BEFORE THE INDIAN CLAIMS COMMISSION

CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, et al.,	)	Docket Nos. 128, 309, 310
Plaintiffs,	)	
THE POTAWATOMIE NATION OF INDIANS, THE PRAIRIE BAND, et al.,	)	Docket Nos. 15-N, 15-O, 15-Q, 15-R
Plaintiffs,	)	
THE HANNAHVILLE INDIAN COMMUNITY, et al.,	)	Docket Nos. 29-L, 29-M, 29-O, 29-P
Plaintiffs,	)	
POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INCORPORATED	)	Docket Nos. 128, 309, 310, 15-N, 15-O, Q, R, 29-L, M, O, P
Intervenors,	)	
IRA SYLVESTER GODFROY, et al., on relation of THE MIAMI TRIBE OF INDIANA,	)	Docket No. 124-B
Plaintiffs,	)	
THE MIAMI TRIBE OF OKLAHOMA, et al.,	)	Docket No. 254
Plaintiffs,	)	
THE PEORIA TRIBE OF OKLAHOMA,	)	Docket No. 314-B
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: September 8, 1978

Appearances:

Robert S. Johnson, Attorney
for the Plaintiffs in Docket Nos.
15-N, O, Q, & R

Robert C. Bell, Jr., Attorney
for Plaintiffs in Docket Nos.
29-L, M, O, & P

Louis L. Rochmes, Attorney
for Plaintiffs in Docket Nos.
128, 309, 310

Edwin A. Rothschild, Attorney
for Plaintiffs in Docket No. 254

Jack Joseph, Attorney for
Plaintiffs in Docket No. 314-B

J. Roy Thompson, Jr., Attorney
for Plaintiffs in Docket Nos.
29-L, M, O, & P.

Albert C. Harker, Attorney for
Plaintiffs in Docket No. 124-B

Robert C. Bell, Jr., Attorney
for Intervenors

Alexander Pires and Richard Beal
with whom was Assistant Attorney
General Peter R. Taft, Attorneys
for Defendant. James E. Clubb
was on the brief.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

Introductory Statement

This case is now before the Commission for a determination of (1) the fair market value of 11 tracts of land ceded by the plaintiffs to the

United States under the terms of the various treaties set out at Table I, p. 77, infra, and described in finding 20 entered herein; (2) the value of the consideration received by the plaintiffs from the defendant for said cessions; and (3) whether the consideration paid was unconscionable within the meaning of Clause 3, Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050. The question of the consideration paid to the plaintiffs for the cessions under the treaties in question must also be determined in order to find the amount which, under our act, must be deducted as payments on the claim. The ceded areas to be valued are included in Royce Areas 132, 133, 146, 180, and 181 in northern Indiana, and Royce Area 145 in Michigan.[1/]

The Commission's title decision in these proceedings was issued on December 28, 1973, 32 Ind. Cl. Comm. 461. In that decision the Commission determined the respective title interests of the plaintiffs in the several subject tracts under consideration. A summary of these results is also reported in Table I, supra. A map delineating the Royce Areas and the individual tracts within said areas is included as Appendix I to this decision at p. 149, infra. The subject area generally is that of the State of Indiana north of the Wabash River, except for a strip of land in the extreme north and northeast of the state and another tract near the Illinois border to the north and west of the present city of

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1/ Royce Area 180 includes an area that overlaps Royce Area 110. This overlap area is designated as Tract H in this case.

Table I

Royce Area	Tract	Tribe	Total Acres	Interest	Valuation Date
132	Y1	Miami	752,000	70%	February 7, 1827
		Potawatomi		30%	February 7, 1827
133	*1	Potawatomi	234,000	100%	February 7, 1827
145	*2	Potawatomi	153,558	100%	January 7, 1829
146	*3	Potawatomi	853,000	100%	January 7, 1829
146	Y4	Miami	121,000	50%	January 24, 1827
		Potawatomi		50%	January 7, 1829
180	AB	Potawatomi	181,476	50%	October 26, 1832
		Wea*/		50%	October 2, 1818
180	*4	Potawatomi	1,821,376	100%	October 26, 1832
180	Y2	Miami	422,193	50%	January 24, 1827
		Potawatomi		50%	October 26, 1832
180	H	Potawatomi	51,384**/	33 1/3%	October 26, 1832
181	*5	Potawatomi	260,134	100%	January 21, 1833
181	Y3	Miami	575,866	50%	January 24, 1827
		Potawatomi		50%	January 21, 1833

*/ Wea Nation or Tribe, Dkt. 314-B plaintiffs herein, are represented by the Peoria Tribe of Oklahoma. See Peoria Tribe of Indians v. United States Docket 65, et al., 4 Ind. Cl. Comm. 223 (1956), rev'd on other grounds, Peoria Tribe of Indians v. United States, 390 U. S. 468 (1968).

**/ This is the correct acreage figure. Because of a transposition of figures, the parties mistakenly used 17,218 acres as equaling a 1/3 interest in Tract H instead of using the correct figure of 17,128 acres. By multiplying the larger incorrect figure by 3, the total acreage figure of 51,654 was reached instead of the correct figure of 51,384 acres.

Lafayette. The area also includes a parcel of land in extreme southwest Michigan. The subject area, composed of 11 separate tracts contains a total of nearly 5.5 million acres. The tracts range in size from about

51 thousand acres to over 1.8 million acres. The valuation hearing in these dockets was held on June 21, 22, and 23, 1976.

Description and Characteristics of Subject Tract

The land was predominately level though marked elevations occurred at different points. During the early settlement period forests covered many parts of the region. Much of the land, however, was prairie, which was frequently broken by oak openings. These were described in the record as groves of trees with no undergrowth, the surface being covered with grass.

The soils in the region were generally rich and quite productive. Much of the land required various degrees of drainage before it could be cultivated. The wetness of the area was primarily due to the level nature of the prairie land, though timbered areas were also occasionally wet. Land along Lake Michigan contained sand ridges and an absence of the wetness or marshiness that characterized other portions of the subject tract. Both parties have taken into account the drainage problem in arriving at their valuation conclusions.

The natural vegetation was principally Blue Stem prairie grass on the prairies, with mixed patches of trees. Beech, maple, aspen, oak, and hickory, were dominant in the area. Timber was frequently found along the water courses in the various tracts.

The major river flowing through the area on the southern border of the tracts was the Wabash River. This river was responsible for the drainage of the southern third of the subject tract through numerous

tributaries. Primary among these were the Tippecanoe and Eel rivers. The northern portions of the area were drained by the Kankakee, Iroquois, St. Joseph, Elkhart, and Pigeon rivers and by small streams emptying directly into Lake Michigan.

The climate in Indiana was humid continental, and commonly known as the "corn-belt climate." It was characterized as being generally temperate with distinct seasonal variations. The average temperature in the subject area during July was 75°F and during January, 25.6°F. Precipitation ranged from 30 to 39 inches. The growing season was from 150 to 180 days. The length of the growing season resulted in this region being very productive agriculturally. During the early years of settlement, agriculture became the primary way of making a living. Wheat and corn were the principal crops, though other grains and vegetables were also grown. The luxuriant growth of grass eventually was put to use for the raising of livestock. The lifestyle of the early settlers was agrarian, with agricultural production generally at a subsistence level. There had been no significant discovery of minerals in the subject area by the valuation dates.

History of the Subject Area and Surrounding Areas

In addition to the Indian tribes that populated this region, the area was controlled successively by the French, English, and finally the Americans.

The French influence began with LaSalle's exploration of the Northwest, including the St. Joseph-Kankakee portage near present day South Bend, in 1679. French explorers established Fort St. Joseph in the early 1690's. Aside from missionary settlements and trading centers, little other permanent migration by settlers occurred at that time. The primary French concern was with the fur trade. For this purpose the French established three posts in Indiana. They were Fort Miami, near present day Fort Wayne, about 1700; Fort Ouiatanon, near Lafayette, about 1718, and Fort Vincennes, about 1727. These forts would in later years exchange hands but the French residency and influence continued until the 1760's.

As British influence advanced towards this region, both the French and British employed the Indians in pushing their trade further into the interior. The fur trade of the Ohio and Wabash valleys was highly prized. Eventually, the rivalry betwen the French and British for the control of the fur trade resulted in the French and Indian War. During this struggle both sides sought the aid and alliance of the various Indian tribes in the Northwest. With British victory in 1763, France ceded to Britain Canada as well as its North American empire east of the Mississippi River.

The Quebec Act of 1774 placed much of the area into a part of the Quebec Province. This act was an attempt by the British to evolve a successful administrative policy for this region. The British also discouraged settlement in the Northwest in order to maintain friendly

relations with the Indians and to avoid the damage to the fur trade which would result from land clearing activities of the colonists.

Increasing colonial resentment towards British policy led the colonists to rebel. Because of the increased incursions into the Northwest by Americans and the consequent hostilities between them and the Indians, the Indians allied themselves with the British during the Revolutionary War.

With its victory over the British the United States gained recognition of its sovereignty in the Northwest. The United States now took an active role in the affairs of this region. The Ordinances of 1785 and 1787 created the machinery of government for the Northwest Territory and outlined the processes by which states could be formed.

Towards the end of the century a wave of land speculation swept parts of the region. With General Anthony Wayne's 1794 defeat of the Indians at the Battle of Fallen Timbers, and the subsequent treaty of Greenville in 1795, the Indians' surrendered most of Ohio. In the treaty, the United States secured cessions of a number of small tracts and necessary lands and water passages in the region. It also acquired a large area in southern Ohio, Royce Area 11. In Indiana these 1795 cessions included the Wabash-Maumee portage, Quiatanon, Clark's Grant, and the Vincennes tract around the village on the Wabash. 2/

2/ See Potawatomie Tribe v. United States, 27 Ind. Cl. Comm. 187 (1972), aff'd 205 Ct. Cl. 765, 507 F.2d 852 (1974), for full discussion of the Treaty of Greenville.

On May 7, 1800, the Territory of Indiana was formed. The capital of the territory, which included the future states of Indiana, Illinois, Michigan, and Wisconsin, was at Vincennes. The Michigan Territory was established in 1805.

In 1811 American troops defeated a contingent of Shawnees at the Battle of Tippecanoe. The Indians now sought further alliances with the British in Canada and who still hoped to regain some part of the Northwest. The War of 1812 provided the British with the opportunity to retake lands lost in the Revolutionary War. The Northwest Indians fought on the side of the British and both groups kept the Northwest in turmoil.

With the end of the war and the Treaty of Ghent in 1814, the British abandoned their Indian allies. Without British aid the Indians were unable to stop the flow of American settlers into the Northwest Territory. Thereafter, the United States pursued a vigorous policy of land acquisition from the Indians.

In 1816, Indiana became a state. Illinois followed in 1818. In 1825 the Erie Canal was completed and provided easier access to the Northwest for settlers from New England. With the increasing influx of settlers into the region, it was clear that much more Indian lands would be needed. Between 1818 and 1833 all the Indian lands of the subject area were obtained by the United States.

Transportation

Water transportation: During the late 1790's and early 1800's, river transportation and commerce were conducted along the Ohio River by the use of canoes, pirogues, flatboats, and keelboats. As the interior of Indiana was being opened for settlement, those tributaries in Indiana connecting to the Ohio River became extensions of the water routes previously used by American settlers. Most notable of these rivers was the Wabash River. It was navigable to within a short distance of Fort Wayne.

With the achievements of Robert Fulton and others, steamboats soon plied the western waters. However, the steamboat, having to confront obstacles such as low water, ice, and snags, failed to immediately supplant the previously used methods of travel. The Wabash River bore the heaviest travel of all northwest Indiana rivers. The St. Joseph River of Lake Michigan 3/ and the Elkhart River were the next most heavily traveled. The harbor at the mouth of the St. Joseph River had been well known for many years. By 1821 steamboat navigation had commenced on Lake Michigan.

Other important water courses during the valuation period were the Whitewater River, Tippecanoe River, Eel River, St. Joseph of the Maumee River, and Kankakee River, and the Erie Canal.

3/ The inclusion "of Lake Michigan" in the name of the St. Joseph River was used to distinguish this river from the St. Joseph River that flowed into the Maumee River. The latter river was commonly referred to as the St. Joseph of the Maumee.

The streams in the northern part of Indiana which empty into the Wabash and Illinois Rivers have their branches interwoven with many of the rivers running into Lake Erie and Lake Michigan. As a result, travel up one stream with a small portage to another stream was quite common.

Overland Travel. The first land routes were the Indian trails which connected the various Indian villages. Later roads often followed such routes. By the treaty with the Potawatomi in 1826, the state of Indiana received a federal land grant to build the Michigan Road from the Ohio River to Lake Michigan. This road was completed in the late 1830's. The Michigan Road passed through the subject area and formed a boundary for five of the subject tracts.

Another road, authorized to be built in 1830, was to run from Pleasant Lake (outside of the area) to Pulaski, Indiana (inside the area). In 1832, a road was authorized to connect South Bend with the mouth of the St. Joseph River, and another to connect Michigan with Chicago. Stage lines reached southwestern Michigan in 1831. By 1833 a stage line connected Detroit with Chicago.

Various portages were also used during this period. The two most notable were the portage connecting the Wabash River to the St. Mary's and Maumee rivers, in eastern Indiana, and the portage between the Chicago River and the Kickapoo branch of the Illinois River, connecting the Great Lakes area with the Mississippi River via the Illinois River.

Canals and Railroads. Besides the Erie Canal, other canals more proximate to the subject area were proposed or completed during the valuation period. In Indiana, during the 1820's, a canal was authorized to connect the Wabash River with Lake Erie. Construction on the Wabash and Erie Canal began in 1832 near Fort Wayne. In the 1830's another canal was authorized along Whitewater River. In Illinois, a canal was authorized in 1825 to connect the Illinois River with Lake Michigan. Work on the Illinois-Michigan Canal did not begin until 1836.

Though the building of the canals created tremendous financial burdens upon the northwestern states, those regions affected by the canals experienced increased property values and population.

Railroad building, which began in earnest in the United States in 1828, did not effectively occur in the Indiana-Michigan area until after the valuation dates. By the end of the 1830's only a few miles of track had been laid in Indiana and Michigan. The influence of rail travel therefore did not yet affect the value of the area.

Population

The growth of population in Indiana was rapid. Between 1820 and 1830 the population more than doubled. In 1830, the population of Indiana reached a total of 343,031. By the end of 1840 the population had nearly doubled again. In the early years the population was centered in the southern portions of the state. With the opening of more northern

Indiana lands in 1830's, the population in that region increased dramatically. For example, Those counties in the subject area which had been organized in 1830 contained a population of 4,987. By 1840 those counties had a combined population of 32,326.

The portion of the subject area lying in Michigan had some settlers in the 1820's prior to the extinguishment of Indian title in 1828. Settlers in substantial numbers arrived in the 1830's. Commerce and military movements connected with the Black Hawk War and the consequent increased use of Lake Michigan spurred settlement in this region.

Economic Conditions

With the demise of the Bank of the United States in 1811 and the end of its influence and power over the financial affairs of the nation, state banks flourished. The issuance of state bank notes proliferated to such an extent that the notes exceeded the margin of safety in coin reserves. Other problems also arose causing the Congress to seek a new financial course. A second Bank of the United States was established in 1817. Its creation was intended, in part, to require other banks to resume specie payments which had been earlier halted.

Branches of the United States Bank were allowed to accept only their own bank notes. In order to stave off bankruptcy state banks were compelled to call in their loans. These events drove many state banks into bankruptcy and helped precipitate the Panic of 1819. The

effect of the panic continued through the beginning years of the next decade. By the mid-1820's, however, the economy was showing healthy signs. The 1825 Gross National Product finally surpassed the 1818 level. Thus, the economic depression had not yet occurred by the 1818 valuation date, and its effects had ended by the 1827 and later valuation dates. In summary, the record amply supports a conclusion that the various economic indicators both prior to 1818 and after 1827, showed that the nation as a whole was financially sound. In the northwest area, the economy, spurred by easy credit, a steady, growing demand for land and farm products, and a fast-growing population, enjoyed the greatest economic advances from about 1827 into the middle of the next decade.

Federal Land Policies

Between 1800 and 1820 the price of government land was $2 per acre. A fairly liberal credit policy existed in this period. A purchaser needed only to pay 5 percent of the sale price on the day of the sale and 20 percent within 40 days. Another 25 percent was due at the end of the second year and 25 percent due at the conclusion of the next 2 years. If the purchaser paid in cash, the sale price was discounted by 8 percent. The minimum tract of land available was 320 acres. In 1804 the minimum tract was reduced to 160 acres.

Due to credit difficulties resulting from purchasing too much land without enough money available when debts became due, many settlers

faced the prospect of losing their lands. To alleviate this situation and prevent forfeitures, Congress passed the Land Act of 1820, which mandated a system of cash purchases. In addition, the minimum cost of land was reduced to $1.25 per acre and the minimum purchasable tract was decreased to 80 acres. Relief acts soon followed for the pre-1820 purchasers who were unable to meet their land related financial obligations.

As of the 1818 valuation date, public lands were selling for a minimum of $2 an acre in tracts no smaller than 160 acres. During the later valuation dates public land sold at prices not less than $1.25 per acre in tracts no smaller than 80 acres.

Public Land Sales

Once surveyed, the public lands were offered for sale at public auctions. If the land remained unsold, persons could then purchase the land at its minimum price at private sales. The Government had hoped that most purchases would be by means of auction to assure higher prices. However, collusion and agreements among speculators and settlers, the ample supply of land, and the likelihood of purchasing good land after the expiration of the auction period, deprived the Government of almost all of its anticipated profit. The minimum price naturally tended to approximate the maximum price. Between 1807 and 1820 over two million acres of Indiana public land were sold at a price of $2 per acre.

During the 1820's more public lands were sold in Indiana than in the other northwestern states. This trend continued through 1832. In

1833, more lands were sold in Ohio than in Indiana. Between 1820 and 1835, 6,437,000 acres were sold in Indiana. Sales in Illinois totaled 4,311,000 acres, and in Ohio 4,146,000 acres were sold. Despite the rapid rate of public lands sales, less than half of Indiana's available public lands had been sold by the end of 1833.

In 1828, the General Land Office reported to Congress the quality and quantity of unsold public lands. The number of acres unsold as of June 30, 1828, in the related states of Illinois, Indiana, and Ohio totalled 30.3 million. Of this amount, Indiana, consisting of five reporting districts, had a total of 10.2 million unsold acres. The three districts nearest the subject tracts--Crawfordsville, Indianapolis, and Fort Wayne--reported the least number of acres unfit for cultivation of their total unsold acres. Fort Wayne, in fact, reported "a very small portion, indeed (if any)" of the lands in that district totally unfit for cultivation. These three districts reported a total of 5.3 million acres unsold with about 450,000, or less than 10 percent unfit for cultivation. Crawfordsville reported most of its land (80 percent) at a value of not less than $1.25 per acre. Indianapolis reported 40 percent of its land worth $1.25 per acre and most of the remaining or third-rate lands at between $0.50 and $0.75 per acre. As to third-rate lands, this district found them generally timbered and fit for cultivation "in some way." The Jeffersonville and Vincennes districts, furtherest from the subject area, reported a combined total of 4.9 million unsold acres, with approximately 2 million deemed unfit for cultivation.

Our analysis of the 1828 reports covered all districts reporting including those in Ohio and Illinois cited in the pertinent exhibit in the record. The narrative that accompanied the statistical breakdown of most of the reports strongly suggests that the reporters assumed that prairie lands were not adaptable to farming and that wet prairies were even less so, without further investigation or analysis. No mention was made, in most cases, of the immediate advantages of simple drainage, or of other acceptable uses of wet lands such as pasture during dry seasons, both of which expedients were already being practiced by many settlers in the region. It appears that most of the districts employed a very constricted rating system in classifying their lands (i.e., first, second, or third rate) with only a few districts venturing commentaries, most of which were generally optimistic regarding the future of prairie lands and with nearly all agreeing to the superior fertility of such lands.

Settlement Trends

Prior to 1833, much of the subject area was still closed to settlement. Since the more southern and central portions of Indiana were already open, these areas were settled first. With the opening of the Erie Canal in 1825, and the development of the town of Chicago in the 1830's, lands in northern Indiana and southwestern Michigan were sought by settlers.

As the subject lands were opened for settlement, settlers and a few speculators bought up substantial amounts of the best lands. Lands in

marshy areas were overlooked as were the less accessible portions of the area. Though prairie land had been ignored in earlier years based on the mistaken beliefs that it was not productive and that farming required proximity to timber, these views had been overcome by the time of the valuation dates. However, partially timbered lands were still more desired than were prairie lands. Lands along the Wabash River and other navigable water routes were favored by settlers over lands further inland.

Highest and Best Use

Considering all possible uses of the subject tracts, the highest and best use of the land was for subsistence farming by individual families purchasing between 40 and 160 acres.

Parties Appraisals and Valuation

A. Plaintiffs Appraisals. The plaintiffs in Dockets 29-L, M, O, and P submitted the appraisal report and valuation conclusions of George Banzhaf and Galen Todd. We have described the Banzhaf-Todd report in our finding 41. The bulk of the report was a brief review of the history of settlement in the northwest. Messrs. Todd and Banzhaf based their appraisal on their examination of 93 sales occuring in 12 Indiana counties between 1827 and 1859. From a larger selection, the appraisers eliminated those sales in which the buyer and seller had the same surname. Small-size lots were also excluded and sales where the deeds were illegible. Using a simple arithmetic mean and standard

deviation, after first adjusting the sales data to the year of valuation, Messrs. Todd and Banzhaf calculated a per acre sale price for each valuation date. This price was then applied to the individual tracts.

We have significant problems with the Todd-Banzhaf appraisal. Initially, of the 93 sales in their sample, only 21 occurred during the valuation period of 1827-1833. We do not believe that so small a number of sales is an adequate basis upon which to construct a sales index applicable to the entire area under consideration. Of further significance was the fact that the appraisers did not discuss and relate such factors as accessibility, remoteness, size, and comparability of the subject tracts to the sales data. Based upon these factors we conclude that the Dockets 29-L, M, O and P plaintiff's valuation of the subject lands is not acceptable.

The plaintiffs in Dockets 15-N and 128 submitted the appraisal report and valuation conclusions of Dr. Roger K. Chisholm. Dr. Chisholm's report contained a detailed analysis of various factors affecting the value of the subject tracts, including history, economics, population and settlement patterns. Dr. Chisholm found that these various factors were favorable to the settlement of the area.

In determining the fair market value of the subject tracts, Dr. Chisholm utilized the market data approach. In constructing a

comparable sales index, he selected 1,960 land sales[4/] by private parties in Indiana, Illinois, and Michigan as the basis for his valuation of the subject tracts. The sales were taken from 14 counties in Indiana, seven counties in Illinois, and two counties in Michigan. The sales covered a span from 1800 to 1836. Dr. Chisholm selected most of the available recorded sales in the study area and then made various exclusions to arrive at valid arms-length transactions. Thus, he excluded sales resulting from sheriff's tax sales, sales with nominal considerations, sales with the buyer and seller having the same surname, and sales involving mortgages. On the other hand, Dr. Chisholm included sales of all size tracts, including numerous small acre tracts, as well as townlots selling for large per acre consideration.

4/ During the Commission's analysis of the computerized presentation of the sales submitted by Dr. Chisholm, we found an error in the computer's tabulation. Sales were found in which, in reporting the acreage, the computer placed a decimal point one extra digit to the right. The effect was to make an actual sales of 80 or 160 acres appear to be a sale of 800 or 1,600 acres. Hence, a sale of 80 acres selling for $100, or $1.25 per acre, was reported as selling for 13¢ per acre. Fortunately, relatively few sales contained this error and the effect of this mistake on the final valuation was minimal. The plaintiffs' amended findings and brief, correcting this error, did not significantly change their assertions.

The defendant responded to the plaintiffs' corrections with amended findings. We have incorporated the defendant's amended findings into their previous findings. (The plaintiffs responded to the defendant's amended findings.) Several of the defendant's assertions were satisfactorily refuted or explained by the plaintiffs. However, several newly asserted positions by the defendant were indeed valid and are considered in this opinion. Other assertions were not sufficiently supported or simply incorrect and are not discussed herein.

The sales data used contained tracts ranging in size from .009 acres to 5724.67 acres. According to Dr. Chisholm the average size tract sold was 126.4 acres and the median size tract sold was 80 acres. The simple average 5/ of the consideration per acre was $63.19. The median per acre value was $2.50. Dr. Chisholm adopted this medium value as being more representative of the general per acre value, and as the starting point for his ultimate valuation conclusions.

From this $2.50 per acre value, Dr. Chisholm deducted 25¢ per acre because of the possibility that some of the lands sold might be improved. In arriving at improvements costs, Dr. Chisholm studied written contemporary observations of persons living in the area. He found that improvements generally consisted of such things as log cabins, cleared land, fencing, and stables. Several of such observation indicated that the first crop paid for much of the preparation of the land, a view accepted by Dr. Chisholm.

Dr. Chisholm asserted that prairie land cost two to three dollars per acre to break if othere were hired to do the work. However, he noted that the settler usually did his own work and, if not, the first crop paid for the cost. Thus, Dr. Chisholm disregarded this particular cost.

Dr. Chisholm determined that the cost of building a cabin and clearing 10 acres of timber land was $100. By using the median size tract sold, 80 acres, the improvements were valued at $1.25 an acre. Dr. Chisholm

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5/ Simple average was obtained by adding the price per acre for each sale and dividing the sum by the number of sales involved. Hence a town lot of less than an acre selling for $600 per acre would have equal weight with a sale of 160 acres selling for $2 an acre.

estimated that 20 percent of the resale data sales contained improvements. He thus concluded that deducting 25¢ per acre would adequately account for improvements. Dr. Chisholm concluded that certain portions of the subject area required drainage. By relating actual drainage costs in the 1850's and 1890 to 1830 values, he determined that drainage costs ran approximately 47¢ per acre, with 10 percent to 20 percent of the area in each county requiring drainage.

Relying on the median value of $2.50 per acre, Dr. Chisholm first deducted the $0.25 per acre cost of improvements to arrive at $2.25 per acre base starting point for his final value conclusions. According to Dr. Chisholm if the median land value is "taken to apply" to the middle year of the valuation period, the per acre value in 1830 would be $2.50, less $0.25, or $2.25 per acre value in 1830. From this middle year, he either added or substracted $0.07 per acre (trend shown by Wabash-Erie Canal sales) to arrive at sales indices for each valuation date. Thus, according to Dr. Chisholm, the trend would result in the following values:

1827:	$2.04 per acre	1831:	$2.25 per acre
1828:	2.11 per acre	1832:	2.39 per acre
1829	2.18 per acre	1833:	2.46 per acre
1830:	2.25 per acre		

From this point Dr. Chisholm analyzed each tract separately, taking into account particular factors or attributes such as accessibility, remoteness, and drainage needs as either plus or minus factors. Several

examples will suffice to demonstrate Dr. Chisholm's approach. In Tract 2 (1829 valuation), the base value is $2.18 per acre ($2.25 less $0.07). Because of its apparent superior location, Dr. Chisholm added a 10 percent factor ($0.21) to arrive at a final value of $2.39 per acre. In the case of Tract Y-4, the 1829 base value is $2.18 per acre. From this, Dr. Chisholm deducted $0.07 per acre for drainage (15 percent of tract required drainage equal to .15 x $0.47, drainage factor) to arrive at a value of $2.11 per acre. In some tracts, such as Tract H, no adustments were made so that the base figure remained unchanged. Other than the foregoing adjustments, it appears that Dr. Chisholm did not apply any discounts for other reasons such as size or holding period. From this methodology, Chisholm achieved the following ultimate valuation conclusions:

Year*	Sub-Tract	Acres	Land Value	Total Value
1827	Y-1	752,000	$2.22	$ 1,669,440.00
	*-1	234,000	2.19	512,460.00
	Miami Y-4	60,500	1.97	119,185.00
	Miami Y-2	211.096.5	1.97	415,860.10
	Miami Y-3	287,933	1.97	567,228.01
		1,545,529.5		
1829	*-2	153,558	$2.39	$ 367,003.62
	*-3	853,000	2.08	1,774,240.00
	Potawatomi Y-4	60,500	2.11	127,655.00
		1,067,058		
1832	Potawatomi AB	90,738	$2.29	$ 207,790.02
	Potawatomi 180-H	17,128	2.39	40,935.92
	*-4	1,821,376	2.31	4,207,378.56
	Potawatomi Y-2	211,096.5	2.32	489,743.88
		2,1[illegible]0,338.5		

1833	*-5	260,134	$2.36	$ 613,916.24
	Potawatomi Y-3	287,933	2.39	688,159.87
		548,067		
	Total Acres	5,300,933	Total:	$11,800,995.22
1818	Wea-Tract AB	90,738	$2.10	$ 190,549.80
	Total Acres	5,391,731	Total Value:	$11,991,545.02

* This table is digested from our finding No. 42, infra.

In our examination of Dr. Chisholm's appraisal report, we have noted certain aspects of his valuation relative to the collection of data that casts some doubts on the absolute validity of his conclusions. Particularly, we question the use of sales data taken from counties which were heavily populated by the time of the valuation dates herein; were settled at much earlier dates; and were located in areas which were not comparable to the subject tracts, especially in terms of accessibility. The presence of these factors as well as the previously discussed use of townlots sales and small acreage transactions tended, in our view, to result in unduly high sales prices. These counties include mainly all of the southern Illinois counties bordering the Ohio and Mississippi Rivers and Clark County in Indiana on the Ohio River. About 8.2 percent of the sales came from Clark County, settled as early as 1802. In addition, about 11.5 percent of the sales occurred in 1835 and 1836, a period of above average land prices. Our own valuation herein will make adjustments for those elements.

In a recent related case, Potawatomie Tribe v. United States, Docket 15-P, et al., 41 Ind. Cl. Comm. 399, decided on June 8, 1978, we stated (by agreement of the parties) that in view of the similarity of parties, witnesses, and some issues, the transcripts and much of the evidence in the instant case could be used interchangeably with the Docket 15-P case. Id. at 401. Thus, in 15-P, we discussed generally Dr. Chisholm's methodology and our difficulties with it, and, while we adopt the broad conclusions we made there regarding Dr. Chisholm's approach which are applicable to both cases, our discussion here also covers valuation methods specifically applicable to the Indiana valuations in this case.

In addition to the foregoing, we are not in accord with two approaches Dr. Chisholm took to arrive at his valuation conclusions. First, Dr. Chisholm applied the $2.50 median value of 1,960 land transactions to the middle year of the 1827 to 1833 valuation period. Thus, $2.50 was placed at the 1830 juncture. We discern no rational basis for this procedure. The sales used by Dr. Chisholm covered a period from 1800 to 1836. There was no basis shown for applying a median value to the year 1830 from sales drawn from 1800 to 1836. Only if the year 1830 was the median year for all sales reported should it have been the recipient of the $2.50 median value.

Secondly, the 7¢ yearly rise in land values, taken from some 160 Wabash-Erie Canal sales, added or subtracted during the years 1827 to 1833, is not appropriate in this case. The resale data covering the years

from 1800 to 1836 included the years embraced by the Wabash and Erie Canal land sales. If land rose in value during those years, it would have been reflected and incorporated in the resale data. The application of 7¢ per acre value increases or decreases does not appear reasonable.

Finally, we do not agree entirely with Dr. Chisholm's approach to the matter of discounting the per acre value conclusions to allow for comparability variables. As discussed herein, Dr. Chisholm did in fact allow a comparability discount of $0.25 per acre to account for the presence of improvements in approximately 20 percent of the resale data. In addition, he considered drainage costs in selected tracts which appeared, in his analysis, to have required drainage. On the other hand, Dr. Chisholm did not allow for the costs of breaking and ploughing the lands; he employed no discount for size; and he did not take into account any costs related to surveying, subdividing, and similar factors of concern to the potential hypothetical purchaser of large tracts of land comparable to the subject tracts.

In our recent Potawatomie Tribe, (Docket 15-P, et al.) decision, supra, we also thoroughly discussed Dr. Chisholm's discount methods which included these very same factors. We concluded in Potawatomie that a discount for breaking and ploughing is as much a part of the comparability variable in the sales index as is the construction of a cabin and fence. We also concluded that size and some holding and preparatory costs must be considered in arriving at the fair market

price a hypothetical purchaser would anticipate and expect to offer and pay for large tracts of land comparable to those under study. 41 Ind. Cl. Comm. 399, 428-429. Accordingly, we will include these discount factors in arriving at our valuation conclusions in this opinion.

B. Defendant's Appraisal. The defendant has submitted the appraisal report and evaluation prepared by its expert Harry R. Fenton. Mr. Fenton was assisted by Everett Fenton who submitted in evidence a comprehensive historical and economic background report. Everett Fenton's report, which is covered in some detail in our finding No. 43, infra, is substantially the same as Dr. Chisholm's except for certain emphasis and some conclusions. Since these matters are adequately presented in our findings, we will concentrate here on Mr. Harry Fenton's valuation and appraisal.

Mr. Fenton's valuation report is first prefaced with an extended description of 31 counties, seven of which are in his comparable sales area. The remaining 24 counties are wholly or partially located within the boundaries of the subject study area. The emphasis of these county reports is on topography, soil classification, drainage, and only briefly on settlement. Our examination of these reports reveals a generally favorable view of the quality and fertility of the lands in most of the counties, especially those within the subject area. Several of the major counties appear to have been heavily forested around the period of

settlement. These include Cass, Fountain, Huntington, Jay, Kosciusko, La Porte, St. Joseph, and Whitely. The most serious problem noted by Mr. Fenton in practically all counties was drainage. He rated some counties such as Starke and Montgomery as very poor in drainage and others such as parts of Wabash and White, as reasonably poor or fair. In most of the areas, however, simple ditch drainage was used to solve that problem.

Mr. Fenton's valuation of the subject tract is based on a comprehensive analysis of 12 studies of land values in what Mr. Fenton describes as "comparable areas in contemporary years." These cover values for "small tracts" of land mostly in quarter sections. Each of the 12 study areas and the results of the sales analysis are fully described in finding No. 44(c), infra. The following is a summary of Mr. Fenton's conclusions in all the studies except for the land offices.

Study Area	1818	1827	1829	1832	1833
1. Land Offices - (Fenton's "Median Opinion")	$ 0.50	$ 0.50	$ 0.50	$ 0.50	$ 0.50
2. Indiana Sales (Private)	2.25	1.85	2.10	2.35	2.35
3. Michigan Sales (Private)	--	--	--	1.85	2.90
4. Illinois Sales (Private)	1.35	2.40	1.65	2.90	2.25
5. Illinois (Military Tract)	0.65	0.80	0.50	0.40	0.65
6. Speculators (Military Tract)	0.30	0.30	0.30	0.30	0.30
7. Mayher Sale (Military Tract)	--	0.45	0.45	0.45	0.45
8. Robinson Sale (Military Tract)	--	--	--	0.25	0.25
9. Iowa Sales (Private)	1.25	1.25	1.25	1.25	2.10
10. Missouri Sales (Private)	1.75	2.00	2.50	2.75	3.50
11. Wabash-Erie Canal Sales	--	1.25	1.25	1.25	1.25
12. Ill.-Mich. Canal Sales	--	1.25	1.25	1.25	1.25

Fenton then adjusted the average price indicated above to take into account the effect of improvements on these lands. Fenton considered improvements costs to consist of a cabin, breaking 20 acres, fencing, and miscellaneous costs such as sheds and wells. It was his view that the typical settler bought 160 acres for $2.50 an acre, or $400 total. Subtracted from that amount was a minimum estimate of $40 for the cost of breaking, $100 for a cabin, $100 for fencing, and $50 for miscellaneous expenses, for a total improvements cost of $290.00, or $1.80 per acre. This left $110.00, or a per acre value of 69¢ for the raw land.

In connection with the 12 sales studies, Mr. Fenton estimated the percentage of tracts which contained improvements. Thus, for example, in the case of the Indiana sales he estimated that there were improvements in 50 percent of the sales in 1818 and 75 percent thereafter. He then applied the estimated percentage for improvements ($1.80 per acre) to those study areas he believed would have had at least marginal improvements. These include only the private sales in Indiana, Michigan, Illinois, and Missouri (Items 2, 3, 4, and 10, supra). After deducting the improvement costs, where applicable, Mr. Fenton totalled the average per acre price for each study area and divided by the number of study areas containing sales to arrive at the following average values for the cession dates.

1818	1827	1829	1832	1833
$ 0.81	$ 0.86	$ 0.80	$ 0.90	$ 1.09

Finally, Mr. Fenton further refined the above indicated value of raw lands by a discount factor to arrive at a "wholesale" price that a hypothetical developer would require to motivate him to risk his money by the purchase of the entire tract. This discount factor Mr. Fenton lists under "cost of subdivision and development" of frontier lands. Basing his analysis on the slow rate of government public land sales and his belief that such land was over-priced at $1.25 per acre, Mr. Fenton first calculated a 20-year marketing period during which the developer would have to carry the property before selling it off. After considering an appropriate interest rate to determine the present worth of deferred sales, Mr. Fenton "guessed" at the probable price at which to offer the land to a prospective settler. In this regard, he stated the proposition as follows:

> Thus for the first five-year period he might establish a price below the government's price, and during the second five-year period he might well assume that he could compete with the government as his land became better known and more settled. During the last 10-years of his 20-year marketing period he might be able to get more than the government, though this might be wishful thinking. [Def. Ex. F-8, Vol. II, p. 141].

By this thinking Mr. Fenton surmised expected selling prices to be $1.00 per acre for the first 5 years, $1.25 for the next 5 years, and $2.00 per acre for the last 10 years. In calculating the present worth of the investment, he used interest factors of 6 percent, 10 percent, and 15 percent. At these rates, the present average value

of the deferred sales over 20 years was 81.8¢, 57.4¢, and 39.6¢ respectively. From these figures he deducted an additional 20 percent for worthless lands; $0.05 per acre for surveying; 10 percent for advertising and promotion; 10 percent for selling commissions; 10 percent for bad debts; and a small amount for taxes. Combining all these factors, Mr. Fenton concluded that the hypothetical developer puchasing all the lands would be willing to pay no more than 25 percent of the "retail" price of the lands. This amounts to a 75 percent discount. Thus, he concluded that the fair market value of the subject lands, which he further adjusted for differences in location, access, and productivity, was as follows:

1818	1827	1829	1832	1833
$ 0.20	$ 0.22	$ 0.20	$ 0.23	$ 0.27/acre

From the above figures, Mr. Fenton arrived at the following final estimated market value (rounded) for the subject tracts as of their date of cession. This table is digested from finding No. 46, infra:

Year	Sub-Tract	Acres	Price Per Acre	Total Market Value
1827	Miami Y-2	211,096.5	$0.22	$ 46,500.00
	Miami Y-3	287,933	0.22	63,375.00
	Miami Y-4	60,500	0.22	13,375.00
	Y-1	752,000	0.28	210,750.00
	*-1	234,000	0.18	42,250.00
1829	*-2	153,558	0.20	30,750.00
	*-3	853,000	0.20	170,750.00
	Potawatomi Y-4	60,500	0.21	12,750.00
1832	Potawatomi AB	90,738	0.23	20,875.00
	Potawatomi H	17,128	0.23	4,000.00
	*-4	1,821,376	0.19	346,250.00
	Potawatomi Y-2	211.096.5	0.23	48,625.00
1833	*-5	260,134	0.25	65,000.00
	Potawatomi Y-3	287,933	0.27	77,750.00
1818	Wea AB	90,738	0.20	18,250.00
		Total Value		$1,171,250.00

In analyzing Mr. Fenton's valuation we concentrated on the 12 land sales studies upon which the final valuation was based. As to the four studies from the Illinois Military tract lands, we found little similarity to the sales conditions existing in the subject area. The owner of bounty lands in the military tract often never saw the lands he possessed. Many of the purchases were made from veterans by eastern land speculators who had no intention of settling in Illinois. The record shows that these veterans sold their lands for a small fraction of what they were worth.

Even for those purchasers who planned to settle on the tracts purchased, the evidence revealed that there were frequent problems with squatters and poorly surveyed lands. Of even further significance was Mr. Fenton's use of the Mayher sale. It took place in 1820 yet Fenton used the 45¢ per acre consideration for four valuation years--1827, 1829, 1832, and 1833. There was no basis for the handling of this sale in that manner. The fact that these lands "may" have been in their virginal state 7 to 13 years later would not justify the application of an 1820 sale to such distant valuation years. Fenton presented no rationale for the inclusion of this study in the later valuation years. As to Mr. Fenton's use of Illinois Military Tract sales generally, in Potawatomie Tribe (Docket 15-P), supra, we rejected Mr. Fenton's similar reliance on such sales as not being representative of open market, arms-length transactions. Id. 432. We reject them here for the same reasons.

We also find the sales studies from Iowa, Missouri, and southern Illinois to be of little value. These areas were quite a distance away from the subject lands. The evidence presented did not convince us of any comparability between these areas and the subject area.

As to the reports of the land offices regarding unsold acreage within their districts, we again find difficulty with the use of this study. The land offices valued only their remaining unsold acreage by accepting the government price of $1.25 an acre as the maximum price of the very best lands remaining. Moreover, the reports were not based on sales data

but only estimates. We believe that these reports are of little probative value as to the actual value of the unsold lands. Additionally, by using the valuation of the unsold acreage, Mr. Fenton ignored the large amount of government land which was probably of better quality than the unsold lands and therefore of higher value.

Thus of the 12 studies only four appear to be helpful for valuation purposes. Two of the four are canal sales at the government minimum $1.25 per acre. The other two studies, private sales in Indiana and southern Michigan, appear to qualify as valid comparable sales. The sales in these areas indicated the highest per acre average--from $1.85 to $2.90. But accepting for the moment the use of all 12 studies, the method of calculation used by Fenton is of dubious value. Besides the Mayher sale already mentioned, some studies contained few sales while others contained literally hundreds of sales. Yet according to his calculations, each study was given equal weight without regard to the number of sales comprising each study.

Of further significance was the revelation developed during cross-examination of Fenton, that in gathering the Indiana sales, Mr. Keller "used his judgment as an appraiser to exclude certain sales which he found because . . . he thought that from the price they were either, must have been improved, or that there was something about them which made them atypical." Tr. III p. 153-154. From the remainder Fenton eliminated further "atypical" sales--both high and low. Yet, in using the Indiana sales study, he reduced the 1818 valuation by one-half and the other valuation years by three-fourths due to the estimated fraction which he deemed represented improvements.

Mr. Fenton, in effect, eliminated some sales because of the supposed existence of improvements and then he still discounted the remaining Indiana sales because of assumed improvements. There seems to be no justification for this practice, which, in effect, constitutes double discounting.

As noted above, in addition to a very substantial comparability adjustment for probable improvements in the resale data--ranging from 40 percent to 70 percent of the indicated market value--Mr. Fenton also discounted the net indicated market value by an additional 75 percent for general investment or holding costs to arrive at a "wholesale" price the hypothetical purchaser would expect to offer for the entire tract. We find both the comparability adjustment and the holding costs discounts excessive in the extreme. As to comparability, we have already noted above that Mr. Fenton appeared to use a double discount method. In addition, no rational basis was offered to support the high (40 to 70 percent) discounts. The Commission's experience in valuation cases indicate that small tract re-sales often involve the unimproved portions of a homestead and that, at most, 20 to 30 percent of transactions in any given sales index involve improved property.

With regard to holding costs or "wholesale" discounts listed above (profit expectation, promotion, commissions, etc.), we are not convinced that they have any relationship to the facts and circumstances of frontier sales in the area and period in question. In Potawatomie Tribe (Docket 15-P,) supra, we found that economic conditions and settlement patterns

were favorable between 1827-1832, and most indicators suggested a growing demand for lands in the subject area generally. From these facts, we concluded that a large discount for a long holding period was not justified. We believe that the same facts and conclusions are valid and applicable to this case. In equating holding costs with Mr. Fenton's wholesale discounts, and properly so, we are fully aware of the fact that any purchaser of a large tract must of necessity take into account the cost of holding land pending resale. See, Nez Perce Tribe of Indians v. United States, 176 Ct. Cl. 815 (1966). Any such discount factor above 25 percent would, in our view, be excessive in this case.

In summary, we find Mr. Fenton's methodology and conclusions unacceptable. Apart from the various reasons discussed above, we find that the combining of the 12 study areas, and giving them equal weight by averaging or dividing by 12 for all five valuation years, constitute the basic failure of his methods. The obtaining of a single average from 12 different conditions produces an artifical result in that all but two of the 12 factors are not a valid basis for comparison.

Commission's Valuation

In determining the per acre value of the respective tracts we centered our analysis on a portion of the sales data supplied by Dr. Chisholm. Certain preliminary adjustments in that data were required in our determinations. We first eliminated all tracts with less than 40 acres on the basis of our belief that sales under 40 acres were not representative

However, it should be noted that for some of the valuation dates the counties used for comparison differed. For the 1827 valuation dates, the only available sales were from Hamilton, Vermillion, Montgomery, and Fountain counties in Indiana and Vermillion county in Illinois. All five counties' sales were used in reaching our valuation for this date. For the 1829 valuation date, we considered sales from the counties used in the 1827 valuation and, in addition, sales from the counties of Huntington, Cass and Wabash.

For 1832 and 1833, however, there were enough counties with reported sales so that we were able to use the counties which were most proximate to the tracts to be valued. Royce Area 180, ceded by the Potawatomi in 1832, was situated in the western portion of the subject area whereas Royce Area 181, ceded by the Potawatomi in 1833, was located in the east-central part of the subject area. Hence, we attempted to use the sales from counties more proximate to the Royce areas. For the 1832 valuation dates the sales of the following counties were examined: in Indiana, Fountain, Cass, Montgomery, Vermillion, Elkhart, in Michigan, Berrien, in Illinois, Vermillion. For the 1833 valuation date county sales were taken from the Indiana counties of Wabash, Cass, Allen, La Grange, Elkhart, and Huntington.

After making the above changes, we calculated, from our selection of sales, both the average and mean per acre prices as of the respective valuation dates of the various subject tracts. The results were as follows:

Valuation Date	Average Price Per Acre	Mean Per Acre Sale
1827	$2.52	$2.32
1829	2.50	2.47
1832	2.55	2.66
1833	2.74	3.07

On the basis of our analysis of the sales data, and all the evidence of record, we conclude that lands in the areas comparable to the subject tracts were selling on the average, in the range of $2.45 to $2.85 per acre between 1827 and 1833.

With respect to comparability variables, the Commission believes that a significant number of sales from all four valuation periods involve sales of lands containing some form of improvements. The subject areas being valued contained little or no improvements. Hence, the indicated per acre "retail" values must be discounted.

In viewing the value-effect of improvements on the land, there are two major theories to be balanced in determining the amount to be discounted. One theory is that improvements should be viewed from the cost necessary to create them. The second theory is that improvements be viewed in relation to the enhancement in value they give the land.

Under the first theory it is difficult to gauge the cost of the improvements because the buyer may create the improvements himself or with the aid of neighbors, or he may pay others to perform the necessary work and supply the requisite materials.

Even though there is evidence that the first crop produced by a settler paid for most of the improvements, this is irrelevant in determining how much of a discount should be applied to the sales' price of lands containing some form of improvements. The fact that a seller, not having lands with improvements thereon and having to create his own, might be able to recover his costs of making his improvements through the first crop he produces does not shed much light on the value to a buyer and seller in having lands partially improved. A buyer purchasing improved lands would still generate profits from his first crop. Moreover, the Commission has found that at the time of the valuation dates, the highest and best use of the land was for subsistence farming. This does not connote any belief that planting for profit was in order at this time. We believe, therefore, that the cost to the buyer theory is not the most probative method for determining the cost increase due to improvements to the land.

It is our belief that the proper method for discounting the land is to consider the enhanced value the property acquires due to the existence of improvements. Under this theory, the cost the buyer saves by receiving improvements in his purchase does affect the enhancement of the selling price. Not having to make certain improvements is also an enhancement to the land value. Another enhancing factor is the ability of the buyer to perceive the condition of the improvements since the buyer might not have been able to make as fine an improvement as did the seller.

We determined from the evidence and through our informed judgment that $2.25 per acre was a fair estimate of this enhanced value. However, since not all the sales involved improved lands, only a portion of the $2.25 is applicable. We believe that the proportion of improved lands to unimproved lands in this case is 1:5. Hence we deducted 45¢ from the per acre retail value applied to each valuation date as follows:

Valuation Date	Sales Index Per Acre Value	Per Acre Value with Improvements Deducted
1827	$2.45	$2.00
1829	2.50	2.05
1832	2.60	2.15
1833	2.85	2.40

Commission
Commission's Valuation of Each Subject Tract

In reaching the final value for the individual tracts comprising the subject area, the representative resale data prices for each period were initially applied to each tract. However, certain factors required that we further discount the applied resale data.

The lands in the resale data had been opened for settlement several years prior to the valuation dates of the subject tracts. The effect of this was that the demand for the subject lands was probably less than for the lands in the resale data. Hence, the prices would tend to be lower. Other factors considered include accessibility., remoteness, and the proportion of land requiring extensive drainage or being otherwise difficult to cultivate. All of these factors are analyzed in the Commission's discussion of the value of each tract which follows below.

A final separate factor considered was the size discount. See e.g., Creek Nation v. United States, Docket 272, 40 Ind. Cl. Comm. 175 (1977). This discount was based primarily on the recognized concept that a purchaser buying a large parcel of land would expect to pay less per acre than a purchaser only buying 80, 160 or 320 acres. The size discount also includes prospective expenses a purchaser of a large tract would perculiarly encounter. These expenses consist, inter alia, of the surveying and subdividing of the parcel and the holding of the land until sold. See Nez Perce Tribe, supra.

1. Tract Y-1, (752,000 acres).
   Miami: 70% interest valued Feb. 7, 1827
   Potawatomi: 30% interested valued Feb. 7, 1827

Tract Y-1 covers all of Royce Area 132. This long, narrow tract extended along the northern side of the upper Wabash and Maumee rivers from the Tippecanoe River to the Ohio State line. It possessed excellent accessibility with a substantial amount of river front acreage, a factir more characteristic of this land than other tracts in the subject area.

The eastern part of the tract approaching Fort Wayne contained the portage area that connected the Wabash River with the Maumee River and the water route to Lake Erie. The tract did not include Fort Wayne itself but was within a short distance of the town.

In comparison with the land in the resale data Tract Y-1 was somewhat less attractive in terms of fertility. A modest percentage of its lands in the river valleys were rough lands. In addition, approximately 10 percent of the tract needed substantial drainage. Considering

these minus factors along with the tract's superior accessibility to the Wabash and other important water routes and its proximity to Fort Wayne, we find that a 15 percent discount is appropriate.

In addition, a further 15 percent size discount is considered appropriate in reaching the fair market value of Tract Y-1. Applying the 30 percent combined discount, the fair market value of this tract in 1827 was $1,052,800 or about $1.40 per acre. Calculating each tribe's respective interest in the tract, the Miami share was $736,960, and the Potawatomi share was $315,840.

2. Tract Y-2 (422,193 acres).
Miami: 50% interest valued on Jan. 24, 1827
Potawatomi: 50% interest valued on Oct. 26, 1832

Tract Y-2 is in the southeast quarter of Royce Area 180. The counties of Pulaski and Fulton include most of the area. The tract's eastern boundary was formed by the Michigan Road. However, as of the 1827 valuation date its proposed route had little effect on the value of the land. By the 1832 valuation date, the road's construction had begun and, though not fully completed, the road had a small but positive effect upon the values of land adjacent to the road or within a short distance of it.

The primary means of access in the tract, other than by land, was via the Tippecanoe River which was navigable for small water craft. The Wabash River, which was the nearest major water transportation route, was several miles from the tract's southernmost boundary. The northern route to Lake Michigan was less reliable because of the Kankakee marshes slightly north of the tract.

In the earlier valuation period (1827), land in Tract Y-2 were less sought by settlers because of its very flat topography and extensive prairie, especially in the northern part of the tract. Accessibility was generally good for southern and eastern travel and not quite as good in the other directions. Approximately 20 percent of the area required extensive drainage on valuation dates. Considering these factors along with the tract's proximity to water travel and the Michigan Road (for 1832 valuation), we find that a 22 percent discount for the 1827 valuation date and a 20 percent discount for the 1832 valuation date is in order.

In addition a further 10 percent discount for size is included before reaching the final value of Tract Y-2. Applying the above discounts (32 percent in 1827 and 30 percent in 1832), the final fair market of this tract in 1827 was $574,182.48 or $1.36 per acre and in 1832 it was $633,289.50 or $1.50 per acre. As to each tribe respective interest, the Miami share was $287,091.24 and the Potawatomi share was $316,644.75.

3. Tract Y-3 (575,866 acres).
Miami: 50% interest valued on Jan. 24, 1827
Potawatomi: 50% interested valued on Jan. 21, 1833

Tract Y-3 embraced over two-thirds of Royce Area 181. Only the northern portion of the Royce Area was outside this tract. The main counties in the tract were Kosciusko and Fulton. The southern boundary of the tract followed the course of the Eel River. Its western boundary was formed by the Michigan Road. As discussed in Tract Y-2's valuation, the proposed route of the road did not play an important factor in the value of the land in 1827 but did play a positive factor in 1832 and 1833.

The primary means of access for this tract was overland either to or from the Wabash River which flowed several miles to the south of the tract. Portions of the Eel River were navigable by canoes and pirogues. Most travelers would have reached the tract by either coming from the east or the south. Travel or commerce from within the tract was to the south towards the Wabash River or east to Fort Wayne.

Tract Y-3 was very comparable to Tract Y-2 except for the northern parts of the tract where the lands were rolling to rough. Approximately 18 to 20 percent of the area required extensive drainage or was otherwise unfit for cultivation during the valuation dates. Considering all factors, positive and negative, for the two valuation dates, we find that a 22 percent discount for the 1827 valuation and a 19 percent discount for the 1833 valuation is in order.

In addition, a further 12 percent size discount is included before reaching the ultimate value for this tract. Applying the aforesaid discounts, the fair market value of Tract Y-3 in 1827 was $760,143.12 or $1.32 per acre and in 1833 it was $955,937.56 equivalent to $1.66 per acre. As to each tribe's respective interest, the Miami share was $380,071.56 and the Potawatomi share was $477,968.78.

4. Tract Y-4 (121,000 acres).
Miami: 50% interest valued on Jan. 24, 1827
Potawatomi: 50% interest valued on Jan. 7, 1829

Tract Y-4 comprised the southeast portion of Royce Area 146, and was second smallest tract within the subject area. It embraced parts of the counties of Whitley, Allen, and Noble. The Eel River was the only major watercourse traversing the tract. However, the Wabash River,

the St. Joseph River, and the Maumee River were within a short distance of the tract. Fort Wayne which was no more than a few miles from the tract had been settled prior to the valuation dates.

During the period of settlement, this tract consisted of small prairies situated between numerous groves and was largely forested. Proximity to the Wabash River, the St. Joseph River, and the Maumee River minimized the effect of the tract's lack of navigable water routes. Tract Y-4 appeared to be equal to or somewhat better than Tracts Y-2 and Y-3.

Approximately 15 percent to 20 percent of the tract required drainage or was otherwise unfit for cultivation. Considering all relevant factors the Commission finds that a 20 percent discount is appropriate on both valuation dates which are too proximate to warrant a lower discount in 1829. In addition, another 8 percent discount for size is included in reaching our final valuation.

Accordingly, the Commission concludes that the fair market value of Tract Y-4 as of the 1827 valuation was $174,240.00 or $1.44 per acre and for the 1829 valuation it was $179,080.00 or $1.48 per acre. As to each tribes respective interest, the Miami share was $87,120.00 and the Potawatomi share was $89,540.00.

5. Tract *-1 (234,000 acres).
Potawatomi: 100% interest valued on Feb. 7, 1827

Tract *-1 covered all of Royce Area 133. It contained portions of the counties of St. Joseph, La Porte, and Porter. Its western boundary fronted on Lake Michigan and the northern boundary was on the border

between Indiana and Michigan. The tract was adjacent to the St. Joseph River of Lake Michigan. Hence, accessibility to and from the area was good. As of the valuation date, the tract was not in the direct path of settlers coming to Indiana over land. However, the tract's location adjacent to the St. Joseph River and Lake Michigan would have made the land attractive to a prospective purchaser. Approximately 10 percent of the land required extensive drainage or was otherwise unfit for cultivation. About 70 percent of the tract was forested. Considering all relevant factors, the Commission believes a 15 percent discount to be indicative of the effect of the various factors on the price of the land. In addition, a 10 percent discount for the size of the tract is included.

Considering these discounts, the 1827 final fair market value of Tract *-1 was $351,000 or $1.50 per acre. The Potawatomi share was 100 percent of this amount.

6. Tract *-2 (153,558 acres).
Potawatomi: 100% interest valued on Jan. 7, 1829

Tract *-2 comprised all of Royce Area 145 and was located in the southwestern corner of Michigan. The tract contained a large portion of Berrien County. Its southern boundary was formed by the Indiana State line. The western border was Lake Michigan, and the northeastern boundary was formed by the St. Joseph River.

The site of the town of St. Joseph, at the mouth of the river with the same name, had been familiar to explorers and settlers for many years. Within the area of Berrien County, settlers had come as early as 1823 even though the county's lands were not officially opened until 1829. The Indian trail that became the Detroit Road in 1833 crossed the tract.

Though the land was some distance from the usual paths of settlement farther south, its remoteness by 1829 was not, by comparison, as much a minus factor as was the remoteness of Tract *-1 in 1827. Its accessibility to Lake Michigan, the St. Joseph River, and the trails traversing the tract would have been a strong incentive to a prospective purchaser. Nearby Chicago (Ft. Dearborn) would have had minimal influence on the area at this time.

Portions of the land adjacent to the St. Joseph River were marshy and generally uninhabitable. About 10 percent of the land required drainage. By comparison with Indiana lands, this tract was more rolling, eroded, and more wooded. In reviewing all pertinent factors, the Commission finds that a 15 percent discount is reasonable in relation to all these factors. Another 8 percent discount for the tract's size is warranted.

Accordingly, the final fair market value of this tract after discount was $242,621.64, as of its valuation date, or $1.58 per acre. The Potawatomi share is 100 percent of this amount.

7. Tract *-3 (853,000 acres).
Potawatomi: 100% interest valued on Jan. 7, 1829

Tract *-3 covers about 85 percent of Royce Area 146. It contained portions of the counties of DeKalb, Noble, Steuben, La Grange, Elkhart, St. Joseph, and Allen. This parcel lies east of the Ohio state line. The southeastern border was formed by the course of the St. Joseph River of the Maumee. The Elkhart River and the Pigeon River also flowed through the tract. The southwestern portion of the tract was within a short distance of Fort Wayne and the Maumee River. The northwestern portion of the tract was located near the Kankakee River and the St. Joseph River of Lake Michigan. The small northwestern border was formed by the Michigan Road.

Access to the tract was generally overland from Lake Erie via the Maumee River or from the Wabash River. The land was more remote and isolated than most of the tracts under study. The land in the tract was of reasonably good quality and the area was generally forested with open meadows and boggy areas. Approximately 20 percent of the land required extensive drainage or was otherwise unfit for cultivation.

Taking into account all pertinent factors, the Commission finds that a 21 percent discount is applicable. Another 15 percent is deducted due to the size factor. Consequently, the final fair market value after discounts of the tract as of the valuation date was $1,117,430.00 or $1.31 per acre all of which is allocated to the Potawatomi who held a 100 percent interest in the tract.

8. Tract *-4 (1,821,376 acres).
Potawatomi: 100% interest valued on Oct. 26, 1832

Tract *-4 embraced nearly three-fourths of Royce Area 180. All or parts of Lake, Porter, Newton, Jasper, Starke, La Porte, St. Joseph, and Marshall counties were in the tract. The western boundary was formed by the Indiana-Illinois border. The extreme northwestern portion fronts on Lake Michigan. The northeastern border was formed by the Michigan Road which had been under construction for several years prior to the tract's valuation date. The Grand and Little Calumet rivers, the Iroquois River, and the Kankakee River flowed through the tract. Most of the Kankakee marshes situated in Indiana were found within this tract.

Access to Tract *-4 was mainly from the Wabash River in the south and overland from Lake Erie in the north. At the time of valuation some traffic moved along Lake Michigan.

A large part of the interior of the tract was fairly remote and access required the crossing of many marshes and swamps. The quality of cultivatible lands was inferior to the lands represented by the resale data. The northern portions of the tract contained relatively good land but was not highly in demand until several years later. Additionally, about 33 percent of the land required extensive drainage or was otherwise unfit for cultivation, especially in the Kankakee Valley. Considering all pertinent factors a discount of 30 percent is justifiable. In addition, a size discount of 20 percent is allocated to the tract which was over twice the size of the next largest tract in the subject area.

On the basis of the foregoing, the fair market value, of this tract as of its valuation date was $1,967,086.00 or $1.08 per acre. The Potawatomi share was 100 percent.

9. Tract *-5 (260,134 acres).
Potawatomi: 100% interest valued on Jan. 21, 1833

Tract *-5 is located in the northern portion of the Royce Area 181. Its western boundary was formed by the Michigan Road which was well under construction at the time of the tract's valuation. The northern and eastern borders were formed by the lines separating this tract from Royce Area 146. The tract embraced portions of Marshall, Kosciusko, and Noble counties.

There were no major rivers traversing the tract, and the closest water transportation was by way of the Wabash River, over 25 miles away. Consequently, this area was the most isolated of any within the subject area. Approximately 20 percent of the land required extensive drainage or was otherwise unfit for cultivation. Accordingly, the Commission finds that a 28 percent value discount is in order. Additionally, another 10 percent discount is included due to size.

The Commission finds that Tract *-5 had a fair market value at the time of its valuation of $384,998.32, or $1.48 per acre. The Potawatomi share was a 100 percent.

10. Tract H (51,384 acres).
Potawatomi: 33 1/3% interest valued on Oct. 26, 1832

Tract H was composed of the overlapping area of Royce Areas 180 and 110, located within a portion of present-day Benton County.

The western border is the boundary between Indiana and Illinois. The eastern border was formed along the course of Big Pine Creek. There were no major water routes crossing the tract although the north fork of the Vermillion River rose on the western portion of the tract.

Access at the time of the valuation was overland from the Wabash River or the Ohio River. The Wabash River was approximately 20 miles away. Marshy areas were found in the southwestern portion of the tract.

Approximately 20 percent of the area required extensive drainage or was otherwise unfit for cultivation. As of its valuation date, much of the tract was level prairie grasslands with some forested areas along the smaller creeks.

Considering all factors the Commission finds that a discount of 23 percent is appropriate. Additionally, a size discount of 5 percent is included. Accordingly, the fair market value of the tract after discount and as of its valuation date was $79,645.20, or $1.55 per acre. The Potawatomi possessed a one-third interest in the tract which results in their share totalling $26,548.40.

11. Tract AB (181,476 acres).
Potawatomi: 50% interest valued on Oct. 26, 1832

Tract AB comprised the south-central portion of Royce Area 180. Its east line adjoins the westerm boundary of Tract Y-2. The tract lies mostly in present-day Pulaski and White counties. The southeastern tip of the tract was adjacent to the Tippecanoe River which was navigable for canoes

and other small watercraft. It was this portion of the tract which was settled first. Early county histories (White County) described the area as fertile and healthful. The central and western portions were described as being very wet.

General accessibility to the tract, particularly the northern portions, was poor. The Wabash River was to the south of the tract, but more than 15 miles away. It could only be reached via the Tippecanoe River or by overland travel. In addition, approximately 25 percent of the land required extensive drainage or was otherwise unfit for cultivation. Considering all relevant factors, we find that a 23 percent discount on the 1832 valuation date to be equitable. Due to the size factor, the value is further reduced by 10 percent.

Accordingly, the fair market value of this tract after discounts and as of the 1832 valuation date was $261,325.44, or $1.44 per acre. The Potawatomi possessed a 50 percent interest in the land making their share equal to $130,662.70.

12. Tract AB (181,476 acres).
Wea: 50% interest valued on Oct. 2, 1818

At the time of this valuation, government land was selling in tracts of 160 acres or more for $2 an acre. Though the Panic of 1819 would severely depress the sale of lands and increase the amount of forfeiture for previously bought land, the year 1818 was a very good year for the sale of land, which were bringing high prices.

For the 1818 valuation of the Wea's interest in Tract AB, the most comparable sales were from counties in Illinois, primarily Randolph, Madison, Monroe, and St. Clair. As with the other valuation dates, sales from the previous 3 years were taken as well as during the year of the valuation. All sales below 40 acres were excluded for the reasons discussed earlier. A total of 50,310.50 acres were sold for $149,640.61, at an average price per acre of $2.97. The mean price per acre was even higher. We find that $3 per acre fairly represents the average price paid for lands comparable to this tract in 1818.

As with the other valuations discussed herein, the lands comprising the resale data contained some improvements. Consequently, $.45 per acre was deducted for improvements as in the case of the other tracts. (See p.114 supra.) Deducting this comparability variable, we find that the net fair market value of comparable Illinois lands was $2.55 per acre.

In comparing the resale data of the four primary counties (St. Clair, Madison, Monroe, and Randolph) with lands in Tract AB, we have considered other significant factors which indicate a further discount is required in arriving at the fair market value of lands in Tract AB.

Although the comparable sales data area was farther away from settlement sources in the South and East, access to the sales data area was easier than was access to Tract AB. Due to their proximity to the

Mississippi River which all four counties bordered, settlers were more prone to settle there first. In addition, there were no established settlements within the vicinity of Tract AB in 1818.

The lands in the resale data area had been opened for sale and resale since 1803 whereas the lands in Tract AB were not opened for sale until some years later. This made the Illinois areas more desirable in 1818 since these lands had been fairly well settled by that time.

Finally, unlike the sales data counties, as much as 25 percent of Tract AB needed extensive drainage or was otherwise unfit for cultivation.

Considering the foregoing factors, the Commission concludes that a 40 percent value discount would place the resale data sales on a comparable level with Tract AB. In addition, a 10 percent discount is required for the size of the tract.

Thus, we conclude that the fair market value of Tract AB after discounts and as of 1818 was $232,289.28, or $1.28 per acre. The Wea possessed a one-half interest in the land equal to $116,144.00.

Summary of Commission Valuation

On the basis of all the evidence of record and the foregoing opinion, the Commission concludes that the fair market value of the subject lands and the value of the respective shares of the parties therein are as follows:

Tribe	Interest (%)	Tract	Acres	Per Acre Value	Total Value
Miami	70	Y-1	526,400	$1.40	$ 736,960.00
	50	Y-2	211.096.5	1.36	287,091.24
	50	Y-3	287,933	1.32	380,071.56
	50	Y-4	60,500	1.44	87,120.00
			Total Miami Share:		$1,491,242.80
Potawatomi					
	30	Y-1	225.600	$1.40	$ 315,840.00
	50	Y-2	211.096.5	1.50	316,644.75
	50	Y-3	287,933	1.66	477,968.78
	50	Y-4	60,500	1.48	89,540.00
	100	*-1	234,000	1.50	351,000.00
	100	*-2	153,558	1.58	242,621.64
	100	*-3	853,000	1.31	1,117,430.00
	100	*-4	1,821,376	1.08	1,967,086.00
	100	*-5	260,134	1.48	384,998.32
	33 1/3	H	17,128	1.55	26,548.40
	50	AB	90,738	1.44	130,662.70
			Total Potawatomi Share:		$5,420,340.59
Wea	50	AB	90,738	1.28	$ 116,144.00
			Total Wea Share:		$ 116,144.00

*See, Table I, supra, p.77 for total acreage in each subtract.

Treaty Consideration

Payments made to or expended for the plaintiffs by the defendant in fulfilling its obligations under the several treaties for the cessions of the subject lands, are payments on the claim and, except

as otherwise provided by the Act of October 2, 1974 (88 Stat. 1499), are deductible from the quantum of the awards under our Act. See, Prairie Band of the Pottawatomie Tribe v. United States, Docket 15-C et al., 38 Ind. Cl. Comm. 128, 211 aff'd, 215 Ct. Cl. ____, 564 F.2d 38 (1977). The defendant asserts in this case that the following amounts were disbursed under the indicated treaties: 6/

1.	(Miami), Oct. 23, 1826, (7 Stat. 300):	$642,211.76
2.	(Pot.), Oct. 16, 1826, (7 Stat. 295):	282,510.78
3.	(Pot.), Sept. 20, 1828, (7 Stat. 317):	386,158.54
4.	(Pot.), Oct. 26, 1832, (7 Stat. 394):	659,901.88
5.	(Pot.), Oct. 27, 1832, (7 Stat. 399):	370,073.87 7/

With the exception of the Wea Tribe (Docket 314-B), the consideration paid according to defendant's calculations is far in excess of the fair market value of the lands as calculated by the defendant. Thus, the defendant asserts that the Miami and Potawatomi are not entitled to any awards in this case. The plaintiffs, on the other hand, assert that the Miami received consideration totalling $240,966.58 and that the total Potawatomi consideration received was $689,089.00, and that such considerations are unconscionably low in relation to the market values they have arrived at, thus entitling them to awards representing the differences.

It is quite clear that the parties differ widely regarding the amounts of consideration paid. In view of the number of treaties under consideration

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6/ Under the Treaty of Oct. 2, 1818 (7 Stat. 186), the Wea received consideration of $98,949.16, according to the defendant. However, the defendant had previously received credit for this amount in 9 Ind. Cl. Comm. 274, and does not claim it here.

7/ These figures are from Def. Brief, Fdg. 36, p. 102.

and in order to avoid repetitive discussion of well established law, we will discuss briefly the conflicting legal positions taken by the parties. The issues are generally identical in each treaty, and our rulings will be applicable to all treaties discussed hereinafter.

Annuities

Of first importance is the manner in which the parties handle the various annuities, either limited or perpetual (permanent). The plaintiffs commuted both of these type of annuities, whereas the defendant regarded as consideration all payments made under either type of annuity.

As to the limited annuity, the decision in Pawnee Indian Tribe v. United States, 157 Ct. Cl. 134, 301 F.2d 667 (1962), cert. denied, 370 U.S. 918 (1962), governs the manner in which this Commission handles such annuities. In that case the court held that, for limited annuities, the United States was to receive full credit for all payments made pursuant to the annuity provisions. This decision was recently reaffirmed in Prairie Band of the Pottawatomie Tribe, supra.

Regarding the perpetual annuity, Pawnee held that the Commission was correct in allowing as consideration only that amount which if invested at 5 percent would yield the required amount for each year, supra at 140. The effect of that case was to credit the defendant with that amount which, had it been paid to the tribe, could have been invested by the tribe to yield the amount of the yearly payments required by the treaty.

However, additional problems arise in the parties' position as to annuities for education. Provisions of this kind, such as Article 6 in the Miami Treaty of October 23, 1826, was commonly phrased as follows: "The United States agree to appropriate, for the purposes of education, the annual sum of $2,000, as long as the Congress may think proper, to be expended as the President may direct."

The plaintiffs contend that such provisions were wholly illusory promises and did not constitute consideration. This is based on the plaintiffs' position that the clause regarding performance was optional on the part of the Government and thus does not constitute consideration or payments on the claim. The defendant, on the other hand, included all payments made under the education provision as payments on the claim.

When the Commission had Pawnee, supra, before it (8 Ind. Cl. Comm. 648 (1960)), it dealt with the issue of the crediting of discretionary payments as consideration. We held then and hold now that the conditional nature of such provisions does not mean that payments made under them by the defendant, acting in good faith, are not consideration or payments or the claim.

However, we find that since there was no stated duration placed on the education type annuities they will be treated as perpetual annuities. The fact that payments made under such annuity provisions continued for many years reflected the intention of Congress to regard the commitment as perpetual. Thus, educational annuity provisions phrased similarly to

the above will be computed for consideration purposes as perpetual annuities. Similarly treated are items (tobacco, iron, steel, pay of laborers, etc.) paid or supplied annually where the treaty provision under which they were given did not express or imply a limited duration. How these latter items are treated in this case is discussed in connection with the individual treaties.

Payments to Chiefs and Other Tribal Members

The parties disagree on the treatment of treaty provisions which call for the payment of money (not "goods"), either in lump sum payments or by annuities, to individual Indians. The plaintiffs assert that such payments are bribes and thus it would be unconscionable to allow the defendant credit for them. Moreover, the plaintiffs state that the payments benefited only the individuals and not the tribe. The plaintiffs further attempt to analogize this situation to an agent-principal relationship in order to justify the exclusion of such payments as consideration. The defendant regards all such payments as payments on the claim and includible in determining the value of the consideration paid under the respective treaties.

In resolving this issue, the Commission must first determine if the payments were in accordance with express provisions of the treaty. If so, all such payments are allowable as consideration under the treaty. In Prairie Band of the Pottawatomie Tribe, supra, the Commission was faced with this same issue, one that various plaintiffs have asserted often

since our decision in Quapaw Tribe v. United States, 1 Ind. Cl. Comm. 644 (1951). In Prairie Band, the Commission noted that "where the defendant has agreed to particular benefits for plaintiffs' chiefs and leaders or other named individuals as part of the consideration for the tribe under the Indian Claims Commission Act, and where they have been paid by the defendant as provided by treaty, they are subject to deduction as payments on the claim." This point was affirmed on appeal. Accordingly, in the present case such payments are allowable as consideration.

Payments of Tribal Debts

Regarding treaty provisions herein calling for the defendant's payments of the plaintiffs' tribal debts, the plaintiffs assert that to allow such payments as consideration would be against public policy. The defendant included as consideration all such payments made under these provisions.

The Commission regards as consideration all payments made pursuant to express treaty provisions. Any additional amount paid which are not clearly shown to be in fulfillment of treaty provisions are excluded. Regarding the inclusion of tribal debt payments, the Commission held in Prairie Band, supra, that where a tribe has ceded land and agreed that part of the consideration would be the defendant's payment of debts which the Indians agreed they owed, and the record did not show that the debts were the obligations of individual Indians, the payment of such debts were part of the treaty consideration or a payment on the claim under the Indian Claims Commission Act.

Payments Not Disclosed in Disbursement Schedules

In analyzing the various claims made by the defendant regarding consideration, we discovered certain items which were not included in the disbursement schedules of the G.A.O. reports. The plaintiffs excepted to the inclusion of these amounts as consideration.

The Commission has routinely held that the government's G.A.O. reports establish a prima facie case as to claimed treaty consideration and as to gratuitous offsets. In other words, if the disbursement schedules lists a particular item then the defendant has satisfied its initial burden of showing that such payments were actually made. However, the Commission has expressly limited this effect to those items covered in the disbursement schedules. In Minnesota Chippewa Tribe v. United States, 32 Ind. Cl. Comm. 192, 194 (1973), this Commission held that "introduction of the . . . disbursement schedules, which is uncontroverted by other evidence, constitutes prima facie proof that treaty consideration was properly paid by defendant." [Emphasis supplied]

If the payment covered in the disbursement schedule was expressly authorized in the treaty and the plaintiffs have not satisfactorily controverted such evidence of payment, then the item will be allowed as consideration. Conversely, if the item shown in the schedule to have been disbursed was not expressly provided for in the treaty, the defendant has the burden of proving that the payment was intended to be pursuant to the treaty. The burden becomes greater when the payments are made long

after the treaty's ratification and cover miscellaneous items not capable of being properly allocated to the terms of a particular treaty.

Finally, for those amounts claimed by defendant but not included in the disbursement schedules, the presumption is that no payments were made. The presumption can be overcome if the defendant presents evidence sufficient to satisfy us that not only were the payments made but, also that they were intended by both parties to be a part of the particular treaty consideration. 8/

Consideration in Subject Treaties 9/

A. Wea. Under the Treaty of October 2, 1818, the Wea received consideration of $98,949.16. The defendant has previously received credit for this amount in 9 Ind. Cl. Comm. 274 and does not, therefore, claim it in this case.

B. Miami Treaty of October 23, 1826. Under the Treaty of October 23, 1826 (7 Stat. 300), the Miami tribe received consideration totalling $232,095. This amount included, inter alia, a $7,700 permanent annuity 10/

8/ Items claimed herein by defendant which are not in fact, treaty consideration, or involve payments in excess of amounts stipulated by treaty, may be asserted by the defendant as gratuitous offsets if they fall within the provisions of the gratuitous payments clause of section 2 of our Act. Accordingly, any dissallowance of such items as consideration is made without prejudice to the defendant's reasserting the item as a gratuitous offset in any further proceedings herein.

9/ All calculations herein are based on defendant's disbursement schedules, Ex. C-1 thru C-7, inclusive.

10/ The treaty provided for a $25,000 permanent annuity but this amount was stated to include the annuities due the Miamis under preceding treaties. Those annuities already due them totaled $17,300. Hence, the amount newly applicable to the instant treaty was $7,700.

which had a capitalized value of $154,000; the payment of tribal debts ($7,723.47); 200 head of cattle ($1,800.85); 200 head of hogs ($531.75); houses built for designated persons ($5,096.00); and wagons and yokes of oxen furnished to several named individuals ($1,167.00). These amounts are allowable deductions as payments on the claim.

The treaty provisions also provided for various implied perpetual annuities. The allowable value of these annuities would normally be their capitalized value. However, in those cases where the total payments made were less than the capitalized value of the particular annuity, only the sum of the payments will be regarded as consideration. Thus, Article 6 of the treaty provides for the appropriation of $2,000 annually, as long as Congress may think proper, for the support of poor and infirm persons and for the education of the youth of the Miami tribe. Although capitalized value of a $2,000 perpetual annuity 11/ is $40,000, only $30,007.28 was actually paid in fulfillment of this obligation. Since that amount was less than the $40,000 capitalized value, only the lesser amount is allowed as consideration or a payment on the claim.

Similarly treated are annuities for iron, steel, tobacco, and the pay of laborers covered in Article 4. Here, however, the monetary amount was not specified. Thus, the Commission endeavored to determine the annual

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11/ As noted earlier, the limitation, "as long as Congress may think proper" is only a requirement of good faith by the Congress and not an actual restricted annuity with a stated expiration period.

cost of each item. This determination was made by adding all amounts paid and dividing by the total number of years in which amounts were paid. After reaching the average annual cost, we applied 5 percent to arrive at the capitalized value of the annuity.

For iron, steel, and the payment of laborers, the total payments made were less than the capitalized value. Thus, the payments actually disbursed were regarded as consideration ($3,894.87, $4,509.77, and $5,200.00 respectively) and will be allowed as payments on the claim. As for tobacco, the total payments exceeded the capitalized value. Hence, only the capitalized value ($2,764.20) is allowed. Finally, the treaty provided for cash payments of $25,000 to be made in the years 1827 and 1828. The record reveals that only $7,700 was paid in each year and thus $15,400 is all that is allowed. See Def. Ex. C-3.

It should be noted that all payments made in "goods" are disallowed as payments on the claim although neither party suggested such disallowance. Public Law 93-494, 88 Stat. 1499 (1974) provides that expenditures for food, rations or provisions may not be deemed payments on the claim. See Prairie Band, supra. The defendant did not indicate which if any, "goods" disbursed were outside the Congressional mandate. Hence, all goods disbursed containing no further explanation are disallowed. Moreover, any alleged payments that are not revealed on the G.A.O. disbursement schedules are disallowed, defendant not having satisfied its burden of proving that the payments were actually made.

In addition, there are payments which are included in the disbursement schedule and are either not claimed by the defendant as consideration or are not satisfactorily shown to have been disbursed pursuant to a pertinent treaty. For example, there was no supporting evidence showing that payments made to John H. Griggs and Sash-O-Quash, pursuant to a later treaty or act, were intended as payment under this 1828 Miami treaty. The treaty provisions do not mention either of these two individuals or their families. Consequently, we dissallow the amount ($3,110.40) as consideration under this treaty.

Also disallowed are certain payments made after 1854 which were the result of an agreement between the plaintiffs and the defendant to commute all previous perpetual annuities. It has already been indicated in this opinion that the capitalized value of the $7,700 permanent annuity ($154,000) was allocable to this 1828 treaty. Regardless of how much more money than the capitalized value of <u>this</u> permanent annuity was received by the plaintiffs either as yearly payments or in a lump sum on commutation, the defendant is entitled to have credit for no more than the capitalized value. The defendant's claims in excess of the $154,000 commuted value of the $7,700 annuity are disallowed. In summary, the Commission concludes that allowable payments on the claim made pursuant to the Treaty of October 23, 1826, total $232,095.00. The balance of the $642,211.76 claimed by the defendant is disallowed.

C. Potawatomi Treaty of October 16, 1826. Under the treaty of October 16, 1826 (7 Stat. 297), the Potawatomi received consideration of $107,187.00. This amount included a $2,000 annuity for 22 years ($44,000), payments of claims existing against the tribe on the date of the treaty, ($9,573), money for the building of mills ($1,450), for the building of a blacksmith's shop and house ($199), and money for the building of a miller's house ($100). The remaining payments on the claim were various permanent annuities. However, the Article 3 provision to "provide and support a miller," though an implied perpetual promise, should not be capitalized. The payments for this purpose were made for only a short period of time which was less than the 20-year period upon which a permanent annuity would ordinarily be capitalized. Thus, the defendants are entitled to credit for the total payments disbursed for support of the miller ($2,140).

The treaty also provided for a $2,000 permanent annuity for education ($40,000) and a permanent annuity for the support of blacksmiths ($9,725) under Article 3. The blacksmith support annuity was determined by first totalling the payments made in each year and dividing that sum by the number of years in which payments were made. The quotient represented the yearly cost of the support. That amount was then calculated at 5 percent interest rate to determine the capitalized value of the blacksmith support annuity. Both of these amounts are allowable as payments on the claim.

We have disallowed as payments on the claim all disbursements made pursuant to Article 4 under the category of "goods" and all disbursements made for salt under Article 3. Though both of these items were a part of the treaty consideration they come within the prohibitions of Public Law 93-494, supra. The defendant did not indicate whether the "goods" disbursed were or were not covered by the exclusionary provision.

Disbursements not called for by the treaty or covered in the capitalization effect of the permanent annuities (e.g. "cash in lieu of" disbursements) are also disallowed. These include disbursements for agricultural implements and equipment, burial of Indians, medical attention, pay of clerks and assistants, pay of laborers, and attorney's fees.

In summary, the Commission concludes that properly allowable payments on the claim made pursuant to the Treaty of October 16, 1826, total $107,187.00. The balance of the $282,510.78 claimed by the defendant is dissallowed for the foregoing reasons.

D. Potawatomi Treaty of September 20, 1828. Under the Treaty of September 20, 1828, (7 Stat. 317), the Potawatomi received consideration of $118,642.00 which amount is deductible as payment on the claim. This consideration includes the capitalized value of a $2,000 permanent annuity ($40,000), the capitalized value of a $1,000 permanent annuity for educational purposes ($20,000), the capitalized value of a permanent annuity of tobacco, iron, and steel ($7,000), and the capitalized value of

the annual support of a blacksmith in perpetuity ($10,107.60).[12/] Also included are a 20-year annuity of $1,000 ($20,000) (Article 2) payments of claims against the Indians ($10,795) (Article 4), expenditures for purchase of domestic animals, the clearing of land, and the erecting of houses, ($7,086.91) (Article 2), and the payment of laborers for 4 months of the year for 10 years ($3,652.89) (Article 2).

Disallowed as payments on the claim are those disbursements not specifically authorized by the treaty and any disbursemtns for "goods" that fall within the "food, rations, or provisions" restrictions of Public Law 93-494, supra. Also disallowed are any disbursements made "in lieu of" those permanent annuities already capitalized. The rationale for this exclusion is that any amount later paid in lieu of a certain annuity requirement is included as part of the capitalized value of the permanent annuity.

In summary, the Commission concludes that payments on the claim made pursuant to the Treaty of September 20, 1828, total $118,642.00. The balance of the $386,158.54 claimed by defendant is dissallowed.

E. Potawatomi Treaty of October 26, 1832. Pursuant to the provisions of the treaty of October 26, 1832, the Potawatomi received consideration

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12/ These two figures were determined by first adding the amounts disbursed under these headings and dividing by the number of years covered by the payments. The figure equalled the yearly cost. To determine the capitalized value of an annuity of this amount, we then divided by 5 percent to obtain the amount that must be reserved in order to produce at 5 percent interest the cost of each yearly disbursement.

and payments on the claim in the amount of $453,698 for which defendant is entitled to credit. This amount consists of $391,316 paid under a provision for a $20,000 annuity for a term of 20 years, and $62,382 paid for debts owed by the Potawatomi.

We have disallowed amounts paid in goods ($128,857). This expenditure is dissallowed under Public Law 93-494, supra, which provides that disbursements for "food, rations, and provisions" are not to be regarded as payments on the claim.

Certain disbursements are disallowed because they were not made pursuant to any treaty provisions herein. This includes amounts reported by defendant to have been expended for work and for stock animals ($4,955), for the payment of debts of Indians ($20,683), and payments allegedly made under a series of acts encompassing the years 1866, 1849, 1913, 1916-1920 and 1928, ($51,708), but unrelated to the treaty in suit. The disbursements schedule does not show any of these latter payments.

In summary, the Commission concludes that allowable payments on the claim made pursuant to the Treaty of October 26, 1832, total $453,698.00. The balance of the $659,901.88 claimed by defendant is dissallowed.

F. Potawatomi Treaty of October 27, 1832. Pursuant to the Treaty of October 27, 1832, the plaintiffs received consideration and payments on the claim totalling $242,998 for which defendant is entitled to credit. This amount consisted of the payments made under Article IV on a $15,000 annuity for a specified term of 12 years ($179,577), the payment of the

plaintiffs' debts ($20,721), the commuted value of a $2,000 permanent annuity for educational purposes ($40,000), and money paid for the purchases of horses ($2,700).

The treaty provided for the purchase of $32,000 in goods soon after the signing of the treaty, and for an additional $10,000 in goods to be delivered the next Spring. All amounts claimed for the purchase of goods are disallowed in view of the provisions of Public Law 93-494, supra, for reasons heretofore stated.

In addition, we have disallowed an 1892 disbursement for attorney fees ($2,568.80). This expenditure was not shown to have been required by any provision in the treaty and could not be considered a payment on the claim. Other claimed payments not appearing on the disbursement schedule are disallowed including payments alleged to have been made under a series of laws encompassing the years 1866, 1894, 1913, 1916-1920, and 1928 ($18,846.90).

In summary, the Commission concludes that payments on the claim made pursuant to the Treaty of October 27, 1832, total $242,998.00. The balance of the $370,073.87 claimed by the defendant is dissallowed for the reasons stated above.

G. Summary all Treaties. In summary, the Commission has determined that the following amounts, exclusive of payments for food, rations, and provisions, were paid by the United States to the plaintiffs pursuant to the provisions of the treaties indicated, and that these amounts are to be deducted as payments on the claim under section 2 of our Act.

1.	Miami, Treaty of October 23, 1826:	$232,095.00
	Total Miami	$232,095.00
2.	Potawatomi, Treaty of October 12, 1826:	$107,187.00
	Treaty of September 20, 1828:	118,642.00
	Treaty of October 26, 1832:	453,698.00
	Treaty of October 27, 1832:	242,998.00
	Total Potawatomi	$922,525.00

The Commission has further found that the following amounts, promised and disbursed by the United States to fulfill obligations under the indicated treaties are not payments on the claim by reason of the Act of October 27, 1974, supra, which amended section 2 of our Act precluding the deductions of amounts spent for food, rations, or provisions:

Treaty	Treaty Promise	Actually Disbursed
October 23, 1826	$ 72,300.00	$ 86,462.84
October 16, 1826	31,447.71	31,447.51
September 20, 1828	47,500.00	45,882.02
October 26, 1832	130,000.00	128,856.60
October 27, 1832	42,000.00	39,250.64

As calculated above, the aggregate value of the consideration paid under all of the treaties herein, excluding payments for food, rations, and provisions was $232,095.00 in the case of the Miami and $922,525.00 in the case of the Potawatomi. Whether or not those sums which the defendant disbursed for food, rations, and provisions, totalling $86,462.84 for the Miami, and $245,436.77 for the Potawatomi are to be added to the foregoing consideration payments in measuring the conscionability of the consideration paid need not be decided here. In either event, the

total of both payments in each treaty is substantially less than the fair market values of the ceded lands. To clarify these results we have included both payments in the following conclusions.

Conclusion

1. In the case of the Miami, the value of the consideration which the United States paid under the Treaty of October 23, 1826, for the cession by the Miami of their interest in Royce Areas 132, 146, 180, and 181, was $232,095.00. In addition, the defendant disbursed $86,462.84 for food, rations, and provisions, or a combined total of $318,557.84. Considering the defendant's payment of these amounts for interests in land which had a fair market value of $1,491,242.80 on the valuation dates, we find that the amounts paid to the Miami for the cessions herein were so grossly inadequate as to render the consideration unconscionable.

2. In the case of the Potawatomi, the value of the consideration which the United States paid;

(a) under the Treaty of October 16, 1826, for the cession by the Potawatomi of their interest in Royce Areas 132 and 133 was $107,187.00. In addition, the defendant disbursed $31,447.51 for food, rations, and provisions, or a combined total of $138,634.71. Defendant's payment of these amounts for lands having a fair market value of $666,840.00 on the respective valuation dates, was so grossly inadequate as to render the consideration unconscionable;

(b) under the Treaty of September 20, 1828, for the cession by the Potawatomi of their interest in Royce Areas 145 and 146 was $118,642.00. In addition, the defendant disbursed $45,882.02 for food, rations, and provisions, or a combined total of $164,524.02. Defendant's payment of these amounts for lands having a fair market value of $1,449,591.64 on the respective valuation dates, was so grossly inadequate as to render the consideration unconscionable;

(c) under the Treaty of October 26, 1832, for the cession by the Potawatomi of their interest in Royce Area 180 was $453,698.00. In addition, the defendant disbursed $128,856.60 for food, rations, and provisions, or a combined total of $582,554.60. Defendant's payment of these amounts for lands having a fair market value of $2,440,941.85 on the respective valuation dates, was so grossly inadequate as to render the consideration unconscionable;

(d) under the Treaty of October 27, 1832, for the cession by the Potawatomi of their interest in Royce Area 181 was $242,998.00. In addition, the defendant disbursed $39,250.64 for food, rations, and provisions, or a combined total of $282,248.64. Defendant's payment of these amounts for lands having a fair market value of $862,967.10 on the respective valuation dates was so grossly inadequate as to render the consideration unconscionable.

3. In the case of the Wea, the United States makes no claims for consideration under the Wea cession of lands having a fair market value of $116,144.00.

Accordingly, the Commission concludes on the basis of this opinion, the findings of fact entered herein, and all the evidence of record that the Miami, Potawatomi, and Wea plaintiffs are entitled, under the provisions of Clause 3, Section 2 of the Indian Claims Commission Act, to recover from the defendant the following net awards, less any gratuitous offsets which may subsequently be allowed:

Treaty	Market Values	Consideration	Net Awards
Miami:			
Oct. 23, 1826	$1,491,242.80	($232,095.00)	$1,259,147.80
		Total Miami:	$1,259,147.80
Potawatomi:			
Oct. 16, 1826	666,840.00	($107,187.00)	$ 559,653.00
Sep. 20, 1828	1,449,591.64	($118,642.00)	1,330,949.64
Oct. 26, 1832	2,440,941.85	($453,698.00)	1,987,243.85
Oct. 27, 1832	862,967.10	($242,998.00)	619,969.10
		Total Potawatomi:	$4,497,815.59
Wea:			
Oct. 2, 1818	$ 116,144.00	(-0-)	$ 116,144.00
		Total Wea:	$ 116,144.00

Margaret H. Pierce
Margaret H. Pierce, Commissioner

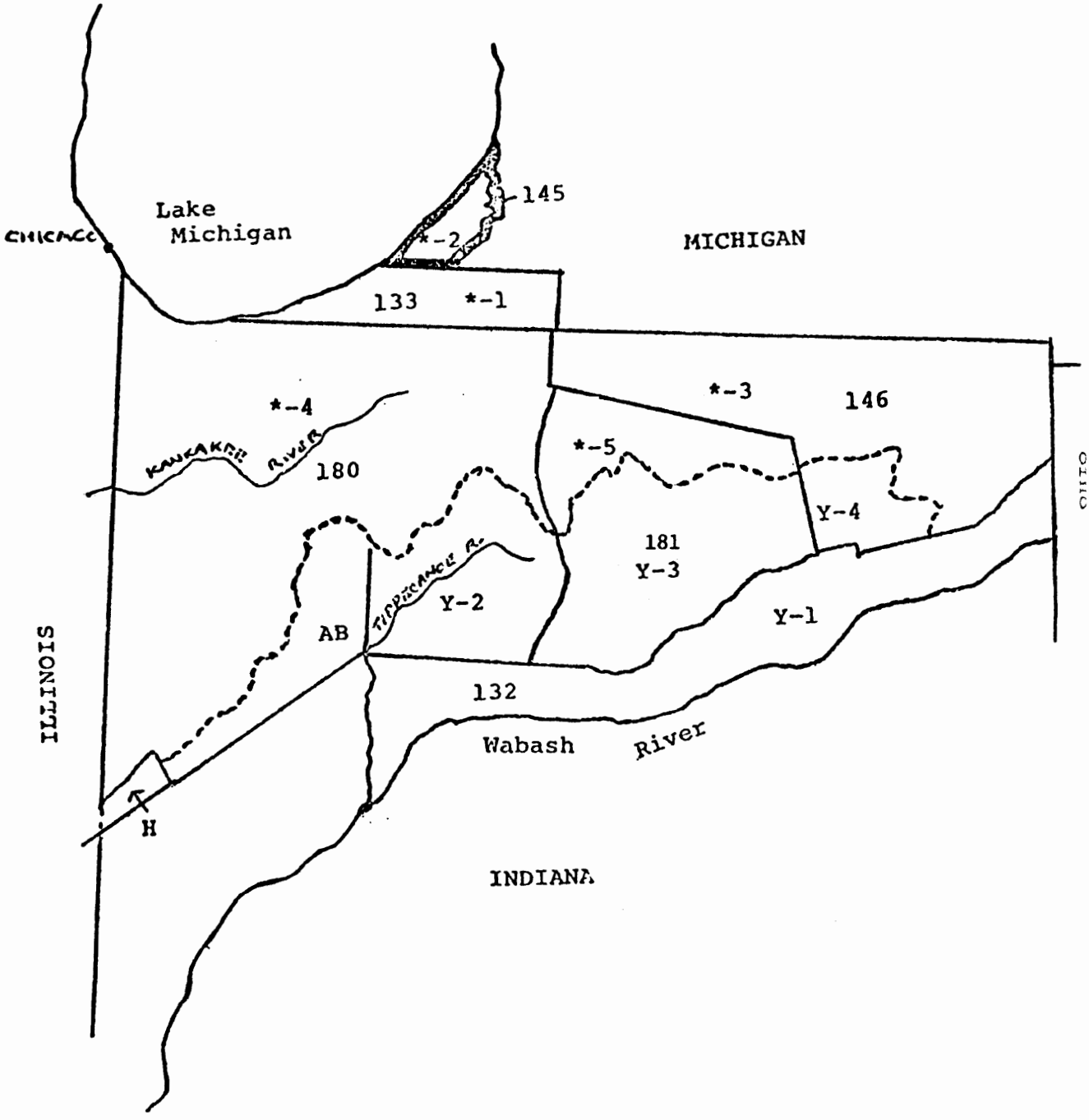
We concur:

Jerome K. Kuykendall
Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarborough
Richard W. Yarborough, Commissioner

Brantley Blue
Brantley Blue, Commissioner



APPENDIX I

(Adopted from Def. Ex. No. 11)