BEFORE THE INDIAN CLAIMS COMMISSION

SENECA-CAYUGA TRIBE OF OKLAHOMA AND PETER BUCK, STEWART JAMISON, RUBY CHARLOE, DAVID CHARLOE AND LEWIS WHITEWING, MEMBERS AND REPRESENTATIVES THEREOF,	)	
Plaintiffs,	)	
v.	)	Docket Nos. 341-A and 341-B
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: April 4, 1974

Appearances:

Paul G. Reilly, Attorney for the Plaintiffs.

Roberta Schwartzendruber, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The claims asserted in these dockets arise out of the Treaty of February 28, 1831, 7 Stat. 348, in the case of Docket 341-A, and the Treaty of July 20, 1831, 7 Stat. 351, in the case of Docket 341-B. By opinion of December 29, 1971, the Commission found that the defendant had breached its duty under said treaties and ordered the cases to proceed for the purposes of (1) determining the fair market value of the lands involved and the resulting damages, if any, caused by defendant's breach, and (2) resolving the accounting issues. 26 Ind.

Cl. Comm. 625 (1971). On December 7, 1972, the Commission issued its decision on the accounting phase of these claims. 29 Ind. Cl. Comm. 262 (1972).

These cases are now before us on the issue of the fair market value of the lands involved and the damages, if any, plaintiff sustained as a result of defendant's breach of the 1831 treaties. The cases were tried on April 16, 1973.

In the previous findings entered in these dockets the Commission set forth the pertinent provisions of the treaties herein involved.[1/] Briefly restated, the plaintiffs ceded to the United States by separate treaties executed in 1831, the Sandusky Reservation (Royce Area 163), and the Lewistown Reservation (Royce Area 164), with provisions for the public sale of the lands and the payment of the proceeds to the Indians, less certain specified deductions.

With reference to the Sandusky Reservation, Article 8 of the Treaty of February 28, 1831, supra, provided, in part, as follows:

> Art. 8. The United States will expose to public sale, to the highest bidders, at such time and in such manner as the President may direct, the tracts of land herein ceded by the Seneca Indians: . . .

With reference to the Lewistown Reservation, Article VIII of the Treaty of July 20, 1831, supra, provided in part:

> Article VIII. The United States will expose to the highest bidders, in the manner of selling the public

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1/ See 26 Ind. Cl. Comm. at 635.

> lands, the tracts of land herein ceded by the Senecas and Shawnees: . . .

The Commission determined that at the time of the treaties the sale of public lands was governed by the Act of April 24, 1820, 3 Stat. 566, which provides, in part, that no lands shall be sold at either private or public sale for "less price than one dollar and twenty-five cents" and that the sales authorized by the act shall "be kept open for two weeks and no longer."[2/] In the case of the Sandusky Reservation, we found that the public sale commenced on December 11, 1832, and closed on December 20, 1832, and that 18,449.34 acres (or about 44.4 percent of the available lands) had sold, at an average price of $2.09 per acre. In the case of the Lewistown Reservation, we found that the public sale commenced on December 28, 1832, and closed on December 29, 1832, and that 3,553.22 acres (or about 9.15 percent of the available lands) had sold, at an average price of $1.74 per acre.[3/] In neither case had the sales remained open the full two weeks required by law. For this reason, the Commission concluded that the United States failed in its duty to the plaintiffs when it sold the lands otherwise than in the manner specified under the provisions of the 1831 treaties. 26 Ind. Cl. Comm. 625, 630.

2/ Fdg. 7, 26 Ind. Cl. Comm. 625, 639.

3/ Fdgs. 9 and 11, 26 Ind. Cl. Comm. 625, 640.

The plaintiffs contend, on the basis of expert testimony and other evidence, that the fair market value of all the lands in both reservations was $186,690. They therefore claim in damages $71,235.71, calculated as the difference between the $115,454.29 gross proceeds ultimately realized from the sale of the subject lands, and the lands' fair market value. Defendant contends that the fair market value of the two tracts was $76,712, and that since the ultimate sales of the lands netted a larger sum, the plaintiffs were not damaged.

The parties have stipulated that the lands which were to be sold for the benefit of the plaintiffs consisted of 41,528 acres in Royce Area 163 (Sandusky Reservation), and 38,184 acres in Royce Area 164 (Lewistown Reservation), or a total of 79,712 acres in both reservations. Both tracts were situated in northwesterly Ohio. Royce Area 163 was located on the east side of the Sandusky River, about 85 miles due north of Columbus and 20 miles from the Lake Erie shore. The greater part of this tract, approximately four-fifths, was located in Seneca County and the remainder in southern Sandusky County. Royce Area 164 was located on the headwaters of the Miami River just north of the Greeneville Treaty line in the middle of the western half of Ohio, about 55 miles northwest of Columbus. The greater part of the tract was in northwest Logan County and the rest in Shelby and Allen (now Auglaize) Counties. The tracts were approximately 50 miles distant from each other.

As evidence of the value of the subject tracts, both parties rely substantially on the testimony, reports, and supporting documentation

of expert witnesses. Dr. Roger K. Chisholm, an agricultural economist, testified on behalf of plaintiffs, and Mr. Richard B. Hall, a real estate consultant and appraiser, testified for the defendant.

There appear to be no serious differences between the parties with respect to the description of the subject lands in terms of location, topography, soil condition and quality, and climate. Plaintiffs, in their brief, have relied to some extent on defendant's reports and exhibits, and both parties rely on a surveyor's field notes taken in a survey of the subject lands between August and November 1832 to reach conclusions as to the quality of the soils therein. Dr. Chisholm did not, however, examine the field notes for purposes of preparing his valuation report.

The surveyor's notes made in late 1832 afford an overall view of the reservations in their original condition. The description in the notes is representative of contemporary standards for judging land quality and is of the kind potential purchasers would have understood. Cf. Sac and Fox Tribe of Missouri v. United States, Docket 195, 13 Ind. Cl. Comm. 295, 315 (1964).

We find, based on the surveyor's notes, and in the absence of better evidence of land quality, that approximately two-thirds of the acreage in Area 163, including most of the river frontage, contained rich soils mixed with some good soils, and the balance contained poor, or third-rate soils. In the case of Area 164, we find the amount of rich and good soils to have been substantially less.

Both parties assumed that as a consequence of the breach by defendant of the 1831 treaties the entirety of both tracts was subject to valuation. In our 1971 opinion, supra, at 629, the Commission was quite specific that the advertising for and conduct of the auction sales was proper. The sales themselves were not tainted in any way by defendant's closing of the auction short of the prescribed two-week period. The breach was only partial, with liability for any damages appropriate thereto.

As a result of that opinion, plaintiffs' claims were already circumscribed and confined to the lands which were not sold at auction. Our concern therefore is limited to the 34,631 acres that remained unsold in Area 164 and the 23,079 acres remaining unsold in Area 163. It was these lands that were to be valued. Accordingly, comparable sales should have been related to the acreage which was not sold during the auction, hereinafter referred to as the valuation lands.

The valuation dates for the valuation lands are the respective dates of defendant's breaches of the treaties, i.e., the dates immediately following the dates that the auctions ceased improperly. Thus, December 21, 1832, is the valuation date for the Area 163 lands, and December 30, 1832, is the valuation date for the Area 164 lands. The parties erred in using the dates of cession as the valuation dates.

In our findings of fact we have examined the evidence pertaining to population growth, migration movements, economic trends, and other

factors related to the economic development of Ohio in the 1830's, and their effect on the subject areas.

The subject areas were remote and isolated from Ohio's major population centers to such a degree that they were not directly affected by the economic growth these centers were experiencing in the 1830's. For example, although large towns such as Dayton and Cincinnati enjoyed economic and industrial growth, the sales abstracts of the auctioned lands disclose no purchasers from any of these relatively distant areas. Canal building in other parts of the state did not, at the early stage of the so-called canal boom, influence transportation entering or leaving the subject areas. None of the canals ultimately completed would ever cross the subject areas, and the rivers in and around the subject areas were not large enough to permit navigation by large vessels. Transport in and around the subject areas was not well developed, and migration and industrial development did not grow rapidly in the subject areas.

To arrive at the fair market value of the subject lands, Dr. Chisholm examined deed records of land sales in and near subject tracts. Plaintiffs submitted, as to Area 163, a record of approximately 1200 transactions in Seneca County which took place between 1831 and 1836. Of these transactions, plaintiffs selected 275 sales, in and adjoining the reservation, in which 46,246 acres were involved. The total consideration for these sales was $117,025, which yielded an average of $2.53 per acre. For Area 164, plaintiffs found that only 30 comparable sales took place in the 1831-36 period, yielding $8,714, or an average of $2.39 per acre.

To sales after 1831, plaintiffs' expert applied an adjustment factor computed by dividing a price index for each year by the index for 1831. According to plaintiffs, the adjustment factor is applicable because land prices frequently reflect changes in the general price levels at large. Thus, plaintiffs arrive at an adjusted fair market value of $2.35 for Area 163, and $2.34 for Area 164.

The Commission has considered one of the best indicators of market value to be the price paid for lands which were sold on or about the valuation date, and which were comparable in quality and quantity to the area being valued. See Miami Tribe v. United States, Docket Nos. 253, et al., 22 Ind. Cl. Comm. 92 (1969). However, we find the comparability of plaintiffs' sales seriously deficient.

Plaintiffs' claim of comparability is based solely on the fact that the sales data treats lands in or adjoining the subject tract. The plaintiffs have presented no evidence that the lands sold in the private transactions utilized for valuation purposes were comparable to the subject lands. Except for plaintiffs' statement that they eliminated certain sales that may have shown intrafamily transactions, duress or government sales, plaintiffs have not indicated any other criteria upon which their selection was based. While it appears that a large part of the sales data submitted by plaintiffs includes resales of certain lands within the subject tracts, factors such as improvements, location, or soil quality of the lands involved in these sales, are not indicated.

In addition, plaintiffs do not distinguish between the lands sold at the auction and the lands remaining unsold at the conclusion of the auction. The evidence shows that the best lands were sold at auction. Sales data should be shown to refer to land of the quality of the tracts remaining at the conclusion of the auction in order to be considered comparable. Plaintiffs did not attempt to make such a showing.

Finally, plaintiffs ignored the best comparable sales evidence, that is, the prices obtained from sales of reservation lands at the respective auctions held immediately preceding the valuation dates.

For these reasons, we reject plaintiffs' contentions as to fair market value.

The defendant's appraiser, Mr. Hall, based his opinion of the fair market value of the two reservations on an analysis of the sales of the lands in said tracts under the pertinent treaties. Mr. Hall arrived at his value conclusions by taking from the sales abstracts the aggregate acreage sold of each reservation and the total purchase price, and computing therefrom the approximate average per acre price. His aggregate sales figure, it is noted, includes public auction sales as well as the subsequent private entry sales of the lands remaining in the tracts after the auctions. Assuming a single purchaser for the entire tract, who would resell in individual parcels, Mr. Hall then discounted the per acre price to account for development and holding costs, and profit for the purchaser.

In the case of Area 163, the sales records show that the lands therein ultimately sold for an average of $1.61 per acre, and in Area 164, at an average of $1.31 per acre. Mr. Hall used a discount formula of 75% for the land and 25% for overhead and profit for Area 163. For Area 164, the discount formula was on a 50-50 basis. Thus, the appraiser arrived at a fair market value of $1.245 per acre (75% of $1.66) in Area 163, and $0.655 per acre (50% of $1.31) in Area 164.

We agree with defendant's contention that the actual sales of the subject lands are good evidence of value. In effect, defendant sought to develop a comparable sales index by an analysis of the prices the subject lands sold for during the several years it took to dispose of them. However, we do not agree with defendant's method of doing so.

The private sales transacted over several years after the close of the auctions should not have been included in defendant's determination of the fair market value of the lands subject to valuation in these claims. While such sales involved the very lands being valued, they were subject to disposal at the federal statutory minimum of $1.25 per acre and therefore could not be considered bona fide, arms-length transactions. Cf. Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 451-452, 175 F. Supp. 926, 943-944 (1959), aff'g in part, rev'g in part, Dockets 67 and 124, 4 Ind. Cl. Comm. 346 (1956). In fact, the record establishes that, with one or two minor exceptions, there was no competitive bidding for any of the lands disposed of at private entry.

Defendant's appraiser, who accurately analyzed the sales abstracts, found that the most desirable lands in the two tracts sold first at auction and at relatively high prices. However, defendant's method of computation allowed for no distinction between the lands which sold at auction and the lands which remained after the conclusion of the auction. By taking a straight arithmetic average of both auction and private entry sales, Mr. Hall assumes that all the acreage in both tracts was of equal quality and value. We have already determined above that the only lands to be valued here are those which remained unsold after the close of the auction, and that any finding of comparability must be related to these lands. As to the discounts taken by Mr. Hall, we do not believe that the facts warrant such a downward adjustment.

We believe that the auction sale abstracts taken alone can be properly considered the basis of a comparable sales index for purposes of valuation herein, with some necessary adjustments to arrive at a reasonable determination of comparability. As noted earlier, the auction sales were proper in conduct and advertising. For the most part, the sales involved individual purchasers, with no large bloc speculative transactions evidenced in the record.

In Area 163, there were approximately 250 transactions at auction involving 18,449 acres which sold at an average of $2.09 per acre. The typical sale was made in 80-acre units, with most buyers acquiring more than one such unit. Out of the 250 sales, however, 60 transactions

were of less than 80 acres and 15 of these under 40 acres. Only 14 parcels, totaling 670 acres, brought over $5.00 per acre. Ten of these sales were river frontage. About 2200 acres sold between $3.00 and $4.50 per acre. These consisted of 32 parcels variously located on the Sandusky River, several roads, and on other streams. Some 9000 acres sold for between $1.26 and $2.96 per acre, and also included river frontage and some improved lands. Approximately 6000 acres went for the statutory minimum of $1.25 per acre. While there were some inconsistencies in the sales pattern, the sales generally reflected a strong demand for the superior river front properties, bottomlands, road frontage, and first rate farm lands with improvements. The record also discloses that during the closing days of the auction, bidding above the $1.25 per acre minimum was rapidly declining.

It is clear from the record that the auction sale disposed of the best lands in Area 163 and that those which remained were the least desirable. An examination of the auction sale abstract (Vol. II of defendant's appraisal report, p. 18ff.) shows that nearly 70% of the lands sold involved the best lands in the reservation, in terms of location and soil quality. To arrive at a comparable sales index, it is necessary therefore, to select those sales which are sufficiently representative and comparable to the remaining lands being valued. The favored, choice tracts which brought the highest prices and included principally river frontage lands cannot be considered comparable here, nor can the 40 some transactions (other than river front) that involved less than 80 acres.

We may reasonably assume that most of the preferred lands in the tract sold at the auction, and that the lands which remained unsold at the conclusion of the auction included most or all of the least desirable lands in the tract. We must then consider what price these less desirable lands, which did not sell at auction for the $1.25 minimum price, would bring at a sale without the $1.25 minimum price a few days after the auction. It is a reasonable conclusion that these lands would sell for something less than $1.25 an acre. However, to some degree, the lands with a value below $1.25 might be offset by some superior lands, still unsold at the conclusion of the auction, with a value in excess of $1.25 an acre.

Upon consideration of the entire record, the Commission has concluded that the fair market value, December 21, 1832, of the 23,079 acres in Area 163 which were not sold at auction, did not exceed $1.25 per acre. Since plaintiffs' lands sold for average prices no less than $1.25 per acre, they have not suffered any damages as a result of defendant's breach of the 1831 treaty.

In the case of Area 164, an examination of the auction sale abstract shows that public interest in these lands was minimal. As noted earlier, the lands in Area 164 were generally of relatively poor quality, and the tract itself was located in an isolated area of Ohio. Of the 3500 acres sold at auction, 2180 sold at the $1.25 per acre statutory minimum. Approximately one-third of the lands sold, or 1360 acres,

brought prices in excess of $1.25. There were no bids or sales above $3.50 per acre, and on the second and final day of the auction, there were no bids in excess of $1.25 per acre. In general, there was little demand for these lands and the public auction involved only 38 transactions. The average per acre price at the public sale of these lands was $1.74. Upon consideration of the entire record, and based on reasoning similar to that applied to area 163, the Commission concludes that the 34,631 acres in Area 164 which were not sold at auction did not have a fair market value on December 30, 1832, in excess of $1.25 per acre. Since plaintiffs' lands sold for average prices no less than $1.25 per acre, they have not suffered any damages as a result of defendant's breach of the 1831 treaty.

On the whole, considering the quality of the lands and the comparable sales data, and looking at all the evidence of record, the total of $115,454.29, which was ultimately realized by the auctions and at subsequent private sales in accordance with Article 8 of the 1831 treaties, was an amount in excess of the fair market value of the subject tracts as of the taking dates. It therefore appears that defendant met its aforesaid obligations under the treaties.

We may add that, although the conscionability of the 1831 treaties as a whole was not at issue, if we consider the conclusion herein that the sales proceeds were in excess of the fair market value of the lands on the valuation dates, the surplus of $20,700.82 due the Indians after the deductions from the sales proceeds (see 29 Ind. Cl. Comm., supra),

as well as the 127,000 acres of land west of the Mississippi which plaintiffs obtained, it appears that overall the plaintiffs received under the treaties fair value for their lands.

There is an additional flaw in plaintiffs' argument which would deny them recovery in these claims. In our 1971 order we stated that the issues to be resolved were the fair market value of the lands and the damages, if any, resulting from defendant's breach.

Normally damages for the breach of a legal obligation would be calculated as the difference between what one would have received if the obligation had been satisfied according to its terms and what one in fact received. See Reynolds v. United States, 141 Ct. Cl. 211, 158 F. Supp. 719 (1958). Thus, the measure of damages in these claims, assuming plaintiffs could prove them, would be the difference between the sales proceeds plaintiffs would have realized had the lands which were not offered at auction been offered for sale competitively on an open market at auction, and the proceeds ultimately credited to plaintiffs' accounts by the defendant after disposing of all the lands.

In order for plaintiffs to prevail here, however, they must show and prove more than merely the fair market value of the subject lands. Plaintiffs have the burden to show that there was such demand that, but for defendant's breach of the 1831 treaties, the remaining lands not sold according to the terms of the agreements could have been sold during the auction period. This matter goes to the fact of damages and

must be established with a degree of certainty. See Palmer v. Connecticut Railway Co., 311 U.S. 544 (1941); Penker Construction Co. v. United States, 96 Ct. Cl. 1 (1942). Plaintiffs did not sustain the burden of proving damages arising out of defendant's premature termination of the auction.

Plaintiffs have not submitted evidence or argued that a demand would have existed for the remaining subject lands had the auction remained open. As we have noted above, on the last day of the auction of Area 164 there were no sales in excess of the minimum price. As to Area 163, during the first seven days of the auction there were 161 sales at prices in excess of $1.25. However, on December 19 there were only eight such sales, and on December 20, the final day, there were only five such sales (two at prices under $1.35 per acre). In the face of this evidence, it is a reasonable conclusion that demand for lands at prices in excess of $1.25 per acre had ceased by the final day of the auction for each area.

We appreciate the difficulty of proof which confronts the plaintiffs. Although the lack of proof of demand does not extinguish defendant's breach or in any way excuse it, it does tend to confirm that the breach was merely technical and that, in reality, plaintiffs suffered no damages resulting therefrom.

We further note that there is implicit in plaintiffs' view of these claims, a proposition that defendant, notwithstanding the express terms

of the 1831 treaties, was under some obligation to sell all of the lands within the two-week period and at a price substantially in excess of the statutory minimum of $1.25 per acre. The defendant, of course, did not guarantee successful auction or any particular amount in proceeds, and clearly could not do so. We have already analyzed the auction sales, and while we know that the lands which actually sold at auction averaged $2.09 and $1.74 per acre for Areas 163 and 164, respectively, we cannot assume that because a portion of these lands sold at the prices indicated, the whole might have sold at these prices, particularly in the absence of evidence that all of the lands were of equal value. The most reasonable assumption we can make under the circumstances is that the best lands sold at auction, and the remaining lands could not have been expected to bring more than $1.25 per acre.

In conclusion, we find that plaintiffs have failed to establish a fair market value of the subject lands in excess of the amount received, and they have also failed to show that the breach of the treaties damaged them. This disposes of all of the issues before us at this time. Accordingly, plaintiffs are not entitled to recover in this phase of the claims. Therefore, these claims will proceed to a determination of offsets, if any, allowable under the Indian Claims

Commission Act against the earlier interlocutory award in this case pursuant to our order of December 7, 1972.

Brantley Blue

Brantley Blue, Commissioner

We concur:

Jerome K. Kuykendall

Jerome K. Kuykendall, Chairman

John T. Vance

John T. Vance, Commissioner

Richard W. Yarborough

Richard W. Yarborough, Commissioner

Margaret H. Pierce

Margaret H. Pierce, Commissioner