

BEFORE THE INDIAN CLAIMS COMMISSION

THE POTTAWATOMIE TRIBE OF INDIANS, THE PRAIRIE)	
BAND OF THE POTTAWATOMIE TRIBE OF INDIANS,)	Docket No. 15-D
)	
Plaintiffs,)	
)	
HANNAHVILLE INDIAN COMMUNITY, FOREST COUNTY)	
POTAWATOMI COMMUNITY,)	Docket No. 29-B
)	
Plaintiffs,)	
)	
CITIZEN BAND OF POTAWATOMI INDIANS OF)	
OKLAHOMA, and POTAWATOMI NATION,)	Docket No. 311
)	
Plaintiffs,)	
)	
THE PEORIA TRIBE OF INDIANS OF OKLAHOMA,)	
on behalf of the KASKASKIA, WEA, and)	Docket Nos. 313
PEORIA NATIONS,)	and 314-A
)	
Plaintiffs,)	
)	
THE KICKAPOO TRIBE OF KANSAS, THE KICKAPOO)	
TRIBE OF OKLAHOMA,)	Docket No. 315
)	
Plaintiffs,)	
)	
POTAWATOMI INDIANS OF INDIANA AND MICHIGAN,)	Docket Nos. 15-D
INCORPORATED,)	and 29-B
)	
Intervenor,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: August 25, 1978

Appearances:

Robert Stone Johnson, Attorney for
Plaintiffs in Docket No. 15-D.

Robert C. Bell, Jr.,
Attorney for Plaintiffs
in Docket No. 29-B, and for the
Intervenor, in Docket Nos. 15-D and
29-B.

Louis L. Rochmes, Attorney for
Plaintiffs in Docket No. 311.

Jack Joseph, Attorney for Plaintiffs
in Docket Nos. 313 and 314-A.

Alan Hull, Attorney for Plaintiffs
in Docket No. 315.

Richard L. Beal, and Alexander J.
Pires, with whom was Assistant Attorney
General, Wallace H. Johnson, Attorneys
for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission,

Scope of this Decision

The claims in this proceeding are for monetary damages to remedy allegedly unconscionable consideration received by the plaintiff tribes for cessions of land in Illinois and Indiana.

The Commission has before it the tasks of determining; (1) the acreages and value of lands ceded in the subject dockets; (2) the value of the consideration paid by the defendant, including the amount and value of exchange land granted to the Kickapoo; (3) whether the consideration for each cession was in fact unconscionable within the meaning of Clause 3, Section 2, of the Indian Claims Commission Act (60 Stat. 1049, 1050); and (4) the amounts, if any, owed by the defendant to the plaintiffs. We have

also to rule on an offer of proof of value by the Peoria plaintiff in Docket No. 313, relative to lands (Royce Area 96a) in which we ruled in our title decision that the Peoria had no compensable interest.

The Commission's title decision in this proceeding was issued on April 4, 1973. 30 Ind. Cl. Comm. 42. It involved a number of overlapping land cessions in fifteen consolidated dockets, only six of which are still directly involved in this proceeding. The nine dockets no longer involved include the claims of the Peoria on behalf of the Piankeshaw in Docket 99, which were dismissed as having been decided previously; and the Miami claims in Docket 124-H and Docket 254, which were dismissed since the Miami were found to have no interest in the subject areas. Also excluded are the Potawatomi claims to Tracts D, E and F in Dockets 15-P, 29-N and 306 (then on appeal on the Potawatomi entity issue)^{1/}, and the Potawatomi claims to Tract H in Dockets 15-Q, 29-O, and 309 (then on appeal in another proceeding.^{2/}).

The subject dockets were tried on value and consideration on January 6-10, inclusive, January 14, and March 13, 1974.

^{1/}Appeal No. 6-73, under lead Docket 29-N, aff'd, Potawatomi Nation of Indians v. United States, 205 Ct. Cl. 765 (1974). These three dockets were tried on value and consideration on June 24, 1976 and were the subject of a separate decision entered June 8, 1978, 41 Ind. Cl. Comm. 399, determining the amount due plaintiffs and reserving for further proceedings the amount, if any, which might be deductible for gratuitous offsets. On July 14, 1978, following a communication from defendant that it would reserve its claim for gratuitous offsets against the award for other docketed cases involving the several plaintiffs, and the plaintiffs' motion for entry of a final award, the Commission entered such final award. 42 Ind. Cl. Comm. 205.

^{2/} Appeal No. 8-74, under lead Docket 128, aff'd, Potawatomi Nation of Indians v. United States, 206 Ct. Cl. 867 (1974). These three dockets were tried on consideration and value on June 21, 22, and 23, and on July 20, 1976, and will be the subject of a separate decision.

Treaties, Cessions, Valuation Dates, and Acreages

Our Finding 38 contains a table which summarizes the Royce Areas, tracts, owning tribes, total acreage, interest of tribes in tract, and the valuation dates. ^{3/} The ceded areas to be evaluated at this time are Royce Area 48 in Illinois, and Royce Areas 98 and 110 both of which are partially in Illinois, and partially in Indiana. Because of overlaps between these and other cessions, the areas were subdivided into various tracts as an aid in determining title interests. Tracts A, A', B, C, D, E, G, H, and I involved in this evaluation are described in our title decision at 30 Ind. Cl. Comm., pages 50 through 53. They are mapped in the same decision as appendices I and II at 30 Ind. Cl. Comm., pages 79, 80; and as Map Appendix A, herein.

Finding 38 in effect corrects our Finding 21 at 30 Ind. Cl. Comm. 110, in respect to the effective date of the Kickapoo cession. The Kickapoo cession was effected by the Treaty of July 30, 1819, 7 Stat. 200 and the Treaty of August 30, 1819, 7 Stat. 202. The latter treaty was ratified on May 10, 1820, which in Finding 21, was given as the effective date of the cession. However, the Treaty of July 30, 1819, was amended by the Treaty of July 19, 1820, 7 Stat. 208, which modified the description of the exchange land ceded to the Kickapoo by the United States. The amended treaty was ratified on January 13, 1821, which is the correct effective date of the Kickapoo treaties, and the valuation date of the cession of the Kickapoo interests herein and of the Kickapoo exchange lands.

^{3/} By Royce Area we refer to cession areas as mapped and numbered by Charles C. Royce in the 18th Annual Report, Bureau of American Ethnology, Part II, Indian Land Cessions (1896-97).

In determining the valuation of the Kickapoo cessions and the Kickapoo exchange land, we have been particularly alert for any significant valuation factors during the eight month interval between May 10, 1820 and the correct valuation date of January 13, 1821.

The acreages were supplied by the United States Bureau of Land Management and accepted by the plaintiffs. In our title decision we held that certain plaintiffs had undivided 1/2 or 1/3 interests in tracts which were separately ceded by two or three tribes. During the trial on value and in their briefs, parties overlooked the undivided nature of the interests in such tracts and discussed the plaintiffs' interests on the basis of 1/2 or 1/3 of the acreage of such tracts. In fact each cession must be valued as a whole and the plaintiffs' monetary interests in each tract must be determined on the basis of their fractional interests in the value thereof.

Offer of Proof

In our title decision we denied and dismissed the claim of the Peoria plaintiff in Docket 313, to Royce Area 96a on behalf of the Peoria and Kaskaskia. 30 Ind. Cl. Comm. 42 at 62 through 64, and 126, paragraph ^{4/}4.

^{4/} As evidenced by Map Appendix I, at 30 Ind. Cl. Comm. 79, and Map Appendix A, infra, Royce Area 96a overlaps Tracts B and D of Royce Area 110 in Illinois. Tract D is also overlapped by Royce Area 177.

On July 11, 1974, the Peoria plaintiff in Docket 313 filed a motion with respect to the valuation date of the Kaskaskia cession of Royce Area 48 under the Treaty of August 13, 1803 (7 Stat. 78). In the final paragraph of its motion the plaintiff announced its intention to make an "offer of proof" with respect to value of the Kaskaskia cession under the aforesaid treaty, with value being computed not as of the 1803 cession treaty but as of the date of the confirmation treaty of September 25, 1818 (7 Stat. 184). The Peoria plaintiff apparently has abandoned its intent to make such an offer of proof.

However, in view of this Commission's determination that the Peoria had no interest in either Royce Area 48 or 96a, under the 1818 treaty, the Peoria, in the same document, announced its similar intent to make an "offer of proof" of value "with respect to the additional lands ceded by them. . . for the purpose of preserving their position for possible appeal." In denying the motion we interpreted the reference to the "additional lands" to be to Royce Area 96a, ceded by the Peoria under the 1818 treaty. We presumed that the offers of proof would be made, if at all, during the valuation hearing. Peoria Tribe of Indians v. United States, Docket 313, 34 Ind. Cl. Comm. 428 at 429, 430 (1974).

During the ensuing hearing on value, counsel for the Peoria plaintiff in Docket 313 introduced plaintiff's exhibit B in relation to its offer of proof. The exhibit, titled "The Market Value of Royce Area 96a in Illinois in the Year 1819," was admitted for identification only and not as evidence.

At page 85 of plaintiffs' proposed findings of fact and brief on value, the Peoria plaintiff contends that this Commission is required "to make a finding on the subject" of its offer of proof for purposes of appeal. In this the plaintiff is mistaken. The purpose of an offer of proof is to make the substance of the excluded evidence known to the trial court so that it may rule intelligently, and to preserve the record for appeal. Rule 103(a)(2) of Federal Rules of Evidence, and Seminole Nation v. United States, Docket 247, 40 Ind. Cl. Comm. 231 (1977). The cases relied upon by the plaintiff are inapposite in that they deal with situations where findings of fact were not based on the whole record. Since plaintiff's exhibit B has not been admitted as evidence, no substantive findings may be based upon it.

Section 23 (e)(1) of the Commission's Rules of Procedure provides:

When at any hearing documentary evidence is offered and objection is made thereto the Commission, Commissioner, or Examiner conducting the hearing shall rule upon same and, if the ruling is adverse to the party offering said evidence, the document may be marked for identification and added to the record.

In this instance the defendant implicitly objected to the admission of plaintiff's Exhibit B and voiced further objection thereto in its brief. The Commissioner conducting the hearing ruled adversely to the offering party, to the effect that the exhibit would not be admitted into evidence, but would be allowed into the record for identification. Nothing remains to be done at this point

by the Commission. For the Commission to make findings of value on Royce Area 96a as of 1818 or 1819 as requested by the Peoria plaintiff would not be appropriate in the light of the foregoing ruling and of our title decision denying and dismissing the Peoria claim to the area.

Historical Background

Our finding 39 sets forth in some detail the historical background of Illinois and western Indiana from about 1671. Until the close of the French and Indian War in 1763, all of the tracts involved in this proceeding were French territory. Explorers such as Joliet, Father Marquette, LaSalle and Hennepin, traveled extensively through the area and issued glowing reports on the many advantages which they considered these lands to possess. French fur trappers, traders, military posts and several thriving trading centers built by the French and populated by French nationals dominated the territory. A chain of military and trading posts were established from the upper Great Lakes region extending southward along the Illinois River and into the Mississippi Valley. Other posts were established in western Indiana along the Kankakee and Wabash river valleys. For the most part the presence of the French did not disrupt the pattern of life of the Indian inhabitants.

When the French and Indian War ended with a British victory in 1763 the British tried to create a strong and friendly alliance with their late Indian enemies in the old Northwest Territory. Pursuant to the Proclamation of 1763, settlement by members of the colonies in lands west of the Appalachian Mountains was forbidden. Despite this prohibition and the

British attempts to enforce it, large numbers of Virginians crossed the mountains and settled in Kentucky and southwestern Pennsylvania, and a few reached Illinois. Some of the older French settlements on the Mississippi River and in the Ohio Valley in southern Illinois survived the British takeover and retained their French flavor although they lost some of their importance as trading centers. Reports of the British who took over the trading and military centers from the French were as glowing as were those of the French concerning the great potential of the area for settlement and trade, for hunting the plentiful wild game, for agriculture and for the construction of mills, one of which was already operating in the late 1760s. The numerous rivers, most of them clearly navigable, were also mentioned in the reports.

Following the colonial victory in the Revolutionary War in 1783, the lands west of the Appalachian Mountains became the property of the new Federal Government. Although the Indians inhabiting these regions had enjoyed friendly and prosperous relations with the French and later the British, this was not the case with the Americans whom the Indians correctly supposed were eager to obtain possession of the Indians' lands in Ohio, Indiana and Illinois. The British had remained in their former military posts along the border between the United States and Canada and from those posts they supplied the Indians in the Northwest Territory with arms, ammunition and trade goods and made it possible for them to defeat every military expedition sent into the area until General Anthony Wayne won a victory at the Battle of Fallen Timbers in 1794. At about the same time John Jay succeeded in negotiating a treaty with the British in which

the British agreed to abandon the military posts in question and to have their soldiers out of such posts by June 1, 1796. News of this impending event was communicated to the Indians by General Wayne in the course of his negotiations with them leading up to the Treaty of Greenville of August 3, 1795. Realizing that without British help they would no longer be able to control all of the Northwest Territory, the Indians agreed to cede to the United States approximately two-thirds of the present state of Ohio, a small part of southeastern Indiana, plus a number of enclaves located in their retained territory. The United States recognized the title of the Indian treaty parties to their lands north and west of the so-called Greenville Line running from east to west across Ohio and south west into Indiana, and the Indians agreed that they would sell their remaining lands to no one but the United States. The small enclaves acquired by the United States in Ohio, Indiana and Illinois, were for the purpose of establishing a chain of military posts.

Even before the Treaty of Greenville a large number of American settlers and traders had moved into Ohio and Indiana and in 1789 Congress provided for a government for the Northwest Territory. 1 Stat. 50. Prior to 1795 most of the Americans settled in former French towns in Indiana and Illinois. After 1795 settlers in greater numbers moved into the newly acquired land in Ohio and Indiana. Callot, publishing in French and English concerning his travels in Illinois in 1796 described Illinois as perhaps the only spot respecting which travellers had given no exaggerated accounts. He wrote of the beauty, fertility and good climate of the area; the majestic rivers which flowed through and around it and of the many smaller navigable rivers and creeks. He mentioned that access to Kaskaskia and Cahokia, both on the Mississippi River in Tract A of Royce Area 48, was not

only by water but by two roads, one open the year around and the other usable in summer. He described the luxuriant vegetation and the rich soils in the area.

With the end of the War of 1812, the British gave up all claims to trade south of the Canadian border and withdrew whatever support they had been giving to the Indians. There was then no further impediment to the westward expansion of the American frontier to the Mississippi River and beyond, and the Federal Government continued its policy of land purchases from the Indians east of the Mississippi River. By 1821 most of Indiana, Illinois, Michigan and Ohio had been acquired from the Indians by the Federal Government and there was a large movement of settlers westward into those regions.

Topography, Soils, Vegetation, Climate, Drainage

The topography and soils of Illinois were largely determined by two glaciers which moved southward during the Pleistocene Age. They left two different soil areas which influenced the patterns of settlement and economic development of Illinois. Details may be found in our finding 40. In general, the result was an undulating countryside with extremely fertile soil in some sections and good soil in most. Minerals abounded in the state including white pipe clay, potters clay, brick clay, fire clay, plasterers' sand, sandstone, limestone, marble, galena, iron, copper, zinc, coal and natural gas. The clay was very useful to early settlers and the mineral springs and salines were also of great value.

All tracts in suit contained some prairie land and some timbered land. The prairie portions were covered with tall grasses which made plowing difficult but which provided good pasturage for cattle. The dense grass con-

tributed to the richness of the soils. Parts of the subject land were heavily timbered, often in commercially exploitable quantities and qualities. Timber was always useful to settlers for building purposes and for fencing. Most parts of Illinois contained many fine fruit trees and fruit bearing bushes. Details of the types of trees and the ratio of timber land to prairie land will be dealt with in parts of this decision dealing with the value of the separate tracts of land.

The Illinois climate was generally of the humid continental type with hot summers, cold winters and short transitional seasons. Average annual precipitation ranged from 32" in the north to 47" in the south. The average number of frost-free days ranged from 160 in the north to over 200 in the south.

Drainage in the various tracts was generally good and only a few areas required tile or ditch drainage which settlers in the times of the cessions in suit were quite familiar with. The many rivers, streams and creeks provided good drainage except where the land was very low and in those areas the marshes, swamps and wetlands were valued because of the wild game and the fur bearing animals and the wild fowl which thrived in such places. Many of the first non-Indians in the areas in suit were hunters and trappers to whom skins and furs were an important source of income.

Transportation and Access

In our finding 41 we have described the transportation through and access to the subject lands which we found to be unusually good because of the network of waterways to the eastern and western states and from the Great Lakes to New Orleans. River and stream routes long used by the Indians and by the French were followed by the Americans. Those

water routes were an essential element of the fur trade and of colonization and settlement by the French, Spanish, British and finally by the Americans.

The major streams and rivers were the Illinois River and its tributaries, the Kankakee and Des Plaines rivers; the Mississippi, the Ohio and the Wabash rivers. Also important were the Iroquois tributary of the Kankakee, the Vermillion, Mackinaw, Sangamon, Macoupin, all tributaries of the Illinois River; the Kaskaskia, Shoal, Big and Little Muddy and Cache, all tributaries of the Mississippi; the Saline tributary of the Ohio River; and the Embarrass, Vermillion and Tippecanoe, tributaries of the Wabash River.

An important route to the Illinois portions of the subject lands was by way of the Great Lakes to Chicago, up the Chicago River and then by portage to the Des Plaines River and down the Des Plaines to the Illinois River at Tract D. Upstream from this point, the Kankakee River and its tributary, the Iroquois River, gave access to Tracts D and E. Access from Lake Michigan was possible by ascending the St. Joseph River and by portage to the Kankakee River. The Illinois River formed the northern border of Tract D and the northern and western borders of Tract B. Tracts A, A' and B all met at the confluence of the Illinois with the Mississippi. The Mississippi constituted the western border of, and gave access to the rich American Bottom Lands of Tract A.

The most important water route to the subject lands until the opening of the Erie Canal in 1825, was down the Ohio River from Pittsburgh, along the borders of West Virginia, Ohio, Indiana and Kentucky. By ascending the Wabash tributary of the Ohio, direct access was gained to the entire southern part of Tracts G and I. The Vermillion tributary of the Wabash

River formed the border between and gave access to Tracts C and G. The Tippecanoe tributary of the Wabash formed the eastern boundary of and gave access to Tract I. The eastern border of Tract C paralleled the course of the Wabash River and was relatively close by. The lower reaches of the Ohio River formed the entire southeastern boundary of Tract A. To the south, the Mississippi River provided the area with access to New Orleans where ocean transport was available to the east coast and abroad.

The descent down the Ohio, past Royce Area 48 to New Orleans was first made by a non-Indian in 1742. Fort Pitt was already in existence as the nucleus of the future traffic west and south from Pittsburgh, Pennsylvania.

The entire length of the Mississippi below the subject lands was navigable by large shallow draft vessels at all times. The other rivers were navigable by canoe and by flatboat. The bark canoe in use in the subject areas ranged in size from a one-man vessel to vessels 30 feet in length and capable of carrying 3,000 pounds of cargo and a 12-man crew. The canoe was light in weight, easily repaired and portaged. The raft, pirogue, barge, bateau and keelboat followed the canoe. Propulsion was by current, oars, sweeps, poles, sail and tow ropes. The keelboat was in use on the Mississippi by 1751 when a fleet ascended from the mouth of the Ohio River about 75 miles to Fort Chartres in Tract A. The journey from Pittsburgh to New Orleans took about three weeks. The return trip took from three to four months by keelboats and barges. Immigrants to the subject tracts from points upstream could sell their vessels to persons going further downstream or the vessels could be dismantled to supply the need for sawed timber.

The first steamboat on any western river left Pittsburgh in November, 1811, on a voyage down the Ohio past Tract A and thence down the Mississippi to New Orleans. In 1812 the first steamboat went up the Mississippi from New Orleans. More and better steamboats followed. In 1820 steamboats were on the Wabash and traversed the entire length of Royce Area 98, Tracts G and I and beyond to Delphi, Indiana.

Overland travel was necessary to reach some parts of the interior of the subject tracts. Shortly after 1700 the French had made a trail from Kaskaskia in Tract A through Danville in Tract G to Detroit. When George Rogers Clark passed through Tract A in 1778, a French trail existed from Kaskaskia to Prairie du Rocher. Two trails led from Kaskaskia to Cahokia and a well defined trail from Kaskaskia to Vincennes in Royce Area 63. As early as 1792, the Territorial legislature enacted authority to lay out roads. The first road in St. Clair County, Tract A, was recorded in 1806. By 1811 there were 17 road districts in that county.

In addition to the above mentioned roads, there were Indian trails, game trails and a few blazed trails referred to as "traces" in the subject tracts. Annual migrations of vast herds of buffalo from the western plains to the salt licks of Kentucky and the Allegheny feeding grounds left well defined trails that were used by Indians and non-Indians. The old St. Louis Trace, believed to be the first overland route used by Americans on their way to Illinois, was such a buffalo trail. Known also as the Vincennes Trail, it extended from the falls of the Ohio to the Wabash River near Vincennes and westward across Tract A to St. Louis, Missouri. To the east

it extended from the present site of Louisville, Kentucky to the Wilderness Road and the Great Valley Road to Richmond, Virginia.

Indian trails radiated in various directions from several focal points in all of the tracts and provided usable "roads" for travel and transportation. Early settlers also made their own trails, removing trees and stumps, fording or bridging small streams and constructing log roads across swamp lands. Compared with much other land being opened for settlement in the years covered by this suit, the subject lands in Illinois and Indiana were not raw and rough or inaccessible.

Settlement and Population

Population of the United States in general and of the areas in suit is dealt with in our finding 49 and also in specific findings relative to the several tracts to be valued. The population of the United States increased 34.8% between 1790 and 1800, and 36.4% between 1800 and 1810. Throughout the period of 1790 to 1820 the total population of the country was in a period of rapid expansion and the population of the immediate region of the subject tracts was rising more rapidly than in the country as a whole. Between 1800 and 1810, Indiana had gained population at ten times the national rate and the gain was even faster between 1810 and 1820. Between 1810 and 1820 Illinois gained in population at a rate of more than 10 times the United States as a whole.

Farming

In finding 50 we have discussed farming in the area in suit. Prior to American settlement, Indians were farming along stretches of the Illinois River in Tract B and the Wea Indians had extensive cultivated fields in the bottom lands of the Wabash and Tippecanoe Rivers along the

borders of Tract I in Indiana. By 1700 the Illinois Indians were farming in the American Bottom portions of Tract A. The Piankeshaw farmed in the vicinity of Danville in Tract G. The French had farmed a great deal of land in the American Bottom.

Most of the American settlers who came into the subject tracts arrived with a team of horses or oxen and a wagon, some household goods, tools, and a little money. Those who arrived on foot with few possessions managed to gain a foothold by working for other settlers.

At first the settlers lived in lean-tos which they replaced with log cabins. They acquired as much land as they could afford and commenced with subsistence farming. Later they produced excess crops which they sold at a profit.

The early settlers preferred to locate their farms in or along the edges of the forested lands preferably along the wooded banks of the many streams that criss-crossed the Illinois lands. Timber furnished materials for buildings, containers, furniture, tools, boats, fencing and fuel. It also provided shelter from the heat, wind and cold of the prairies. While the early settlers recognized the value of the prairies as pasturage for their cattle, the density and toughness of the sod was a deterrent to settlement and farming such land because those settlers came with primitive wooden plows and harrows which could not make much headway on tough prairie soil. Even those settlers who appreciated the richness of the prairie soil for the raising of grain crops, the difficulties they faced in bringing such land under cultivation discouraged them until better tools were acquired.

A great variety of crops could be and were grown in the subject areas, including corn, wheat, barley, oats, rye, buckwheat, grasses, clover, Irish and sweet potatoes, tobacco, castor beans, flax, cotton, apples, peaches, plums, grapes, a variety of berries, melons and garden vegetables. Farm production in the earliest days of settlement was mostly for home consumption and labor barter. Where river transportation was available to market centers as it was on the borders of the subject lands, excess farm produce was sold at a profit and shipped to established settlements.

Banking and Finance

In our finding 51 we have dealt with banking and finance in the United States from 1791 through 1821, the last valuation date in suit. The First Bank of the United States was chartered by Congress in 1791 and lasted until 1811. Thereafter, until the Second Bank of the United States was established in 1816, citizens and the government had to rely on state chartered or unchartered banking institutions for their banking needs and, largely, for currency. The earliest bank in Illinois, the Bank of Illinois at Shawneetown just outside the southeastern edge of Tract A, grew from a mercantile business commenced in 1804. By 1813 its owner began to accept deposits, to lend money and to issue bills of credit. A charter was applied for in 1816 and the bank was highly regarded. Other banks followed and survived the financial panic of 1819. In 1821 the Bank of Illinois at Vandalia was chartered.

Public Land Laws of the United States

The details of the public land laws applicable to Indiana and Illinois at valuation dates are in our finding 52. The Harrison Act of 1800

applicable to public lands in Ohio and Indiana, provided for public sale at auction of surveyed public lands in 320 acre half sections for not less than \$2.00 an acre. Lands remaining unsold might then be sold at private sale for \$2.00 per acre. Installment payments with certain limitations and penalties for non-payment are detailed in our finding. The discount allowed for advance payment could reduce the purchase price from \$2.00 to \$1.84 per acre. After the admission of Ohio in March of 1803, the Act of March 26, 1804, extended the public land laws to the rest of the Old Northwest Territory including the lands in suit. The \$2.00 minimum price per acre was retained but the land could be offered at both public and private sales in 160 acre quarter sections. Land offices were established at Detroit, Vincennes and Kaskaskia. Other land offices were opened in 1807 at Jeffersonville, Indiana, and Shawneetown, Illinois, the latter in 1812. In 1816 a land office with jurisdiction over Illinois lands was opened at Edwardsville and in 1820 land offices were opened at Vandalia and Palestine, Illinois. Legislation in 1817 permitted the sale of 80 acre tracts in six out of every 36 sections and in 1820 further legislation required that all public lands be offered in 80 acre tracts with the minimum price reduced to \$1.25 per acre. Credit sales were abolished and full payment on the date of purchase was required.

Because public land could not be sold prior to survey, and substantial periods of time were required to make surveys of the Indian land cessions, the Government's total inventory of public lands tended to exceed the supply actually available for purchase by the public.

Details concerning the rights of squatters, speculators and

the effect of the preemption laws are given in our finding 53.

Prior to 1830 the law did not accord rights to squatters on public lands to purchase the tracts on which they had made improvements. Rather, remaining on public lands without permission of the register and receiver of the local land office was a misdemeanor. The law was not often enforced. There were, moreover, a number of statutes applicable to special areas or to special classes of persons which granted preferential rights to purchase, called preemption rights. For example, an 1813 statute granted a preemption right to Illinois residents to purchase at private sale for the minimum per acre price (\$2.00) not more than one quarter section of unreserved public land in a tract which they had actually inhabited and improved prior to the enactment of the law.

Despite the laws, settlers swarmed over public lands, and also on unceded Indian lands in Indiana, Illinois and elsewhere. Sometimes they moved west when their tracts were put up for public auction. At other times they attempted, and sometimes succeeded, to bid in the land. Success in buying land at auction often resulted from arrangements among the various settlers in an area and this could and did result in very valuable land being purchased at bargain prices. Competitive bidding at Federal land sales in the area north of the Ohio River became rare after 1816.

Despite the vigorous opposition of settlers, speculators in land managed to stay in business and buy up considerable quantities of land. They also had their associations which indulged in a variety of schemes to procure public land at bargain prices.

In pre-industrial America, land speculation was big business. Great

landowners moved west with, and sometimes ahead of the frontiersmen, following closely the surveyors. Speculators who bought large tracts of choice land and held them for resale at prices the settlers could not afford were a serious deterrent to the settlement of public lands.

In Finding 54 we have summarized the public land sales at land offices northwest of the Ohio River from 1800 through the first half of 1820. Also in that finding we have shown sales under the cash system from 1820 to 1825 when the minimum price for public lands was reduced to \$1.25 per acre cash .

We shall now describe the physical characteristics of each of the tracts in suit on the basis of evidence in the record. Next we will report the expert witnesses' opinions on the value of each tract, and finally the Commission's findings of value and its reasons for accepting or rejecting value theories advanced by the parties.

Tract A of Royce Area 48. Tract A was ceded by the Kaskaskia Nation under the Treaty of December 12, 1803, and will be valued as of that date. It consists of 6,279,118 acres of land in southwestern Illinois bounded on the west by the Mississippi River and on the south by the Ohio River. The tract encompasses all or parts of the following present day counties ranging from the southern part northward: Alexander, Pulaski, Union, Massac, Johnson, Pope, Hardin, Jackson, Williamson, Saline, Gallatin, Randolph, Perry, Franklin, Hamilton, White, Monroe, St. Clair, Washington, Jefferson, Madison, Clinton, Marion, Bond, Fayette and Effingham. Of the total acreage in the tract 352,000 acres were the famous American Bottom lands

described in some detail in our finding 42. The balance of Tract A was 3/4 timbered lands and 1/4 prairie lands.

The American Bottom is a strip of rich alluvial soil along the eastern bank of the Mississippi River, 100 miles long and from 3 to 15 miles wide with an average width of from 5 to 6 miles. It stretches from the mouth of the Illinois River on the north to the mouth of the Kaskaskia River on the south through present day counties of Madison, St. Clair, Monroe and Randolph. The soil reaches some 25 feet in depth and was described by 19th century writers as of unsurpassed fertility, the finest body of land in what was then called the "west" and by far the most beautiful tract of land in the "western" country. It was believed to be capable of supporting more people than any other tract of equal size in America.

The area was heavily used from time immemorial by American Indians. It supplied them with game, fish, wild fowl, fruit, nuts, corn, berries, timber, water and excellent grass for their stock. The opulence of the area attracted white settlers from the time it was first discovered by them. It was the original seat of the French settlement of Kaskaskia in 1700, Prairie du Rocher in 1722, Fort Charles, Cahokia in 1699, and Prairie du Pont in 1760. Apparently the French used the area without disturbing the Indian inhabitants. American settlement of the area began in 1779. In 1783 Piggot's Fort was established. In 1786 New Design was founded, and in 1800 Bellefontain, Whiteside's Station and Goshen were founded. For a number of years more than three-fourths of the population of Illinois lived in the American Bottom area.

While the portions of Tract A which contained American Bottom lands were the finest in the tract and were settled in some areas long before the 1803 valuation date, the remainder of Tract A contained much excellent land. The lands bordering the Mississippi River contained fine arable lands, rich bottom lands, large stands of timber and few of the prairie-type areas which early settlers found difficult to cultivate. There were many streams, lakes and marshes where fish and wild fowl were plentiful. The lands bordering the Ohio River on the south were of the same type. The interior portions of Tract A contained some broken and hilly areas but drainage was good because of the many small streams traversing the land and emptying into the large rivers. Heavy stands of timber covered much of this interior land and there were no large areas of prairie without timber. All of the area was well watered and in some portions there were mineral springs and salines. Transportation to and from the interior areas was not as easy as in the case of the lands bordering on the navigable waters of the Mississippi and Ohio rivers, but access was by no means difficult and settlement of the interior areas, although slower than the river areas, was steady.

Tract A' of Royce Area 48. Tract A' is located in central Illinois and is overlapped by Royce areas 48 and 110. It contains 3,824,842 acres of land ceded by the Kaskaskia in 1803 and in which we have found they have an undivided one-half interest, the other one-half interest having been ceded by the Kickapoo in 1821. A detailed description of this area is in our finding 43.

One-fourth of the land in Tract A' was well timbered and the balance

was prairie land and was located in the so-called Grand Prairie of central Illinois. The soil was rich black loam well suited to the growing of a large variety of crops. The topography was not as hilly as that of Tract A and the area was not as accessible by means of large rivers as the Tract A lands. The timbered areas were primarily in the vicinity of smaller rivers and streams which criss-crossed the tract and it was to these sections that the settlers first came. The northwestern portion of the tract was close to the towns of Peoria and Pekin from which supplies could be brought into the tract without much difficulty. The climate in the northern part of the tract was excellent with short winters and long pleasant summers.

Settlement in Tract A' commenced later than in Tract A and population growth was slower. The Goshen settlement was established in 1800. Settlement of Bond County which was inland and east of the Mississippi River began in 1811. At the conclusion of the War of 1812 settlers began arriving in greater numbers.

Wild game was plentiful in the tract. Drainage was no problem and the tract contained all sorts of clay useful to settlers in building.

Tract B in Royce areas 96a and 110. Tract B is in north-central Illinois and is overlapped by Royce areas 96a and 110. The counties later formed are listed in our finding 44. The tract contains 5,117,115 acres, approximately 60% of which were prairie and the balance timbered lands. The valuation date of this tract is January 13, 1821, and all of it was owned by the Kickapoo.

The southwestern and western portions of Tract B are bordered by the Illinois River which flows into the Mississippi River in Jersey County which is in Tract B. The lands drained by the Illinois were exceptionally fertile.

The bottom lands, particularly those above high water mark, were considered by Indians and non-Indians as superb lands for crop raising. The bluffs along the river were covered with fruit trees and grapevines and also contained quantities of clay used by the settlers in building. These areas were predominately timbered which made them attractive to settlers who commenced coming into the area prior to the extinguishment of Indian title, i.e., as early as 1815. There was little flooding and the climate was temperate and pleasant. Mineral springs were present and were valued for their medicinal properties. The occasional barrens or hickory flats were used for growing wheat and the rich grasses were useful for cattle grazing.

Those portions of Tract B not on the Illinois, were well drained by smaller rivers such as the Sangamon, Vermillion and the Mazon and also by Salt Creek. There were fine stands of timber along all of the many watercourses in the tract and the prairie lands in this tract were either rolling or level and were exceedingly fertile.

Settlement commenced in Jersey County in 1815 prior to the 1821 valuation date. The first grist mill was built in the county in 1821 and the first blacksmith shop in 1824. The first settlement in Green County was in 1815 and immigrants began to pour into the county immediately after the Kickapoo cession treaty was signed in 1819 and before its 1821 effective date. Settlement commenced in Sangamon in 1816, the great fertility of the area having been well advertised. Morgan County settlement commenced in 1816 and there were a few non-Indian settlements in Cass, Morgan, Scott, and Woodford counties prior to 1821. After 1821 settlement was rapid.

Tract C of Royce Area 110. Tract C containing 2,193,176 acres in central Illinois near the eastern border of the state was ceded by the Kickapoo on January 13, 1821. Two thirds of the tract is prairie land and one third is timbered. The present day counties in this tract are listed in our finding 45.

Most of Tract C was well drained by numerous creeks and by the Embarrass River which flowed through much of the tract and was navigable by flatboat. The river contained an abundance of fish, and timber grew along its banks which were not subject to flooding. Most of the swamps in the tract dried out sufficiently in summer to permit cultivation. The prairie areas were very fertile with thick black soil excellent for growing corn, wheat and grasses. Most of the timber was hardwood and the timbered areas were settled first. The Wabash River was not far to the east of Tract C and provided drainage and transportation to and from the tract. The Kaskaskia River which was near the tract on the west was navigable and provided drainage. Other rivers which benefited the tract were the Vermillion, the Kickapoo, the Sangamon and the Little Wabash.

The earliest non-Indian settlers in Tract C were the French. American settlement commenced in 1816 and increased slowly after the Kickapoo cession in 1821. Because the Kickapoos did not leave the area immediately following the cession, settlement did not pick up until 1828. Settlers found portions of the land in this tract so productive that they did not need to practice rotation of crops.

Tracts D and E of Royce Area 110. Tracts D and E formed the north-eastern portion of the 1821 Kickapoo cession and the Kickapoos had an

undivided one-half interest in each tract. Finding 46 lists the present day counties which are partially or wholly within the tracts.

Tract D is bordered by the Illinois River on the north and by the Kankakee River, a tributary of the Illinois, on the northeast. The tract benefited by drainage from those rivers and also by the Mazon River, the Vermillion and by numerous streams. Although the bulk of the tract consisted of prairie lands, there was good timber along the many streams and rivers which bordered and criss-crossed the tract and the bottom lands along those river and stream courses were exceedingly fertile. Coal outcroppings were visible and were used by blacksmiths once the Indians left the area in 1828 and settlers commenced arriving in numbers. Well defined Indian trails which paralleled the Illinois River and led to Chicago some 40 miles away, plus the rivers themselves provided access and easy transportation. Since 1812 there had been talk of building a canal to link Lake Michigan with the Illinois River and the canal was actually completed in 1848.

Tract D had 890,014 acres of which 98% were classified as prairie lands and 2% timber.

Tract E contained 844,794 acres which included several present day counties listed in our finding 46. Eighty percent of the tract was prairie land and 20 percent was timbered. The tract was drained by the Iroquois, the Vermillion and Kankakee rivers and by numerous creeks. Most of the tract is located in Iroquois County which also extends into tracts D and C, and was the former bed of Lake Kankakee. Most of the land in the tract was exceedingly fertile. Transportation and access were good

by water and by Hubbard's Pack trail from Danville, Illinois, to Chicago and the Butterfield Trail.

The Kickapoos remained in both tracts after the 1821 cession and non-Indian settlement did not commence to any marked degree until 1828.

Tracts G and I of Royce areas 110 and 98. Tract G, containing 402,870 acres in the western part of Royce Area 98, is overlapped by part of the Kickapoo cession of Royce Area 110. The tract is partly in Illinois and partly in Indiana and the Kickapoo, Potawatomi and Wea tribes each have an undivided one-third interest. The Potawatomi and Wea interests are valued as of October 2, 1818, and the Kickapoo interest as of January 13, 1821. Tract I contains 351,756 acres wholly in western Indiana. The Wea and Potawatomi each have an undivided one-half interest to be valued as of October 2, 1818. The counties which are wholly or partly included in these tracts are listed in our finding 47.

The Illinois portion of Tract G is drained by three forks of the Vermillion River and its tributaries and also by the Little Vermillion River. Timber in belts of from one to three miles in width grow along these watercourses. The prairie lands in the tract were of black, dense, muck-like soil of variable depth. Good supplies of well water were obtainable at from 15 to 50 feet, including artesian flows in the northwest portion of Vermillion County. The tract had an important Indian saline which was in great demand by the settlers. The tract contained a part of the Grand Prairie which, in the early days of settlement, was not favored by the non-Indian pioneers. The climate was hot and dry in the summers and very cold in the winters.

The Indiana part of Tract G contained about 220 square miles and was bordered on the west by the Illinois-Indiana line and on the east by the Wabash River. This area contained rich bottom lands and some fine terraces in the river valleys. The terrace, or "second bottom" rose some 40 feet above the first bottom and was from one to four miles wide. It furnished a broad stretch of rich, well drained farming country. The soil of the second bottom was black, sandy loam which produced abundant crops. Rising from the second bottom were abrupt bluffs reaching heights of from 120 to 130 feet above the river and forming the border of the Grand Prairie in the central part of Tract G. The bluffs and bottoms were timbered with oak, hickory, maple and walnut. Although the first non-Indian settlers came to Tract G as early as 1816, the Kickapoos and the Potawatomes remained in the area for several years thereafter. The settlers preferred the timbered portions and considered the Grand Prairie area poor for settlement.

Tract I is in the vicinity of the Wabash and Tippecanoe rivers. It is well drained by those rivers and also by Pine, Indian and Burnett creeks. The Wabash at this point contains salmon, bass, red horse and pike. Buffalo fish were found in the Tippecanoe River. Geese, duck and other wild game birds were in good supply in this area. The Wabash River was navigable by light draft boats.

The prairie portions of Tract I were very fertile and either level or gently undulating. There was good timber land and many fruit-bearing trees and bushes. Except for some inferior land in the oak barrens, the soil of the timbered lands was of excellent quality. Settlement in Tract I commenced in 1820 and increased after the Indians had left.

Tract H - Royce Area 110. Tract H lies in western Indiana in Benton County and constitutes the overlapping portion of Royce areas 110 and 180. The Kickapoo and Wea tribes each have an undivided one-third interest in this 51,384 acre tract. The Wea interest has a valuation date of October 2, 1818, and the Kickapoo interest, January 13, 1821. See our Finding 48.

Most of the tract consists of gently rolling prairie land dotted by groves of oak, hickory and maple. Much of the surface soil is of various silt loams ranging from clay to rich black loam. The country is drained by five major creeks and the headwaters of the North Fork of the Vermillion River. Certain parts of the county have small lakes and wet ground which require ditch and tile drainage. Early settlers arrived in the 1820s and kept to the timbered portions or near to them. This area was particularly well adapted to the growing of corn and other grains. Despite the presence of the Indians in this tract, settlers continued to take up land therein.

Parties' Appraisals and Valuations

The plaintiffs in Dockets 15-D, 311, 313, 314-A and 315 jointly employed as their valuation expert, Dr. Roger K. Chisholm, Associate Professor of Economics at Memphis State University. Plaintiffs' counsel rely on Dr. Chisholm's detailed report and on the sales data gathered by Dr. Chisholm and have also introduced in evidence and analyzed certain evidence of early sales in Indiana which defendant's expert collected but which defendant did not introduce in evidence. In addition, plaintiffs rely on certain findings of fact made by this Commission in Miami Tribe v. United States, Docket 67, 4 Ind. Cl. Comm. 346 (1956), aff'd in part, reversed in part and remanded for further proceedings on the matter of value, 146 Ct. Cl.

429 (1959). The land being valued was in Royce Area 99 in Indiana immediately south of Royce Area 98 involved in this proceeding.

In appraising all of 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 in the northwest part of the United States in particular. Much of the material which we have included in our findings on the several tracts involved in this proceeding was contained in exhibits which were the basis for Dr. Chisholm's report.

In our finding 57-A we have described the sales data used by Dr. Chisholm in his report. Basically, he selected 508 recorded land sales in six Illinois counties in Tract A, Royce 48, and wrote a report on the land prices reflected by those sales and their significance in arriving at values for the various tracts in 1803, 1818 and 1821. The sales occurred over a 31 year period from 1789 through 1821 plus a sale in 1822 and one in 1848. The largest number of sales took place in 1818 when 56 of the tracts were sold. The per acre consideration ranged from 2 cents per acre to \$5,400 per acre. The highest prices in the sales considered by Dr. Chisholm, were for townlots. Dr. Chisholm obtained a weighted average price per acre of \$2.38 by dividing the mean total consideration of \$575,872 by the mean acres sold(242,885). The median value for the 508 transactions selected is \$2.13 per acre.

A tabulation of the six 1803 sales used by Dr. Chisholm shows that they had a weighted average price of \$1.15 per acre. A recapitulation of

29 sales from 1798 through 1807 produces a weighted average price per acre of \$1.17. Similar treatment of 80 sales selected in 1818 results in a weighted average price per acre of \$4.05. A like computation involving 25 sales in 1820 and a single sale each in 1821 and 1822, produces a weighted average price per acre of \$3.66. The evidence used by Dr. Chisholm does not indicate whether or not any of the land involved in the sales included improvements. Much of the rich American Bottom lands in Tract A was settled prior to the extinguishment of Indian title in 1803. In view of the fact that the Kaskaskia's recognized title to Royce Area 48 was not extinguished until December 12, 1803, any settlers who made their homes on that land were trespassers vis a vis the Kaskaskia and the value of any improvements on such land would not be deductible from the value of plaintiff's land on valuation date. Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130, 146, 147; 389 F. 2d, 778, 789 (1968); United States v. Northern Paiute Nation, 183 Ct. Cl. 321 (1969) aff'g Dkt. 87, 7 Ind. Cl. Comm. 322, 615 (1959), 16 Ind. Cl. Comm. 215 (1965).

The holding in Fort Sill Apache Tribe v. United States, Docket 182-A, 40 Ind. Cl. Comm. 143(1977), on reversal and remand by the Court of Claims, 209 Ct. Cl. 433 (1976), that improvements made by trespassers on plaintiff's lands must be deducted from an award for the miners' trespass damages imputed to the United States, is distinguishable from the facts in the instant case on several grounds. In the Apache case the land was held by Indian title rather than recognized title as in the Kaskaskia situation.

The United States was at war with the Apache and had no duty to protect them. To the extent that defendant was held liable to the Apache for imputed trespass damage to their lands by the miners, the court held that equity required that any enhancement to the land by virtue of improvements made by the trespassers, should be deducted from the final award. None of these circumstances are in the Kaskaskia case which is not based on a taking of land nor on imputed trespass, but rather involves a cession of land improved prior to cession by third parties whom defendant had failed to eject.

In selecting his sales data for use in his valuation, Dr. Chisholm eliminated transactions involving governmental bodies, sheriff's and estate sales, sales between parties having the same names, and sales with no, or only nominal consideration.

Plaintiffs analyzed data on sales in Indiana prior to 1833 compiled for, but not used by defendant, and described in our finding of fact 57-B. Data were gathered in counties bordering Royce Area 98 on the south and in present day Warren and Tippecanoe counties north of the Wabash River extending into Royce Area 98. Data concerning sales prior to 1818 were in the Clark's Grant area on the southern border of Indiana and consisted of a number of sales between 1790 and 1802. With the consent of defendant's counsel, plaintiff's counsel introduced in evidence data on 47 such pre-1803 sales in the Clark's Grant area. In selecting the 47 sales, Mr. Keller who had done the research for defendant, eliminated town lot sales, sales with small acreage, sales with long boundary descriptions

which he found difficult to read or from which it was difficult to compute a per acre price, and most sales at \$4 or more per acre, on the assumption that such sales must have included improvements. Mr. Keller testified that he had selected sales which were easy to work with and which fell in the price range of from \$1 to \$3 per acre because he judged such price range at that time and place to be "normal". Plaintiff's counsel eliminated seven sales from Keller's compilation because they involved parties having the same names, and then recapped the balance. In spite of the obvious bias of Keller's selection procedure which was guaranteed to result in the lowest possible price per acre, the weighted average per acre price thus obtained for the Clark's Grant sales in 1800, 1801 and 1802 were \$1.88, \$1.91 and \$1.76 respectively and the overall weighted average price per acre for all forty sales used by plaintiff's counsel was \$1.68.

Plaintiff's counsel also relied on our decision in Miami Tribe v. United States, Docket 67, 4 Ind. Cl. Comm. 346 (1956) aff'd in part and remanded for further proceedings on the matter of value, 146 Ct. Cl. 429 (1959), and on the findings and opinion following the remand, 9 Ind. Cl. Comm. 1(1960), in which the Commission found that the 7,036,000 acres in Royce Area 99 in central Indiana immediately south and east of Royce Area 98, had an 1818 value of \$1.15 per acre. (Our finding of fact herein, 57-C.)

Based on the physical characteristics of Royce Area 48, access to the area, population data, export sales, banking, natural resources, soils, settlement, economic development and sales of comparable lands, the Kaskaskia plaintiff and its expert witness, Dr. Chisholm concluded

on December 23, 1803, Royce Area 48 land had an average per acre value of \$1.90. Plaintiff computed the Kaskaskia interest in the area on the basis of 100% ownership of Tract A which contains 6,279,118 acres, and on an undivided one-half interest in Tract A' which contains 3,824,842 acres, making a total Kaskaskia interest in 1803 of 8,191,539 acres. Applying the \$1.90 per acre to the total Kaskaskia acreage, plaintiff reaches a December 23, 1803, valuation of \$15,563,924.10. See Finding 62.

Defendant made an extensive analysis of Dr. Chisholm's valuation methods in general and his sales data in particular. In an effort to show what defendant felt the sales data indicated as the proper value of the American Bottom portion of Tract A in Royce Area 48 in 1803, defendant selected 68 of Dr. Chisholm's 508 sales. The selection covered the period from 1790 to 1809. Three of the sales selected were not in the American Bottom but were of land located some 150 miles north thereof at Peoria, Illinois, in Royce Area 110. A fourth sale was located west of the Illinois River at Peoria and was outside any of the lands in suit. Included in defendant's selection were sales as far back as 1790 at prices of \$.02 per acre with few post-1803 sales at higher per acre prices. Defendant considered the land had value only for subsistence farming and eliminated all sales of less than 40 acres. Defendant also ignored all other uses to which this land was actually put, including business and residence sites in towns, townsites and millsites. Defendant also failed to take into consideration that settlers often purchased less than 40 acres to add to their existing holdings originally purchased for subsistence farming. Defendant's analysis of the Chisholm data is expressed

in "average" prices per acre without indicating which type of average was used, i.e., mean, median, mode, weighted average, etc. Defendant justified the elimination of many sales carrying high prices per acre on the grounds that the lands in question were located in or near the numerous pre-cession towns in the area; that they reflected purchases of townsites for subdivision and resale; that they were for lands located on the Mississippi or Kaskaskia Rivers; that they included a ferry landing, rich timber lands, "perhaps a coal mine", and rich Mississippi River bottomlands; that they reflected French or military donation lands, and that some sales were at prices which must have included improvements prior to valuation date. Defendant makes a blanket assertion that most of Dr. Chisholm's sales data was not comparable in time, access to comparably navigable streams, to soil and climate, population, and state of improvements to the land being valued. In view of the fact that most of Dr. Chisholm's sales data used for valuing Royce Area 48 in 1803 were land sales of land in Royce Area 48, it seems that it would have been difficult to have used sales data that was more closely comparable.

In reaching its valuation of Royce Area 48, defendant did not adopt the valuation of its appraisal expert witness, Mr. Harry R. Fenton. (See our finding of fact 59 for a description of Mr. Fenton's testimony.) Mr. Fenton assumed that a hypothetical buyer of Royce Area 48 in 1803 would have been a land speculator paying cash in U.S. gold dollars or the equivalent in specie, and would be buying to resell in smaller tracts. He assumed that it would take such a buyer from 10 to 30 years to resell the land and make his profit and that he would therefore take a substantial

discount for delay and would also deduct from his purchase price the costs of surveying, recording, quieting title, policing and defending the property. He concluded that the buyer would pay only a fraction of the small tract per acre price and would resell at from 3 to 5 times his cost. Mr. Fenton did not use the sales data gathered by Mr. Thomas L. Keller, a real estate appraiser retained by Mr. Fenton to gather sales data for use in the case, which data was, with defendant's permission, introduced in evidence and used by plaintiff's counsel. Instead Mr. Fenton relied on sales in the Illinois Military Tract and sales in Missouri and in Ohio.

Mr. Fenton was of the opinion that landsales on the American frontier, regardless of where that frontier might be, at what particular time the sales took place, the quality of land involved or other conditions usually deemed significant in connection with comparability, were all "comparable" for the purposes of his valuation since he believed the "frontier" to be a moving phenomenon which kept many of its characteristics intact. Accordingly, Mr. Fenton relied on sales of very large tracts of land in western New York State in the late 1700's by the State of Massachusetts to land speculators, individuals and companies. Indian title had not yet been extinguished to much of this land and the title acquired by the purchasers was, therefore, somewhat clouded. Other sales relied on were large purchases of Indian lands in New York State and in Pennsylvania made by New York State in the late 1700's and by Connecticut in 1795. In addition Mr. Fenton and defendant relied on purchases of large tracts of land in western Pennsylvania by the Holland Land Company (1792-1793) from an undisclosed seller, and resales of lands included in the large early purchases of New York State Indian lands.

Using the average per acre price of the large land sales by states and land speculators described above and in our findings of fact 59-A and 63, Mr. Fenton concluded that the land in the Gorham-Phelps tract, the Robert Morris purchase, the Macomb purchase and the Boston 10 Towns tract, all in New York in the 1700's, was worth on the average 9 cents per acre. He then computed the average per acre price of the Ohio Land Company lands, the Western Reserve tract and the Symmes tract, all in Ohio, at 18 cents per acre. He considered Tract A in Royce Area 48 to be similar to the Ohio lands but not quite as good and on that basis he valued Tract A at 15 cents per acre. He considered the lands in Tract A' to be worth about two-thirds of the price of the land of Tract A, or 10 cents per acre.

Defendant followed a different approach in its valuation of Royce Area 48 to arrive at a slightly higher valuation. Defendant started with the proposition that Royce Area 48 was 2/3 timbered and 1/3 prairie with the less favored prairie land concentrated in the northern portion of the area. Defendant assumed that a hypothetical purchaser in 1803 would buy the land for resale and that it would take 30 years to sell the southern 68% of the area in small tracts with an average holding period of 20 years. Defendant assumed that it would take 35 years to sell the northern portion with an average holding period of 25 years. From this defendant concluded that an overall average holding period would be 22 years. Defendant assumed that its purchaser would have realized 10% per annum on his money by means of some unspecified investment and thus justified discounting comparable small tract sales figures to determine the then present worth of such lands on a per acre price basis if payment were deferred for 22 years at 10%.

interest annually. Present worth tables show that each dollar so deferred has a present worth of only \$.122,845,9736.

Defendant next took into account three sets of sales figures. Of the 508 Illinois sales introduced in evidence by plaintiff from the data compiled by Dr. Chisholm, defendant selected 68 sales of 40 acres or more during the period 1790-1809. Of these defendant selected 16 sales for the years 1801-1803 showing an arithmetic average price of \$.83 which the defendant reduced to \$.102 by application of the above mentioned present worth factor.

Defendant separately considered 31 sales of 400 acres each included in Dr. Chisholm's sales data for the years 1793 through 1809. Defendant appears to assume that these sales were of military donation lands although it seems more likely that they were improvement grants under the Act of 1791. In either case, it is well known that grants of either type generally sold well below the actual market value of the land especially in the initial sales. Defendant's weighted average per acre price of those 31 sales was \$.88 which defendant discounted to \$.118 by applying the present worth factor.

Next, defendant considered 39 of the 47 sales of small tracts in the Clark's Grant area of Indiana, data gathered for, but not introduced in evidence by, defendant and finally introduced in evidence by plaintiff. Defendant found a weighted average per acre price for the 39 sales of \$1.68 which defendant discounted to \$.20 by application of the present worth factor.

Defendant considered the early sales of large tracts of frontier land by the State of Massachusetts in what is now New York State, by the State of Connecticut and by the United States of lands in Ohio, and other large private sales. Defendant calculated average prices per acre of \$.09 for the New York lands, \$.18 for the Ohio lands, as did Mr. Fenton, defendant's expert witness.

Defendant concluded that the fair market value of the 10,103,960 acres in Royce Area 48 was 14 cents per acre in 1803 which, when applied to the Kaskaskia's 100 percent interest in Tract A and undivided one-half interest in Tract A', would amount to approximately \$1,150,000.

For the reasons discussed hereinafter and on the basis of our findings of fact we cannot concur with defendant's or Mr. Fenton's valuation of the Kaskaskia interest in Royce Area 48, tracts A and A'. We particularly reject Mr. Fenton's conclusion that sales in the Military Tract in Illinois represented a good example of a free, normal and active market for lands in the West and that sales prices for land in that tract are comparable for the purpose of valuing Area 48. As we said in our recent decision in Potawatomie Nation of Indians, the Prairie Band, et al. v. United States, Dockets 15-P, 29-N, 306, 41 Ind. Cl. Comm. 399 (1978), we consider the Military Tract a mere paper market operated for the sole benefit and enrichment of eastern land 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. While the market in such lands was an active one, the prices

were unrealistically low for land of generally good quality.

If it had not been for the confusion over the location of several types of land the tax status of the land, speculation at tax sales, the validity of titles, and innumerable other problems inherent in the military tract market, sales of this land might well have been comparable since the land was near to Royce Area 48, the climate and physical features of the tract were similar to the land being valued and much of the land was very desirable. See our finding of fact 56.

Defendant's reliance on the early sales of large tracts of frontier land in New York State and in Ohio, is, we think, entirely misplaced. The results obtained from an analysis of that sales data are as unreliable as those obtained from analyzing the Military Tract sales evidence, and for generally the same reasons. In most instances Indian title had not been extinguished to the lands being sold, the purpose of the sales was not settlement but pure speculation and the lands were far removed from the Illinois lands being valued in this proceeding and many of the transactions relied on took place in the 1700's.

On the whole the Commission is of the opinion that the private sales submitted by Dr. Chisholm are the best evidence in the record of the probable fair market value of the subject lands.

Before explaining our valuation of each of the several tracts in suit, particularly from the standpoint of the sales evidence of lands consisting of 40 acres or more, we wish to point out that the record contains evidence of a special value attributable to much of the land in suit by reason of town-sites, town lots and commercial sites which were present and for which there is sales data. Land in or near towns and adjacent to roads, navigable rivers and other primary transportation means, were greatly enhanced in value

in comparison to unimproved rural areas. Speculation was frequently involved in the sale of townsites, town lots and sites for mills, ferries and other commercial enterprises and such speculation inflated the prices of these sites and of adjacent lands. Between 1810 and 1812 townlots in Harrisonville, Illinois, sold at prices ranging from \$1,428.57 to \$5,400 per acre. In Tuscarora County, Ohio, town lots were selling at from \$30 to \$1,000 for lots measuring 60 by 90 feet, and an unimproved millsite near Zanesville, Ohio sold for \$50 an acre. There was active speculation in town lots in Indiana just after the end of the War of 1812, particularly along the Wabash River a few miles downstream from Royce Area 98; at Bloomington, Indiana; at places on the road from Vincennes to Louisville, on the Ohio River and elsewhere in the state. In 1818 a townsite in St. Clair County (Tract A of Royce Area 48) sold for \$13.03 per acre, or \$1,700 for the 130.42 acres in the site. The buyer laid out the land as the town of Illinois and began selling town lots that same year. Three lots were sold in 1818 for \$289.47, \$578.95 and \$1,153.85. At Palestine, the first capital of Lawrence County in southern Indiana east of Vincennes, 157 town lots averaging 1/3 acre in size, sold in 1818 for over \$14,000, averaging \$90 per lot. Banks at Edwardsville in Madison County (Royce Area 48) and Shawneetown (Royce Area 48) participated actively in the speculative boom in town lots which swept Illinois in 1819. In the summer of 1821, town lots at Greenville, Illinois (Bond County, Tract A), sold for \$44.60 a lot.

In 1821 competition was keen for land at the site of Indianapolis which had been selected as the new capital of Indiana. Four sections of land consisting of 2,560 acres, were laid out in the wilderness some 40 to 60 miles from the nearest settlement. Three hundred lots were sold at the first sale in October, 1821, for a total of \$35,596.25, or \$118.65 per lot. Many

lots sold for \$500 each.

The agricultural settlement of New Harmony, Indiana, 100 miles south of Royce Area 98, was established in 1813 on 24,734 acres purchased from the Government for \$2.50 per acre. This land was resold in 1824 for \$182,000 or approximately \$7.50 per acre.

One William Digby, the first proprietor of Lafayette, Indiana at the south central edge of Tract I, purchased 80 acres in 1825 at the Government price of \$1.25 per acre, divided 50 acres into 148 lots and sold them three days later for \$4.80 per acre. He retained ferry privilege, and sold the remaining 20 lots for \$3 per acre. Digby's purchaser resold five-eighths of the odd numbered lots consisting of about 15 acres for an average of \$8.66 per acre.

The town of Danville in Tract G was laid out in 1827. In April of that year 42 town lots sold for \$22 each. At Warrenton, Indiana, in Tract I, seven miles up the Wabash River from Williamsport in Tract G, town lots sold for from \$10 to \$20 in 1828. In 1829 combinations of bidders for the townsite of Pekin, Illinois, in Tract B just south of Peoria, managed to reduce the initial bid of \$100 per acre to \$1.25 per acre.

Often speculation in townsites prevented the orderly settlement of land in Indiana and in Illinois. Speculators would buy land from the Government at the minimum price and then keep the land off the market, particularly when the land was two or three miles from a good transportation site, holding it until it could be sold for high prices. As a result of this practice, the land around Joliet, Illinois, just north of Tract D, brought from \$40 to \$50 per acre sometime prior to 1838 and the townlots sold for from \$500 to \$600 each.

The prevalence of speculative buying of town lots, mill sites and other commercially exploitable land in Illinois is evidence of the optimism felt about the future of these lands during the periods in suit.

Some portions of the area we are to value contained cultivated pre-cession Indian corn fields and well established Indian villages. There were also a number of non-Indian villages, many established in the 1800's by the French and some by Americans. There were a number of thriving businesses such as mills, breweries, trading posts for trade with the Indians, established farms and plantations. The well established non-Indian settlements and businesses were chiefly in the American Bottom portion of Tract A. A number of pre-cession non-Indian farms and businesses were also in Tract A' and Tract C of Royce Area 110, but they were fewer in number than in Tract A and Tract B. A valuable Indian saline was in Tract C and was developed by whites prior to the cession date of this tract. Such properties had immediate resale, lease or rental value for the indicated uses.

Timber lands had a highest and best use generally for farms and were highly prized for that use because they furnished materials for building, fencing, tools, fuel and containers of all sorts. They also provided shelter, fruits, nuts, honey, game and furbearing animals, forage and water. In Tract D and in some parts of the other tracts, the timber had an immediate commercial value. In Tract C timber was used to build flatboats for the river traffic.

The prairies which were in the immediate vicinity of timbered lands had a highest and best use at valuation dates for subsistence farming and as pasturage for farm animals. Later they would become valuable for raising grain crops. Prairies which were not near timbered lands, were most

valuable for hunting and for their potential use for farms, grazing, and in some places for the development of the coal and other minerals which were present in those areas.

All of the areas in suit had an obvious potential at valuation dates for speculation in the sale of townsites, town lots and commercial sites for mills, ferries, etc.

Many of the early settlers saw the areas in suit as ideal for subsistence farming in parcels of 40 acres or more. Subsistence farming included the use of part of the land for the grazing of cattle and other livestock and for the growing of crops to supply the settler's immediate needs. Eventually the owner would raise a surplus crop to be sold at a profit to neighbors or for export down the Mississippi or other rivers.

The highest and best uses for all of the subject lands varied from tract to tract but included subsistence farming, farming to raise cash crops for profit, townsite and town lot speculation, business enterprises based on mill and ferry sites, commercially exploitable timber to a small degree, and hunting and trapping for home use and for profit.

Turning first to Tract A in Royce Area 48, we believe that a purchaser in 1803 would have been aware of the rich agricultural lands comprising the American Bottom which, for many years prior to 1803, had been considered the richest agricultural land in the nation and was in great demand by settlers. It contained approximately 352,000 acres and

was almost totally in Tract A. Although less than five percent of the total area of Royce Area 48, and less than six percent of Tract A consisted of American Bottom, the extinguishment of Indian title to that valuable land had a significant and substantial effect on the value of the entire cession area in 1803. The value of lands adjacent to the American Bottom was enhanced by such a location.

Excluding the American Bottom, the remainder of Tract A consisted of approximately three-fourths timbered lands and one-fourth prairie land. Portions of each type would have presented some difficulties in cultivation at the time of valuation but most of the tract was very desirable agricultural land. In 1803 the most sought after lands for settlement were the timbered lands and this tract was predominantly of that type. Settlers' reluctance to settle on the prairies was soon to change.

Access to Tract A was excellent. It was bordered by the Mississippi and the Ohio rivers and was traversed by the Kaskaskia, the Cache and the Big Muddy rivers as well as by several other smaller water courses. Portions of Tract A along the Mississippi and Ohio rivers had been settled for many years prior to 1803, predominantly by the French. The area contained established towns, good potential townsites, an operating mill and other fine millsites.

Due to the early valuation date, the parties were able to find few comparable sales involving lands in the immediate vicinity of or within Royce Area 48. This is understandable since on the valuation date

nearly the entire state of Illinois was encumbered by Indian title and only three areas had been ceded to the United States: Royce Area 26, consisting of the post of Vincennes on the Wabash River, and adjacent lands in southeastern Illinois and southwestern **Indiana**, to which Indian title had been extinguished prior to 1795 and which was ceded to the United States under the provisions of the Treaty of Greenville, August 3, 1795, 7 Stat. 49; Royce Area 27, a tiny area of land near the mouth of the Ohio River known as Fort Massac, similarly ceded to the United States in the Greenville Treaty; a four square mile tract, Area 47, ceded by the Treaty of June 7, 1803, 7 Stat. 14, consisting of the Great Salt Spring on Saline Creek near the Ohio and Wabash rivers. Likewise, the entire state of Indiana immediately east of Illinois and the subject tract, was still Indian country in 1803 except for the above mentioned Royce Area 26 and four areas ceded to the United States in the Treaty of Greenville, i.e., Royce areas 11, 16, 17 which were very small, and 25, the latter in southeastern Indiana on the Ohio River and known as Clark's Grant. Until Indian title is extinguished and the land is surveyed and officially opened to settlement, there could be few if any valid sales.

However, the record does contain evidence of 29 sales between 1800 and 1805 of land which was either within or in the immediate vicinity of Tract A. These sales are in the data compiled by Dr. Chisholm, plaintiff's expert valuation witness. In selecting his sales data, he eliminated sales where the grantor and grantee had the same surname or the transactions involved governmental bodies, sheriff's sales or estate sales, or where the consideration was abnormally low. If we eliminate three sales which involved tracts containing less than the 40 acres we believe would have

been required for subsistence farming, the remaining 16,205 acres in the 26 Illinois sales sold for \$12,005, or an average per acre price of \$0.74.

Also of significance in determining the 1803 market value of Tract A were the sales of land in Indiana, Royce Area 25, known as Clark's Grant. Indian title to this tract was extinguished in 1795 and like Tract A it lies along the Ohio River. The 1800 to 1803 sales prices of land in Clark's Grant (above \$1.60 per acre) are some evidence of the probable market value of the lands in Tract A. Although Clark's Grant was closer to the migrating settlers, the rich agricultural lands in Clark's Grant and the tract as a whole was equal to if not more desirable than the land in Clark's Grant. Both tracts were accessible by navigable rivers and good trails, but the large interior portions of Tract A were somewhat less accessible and the whole tract was much larger than Clark's Grant.

From our analysis of the factors at work in these two land markets, it is our view that a reasonable per acre base figure lies somewhere in between. The very superior lands of the American Bottom were not commanding premium prices near the valuation date. By far the greater part of Tract A was not so accessible as equal lands elsewhere. Comparing all the qualities of Tract A with the market data we find to be comparable, we think the Tract A lands had a market value of \$1.15 per acre. However, due to the large size of the tract, we feel that a significant size discount is in order (but not the size discount recommended by defendant) since the tract's many desirable features tended to offset the disadvantage of its size. Under the circumstances, we feel that a discount of 20% is appropriate.

On the basis of the record and the above considerations, we conclude that the value of Tract A in 1803 was \$5,776,800 or approximately \$.92 per acre on the average. The Kaskaskia's interest in the tract is 100 percent.

Tract A' contains 3,824,842 acres. It constitutes the overlapping areas of the northern half of Royce Area 48 and the central and south-central portion of Royce Area 110. The Kaskaskia and Kickapoo tribes each have an undivided one-half interest in A'. The valuation date of the Kaskaskia interest is December 12, 1803. The Kickapoo interest is valued as of January 13, 1821.

In valuing the 1803 Kaskaskia interest in Tract A' we relied on the same data used in our valuation of Tract A lying directly to the south. However, several factors made Tract A more valuable in 1803 than Tract A'.

The American Bottom, that rich agricultural section along the Mississippi which so enhanced the value of Tract A was almost exclusively outside of Tract A'. However the close proximity of portions of Tract A' to the American Bottom did have some positive effect on the value of the tract.

Whereas Tract A was predominantly timbered lands, Tract A' proportionately had far more prairie lands. As noted earlier, the migrating settlers in 1803 preferred timbered lands over prairie lands and would have believed that Tract A' was, for that reason, less valuable than Tract A.

Tract A had excellent access since it was bordered on two sides by the Ohio and Mississippi rivers and was traversed by many interior streams, most of which were for 1803 purposes, navigable. Only the southwestern portion of Tract A' was near a major waterway, i.e., the Mississippi. Overland travel was generally required to reach the Mississippi since the waterways traversing Tract A' were fewer in number than those in Tract A.

Settlement in Tract A' began later than in Tract A. While settlement in Tract A had begun by the early 1700's, settlement in Tract A' did not begin until the early 1800's. The extreme fertility, attractiveness and nearness to the Mississippi and Ohio rivers accounted for this difference, since both tracts were technically closed to settlement prior to the extinguishment of Indian title in 1803. Even after both tracts were officially opened for legal settlement, Tract A' experienced a much slower influx of settlers due partly to the remoteness of large portions of Tract A' from the Ohio River which was a favorite path followed by many early settlers.

In 1803 we have found that Tract A had an average per acre value of \$1.15 before any discounts. Based on the record, our findings of fact and the factors discussed above, it is our belief that in 1803, Tract A' had an average per acre value of about \$.90 before the application of discounts. Although Tract A' is about half the size of Tract A, we believe the same 20% discount for size is applicable since Tract A' did not enjoy the many off-setting enhancements in value which favored Tract A. Accordingly, we conclude that in 1803 Tract A' had a value of \$2,753,900, or an average per acre value of about \$.72. The Kaskaskias' one-half interest would amount to \$1,376,950.

Royce Area 110. The valuation date of the Kickapoo interest in Royce Area 110 is January 13, 1821. Because this area partially overlaps Royce areas 48, 96a, 98, 177 and 180, the portions of Area 110 involved in this proceeding have been designated as tracts A', B, C, D, E, G and H. We have already discussed the parties' valuations of the Kaskaskia interest

in Tract A' as of 1803.

Plaintiffs rely on the \$2.13 median price per acre of the sales gathered by Dr. Chisholm from six Illinois Counties (see our Finding 57-A and also Finding 65) in Tract A of Royce Area 48 , as the basis of their valuation. Plaintiffs point to the generally easy access of Royce Area 110, its fertile prairie soil, its known natural resources and all of the other factors discussed in Dr. Chisholm's report, and conclude that the land was worth on the average \$2.00 per acre in 1821. We have discussed the evidence of those other factors in findings, 43, 44, 45, 46, 47,48 and earlier in this opinion.

The Kickapoo had an undivided 1/2 interest in the 3,824,842 acres in Tract A'; a 100% interest in the 5,117,115 acres in Tract B and in the 2,193,176 acres in Tract C; an undivided 1/2 interest in the 890,014 acres in Tract D and in the 844,794 acres in Tract E; and an undivided 1/3 interest in the 402,870 acres in Tract G and in the 51,384 acres in Tract H. Plaintiffs applied the \$2.00 per acre value to these interests and obtained a total value of \$20,483,068 for the Kickapoo interest in Royce Area 110.

In our finding 66 we discussed defendant's valuation of the Kickapoo interest in Royce Area 110. Defendant's valuation approach was similar to the one used in valuing Royce Area 48 in 1803, i.e., a single hypothetical purchaser who could pay cash for land he expected to develop and resell. Defendant's expert witness, Mr. Fenton, reasoned that the hypothetical purchaser would estimate the diminished present worth of the money he would receive on resale in from 10 to 30 years of purchase, would deduct therefrom the costs of surveying, recording, quieting title, policing the pro-

perty plus resale expenses and would conclude that he could pay only 1/3 to 1/5 of the small tract price per acre if he were to make a profit. The small tract price per acre used by Mr. Fenton was derived from data he collected on sales in the Illinois Military Tract for the years 1817-1820 showing that in Fulton County there were no sales in 1817; that in 1818-1820 the average prices per acre were \$0.68, \$0.74 and \$0.92, respectively; that in Henry County the average prices per acre in 1817-1820 were \$0.47, \$0.58, \$0.39 and \$0.79, respectively. In Henry County, the average prices per acre in 1817-1820 were \$0.47, \$0.58, \$0.39 and \$0.79, respectively. In Knox County the average prices in 1817-1820 were \$0.70, \$0.76, \$0.40, and \$0.74, respectively. From these sales in the Military Tract which we have found to be not comparable with any of the land in suit, Mr. Fenton concluded that the value of a small farm-sized tract located in the area of Royce Area 110 in 1821 was \$.70 per acre. Mr. Fenton then concluded that the purchaser would discount this price by 80% to cover anticipated expenses, risks and the need for a profit on resale and would therefore offer 1/5 of that price or \$0.14 per acre .

We have not valued Royce Area 110 as a whole as did the parties but have considered each tract separately.

Tract A' We described the physical characteristics of Tract A' in our finding of fact 43, earlier in this opinion, and in connection with our valuation of the Kaskaskia's 1803 interest in the tract. We noted that it was outside the American Bottom region but that it was sufficiently close to it to enjoy some enhancement in value; that access to the tract was

not as good as that of Tract A but that the southwestern portion of the tract was close to the Mississippi River and that there were a number of good watercourses traversing the tract which was made up of more prairie lands than the better liked timbered lands.

We examined the sales obtained by Dr. Chisholm and relied on by him in reaching his value of Tract A' on 1821. We excluded all sales where the transactions involved fewer than 40 acres and also all sales prior to 1818 and after 1821. We selected as comparable, 164 sales in Illinois involving 37,993 acres which were sold for \$149,449, or a per acre average price of \$3.93. Because we considered these sales to be sufficient in number and quality for valuation purposes, we did not consider any of the sales from Indiana which plaintiffs introduced in evidence from data collected but not used by defendant's expert witnesses.

In addition to the differences noted above between Tract A and Tract A' in 1803, we found further differences between the two tracts due to the later valuation date of the Kickapoo interest. By 1821 the sales data counties of St. Clair, Randolph, Monroe and Madison in Tract A were heavily populated compared to the Tract A' lands. Since by 1821 many of the sales in Tract A may have been of improved lands, that factor probably was reflected in the prices. Tract A' was almost totally unimproved in 1821. After the conclusion of the War of 1812, migration into the Northwest areas increased as did the demand for its land.

Based upon the record in this case and upon the above factors, we are of the opinion that the lands in Tract A' had an 1821 average per acre value

of \$1.40 before any discounts. Due to the size of Tract A (approximately 3,800,000 acres) and the other factors previously discussed in connection with our valuation of this same land as of 1803, we believe a 20% discount is appropriate resulting in an average per acre value of \$1.12, or a total tract value of \$4,282,823.00.

The Kickapoo's undivided one-half interest in Tract A' as of 1821 was worth \$2,141,912. Finding 67

Tract B. Tract B consisting of 5,117,115 acres occupies the western portion of Royce Area 110 (see our finding 44). The valuation date of this tract is January 13, 1821.

We used the sales data compiled by Dr. Chisholm in arriving at our valuation and selected 160 sales occurring between 1818 and 1821.

The 37,993 acres involved in those sales brought an overall price of \$149,449, or \$3.93 per acre. We did not take into consideration the Indiana sales introduced in evidence by plaintiffs.

There were certain significant differences between the lands covered by the sales data and the tract to be valued. Lands reflected in the sales data came from counties in which the rich American Bottom comprised a substantial portion. The southern end of Tract B was in the immediate vicinity of the American Bottom and was thus enhanced in value. However, most of Tract B was far from this valuable area. There were rich agricultural lands in Tract B lying along the Illinois River bottom and the Sangamon River bottom. Frequent flooding of these rivers made the bottoms less valuable than the American Bottom lands.

The sales data counties had immediate access to the Mississippi River

whereas only the southwestern portion of Tract B lands were near the Mississippi. The western border of the tract was the Illinois River which flows into the Mississippi River and the tract was traversed by other watercourses which flowed into the Illinois River. Access to the tract and means of transportation through it were not difficult but not as good as in the case of Tract A.

The counties comprising the sales data were adjacent to or were included in areas that had been settled by the French. As early as 1803, the valuation date for Tract A, those settlements were well established. Tract B, on the other hand, did not experience much settlement until the 1800's. The sales data lands possessed excellent conditions for agriculture and were greatly desired by settlers. Tract B was approximately 60% prairie and 40% timber. By 1821, the unpopular prairie lands were beginning to find a market, particularly if there was timber nearby. Large prairie areas, however, were still avoided where possible.

Due to the well established settlements in the sales data area, there was a likelihood that some of the sales between 1818 and 1821 contained improvements.

Portions of Tract B extended into north-central Illinois and was considered more remote by settlers from the east and south than were the sales data counties. If we were valuing Tract B lands in 1803, they would have been much less valuable than the lands in the sales data counties in Tract A in 1803. However, as of 1821 the movement of settlers into this area had increased and lands to the north of Tract A were being sought out.

Under all the facts and circumstances, it is our opinion that the

per acre value of Tract B in 1821 would have been approximately \$1.50. Tract B contains over five million acres and this size coupled with other factors discussed in connection with our valuation of Tracts A and A', indicates that a 20% discount is in order.

On the basis of the whole record and the above considerations, we conclude that the value of Tract B in 1821 was \$6,140,538, or an average per acre value of \$1.20. The Kickapoo plaintiffs have a 100% interest in this tract. Finding 67

Tract C. Tract C contains 2,193,176 acres and occupies the southeast corner of Royce Area 110. The valuation date is January 13, 1821 and the Kickapoos have a 100 percent interest in this tract. See our finding 45 for the physical characteristics and settlement patterns in this tract.

As with Tract B, 1818-1821 sales were obtained from the data compiled by Dr. Chisholm for use in our valuation of the tract. We treated these sales in the same manner discussed in the previously valued tracts. The \$3.93 per acre average price for the acceptable sales was adjusted on the basis of the factors discussed below, which factors distinguish Tract C from the counties in the sales data area.

Tract C possessed rich lands along the Embarrass River but they did not compare with the quality and location of the American Bottom lands in the sales data counties. The Embarrass River flowed into the Wabash River which in turn flowed into the Ohio River. Thus, the distance from Tract C to the more widely used routes of travel was greater than in the case of the sales data counties.

Access to Tract C was inferior to that of the counties comprising the sales data area. The eastern boundary of Tract C was within a short

distance of the Upper Wabash River but often required overland travel in order to reach the river. The northern boundary of the Tract was bordered by the Vermillion River and the tract was traversed by the Embarrass and Little Wabash rivers. None of these rivers compared, of course, with the Mississippi.

Settlements within the sales data counties were established in the mid-1700's. Settlement in Tract C did not commence until the 1800's but the southeast portion of Tract C was only a short distance from Vincennes, Indiana, which had been settled by the French in the 1700's. Lands in Indiana directly east and southeast of Tract C had been ceded by Indian tribes many years prior to the 1821 valuation date and were well settled by that date. Accordingly, Tract C could not be considered as having a "remote location" at the time of valuation. The sales data counties in Illinois had also been settled for many years by 1821 and were still attracting settlers.

In 1821 lands in Tract C were almost wholly unimproved whereas the lands in the sales data counties undoubtedly contained improvements.

Tract C was approximately two-thirds prairie and one-third timber. In 1821 settlers were still reluctant to settle on prairies if timbered lands were available. The lands in the sales data counties contained much timbered lands.

The above circumstances indicate that the market value of Tract C in 1821 was lower than the per acre price of the sales data lands. Tract B lands were also more desirable than Tract C lands due to the presence of rich lands along the Illinois and Sangamon rivers and their tributaries.

It is our opinion that under all the circumstances, the per acre value of lands in Tract C in 1821 would have been \$1.35. The tract contained over two million acres and this, in addition to other factors discussed in this opinion, persuades us to apply a 20% discount.

On the basis of the record and the above considerations, we conclude that the value of Tract C in 1821 was \$2,368,630 or an average per acre price of \$1.08. Finding 67.

Tract D. Tract D contains 890,014 acres in the northeastern corner of Royce Area 110. The valuation date is January 13, 1821, and the Kickapoo Indians have an undivided one-half interest in this tract. Finding 46.

In reaching our valuation of Tract D we used the 1818 to 1821 sales obtained by Dr. Chisholm and discussed in connection with our valuation of Tract C. Due to the various factors listed below which distinguished Dr. Chisholm's Tract A sales data from Tract D, we adjusted his \$3.93 average per acre 1821 value to conform to what we believe were the conditions existing in Tract D in 1821.

As noted above, the 1818 to 1821 Chisholm sales data came primarily from the counties of Madison, St. Clair and Randolph, all of which were on the Mississippi River and therefore very accessible to travelers and settlers. Tract D bordered on portions of the upper Illinois River, the Kankakee River and the Vermillion River. None of these rivers were as easily navigable as the Mississippi nor as important as a means of travel or trade. Access to Tract D was not physically difficult but was hampered due to the fact that lands adjacent thereto were still inhabited by Indians. This was not true of the sales data counties.

Royce Area 180 immediately to the east of Tract D in Indiana was in Indian ownership until 1832.

Tract D possessed much fertile lands along the several rivers which traversed the tract but the quality of land did not reach that of the American Bottom lands in the sales data counties. In many places in the tract drainage was required along the river bottoms before the admittedly rich land could be cultivated.

The first settlers did not move into Tract D until the mid 1820's. By 1821 the sales data counties were relatively well populated having had thriving settlements in the area since the mid-1700's. The demand for land in the sales data counties was high due to richness of the lands and the fact that access and transportation were excellent. Tract D contained almost all prairie lands with only a small portion of timber land. In 1821 many settlers still preferred timbered areas and avoided settling on prairies unless the land was within reasonable distance of timbered lands. The large proportion of prairie lands comprising Tract D would have made this tract less attractive to settlers.

Tract D lands were unimproved whereas the sales data county lands were probably improved to some extent.

Tract D was within a short distance of Lake Michigan but in 1821 that lake was not widely used by settlers and land values would not have been greatly enhanced due to such a location. Although slightly more remote from established settlements than Tract C, Tract D had better access because of its proximity to the Illinois River.

It is our opinion that the per acre value for lands in Tract D in 1821 would have been \$1.35 Tract D contains 900,000 acres, approximately, and

this relatively smaller size plus other factors previously discussed in relation to size discounts, persuades us to apply a 15% discount resulting in a value for Tract D on January 13, 1821, of \$1,023,516, or an average per acre price of \$1.15. The Kickapoo Indians' one-half interest amounts to \$511,758. Finding 67.

Tract E. Tract E contains 844,794 acres and is also in the north-eastern corner of Royce Area 11. The valuation date is January 13, 1821, and the Kickapoo Indians have an undivided one-half interest in the tract. (See our finding 46).

As with the other tracts in which the Kickapoo had an interest which they ceded in 1821, we based our valuation on the physical characteristics of the tract, settlement patterns, and evidence of 1818-1821 sales data compiled by Dr. Chisholm in the Tract A counties of Illinois. The factors which we found distinguished the land in tract D from the sales data counties of Madison, Monroe, St. Clair and Randolph in the American Bottom portion of Tract A, hold true for Tract E. Although Tract E contained some very fertile lands along the Iroquois River and in the old Kankakee Lake bed, the amount, quality and location of its fertile lands did not match that of the sales data counties.

Tract E bordered on portions of the Vermillion and Kankakee rivers and was traversed by the Iroquois. While these waterways provided access and transportation to the area as well as fertile timbered areas along their banks, none of them were as important or as easily navigated as was the Mississippi River. Access to Tract E and demand for its lands in 1821 was diminished due to the presence of Indians in lands just to the east in Illinois and in Indiana.

The sales data counties were well settled by 1821 whereas Tract E was outside the main path of migration. About 80% of Tract E consisted of

unimproved prairie lands and 20% timbered lands. It was only a short distance from Lake Michigan but it was not until after the Erie Canal opened in 1825 that settlers began to reach the Northwest by way of Lake Michigan, at least in any numbers. Since settlers used other routes in 1821 and the town of Chicago had not yet become an important center, the tract's proximity to Chicago and to the Lake would not have significantly affected its value.

Tract E was very comparable to Tract D. What Tract E lacked by not having direct access to the Illinois River, it made up for by possessing a larger proportion of timbered lands.

It is our view that the average per acre value of the lands in Tract E in 1821 would have been \$1.35, the same as Tract D lands, and that a 15% discount is appropriate.

On the basis of the record and the above considerations we conclude that the value of Tract E on January 13, 1821, was \$969,401.00 or an average per acre price of \$1.15. The Kickapoo's undivided one-half interest amounts to \$484,700. Finding 67.

Tract G. We have discussed the Kickapoo plaintiffs' and the defendant's valuations of Tract G, but before we explain our valuation of the tract we should discuss the valuation submitted by the Potawatomi plaintiffs in Docket 29-B. (See our finding 58) Dr. Helen Hornbeck Tanner, an ethnohistorian, consultant and expert witness in this and a number of other cases involving Indian claims, used an historical approach in valuing the lands in Royce Area 98 (Tracts G and I) and to value Tract H in the overlapping portions of Royce areas 110 and 180. She collected her materials from county histories written, as she pointed out, many years after the valuation date, but containing much valuable and verifiable data bearing on the 1818 value of the

land in suit. She also used material from Government census records and the records of the federal land offices. Her sales data came from the latter sources. The lands being valued by Dr. Tanner had been ceded on October 2, 1818. She noted that it was about 10 years after the cession of the subject lands that sales in any appreciable numbers took place in the tracts. After examining the sales figures for Indiana in the American State Papers, she observed that tracts of comparable size to Royce Area 98 were disposed of within three or four years in Indiana in the early 1820's and during any eighteen month interval in the early 1820's. She noted the prices at which the Indiana commissioners offered Indiana Wabash and Erie canal lands for sale, i.e., from \$3.50 for 1st rate land to \$1.50 for third rate land. The middle figure set by the commissioners was \$2.50 per acre. Dr. Tanner believed that because all parts of Royce Area 98 were within a day's journey of the Wabash River and because the relatively small tracts in suit were of generally high quality land having a diversity of local resources, a bonus factor estimated at 15 cents per acre should be added to the base figure of \$2.50 per acre for an 1818 average valuation of the tracts in Royce Area 98 of \$2.65 per acre. She did not think that this price should be discounted in any amount for size or for the period during which it might have to be held before sale but rather urged that the accessibility, quality and natural resources of the area required that the base value per acre be enhanced.

In our finding 59-B we discussed defendant's expert's valuation of Royce Area 98. As in the valuation of Royce Area 110, hereinabove discussed, defendant relied on sales in Henry, Knox and Fulton counties

in or near the Illinois Military Tract. Since we have already discussed that evidence and concluded that those sales were not comparable for valuation purposes in connection with any of the tracts to be valued in these dockets, we will not go into the matter again.

Tract G contained 402,870 acres located in the western part of Royce Area 98 and is overlapped by the Kickapoo cession of Royce Area 110. The tract embraces parts of Indiana and Illinois and the Kickapoo, Potawatomi and Wea tribes each has an undivided one-third interest in the tract. The valuation date of the Potawatomi and Wea interests is October 2, 1818, and of the Kickapoo interest is January 13, 1821.

For the Potawatomi and Wea interests we carefully considered the materials submitted by Dr. Tanner and by Dr. Chisholm and found it all quite helpful. We selected as comparable approximately 270 sales of 59,556 acres which took place during the years 1815 through 1819, eliminating all sales where the grantor and grantee had the same surname or where the transactions involved governmental bodies, sheriff's sales and estate sales. We also eliminated any sales for less than 40 acres since we felt 40 acres was the minimum amount that would have been purchased for the predominant use at that time of subsistence farming. The total selling price was \$194,679 or an average per acre price of \$3.27 as of October 2, 1818.

For the valuation of the Kickapoo interest, as with the other tracts in which they had an interest, we used the 1818 to 1821 sales which were compiled by Dr. Chisholm. We selected 164 sales which we deemed acceptable involving 37,993 acres which were sold for a total price of \$149,449 or an average per acre price of \$3.93 as of January 13, 1821.

The per acre price of the two sales data periods require adjustment because

of certain factors noted below. These factors reveal pertinent data which distinguish Tract G from the lands involved in the sales data.

The sales data lands were located in the extremely fertile and early settled American Bottom portion of Royce Area 48 which was bordered on the west by the Mississippi River and on the south by the Ohio River. Tract G contained a great deal of fertile lands along the Vermillion and Wabash rivers but the lands were not as fine as those in the sales data counties. Although the Vermillion and Wabash rivers were navigable and certainly enhanced the value of Tract G, they did not reach the importance of the Mississippi and Ohio rivers.

Tract G did not experience steady settlement until the 1820s. The sales data counties were fairly well populated long prior to 1818 and some settlements had been in existence since the mid-1700's. These established settlements attracted settlers towards the sales data region which was in the path of westward migration. Tract G was outside that path in 1818 and 1821 and the lack of existing settlements within its vicinity further reduced the demand for the lands in the tract.

Nearly all of the land in the sales data counties possessed a topography and terrain highly attractive to settlers being mostly timbered lands. On the other hand, slightly over one-half of Tract G consisted of prairies and at both valuation dates for this tract settlers continued to be reluctant to homestead on prairies unless there were adjacent timberlands. Most settlers, having come from timbered areas, were either unskilled or uneducated in the process of breaking and cultivating the prairies.

Since the sales data counties were well populated at the time of

these valuations, it is likely that the lands sold and reflected in the sales data contained some improvements which would have increased the value of such lands and resulted in a higher selling price to buyers. Tract G was almost entirely unimproved and therefore the sales price for its lands would not have been as high as prices in the sales data counties.

Tract G was bordered on the west by Tracts E and C and we find the value of Tract G to be comparable with the value of these adjacent tracts. However, tracts C and E were valued as of 1821 and only the Kickapoo interest in Tract G is valued as of that time. The Potawatomi and Wea interests must be valued as of 1818. Therefore, it is our view that the per acre price for the lands in Tract G in 1818 was \$1.28, and in 1821 was \$1.35.

Tract G contains slightly more than 400,000 acres. This and other factors previously discussed as part of the size discount persuades us to apply a 10 percent discount. We conclude that the value of Tract G on October 2, 1818, was \$463,301 or an average per acre value of \$1.15. The Potawatomi's and Wea's one-third interest in the tract amounts to \$154,434 each. The value of the tract on January 13, 1821, was \$491,501 or an average per acre value of \$1.22. The Kickapoo's one-third interest amounts to \$163,834.00. Finding 67

Tract H. Tract H contains 51,384 acres in the western part of Indiana and constitutes the overlapping portion of Royce areas 110 and 180. The Kickapoo and Wea tribes each has an undivided one-third interest in the tract. The Wea interest is valued as of October 2, 1818 and the Kickapoo interest as of January 13, 1821.

The Potawatomi Indians also possessed an undivided one-third interest in Tract H but the valuation of their interest was assigned to dockets 15-N, O, Q and R and will not be touched upon in this decision.

In our valuation of this tract we examined sales from 1815 through 1819 for the Wea interest, and sales from 1818 through 1821 for the Kickapoo interest. These sales were selected from the data prepared by Dr. Chisholm previously discussed in connection with our other valuations.

From Dr. Chisholm's sales data for the years 1815 through 1819 we selected 270 sales involving 59,556 acres of land with a total selling price of \$194,679, or an average per acre price of \$3.27. The 1818 through 1821 period produced 164 acceptable sales involving 37,993 acres selling for \$149,449, or \$3.93 per acre.

The per acre prices of the two sales data periods require adjusting because of various factors which reveal pertinent differences between Tract H and the sales data counties.

Tract H did not possess as fertile soil as that in the sales data counties, described and referred to several times above. Tract H did not possess the easily navigable water routes enjoyed by the sales data counties although the north fork of the Vermillion River rose in the western portion of the tract and the Wabash River was only 20 miles away.

The Tract H land was fertile and desirable but it did not experience steady settlement until several years after 1821. As of the valuation dates, the sales data counties were relatively heavily populated with several thriving settlements having been in existence for many years. St. Louis, just across the Mississippi River from the sales data area, had been settled by the 1760's. The sales data area was in the direct path of westward migration whereas

Tract H was outside of such path, partly due to the continued presence of Indians in Tract H and other adjacent lands.

Slightly over one-half of Tract H was composed of prairies whereas the sales data counties were predominantly timbered lands which were much preferred by settlers. Tract H was almost totally unimproved at valuation dates whereas the sales data counties must have contained significant improvements in some areas.

Tract H was bordered on the west by Tract E which we find to be comparable land. Tract E was valued as of 1821. The Kickapoo interest in Tract H is also to be valued as of 1821 whereas the Wea valuation date is 1818. In view of the circumstances and evidence of record we conclude that the per acre value of the lands in Tract H in 1818 was \$1.28 and in 1821 was \$1.35.

Tract H contains slightly more than 50,000 acres and is the smallest tract to be considered in this decision. This relatively small amount of acreage plus other factors previously discussed in connection with size discounts, persuades that a 5 per cent discount is appropriate. On the basis of the record and the above considerations, we conclude that the value of Tract H on October 2, 1818 was \$62,483 or an average per acre price of \$1.22. The Wea's one-third interest amounts to \$20,828. Finding 71. The value of Tract H on January 13, 1821, was \$65,874, or an average per acre price of \$1.28. The Kickapoo's one-third interest amounts to \$21,958. Finding 67.

Tract I. Tract I contains 351,756 acres in western Indiana and constitutes the eastern half of Royce Area 98. The Wea and Potawatomi tribes each have an undivided one-half interest in the tract. These interests are

valued as of October 2, 1818.

In valuing Tract I we relied on the sales data gathered by Dr. Chisholm and selected therefrom 270 sales occurring between 1815 and 1819, inclusive, observing the same exclusions made by him plus our own exclusion of any tract having less than 40 acres.

The 270 sales we selected contained 59,556 acres selling for a total of \$194,679, or an average per acre price of \$3.27. However, these sales were derived from an area that differed in significant ways from Tract I requiring an adjustment in our valuation of that tract for reasons discussed below.

As noted above, the sales data used by Dr. Chisholm involved lands located largely in the American Bottom area along the Mississippi River and having extremely fertile and desirable lands. In addition, there were a number of established settlements in this area and much of the land was improved. The fertile lands in Tract I were not as exceptional as those in the sales data areas and some lands in Tract I required drainage before they could be cultivated. Tract I was bordered on the west by Big Pine Creek, on the south by the Wabash River, and on the east by the Tippecanoe River. Although access to the tract was generally good, the journey to Tract I from the Ohio River and then up the Wabash River was difficult compared to the ease with which the sales data counties could be reached. Tract I was outside the path of westward migration in 1818 and remained so until the late 1820's with little permanent settlement until that time.

Since the sales data counties were well populated in 1818, it is likely that the sales reflected in the data included improvements. Tract I was almost totally unimproved at the time of valuation.

The sales data counties were mostly the desired timbered lands whereas Tract I had substantial amounts of prairie lands which settlers were reluctant in 1818 to cultivate.

Tract I was bordered on the west by Tract G which had an 1818 value of \$1.28. We find that Tract G and its per acre price comparable to that of Tract I. Tract I contained slightly more than 350,000 acres and we believe a 10 percent discount is appropriate. On the basis of the record and the considerations we have discussed, we conclude that the value of Tract I on October 2, 1818, was \$405,223, or an average per acre value of \$1.15. The Wea's and the Potawatomi's undivided one-half interest amounts to \$202,612 each. See Finding 71.

Consideration

Consideration in Docket 313. In Docket 313 the Peoria plaintiff on behalf of the Peoria and Kaskaskia, contends that the value of the consideration received by the Kaskaskia from the defendant under the Treaty of August 13, 1803, 7 Stat. 78, totaled \$11,158.64, and that defendant is entitled to have this sum deducted from any award made to the Kaskaskia. Defendant claims that the total consideration properly deductible is \$11,580.

Under the Treaty of August 13, 1803, the Kaskaskia's perpetual annuity of \$500 in goods which they were receiving pursuant to Article IV of the Treaty of Greenville of August 3, 1795, 7 Stat. 49, was increased to \$1,000.00. Both parties agree that the capitalized value of this \$500 perpetual annuity is \$10,000 and that it is deductible from the award.

The third article of the 1803 treaty provided that whereas the greater part of the tribe had been received into the Catholic Church, the United States

would give the Tribe \$300 to assist in the erection of a church and also \$100 annually for seven years for the support of a priest who, in addition to the duties of his office as a priest, would instruct as many as possible of the tribe's children. The parties agree that the \$300 for the church is deductible consideration. Plaintiff contends that the seven annual payments of \$100 each should be capitalized at \$578.64 and only that sum deducted from the award, relying on Miami Tribe v. United States, 150 Ct. Cl. 725 (1960); Crow Tribe v. United States, 151 Ct. Cl. 281 (1960); and Absentee Shawnee Tribe v. United States, 151 Ct. Cl. 700 (1960), cert. denied in all three cases, 366 U.S. 924 (1961). That ruling was rejected by the Court of Claims when the issue was again raised in a later case, Pawnee Indian Tribe v. United States, 157 Ct. Cl. 134, 138-139, 301 F. 2d 667, 668-669 (1962) cert. denied 370 U.S. 918. In Pawnee the court held that permitting deferred payments of a short term annuity to be commuted to a cash value at treaty date and deducting only that amount from the award as consideration was tantamount to charging the United States with interest and would thus be contrary to well established law that the United States is not liable for interest in the absence of contractual or statutory authority therefor. Accordingly, defendant is entitled to have deducted the \$700 actually paid under the temporary annuity provisions of the treaty.

Both parties appear to have assumed that the \$500 promised by the United States to procure necessary articles for the Kaskaskia and to relieve them from debt, is a properly deductible item of consideration. Since "necessary articles" under most Indian treaties were "food, rations or provisions" which, under the Act of October 27, 1974, Public Law 93-494,

88 Stat. 1499, may not be deducted as payments on the claim, in the absence of a showing to the contrary, this sum is not deductible. Prairie Band of The Potawatomi Tribe of Indians, et al. v. United States, Docket Nos. 15-C, 29-A and 71, 38 Ind. Cl. Comm. 128 (1976), affirmed, 215 Ct. Cl.____, 564 F. 2d 38 (1977).

Defendant is entitled to a credit as consideration under the 1803 Treaty, the \$10,000 capitalized value of the \$500 increase in the tribe's perpetual annuity; \$700 representing the seven annual payments of \$100 each for the support of the priest; and \$300 for the erection of the church, making a total consideration of \$11,000.00. Finding 72

Consideration in Dockets 15-D, 29-B and 311. Under the Treaty of October 2, 1818, 7 Stat. 185, the Potawatomi were promised a perpetual annuity of \$2,500 in silver. Both parties agree that this annuity was the sole consideration given by defendant under that treaty and that the capitalized value of that annuity is \$50,000. It is uncontested that the tribe has been paid the capitalized value of the annuity and that defendant is entitled to a credit in that amount against the Potawatomi award in the subject dockets. Finding 73.

Consideration in Docket 314-A. The sole consideration received by the Wea under the Treaty of October 2, 1818, was an \$1,850 perpetual annuity payable in silver. In Docket 314-A, the Peoria plaintiff on behalf of the Wea contends that defendant has already received full credit for this annuity, referring to the \$34,478.16 credit allowed defendant against the award in Peoria Tribe of Indians v. United States, Docket 314 (Amended), 9 Ind. Cl. Comm. 274, 288-

289 (1961), aff'd on other grounds, 169 Ct. Cl. 1009 (1965). Plaintiff is correct. In Peoria, supra we found that under Article 6 of the Treaty of May 30, 1854, 10 Stat. 1082, defendant commuted the 1818 Wea perpetual annuity of \$1,850 for \$34,478.16; that such amount was actually paid to the Wea Tribe; and that the defendant was entitled to credit in that amount against the award to the Peoria in that proceeding. In Docket 99 et al, Peoria Tribe of Indians v. United States, 22 Ind. Cl. Comm 186 (1969) defendant again attempted to have the commuted value of the 1818 Wea annuity credited against the award in that case and the Commission denied the claim on the ground that the credit had already been granted in Docket 314 Amended.

It is true, as defendant contends, that the capitalized value of the 1818 annuity is \$37,000. However, since the Government in 1854 chose to commute that annuity for \$34,478.16, defendant is bound by that choice. Since full credit for the annuity has already been granted to defendant in Docket 314 Amended, defendant may have no credit for it in this proceeding. Finding 74.

Consideration in Docket 315. Under the Treaty of July 30, 1819, 7 Stat. 200, as amended by the Treaty of July 19, 1820, (7Stat. 208), involved in this docket, defendant promised and paid to the Kickapoo \$2,000 in silver annually for 15 years. Article 6 of the July 30th treaty states that the United States delivered \$3,000 worth of merchandise to the tribe on that date. In addition, defendant promised and delivered to the Kickapoo 1,868,500 acres of land in the Territory of Missouri, hereinafter called the "exchange lands". The tract in Missouri must be valued for the purpose

of consideration, as of January 13, 1821, the effective date of the treaty.

Under the Treaty of August 30, 1819, 7 Stat. 202, also involved in this docket, defendant, in return for the cession described in Article 2, and in return for the release by the Kickapoo of an annuity of one thousand dollars then due them, promised to pay and did pay to the Kickapoo \$200 in specie annually for 10 years and delivered \$3,000, presumably in cash, at the time of the signing of the treaty. The one thousand dollar annuity which the Kickapoo released under the August 30th treaty included a \$500 perpetual annuity granted to them under the 1795 Treaty of Greenville; the \$400 and \$100 perpetual annuities granted them under the Treaty of December 9, 1809, 7 Stat. 117; and the Kickapoo's interest in a salt annuity granted jointly to eight tribes under the Treaty of June 7, 1803, 7 Stat. 74. The value of the released monetary annuities, capitalized at 5%, is \$20,000. The similarly capitalized value of the Kickapoo's 1/8 interest in the salt annuity is approximately \$500 (See finding 75 for details). The combined salt and cash annuity has a capitalized value of \$20,500.

The \$30,000 paid to the Kickapoo under the Treaty of July 30, 1819, as a 15 year annuity at \$2,000 a year, and the \$2,000 cash annuity paid for 10 years under the Treaty of August 30, 1819, totaling \$20,000, plus the \$3,000 in cash paid under the August 30th treaty, are all deductible from the Kickapoo award as consideration paid under the pertinent treaties. Plaintiff's contention that the two temporary annuities are not deductible in their entirety, but only their capitalized value, is without merit, as noted in connection with the same contention of the Peoria plaintiff in Docket 314-A, and for the same reason. The \$3,000 worth of merchandise promised in Article 6 of the July 30, 1819 treaty, will, in the absence of

proof to the contrary, be deemed to have been food, rations or provisions within the meaning of the Act of October 27, 1974, prohibiting the deduction of the value of such items as payments on the claim. Prairie Band of Potawatomi Tribe of Indians, et al. v. United States, Docket Nos. 15-C, 29-A and 71, supra. From the total amount of the capitalized temporary annuities and the \$3,000 cash payment, must be subtracted the capitalized value of the \$1,000 annuity and other obligations (salt annuity worth \$500 commuted value) totalling \$20,500 which the Kickapoos released in the Treaty of August 30, 1819.

The Kickapoo plaintiffs concede that the the exchange lands in Missouri granted to the tribe under the Treaty of July 30, 1819, constituted part of the consideration for the tribe's cession of lands to the United States. Plaintiffs contend, however, that the exchange lands should be valued according to plaintiffs' estimate that defendant paid only \$0.01 per acre for the lands when they were purchased by the United States from the Osage Indians under the Treaty of November 10, 1808, 7 Stat. 107. Defendant argues that the lands should be valued at their fair market value as of the January 13, 1821, effective date of the treaty under which the Kickapoo plaintiffs received the lands. The matter of the proper valuation of "exchange lands" was thoroughly discussed in our decision in Prairie Band of Potomatomie Tribe of Indians v. United States, Dockets 15-C et al., 33 Ind. Cl. Comm. 394, 400 ff. Under the circumstances in this case, the provisions of the treaty, and the holding of the Commission in the Prairie Band case, we are of the opinion that defendant is entitled to a credit of the fair market value of the exchange lands as partial consideration.

As evidence that equity will be served by such measure in this instance, we take judicial notice of the fact that when the Kickapoo re-ceded the 1,868,500 acres of exchange land in Missouri to the United States as Royce Area 179 under the Treaty of October 24, 1832, 7 Stat. 391, they ultimately received the 1832 fair market value of such lands. Under the 1832 Treaty the Kickapoo were given \$143,000 and 786,000 acres of exchange land in Kansas. They sought additional compensation for the transaction in Kickapoo Tribe of Kansas v. United States, Docket 193, 19 Ind. Cl. Comm, 67 (1968), which resulted in a compromise settlement for an additional \$540,000.

The Kickapoo plaintiffs presented no expert witness to show the value of the Missouri exchange lands and no value evidence except Joint Exhibit X which is a copy of the defendant's expert witness report in Osage Nation or Tribe of Indians v. United States, Docket 105, 21 Ind. Cl. Comm. 67, (1969), involving the same and additional lands. Defendant's expert in that case, Dr. William G. Murray, valued the lands at 15 cents an acre as of April 28, 1810.

In Docket 315 herein, defendant again employed Dr. Murray as an expert to value the exchange land in Missouri. Dr. Murray submitted an appraisal report valuing the land as of July 30, 1819 instead of January 13, 1821. He testified that there would have been little change in the value between 1819 and 1820 and we have found the same would have been true as of the 1821 actual valuation date.

In our findings 76 and 77 we have described the location and physical characteristics of the Missouri lands. In general the lands were in the western portion of the Ozark Plateau known as the Springfield Plain with large, treeless prairie-like areas in the southwest portion. It also contained numerous swales, depressions and minor streams, many of which were

bordered by stands of timber. About two thirds of the tract was a combination of timber and prairie land. The tract was drained by the Sac, Osage and Pomme de Terre rivers and their tributaries. The soils ranged from good to medium fertility and were capable of growing grain crops in the better watered areas and grass for grazing in the less watered places. The soils in the valleys were generally fertile except for large sections which were steep, rocky and gravelly. Timber was not present in commercially exploitable quantities but was sufficient for the needs of subsistence farmers. At valuation time the tract had no known mineral potential. In Finding 78 we have described the climate of the exchange area and the fact that on the whole the growing season averaged 180 days per year. The highest and best use of this land in 1821 would have been for subsistence farming in the forested tracts along the river valleys with some of the prairie expanses lacking the best soils, water and timber, being useful for the grazing of livestock in connection with a settler's general farming operation. Finding 79.

In Finding 80 we discuss the surveyor's notes in connection with the earliest surveys in the exchange land tract, i.e., from 1833 to 1835.

In 1820 the non-Indian population of the Territory of Missouri was 66,586 persons. Most of these people lived in the eastern portion of the territory along the Mississippi River with a concentration in northeastern Missouri around St. Louis and near the Missouri River in the vicinity of Boone's Lick country. The non-Indian population in southwestern Missouri where the exchange lands were located, was less than two persons per square mile in 1821. Finding 81.

There were no roads in the tract in 1821, only Indian trails. None of the rivers in the tract were used for navigation by non-Indians. No travel or trade routes had been developed through or near the tract by non-Indians. By 1821, however, the Osage River had a reasonably foreseeable potential for navigational use. In 1821 the tract was not easily accessible. Finding 82.

By 1821 the general area around and adjacent to the exchange land tract had not been developed or settled but was still part of a vast wilderness extending from near the Missouri River on the north, to and beyond the Arkansas Territory on the south; from the rough Ozark highlands on the east to the near level prairie lands of Kansas and beyond. The rate of settlement in Missouri had reached a low point in 1820 when there were no sales of public land in the entire territory and millions of acres of good lands in Missouri available for sale enjoyed a much better location east of this tract. The normal flow of immigration in 1821 was down the Ohio River, into Kentucky, Ohio, Indiana, Illinois and northeastern Missouri above St. Louis. Finding 83.

In Finding 84 we describe the state of public land sales in Missouri at and around the valuation date. In Finding 85 we describe Dr. Murray's appraisal of this land as of July 30, 1819. Dr. Murray concluded that the highest and best uses of the tract were for farming and stock raising. Since there were no land sales near these lands in 1819, Dr. Murray chose three Missouri tracts some distance to the east where there had been some sales in 1819, 1823 and 1831. The three tracts chosen by Dr. Murray were located in areas which were not comparable to the exchange lands and therefore, the sales data is not helpful. In fact, Dr. Murray concluded

that under the circumstances existing in western Missouri at the valuation date, there was no market for the exchange lands. In reaching an 1819 value of the exchange tract, Dr. Murray calculated what a buyer would have had to pay for the land if, at 7% interest, he expected to recover the 1819 statutory price (\$2.00 per acre) for public land, i.e., \$1.64 cash in from 25 to 30 years. He decided that a buyer would have paid 23 cents per acre on this basis and that the tract had a fair market value in 1819 of \$429,755.

By 1820 the statutory price for public land had changed to \$1.25 per acre cash and defendant's counsel calculated that the 1820 value of the exchange lands would be approximately \$0.17 per acre.

In reaching our own valuation of the exchange lands in January of 1821, we considered all the evidence available, most of which is reflected in our findings. We took judicial notice of our value findings and conclusions in Docket 105 (Osage), supra, and in Iowa Tribe v. United States, Docket 135, 12 Ind. Cl. Comm. 487 (1963), aff'd 179 Ct. Cl. 8, cert. denied 389 U.S. 900 (1967). In the latter case we valued two tracts in northern Missouri on a thoroughly developed record. The 1,551,200 acre Iowa tribal lands in northwestern Missouri in 1825, we valued at 45 cents an acre; and the 1,241,700 acre Sac and Fox tract in northeastern Missouri we valued at 80 cents per acre as of 1825. We justified the difference in value on the basis of accessibility, settlement patterns and location, although we found the two tracts to be comparable with respect to their physical characteristics. We noted that sales activity within and adjoining the Sac and Fox tract reflected demand therefor, whereas no such activity existed in the Iowa tract region in northeastern Missouri.

The Kickapoo exchange lands were generally less fertile than the two tracts in Docket 135, and unlike the Iowa-Sac and Fox lands, were frequently stony. The exchange lands were not as level as the Docket 135 lands and were further from the direction of settlement. In addition, there was no market whatsoever in 1821 for the exchange land whereas in 1825 there had developed a market for the Iowa and Sac and Fox tracts. Finally, economic conditions in Missouri and nationally were much better in 1825 than in 1821.

Missouri's application for statehood had been pending in Congress since February 13, 1819, and it did not become a state until August 10, 1821 after the famous Missouri Compromise on the question of slavery. On January 13, 1821, the vicinity of the subject tract had no civil government and was considered raw wilderness.

Based on all of the above considerations, our findings and the record as a whole, we are of the opinion that the subject tract had a fair market value on January 13, 1821, of \$373,700, or an average per acre value of \$.20.

The total gross consideration in Docket 315 is summarized in our finding 75 as \$426,700. From this we deducted \$20,500 representing the capitalized value of the perpetual annuity obligations released by the Kickapoo in 1819. Accordingly defendant is entitled to a credit for the net consideration of \$406,200 in Docket 315.

In our finding 88 we have determined that the amount of consideration paid by defendant for each cession in suit, and allowable against the plaintiffs' claim in this proceeding, is so grossly inadequate as to be unconscionable

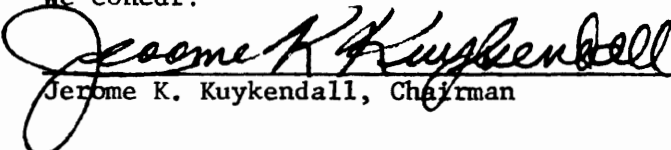
within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act. Accordingly, the plaintiffs are entitled to awards for the difference between the value of their interests ceded and the allowable amount of consideration received, as summarized in the following table:

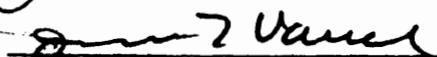
<u>Cession</u>	<u>Value</u>	<u>Allowable Consideration</u>	<u>Award</u>
Docket 313: Kaskaskia, Royce Area 48	\$7,153,750	\$11,000	\$7,142,750
Dockets 15-D, 29-B, 311: Potawatomi cession of Royce Area 98	357,046	50,000	307,046
Docket 314-A: Wea cession of Royce Area 98 and Tract H	377,874	0	377,874
Docket 315: Kickapoo cession	11,833,330	406,200	11,427,130

The above awards will be reduced by 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