BEFORE THE INDIAN CLAIMS COMMISSION

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| THE CREEK NATION, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | Docket No. 272 |
| | ) | |
| THE UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |

Decided: June 15, 1977

Appearances:

Paul M. Niebell, Attorney for Plaintiffs.

Bernard M. Newberg, Julia Hook and James M. Mascelli, with whom was Assistant Attorney General Wallace H. Johnson, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This case is before the Commission for a determination of the fair market value of the lands ceded by the Creek Nation to the United States under the Treaty of March 24, 1832, 7 Stat. 366, as revised by our decision of December 8, 1971, 26 Ind. Cl. Comm. 410, 420, aff'd, 201 Ct. Cl. 386 (1973).

At the outset we must dispose of two pending motions that were filed by defendant after the briefs on value had been filed and the record closed. On March 10, 1975, defendant moved that the issue of consideration in this docket be preserved for the trial on offsets, which generally follows the valuation phase of an unconscionable consideration case. As grounds therefor, defendant stated that in cases where neither the parties nor the Commission raise the issue of consideration

> . . . it is usually understood that the consideration issue, as it relates to testing whether the amount thereof is conscionable as weighed against the valuation amount, goes over to the trial on the United States offset claims, i.e., the payments on the claim, gratuitous offsets, or other set-offs to which the United States might be entitled from the valuation award.

Plaintiff opposed this motion, stating that defendant had failed to obey two orders of the Commission (dated October 11, 1973, and May 8, 1974) and thus had waived its right to present evidence on the issue of consideration paid. Plaintiff also stated that defendant's failure to present evidence on consideration paid prejudiced plaintiff's right to an expeditious final determination of this case.

Defendant alternatively moved, on March 27, 1975, that we admit the G.A.O. accounting report into evidence, so we may "determine whether or not the Creeks received unconscionable consideration for their lands." Plaintiffs also opposed this motion, again citing their waiver argument.

We believe both motions should be denied. The issue of the conscionability of the 1832 treaty consideration has been determined. In affirming our 1971 opinion, supra, the Court of Claims held (201 Ct. Cl. at 409-410)

> that under the facts and circumstances of this case where the whole individual-reserves scheme constituted unconscionable treaty consideration, the tribe can present a valid claim under the Indian Claims Commission Act.
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> The Treaty will be deemed revised to eliminate the individual reserve provisions, and treated as a cession of the entire tract under Article I of the Treaty.

> This case should proceed to a determination of the fair market value of the entire 5,200,000 acres ceded by the Creeks. Defendant is entitled to an offset of other actual monetary consideration received by the Tribe or its members called for by the treaty.

The Court of Claims, therefore, has held that the treaty consideration was unconscionable, and mandated that we offset the monetary consideration received by plaintiff against the 1832 fair market value of the 5,200,000 acres. In effect, the granting of defendant's motion to preserve the issue of consideration to the trial on offsets would only duplicate the order of the Court of Claims. The motion will be denied, and the matter of "payment on the claim" will be considered at the offset phase of this case. Since defendant's accounting report is of no present utility to the Commission, we will deny defendant's motion to admit the report without prejudice to defendant's right to renew its motion at a later date.

The area to be valued, "Royce Area 172," is a roughly triangular tract of about 5,200,000 acres lying in east-central Alabama, along that state's common border with Georgia. The eastern border is partially formed by the Chattahoochee River and the western border is partially formed by the Coosa River.

The parties disagree over the exact acreage of the subject tract. Defendant has offered a special exhibit prepared by the Bureau of Land Management in which the acreage of the tract to be valued has been computed as 5,128,425 acres. Defendant asks that we adopt the above figure as the precise acreage of the subject tract. On the other hand, the plaintiff says that the parties are judicially estopped from raising this acreage issue

because of the prior litigation in this case in which the subject area was identified as a 5,200,000 acre tract. Plaintiff also challenges the accuracy of the defendant's exhibit.

In the instant case the Commission views the controversy over the exact acreage of the subject tract as of no great consequence. The award area has been repeatedly referred to as a 5,200,000 acre tract, a reference which was intended to be a general one, meaning "about 5,200,000 acres." See Creek Nation v. United States, 77 Ct. Cl. 226, 227 (1933). Each figure seems to be an informed estimate derived by varying degrees of sophistication from maps, and the figures do not express the exact accuracy of an on-the-ground survey. Since the tract has been noted in the judicial literature of the past half-century as containing 5,200,000 acres we adopt that figure.

The land area to be valued is drained by three major rivers--the Coosa, the Tallapoosa, and the Chattahoochee--and numerous smaller rivers and creeks. All drainage from the subject area flows to the Gulf of Mexico. The elevation of the area varies from approximately 100 feet above sea level to 2,407 at Cheaha Mountain, the highest point in Alabama. The topography of the subject tract features level to gently rolling coastal plains in the southern regions and the rugged Talledega Hills in the north.

The soils of the subject tract follow the general topographic patterns of the area. All of the soils are reasonably fertile. Except for the shale and sandstone regions of the Appalachian Plateau, the soils are suitable for agricultural use where the topography permits.

In 1832, the prime native vegetation in the subject area was its standing timber. Approximately three quarters of the tract was fifty percent, or more, forested with loblolly or shortleaf pine associated with other southern pines, oak, hickory, and gum. The other quarter of the subject area (not a distinct geographic region but distributed across the northern half of the tract) was fifty percent or more hardwood, usually oak, associated with southern pines, gum and hickory. Although there was no significant commercial market for timber in 1832, the timber would be necessary for domestic use. Housing, fencing and firewood all required timber.

The lands of the subject area were agriculturally productive. The best or first quality agricultural lands constituted about 13 percent of the subject area and were level to rolling, suitable principally for growing cotton and corn in a plantation style operation.

The second quality agricultural lands consisted of the more hilly lands and the clay soil areas, interspersed with small tracts of first class lands that were separated by streams or rugged areas. These second quality lands were better suited for small-scale farms and subsistence farming. Approximately 63 percent of the subject tract was second quality agricultural lands.

Third quality lands embraced the heavily forested regions, pasture lands, and stony, rocky or mountainous areas. These lands were unsuitable for cultivation in 1832, but would enhance the area as a whole as timber and grazing areas and as a source of wild game.

As of 1832, no minerals of economic value had been discovered in the subject area, although there were reports, albeit somewhat conjectural,

attesting to the discovery of gold in the subject area as early as 1830. It was not until 1835, however, that the presence of gold was confirmed in quantities sufficient to promote active mining of the metal. There may have been some additional speculative value to the subject tract in 1832 because of the earlier gold reports. There is no evidence of record, however, to measure this incremental value.

The present State of Alabama formed the eastern half of the Mississippi Territory when that territory was created in 1798. 1/ The first major settlement in the Alabama portion of the Mississippi Territory was the town of St. Stephens on the lower Tombigbee River.

After creating the Mississippi Territory the United States undertook to quiet the Indian title to the lands therein. Between 1802 and 1819, when Alabama was admitted into the Union as the twenty-second state, the United States acquired from the resident Indians all of the lands in Alabama except the subject area, the Cherokee lands immediately north of the subject area, and the small Choctaw and Chickasaw tracts in western Alabama. The pattern of land acquisition generally radiated northward and eastward from the St. Stephens area.

The settlement of Alabama followed the course of Indian cessions. As the Indians were moved out, and often before, the large planters and settlers moved in. Two classes of settlers came to Alabama. The wealthy planters, with capital and slaves, purchased the rich bottom lands close

1/ The area south of the 31st parallel remained Spanish territory until 1819, although Mobile had been occupied by Americans in 1813.

to the river transportation to their markets. The greater number of settlers were farmers with little capital to invest who settled on the backlands and more isolated river and creek bottoms. The population grew rapidly, from 1,250 in 1800 to 309,527 (of which 117,547 were slaves) in 1830. The pattern of settlement followed the major river systems; northward and eastward from St. Stephens on the Tombigbee, Black Warrior, Alabama, Cahaba, Milberry, Coosa and Tallapoosa rivers, and westward from Huntsville on the Tennessee River, and later, northward from Appalachicola on the Chattahoochee River.

The rivers were the major links to the markets. Products were shipped south and west to markets in Mobile and New Orleans. Merchandise was brought overland and down river from Georgia, West Virginia and Tennessee. The steamboat revolutionized this system allowing goods to be brought upriver as well as down.

For several years prior to 1832, steamboats plied the Coosa River as far north as Wetumpka on the western boundary of the subject area. There they received cargoes assembled from the upper reaches of the Coosa and from overland routes. The first steamboat on the Chattahoochee River reached Columbus, Georgia, on the eastern border of the subject area, in 1828. These routes were traveled when the rivers were high enough to permit safe navigation, generally in the fall and winter months.

Land transportation began along existing Indian trails. As successive settlers widened these trails to enable their wagons to pass, they became

roads. By 1832, there was a system of poorly constructed roads throughout the state.

The first railroad in Alabama, a meager effort of some 2 miles, was completed in 1832. The development of railroads in Alabama as a significant means of transportation lay well in the future. As of 1832, the railroad had little or no impact on the fair market value of lands within the subject tract.

In fixing 1832 fair market value estimates for the subject tract, the parties herein have relied almost exclusively upon the written reports, testimony, and opinions of their respective expert witnesses.

The plaintiff utilized the services of Mr. M. J. Williamson, a real estate appraiser from Birmingham, Alabama, who has appeared previously before this Commission on behalf of the Creek Nation. Mr. Williamson utilized exclusively the market data or comparable sales approach in evaluating the subject tract. According to Mr. Williamson, he abstracted 2,000 private sales transactions from the deed record books in nine counties that adjoin the subject tract, while discarding all sales of a family nature or where the deeds showed improvements. From his compilation, which covered the period 1830 through 1834, and involved 287,000 acres, the plaintiff's expert determined that the average sales price was $4.35 per acre. Mr. Williamson then discounted this average per acre price by 38.4 percent, to $2.68 per acre, to allow for costs of improvements, such as clearing land and surveying, and the size of the subject tract. Applying this $2.68 per acre figure to the "5,200,000" acres in the subject tract on a per acre basis,

Mr. Williamson's ultimate conclusion was that, in 1832, the subject tract had a fair market value of $13,936,000.

At the other end of the spectrum is the value conclusion of Mr. Ernest G. Booth, defendant's expert appraisal witness. According to his appraisal report Mr. Booth utilized four approaches, including one labeled the "Private Enterprise Sales Approach," to arrive at an 1832 fair market value estimate of the subject lands. Basically, however, the core of Mr. Booth's analysis and appraisal of the subject tract was the pre and post 1832 quantum of public land sales in Alabama and elsewhere. The 1832 per acre values of the subject tract under Mr. Booth's four methods ranged from a low of 69.7 cents per acre to a high of 91.4 cents per acre, with intermediary values of 73 cents per acre to 75.3 cents per acre. Mr Booth finally settled on 73 cents per acre and, on the basis that the award area contained 5,128,425 acres, he concluded that the subject tract was worth $3,743,750.

Aside from agreeing, in substance if not in exact language, that the highest and best use of the tract was for farming, and that the tract could be subdivided and sold for such uses, the appraisers' methods and conclusions were far apart. While we do not question the professional ability of either appraiser, the large difference in their final conclusions, and defects we find in their chains of reasoning, lead the Commission to conclude that a more reasonable value figure can be derived from the evidence in the case.

The appraisal report presented by the defendant, and supporting documents, presents much relevant evidence that has been of value to the Commission. We have, for example, accepted Mr. Booth's soil classifications and land quality classifications based on the original surveyor's notes, which are an evidentiary source of high value. See Sac and Fox Tribe v. United States, Docket 195, 13 Ind. Cl. Comm. 295, 315 (1964). Plaintiff criticizes Mr. Booth's conclusions because of the small size of the sample used (he examined the field notes from 182 section line surveys made in 1832 of 19 selected townships in the subject area). However, plaintiff's expert, Mr. Williamson, based his estimate of land quality on his 41 years of appraisal experience in Alabama beginning in 1933, apparently without any consideration of the 1832 conditions. Of the two we prefer the surveyor's notes because they are based on actual observations made within a year of the date of taking. We note also that although Mr. Williamson estimated higher amounts of first class farm lands, 25 percent versus 12.9 percent, Mr. Booth estimated much higher amounts of second class farm lands, 63.3 percent versus 35 percent. Thus Mr. Booth has estimated that 76.2 percent of the subject area was suited for farming in 1832, as opposed to 60 percent estimated by Mr. Williamson, enhancing the value of the land. As shown in our findings the Commission has adopted Mr. Booth's findings on soil classification as its own.

The Commission further agrees with defendant's appraiser's opinion that the history of the public land sales in Alabama during the relevant time period would indeed have an effect on sales in 1832. However, we

were unable to find in Mr. Booth's appraisal any genuine consideration of the private sales data in the record. With the evidence available, as presented by the plaintiff, of an active private market in agricultural lands, a value conclusion not assessing such evidence has little force. The defendant's appraisal seems to be based on the assumption that the $1.25 per acre price for public lands was a ceiling price in the private market, which assumption the private sales evidence in the record flatly contradicts. We reject Mr. Booth's conclusion.

Most helpful to the Commission has been the private sales data presented by the plaintiff's appraiser Mr. Williamson. However, on close examination of the sales data relied on we find defects in the data that do not allow us to reach the same value from it as did the witness. Despite his declaration to the contrary, our examination of the private sales disclose numerous sales in which similar names of grantors and grantees indicate family transactions, and sheriff and estate sales. Also, there are apparently numerous resales of the same properties during the 1830-1834 period, which distort the total acreage figures to a certain extent, and, where the price increases upon each sale, tends to support an inference of improvements or a unique value. However, as will be seen, we feel that the sales data can be assessed in a sounder manner to derive a valid retail sales index figure.

In addition to the infirmities in the plaintiff's sales data, we find many of the witness' conclusions based exclusively on his many years of appraisal experience in the subject area. We do not doubt

the witness' great experience in the subject area and it would be very useful if we were considering events and circumstances existing during contemporary times. However, we are restricted to the 1832 time period and it is not possible for us to apply his undocumented conclusions, based on his own present personal knowledge, to the 1832 taking date. We must reject his ultimate appraisal conclusion.

Our approach to reaching a value conclusion focuses on the evidence presented by the plaintiff of more than 2,000 private sales near the subject tract during the 1830-1834 period. This is very valuable evidence of a private land market and provides a more helpful record than is usually found in our historic value cases. Such underlying factors as climate, remoteness, and banking facilities apply equally to these sales and the subject tract and need little further consideration. Our method of analyzing this data involves refining the evidence to derive as accurately as possible a retail sales index figure that represents what agricultural land was actually selling for in farm-sized tracts at the relevant time and place. To do this we arranged the more than 2,000 transactions in the evidence in the order of the indicated price per acre from the lowest price per acre to the highest price per acre both by county and by year. Then we divided the transactions into quarters, discarded the transactions in the lowest quarter and the highest quarter, and took the average in the inner quartiles to derive a retail sales figure. In discarding the lowest 500 or so sales, we feel we have eliminated most intra-family or forced sales that might have brought abnormally low consideration. By discarding the highest quarter we have largely eliminated sales involving major improvements or unique values such as

proximity to a town. We think the resulting retail sales index figures of $3.26 and $3.17, the averages of the 1,000 or so sales in the two inner quartiles derived by the two methods described, fairly accurately represent the average price per acre of farm land sold at retail in central Alabama in the relevant period. We have selected $3.20 per acre as a reasonable retail sales figure based on the two computed sales figures.

To relate the retail sales figure to the market value as a unit of the large subject tract, we must consider the customary discounts. Most important here is the comparability of the land sold in the private sales and the lands in the subject tract. Unfortunately, the plaintiff's appraiser did not offer evidence as to the exact characteristics of the land sold in the private sales; for instance, whether the tracts sold could be considered first class farm land or second class farm land. His evidence is that the land in the area of the private sales is generally comparable to the subject tract, which we do not doubt. However, we feel that the land sold on the private market is likely to involve a higher percentage of the best farm lands than would be found in the subject tract as a whole. Further, since the area of the private sales had been settled for some years, there is reason to believe that many of the lands there may have had some improvements, at least to the extent of clearing and fencing. No large discount for improvements is justified, however, since our exclusion of the highest one-fourth of the sales would eliminate most substantially improved tracts, and the members of the plaintiff tribe undoubtedly had carried our clearing and cultivation on the subject

tract. Thus comparing the agricultural lands in the private sales and the agricultural lands in the subject tract, we feel a discount of 25 percent of the expected retail value would be necessary, mostly to reflect the likely higher quality of the lands traded in the private market.

A purchaser of the subject tract in 1832 would also consider other factors involved in bringing the lands to sale. In this case we feel that survey costs would be minimal. We further think that the evidence shows a strong demand for lands in the subject tract as evidenced by the subsequent sales therein as described in our finding of fact No. 44. Therefore, no large discount for a long holding period would be justified, as the 1832 purchaser could expect to sell his lands reasonably promptly, and expect a rising price for land over the holding period. Some discount for size seems reasonable, as a purchaser of a very large tract might always expect that his cost per unit would be smaller than in a transaction involving a limited quantity. Considering all of these discounting factors that would be of concern to a hypothetical purchaser of the subject tract we think an additional discount of 10 percent from the retail sales value is a reasonable one.

Relying on the private sales data, we feel that the market there illustrated is one for agricultural land only. A very large quantity of public land was unsold at $1.25 per acre; we do not think a purchaser would have been willing to pay more than a nominal value for land not suitable for cultivation. The 23.8 percent of the subject tract classified as non-agricultural was mostly hilly, timbered land that would have enhanced the tract by providing timber, grazing and hunting at locations reasonably accessible to settlers on the subject tract. Although

no immediate commercial value in 1832 was demonstrated, it was not barren or inaccessible. We find an analogy with the valuation made in the case of Tlingit and Haida Indians of Alaska v. United States, 182 Ct. Cl. 130 (1968) where hemlock timber lands for which there was little immediate demand had undoubted potential value. There a nominal value of $.10 an acre was assigned to such lands (or less, where the demand was more remote), while barren and inaccessible acreas were assigned no value. We do not think these non-agricultural lands could be said to be worthless, and we assign to them the nominal value of $.10 an acre as these lands' contribution to the value of the tract as a whole.

Therefore our conclusion as to the value of the subject tract is, firstly, that the 3,962,400 acres of agricultural land were worth $3.20 an acre at retail, and, after discounts of 25 percent and 10 percent, worth about $2.08 per acre to the hypothetical purchaser in 1832, and, secondly, that the 1,237,600 acres of non-agricultural land contributed $.10 per acre to the value of the tract. Our calculations produce a total market value for the whole tract of $8,365,552.

We will therefore at this time enter an interlocutory award in favor of the plaintiff tribe for $8,365,552, subject to any payments on the claim or other offsets to be determined in subsequent proceedings.

Richard W. Yarborough, Commissioner

We concur:

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Chairman Kuykendall, dissenting:

The Commission has determined that as of April 4, 1832, approximately 3.9 million acres of "agricultural land" in the 5.2 million acre subject tract had a retail market value of $3.20 per acre and a wholesale value of $2.08 per acre, and that in the balance of the tract, more than 1.28 million acres of non-agricultural land had a nominal value of $0.10 per acre. From these figures the Commission has concluded that in 1832 a well informed prospective purchaser would invest 8-1/3 million dollars, roughly $1.60 per acre to purchase the subject tract, and, thereafter, could expect to resell, within a reasonable time, the agricultural land at $3.20 per acre and thus achieve a profit of $4.3 million dollars -- a 51 percent return on his investment.

It appears to me that proper consideration has not been given to the enormous amount of public land which was available for sale at $1.25 per acre in the Alabama land market in 1832. The Commission has set forth in some detail in its findings of fact 1/ the record of public land sales in Alabama up to 1832, and has specifically stated in its opinion that the history of public land sales would have had an effect on sales in 1832.2/ Yet, it has relied exclusively on the private sales data in evaluating the subject tract. 3/

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1/ Commission's Finding No. 38.
2/ Opinion - p. 184.
3/ Ibid. - p. 186.

The evidence shows that between 1820 and 1832, when the federal government instituted the cash price of $1.25 per acre for public lands, there was available in the Alabama land market a minimum of 13.2 million acres of surveyed public land. Much of this land was in close proximity to the subject tract and was interspersed with land already in private hands. The record also shows that, as of 1832, this enormous area of public land had been on the open market from nine to 23 years. In the absence of any evidence to the contrary, there is no basis to presume that it was inferior, or that it was not, for the most part, comparable to the land within the subject tract. I think the more reasonable explanation of the cause of this surfeit of public land in Alabama in 1832 was the law of supply and demand, -- there were many acres but few buyers. I do not see how a well informed, prospective buyer of the 5,200,000 acre subject tract could or would ignore the fact that, apart from the areas of better quality land and premium sites within the purchased tract, he would have to compete openly with the public land market in making his initial resales.

The case of Miami Tribe of Oklahoma, et al., v. United States, which is relevant here, contains the following language:

> "It is true that the amount of land available throughout the United States is irrelevant, but in this case we are concerned with evidence of the availability of large quantities of very similar land immediately adjoining the tract in question." 4/

There is no evidence in the record that the public lands in Alabama

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4/ 150 Ct. Cl. 725 (1960), aff'g in part, rev'g in part, remanding Docket Nos. 124-A and 251, 6 Ind. Cl. Comm. 513, 552, (1958), cert.denied, 366 U.S. 924 (1961).

were not comparable to the lands in the subject tract, nor any other evidence which would make consideration of these lands irrelevant to the issue of value of the subject tract.

Let us consider the private land sales data. The total acreage included therein is only two percent of the acreage available in the Alabama land market in 1832 and six percent of the acreage presumably available for resale in the subject tract. These sales may be summarized as follows:

| YEAR | ACRES | PRICE | PRICE PER ACRE |
|---|---|---|---|
| 1830 | 40,755. | $ 169,276.78 | $4.15 |
| 1831 | 44,904.06 | 170,279.32 | 3.79 |
| 1832 | 61,852.14 | 234,285.17 | 3.79 |
| 1833 | 75,157.35 | 344,668.06 | 4.58 |
| 1834 | 65,055. | 333,105.05 | 5.12 |
| | 287,728.55 | $1,251,614.38 | $4.35 |

This schedule embraces some 2,000 transactions which occurred during a five year period. Approximately 33 months of the five years follow the valuation date and only 27 months precede it.

It is obvious from this summary that the $4.35 per acre average price for all sales transactions was influenced upward by the post-1832 treaty sales. Indeed, approximately one-half of the total acreage was sold during the years 1833 and 1834, and, if those sales which occurred during the nine months remaining in 1832, after ratification of the treaty, were separated and added to the 1833 and 1834 sales, I am sure that the post treaty sales prices would be higher than now shown. The mean average sales price for all lands through 1832 was $3.89 per acre,

and for the year 1833 and 1834 it was $4.83 per acre. It is to be expected that the most desirable acreage would be sold first, but apart from all this, there is no way that a prospective purchaser, on or before April 4, 1832, could have reaped the benefit of a sales index of value that included transactions occurring after that date.

I also doubt the validity of the following statements and conclusions of the Commission:

> "We further think that the evidence shows a strong demand for lands in the subject tract as evidence by the subsequent sales therein as described in our finding of fact No. 44. Therefore no large discount for a long holding period would be justified, as the 1832 purchaser could expect to sell his lands reasonably promptly and expect a rising price for land over the holding period." 5/

The Commission's finding No. 44, which is set forth below, recites four specific sales, three 6/ by speculators, and one by government auction. With the exception of the orphan lands, the other properties belonged to the Creek chiefs, being part of their allotments. The evidence

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5/ Opinion, p. 188.

6/ "44. Sales in the Subject Area. After the 1832 cession four signficant sales of ceded territory occurred. 23,040 acres were sold by Eli Shorter at an average price of $4.12 per acre between 1834 and 1836. 9,600 acres were purchased from Creek chiefs in 1835 for $3.65 per acre and resold by 1838 at an average price of $7.81 per acre. In 1836 there was a report that two land speculators had sold 36,160 acres at an average price of $9.38 per acre. In 1836 and 1837 public auction sales were held to dispose of lands held for the benefit of Creek orphan children, pursuant to Article II of the 1832 Treaty. 12,800 acres were sold at an average price of $8.29 per acre. These sales indicate that high prices were paid for select portions of the subject area, however, they comprise less than 1-1/2 percent of the total tract. No attempt has been made to identify the lands sold and there is no reason to believe that the lands of the subject area were of any greater value than those of the neighboring counties."

shows that the chiefs, some 90 in number, possessed some of the choicest lands in the entire Creek cession, and there is no doubt that these select properties would sell, and did sell, at premium prices. The orphan lands were also allotted areas which were specifically set aside under the terms of the 1832 Treaty. I believe the Commission is in error in equating this very minimal, select land activity with a norm that would govern the disposal of the entire 5.2 million acre tract. Furthermore, the bare bones finding of the Commission does not tell the whole story which is in the record. For example, Eli Shorter, one of the most active speculators, reputedly had an interest in some 300,000 acres of Creek allotted land and at one time offered to sell back to the United States his entire holdings at 62-1/2 cents per acre, or one-half the prevailing government price of public lands. 7/ The offer was rejected. The record also shows that, following his death, Shorter's legal representatives spent years trying to unload the balance of his properties at prices which barely recaptured costs.

It is also interesting to note that the Commission has not included in finding of fact No. 44, which deals with land sales in the subject area, some 98 sales recorded in Talladaga County for the years 1832, 1833, and 1834. Talledaga County was one of the new counties formed in the subject area. In these 98 transactions a total of 33,000 acres was conveyed for a consideration of $48,302.00, which is an average price per acre of $1.46. Prices ranged from a low of $0.10 per acre to a high of $6.25 per acre.

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7/ Def. Ex. 68, p. 112.

The evidence indicates that the demand for Creek lands in 1832 was created largely by the activities of two groups, the land speculators and the white squatters. The speculators were there at that time to deal the Indians out of their choice allotted lands in expectation of reaping a quick profit; the white squatters, for the most part, had intruded upon the Indian lands prior to the 1832 treaty with hope that, following the cession, the United States would accord them preemptive rights under which they could remain on their lands by paying the minimum government price of $1.25 per acre for it. In my opinion the prospective purchaser of the tract in 1832 would have had to take into account the influx of land speculators and the actual presence of the resident white squatters, and, therefore, would have been unable to sell much, if any of his land until these conditions had been resolved and normal market conditions had been established. For these reasons, I believe that the Commission should have applied a reasonable discount to cover an appropriate holding period.

For the foregoing reasons, I am of the opinion that the Commission's judgment is not adequately supported by the evidence. Accordingly, I dissent.

Jerome K. Kuykendall, Chairman