South Dakota. The record contains evidence of 403 of these sales during the years 1863 through 1869. These sales involved a total of 29,730 acres, and were sold for an aggregate consideration of approximately \$175,000. The average sale price was about \$5.90 per acre.

The record also contains data on state school land sales. Between 1862 and 1869, Minnesota sold more than 380,000 acres of school lands at an average price of \$6.15 per acre. Nebraska had sold more than 100,000 acres by the beginning of 1877 at an average price in excess of nine dollars per acre. Kansas school land sales between 1865 and 1875 totalled more than 110,000 acres at an average price of \$4.32 per acre.

Sales data of railroad grant lands are also included in the record. This evidence indicates that millions of acres of railroad lands were selling for average prices generally in excess of four dollars per acre.

The method used by plaintiffs' appraisers to value the agricultural land is summarized in finding of fact 48. Messrs. Kleinman and Meyers based their estimate of the amount of agricultural land in the subject tract on their examination of descriptions of the subject tract and its climate, contemporary accounts of the suitability of the land for crop raising, and on federal census data. We find that their conclusion is supported by the evidence and we adopt it.

In valuing the agricultural lands, Messrs. Kleinman and Meyers placed great weight on their analysis of the sales of southeastern Dakota farmland. They excluded from consideration 38 sales for prices over \$20 per acre as probably involving improved lands, and four sales for

prices less than \$1.00 per acre as probably not being arms-length transactions. For the remaining sales the appraisers calculated an average price of \$5.41 per acre and a weighted average of \$5.44 per acre. Messrs. Kleinman and Meyers also analyzed sales of state school lands, sales of railroad grant lands, and private land sales in Iowa.

Based on their analysis of the sales data, plaintiffs' appraisers hypothesized that a purchaser of the Sioux tract could anticipate reselling the agricultural lands at an average price of \$5.00 per acre over a period of years. They estimated that the 1869 purchaser would be willing to pay between \$2.50 and \$3.00 per acre for the farm land east of the Missouri, and about \$1.80 for the farm land west of Missouri. They concluded that agricultural land east of the Missouri had a fair market value of \$15,000,000 or \$2.63 per acre, and that agricultural land west of the Missouri had a value of \$5,000,000, or \$1.79 per acre. Their total appraisal for the agricultural land in the Sioux tract was \$20,000,000.

We find some faults in the appraisal by Messrs. Kleinman and Meyers. For example, they did not make adequate allowance for the likelihood that many of their sales involved improved lands. In Docket 74-B, which involved the same plaintiffs and in which Mr. Meyers was the appraiser, land sales from Clay, Union, and Yankton counties in the years 1875, 1876, and 1877 were used as comparable sales. In his appraisal in that docket, Mr. Meyers stated that he considered all sales for prices in excess of \$12.00 per acre as probably involving improved land. In this docket Messrs. Kleinman and Meyers only exclude as probably improved those sales for

prices higher than \$20.00 per acre. We think it highly unlikely that the prices paid for lands with improvements in the same southeast Dakota area would have been higher in the years 1863 through 1869 than they were in the years 1875 through 1877. In Docket 74-B the Commission considered all sales for prices in excess of \$10.00 per acre as probably involving improved land. We shall do the same thing in this docket.

A large number of the sales used by the plaintiffs' appraisers involved small tracts of land. Nearly 175 of the southeast Dakota sales involved tracts of less than 40 acres. Of these, more than 140 sales involved tracts of 20 acres or less. The Commission is of the opinion that a tract of less than 40 acres could not have served as an economically sound farm in Dakota during the 1860's. Therefore sales of tracts of land of less than 40 acres are not comparable sales for the purpose of evaluating agricultural land in the Sioux tract.

Dr. Murray, defendant's appraiser, arrived at his estimate of the number of acres of farmland within the tract by analyzing the field notes of the government surveyors of these tracts. Dr. Murray concluded that the tract contained 14,000,000 acres of farmland. In its proposed findings and brief, the defendant adopted the farm acre estimate of the plaintiffs' appraisers rather than that of Dr. Murray.

Dr. Murray's appraisal of the farmland in the Sioux tract was based on his interpretation of public land entries and sales in two areas in Nebraska. The data used by Dr. Murray were not sale prices, but rather the numbers of entries made under the public land law. From this data Dr. Murray estimated the demand for farm land within the subject tract.

Dr. Murray hypothesized that the purchaser of the Sioux tract would have been able to resell the better quality farmland at a price near \$1.25 per acre over a period of from 5 to 15 years. He concluded that the purchaser would be willing to pay 65 cents per acre for this land in 1869. He further hypothesized that it would require between 10 and 25 years to resell the lower quality farmland. He concluded that a purchaser in 1869 would be willing to pay only 25 cents an acre for this land. Applying an average 45 cents per acre to his estimate of 14 million acres of farmland, Dr. Murray arrived at an appraisal of \$6,300,000.^{3/}

We are unable to accept Dr. Murray's appraisal of agricultural land. Dr. Murray's assumption that the better farmland within the tract would sell at a price of only \$1.25 per acre is unsupported by any evidence. His market data did not indicate any sales prices. On the other hand there is a great deal of evidence in the record which indicates that the farmland in the tract would resell at prices far in excess of \$1.25 per acre.

The underlying assumption of Dr. Murray's appraisal seems to be that the market for land in the midwest during the 1860's was solely a buyer's market. He assumes that our hypothetical willing seller would be forced to sell at whatever price was offered by our willing purchaser, and that our purchaser would in turn be forced to resell the land at prices not significantly higher than \$1.25 per acre. These assumptions are contrary to the concept of fair market value and to the evidence, and are erroneous.

^{3/} Although it rejected Dr. Murray's figure of 14 million acres of farmland, the defendant did adopt both Dr. Murray's 45 cents per acre and total appraisal of \$6,300,000.

In his own valuation report, Dr. Murray defines fair market value as "the worth of a property measured by the price arrived at in free and open negotiations between a well-informed seller who is able, willing, and under no compulsion to dispose of his property, and a well-informed buyer who is able, willing, and under no compulsion to buy the property in question." His definition is in accord with the legal definition which the Commission and the courts have applied in numerous cases. Yet, in his appraisal, Dr. Murray is concerned solely with what a purchaser would be willing to pay for the subject tract. In fact, as we have stated, he seems to assume that the seller would accept whatever price the buyer offered. Certainly this would not be true of a seller who was under no compulsion to sell his land.

Similarly Dr. Murray assumes that after purchasing the Sioux tract the hypothetical seller would resell the land at or about the public land price of \$1.25 per acre. The record, on the other hand, shows that agricultural land would sell at considerably higher prices despite the availability of public lands selling at \$1.25 per acre.

In our finding of fact 47 we have briefly described the activities of land speculators in Iowa. Although the land speculation period in Iowa was earlier in time than would be the resale period in the subject tract, and the Iowa lands were overall better in quality than the farm land in the Sioux tract, the Commission is of the opinion that the method of operation of the Iowa speculators can serve as a model for our hypothetical purchaser. As the experience of James Easley shows, for example, the large land speculator would have sufficient resources to

purchase extensive tracts of land, set a resale price for those lands, and hold them until such time as the resale price was met. He would be in no hurry to sell and would refuse to sell for less than his asking price. He surely would not sell the land as rapidly as possible, at or near the public land price, as Dr. Murray suggests.

Finally, there is no support for Dr. Murray's assertion that resale of the land could not begin until 1874. A hypothetical purchaser of the Sioux tract would begin placing his land on the market immediately. Since these lands would not be public lands there would be no need to await public surveys.

The Commission concludes that the 8,496,000 acres of agricultural land in the Sioux tract would have contributed \$14,925,000 to the fair market value of the subject tract. Of this amount, \$11,135,000 is attributable to the agricultural lands east of the Missouri River, and \$3,790,000 to the agricultural lands west of the Missouri River. In reaching this conclusion we relied primarily on the lands sales in southeast Dakota. We excluded those sales with per acre prices in excess of \$10.00, and those sales involving tracts smaller than 40 acres. In our calculations we applied a discount for size of about 50% with respect to the eastern lands, and discounts for size, lesser quality, and remoteness totalling about 65% with respect to the western lands.

Grazing Land

Prior to the valuation date, it was known that the subject tract had a tremendous potential for cattle raising. Its excellent and extensive grasslands, its proximity to cattle markets, the rapidly decreasing availability of other grazing land, and the possibility of obtaining

legal title to the land, would have made the Sioux tract extremely desirable to large scale cattle operators. When it became available for grazing, sometime after the valuation date, the Sioux tract rapidly filled with cattle.

Grazing was a use to which land would be put in the absence of a more economically rewarding use. Excluding those acres which had a highest and best use for agriculture we have calculated that 39,646,000 acres of the subject tract had a highest and best use as grazing land. Of this amount 8,564,000 acres were located east of the Missouri and 31,082,000 acres were located west of the Missouri.

The appraisal of the grazing land by Messrs. Kleinman and Meyers is summarized in finding of fact 57. The plaintiffs' appraisers used a comparative sales method to reach the value of the grazing lands in the Sioux tract. This method was keyed to their calculations of the cattle carrying capacities of the tract and of the comparable sales areas. Relying on Soil Conservation Service recommended stocking rates for range sites within the subject tract, and applying a 30% discount for the hazards of the range, the appraisers concluded that the subject tract could support 1,116,849 head of cattle on a sustained yield basis. We are of the opinion that Messrs. Kleinman and Meyers were too optimistic in their calculations. The unequal water distribution in the tract, and the fact that some areas of the tract were considered less suitable for grazing, has led the Commission to discount by an additional 10% in calculating carrying capacity.

In their analysis, Messrs. Kleinman and Meyers relied upon sales by the Atlantic and Pacific, Union Pacific, and Central Pacific railroads, and the Matador, Espuela, Francklyn and Maxwell ranches. They compared these sales with the grazing lands of the Sioux tract on the basis of their respective carrying capacities. Based on the sales prices and the carrying capacities of the comparable sales they calculated that the tracts sold at prices per animal unit ranging from \$36.36 to \$55.67. Applying these figures to their estimate of the carrying capacity of the Sioux tract they came up with a value range for the tract of \$40,608,629 to \$62,174,976. They then applied varying discounts to the comparable sales statistics to account for such factors as remoteness in location, remoteness in time, and the differences in cattle prices and tenure of sale. The discounted figures resulted in a value range of \$36,543,299 to \$55,954,134 for the grazing land of the Sioux tract. Messrs. Kleinman and Meyers concluded that in their opinion the grazing land of the subject tract had a value of \$42,000,000, of which approximately \$13 1/3 million was for land east of the Missouri and \$28 2/3 million for land west of the Missouri.

The appraisal by Messrs. Kleinman and Meyers suffers from some faults. As we have already stated, their estimate of the cattle carrying capacity of the subject tract is too optimistic. Furthermore, their estimates of the cattle carrying capacities of the comparable sales areas are inconsistent with previous findings of the Commission. In Docket 74-B, involving the same plaintiffs, some of the same comparable sales were used by the plaintiffs' appraiser. In arriving at estimates of carrying capacities

for these tracts in Docket 74-B, plaintiffs' appraiser applied a discount of 25% to the Soil Conservation Service figures. The Commission accepted this method and its findings were based on such a discount. See 33 Ind. Cl. Comm. at 293.^{4/} In this docket plaintiffs' appraisers have applied a 30% discount to Soil Conservation Service figures and have come up with different results. Obviously, the same land cannot have two different carrying capacities on the same date. Plaintiffs' appraisers should have applied the same 25% discount that was applied in Docket 74-B.

The Commission is also of the opinion that the final discounts applied by Messrs. Kleinman and Meyers to account for differences between the comparable sales and the hypothetical sale of the Sioux tract were too low. For example, Messrs. Kleinman and Meyers did not provide a discount for the presence of buffalo on the Sioux tract. Millions of buffalo ranged the subject tract in 1869 and would have impeded the immediate development of large cattle ranches. This was not true of the comparable tracts, all of which were sold after the buffalo herds had been largely destroyed. Further, plaintiffs' appraiser did not discount

^{4/} The Commission now discovers that its finding as to the carrying capacity of the Union Pacific sales was erroneous in Docket 74-B. The error resulted from an arithmetical error by plaintiffs' appraiser which was overlooked by both the plaintiffs and the Commission. A review of the record indicates that correcting the error would not have produced a substantial change in our value conclusions in Docket 74-B. In this docket we have used the proper figures.

for the checkerboard pattern of the railroad comparable sales, although in previous decisions the Commission has repeatedly ruled that such a discount is warranted. See, e.g., Sioux Nation v. United States, Docket 74-B, 33 Ind. Cl. Comm. 151, 181 (1974); Hualapai Tribe v. United States, Docket 90, 17 Ind. Cl. Comm. 456, 526-28 (1966).^{5/}

Dr. Murray's appraisal of the grazing land of the tract is summarized in finding of fact 58. On the basis of his evaluation of the field notes of government surveyors, Dr. Murray estimated that the Sioux tract contained 32,000,000 acres of grazing lands.

Dr. Murray based his appraisal of grazing land on his analysis of eight factors which he felt would affect the market value of these lands. These factors included the open or free range policy, the carrying capacity of the tract, control of water, weather, and marketing of cattle. Dr. Murray concluded that the value of the grazing land would lie between 10 and 25 cents per acre, with an average of 17 1/2 cents per acre. Applying this figure to his estimate of 32,000,000 acres of grazing land, Dr. Murray valued the Sioux tract grazing land at \$5,600,000.^{6/}

^{5/} Plaintiffs' appraisers actually concluded that the fact that some of the comparable sales were in checkerboard patterns rather than solid blocks would have enhanced the fair market value of the Sioux tract.

^{6/} Dr. Murray estimated that 2,142,000 acres of the Sioux tract were nonproductive lands. He gave these lands a nominal value of 6 cents per acre for a total of about \$135,500.

We must reject Dr. Murray's appraisal. Dr. Murray does not explain how he reaches his conclusions. We are unable to tell from Dr. Murray's report the method he used in transforming the general factors he says would have affected value into an actual value figure. Dr. Murray makes no use of market data in his appraisal. In fact, until he reaches his 17 1/2 cent conclusion he does not show any indication of the money value of grazing land. We must conclude that Dr. Murray's valuation is nothing more than his unsupported opinion. It is not supported by any evidence.

In valuing the grazing land of the subject tract, the Commission has used the comparative sales approach of plaintiffs' appraisers. We have found that the carrying capacity of the Sioux tract on the valuation date was 957,300 head, of which 303,600 head would have been east of the Missouri and 653,700 head west of the Missouri. We applied to these carrying capacities the prices per animal unit of the comparable sales tracts after applying adequate discounts.

The Commission concludes that the 39,646,000 acres of grazing land would have contributed \$30,760,000 to the fair market value of the subject tract. Of this amount, \$9,760,000 is attributable to grazing land east of the Missouri River, and \$21,000,000 to grazing land west of the Missouri River.

In sum we conclude that the fair market value of the Sioux tract

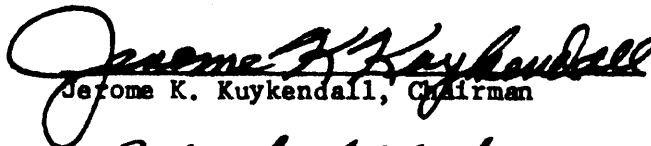
on February 24, 1869, was \$45,685,000.00. This value may be broken down as follows

	<u>East of the Missouri</u>	<u>West of the Missouri</u>
Agricultural	\$11,135,000	\$ 3,790,000
Grazing	9,760,000	21,000,000
Total	\$20,895,000	\$24,790,000

This case shall proceed to a determination of consideration and all other remaining issues.

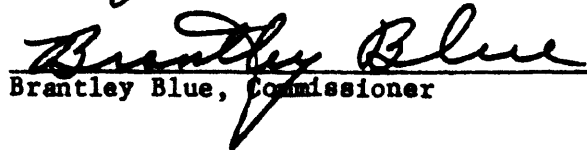

 John T. Vance, Commissioner

We Concur:


 Jerome K. Kuykendall, Chairman


 Richard W. Yarborough, Commissioner


 Margaret H. Pierce, Commissioner


 Brantley Blue, Commissioner