BEFORE THE INDIAN CLAIMS COMMISSION

SAGINAW CHIPPEWA INDIAN TRIBE OF MICHIGAN, et al.,	Docket No. 59
HANNAHVILLE INDIAN COMMUNITY, et al.,	Docket No. 29-E
THE OTTAWA TRIBE and GUY JENNISON, et al., as representatives of THE OTTAWA TRIBE, Plaintiffs,	Docket No. 133-B
POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INC.,	Docket No. 29-E
PRAIRIE BAND OF POTTAWATOMIE INDIANS, et al. [Plaintiffs in dismissed Docket Nos. 15-F and 15-G],	Docket No. 29-E
CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, et al. [Plaintiffs in dismissed Docket No. 307 (as amended)], Intervenors,	Docket No. 29-E
v.	
THE UNITED STATES OF AMERICA, Defendant.	

Decided: May 11, 1978

Appearances:

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket 29-E, and for the Potawatomi Indians of Indiana and Michigan, Inc., Intervenors.

James R. Fitzharris, Attorney for Plaintiffs in Docket 59.

Allan Hull, Attorney for Plaintiffs in Docket 133-B.

Robert S. Johnson, Attorney for Prairie Band, Intervenors.

Jack Joseph, Attorney for Citizen Band, Intervenors.

D. Lee Stewart, with whom was Assistant Attorney General James W. Moorman, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

The Commission previously entered in these dockets findings and an opinion dated June 13, 1973.[1/] The Commission determined therein that plaintiff Indians ceded the lands designated as Royce Area 66 in Michigan and Ohio to defendant by the 1807 Treaty of Detroit, effective January 27, 1808. 7 Stat. 105. The Commission concluded that the Ottawa bands of the Maumee, Blanchard's Fork, Au Glaize and Roche de Bouef had held recognized title to the southern portion of the subject property; that the Potawatomi Tribe had held recognized title to the central portion of the subject property; and that the Saginaw Chippewa Band of Indians had held recognized title to the northern portion of the subject property.

Trial on value and consideration was held before the Commission on April 7, 1977.

The total acreage of Royce Area 66 and the acreage of each of the portions belonging to the three plaintiffs has been agreed upon by the parties as follows:

The Ottawa tract contains	469,116 acres
The Potawatomi tract contains	1,843,779 acres
The Chippewa tract contains	3,298,637 acres
Total acreage	5,611,532 acres

1/ 30 Ind. Cl. Comm. 388 (1973), rehearing denied, 31 Ind. Cl. Comm. 408 (1973), aff'd, 207 Ct. Cl. 960 (1975).

The valuation date is the effective date of the Treaty of Detroit, January 27, 1808.

Royce Area 66 borders on the western end of Lake Erie, the southwestern portion of Lake Huron, and the connecting waters between the two lakes. The subject lands lie predominantly in southeastern Michigan, with a portion lying in northwestern Ohio. There are certain enclaves in the subject tracts, including Detroit, which are excluded from valuation in this proceeding.

The first white settlers in Royce Area 66 were French fur traders. Detroit became an early French trading center. The British entry into the area in the 18th Century was for purposes of colonization.

Although the United States gained sovereignty over the area from the British following the American Revolution, it was not until 1794 that Indian resistance was put down and the British agreed to surrender their remaining military outposts along the United States-Canadian border.

The new American government developed a land policy designed to encourage settlement of the Old Northwest, a region which included the subject tracts. Lands were to be acquired from Indians by treaty. By the Greenville Treaty in 1795, 7 Stat. 49, the United States acquired most of the present state of Ohio and the right to purchase from Indian parties to the treaty the lands remaining in their possession.

The United States' public land policy evolved gradually. In the early 1790's the Government sold vast tracts of frontier lands

to speculators as a means of encouraging settlement of the frontier, but the system proved unsatisfactory and was abandoned by the middle of the decade. In 1796, the Government commenced offering settlers small tracts of 640 acres at $2 per acre on credit terms. By 1804 the size of the minimum tract offered for sale was reduced to 160 acres, but the $2 per acre credit price was maintained, while the cash price was set at $1.60 an acre. The Government throughout this period was concerned with stimulating frontier settlement and set its prices with that aim in view rather than for the purpose of maximizing revenues. The effect of the Government's policies was to set a ceiling price of $2 per acre for all but unusually select frontier lands which often sold for higher prices at public auctions. This was the status of United States land policy on the valuation date.

At the valuation date the United States population was increasing rapidly. The compound annual growth rate of the population was 3.25 percent. In 1800 Ohio had a population of 45,365. The neighboring states to the east, New York and Pennsylvania, had populations which were expanding rapidly, providing numerous potential settlers for the Old Northwest. The result was that by 1810 Ohio's population had increased to 230,760. Michigan, on the other hand, was very sparsely settled, and that settlement was mostly in or around Detroit. Although population growth in the Old Northwest during the first decade of the

19th Century tended to be toward the west, it bypassed Michigan to the north. In 1810 the recorded population for Michigan was just under 5,000.

Consideration of economic patterns of the period shows that the economy was generally expansionary, but subject to short periods of decline. At the end of 1807 the economy had just completed a year of decline following an eight-year period of expansion. Agricultural production showed similar long-run expansionary trends during the period prior to the valuation date.

Access to Royce Area 66 at the valuation date was not well developed. Primitive roads, trails, and the Great Lakes waterways, were the avenues of transportation at the time. However, the terrain and waterways were favorable to the eventual development of a good transportation system into the subject tracts.

The climate and topography of the area were favorable to development. The temperatures were moderate, the rainfall plentiful, and the growing season was long. The terrain was nowhere difficult. The only impediment to settlement was the existence of areas of swampland which could become productive farmland only after being drained. At the time of valuation the subject tracts were forested, but no value was attached to timber at the time. No surveys had been undertaken in Royce Area 66 as of 1808, and there was no knowledge of minerals in the area.

The parties have agreed that the highest and best use of the subject tracts was for subsistence farming by settlers. They disagreed on the amount of swampland which was unusable as of the valuation date because of the need for drainage. However, the early settlers were aware that with drainage this land was suitable for agriculture. Roughly one-sixth of the subject lands would have required drainage in order to become productive.

The parties introduced evidence of comparable sales. Plaintiffs' evidence was of sales of small tracts to settlers in 1807. Abstracts of 118 sales were introduced into evidence. Four counties in eastern Ohio accounted for 110 sales. The remaining eight were from Wayne County, Michigan, and were mostly in the vicinity of Detroit.

Plaintiffs' sales data included transactions involving lots of less than an acre in size that were sold at prices of thousands of dollars per acre and that were undoubtedly townlots. Plaintiffs reported that the median sales price was $2.50 per acre.

If the sales are listed by price per acre, and the top and bottom 25 percent of sales are eliminated in order to remove from consideration exceptional sales, all townlot sales are eliminated. The remaining 50 percent of sales showed an average tract size of 215 acres, and an average price per acre of $2.57.

Inasmuch as all of these sales were from areas which were relatively settled as compared with the subject lands, they cannot be viewed as

wholly comparable. What the sales may tend to indicate is the level that prices might be expected to reach in the subject tracts when settlement there had progressed to the extent it had in the lands where the above described sales took place.

Defendant introduced evidence of large-scale transactions which occurred during the period when the Government was attempting to use land speculators as a means for developing frontier lands. These transactions involved millions of acres and occurred during the decade prior to 1796. Defendant considered the purchases made by the Connecticut Land Company and the Holland Land Company as comparable. The prices of these purchases ranged from $.26 to $.44 per acre. The retail prices which these companies received when the land was resold in small parcels to settlers ranged in general from $1 to $2.50 per acre. Liquidation of the large tracts by the companies took over 20 years.

We consider that these transactions could not be considered comparable for valuation purposes. See Miami Tribe v. United States, Dockets 253, et al., 22 Ind. Cl. Comm. 92, 122 (1969). By the valuation date, the policy of large scale sales to land companies was no longer being followed and the conditions under which such large sales had been made no longer prevailed. However, the evidence of these sales is useful in that it does indicate the length of time which might be required to liquidate large frontier land holdings.

While the parties to a hypothetical transaction would doubtless have found the aforementioned sales data worthy of consideration, we feel that other data, not introduced in evidence herein, would have been at least equally valuable. Such would be evidence of Government sales of comparable tracts further west in Ohio.

We have therefore included a finding concerning Government sales of the so-called Greenville lands in the Cincinnati Land District of Ohio. The finding is based on a fully developed record in the case of Miami Tribe of Oklahoma v. United States, Dockets 67, et al., 4 Ind. Cl. Comm. 346 (1956), aff'd in part and remanded for add'l findings, 146 Ct. Cl. 421 (1959). The record shows that during the decade of 1800 to 1810 sales of land from the three million acres available in Ohio were made at a rate of about 3.3 percent per year. In the following decade the rate of sales increased so that by the end of 20 years, some three-quarters of the entire tract had been sold.

Data in Miami also showed that some randomly selected parcels of Greenville lands which were withheld from general sale by the Government pursuant to statute, commanded premium prices of as much as $8 per acre when subsequently placed on the market.

We will now consider the parties' respective valuations which treated the three tracts in Royce Area 66 separately.

Plaintiffs' expert witness for valuation was Dr. Roger K. Chisholm, an associate professor of econmics. Dr. Chisholm considered demographic,

economic and other pertinent conditions which he felt would influence the sale of the subject tracts on the valuation date. He relied on the evidence of sales in 1807 which he deemed comparable and which showed a market price of $2.50 an acre. He used this figure as the basis for his calculations of fair market value of the three tracts.

Dr. Chisholm considered the central tract, that of the Potawatomis, as typical of the whole of Royce Area 66. He noted that it had excellent farmland and was adjacent to Detroit, which was the nucleus for future settlement. He concluded that this tract should therefore be valued at the $2.50 per acre comparable sales figure. Using that figure, Dr. Chisholm calculated the fair market value of the Potawatomi tract at $4,609,447.50 as of the 1808 valuation date.

Turning to the southernmost tract, that of the Ottawas, Dr. Chisholm stated that because of its proximity to existing settlement in Ohio, it merited a premium over the $2.50 per acre comparable sales figure. He therefore concluded that this tract should be valued at $2.65 per acre. Using that figure, Dr. Chisholm calculated the value of the tract at $1,243,157.40 as of the 1808 valuation date.

In valuing the northernmost tract, that of the Chippewas, Dr. Chisholm discounted the $2.50 comparable sales figure because this tract was a greater distance from established settlement than the other two tracts and because of the presence of some inferior agricultural land. He concluded that the tract should therefore be valued at $2.35

per acre. Using that figure, Dr. Chisholm calculated the fair market value of the tract at $7,751,796.95 as of the 1808 valuation date.

We do not feel that plaintiffs' valuation is acceptable. As we have noted above, the sales Dr. Chisholm relied on are not sufficiently comparable. In addition, we feel that plaintiffs erred in omitting from consideration sales data such as that in evidence in the Miami case. Also we feel that plaintiffs should have given consideration to the fact that immigration by 1810 tended to bypass the Michigan part of Royce Area 66 in favor of lands to the south and west. Plaintiffs failed to take into account the need for drainage of substantial portions of swamplands, particularly in the Ottawa tract.

We cannot accept plaintiffs' argument that the Commission must value the Indians' tracts solely on the basis of the fair market value of small parcels of land. Plaintiffs argue that deductions, which are normally applied by the Commission to adjust that "retail" value,[2/] are improper. Such deductions are based on the assumption that one purchaser will buy the entire tract and hold it until he can sell it in small parcels to settlers.[3/] These deductions reflect the time and expense required to dispose of a large tract of property as well as other such factors which would be considered by parties to a hypothetical transaction on the valuation date.

2/ E.g., Nooksack Tribe v. United States, 162 Ct. Cl. 712, 717-18 (1963), aff'g Docket 46, 6 Ind. Cl. Comm. 578 (1958); Sac and Fox Tribe v. United States, Docket 83, 32 Ind. Cl. Comm. 320 (1973), aff'd, 206 Ct. Cl. 898 (1975).

3/ This assumes a highest and best use of the tracts for subsistence farming, as in this case.

Plaintiffs cite in support of their argument the recent decision in Joint Council of Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975). Plaintiffs argue that the Passamaquoddy decision establishes the rule that the United States was a fiduciary of the Indians at the time of the historic cessions of Indian lands to the United States. Plaintiffs further maintain that a fiduciary, when selling a beneficiary's lands, must sell them either as a whole or in subdivided parcels, whichever is more advantageous to the seller. In the instant case, plaintiffs maintained it would clearly have been more advantageous to the Indians for defendant to have sold the land in subdivided parcels, as in fact defendant subsequently did sell it to settlers.

Defendant's reply does not discuss plaintiffs' arguments beyond noting that they are novel and not valid. Defendant contends that the valuation should be made according to the long-settled standard of what a single willing buyer would pay a willing seller for the subject tracts.

We have considered Passamaquoddy and plaintiffs' argument. We conclude that Passamaquoddy is not in point. That case concerned the obligations of the United States under the Trade and Intercourse Acts with respect to sales by Indians of their lands to a state.

Plaintiffs cite the Miami Tribe decision of the Court of Claims, 146 Ct. Cl. 421, supra, in support of their contention that the sales price of comparable lands should not be discounted. In Miami, at 467, n. 6; the court stated that, as of the valuation date, there was an active demand by settlers for the Miami plaintiffs' land at $2 per acre.

The court rejected the Commission's ultimate finding on valuation which was that the land had a fair market value of $.75 an acre, stating that such finding was not supported by the record or by the primary findings. On remand, the Commission considered the length of time which would probably have been required to dispose of the land, and ultimately found a value of $1.15 per acre. 9 Ind. Cl. Comm. 1, 17 (1960). This decision was affirmed, 159 Ct. Cl. 593 (1962). We conclude therefore that Miami does not support plaintiffs' contention regarding discounts. See also, Nez Perce Tribe v. United States, 176 Ct. Cl. 815 (1966), cert. denied, 386 U.S. 984 (1967), (aff'g Docket 175-B, 13 Ind. Cl. Comm. 184 (1964)).

In a supplemental brief the Eastern Potawatomi Indians urged that the Commission should take into consideration the effects of inflation and the consequent devaluation of the dollar in the course of the 170 years which have intervened since plaintiffs' lands were ceded. This argument has been considered before and rejected. See Nooksack Tribe, supra, note 2.

Defendant's expert witness for valuation was Dr. Ernest Booth, a professional real estate appraiser. Dr. Booth's valuation report stressed the downturn in the economy that started in 1807, the allegedly poor soils in the subject tracts and the necessity for drainage, the problems of access to the tracts, the tendency for settlement to bypass Royce Area 66, and the estimated time that would be required to sell the lands to settlers.

Defendant's expert used three "alternative" methods of valuation (see finding 24, infra). However, as he noted, the methods had overlapping assumptions and did not yield significantly different conclusions as to market value.

Dr. Booth started his valuations with the southernmost tract, that of the Ottawa plaintiffs. Dr. Booth maintained on the basis of his soil data that 52 percent of the tract was non-saleable land. Because of this and the lack of access roads, he estimated 35 years would be required to sell the land. Calculating on the basis of these assumptions, he arrived at a fair market value of $.33 per acre for the Ottawa lands, or $154,808 for the 469,116 acres in the tract as a whole.

Dr. Booth valued the northernmost tract, that of the Chippewa plaintiffs, next. On the basis of the remoteness of this tract and because of his estimate that 22 percent of the land in the tract was poor, he estimated 30 years would be required to sell the lands. Calculating on the basis of these assumptions, he arrived at a fair market value of $.40 per acre for the Chippewa lands, or $1,319,455 for the 3,298,637 acres in the tract as a whole.

Dr. Booth finally valued the Potawatomi tract, which lay between the other two. Because of difficulties of access and his estimate that 36 percent of the land was "marginal," he concluded that 20 years would be required to liquidate. Calculating on the basis of these

assumptions, he arrived at a fair market value of $.55 per acre for the Potawatomi lands, or $1,014,078 for the 1,843,779 acres in the tract as a whole.

Without going into the details of Dr. Booth's different approaches to valuation (which are set out in some specificity in finding 24), we will review the assumptions which underlay his calculations.

Dr. Booth started with the assumption that the sales of large tracts to speculators over a decade prior to the valuation date were sales comparable to the hypothetical purchase of Royce Area 66 in 1808. This assumption was the basis for one of Dr. Booth's approaches. We have concluded hereinabove, however, that these sales to speculators in the period up to 1796 were not comparable. Cf. Miami Tribe v. United States, 146 Ct. Cl. 421, 467, n. 6, supra. We therefore reject this assumption of defendant's.

Dr. Booth's assumptions concerning large percentages of poor soils are not borne out by the evidence. There was a substantial portion (perhaps one-sixth) of the subject lands that required drainage, but once drained the soil was good for agriculture. Dr. Booth's deductions for worthless or marginal lands were greatly exaggerated.

Dr. Booth made further assumptions concerning the length of time that would be required for a hypothetical purchaser to resell the subject lands. We find ourselves in rough agreement with Dr. Booth in this regard. We agree that there was inadequately developed transportation

in the subject area in 1808, and a tendency of settlement to bypass Royce Area 66 in favor of comparable public lands that were abundantly available to the south and west. The experience at the valuation date concerning the period necessary to dispose of large tracts of land through sales of small tracts suggested a minimum time of 20 years. Therefore, Dr. Booth's estimates of from 20 to 35 years for liquidation of the subject tracts of lands appear to us to be a reasonably accurate reflection of what hypothetical parties to a transaction in 1808 would have anticipated.

Dr. Booth's two remaining approaches accepted retail prices of $2.30 to $2 per acre. He maintained, reasonably enough we think, that as the time for resale lengthened, the disparity between the retail price and the wholesale price would increase.

In these two approaches, Dr. Booth used formulas based on his estimated liquidation periods to make deductions from the retail price necessary to arrive at fair market value in 1808. But in neither case did Dr. Booth explain or justify to our satisfaction the basis for his formulas. The results of his formulas were reductions of the retail price by factors of from 1:4 to 1:7. We think that these deductions are excessive.

For the foregoing reasons we reject the respective valuations of the parties' experts.

As we have noted, we have concluded for varying reasons that the sales data which was introduced into evidence by the parties

does not show transactions which were comparable to those under consideration here, involving three tracts ranging from a half-million to over three million acres to be sold in 1808. Moreover, it is apparent that since the abandonment by the Government over 10 years earlier of the policy favoring large-scale land speculation, there was no market for tracts such as these. In addition, because of the remoteness of the tracts and problems of access, there was a limited market in Royce Area 66 for retail sales of small tracts to settlers on the 1808 valuation date.

In circumstances such as these, in the absence of comparable sales or a market, we are guided by factors such as those set out by the Court of Claims in _Emigrant New York Indians_, _supra_, at 285, and _Nez Perce Tribe_ v. _United States_, 176 Ct. Cl. 815, _supra_. These factors include the physical characteristics and attributes of the land, the climate, settlement and population patterns, access to land, economic conditions and public land policies. On the basis of consideration of such factors, we must determine the amount that a willing buyer would pay a willing seller on the valuation date in order to arrive at a fair market value for the subject tracts.

In our view, in hypothetical negotiations for the subject lands in 1808, a willing seller would have stressed the fact that he could hold on to the lands until the expanding population and economy of the United States created a more active market for his lands. He would have been aware of the course of land development in the western

portions of New York and Pennsylvania, and in southern and eastern Ohio. He could have expected the same to occur in Royce Area 66. The willing seller would have anticipated that he could live comfortably off the land during the interval until demand grew and would then be able to sell the bulk of his lands at the $2 per acre prevailing price for public lands. Cf. Sioux Tribe v. United States, Docket 74, 38 Ind. Cl. Comm. 469, 505-506 (1976).

If the seller followed the policy of holding certain enclaves off the market, as had been done before by private developers and the Government, he could get premium prices for such enclaves. On the other hand, in order to sell the land more rapidly he could offer a deduction such as that offered by the Government for cash sales. Similarly, the price of less desirable or relatively inaccessible lands could be reduced in order to expedite sales. Nonetheless, a willing seller would have to consider his costs of survey, and the cost to the buyer of any necessary drainage and transportation.

Taking these factors into consideration, we conclude that a willing seller might reasonably have expected to receive an average price of $1.40 per acre for the subject lands.

In hypothetical negotiations a willing buyer would have stressed the long delay which would occur before the tracts could be resold. He would be aware of the remoteness of the subject lands from settled areas and note the need for surveys, roads, and some drainage. He would have accepted the fact of the inexorable growth of the economy

and population but would have noted the tendency of settlers to locate in the more desirable parts of the subject area. He would have observed that although economic and demographic growth was relatively rapid, the rate of growth had definite limits. He would have argued that this consideration reinforced previous experience showing that more than 20 years would be required to sell the lands. He would have noted the existence of abundant public lands, offered at $2 per acre and lying in the path of population and settlement growth. Because of the remoteness of portions of the subject tracts, he would have expected the retail sales in Royce Area 66 to be quite slow for several years after 1808.

Taking these factors into consideration, we conclude that a willing buyer might reasonably have made a final offer for the subject lands in the neighborhood of $1 per acre.

On the basis of the above assumptions, we will now value the three tracts separately.

We will start with the southernmost tract, that of the Ottawa plaintiffs. There are several distinguishing factors concerning this tract which would concern the hypothetical parties to a sales transaction in 1808.

The hypothetical parties would be expected to note that the tract of less than a half-million acres was relatively small. They would observe that the land had ready access to the East via Lake

Erie and that it was in the path of the westward course of settlement in the Old Northwest. They would consider that all of the land was potentially good for agriculture, while noting that some of the land in the tract would require drainage. They could be expected to realize that it would take a number of years to dispose of the bulk of the Ottawa land.

Taking these factors into account, we conclude that the 469,116 acre Ottawa tract had a fair market value on the 1808 valuation date of $600,000, or approximately $1.28 per acre.

We turn next to the Potawatomi tract adjacent to the northern border of the Ottawa tract and containing 1,843,779 acres.

The parties to a hypothetical transaction involving this land would be expected to note the proximity of the Potawatomi tract to Detroit, already at that time a trading center, and the tract's location between Lake Erie and Lake Huron which could be expected to assure its future importance. They would also be aware of its abundance of good agricultural land which could be settled with a minimum of difficulty.

The hypothetical parties could be expected to take into account the large size of the tract, almost two million acres. They would also note that the tract lay slightly north of the stream of settlement. For these two reasons they could expect at least 20 years to elapse before the bulk of the lands would be sold.

While this tract contained land that was somewhat better than the Ottawa tract, its much greater size persuades us that a slightly

lower price per acre value is appropriate. We conclude that the Potawatomi tract had a fair market value on the 1808 valuation date of $2,300,000, or approximately $1.23 per acre.

We turn finally to the northernmost tract, approximately 3.3 million acres to which the Chippewa plaintiffs had title.

The hypothetical parties could be expected to note the large size of this tract, its remoteness from existing settlement, unlikelihood of immediate population growth, and the existence of marginal lands constituting a small portion of the tract. They could be expected to estimate that it would require longer to dispose of this tract through sales to settlers than in the case of the other two tracts.

Taking the above factors into account, we conclude that the Chippewa tract had a fair market value on the 1808 valuation date of $3,500,000, or approximately $1.06 per acre.

We turn now to the matter of consideration. The Treaty of Detroit provided for consideration to be paid to the plaintiffs in the amount of $10,000 in money and goods, a perpetual or permanent annuity of $2,400, and two blacksmiths to be provided for a period of 10 years, one to live with the Chippewas and one to live with the Ottawas. The annuity was to be divided $800 each to the Ottawas and Chippewas and $400 to the Potawatomis.

The defendant introduced in evidence a report of the General Accounting Office showing payments made to the plaintiffs under the

1807 Treaty of Detroit. Regarding the probity of such disbursement schedules, we held in Minnesota Chippewa Tribe v. United States, 32 Ind. Cl. Comm. 192 (1973), that such schedules, uncontroverted by other evidence, were prima facie proof that treaty consideration was properly paid by defendant.

The parties are in agreement that in calculating the value of the annuity received by the plaintiffs, the defendant should be credited with the payment of the sum of $40,000, an amount which if invested at five percent would have earned the stipulated $2,400 per annum. This is the established way of giving defendant credit for payment of a permanent annuity. Pawnee Indian Tribe v. United States, 157 Ct. Cl. 134, 140 (1962), cert. denied, 370 U.S. 918 (1962).

The parties are in agreement that the plaintiffs received their proper portion of the $10,000 promised in "money, goods, implements of husbandry, or domestic animals". Article II of the 1807 Treaty. However, Public Law 93-494, 88 Stat. 1499 (1974) amended the Indian Claims Commission Act by providing that "expenditures for food, rations, or provisions shall not be deemed payments on the claim." To the extent that payments under this provision of the Treaty were in the form of food, rations or provisions within the meaning of the 1974 Act and as interpreted by the Commission, the value of such payments may not be deducted from the award.

Since the enactment of the 1974 amendment we have been confronted with cases requiring our interpretation of which treaty payments were

to be regarded as coming within the "food, rations, or provisions" phrase. In Prairie Band of the Pottawatomi Tribe v. United States, 38 Ind. Cl. Comm. 128 (1976), we held that "the phrase, 'food, rations, or provisions', included at least the goods and supplies, and perhaps some services, that were available through army depots or supply stations." Supra at 226. The result of that interpretation was that expenditures disbursed under the label of "removal and subsistence" and all disbursements identified as "treaty goods and provisions", while clearly treaty consideration, were not deductible as payments on the claim.

In Western Shoshone v. United States, 40 Ind. Cl. Comm. 318 (1977), we held that the ordinary meaning of the phrase, "food, rations, or provisions", did not include individual services to the Indians unless those services were a necessary part of furnishing and supplying, or making available food, rations or provisions, i.e., the transportation and storage of food. Thus the value of the services of a blacksmith and certain other laborers constituted a deductible payment on the claim and were credited to defendant.

In the present case the treaty provisions regarding consideration are not as complex as in the above two cases. The only issue to be resolved here is whether or not the payments made to the treaty parties under Article II of "$10,000 in money, goods, implements of husbandry, or domestic animals" are deductible payments on the claim. Defendant did not attempt to show which payments to the parties were made in cash

and which in "goods, etc.". Any payments in the latter category would fall within the purview of the 1974 amendment. The burden of proof of deductibility of an item of consideration from the final award is on the defendant. Since defendant has failed to satisfy this burden, the entire amounts ($3,333.34 to the Ottawas, $3,333.34 to the Chippewas, and $1,666.67 to the Potawatomis) may not be deducted from the final award as payments on the claim or consideration.

The parties differ as to the amounts the plaintiffs received for the services of blacksmiths. Defendant maintains that the General Accounting Office Report shows that two blacksmiths were furnished for 10 years at a cost of $469.20 per blacksmith per annum. Plaintiffs urge that the accounting report shows that blacksmith services in the amount of only $3,650 for the 10 years were actually received by the parties.

Our examination of the record and the accounting report persuades us that defendant is correct and plaintiffs received the total amount of $4,692 promised for services of blacksmiths.

The treaty consideration payments made to plaintiffs and for which defendant is entitled to have credit as a deduction from the final award are as follows:

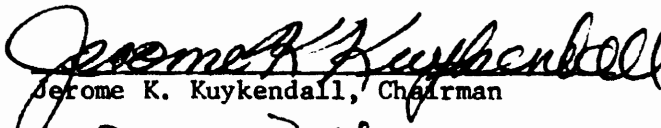
Chippewa Indians	Ottawa Indians	Potawatomi Indians
$20,692.00	$20,692.00	$8,000.00

Although part of the consideration promised and paid to plaintiffs for the cession of their lands may not be deducted as payments on the claim as noted above, all of the consideration may be taken into account in determining whether the land was secured for an unconscionably low consideration. We hold that consideration of $57,717.32 for land having a fair market value in excess of $6,000,000.00 was so grossly inadequate as to render that consideration unconscionable within the meaning of Clause 3, Section 2, of the Indian Claims Commission Act.

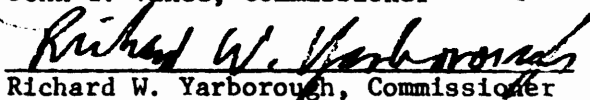
The respective plaintiffs are entitled to recover from defendant the following net sums, less offsets, if any, which defendant may be entitled to under the provisions of the Indian Claims Commission Act: to the Ottawa plaintiffs: $579,308.00; to the Potawatomi plaintiffs: $2,292,000.00; to the Chippewa plaintiffs: $3,479,308.00. An order will be entered accordingly.

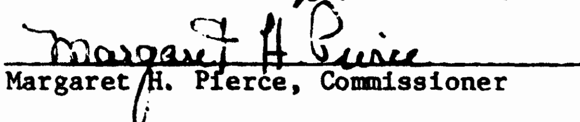
Brantley Blue, Commissioner

We concur:


Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner