BEFORE THE INDIAN CLAIMS COMMISSION

JAMES STRONG, et al., as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS,	Docket No. 13-E
THE DELAWARE TRIBE OF INDIANS,	Docket No. 27-E
HANNAHVILLE INDIAN COMMUNITY, et al.,	Docket No. 29-D
THE OTTAWA TRIBE, and GUY JENNISON, et al., as representatives of THE OTTAWA TRIBE,	Docket Nos. 133-A and 302
LAWRENCE ZANE, et al., ex rel., WYANDOT TRIBE, et al.,	Docket No. 139
ABSENTEE DELAWARE TRIBE OF OKLAHOMA, DELAWARE NATION, ex rel., W. E. EXENDINE and MYRTLE HOLDER, Plaintiffs,	Docket No. 202
CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA,	
PRAIRIE BAND OF POTTAWATOMIE INDIANS, et al.,	
POTAWATOMI INDIANS OF INDIANA and MICHIGAN, INC., Intervenors in Docket No. 29-D,	
v.	
THE UNITED STATES OF AMERICA, Defendant.	

Decided: August 10, 1978

Appearances:

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket No. 29-D and for Potawatomi Indians of Indiana and Michigan, Inc., Intervenors in Docket No. 29-D.

Rodney J. Edwards, Attorney for Plaintiffs in Docket No. 139.

James R. Fitzharris, Attorney for Plaintiffs in Docket No. 13-E.

Allan Hull, Attorney for Plaintiffs in Docket No. 133-A.

Robert S. Johnson, Attorney for Prairie Band of Pottawatomie Indians, et al., Intervenors in Docket No. 29-D.

Jack Joseph, Attorney for Plaintiffs in Docket No. 27-E and for Citizen Band of Potawatomi Indians of Oklahoma, Intervenors in Docket No. 29-D.

James M. Upton, with whom was Assistant Attorney General James W. Moorman, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

In its title decision in this consolidated proceeding, 30 Ind. Cl. Comm. 8 (1973), aff'd, 207 Ct. Cl. 958 (1975), cert. denied, 423 U. S. 903 (1976), the Commission determined that, as of July 4, 1805, the effective date of the Treaty of Fort Industry, 7 Stat. 87, five tribes, as then constituted, each held recognized title to an undivided one-fifth interest in the lands comprising Royce Areas 53 and 54 in Ohio. The tribes, and their present-day successors in interest are: (1) the

Delaware Tribe, represented by the plaintiffs in Dockets 27-E and 202; (2) the Wyandot Tribe, represented by the plaintiffs in Docket 139; (3) certain bands of Ottawa Indians, represented by the plaintiffs in Dockets 133-A and 302; (4) the Chippewas of the Saginaw, represented by the plaintiffs in Docket 13-E; and (5) the Potawatomi Tribe, represented by the plaintiffs and intervenors in Docket 29-D. Under the terms of the Fort Industry Treaty, the United States extinguished the Indians' title to the tract consisting of Royce Areas 53 and 54.

Trial on value and consideration was held before the Commission in this consolidated proceeding from April 4 through April 6, 1977.

Royce Areas 53 (the northern portion) and 54 (the southern portion) form a roughly rectangular tract of land of 2,589,807 acres located in the north-central portion of the State of Ohio. The combined tract is bounded on the north by Lake Erie, on the east by the Cuyahoga and Tuscarawas Rivers and the portage between them, on the south by the Greeneville Treaty line and on the west by a line 120 miles west of the Pennsylvania border. The line of 41° north latitude divides Royce Areas 53 and 54. A small six-mile square tract in the northwestern corner of Royce Area 53 is excluded since it had previously been ceded to the United States at the Treaty of Greeneville, August 3, 1795, 7 Stat. 49.

Royce Areas 53 and 54 were a part of the Northwest Territory, the orderly settlement and political organization of which were enunciated

in the Ordinance of 1787, the substance of which Congress reenacted, after the Consitution became effective, by the Act of August 7, 1789, 1 Stat. 50.

Until 1794, there was no organized or significant settlement of the Old Northwest because the resident Indian tribes, with the assistance of the British based in Canada, resisted American encroachments and sovereignty. At the Battle of Fallen Timbers in 1794, General Anthony Wayne's forces broke the back of the Indian resistance. The next year the United States and representatives of the various Indian tribes of the Old Northwest executed the Treaty of Greeneville, supra, under the terms of which the United States extinguished Indian title to most of what later became the State of Ohio and to several strategically located enclaves, such as Detroit and Chicago, scattered across the Old Northwest. The treaty also anticipated future cessions of the remaining Indian lands in the Old Northwest by providing euphemistically that, should the Indians later "decide" to sell their remaining lands, they could be sold only to the United States. Over the years that followed the Indians at several treaties, including the Fort Industry Treaty, relinquished piece-meal their title to the remainder of the Old Northwest.

Soon after the Greeneville Treaty, settlement commenced in those portions of Ohio to which Indian title had been extinguished. At the same time, the Government grappled with the complexities of providing for the orderly disposition and settlement of the lands it had acquired

and was continuing to acquire from the Indians in the Old Northwest. In the early 1790's, the Government sold immense tracts of frontier lands to speculators who, in turn, prepared the lands for sale to settlers. For several reasons this system failed. In 1796, the Government began selling 640 acre tracts directly to settlers at $2 per acre on credit terms. By 1804, the size of the minimum tract offered for sale had been reduced to 160 acres. The $2 per acre credit price was maintained but, if cash was paid, the price was set at $1.60 per acre. Government policy was to offer the lands at low prices to stimulate settlement. The Government price of $2 per acre thus became the effective maximum price for frontier lands. As settlement progressed in specific areas prices in those areas tended to increase above $2 per acre.

In the year 1805, economic indicators reflected expansionary trends. Gross national product and income from private production were rising. Agricultural production was increasing and with it agricultural income. The population of the nation was increasing dramatically.

Ohio had been admitted as a state of the Union on March 1, 1803. At the valuation date, settlement in Ohio was taking place in the southern portion of the State, around Cincinnati, and in the northeastern sector east of the Cuyahoga River. The southern portion of Ohio had been acquired by the United States in 1795 at the Treaty of Greeneville and, within a few years thereafter, portions of these "Greeneville lands,"

comprising 3,150,229 acres, were opened for settlement. In northeastern Ohio, the Connecticut Land Company, which in 1795 had purchased the eastern portion of the Western Reserve, a tract of 2,841,471 acres between the Pennsylvania border and the Cuyahoga River, was selling these lands to settlers. For various reasons, settlement of southern Ohio was progressing much more rapidly than settlement in the northeastern sector. This was so primarily because the main route westward at the time was the Ohio River. In addition, the Connecticut Land Company was plagued by serious internal management problems and related financial difficulties. The public was growing increasingly skeptical of land speculators. The company's lands were never effectively marketed to potential settlers.

During the decade 1800 to 1810, the population of Ohio grew from 45,365 to 230,760. As stated above, most of this growth occurred along the Ohio River where settlers purchased approximately one million acres during the decade. In contrast, northern Ohio had a white population of fewer than two persons per square mile in 1805.

In the midst of this situation, the United States, in 1805, acquired title to Royce Areas 53 and 54. These lands were completely forested and unsurveyed. The larger rivers were navigable by smaller crafts but there was no network of roads. Access to these lands was difficult at best.

The lands themselves were favorable to development. The temperatures were moderate, precipitation was conducive to agriculture, and the growing season was long. The terrain was undulating and the soils productive. Substantial portions of the tract would, however, require drainage before the lands could be put in agricultural use. The parties agree that, as of 1805, the highest and best use of the tract was for subsistence farming by settlers.

The expert witnesses for both plaintiffs and defendant developed valuation theories utilizing what each considered to be comparable sales. Plaintiffs' evidence was of 182 sales of small tracts during the year 1805. All but three of these sales were of lands located east of the Cuyahoga River in northeastern Ohio in the area known as the Western Reserve. The average size of these 182 tracts was 209 acres. The average price was $2.09 per acre, while the median price of all sales was $2.44 per acre. Plaintiffs' expert, Dr. Roger K. Chisholm, concluded that $2.40 per acre represented the fair market value in 1805 of the tract consisting of Royce Areas 53 and 54. This figure was arrived at by deducting from the median price of $2.44 per acre for the 182 sales in his analysis, the sum of $.04 per acre to reflect what plaintiffs' expert believes to be the very slight chance that some of these sales were of improved lands.

Defendant's comparable sales approach utilized large-scale transactions which took place during the last decade of the 18th Century when the

Government was attempting to develop frontier lands by selling large tracts to speculators who would prepare the lands for settlement and resell in small tracts. Defendant's expert, Dr. Ernest G. Booth, considered that the purchase made in 1795 of 2,841,471 acres in northeastern Ohio for $0.422 per acre and purchases made by the Holland Land Company in 1792 of four tracts in New York and Pennsylvania varying in size from 700,000 to 1.5 million acres at prices ranging from $0.26 to $0.40 per acre, were comparable sales upon which to develop an opinion of the fair market value of Royce Areas 53 and 54 in 1805. On the basis of this data, Dr. Booth decided that the wholesale value of the subject tract in 1795 was $0.40 per acre. He then added 5 percent per year ($0.02 per acre per year) and concluded that in 1805 the lands had a value of $0.60 per acre.

Dr. Booth also utilized alternative approaches, the first of which he termed the "development approach." Here he estimated a maximum retail sales price of $2.30 per acre based upon the experience of the Holland Land Company transactions in western New York. Using a 1 to 4 ratio, he concluded that $0.575 was a reasonable value per acre (rounded to $0.60 per acre).

Dr. Booth's other alternative approach was based upon public domain sales of $2.00 per acre from which he deducted $0.60 for costs of acquisition, $0.66 as a write-off for marginal lands, and $0.142 for surveying, selling expense, etc. Under this approach the resulting value is $0.592 per acre (rounded to $0.60).

In the recently decided case of Saginaw Chippewa Tribe, et al. v. United States, Dockets 59, et al., 41 Ind. Cl. Comm. 327 (1978), this Commission valued Royce Area 66 located in southeastern Michigan as of 1808. In that case, the parties employed the same expert witnesses who utilized the same valuation theories and methods. There the Commission rejected the analyses of both experts. Plaintiffs' valuation was rejected for several reasons, the most important of which was that the lands upon which the sales data were based were not comparable to those being valued. Defendant's valuation was rejected basically because the Commission decided that sales of large tracts to speculators over a decade before the valuation date were not sales comparable to the hypothetical purchase of Royce Area 66 in 1808.

Other factors considered by the Commission as relevant in its decision to reject the plaintiffs' appraisal were: (1) failure to consider sales data for the Greeneville lands in southern Ohio;[1/] (2) failure to take into account that Royce Area 66 in Michigan was far from the primary paths of westward immigration during the first decade of the 19th Century; (3) failure to take into account that substantial portions of Royce Area 66 would require drainage before they would be productive for agriculture; and (4) failure to discount retail sale price to reflect anticipated holding period and other relevant factors.

1/ The Commission made findings regarding these sales in Miami Tribe 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).

In the case of defendant's expert the Commission recited the following additional reasons for rejecting his appraisal: excessive estimates of worthless or marginal lands and excessive discounts for anticipated holding periods.

In the Saginaw Chippewa case, supra, the expert valuations were rejected in toto because the lands themselves were not comparable nor were the circumstances surrounding the sales. In the case we now have before us, the expert opinions do have some relevancy as we will explain hereinafter, although we must reject or modify certain of the assumptions upon which the experts formulated their respective opinions.

In the instant case, both experts have utilized the same lands as comparable. These are the lands of the eastern portion of the Western Reserve in northeastern Ohio. What the respective experts have done is to look at these same lands from different ends of the spectrum of frontier development. Defendant's expert has based his opinion of value upon the wholesale purchase in 1795 by the Connecticut Land Company of 2.8 million acres of the Western Reserve at slightly more than $0.40 per acre, while plaintiffs' expert has based his analysis upon recorded sales during 1805 of small tracts within these same Western Reserve lands.

Furthermore, the lands offered as comparable in this case are contiguous to Royce Areas 53 and 54. The topography, soil formations, climate and other relevant factors are similar. Therefore, in our case,

we are willing to accept that the lands utilized by each expert were comparable to the lands we are valuing. It does not necessarily follow, however, that the sales of these comparable lands were comparable to the hypothetical sale of Royce Areas 53 and 54. We do not believe they were for reasons we will explain infra. For this reason and because both experts have exaggerated, ignored (or in one or more ways otherwise distorted) factors which affected the fair market value in 1805 of Royce Areas 53 and 54, we cannot accept the ultimate opinion of either expert as to the value of the subject tract.

The most significant omission in both experts' reports is their failure to consider in their analyses, the effect which the active market for the Government's Greeneville lands in southern Ohio had upon the fair market value of Royce Areas 53 and 54 in 1805. The Greeneville lands, over 3 million acres, were opened for settlement in 1800. Between 1800 and 1810, one-third of these lands were sold to settlers at $2 per acre. During this period the Greeneville lands were being disposed of at an approximate rate of 3 percent per year. See Miami Tribe v. United States, Dockets 67 et al., supra n.1. The Greeneville lands were the primary location for settlement in Ohio during the early 19th Century because of their location near the Ohio River. These lands were being settled at a much faster rate than the Connecticut Land Company's lands in northeastern Ohio.

The availability for settlement in Ohio of both the 3 million acre Greeneville lands and the nearly 3 million acre Connecticut Land Company tract, the prices at which lands were selling in each, and the comparative rates of settlement in each, would have been significant factors in any negotiations for the sale of Royce Areas 53 and 54 between a knowledgeable buyer and seller. Specifically, such hypothetical parties would have been aware that the maximum forseeable retail price for small tracts offered for sale would have been $2 per acre. It would also be apparent, however, that immigration into Ohio would continue to increase and that Royce Areas 53 and 54 were so located that settlement within the reasonably near future would be inevitable. A liquidation period of from 15 to 20 years would have been anticipated.

Turning to plaintiffs' appraisal, we believe that their expert's failure to apply the customary discounts to retail price is clearly erroneous and not in accord with existing law. See Saginaw Chippewa Tribe v. United States, supra, at 336-37. The principle is well-settled that it is proper in valuing a large tract of frontier land to deduct from the retail sales prices of comparable lands an amount reflecting such factors as the time and expense required to dispose of such a large tract. Eg. Nez Perce Tribe v. United States, 176 Ct. Cl. 815, 824 (1966), cert. denied, 386 U. S. 984 (1967) (aff'g in part, rev'g in part Docket 175-B, 13 Ind. Cl. Comm. 184 (1964)); Sac and Fox Tribe v. United States, Docket 83, 32 Ind. Cl. Comm. 320 (1973), aff'd, 206 Ct. Cl. 898 (1975).

The 179 Ohio sales and 3 Michigan sales which constitute the entire basis for Dr. Chisholm's valuation are simply too few to be accepted as representative of the value of a 2.5 million acre tract. Such evidence is helpful in establishing that (1) small tracts of similar lands relatively close to Royce Areas 53 and 54 were selling in 1805 at an average retail price of slightly in excess of $2 per acre and (2) sales of such retail tracts were proceeding slowly in 1805.

In the case of defendant's expert's valuation, we immediately note that the Court of Claims has previously determined that it is "unthinkable" to predicate wholesale value of a large tract of land upon evidence of the prices paid by land speculating companies in the 18th Century. Miami Tribe v. United States, 146 Ct. Cl. at 467 n.6, supra. Since Dr. Booth's "comparable sales" approach is based upon such sales it must be rejected. As to Dr. Booth's "development" approach, we believe that his deductions of 75 percent of estimated retail sales price are excessive in light of the evidence. Finally, under his "Government sales" approach, his estimates of costs of acquiring, surveying, and preparing the lands for settlement are much too high. Furthermore, his write-off of one-third for marginal lands is without any evidentiary foundation.

In our opinion, persons negotiating in 1805 for the sale of 2.5 million acres in north-central Ohio would have been aware of a myriad of factors which would have influenced the price a potential buyer would be willing to pay and the price a potential seller would have been willing

to accept. These factors would include the physical characteristics of the land, the climate, existing settlement and population patterns, access to the lands, economic conditions, public land policies, and availability of other lands for settlement. Available information relating to demand for and sales of similar lands would be merely one factor they would consider. United States v. Emigrant New York Indians, 177 Ct. Cl. 263, 285 (1966) (aff'g Docket 75, 11 Ind. Cl. Comm. 336 (1962)).

Parties negotiating in 1805 for the hypothetical sale of Royce Areas 53 and 54 would be aware that then-existing patterns of settlement tended to follow the Ohio River in the general area of which several million acres of Government lands were open for settlement. Furthermore, the parties would know that in northeastern Ohio sales of retail tracts by the Connecticut Land Company were proceeding very slowly both because the lands were off the then main path of immigration and also because the Company was unable to market the lands effectively. But they would also be aware that resales of small tracts in northeastern Ohio were averaging slightly above $2 per acre.

The hypothetical buyer and seller would also know that in 1805 the subject tract was forest-covered, unsurveyed, and lacked an internal system of roads. They would also know that while drainage was a prerequisite to agricultural development, the tract would, after drainage, surely be a very productive agricultural area.

The parties would take into account that the general economic picture in the nation and in Ohio was favorable. Furthermore, they could reasonably predict that continued heavy settlement in southern Ohio would soon create a situation where demand for land in northern Ohio would increase substantially.

Given all these factors we believe that the hypothetical buyer and seller would reasonably conclude that the subject tract would be settled over a period of from 15 to 20 years and that potential retail sales price of small tracts would be very close to the $2 Government sales price of frontier lands.

From our base figure of $2 per acre, certain discounts must be taken. The anticipated liquidation period of between 15 and 20 years, based upon demand and size of the tract, requires, in our opinion, a discount of 40 percent. Costs of survey, and otherwise preparing the lands for settlement, would amount to no more than 5 percent. There is no need to discount for improvements since we are using the $2 per acre Government price as a base. Nor is a discount required to reflect the necessity to drain portions of the tract. See Miami Tribe v. United States, 9 Ind. Cl. Comm. 1, 9-10 (1960). Thus, considering all the factors, we conclude that the fair market value in 1805 of the 2,589,807 acres of Royce Areas 53 and 54 was $1.10 per acre or a total of $2,848,787.70.

A few other matters require comment. As in the Saginaw Chippewa case, supra, plaintiffs cite the recent decision in the case of Joint Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir., 1975)

in support of their argument that the lands should be valued at retail price for small tracts. In Saginaw Chippewa, we held that Passamaquoddy was not in point. 41 Ind. Cl. Comm. at 337. We reaffirm that holding here. We also reaffirm our holding in the Saginaw Chippewa case that inflation and consequent dollar devaluation cannot be taken into account. 41 Ind. Cl. Comm. at 338.

The parties basically agree regarding consideration. We have determined that the total consideration for the cession of Royce Areas 53 and 54 was $32,666.65. The defendant used 5 percent in calculating commuted value of annuities provided for in the treaty. Article V of the treaty, however, states that $2,916.67 had been set aside to produce an annuity of $175, which works out to a 6 percent interest rate. Thus, 6 percent should be used. We have distributed the $12,000 provided under Article V to the Potawatomies, Ottawas, and Chippewas as the evidence establishes it was actually distributed, not in equal shares as the plaintiffs propose.

Consideration of $32,666.65 for lands having a fair market value of $2,848,787.70 was so grossly inadequate as to render it unconscionable within the meaning of section 2 (3) of the Indian Claims Commission Act.

The defendant is entitled, however, to credit for the entire consideration paid as payments on the claim. We have allocated that consideration among the tribes as follows:

Wyandots	$8,333.33
Delawares	8,333.33
Chippewas	6,133.33
Ottawas	6,133.33
Potawatomies	3,733.33

The respective plaintiffs and intervenors are entitled to recover from defendant the following net sums less any offsets, as determined in subsequent proceedings, to which the defendant may be entitled: to the Wyandot plaintiffs, $561,424.21; to the Delaware plaintiffs, $561,424.21; to the Chippewa plaintiffs, $563,624.21; to the Ottawa plaintiffs, $563,624.21; to the Potawatomi plaintiffs and intervenors, $566,024.21. 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