

BEFORE THE INDIAN CLAIMS COMMISSION

THE SAC AND FOX TRIBE OF INDIANS)	
OF OKLAHOMA, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 83
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: December 26, 1973

Appearances:

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

George B. Pletsch, Attorney for the Sac and Fox Tribe of Indians of Oklahoma. Guenther M. Phillipp of Schiff, Hardin, Waite, Dorschel & Britton was on the briefs.

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

David M. Marshall 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.

The case is now before the Commission for a determination of the acreage and the fair market value of the aboriginal title lands ceded by the Sac and Fox Indians to the United States under the Treaty of

November 3, 1804, 7 Stat. 84.^{1/} The valuation date is January 25, 1805, the ratification date of the 1804 treaty of cession. Also for decision is the question whether the consideration paid to the plaintiffs by the United States for the ceded lands was unconscionable within provisions of the Indian Claims Commission Act. 60 Stat. 1050.

The Sac and Fox title lands were composed of 3,651,424.39 acres in two noncontiguous tracts located in east-central Missouri, hereafter referred to as the Missouri tract, and northwestern Illinois and southwestern Wisconsin, hereafter referred to as the Illinois-Wisconsin tract. The net acreage to be valued in the Missouri tract is 1,638,724.39 acres. With the Mississippi River as its eastern boundary, this tract measures approximately 60 miles from north to south and varies between 30 and 54 miles in width from east to west. The Missouri tract includes all of present-day Pike and Ralls Counties, most of Lincoln County, the southern half of Marion County, the southeastern portion of Shelby County, the eastern one-third of Monroe and Audrain Counties, the northeast corner of Callaway County, the northeastern one-third of Montgomery County, and the northern portion of Warren County.

^{1/} The Commission earlier determined that the plaintiffs had proven aboriginal title to those portions of ceded area in Royce Area 50 as described in Finding 21 at 7 Ind. Cl. Comm. 675, 706 (1959).

The 2,012,700 acre Illinois-Wisconsin tract extends approximately 115 miles from north to south and varies in width, east to west, from 14 to 35 miles. The western boundary follows the Mississippi River, the northern boundary follows the Wisconsin River, the eastern boundary follows a series of local watershed divides roughly paralleling and approximately 30 to 35 miles east of the Mississippi River, and running southerly to the northeast corner of Mercer County, Illinois.

The Missouri tract, like the bulk of the land area north of the Missouri River, consists of rolling prairie country with an abundance of streams. These streams flow eastwardly through the prairie plain and empty into the Mississippi River. The major streams in the Missouri tract are the Salt, North and Cuivre Rivers.

The topographical features of the Missouri tract fall into three general categories. First, the Mississippi bottom, or flood plain, which lays adjacent to the Mississippi River, and varies in width from two to four miles. It was subject to periodic inundation. Second, the adjacent river hills form a five to twelve mile wide rolling, hilly, forested belt characterized by a steep bluff line adjacent to the Mississippi River and bottom. Third, the prairie plain, adjacent and merging with the river hills on the west, consists of a broad, level upland, interspersed by rolling forest land bordering the streams.

Elevation of the broad upland area ranges between 900 feet on the western side and 700 feet on the eastern side, with the flood plains surrounding the Mississippi River being 300 to 400 feet lower than the upland area.

Most of the Illinois-Wisconsin tract lies within the "Driftless Area" which escaped the glaciers of the ice age. The topography consists of a dissected plateau characterized by broad rolling prairie ridges and steep-sided valleys with some forest land interspersed. Elevations in this area range from 1,225 feet above sea level in Grant County, Wisconsin, to 595 feet at the Mississippi River near Dubuque, giving a relief of slightly more than 600 feet. Relief ranges from 50 to 500 feet per mile in the Driftless Area. The upland prairie plains are relatively broad, ranging in width from approximately 1/2 to as much as 10 miles. In the Driftless Area there is tendency to find slopes which are steeper, but which occupy a smaller proportion of the total area than is the case in the glaciated area. There is some bottom land which is subject to periodic inundation along the Mississippi. The balance along that river in the Driftless Area consists of rough and hilly lands with rock outcrops. There was also a small area of swamp land present in the Driftless Area, although the record does not indicate how much. For that reason this portion of the prairie sections containing areas of poor natural drainage could not have been used for farming purposes without drainage. However, much

of this swamp land could have been utilized for grazing purposes, particularly in the dry seasons.

To the south of the Driftless Area, the glaciated areas of the Illinois-Wisconsin tract have low relief. Differences in elevation are less than 50 or 60 feet per mile and most slopes do not exceed 6% to 8%. Approaching the Mississippi River and along the major tributaries, topography becomes moderately sloping to steep. There were also some poorly drained areas, or swamps, in the glaciated portion of the tract.

The broad plains occupied by the Green River and the lower Rock River vary from nearly level to gentle slopes.

The Illinois-Wisconsin tract for the most part is well drained and served by the Rock, Apple, Galena, Wisconsin, Grant, Platt and Plum Rivers and the tributaries of the Rock River.

The Missouri tract has a continental climate, experiencing frequent changes in the weather. The summers are rather hot and the winters are relatively cold, but without extreme periods of very cold, or very hot weather.

The frost-free growing season is approximately six months in duration. The average date for the last light freeze is about mid-April and the first freeze in the fall comes about mid-October.

Annual precipitation ranges between 32 and 40 inches throughout northern Missouri with the highest amount falling during the growing

season. While the precipitation and climate are favorable for good crop growth, serious droughts and extremes in temperature have been experienced during the growing season.

Snow usually falls in Missouri in December, January and February; however, it has occurred as early as October and as late as May. Snowfall averages 18 to 22 inches and normally melts in a week or two.

The Illinois-Wisconsin tract also has a continental climate. The average length of the frost-free period is between 150 and 160 days in the northern portion and from 160 to 170 days in the southern portion.

Average annual precipitation varies within the subject tract and ranges between 32 and 34 inches, with an average of 20 to 22 inches falling during the growing season between April 1 and September 30.

The average annual snowfall is approximately 30 inches. Several times each winter the temperatures drop below freezing. The soil freezes to a depth of about three feet and occasionally remains snow-covered for weeks at a time.

The good quality soil and well distributed annual precipitation make agricultural production favorable.

Although the climate in both subject tracts was considered suitable for settlement and farming, early settlers were plagued with malaria, or the "Illinois shakes" as it was sometimes called. Malaria, which was spread by the mosquito, flourished in areas where poor natural drainage left stagnant pools of water in marshy land along rivers and on flat prairie land. In Missouri, the record contains

evidence of the disease along the Missouri River and the Salt River, which was within the subject tract. It was also a problem in the glaciated portion of the Illinois-Wisconsin tract, and to a lesser extent in southwestern Wisconsin.

Under modern soil classifications, 36.8 percent of the Missouri tract is covered by the Putnam-Mexico-Gara series of prairie soils. The Lindley-Keswick-Baxter series of sloping forest till-derived soils account for 33.4 percent; the Hagerstown-Baxter-Weldon sloping forest loss-derived soils for 10.1 percent of the area. Small creek and stream bottom lands cover 8.3 percent, and Mississippi River bottomlands 5.8 percent. Overall, 36.8 percent of the land is covered with prairie type soils, 49.1 percent with forest soils, and 14.1 percent with alluvial bottomland soils.

The prairie soils occupy gently sloping to slightly rolling terrain. They are dark in color and were highly fertile in their virgin state, having a depth of approximately five feet, with clay subsoils. Tall prairie grasses were the dominant ground cover found on these soils at the time of the 1805 cession, but trees were reported by the surveyors in every prairie-soil township. Trees were also situated along most of the drainage ways. The soils derived from forested areas occupy rolling terrain with slopes varying from 5% to 15%. These soils are lighter in color than the prairie soils, are well watered with

numerous streams and are classed as moderately productive. Relatively narrow bands of more steeply sloping forested soils (Hagerstown-Baxter-Weldon soil series) are situated approximately 5 to 10 miles west of the Mississippi River, having slopes varying from 5% to 50%. These soils are red in color, well watered, fertile and productive. Small creek and bottomlands along the Mississippi River contain fertile alluvial soils with excellent water supplies.

The grassland soils account for 29.4% of the Illinois-Wisconsin tract and are dark, highly fertile, well-drained soils found on gently rolling terrain. The woodland soils are somewhat more rolling than the grassland soils and comprise 57.7% of the Illinois-Wisconsin tract. Bottomland soils generally involve alluvial deposits, and are found in terraces along the Mississippi River and tributary streams; they comprise 12.9% of the tract.

All of the soil associations in ceded area are suitable for cultivation of crops, but the potential for actual use for crop production has generally depended upon the degree of slope found on the land. Soils occurring within slope classifications of 0% through 20% are capable of cultivation, and lands with higher slope classifications are best adapted to pasture and woodland uses. Thus, approximately

17% of the Wisconsin lands and 13% of the Illinois lands in the subject tract would today be considered unsuitable for general crop raising on the basis of their slope characteristics.

The timber supply was ample in the Missouri tract, although it was primarily restricted to the slopes along streams. The most prevalent trees were the various species of oak, but the elm-ash-cottonwood forest type was also found along streams in the prairie region. To a lesser extent, the tract contained stands of maple, beech and lowland oaks. There was no commercial value for the timber in the Missouri tract in 1805, although future settlers found it necessary for houses, fences and fuel.

Early vegetation in the Illinois-Wisconsin tract consisted of grassland prairies, hardwood forests, and prairie-forest transitional areas. Prior to settlement "oak openings" or "oak savannas" were one of the most widespread plant communities in this tract. This vegetative type was a forest and grassland combination in which most of the land was covered by grasses and a few shrubs, but a few widely spaced tall trees were also present. Bluestem grasses and bur and white oak trees were the dominant species present in the oak savannas. Hardwood forest

areas consisted of oak forests on hills and exposed sites, sugar maple and basswood on north slopes; in lowlands along major streams the forests were largely composed of elm, willow, ash and silver maple. On sandy and loamy terraces, black oak and prairie grasses were predominant. In addition, there were oak forests and groves of hardwood trees generally distributed throughout the balance of the Illinois-Wisconsin tract. As in the Missouri tract, the timber in the Illinois-Wisconsin tract had no commercial value in 1805.

In 1805, the Missouri tract contained known salt springs along the Salt River. Although it was an important resource and was one of the necessities a typical frontier settler could not produce for himself, salt was of no commercial value in 1805. The area was inhabited by rather hostile Indians, and it was not until after 1815, following the successful conclusion of the War of 1812, that the salt springs in the Missouri tract became safe for commercial development. Deposits of limestone and clay, found in the Missouri tract, were of no commercial value in 1805.

While the Illinois-Wisconsin tract did in fact contain deposits of zinc, they were of no commercial value in 1805.

Travel on western rivers involved many difficulties. For example, navigation on the Mississippi River was impeded by snags, sand bars, shifting currents and other obstructions. Three series of rapids, two of which were located between the Missouri tract and the Illinois-Wisconsin tract, and the other near the mouth of the Grant River, added to the problems and made passage particularly arduous during low water for as many as three months each year.

Except for Indian trails there were no roads within either the subject tracts. Access into the subject tracts was primarily dependent on the rivers and streams. The main routes to the cession areas were from Pittsburgh down the Ohio River and then up the Mississippi River or from New Orleans north on the Mississippi. In addition, boats crossed on the Great Lakes from Buffalo to Green Bay where there was a water route to the Mississippi via the Fox and Wisconsin Rivers.

Explorers, who had been traveling the Mississippi River for more than a century, reported the river was bordered on both sides by an intermixture of prairies and woodlands. Timber was primarily located adjacent to the numerous streams flowing into the Mississippi. It was also reported that the lands along the river were fertile and the climate well suited for farming.

A prospective purchaser would also have known that settlers moving west located on timbered land nearest rivers and streams because waterways were the principle means of transportation and timber was needed for fuel, fences and cabins. Also falling within their preferences were riverbottom lands with adjacent higher timbered lands where homes could be built on land high enough to be safe from flooding. Prairies were avoided by early settlers due to the lack of timber and water and the lack of protection from bitter winter winds and prairie fires during the summer months. Also the sod was thick, tough and difficult to plough with the agricultural implements then in use.

In 1805 Missouri was divided into five districts: New Madrid, Cape Girardeau -- both largely American -- Ste Genevieve, St. Louis and St. Charles. At that time the combined populations of these five districts was between 9,000 and 10,000 people, of whom a majority were American and over 15% were slaves. The Missouri tract was located in the St. Charles District, which in 1804 had a population of about 1,500. On the valuation date, most of the people living in the latter district lived in what is today St. Charles County, southeast of the subject lands. There were a few settlers living in the southern part of the tract, and there is evidence of land grants and temporary settlements farther up the Mississippi, especially on the Salt River, but no clear evidence that any permanent settlements had been made.

On the valuation date the Illinois-Wisconsin tract was even more isolated and farther removed from existing settlements than was the Missouri tract. Galena, established as a trading post on the Fever River in 1819, was the first settlement within the subject tract in Illinois. It was not until after the Black Hawk War that there was any widespread knowledge of northern Illinois or any movement of settlers into the region, other than the miners who began arriving in the early 1820's. Apparently the first settlements within the subject lands in Wisconsin were made in 1824 by prospectors at Hazel Green in present Grant County and at New Diggins at present southwest Lafayette County. It was not until the autumn of 1833 that settlers in any numbers began to arrive in Wisconsin.

A prospective purchaser of over 3,650,000 acres of land would have been aware of the state of the American economy in 1805. He would have known that the United States profited greatly from her role as a neutral in the European wars which broke out in 1792. The wars stimulated European demand for American exports and ships until the peace of 1802 caused a drop in foreign trade and a sharp decline

in commodity prices. However, in 1803 the renewal of hostilities again resulted in high prices for exportable staples and demand for American ships. These favorable conditions were to continue until the passage of the Embargo Act in 1807.

On the valuation date there were relatively few banks in the United States and little money in circulation. The money centers were located in large cities along the eastern seaboard. In 1805 the highest interest rate the government was paying on its loans was 6 percent. However, brokers' discounts on good notes were around 9 to 12 percent in 1810, and had been as high as 18 to 24 percent during previous years. Leading banks in the United States, including the Bank of the United States, paid dividends ranging from 8 to 10 percent during the years 1800 to 1810.

However, in 1805 the economy of the Mississippi Valley was still a barter economy, which did not give way to a monetary economy until banks were established a number of years after the valuation date. The prospective purchaser would have realized settlers moving west had little cash and would have to purchase land in small parcels, relying heavily on the credit system. The very size of the subject tracts would have necessitated their being marketed over a period of at least twenty to twenty-five years.

It is evident from the record that the cession lands, inhabited primarily by Indians, were raw, undeveloped and unsurveyed in 1805. Although few isolated settlers lived in the southern part of the Missouri tract, there is no clear evidence that any permanent settlements had been made. Communities in the Illinois-Wisconsin tract were also non-existent. As of 1805 there were no public lands available for sale in either of the subject tracts. The only public land offices open and selling land were located in Ohio, which was a considerable distance from the cession lands. During this period the statutory price for government lands was \$2.00 per acre in minimum tracts of 160 acres. If paid in cash, the price was \$1.64 per acre. A purchaser could pay 1/20 of the purchase price as a minimum down payment with 1/4 of the balance in 40 days. The remaining balance of the purchase price would be paid 1/4 in two years, 1/4 in three years and the final 1/4 within four years.

Between 1787 and 1795, several large tracts of public and state land, located in central and western New York and in Ohio, were sold to individual speculators and land companies. The prices paid by these companies steadily increased from approximately \$.08 or \$.09 per acre in 1787 to \$.40 per acre in 1795. The last major speculative purchase of western lands was made in 1795 when the Connecticut Land Company purchased from the State of Connecticut about three million acres of land in the Western Reserve at \$.40 per acre.

Evidence in the record indicates the resale of some of the above mentioned tracts, located in central and western New York and in Ohio, in the 1790's and the early 1800's. The land companies involved in the sale and resale of the lands within these tracts found no genuine market for their product. Much of the land was inaccessible and too distant from existing settlements. Because of a poor choice of lands, improper financing, mismanagement, and in some cases outright fraud, some of the land companies collapsed. As a result there arose a popular revulsion against land speculators.

The Commission rejects these sales and resales as not comparable and of limited probative worth in evaluating the two Sac and Fox tracts as of 1805. Lands located in New York were far removed from market factors that would have influenced a prospective purchaser of the subject tracts. In addition, lands offered for private sale in Ohio and New York were marketed under different terms than public lands. Smaller acreages than the minimum 80 acre public land tract could be purchased at a price lower than the \$2.00 per acre statutory government price in 1805.

There is also evidence in the record of private sales of foreign land grants between 1803 and 1811 in the St. Louis and St. Charles Districts as well as in the Missouri tract and its adjacent area. However, these sales do not qualify as comparable sales, for they involved unsurveyed land of much smaller acreages than the subject tract. Furthermore, the machinery for confirmation of the foreign land grants by the United States was not set up until Congress passed the Act of March 2, 1805

(2 Stat. 324). 25 Ind. Cl. Comm. 414, 425. This resulted in a state of questionable land titles in upper Louisiana for many years after the valuation date.

The plaintiffs' appraiser, Professor Raleigh Barlowe, Chairman of the Department of Resource Development at Michigan State University, prepared an appraisal report and testified at the hearing on value. The plaintiffs also introduced three other reports prepared by experts who testified at the hearing. They were C. L. Scrivner, Associate Professor of Soils at the University of Missouri; Dr. A. J. Beaver, Assistant Professor of Plant and Earth Science at Wisconsin State University at River Falls; and Harris A. Palmer, Associate Professor of Geology at Wisconsin State University at Platteville. Mr. Walter R. Kuehnle, a real estate appraiser and consultant in Chicago, prepared the defendant's appraisal report and testified at the hearing.

Professor Barlowe, who gave separate treatment to the value of lead deposits in the Illinois-Wisconsin tract, concluded that on the cession date the Missouri tract had a value of \$1.25 to \$1.50 per acre and the Illinois-Wisconsin tract had a value of \$2.25 to \$2.50 per acre, including an enhancement for the lead deposits of no less than \$1.00 per acre. After deducting \$.03 1/2 per acre for surveying costs in both tracts, Professor Barlowe valued the Missouri tract at \$1,991,050.14 to \$2,400,731.24^{2/} and the Illinois-Wisconsin tract at

^{2/} Professor Barlowe's range of values was based on the gross acreage, not the net acreage of 1,638,724.39 acres determined by the Commission.

\$4,458,130.50 to \$4,961,305.50. The plaintiffs partially adopted their appraiser's values, for they asked the Commission to find that the Missouri tract had a fair market value of \$1.50 per acre; that the exclusion of the Spanish land grant areas (211,275.61 acres) from the Missouri tract would result in a value for the remainder of the tract of not less than \$1.44 per acre; that the presence of mineral deposits in the Illinois-Wisconsin tract enhanced the market value of those lands by not less than \$1.50 per acre; and that the total value of the Illinois-Wisconsin tract was \$3.00 per acre. The plaintiffs contend the consideration of \$20,000.00 paid by the United States for the cession lands is unconscionable under the provisions of the Indian Claims Commission Act, and they asked the Commission to enter a final judgment of \$8,253,312.72.^{3/}

The defendant's appraiser concluded that the average per acre value for the Missouri tract was \$0.20 1/2; that for the Illinois tract south of the lead region was \$0.17; and that for the Illinois-Wisconsin lead region was \$0.21, which included \$0.10 per acre for enhancement attributable to the lead ore potential. The defendant adopted its appraiser's

^{3/} This amount includes a deduction of \$.03 1/2 per acre for surveying costs.

conclusions on value and asked the Commission to value the cession lands at \$722,000.00 based on the following divisions: \$337,000^{4/} for the Missouri tract, \$165,000 for the Illinois portion south of the lead region, and \$220,000 for the lead region. The defendant asked the Commission to make an award of \$702,000, resulting from the inadequacy of the consideration of \$20,000 paid by the United States under the treaty of cession, and subject to offsets that may have accrued since June 30, 1960.

The presence of lead in the Upper Mississippi River Valley had first been reported in the latter part of the seventeenth century. In 1805, lead mining was carried on by the Indians who occupied the region and by Julian Dubuque. Dubuque employed Indians in his mining and prospecting activities, as well as some Canadians and halfbreeds. While Dubuque's principal mines were on the west side of the Mississippi, some mining and prospecting were conducted on the east side within the Illinois-Wisconsin tract. Mining operations were limited to shallow deposits located in upper crevices and crevice openings of the galena dolomite formation. Loose chunks of the lead ore would also be found on or slightly below the surface of the soil.

^{4/} In his appraisal report Mr. Kuehnle valued the Missouri tract at \$270,000 based on the mistaken assumption that the tract contained 1,403,430 acres. The defendant made the necessary acreage adjustment and rounded off its calculation of \$336,470.28 to \$337,000.00.

In 1805, Dubuque's lead production was estimated to be from 20,000 to 40,000 pounds of lead ore a year. However, for this period accurate production records for the Upper Mississippi Mining District are not available. The figures are mere estimates. White miners did not begin active prospecting and mining in the subject tract until the early 1820's.

In evaluating the lead deposits, the plaintiffs' appraiser utilized the income capitalization and the royalty methods, along with illustrative calculations that were intended to indicate the general range of values by which the subject tract was enhanced by lead deposits. It was his conclusion the lead deposits enhanced the value of the tract by no less than \$1.00 per acre in 1805. However, the plaintiffs have asked for an enhancement of \$1.50 per acre.

The income capitalization approach is a modern appraisal tool that had not been developed on the valuation date. This approach requires mathematical calculations not available to the ordinary man of 1805. In contradistinction, the royalty approach was in use on the valuation date, but it, like the income capitalization approach, required information that was not available on the valuation date. An integral part of both appraisal methods was the use of anticipated annual production figures which were nonexistent as of 1805. Professor Barlowe used Owen's estimated production potential at the time of his survey in 1839,

his later report of actual production in 1839, as well as the average annual production figures as calculated by Professor Palmer in his report for the years 1825-1849. This hindsight information in both appraisal approaches is too far removed from the valuation date to be considered probative evidence.

The defendant's appraiser analyzed the pre-1805 development of Dubuque's mines in Iowa and the October 20, 1804, sale of two-thirds of the Dubuque grant for approximately \$0.18 an acre. He also estimated the enhancement to the fair market value of the 800,000-acre southeastern Missouri Lead Region to be approximately \$0.15 an acre. Because the upper Mississippi lead lands in the subject tract were remote and undeveloped as of January 25, 1805, the defendant's appraiser estimated the enhancement of the subject lands in the lead region to be two-thirds of that estimated for the southeastern Missouri Lead Region, or \$0.10 an acre. The defendant adopted its appraiser's conclusion and urges the Commission to so find.

At the time of valuation there was no market for the sale of lead lands in the Upper Mississippi Mining District. There is no evidence that the sale of two-thirds of the Dubuque grant for \$0.18 an acre was indeed a bona-fide, arms-length transaction.

The defendant's appraiser arrived at the enhancement value of \$0.15 per acre for the southeastern Missouri Lead Region by calculating the

1805 royalty value of lead deposits, again based on estimated lead production for future periods. The enhancement value is an estimate only, and becomes of even less value when used as a basis for the enhancement of the lead deposits in the Illinois-Wisconsin tract. The reduction in value applied to the latter tract is no more than conjecture.

In 1805, there was no market for the sale of lead lands in the Upper Mississippi Mining District and the lead lands in the subject tract were undeveloped and unsurveyed. A prospective purchaser would not have known the extent or richness of the deposits, except for those noted by early explorers. There had been no bona fide sales of any significant mining properties in the West. The experience of the eastern states offered little help because no similar bodies of ore had been found there.

Productive mining of the lead lands did not begin for approximately twenty years after the valuation date. In 1805, a knowledgeable estimate of the extent of the lead deposits and of the annual production could not have been made, nor were any production costs available. Therefore, we are unable to value the lead deposits separately. However, the mineral deposits were a matter of common knowledge in 1805 and have been considered by the Commission as a plus factor in the valuation process.

Comparable land sales in an active land market would have been the "best evidence" in the Commission's determination of the 1805 fair market value of the Sac and Fox lands. In the absence of such evidence we have

considered where possible those factors which the Court of Claims enumerated in United States v. Emigrant New York Indians, 177 Ct. Cl. 263, 285 (1966):

(a) the prevailing economic situation and the condition of the money market; (b) the population level and physical development of the area, along with its general desirability to prospective settlers; (c) relative ease of accessibility to the area; (d) the effect of the existence of more suitable and marketable land in other areas; (e) the prices paid for land in more settled areas; (f) the prevailing climate within the claimed area; (g) the existence, location, and extent of timber land within the tract.

In applying the above criteria, the Commission believes the values proposed by the parties do not represent a realistic assessment of the 1805 fair market value of the Sac and Fox lands. We disagree with the plaintiffs' position that the Missouri tract should be valued at \$1.44 per acre and that the Illinois-Wisconsin tract should be valued at \$3.00 per acre, including an enhancement value of \$1.50 per acre for the lead deposits. In our judgment the plaintiffs' proposed 1805 values are unrealistically high. We believe their values were based on conditions which did not actually exist in 1805 and hindsight was too heavily relied upon.

On the other hand the defendant has urged the Commission to find an average per acre value of \$0.20 1/2 for the Missouri tract, \$0.17 for the Illinois tract south of the lead region, and \$0.21 for the Illinois-Wisconsin lead region, including \$0.10 per acre attributable to the lead ore potential. However, we believe the defendant's proposed values are too conservative.

Mr. Kuehnle, defendant's appraiser, classified the subject lands in terms of preferences of grantees of early Spanish land grants made from among various land types, of which 133 were made in the Missouri tract, 166 early land grants in St. Charles County, 33 resales of lands in the St. Charles County grants and all of the government land sales in the subject area from 1818 or 1830. He projected a probable annual rate of resale at retail, and derived therefrom a probable holding period during which a prospective purchaser of the subject lands would attempt to sell parcels at retail. On the basis of the foregoing, Mr. Kuehnle projected a retail price per acre, and from that he estimated the purchase price upon which a fully informed and willing purchaser and a fully informed and willing seller would have agreed.

The defendant's land classification system is based on a system of purported settler preference for various land types. However, the fact is that settlers initially chose lands that were most readily accessible to river transportation and later settled on lands that were located at greater distances from water transportation. If defendant's land classification is given credence, then many early settlers actually chose lands with poor drainage and swamps that were subject to frequent inundation. That a settler would select such lands for their inherent quality contravenes the fact that settlers moving west were concerned primarily with easy access and the presence of timber. Preference for various land types developed much later as it became apparent that prairie

soils were fertile and productive and as agricultural implements for tilling the tough prairie sod became available.

The 1805 statutory price for government lands was the starting point in the Commission's valuation process. The credit price was \$2.00 per acre in minimum tracts of 160 acres; or, if paid in cash, the price was \$1.64 per acre. It follows that in 1805 the Sac and Fox tracts could not have sold for more than government lands, because the former lands were selling in competition with the latter. We then considered the positive and negative aspects of the two tracts.

As of January 25, 1805, the Missouri tract was raw, unimproved land which had not been settled. The fact that the subject tract had not been surveyed until 1816-1818 indicates a lack of demand in 1805 for lands north of the Missouri River. Contemporaneously, there were many thousands of acres of nearby public lands on the market in Ohio as well as additional public, state, and private lands in Kentucky, Massachusetts and New York. These lands were all situated closer to existing new settlements and well-established urban areas. Remoteness, lack of demand, relative inaccessibility, and the very size of the tract would have necessitated its being marketed, consistent with its highest and best use, over a period of at least twenty to twenty-five years. This would have involved necessary surveying, management and selling costs.

On the other hand, the fertile soil and good climate in the Missouri tract were conducive to agricultural pursuits. There was a good water

supply and an adequate amount of timber located along numerous streams throughout the tract. Although the lands were not settled on the valuation date, it was favorably located for future settlement with the Mississippi River as its eastern boundary.

On the 1805 valuation date the Illinois-Wisconsin tract was also raw, unimproved, and unsettled land occupied by unfriendly Indians and a few traders. Settlements were all located well to the south and east of the subject tract in southern Illinois and Indiana. The primary routes of settlement to the West were along the Ohio River and its tributaries and north on the Mississippi, and it was clear that it would be many years before the tide of immigration reached the subject lands. Competitive lands, more convenient to then existing population centers, were available in the eastern part of the country. The public lands in Illinois and Indiana had yet to be offered for sale. As a result the demand for this tract would not materialize for many years. The fact that the nonmineral land in the subject tract was not surveyed until the 1820's is indicative of a lack of demand in 1805. As was the case with the Missouri tract, a prospective purchaser would have expected a long holding period with various expenses involved.

One plus factor for the Illinois-Wisconsin tract was its suitability for farming due to the fertile soil and continental climate. Another favorable aspect was the presence of lead deposits. While in 1805 the land had not been surveyed and the exact location and quantity of the deposits were not known, the presence of lead in the Upper Mississippi

Mining District had been reported for many years prior to 1805. It was also known that some mines in the general vicinity of Galena were being worked by Indians.

In sum, a prospective purchaser in 1805 would have known he was acquiring two large noncontiguous tracts of raw, undeveloped, relatively inaccessible land of over 3,650,000 acres, whose highest and best use, with the exception of the lead lands in the Illinois-Wisconsin tract, would have been subsistence farming, and thus would have required subdivision into small parcels.

Based on these enumerated factors and all the evidence in the record the Commission has determined that on January 25, 1805, the 1,638,724.39 acres in the Missouri tract had a fair market value of \$983,235, or approximately \$0.60 per acre, and the 2,012,700 acre Illinois-Wisconsin tract had a fair market value of \$1,006,350, or \$0.50 per acre. The combined value of the Sac and Fox tracts was \$1,989,585.

Under Article 3 of the 1805 treaty, the plaintiffs were guaranteed a perpetual annuity of \$1,000 for the cession of the subject tracts. By virtue of the Act of April 4, 1910, 36 Stat. 269, 389, this annuity was commuted for \$20,000, which is the consideration paid by the United States for the ceded lands. The payment of \$20,000 for lands worth \$1,989,885 constitutes the payment of an unconscionable consideration by the defendant under Section 2 of our act.


The defendant has asserted no claim in this case for gratuitous offsets accruing subsequent to June 30, 1960. All gratuitous expenditures prior to June 30, 1960, have already been settled for \$35,000 and offset

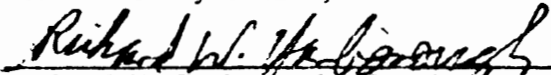
against the award made to the plaintiffs in Docket 138, Iowa Tribe
v. United States, Dockets 11-A and 138, 15 Ind. Cl. Comm. 42 (1965).

As additional compensation for the lands ceded under the 1805 treaty,
the plaintiffs are entitled to a final award against the defendant in the
sum of \$1,969,585.

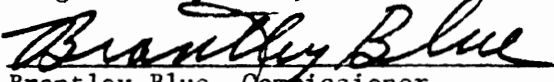

John T. Vance, Commissioner

Concurring:


Jerome K. Kuykendall, Chairman


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner