BEFORE THE INDIAN CLAIMS COMMISSION

THE POTAWATOMIE NATION OF INDIANS, THE PRAIRIE BAND, et al.,	)	Docket No. 15-P
Plaintiff,	)	
THE HANNAHVILLE INDIAN COMMUNITY, et al.,	)	Docket No. 29-N
Plaintiffs,	)	
CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, et al.,	)	Docket No. 306
Plaintiffs,	)	
POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INCORPORATED,	)	Docket Nos. 15-P, 29-N, and 306
Intervenors,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: June 8, 1978

Appearances:

Jack Joseph, Robert S. Johnson, and Louis L. Rochmes, Attorneys for Plaintiffs in Docket Nos. 15-P and 306.

Robert C. Bell, Jr., and J. Roy Thompson, Attorneys for Plaintiffs in Docket No. 29-N.

Robert C. Bell, Jr., Attorney for the Intervenors.

Richard L. Beal, with whom was Assistant Attorney General Peter R. Taft, Attorneys for the Defendant. James E. Clubb was on the Brief.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

Introductory Statement

This case is now before the Commission for a determination of (1) the fair market value of the lands ceded by the plaintiffs to the United States under the terms of the Treaty of October 20, 1832, 7 Stat. 378; (2) the value of the consideration received by the plaintiffs from the defendant for said cession; and (3) whether the consideration paid was unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050. The question of the consideration paid to the plaintiffs for the cession under the above treaty must also be determined in order to find the amount that, under our act, must be deducted as payment on the claim. The ceded area to be valued is Royce Area 177, a tract of land in northeastern Illinois, fully described in finding 38 entered herein, and briefly restated elsewhere in this opinion.

The Commission's title decision in this proceeding was issued on April 4, 1973, 30 Ind. Cl. Comm. 42. That decision involved a number of overlapping land cessions in 15 consolidated dockets, three of which are the direct concern of these proceedings. The remaining 12 dockets, in what is referred to as the "Illinois" consolidation, have been or are being disposed of separately. (The Peoria claims on behalf of the Piankeshaw in Docket 99 and Miami claims in Dockets 124-H and 254 have been dismissed. 30 Ind. Cl. Comm. 42, at 125. The nine remaining

Dockets 15-D, 15-Q, 29-B, 29-O, 309, 311, 313, 314-A, and 315 will be the subjects of separate valuation decisions of the Commission.)

In the title decision of April 4, 1973, supra, the Commission held that by the Treaty of October 20, 1832, supra, the Potawatomi Tribe ceded to the United States all of its interest in Royce Area 177 (subject to the reserves provided by Article II of the treaty), viz.:

> (a) exclusive recognized title to the portion of Royce Area 177 designated as tract F on Map Appendix I . . . , and
>
> (b) a recognized, undivided one-half interest in the portions of Royce Area 177 designated as tracts D and E on Map Appendix I. 1/

The Commission also determined in the title decision that the effective date of cession of the Potawatomi interests under the Treaty of October 20, 1832, supra, was the date on which the treaty was signed and concluded by the parties, viz., October 20, 1832. 30 Ind. Cl. Comm. 42, at 115. Accordingly, the valuation date for the ceded lands herein is October 20, 1832.

The valuation hearing in these dockets was held on June 24, 1976. For the purpose of clarity with respect to the interchange of transcripts and documentary evidence in this record, it should be noted that the Commission had also set for trial another consolidated case known as the "North of the Wabash" case involving some lands abutting on the subject tract, Royce Area 177. The plaintiffs in this case are also plaintiffs in the Wabash case (Dockets 128, et al.). The Wabash case valuation

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1/ 30 Ind. Cl. Comm. 42, at 115. (Note Map Appendix I has been incorporated and reproduced in this decision at p. 443, infra. A detailed insert map of the subtracts is also included as Map Appendix II, page 444, infra.)

trial commenced on June 21, 1976, immediately preceding the trial in this case. Because of the similarity of the cases, and since much of the evidence and witnesses were the same, it was agreed (Tr. p. 6) [2/] that the parties could refer in one case to the transcript of the other. During the course of these trials, it also became apparent that many of the issues litigated in the "Illinois" consolidation were also issues in this case. [3/] In order to save time, particularly with respect to cross examination of witnesses, the Commission, upon request, ruled that the transcript of the Illinois proceeding might also be cited in this case as well as in the Wabash cases. (Tr. NW, p. 7).

Tract Description -- Physiographic, Climate

The lands to be valued in this case within Royce Area 177 (hereinafter R. A. 177) are situated in northeastern Illinois, south of Lake Michigan. In the title decision of April 4, 1973, supra, the Commission divided R. A. 177 into three subtracts labeled "D", "E", and "F". The United States Bureau of Land Management, whose calculations the parties have agreed to accept (Tr. 4-5), has determined that R. A. 177 contains a total of 2,232,229 acres. The Potawatomi interest in the subtracts of R. A. 177 is as follows:

2/ Hereinafter, the reference "Tr", is to the transcript in this case; the reference "Ill. Tr." is to the transcript in the Illinois consolidation cases; and the reference "NW" is to the transcript in the "North of the Wabash" cases.

3/ The claim of the Potawatomi plaintiffs herein was removed from the original "Illinois" valuation trial which commenced on January 6, 1975. At the time of that trial, the instant dockets were the subject of appeals pending before the U. S. Court of Claims on party questions. These questions have been resolved and the appeals concluded. See Pottawatomie Nation of Indians v. United States, 205 Ct. Cl. 765, 507 F. 2d 852 (1974).

Subtract	Total Acreage	Potawatomi Interest
D	890,014	50%
E	844,794	50%
F	497,421	100%

The approximate boundaries of R. A. 177, a roughly triangular-shaped tract of land, are as follows: The northern boundary begins at a point on the southern shore of Lake Michigan near present-day South Chicago and runs southwestward to the Kankakee River and then along the Kankakee and Illinois Rivers to the Fox River. The western boundary of the tract is east of a line from the mouth of the Fox River southeastward to the ridge between the two Vermillion Rivers. The southern boundary follows the watershed between the lands drained by the Vermillion and those that drain northward to the Iroquois River. The eastern boundary of the tract is the Illinois-Indiana state line. Subtract D occupies most of the western half of the tract; subtract E is in the southeast portion; and subtract F is in the northeastern section of the tract. The present-day counties wholly or partially within R. A. 177 include Will, Grundy, Kankakee, Iroquois, Livingston, and Vermillion.

The subject tract is principally of uniform topography made up largely of flat plains as prairie lands with gentle slopes on level surfaces. Except for a few steeper slopes along the drainage courses, there are no sharp variations in the general topography of the tract as a whole. Smooth plains on the north, west and south fringes of R. A. 177 account for about 20 percent of the total area. Areas

of sand and slower drainage characterize parts of the smooth plains. The immediate surface of the subject tract is entirely the product of the Wisconsin Glacial Drift or deposition.

The principal soil materials in the general study area, deposited during the Wisconsin glacial period, were Peorian loess, a wind-born deposit; outwash, soil particles deposited by glacial meltwater; and glacial till. There was also some alluvium of recent geological deposit over bedrock near the major streams. This basic soil formation of the tract was generally well supplied with nutrients, friable, and with a water-storage capacity. As noted above, areas of sandy soils were located in the northern section of R. A. 177. Most of the area contains or displays an almost black-colored surface layer. These dark prairie soils are very rich and fertile. Much of the area's fertility is accounted for in large part by the organic material returned to the soil over a long period from the dense grass coverage of the prairie.

At the time of settlement, in the beginning of the 19th Century, the vast region of the central prairie which includes the subject tract had a thick covering of prairie grasses, with Big Bluestem dominant. Finger-like projections of the oak-hickory forest association followed river courses, especially in the Vermillion and Illinois River valleys. Also at the time of settlement, the large fields of prairie grasses were interlaced with forest lots or "groves" of similar hardwoods found along the rivers. The vegetation of the tract as a whole was approximately 90 percent prairie and 10 percent forest.

The general area of northeastern Illinois experiences a humid, continental climate with hot summers, cold winters, and short

transitional seasons in between. Annual temperatures in the area vary over a wide range. July average readings of 75° F. and January averages of 25° F. were taken at Kankakee, Illinois, located in the center of the subject tract. The average precipitation is about 33 inches, also reported from Kankakee. Moderating temperatures usually occur in the Lake Michigan area with cooler summers and milder winters noted. The average number of frost free days in northern Illinois is about 160 to 170.

The question of drainage as a factor to be considered with regard to the quality of the subject lands has been raised in connection with the parties' discussion of the tract's topography. Commenting in its brief, without direct reference to R. A. 177, the defendant states that parts of the prairie were ill-drained as a result of the flat topography, and that upland prairie with better drainage conditions was also present. According to the defendant, R. A. 177 contained both types of prairie and included much of the most extensive prairie area found in Illinois. This Grand Prairie, defendant concludes, contained "vast acreages" that were poorly drained, especially in spring and summer. No specific areas in the subject tract are identified as swampy, although the defendant generally states that 20 percent of the prairie soils in R. A. 177 were wet prairie.

The plaintiffs' position is that the lands on which water stood for any length of time were largely outside of R. A. 177. The plaintiff relies on county histories written in about 1880. With the exception of some sandy areas, few sloughs, and an area of marshland in the eastern edge of Kankakee County, these histories generally

described the counties as well-drained through their river systems, i.e., the Kankakee, Iroquois, Du Page, Des Plaines, and Vermillion Rivers. Poor drainage appears to have been most pervasive in the relatively small areas constituting the smooth prairie portion of R. A. 177. Even on the smooth prairie, however, the drainage problem occurred only at the lowest depression of a given tract of land and generally as an aggravated condition during the wet seasons. It is agreed, nonetheless, that settlers entering such lands in the early 1830's had the technology or understood drainage by simple open ditching for short distances, and that wet lands during dry seasons were useful for pasturage and wild game. The only areas in the tract which would have been described in contemporary literature as swampland were located in a narrow strip in the east-central section of R. A. 177 along the Kankakee Marshes.

Historic Development

The first important, non-Indian historical developments in the general area of the subject tract and northeastern Illinois evolve from the white incursions into the whole Northwest Territory in the mid-17th Century. From about 1671 to 1763, this entire study area, west and south into the Mississippi Valley, was French Territory. With the first Treaty of Paris in 1763, French dominion over the northwest, including Canada, passed to England. In the intervening 90 years, French explorers such as Louis Jolliet and Pierre Marquette, as well as fur traders, trappers, and military posts dominated the area. French explorations represent the first recorded visits of white men to any part of northeastern Illinois. Both Jolliet and Marquette entered and explored parts of R. A. 177. In 1673, Marquette's party travelled up the Illinois River and

crossed the Chicago portage from the Des Plaines River to reach Lake Michigan. This important portage was located near the northern tip of the subject tract.

The observations of the early French explorers were generally favorable and contained glowing accounts of the land, its fertility, abundance of wildlife, and the beauty of the rivers and lakes. There is no evidence, however, to indicate any major influx of settlers to the area as a result of these explorations. The exploration did serve to establish an important string of military posts and trading centers in the region, extending from the upper Great Lakes south along the Illinois River and into the Mississippi Valley, relatively near the boundaries of the subject tract. French posts were also established east of the subject tract in the Wabash and Kankakee River Valleys. Northern Illinois, including the subject tract, remained largely unexplored and devoid of white settlers for most of the 18th Century French-English occupation. The numerous Indian Wars and French-English conflicts of the 1750's also retarded permanent settlement of the region in this period. The English period (1763-1783) was marked by efforts on the part of England to create friendly and peaceful alliance with the Indians. The main thrust in this direction was to discourage white settlements west of the Appalachians under the Proclamation of 1763. The Colonial-American movement to the West was not, however, totally discouraged. White settlers, largely from Virginia, did begin to move in increasingly large numbers into Kentucky and parts of the Ohio Valley up until the beginning of the War of 1812.

By 1790, the Northwest Territory was under the control of the new Federal Government. The United States had already provided the territory with a government under the Act of August 7, 1789 (1 Stat. 50). By 1794, England had agreed to abandon all military posts in the Northwest. This action, coupled with the American victory over the Indians at Fallen Timbers in 1794, led to the signing of the Treaty of Greeneville on August 3, 1795 (7 Stat. 49). 4/ With conditions relatively peaceful in the area, settlers in large numbers established themselves first in Ohio, then in Indiana. By the Act of May 7, 1800 (2 Stat. 58), Indiana Territory was formed, and on March 1, 1803, Ohio was admitted to the Union. The rapid settlement of Ohio (estimated 250,000 people by 1812) led to an overflow of newcomers into Indiana. By 1805, Indiana Territory had already convened a legislature. Further west, new settlements were developing along the Mississippi in southern Illinois. By 1809, Illinois had become a separate territory (Act of February 3, 1809, 2 Stat. 514). Indiana was admitted to the Union on December 11, 1816, and Illinois, pursuant to an enabling Act of April 18, 1818, 3 Stat. 428, was admitted on December 3, 1818.

A temporary halt in the westward expansion and peace in the Northwest Territory resulted from the War of 1812. While the war predates the valuation date in this case by some twenty years, its final outcome

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4/ For a complete discussion of the Treaty of Greenville and other treaties relating to the Potawatomi, and cessions by them and other Indians in the Northwest Territory, see, Potawatomi Tribe v. United States, 27 Ind. Cl. Comm. 187 (1972), aff'd 205 Ct. Cl. 765, 507 F. 2d 852 (1974).

was significant to the future frontier ambitions of the United States. With the signing of the Treaty of Ghent in 1814, the British signified their intention of abandoning the northwest Indians to land-hungry frontiersmen. Britain also gave up all claims to trade south of the Canadian border. Both factors cleared the way to further westward expansion that would eventually carry the frontier to the Mississippi. Thereafter, the Americans pursued a steady policy of land purchases from the Indians. There followed a period of American consolidation in the western area through these cessions and the pacification of the Indians through a fort-building program. By 1821, nearly all of Indiana, Illinois, and Michigan were in American hands. This period also marks the beginning of the "Great Migration", which amounted to an enormous western population movement into Ohio, Indiana, and southern Illinois.

Access, Population, Settlement

By the 1832 valuation date in this case, access to the borders of the subject tract, from the northeast, west, and to a lesser extent from the south, was firmly established. The principal routes of access combined overland travel with water transportation, as later augumented by canals. Overland travel, while rapidly improving and expanding in the 1830's, was the least satisfactory, especially in the prairie areas of northern Indiana and Illinois during wet seasons. The major east-west land routes that skirted or entered R. A. 177 in the 1820's were native trails such as the Great-Sauk, Calumet Beach, and Chicago-Detroit. These and all other access routes in the area are fully described in our finding 41, infra. The better roads to northeast Illinois were planned

and constructed in the mid-1820's. These roads were designed mainly to connect the East with Detroit and Chicago, the principal focal points for trade and commerce in the Northwest Territory. Two such roads were a federal military road, started in 1825, from Chicago to Detroit, and the Michigan Road, started in 1828, connecting the study area from lower Lake Michigan southeast through Indiana to the Ohio River.

The defendant's position regarding the question of access is that much of the subject area was far from any navigable river. The defendant states, moreover, that transport was difficult to and from and within Illinois in 1832, and limited to travel by foot, by horse, or by boat. Although we agree that the means of transportation in northeast Illinois were limited in 1832 (as they were throughout the nation), we do not agree with defendant's bleak picture of the accessibility of the subject area.

Insofar as navigable rivers are concerned, R. A. 177 was certainly not land-locked. It was a fact, in this regard, that the major navigable river systems in the Northwest provided the most natural, cheapest and least difficult routes and natural highways to the very borders of the subject tract. The northeast water approach to the tract was via the Chicago portage which linked the headwaters of the Chicago and Illinois Rivers, thereby joining the Great Lakes and Mississippi water way systems.

Of great importance in this link was the Erie Canal, completed in 1825, connecting Albany on the Hudson River and Buffalo on Lake Erie. Prior to the Erie Canal, river transportation to the West was southerly in direction towards the Ohio River system. The Erie Canal opened migration and trade to areas north of the Ohio and in the Great Lakes region.

Principal access on the western boundaries of R. A. 177 from the large settlements in southwestern Illinois was also mainly by water up the Illinois River. Water or river access from the south was not as direct. The Wabash-Maumee River system served the southeastern borders of the subject tract. Danville, near the southern end of R. A. 177 (subtract E) was a transshipment point to and from the Wabash near Perrysville, Indiana.

The Kankakee-Illinois River system gave some access to the east-central portion of R. A. 177. The Kankakee, which flows through the subject tract northwesterly to the Illinois River, begins about 3 miles from the St. Joseph River in Indiana. This short portage was the only interruption to a continuous water system from the Great Lakes, the St. Joseph, Kankakee, and Illinois Rivers to the Mississippi. The Kankakee, however, was often a sluggish stream so that access to the interior of R. A. 177 was less reliable. In this regard, a large portion of the interior of the subject tract could only be reached by overland routes or trails discussed in our finding 41, infra.

In 1830, the Old Northwest, designated as the East Northcentral District, was given a population of 1,470,018 by the Census. Ohio was assigned 937,903 people; Indiana 343,031; Illinois 157,445; and Michigan 31,639. The population of the United States as a whole was 12.8 million in 1830, and increasing at a compound annual growth rate of 3 percent. The areas which tended to exert the most demographic pressure on the subject area -- Ohio, southern Indiana and Illinois -- demonstrated

amazing growth in population to 1840. Indicative of the rapidity with which populations entered into and settled upon Illinois lands is the fact of statehood. By the time R. A. 177 was ceded, Illinois had been a state for 14 years. Both parties agree that the population was plainly coming and that this matter of statehood was clear evidence of the future of the Middle West.

The pattern of population movement and settlement into Illinois prior to 1825 was southerly along the Ohio, Mississippi, and Missouri Rivers into southern Ohio, Indiana, and Illinois. After 1820, small settlements began to move north, first, along the lower reaches of the Illinois, then to the area around Chicago, the southern shores of Lake Michigan, and to Galena, in northwestern Illinois, where a mining community of some size had developed. With the opening of the Erie Canal in 1825, and the physical ease of transportation it provided, the migration movement shifted to the north. The northern ports in Ohio, Indiana, and Illinois became settled overnight, and some communities on the Great Lakes, like Chicago and Detroit, became boom towns by the early 1830's. Before the opening of the Canal, in the period 1820 to 1825, the population of Illinois increased 17,655. From 1825 to 1830, the increase totalled 84,620.

Notwithstanding this mass movement of people into the Northwest, especially from New England, there were no established towns entirely within the borders of the subject tract. A small exception can be made for the operators of trading posts (such as the one at Momence, Kankakee County), remnants of French trading families (i.e. Bourbonnais Village),

and a small settlement at Milford. The major settlements prior to 1832, in Illinois, were still in the southern part of the state.

By the beginning of the 1830's, small settlements were encroaching on the borders of R. A. 177 and included Chicago, Joliet, Ottawa, Pontiac, and Danville. Of these, Chicago was the most important in terms of potential. The first official plat of the town was recorded on August 4, 1830. Chicago, however, did not begin its expansion from village status until about 1834. In addition to the above settlements, small settlements were also developing further outside of the boundaries of R. A. 177 and, because of their proximity to the subject area, exerted some economic influence in the over-all development of the area. Our finding 43 (b) sets out in detail these settlements and their locations.

Another indication of the rapidity of settlement of Illinois is the fact that by the valuation date all of Illinois with the exception of two areas had been divided and organized into counties. The excepted areas were the extreme northcentral portion of the state and the subject tract. The number of counties organized by 1830 totalled 48 and by 1832, an additional seven counties had been organized.

The current day counties wholly or partially within R. A. 177 include Will, Grundy, Kankakee, Iroquois, Livingston, and Vermillion. Iroquois County appears to have been the first county organized in R. A. 177 (subtract E). Will County, organized in 1836, was carved out of Cook County (organized 1831), which includes Chicago. Vermillion County was organized earlier in 1826, but only a very small fraction of it extends into the subject tract. The significance of Vermillion County is due to the location of Danville, its county seat. Danville was an important

trading center for settlers on the southern borders of the subject tract and was located near the important Indian salines occupied by Americans since 1819. Our finding 44, infra, fully describes each of the said counties, their topography, and principal settlements.

Economic Factors 1820-1833

Our findings 45 and 46, infra, closely examine the general economic conditions in the United States from about 1819 to 1833, with specific references to the western states. Our discussion here is a summary of these findings. Following the disastrous Panic of 1819, the economy of the United States as a whole was one of almost total paralysis. The western states, where land speculation and borrowing had been most rampant, suffered the greatest hardships as a result of the ensuing depression. The numerous state banks in the West were forced to call in loans, suspend specie payment or, if all else failed, close their doors. Monetary circulation in all the United States had dropped from an average $11.68 per capita in 1818 to an average $6.00 per capita in 1823.

Western grain, much of it destined for the South, declined in prices. In 1821, corn was selling at the unbelievably low price of 10 cents a bushel in Cincinnatti. Frontiersmen from Ohio to Illinois, were thus hardest hit. Nearly half of them had purchased their lands on credit, and with no market (or only depressed ones) for their surplus products, they were hard-pressed to meet installment payments. Only congressional "relief acts" prevented total catastrophe -- some 12 had been passed by 1820 to prevent forfeitures.

By 1824, the economy began to show signs of recovery, especially in the West. Graphs and statistics in the record indicate a steady but fairly slow recovery for the nation after the mid-1820's. In 1824, monetary circulation was at $6.6 million. By 1834, this figure had gradually increased to about $155 million. The circulation of western banks in 1830 was estimated at $295,000. Shortly after the valuation date it had increased to $2.9 million. Public land sales which, in 1820, had dropped to their lowest point in 10 years, also increased rapidly. Between 1829 and 1833, annual sales averaged slightly over 2 million acres.

Commercial traffic on western rivers after 1825 indicated rapid growth and signs of general economic recovery. By the end of 1833, some 230 steamboats were listed as operating on western rivers, and the freight tonnage on the Ohio and Mississippi alone exceeded that of the Atlantic Seaboard. In 1834, annual operating expenses for steamboats were estimated at $4.6 million, of which 36 percent went to wages and 48 percent for provisions. The important Erie Canal-Great Lakes traffic also boomed after 1824. Traffic of less than 100,000 tons passing west from West Troy, New York, in 1824, grew to about 500,000 tons by the end of 1833. The record with respect to agriculture indicates that the western farmer was better off than he had ever been with a growing market for his products, especially in the cotton-growing areas of the South. The defendant's expert states that the farmer, in the period of recovery, was growing an increasing volume of cereals and that it was a period of "good times" for the farmer (Def. Ex. 8, Vol. I., p. 17).

Banking in the West suffered the extremes of rapid expansion prior to 1819 and equally rapid decline after the Panic of that year. In Illinois, all the state banks collapsed in the 1820's, and all but one failed in Indiana. By 1830, the Ohio banks were reduced by two-thirds their number in 1820.

While there were no banks in operation very close to or in the subject tract on the valuation date, western banks nearby were again expanding. Banking for new settlers and residents in northeastern Illinois would have been reasonably proximate and available in Detroit, Cincinnatti, and Louisville. In the general field of banking, the Second Bank of the United States exerted strong influence toward stabilizing the currency and created some stability and restraint on state bank excesses throughout the western states. That bank was authorized to make loans at not over 6 percent. Interest rates in the area generally fluctuated, however, depending on the risks involved and the distance from financial institutions. Rates to new settlers were especially high because of lack of security for borrowing purchase money. The willing and able hypothetical purchaser of the subject tract is presumed, however, to have had the cash to make the transaction and would not suffer the economic disabilities of the small settler.

In summary, the economic and financial position of the nation was unusually good by the valuation date, and by 1833, the country was on the verge of an economic boom. In the West, the economy, spurred by easy credit, a steady, growing demand for land and farm products, and a fast-growing population, showed the greatest advances. In addition,

the internal improvements fever, following the success of the Erie Canal, was sweeping the area. By the early 1830's, Ohio, Indiana, and Illinois had pledged large sums to finance canal and turnpike construction. 5/ While many of these projects were not completed and others not started by the valuation date, the area benefitted in terms of expenditures in planning, materials, supplies, and the attraction of native and immigrant labor, many of whom would eventually become land buyers and permanent settlers.

Factors Bearing on Subject Area Land Market

Having disposed of the history and development, both political and economic, of the area in which the subject land is located, we turn now to a brief consideration of the factors related to the land market in the area and those matters directly related to our ultimate valuation of the subject tract.

During the period under consideration, the public land market was governed by the Act of April 24, 1820 (3 Stat. 566). This legislation abolished the credit system of land purchase, reduced the minimum price to $1.25 (from $2.00), and permitted smaller purchases in 80-acre tracts. Like its predecessor land acts, the 1820 statute was not an attempt to secure true value for the public lands but was, rather, a matter of public policy to establish a nominal figure in order to encourage

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5/ It should be noted that by the late 1830's, many of the internal improvement projects left the states badly in debt and near bankruptcy, especially Indiana and Illinois. On the valuation date, however, the euphoria of good times prevailed and failure was not predictable or foreseen.

settlement in the West and bolster lagging sales.[6/] In addition, the act represented clear recognition of (1) the Government's unwillingness and inability to enforce the credit system or impose forfeiture; (2) the western concern with a growing debtor class requiring immediate relief; and (3) the scandalously high land debt owed by settlers, particularly in the West.[7/] Thus the $1.25 price represented a discount, as it were, in exchange for immediate payment.

The beneficial effects of the 1820 Act were not reflected in increased land sales until about 1828. The slow economic recovery in the intervening years and the uncertainty of the period immediately following the Panic of 1819 somewhat retarded migration. By 1828, however, the economy was on an upswing and, with the opening of the Erie Canal three years earlier, the frontier was overflowing with new settlers. Public land sales in excess of one million acres occurred annually after 1828, reaching a peak in 1836 when over 20 million acres were sold. In 1832, the date of valuation, 2.4 million acres of public lands were sold in the United States. Of this total, 757,000 acres were sold in Indiana and Illinois combined, or about one-third of the total, an indication of the demand for lands in western regions.

6/ See Miami Tribe v. United States, 146 Ct. Cl. 429, 465 (1956). This case, affirming in part Docket 67, 4 Ind. Cl. Comm. 346 (1956), was remanded to the Commission for further proceedings on the issue of value. With regard to public lands, the Court found that the record relating to public land prices and public policy wholly supported conclusions reached by the Commission.

7/ Defendant's Ex. F3.12, a well-documented history of the abolition of the credit system, cites the figure of $22 million as the amount due the United States from land purchases as of September 30, 1819. Of this amount, more than half was due in Alabama alone where speculation in cotton lands in this period was most rampant.

In 1828, the General Land Office submitted to Congress an inventory and analysis of unsold lands subject to private entry.[8/] The reported number of acres unsold in Illinois, Indiana, and Ohio totalled 30.3 million acres. Of this total, the Indiana land office reported 10.2 million unsold acreage, and the Illinois offices reported 13.2 million. The defendant has proposed findings regarding the 1828 reports, pointing out the depressing effect of such large quantities of land on the market and the amount of such lands reportedly unfit for cultivation.

We have carefully examined the 1828 reports from the land offices, especially as regards Illinois and Indiana. Illinois had six land offices operating in 1828, all of which were located in the southern half of the state. Those districts nearest the subject tract were Vandalia and Springfield, relatively new offices. Both of these reported the largest number of unsold acreage and acreage they estimated to be unfit for cultivation. They also estimated the per acre value of the whole. The Vandalia district opinion was entirely arbitrary as there was no evidence on file from which the necessary information could be gathered. The Springfield district also reported on the basis of limited information. Both districts qualified their opinions regarding unfitness stating that the prairie lands were of the highest fertility but unfit only from the circumstances of there being little or no timber and water. In Indiana, the nearest district to the subject tract, was Crawfordsville. This district offered no opinion

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8/ This report, appearing in Def. Ex. F5.1, is digested in finding 48(a), infra.

as to the value of lower grade lands but estimated the value of the whole at no less than $1.25 per acre.

In our view, the fundamental lack of basic data and information makes these official 1828 reports less than reliable. Overall, however, the reporting registrars at these offices almost uniformly held a high opinion of the quality of prairie lands and their adaptability to tillage.

Other views of an official nature were generally optimistic regarding the quality of and demand for public lands in the West, particularly in Illinois. The Commissioner of the General Land Office, in his 1830 report, estimated that the annual demand for public lands by actual settlers would be 1.5 million acres commencing in 1831, and that that demand would increase by 50 percent over the next 10 years, especially in the Mississippi Valley area.

In 1832, Congress was debating the expediency of reducing the price of public lands. The question of public policy as a determining factor in pricing lands appeared frequently in these debates. A goodly portion of congressional discussion explored the questions of land quantity and demand for lands in the western states. The general consensus recognized the fact of large surpluses of public lands on the market. In the case of Illinois, however, several senators, and the House Committee on public lands, were of the opinion that the state contained mostly arable lands, which would soon sell without any reduction in price according to the demands of a fast growing population. The Committee believed more than nineteen-twentieths of Illinois to be arable lands.

Views garnered from unofficial sources in the record were, as expected, highly divergent and not weighted in any one direction. The writings of contemporary travelers and diarists were largely centered on frontier living conditions, the hospitality of settlers and innkeepers, and on scenic observations. Very few offered views regarding the land market in the area and those that did were not expert in the subject, merely citing isolated examples of successful resales of particular homesteads on the prairie. There was, however, a rather strong feeling amongst the travelers cited by both parties regarding the health conditions of prairie life. The reputation of unhealthiness in the area -- as often confirmed as it was denied -- was pervasive. But there is no evidence to suggest that this reputation retarded the progressively increasing migratory flow into Indiana and Illinois of the 1830's.

In connection with settlements on the prairie, the parties have submitted an ample record with regard to the land preferences of the settlers. The view that the prairies of Illinois and Indiana were unattractive to settlers clearly prevailed during the first waves of migration prior to the mid-1820's, when most settlers came from the forested regions south of these states. From the second half of that decade until the beginning of the next (1830), when the east-west pattern of migration was established, the prairies were discovered to be good farm land and settlement of these lands began to grow. Lack of timber and water appeared to be the most common objection to settlement on the prairies. It was the defendant's experts' view, however, that

the new eastern settlers were better equipped financially and with agricultural know-how and tools to cope with the problems of prairie settlement. (Def. Ex. 8, p. 22). For the most part, settlers could arrange for timber from nearby groves.

Parties' Appraisals and Valuations

The plaintiffs in Dockets 15-P and 306 submitted the appraisal report and valuation of Dr. Roger K. Chisholm. The plaintiffs in Docket 29-N introduced the appraisal report of Galen D. Todd, technical director of George Banzhaf and Company. The defendant submitted the appraisal and valuation report of Harry R. Fenton and a supporting historical research report prepared by Everett W. Fenton. All the above named experts and George Banzhaf testified in the valuation hearings in this case. The defendant's appraiser concluded that the combined fair market value of the three subtracts in R. A. 177 was $450,392.00 on the valuation date. The expert witness for the plaintiffs in Dockets 15-P and 306 found the total fair market value to be $3,074,607.45, and the experts for plaintiffs in Docket 29-N concluded that the value was $3,425,710.75 on the valuation date. We shall summarize here the evaluation and appraisals supporting these conclusions. The appraisals are described in more detail in our findings. (Fdgs. 51-54, infra.)

In appraising the subject lands, Dr. Chisholm prepared a comprehensive background report covering a broad spectrum of historic events influencing the settlement of the Northwest, and a number of economic variables which operated on the land market generally, and on the land market of the northwest section of the United States in particular. On the

In determining the fair market value of the subject tract, Dr. Chisholm utilized the market data approach. For this purpose, he constructed a comparable sales index from 2,150 transactions taken from 28 counties located mostly in northern Indiana and southern Illinois between 1800 and 1836 inclusive. These transactions involved 282,617 acres of land which sold for $701,029.00 total consideration. Dr. Chisholm was of the opinion that the lands in the 2,150 sales were lands comparable to subject tract. He further refined the matter of comparability (for his ultimate value conclusions) by adjustments for reasons of accessibility and drainage. Thus, for example, in the case of R. A. 177, subtract F, Dr. Chisholm added $.10 per acre over subtract E for reasons of superior accessibility.

We note here that the evidence of market data submitted by Dr. Chisholm is in the form of computer readouts. Upon examination of the basic exhibit (P. Ex. Y-6a), which contained the year-by-year listings of each of the transactions reported, the Commission discovered that in a number of sales in several counties, the amount of acres in a particular sale was printed erroneously by a factor of ten when compared with the raw data description of the sale reported in plaintiffs' Exhibit Y-4. Thus, for example, a quarter section (160 acres) sale was recorded as a transaction of 1,600 acres. The result was that the readout showed a lower price per acre than the raw data actually indicated. The parties were informed of this error. By order dated January 11, 1978, the Commission permitted the plaintiffs to file amended computer readout exhibits. On March 17, 1978, the defendant filed amended findings of fact

19 and 20, findings 20-A, and objections to plaintiffs' findings, as well as an amended brief. The plaintiffs filed a reply to the defendant's requested amendments on April 10, 1978. The matters raised by the parties in these amended filings are treated with in our valuation conclusions at page 433, infra.

In applying the market data, Dr. Chisholm relied on the median value of $2.50 per acre as the base starting figure for his ultimate value conclusions. From this point, he considered the effects of possible improvements in some of the transactions. On the basis of an analysis of various documents in the record dealing with contemporary reports on the cost of improving a farm, Dr. Chisholm calculated that the value of improvements on a typical 80-acre tract was $1.25 per acre. 9/ Dr. Chisholm testified that his analysis of the market data indicated that only a small number of the sales involved improved lands, citing as some reasons the rapid turnover of land by persons with similar names (real estate dealers), and the probability that a settler would sell but a small portion of his tract, if any at all, after devoting much time and hard work to the effort. He concluded, therefore, that 20 percent of the transactions at most would have had improvements. Thus, the value of the improvements in the data series would be 20 percent of $1.25, or $.25 per acre, reducing the median value to $2.25 per acre.

Except for adjustments for reasons of accessibility, it does not appear that Dr. Chisholm applied any discounts to the median price other than the $.25 per acre for improvements. Because of the wide range in the quality of the lands inherent in a large sampling

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9/ The sales data disclosed that the median size tract sold was 80 acres. There were 603 such transactions, or 28 percent of the whole during the study period.

of sales such as that provided in Dr. Chisholm's sales index, any upward or downward factor affecting value would, according to Dr. Chisholm, have been already reflected in the sales data consideration. No discount for the size of the tract was made, on the grounds, according to Dr. Chisholm, that the hypothetical purchasers of the subject tract would have been multiple, individual buyers of 80-acre tracts, the most common size and typical transaction revealed by the actual market data.

On the basis of the foregoing, Dr. Chisholm valued subtract D at $2.25 per acre. Because of its remoteness from Chicago, he "discounted" the value of subtract E to $2.20 per acre, and because of the major travel routes located on the borders of subtract F., he valued that tract at $2.30 per acre. Dr. Chisholm's value conclusions are as follows:

	Per Acre Price	Potawatomie Interest
R. A. 177-D	$2.25	$1,001,265.75
177-E	2.20	929,273.40
177-F	2.30	1,144,068.30
		$3,074,607.45

Our examination of Dr. Chisholm's market data leaves us with some serious doubts as to the validity of his conclusion. We particularly question the application of the results of a very broad market survey, containing extreme variables, to a relatively confined, limited market area characterized by uniformity in land forms and stability in land prices. Apart from the fact that the sales are taken from a span of years (1800 to 1836) much too wide to be meaningful to an 1832 valuation date, the data contains a large number of high priced town lot sales. In addition,

nearly 36 percent of the sales are taken from counties that were heavily populated, settled at an early date, or located in areas which were not comparable to the subject tract in terms of topography and access -- factors which tended to result in higher land prices. These counties include all the southern Illinois counties bordering the Ohio and Mississippi Rivers, Clark County in Indiana on the Ohio River, and Allen County, Indiana, the location of Ft. Wayne. Several other counties in Indiana from which sales data was taken were established in the late 1830's, a period of relatively high land prices. Approximately 12 percent of the sales occurred in 1835 and 1836.

Apart from the fact that Dr. Chisholm's stated purpose, as regards his selection of private sales, was to obtain a broad view of the general land market in a wide area, his approach is further explained, in part, from the fact that the market data was intended for use not only in this case but in related cases where the subject matter was located principally in Indiana.[10/] We do not believe, however, that the results of this overview of the land market in southern Illinois and northern Indiana can be applied successfully to the valuation of the relatively small-sized subject tract. To be truly meaningful, greater weight must be given to market data from resales of nearby lands, similar in character and during a period reasonably contemporaneous with the cession. See Minnesota Chippewa Tribe v. United States, Docket 18-T, 25 Ind. Cl. Comm. 146, 154 (1971) . Accordingly, we reject Dr. Chisholm's valuation

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10/ "North of the Wabash" cases under lead Docket 128, scheduled for valuation trial concurrently with this case.

conclusions insofar as they are based on the entire sales index in the record.

Finally, we cannot accept Dr. Chisholm's method, or lack thereof, of discounting the indicated per acre value conclusion of $2.50 to allow for comparability variables (upward or downward) and for size. In the first place, he did not, in fact, allow any discount a potential purchaser would anticipate because of the size of the subject tract. Since the sales data disclosed that the most common sized tracts actually being sold on the private market were in 80-acre parcels (603 such sales), Dr. Chisholm reasoned that the hypothetical purchaser would be similar, that is, multiple individual buyers of 80-acre tracts.[11/] Accordingly, he did not allow a discount for size. We believe the size of the subject tract requires a discount. At best, the market data merely indicated the existence of a market for small-sized farms -- the knowledge of which, by the way, would have been beneficial to the large tract purchaser seeking to establish a resale market for his lands. The data does not, however, form a sound basis for Dr. Chisholm's conclusion regarding the kind of potential purchaser who would buy the whole tract.

In addition to the foregoing, Dr. Chisholm's discount for improvements, a comparability variable, covers only the cost of a cabin and the clearing of some timberlands. It fails to include sod breaking, ploughing, and other clearing costs of tillable lands, on the ground

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11/ By this method, [illegible] take an unrealistic total of some 18,000 individual purchasers [illegible] the subject tract. On cross examination, Dr. Chisholm could not [illegible] the period it would take to sell off the subject tract under his multiple-hypothetical purchaser approach. (Tr., N., Vol. II, p. 42, et seq.)

that these costs are usually recovered out of first year crops. This reasoning totally ignores the effect of these improvements on the resale value of the land. One who expends time and money to convert part of his real estate into income-producing property expects the improvements to increase the market value of the whole. The resultant value increment is not to be ignored as Dr. Chisholm did because of the fact that the costs of improvement were recovered through income earned prior to sale. Value has been added and must be considered in any adjustments for improvements.

Finally, we come to the matter of drainage costs. This subject was thoroughly covered in testimony in relation to the valuation of lands north of the Wabash River in Indiana. Dr. Chisholm, however, has not made any adjustment for drainage costs in this case, presumably on the grounds that all the lands in the subject tract were well-drained naturally. We believe that about 10 percent of the lands in the tract required drainage, especially in the eastern section of R. A. 177, subtract E, along the Kankakee River border with subtract F. We have accordingly included a drainage cost factor in our evaluation discussed below.

The plaintiffs in Docket 29-N have accepted the valuation conclusions submitted by their appraisal experts, George Banzhaf and Galen Todd. We have described their market analysis in our finding 52(b) infra. Since we do not intend to rely on the Banzhaf-Todd report for our evaluation of the subject tract, we find it unnecessary to make a further analysis of their report. In short, we have concluded, in our findings (Fdg. 55(a) infra), that the 93 transactions relied upon by the Docket

29-N plaintiffs for their sales index do not provide an adequate basis upon which we could make any sound valuation conclusions. Moreover, we can find no clue as to how comparability in the data was determined. As regards the historic and economic background report submitted by Messrs. Banzhaf and Todd, it is much too abbreviated to be of any value to our examination. Accordingly, we find that the valuation report submitted by the plaintiffs in Docket 29-N is of little assistance to the Commission.

The defendant has submitted the appraisal report and evaluation prepared by its expert, Harry R. Fenton. Mr. Fenton, assisted by Everett Fenton, an historical researcher in this case, has also submitted a comprehensive background report covering historic and economic matters in very much the same vein as in the case of plaintiffs' background report. With the exception of some differences in emphasis, the background material is substantially the same as Dr. Chisholm's. Our finding 53(e), infra, describes in greater detail Mr. Fenton's conclusion respecting historic and economic influences in the subject area. We will summarize here, instead, Mr. Fenton's valuation of the subject tract.

Mr. Fenton's appraisal of the subject tract appears to be based entirely on sales data taken from the counties of Knox, Fulton, and Henry located in the Illinois Military Tract of western Illinois. The market data reported in Def. Ex. 9, Vol. II-A, covers the period 1817 to 1833. The total sales for this period are 1,812 transactions for the three counties. While not entirely clear from the record, an examination of

Mr. Fenton's analysis (Def. Ex. 8, p. 30) and defendant's brief (Def. Br., p. 24) strongly indicates that Mr. Fenton used only the sales in the three counties above which occurred in 1831 and 1832, or a total of 268 transactions. Of these, 38 of the transactions ranged in size from 2,000 acres to over 66,000 acres. The range in price per acre for these counties in 1831 and 1832 was from a low of $.26 per acre to $1.24 per acre. According to Mr. Fenton, sales in the market data series prior to 1832 did not average above $1.00 an acre, except in Fulton County where, in 1830 the average was an even $1.00, in 1831 it was $1.24, and in 1832 it was $1.08. In Henry and Knox Counties the prices were half that of Fulton.

In prefacing his value conclusions, Mr. Fenton states that business in 1832 was "quite good", the bulk of migration was shifting north to the Great Lakes area and subject property, and that the subject tract, even though largely wet prairie, was about as desirable as the Military Bounty lands. The sales data for the three counties in comparison with the subject property indicates, in Mr. Fenton's opinion, a retail market value of about $1.00 per acre.

At this point in his evaluation, Mr. Fenton considered cost factors, along with risk and anticipated profit, which a potential purchaser of the subject tract would study in order to arrive at a wholesale price for the entire tract. It was Mr. Fenton's view that the wholesale land purchaser had to be able to resell the land at three to five times his land cost if he was to profit from the transaction. In this case, he

opted for three times the initial investment on the basis of the fact, as disclosed in cross examination, that R. A. 177 contained superior lands and was close to the routes of migration and settlement to northeast Illinois. Thus, he concluded that the value of the subject tract on the valuation date was $.33 per acre, or $450,392.00 for the Potawatomie interest in the tract.

For the reasons discussed hereinafter, and on the basis of our findings, we cannot accept Mr. Fenton's valuation of the subject tract. Most important, we disagree with his conclusion that the Illinois Military Tract represented a good example of a free, normal, and active market for lands in the West. In our opinion, the Military Tract was nothing more than a "paper" market for the sole benefit and enrichment of eastern speculators. Being bought and sold were soldier's warrants to lands that neither the speculator nor the soldier knew anything about or ever intended to develop for settlement purposes.

Evidence submitted by the defendant shows an active speculative market. Lands in the Military Tract were being bought and sold at prices as low as $15.00 per quarter section to a high of about $110, or from $.08 to $.90 per acre. (Def. Ex. 10, p. 126). Sample deeds submitted by the defendant support our view of an artificial market. A large number of these low-priced transactions were the results of tax sales.

In addition, evidence disclosed in the record (Def. Ex. Y-60), and discussed in plaintiff's brief (Pl. Br. p. 54), indicated that, notwithstanding restrictions on alienation contained in the bounty acts, fraudulent

transfers were common with resultant conflicting title claims. In Seneca Nation v. United States, Docket 342, 28 Ind. Cl. Comm. 12 (1972), the Commission rejected defendant's valuation based on New York Military Tracts sales on similar grounds related to conflicting and fraudulent title claims.

In our view, the hypothetical, knowledgeable purchaser of the subject tract would have sought more stable market situations upon which to base his investment. In short, we are not convinced that the sales of Illinois Military Tract lands, under the distressed circumstances described herein, were bona fide arms-length transactions of the kind we have come to expect in valuation cases before the Commission.

Commission's Valuation

Notwithstanding the shortcomings we found in plaintiffs' market data, the Commission is of the opinion that the private sales submitted by Dr. Chisholm are the best evidence in the record of the price a willing buyer would have paid to a willing seller. Our own selection of the sales meets most if not all of the objections we discussed above, and those made by the defendant in its amended findings and brief of March 17, 1978.

From the 2,150 transactions submitted by Dr. Chisholm, the Commission selected 411 sales. The Commission finds this selection to be the most comparable of all the market data in terms of proximity to the subject tract, soil and land formations, accessibility, and settlement pattern. Thus, we eliminated all southern Illinois and northern Indiana sales and chose only those sales recorded in Vermillion County, Illinois,

and the counties of Vermillion, Fountain, Montgomery, Hamilton, and Grant in Indiana, all prairie counties, generally. In addition, we excluded all extremes in the array such as town lots and large acreage sales and restricted our time period to between 1827 and 1833.[12/]

The fact that over 60 percent of the 411 sales were in 80-acre tracts leads us to conclude that the chosen data represented a good market for typical farm-sized tracts. The 411 transactions involved 38,846 acres for a total consideration of $103,655.09, or an average of $2.66 per acre. The average sale amounted to 94.5 acres. Our finding 56(b), infra, sets out a yearly analysis of these sales. The mean for all 411 sales amounted to $2.52.[13/] On a yearly basis, mean prices ranged from $2.32 to $2.94, median prices ranged from $2.17 to $2.94, and average per acre prices ranged from $2.34 to $3.75. We observed no particular trend, upward or downward in the seven year period studied, but found instead, rather stable prices for the comparable lands.

On the basis of our analysis of the sales data, and all the evidence of record we conclude that lands in areas comparable to the subject tract were selling,on the average, in the range of $2.20 to $2.60 per acre on the valuation date.

To relate the comparable "retail" sales figures to the 1832 market value of the subject tract, we must consider discounts, if any,

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12/ It should be noted that except for some high-priced town lots, the extremes on either end of the selected sales were less apparent in the six counties chosen above.

13/ A similar analysis of transactions in 80-acre parcels, numbering 247, resulted in a mean of $2.4

applicable to our valuation. See e.g., Nez Perce Tribe v. United States, 176 Ct. Cl. 815 (1966), rev'g on other grounds Docket 175-B, 13 Ind. Cl. Comm. 184, (1966); Creek Nation v. United States, Docket 272, 40 Ind. Cl. Comm. 175 (1977); Ponca Tribe of Indians v. United States, Docket 323, 28 Ind. Cl. Comm. 335 (1972).

The defendant's comprehensive 67 percent discount, we believe, is much too high, while plaintiff's approximately 10 percent discount, limited as it is to improvements only, is too low. The evidence relating to economic conditions in 1832 as well as migration-settlement movements to the northwest showed a growing demand for land in the area. Therefore, no large discount for a long holding period, such as suggested by defendant, would be justified. Though we believe the lands in the area of private sales are generally comparable to the subject tract, we feel that these sales did involve a fair percentage of the best farm land available and that about 20 percent of the sales, the figure suggested by the plaintiffs, contained some improvements. Comparing the private sale lands with lands in the subject tract, we conclude that a discount of 20 percent of the expected retail value would be necessary, mostly to reflect the probability of higher quality lands in the market data and the fact of improvements. In this regard, we also considered the cost of breaking and ploughing, a factor omitted by plaintiffs.

A purchaser of the subject tract must also consider other cost factors involved in bringing the lands to sale in 1832. As we stated above, the potential purchaser would not expect a large discount for a long holding

period, since a growing market existed for his lands, and he would also reap the benefits of rising land prices after 1832. However, he could not be unaware of the fact that lower priced government lands were available to the prospective settler--a fact which would have had a retarding effect on resale, especially after choice lands were disposed of. These government lands, however, would not have been as favorably located as the subject lands on the valuation date. Accordingly, we feel that a small discount to cover all holding and disposal costs is appropriate in this case. Finally, some discount for size should be a part of our consideration of disposal costs. The subject tract, consisting of 2.2 million acres subdivided in three smaller tracts, is not, in our view, an excessively large tract. In this regard, we are guided by our recent decision in Creek Nation, supra, where a 10 percent discount for size was applied to a very large tract containing over 5 million acres.

Combining all the foregoing discount factors we conclude that a total discount of 35 percent from the retail sales index is appropriate in this case. Accordingly, on the basis of this opinion, the findings of fact entered herein, and all of the evidence of record, we conclude that the fair market value of the subject tract, having a highest and best use for subsistence farming, was as follows on the valuation date:

(a) R. A. 177, Subtract F. The value of this tract was enhanced by its location in relation to water transportation and accessibility, and would probably have been settled first, at an overall higher price per acre. Accordingly, we conclude that the fair market value of this tract, before discount, was $1,293,300.00. Applying the 35 percent

discount, the final fair market value of Subtract F on the valuation date was $840,645.00, or about $1.69 per acre;

(b) R. A. 177, Subtract E. In terms of the best known transportation routes of the time, this tract was the least accessible by water, and the most remote from the established settlement patterns of the northeast. The tract did contain several well-known overland trails. A portion of its northeast corner was flat, wet plains. Accordingly, we conclude that the fair market value of the tract before discount was $1,858,500.00. Applying the 35 percent discount, the final fair market value of Subtract F on the valuation date was $1,208,000.00, or about $1.43 per acre. The Potawatomie interest in this tract was $604,000.00;

(c) R. A. 177, Subtract D. Overall, this tract compares favorably with Subtract F, except that it contained a higher proportion of interior lands requiring more difficult overland transportation. Accordingly, we conclude that the fair market value of Subtract D before discount was $2,180,500.00. Applying the 35 percent discount, the final fair market value on this tract on the valuation date was $1,417,300.00, or about $1.59 per acre. The Potawatomie share was $708,650.00,

(d) Summary. The Commission concludes that the fair market value of the Potawatomie interest in R. A. 177 was as follows:

Subtract	Acreage	Fair Market Value	Potawatomie Interest
D.	890,014	$ 1,417,300.00	$ 708,650.00
E.	844,794	1,208,000.00	604,000.00
F.	497,421	840,645.00	840,645.00
	2,232,229	$ 3,465,945.00	$2,153,295.00

Treaty Consideration

Payments made to or expended for the plaintiffs by the defendant in fulfilling its obligations under the Treaty of October 20, 1832, supra, for the cession of the subject lands, are payments on the claim and, except as otherwise provided by the Act of October 2, 1974 (88 Stat. 1499), are deductible from the quantum of the award under the Indian Claims Commission Act. See Prairie Band of the Pottawatomie Tribe v. United States, Docket 15-C, et al., 38 Ind. Cl. Comm. 128, 211, aff'd, 215 Ct. Cl. ___, 564 F. 2d 38 (1977). The defendant asserts in this case that a total of $437,042.14 was disbursed in satisfying the Government's obligations under the 1832 treaty, supra. The plaintiffs, on the other hand, assert that the maximum credit allowable to defendant by reason of consideration is $186,930.00. We will discuss each claim as it appears in defendant's disbursement schedules.

Article III of the treaty provides that in consideration of the cession, the United States would pay to plaintiffs an annuity of $15,000 for twenty years and annual payments to certain named individuals for life.[14/] Defendant's evidence indicates that a total of $297,232.60 was paid to fulfill the 20-year annuity obligation, and that $16,363.83 was expended to fulfill obligations to the named individuals in Article III.

The plaintiffs claim that only the commuted value of the annuity payment on the valuation date (i.e. $186,930) should have been offset

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14/ "Article III. In consideration of the cession in the first article, the United States agree to pay to the aforesaid Potawatomie Indians, an annuity of Fifteen Thousand dollars for the term of twenty years. Six hundred dollars shall be paid annually to Billy Caldwell, two hundred dollars to Alexander Robinson, and two hundred dollars to Pierre Le Clerc, during their natural lives."

against the value of the cession. This commutation theory was urged upon the Commission in Prairie Band, supra, and rejected. The parties in this case were also parties in Prairie Band. On appeal, the Commission's decision on this issue was affirmed by the Court of Claims. (Prairie Band, supra, slip opinion, p. 5).

The Commission also held in Prairie Band that payments to individuals as provided by treaty (under circumstances identical to this treaty) are subject to deduction as payments on the claims. This ruling was also affirmed on appeal. (Slip opinion, p. 6) Accordingly, the total disbursement under Article III in the amount of $313,596.43 shall be counted as payments on the claim.

Article IV of the Treaty herein provides for the payment of $28,746.00, to be applied to the payment of certain debts of the Indians; a total of $75,000 in merchandise; and $1,400 for horses stolen from the Indians. Under these provisions, the defendant claims it disbursed the total amount of $105,678.31. Plaintiffs object to these items on the general grounds that the language of Article IV does not specify these items as consideration for the cession, and that they appear to be inducements to the Indians to enter into treaty negotiations.

It is plaintiffs' contention that the payments in Article IV are not consideration for the land cession because, unlike Article III, Article IV does not begin with the words "In consideration of. . ." We cannot agree. Consideration includes all the promises that the United States has offered and that an Indian tribe has accepted in exchange for a land cession. This Commission has never required that each and every

promise made by the United States be prefaced by the words "in consideration of" in order to constitute consideration. See, e.g., Minnesota Chippewa v. United States, Docket 18-U, 35 Ind. Cl. Comm. 427, 428-30 (1975)); Nez Perce Tribe v. United States, Docket 175, 24 Ind. Cl. Comm. 429, 440-41 (1971). Moreover, there is nothing in the record of this case to indicate that the parties intended Article IV to be anything but consideration for the land cession.

With regard to the item of $28,746.00 for the payment of debts, in Prairie Band, supra, 38 Ind. Cl. Comm. at 218 (citing Absentee Delaware v. United States, Docket 337, 9 Ind. Cl. Comm. 346 (1961)), the Commission held that an agreement of this kind was part of the consideration. Accordingly, the treaty obligation of $28,746.00 shall be counted as payment on the claim.

Defendant's schedules show an additional sum of $13,262.40 disbursed for the payment of debts under the category "Other Payments", (Def. Ex. C-5), and a payment of $1,945.00 over and above the $28,746.00 called for in Article IV. Neither of these payments are provided for in any of the provisions of the treaty and are, therefore, disallowed.

Under Article IV, the defendants also disbursed the total of $70,415.31 in annuity goods and merchandise, plus an additional amount of $4,505.00 for annuity goods listed under "Other Payments." The United States also delivered $3,172.00 worth of horses in lieu of annuity goods. In considering the payments claimed by defendant for

goods and merchandise as creditable consideration, we are of the opinion that these disbursements are governed by the recent amendment of the Indian Claims Commission Act by the Act of October 27, 1974, P. L. 93-49 (88 Stat. 1499). 15/ That act provides that food, rations, and provisions shall not be deemed payments on the claim under section 2 of our act. The Commission has found that the phrase "food, rations, and provisions" in the 1974 act is amenable to broad and flexible interpretation and certainly would include at least the goods and supplies generally available through army depots and supply stations. Prairie Band, supra, 38 Ind. Cl. Comm. 128, 225-226. Defendant has not shown that any part of the goods or merchandise paid to these Indians was not in the nature of food, rations, or provisions. Accordingly, these costs for goods and merchandise, and the livestock substitutions, totalling $78,092.31 will not be deducted as payments on the claim.

Finally, Article IV provided for the payment of $1,400 for horses stolen from the Indians. For the reasons stated above in regard to the payment of Indian debts, the disbursement of $1,400 under this article shall be counted as payment on the claim.

In summary, the Commission has found that the following amounts were paid by the United States to the plaintiffs pursuant to the provisions

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15/ The parties in this case have not discussed in their briefs the effect of the Act of October 27, 1974. The act, however, was thoroughly examined in the Prairie Band case before the Commission and on appeal before the Court of Claims. (Slip Opinion pp. 7-16, incl.). We need not repeat the discussions here except to note that the court accepted the Commission's interpretation of the 1974 Amendment and affirmed our ruling which excluded from allowable offsets some $515,606 for food, rations, and provisions.

of the Treaty of October 20, 1832, and that these amounts are to be deducted as payments on the claim under section 2 of our Act:

$297,232.60	..... Tribal Annuities.
16,363.83	..... Annuities for Caldwell, Robinson, and LeClerc.
28,746.00	..... Claims against Plaintiffs.
1,400.00	..... Article IV, horses.
$343,742.43	

Conclusion

The value of the consideration which the United States paid under the Treaty of October 20, 1832, was $343,742.43. Considering the defendant's payment of less than $345,000 for interests in land which had a fair market value of $2,153,295.00 on the valuation date, October 20, 1832, we find the amount paid for the cession to be so grossly inadequate as to render that consideration unconscionable. Accordingly, the Commission concludes, on the basis of this opinion, the findings of fact entered here, and all the evidence of record, that the plaintiffs are entitled, under the provisions of Clause 3, Section 2 of the Indian Claims Commission Act, to recover from the defendant the sum of $1,809,552.57, less any gratuitous offsets which may subsequently be allowed.

Margaret H. Pierce, Commissioner

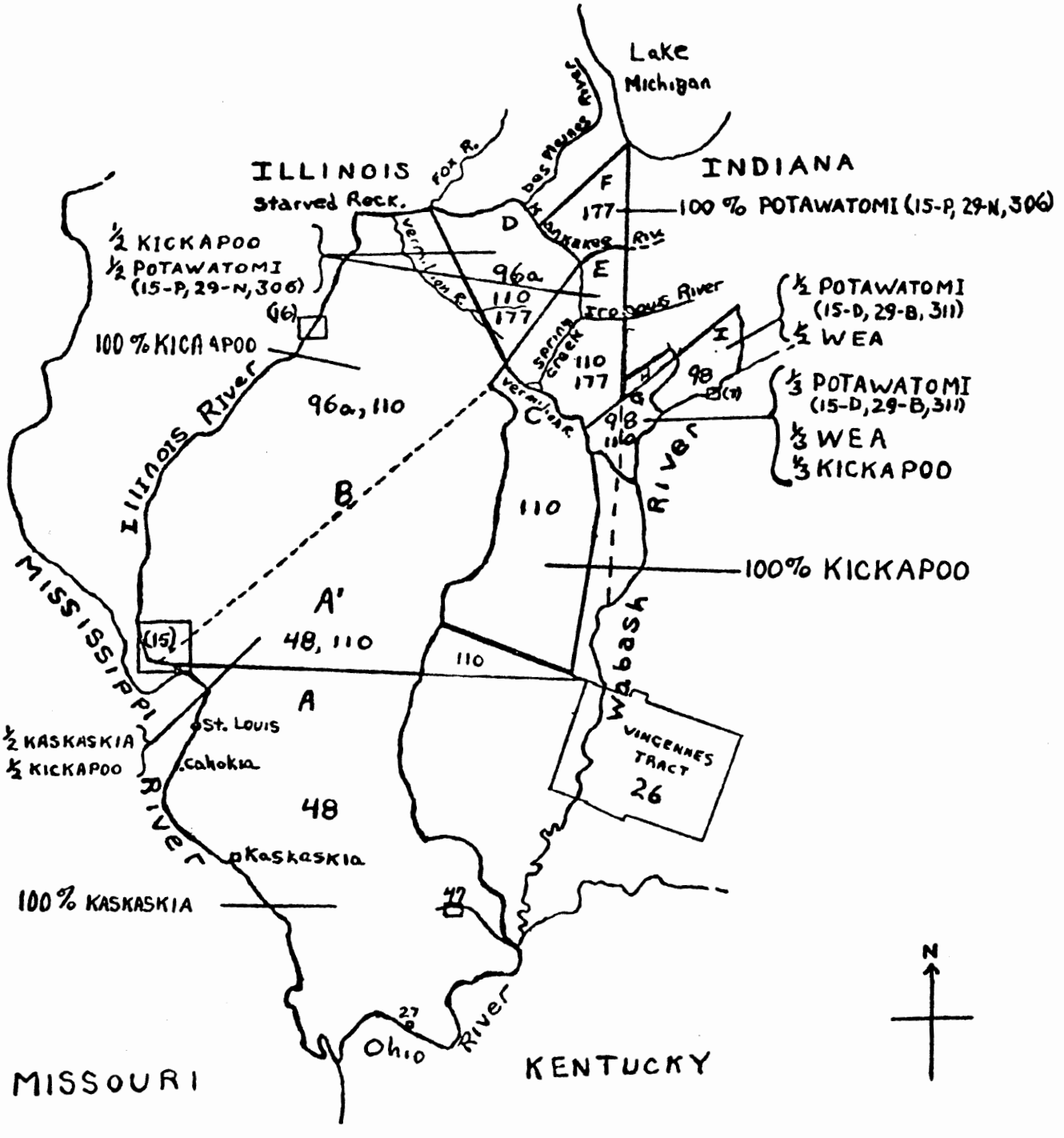
We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner


Lake Michigan
ILLINOIS
Starved Rock.
INDIANA
Fox R.
Des Plaines River
Kankakee Riv.
Vermilion R.
Iroquois River
Spring Creek
Vermilion R.
Illinois River
Mississippi River
Wabash River
F
177
100 % POTAWATOMI (15-P, 29-N, 306)
D
E
96a
110
177
½ KICKAPOO
½ POTAWATOMI
(15-P, 29-N, 306)
(16)
100 % KICKAPOO
96a, 110
½ POTAWATOMI
(15-D, 29-B, 311)
½ WEA
I
H
G
98
(17)
110
177
⅓ POTAWATOMI
(15-D, 29-B, 311)
⅓ WEA
⅓ KICKAPOO
9/8
110
C
B
110
100% KICKAPOO
A'
48, 110
(15)
110
A
½ KASKASKIA
½ KICKAPOO
St. Louis
Cahokia
VINCENNES TRACT
26
48
Kaskaskia
100 % KASKASKIA
42
27
Ohio River
MISSOURI
KENTUCKY
N

MAP APPENDIX II