BEFORE THE INDIAN CLAIMS COMMISSION

THE POTTAWATOMIE TRIBE OF INDIANS, THE PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS, et al.,	)	Docket No. 15-E
HANNAHVILLE INDIAN COMMUNITY, et al.,	)	Docket No. 29-C
LAWRENCE ZANE, et al., ex rel. WYANDOT TRIBE, et al.,	)	Docket No. 120
IRA SYLVESTER GODFROY, et al., ex rel. THE MIAMI INDIAN TRIBE,	)	Docket No. 130
MIAMI TRIBE OF OKLAHOMA, et al.,	)	Docket No. 252
CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, et al.,	)	Docket No. 338
THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, et al.,	)	Docket No. 338
KICKAPOO TRIBE OF OKLAHOMA, THE KICKAPOO TRIBE OF KANSAS, et al.,	)	Docket No. 338
THE OTTAWA TRIBE OF OKLAHOMA, et al., as representatives of THE OTTAWA TRIBE,	)	Docket No. 338
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: September 29, 1978

Appearances:

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket No. 29-C.

Rodney J. Edwards, Attorney for Plaintiffs in Docket No. 120.

Allan Hull, Attorney for Ottawa and Kickapoo Plaintiffs in Docket No. 338.

Robert S. Johnson, Attorney for Plaintiffs in Docket No. 15-E.

Jack Joseph, Attorney for Potawatomi and Peoria (Wea and Kaskaskia) Plaintiffs in Docket No. 338.

Edwin A. Rothschild, Attorney for Plaintiffs in Docket No. 252.

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

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

In its title decision of August 9, 1973, 31 Ind. Cl. Comm. 89, the Commission determined that, as of August 3, 1795, the effective date of the Treaty of Greeneville, 7 Stat. 49, the tribes represented by the various plaintiffs in this consolidated proceeding each held aboriginal title to one or more of 15 separate enclaves in Ohio, Indiana, and Illinois, which enclaves were ceded to the United States under the Greeneville Treaty. The Commission also determined that two large tracts, located within Royce Area 11, Ohio, were aboriginally owned, as of August 3, 1795, by the Delaware and Shawnee Tribes, respectively. 31 Ind. Cl. Comm. at 216-17. The parties to those claims, however, entered into compromise settlements and final awards have been entered with respect to each of those claims. See 41 Ind. Cl. Comm. 158 (1977) (Delaware); 40 Ind. Cl. Comm. 173 (1977) (Shawnee).

The Court of Claims, at 207 Ct. Cl. 254 (1975), affirmed the Commission's title decision as to every issue save one. The court remanded for further findings the Commission's determination that the Peorias (on behalf of the Weas) were not entitled to compensation for the six-mile square enclave located at Ouatanon or Old Wea Towns on the Wabash River in Indiana because this enclave had, after the Greeneville Treaty, been retroceded to the Indians and later ceded to the United States again as part of a larger cession for which the Indians had sought compensation in other dockets before the Commission. See 207 Ct. Cl., at 277-79. The Supreme Court denied issuance of a writ of certiorari, 423 U. S. 1015 (1975).

Trial was held before the Commission on April 12 and 13, 1977, on the issues of value, consideration, and compensation for the Ouatanon enclave.

Before turning to matters relating to the valuation of the subject tracts, we will discuss the remanded issue concerning the Ouatanon enclave. Pursuant to the provisions of subsection 7 of Article 3 of the Greeneville Treaty, a tract of land described as "one piece six-miles square at the Ouatanon or Old Weea town on the Wabash river" was ceded to the United States. The defendant contends that the Weas are not entitled to recover an award for this cession because they have already been compensated for the cession of the enclave under the treaties of October 2, 1818 (7 Stat. 186) and October 6, 1818 (7 Stat. 189), and because they received in addition, supplementary compensation for the cession of all of their lands in Indiana pursuant to the Treaty of October 2, 1818 (7 Stat. 169).

We have set forth in finding No. 48, infra, the history of this enclave from its cession in 1795 through 1818. It is true, as defendant contends, that in 1809 the United States in a treaty with the Miami (7 Stat. 101) relinquished its right to the enclave to the Miami Indians. Although the Weas are not a party to this treaty, they gave their consent by signing the Treaty of October 26, 1809 (7 Stat. 116). It is also true that in the Treaty of October 2, 1818, supra, the Weas ceded to the United States all of their lands in Indiana. At the time of the latter treaty the Weas were no longer confederated with the Miami Indians.

In the decision on appeal of Dockets 13-G, et al., James Strong, et al. v. United States, 207 Ct. Cl. 254, 518 F. 2d 556 (1975), the Court of Claims remanded for further findings the issue of whether or not the Weas were entitled to an award for the cession in 1795 of the six-mile square enclave. It was noted that although the Commission had found the area was located within the aboriginal area of the Wea Nation in 1795 and had been ceded to the United States in 1795, we had concluded that the Weas were not entitled to recover for this enclave. The court stated that the Commission had made insufficient findings to show that the Weas were compensated for this land even in part through the recovery for Royce Area 99 in Docket 67, 9 Ind. Cl. Comm. 1 (1960). That portion of the six-mile square strip lying south of the Wabash River was included in Royce Area 99. The northern portion of the enclave was included in Royce Area 98 which area was involved in Docket 15-D, 42 Ind. Cl. Comm. 354 (1978) and in which case the awards were entered for Royce Area 98

among other areas involved. However, in the latter case there was no award to the Weas for any part of the enclave in question.

While it is true that the Weas recovered this enclave under the Treaty of 1809 and that they received an award for that part of the enclave which lies south of the Wabash River, that award was for recognized title to the enclave. As far as our records reveal, the Weas received nothing for the cession of the recognized title for the portion of the tract which lay north of the Wabash River in Royce Area 98. In the light of all the facts and on reconsideration of the law in this case, we conclude that it makes no difference whether the Weas received an award or compensation for their cession of the recognized title to the tract. It is clear they have never received more than they were paid under the Treaty of Greeneville for the cession of their Indian title in the enclave in 1795. Accordingly, they are entitled to an award for this cession if the amount they received was so far less than the fair market value of their lands in 1795 that the consideration was unconscionable.

The lands to be valued consist of 15 separate enclaves located in Ohio, Indiana, and Illinois. The total acreage of these 15 enclaves is 336,790. The enclaves, and the acreage and ownership of each are as follows:

	Enclave	Acreage	Title Holder
1.	Royce Area 16, Indiana [1/]	23,040	Miami - 2/3 Wea - 1/3 [2/]
2.	Royce Area 17, Indiana	2,560	Miami - 2/3 Wea - 1/3 [2/]
3.	Portage Road from Royce Area 16 to Royce Area 17, Indiana	2	Miami - 2/3 Wea - 1/3 [2/]
4.	Six miles square at Ouatanon or Old Wea Towns (unnumbered red line in west-central Indiana on Royce's map)	23,040	Miami - 2/3 Wea - 1/3 [2/]
5.	Royce Area 18, Ohio	92,160	Ottawa
6.	Royce Area 19, Ohio	17,280	Ottawa
7.	Royce Area 20, Ohio	2,560	Wyandot
8.	Six miles square at Ft. Sandusky (unnumbered dotted black line near Sandusky, Ohio, on Royce's map)	23,040	Wyandot
9.	Royce Area 24, Illinois	23,040	Potawatomi

1/ Numbered "Royce Areas" are from Charles C. Royce, Indian Land Cessions in the United States, 18th Annual Report of the Bureau of American Ethnology, Part 2 (1899).

2/ The Commission found in its decision (31 Ind. Cl. Comm. at 213) that the Weas were a part of the Miami Tribe during the 18th century. The Commission has previously found that the allocation of interests between the Miami and Wea with respect to land ceded before the separation of the Wea from the Miami in 1805 was 2/3 Miami and 1/3 Wea. Miami Tribe, et al., v. United States, Dkts. 253, et al., 22 Ind. Cl. Comm. 469 (1970). The parties agreed to this allocation of interests on a 2/3-1/3 basis at the trial, Tr. II, at 150. In this proceeding, the Weas are represented by the Peoria plaintiffs in Docket No. 338.

	Enclave	Acreage	Title Holder
10.	Portage Road from Royce Area 24 to Illinois River	8	Potawatomi
11.	Area west of the Illinois River at the Old Piorias fort and village 3/	7,360	Potawatomi
12.	Area east of the Illinois River at the Old Piorias fort and village 3/	15,680	Kickapoo
13.	Area west of the Illinois River at its mouth 4/	22,000	Potawatomi
14.	Area east of the Illinois River at its mouth 4/	85,000	Kickapoo
15.	Royce Area 27, Illinois	20	Kaskaskia

The valuation date is August 3, 1795, the effective date of the Treaty of Greeneville, 7 Stat. 49.

All of the subject tracts were located within the Northwest Territory, the orderly settlement and political organization of which were enunciated

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3/ These two areas together constitute a six-mile square tract identified on Royce's Map of Illinois 1 by a dotted black line on the Illinois River in north-central Illinois.

4/ These two areas together are identified on Royce's Map of Illinois 1 by a dotted black line at the confluence of the Illinois and Mississippi Rivers. The area identified by Royce exceeds the 12-mile square area described in clause (15) of the second paragraph of Article III of the Treaty of Greeneville, 7 Stat. at 50.

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

The subject enclaves were relatively small tracts of land located at important geographical locations throughout the Northwest Territory. Several of the enclaves in 1795 or earlier were the sites of British and American forts. Most had been the sites of Indian settlements long before the American Revolution.

All of the subject tracts were located on or very near navigable waters. All of the tracts consisted of predominantly level to undulating terrain. A few possessed steep bluffs or slopes. Another few contained some portions of low-lying marsh lands. As was common and natural in the case of lands bordering bodies of water, many of the low-lying areas of the tracts were subject to accumulation of water and the natural drainage was poor. All of the tracts were heavily forested.

Soil classifications vary, of course, in the 15 separate enclaves. Generally speaking, the soils can be classified as moderately to extremely fertile, subject, in almost every instance, to the necessity for artificial drainage.

All of the subject tracts lie within the temperate climate zone. Average temperatures in January are in the high 20's; in July, in the mid-70's. Average yearly precipitation varies from approximately 31 inches in the northern enclaves to slightly in excess of 45 inches in the southern enclaves. Frost free days range from a high of 196 at

Chicago to a low of 168 at Ouatanon (Lafayette, Indiana) and Royce Area 20 (Fremont, Ohio).

In 1795, all of the tracts were isolated enclaves within the surrounding Indian country. The only means of ingress and egress were the navigable rivers and lakes which bordered or were close by each of the enclaves.

Even before the end of the American Revolution, the states were debating and disputing among themselves the future of the Old Northwest. The difficulty centered around the fact that certain of the states claimed sovereignty, by virtue of their colonial charters, to lands west of the Ohio River. The disputes were resolved, and the Articles of Confederation adopted, after the Continental Congress passed resolutions recommending that all lands northwest of the Ohio River claimed by various states be ceded for the common benefit of the United States and be organized into separate states. Those states with claims did subsequently cede their claims to the United States.

Pursuant to the Land Ordinance of 1785, Congress provided that settlement would be only on surveyed parcels of land. The surveys were to be in the form of square townships, six miles square, with 36 one-mile square sections. Each section contained 640 acres. The purchase price of tracts was fixed at a minimum of $1 per acre at public auction with the purchaser to pay the cost of survey.

Under the Trade and Intercourse Act of 1790, 1 Stat. 137, and by virtue of the 1795 Treaty of Greeneville, the Indian Tribes of the

Northwest Territory were permitted to sell their lands only by treaty either to the United States or to third parties upon the approval of the United States.

The proceeds of land sales were a source of Federal revenue. Initially, Congress relied upon land speculators to purchase large tracts and subdivide and resell to settlers. Because of mismanagement, poor choice of land, and improper financing within the speculating land companies, this system collapsed in 1795 and the public turned against speculators. In 1796, Congress provided for direct sale of small tracts of 640 acres at $2 per acre minimum price.

In addition to Federal sales to speculators before 1796 of lands owned by the United States, the states of Pennsylvania and New York were also selling large tracts of state-owned lands to speculating land companies for resale after subdivision.

During the last decade of the 18th century, the economy of the United States expanded tremendously. Between the years 1789 and 1795 the gross national product more than doubled, from $158.4 million to $452.2 million. Agriculture was the primary economic activity, accounting for almost one-half of private production income during the 1790's. In such an agrarian economy, the nation's basic resource was land.

In 1791, Congress chartered the First Bank of the United States. The bank, during the 1790's, was able to stabilize what had previously been a near-chaotic banking and monetary situation. As a result, in the 13 states credit was becoming available.

In the Northwest Territory in 1795, however, the economy was still in a primitive stage. There were no banks, and specie or currency were in short supply. A barter economy prevailed.

In 1790 the population of the United States was 3,929,000, and in 1800 the population was 5,297,000. It has been estimated that the 1795 population was 4,607,000. Population of the United States was increasing at a rate slightly in excess of 3 percent per year.

The earliest population figures available for the Northwest Territory were compiled in 1800. In that year, the population of Ohio was 45,365; Indiana, 5,641; Illinois had no recorded population although it is known there were scattered settlers there. What population there was in Ohio and Indiana in 1795 was concentrated in the southern portions of those territories along the Ohio River which was the main (and almost exclusive) path of westward migration as of 1795. The areas of Ohio and Indiana north of a thin belt along the Ohio River, together with all of Illinois, were, for all practical purposes, devoid of any white population in 1795.

Experts for both parties developed valuation theories based essentially upon sales of what they considered to be comparable lands. Plaintiffs' expert, Dr. Roger K. Chisholm, developed two samples of what he considered to be comparable sales.

His first sample consisted of 31 sales occurring between 1790 and 1800 of small, strategically located lands which he believed to be comparable to those small and strategically located enclaves among the

15 subject tracts. Twenty-nine, or 93.5 percent, of the sales were of lands in Wayne County, Michigan, the location of Detroit. The remaining sales were of lands in St. Clair County, Illinois (on the Mississippi River opposite present-day St. Louis, Missouri), and Trumbull County, Ohio (in eastern Ohio, bordering Pennsylvania). In this sample, lands sold in parcels ranging from 0.01 to 5.55 acres. The average tract was 0.61 acres, and the median, 0.092 acres. Prices per acre ranged from a low of $10 to a high of $50,000. The most commonly observed price was $25,000 per acre, with three transactions, or 9.7 percent of the total, at this price. The median price of all the sales was $7,954.54. The weighted average was $1,211 per acre.

Dr. Chisholm's second sample consisted of 185 sales of tracts which he considered to be comparable to the larger and not especially strategically located of the subject enclaves. Of these sales, 117, or 56 percent, were of lands located in Wayne County, Michigan (Detroit), and 65, or 31.1 percent, of lands in Trumbull County, Ohio, which borders Pennsylvania in eastern Ohio. Lands in this sample sold in parcels ranging from 0.01 acres to 36,245.38 acres. The average tract was 636.9 acres, and the median tract, 161.6 acres. Prices per acre ranged from $.02 to $50,000. The median price per acre was $1.36.

Defendant's expert appraiser, Dr. Ernest G. Booth, concluded that the most accurate indication of retail market value, as of 1795, was the resales by speculative buyers selling wild lands without any development and without the increment of unearned surrounding settlement

values. Upon analysis of numerous such sales, Dr. Booth concluded that in the years preceding 1800, wild land in farm-sized acreage was freely available at retail at under $1 per acre in the Old Northwest within areas available for settlement.

Dr. Booth then analyzed each enclave under three approaches to fair market value. These approaches he termed "comparable sales," "developmental sales," and "income sales." First he determined what he considered to be the highest and best use for each enclave. Generally speaking, the larger enclaves he determined to be subsistence farming lands, while the smaller enclaves (and small portions of the larger enclaves) he determined to be potentially suitable for such uses as military forts, trading posts, townsites, and other specific uses. He anticipated a period of from 20 to 30 years for settlement or other utilization of the enclaves.

Under his comparable sales approach, Dr. Booth considered large acreage land transactions such as the Connecticut Land Company and Holland Land Company purchases in northwestern Pennsylvania and New York between 1792 and 1795 which included valid purchases and offering prices of $.26 to $.44 per acre. From this data he determined that $.40 per acre was indicative of market value for average quality lands in the Old Northwest in 1795. From this figure he took a large discount (usually 50 percent) to reflect isolation of the various enclaves. He also considered smaller sales and used a price of $2.07 per acre from which he discounted, in many cases up to 90 percent, for such factors

as lack of immediate saleability, lack of access, location, and quality.

Under his developmental sales approach he assumed the viewpoint of a hypothetical land developer. He generally postulated a potential resale price for the various enclaves at $2 to $2.30 per acre within a 20- to 30-year period. These assumptions resulted in wholesale-resale ratios of as high as 1 to 12.

Dr. Booth's income sales approach was based upon the investment a speculator might be willing to make in 1795 on lands which in 20 to 30 years he could resell. Under this method he postulates a 10 percent return on investment of various estimates of per acre value. In the case of three of the small enclaves he used only this method because he asserted that data were not available upon which to analyze value under his first two methods. These three enclaves were the portage at Fort Wayne, the portage at Chicago, and Ft. Massac (Royce Area 27, Illinois).

The following chart shows the valuations reached by each expert witness for each of the 15 enclaves:

	Enclave	Title Holder	Acreage	Plaintiffs		Defendant	
				Per Acre Value	Total Value	Per Acre Value	Total Value
1.	Royce Area 16, Indiana	Miami - 2/3 Wea - 1/3	23,040	$ 5.60	$129,024.00	$ 0.2387	$ 5,500
2.	Royce Area 17, Indiana	Miami - 2/3 Wea - 1/3	2,560	50.00	128,000.00	0.1953	500
3.	Portage Road from Royce Area 16 to Royce Area 17, Indiana	Miami - 2/3 Wea - 1/3	2	1,200.00	2,400.00	750.00	1,500
4.	Six miles square at Ouatanon or Old Wea Towns (unnumbered red line in west-central Indiana on Royce's map)	Miami - 2/3 Wea - 1/3	23,040	5.60	129,024.00	0.1953	4,500
5.	Royce Area 18, Ohio	Ottawa	92,160	1.40	129,024.00	0.217	20,000
6.	Royce Area 19, Ohio	Ottawa	17,280	9.80	169,344.00	0.2025	3,500
7.	Royce Area 20, Ohio	Wyandot	2,560	50.00	128,000.00	0.5859	1,500
8.	Six miles square at Ft. Sandusky (unnumbered dotted black line near Sandusky, Ohio, on Royce's map)	Wyandot	23,040	5.60	129,024.00	0.4123	9,500

	Enclave	Title Holder	Acreage	Plaintiffs Per Acre Value	Plaintiffs Total Value	Defendant Per Acre Value	Defendant Total Value
9.	Royce Area 24, Illinois	Potawatomi	23,040	$ 5.60	$129,024.00	$ 0.1736	$ 4,000
10.	Portage Road from Royce Area 24 to Illinois River	Potawatomi	8	1,200.00	9,600.00	125.00	1,000
11.	Area west of the Illinois River at the Old Piorias fort and village	Potawatomi	7,360	14.00	103,040.00	0.2038	1,500
12.	Area east of the Illinois River at the Old Piorias fort and village	Kickapoo	15,680	9.80	153,664.00	0.1275	2,000
13.	Area west of the Illinois River at its mouth	Potawatomi	22,000	8.40	184,800.00	0.1136	2,500
14.	Area east of the Illinois River at its mouth	Kickapoo	85,000	1.40	119,000.00	0.1882	16,000
15.	Royce Area 27, Illinois	Kaskaskia	20	1,200.00	24,000.00	150.00	3,000
	Total				$1,666,968.00		$76,500

Our analysis of value begins with our determination that the highest and best use for the lands of the subject enclaves in 1795 was for subsistence type farming. Certain of the enclaves (and portions of certain others)had potential as townsites or trading posts. Others had value because of their strategic geographical locations. We have enhanced the value of certain of the enclaves to reflect such attributes and potential uses of the various enclaves beyond the highest and best use as subsistence farming land which we have designated as applying to all.

We are unable to derive much assistance from the plaintiffs' expert's analyses of value. Dr. Chisholm's valuations are based on his two samples of resales. In the case of the small tracts, he adopted the weighted average of sales in his smaller sample which is $1,211 per acre. In the case of the larger tracts he had adopted the median price per acre ($1.36 rounded to $1.40) from his larger sample and applied a multiple. The smaller the tract the higher the multiple. We find no reasonable basis for applying such a theory based solely upon the size of the enclave. We find, however, a further and more fundamental flaw in his analysis. In Dr. Chisholm's smaller sample 93.5 percent of the sales were in Wayne County (Detroit), Michigan, as were 56 percent of the sales in his larger sample. In our title decision in this case, 31 Ind. Cl. Comm. at 196-98, we made findings showing that Detroit was a flourishing settlement in the late 18th century. By 1788, there were 4,000 white settlers in and around Detroit. The area for several miles around the military post of Detroit was farmland. Sales of lands around

Detroit cannot be considered comparable to hypothetical sale of the subject enclaves, all of which were wilderness lands with no existing settlement, other than scattered traders. We are, therefore, unable to find Dr. Chisholm's analyses of any probative value.

The analyses by defendant's expert we have found to be helpful to a greater degree than those of plaintiffs' expert but we are unable to adopt his valuation figures because they are low beyond the range of reasonable deduction. While initially placing emphasis on the facts that government frontier lands up until 1796 were available at $1 per acre and that resales of such frontier wilderness lands were freely available at retail at prices of slightly less than $1 per acre, Dr. Booth then, under his comparable sales approach, turns to those same large, speculative sales which he has relied upon, and we have rejected as bases for comparison, in recent decisions. Eg. James Strong v. United States, Dockets 13-E, et al., 42 Ind. Cl. Comm. 264, 276 (1978). Under his alternative approaches, he likewise ignores the predominant fact that wilderness lands in small tracts were selling for approximately $1 per acre, and develops instead theories of value which contemplate development far in the future, thus permitting him to justify applying excessive, large discounts from the assumed selling prices at that indefinite future time.

We have taken a much more straight-forward approach to the valuation of these 15 tracts. The evidence establishes that the prevailing price of relatively small frontier, wilderness tracts in 1795 was approximately

$1 per acre. These tracts, however, were nearer to established settlements, such as Vincennes, Indiana, than the subject enclaves which, as we have indicated earlier, were all isolated pieces of land in the heart of the then Indian country. We have begun with a base figure of $1 per acre based upon our earlier conclusion that, regardless of other potential uses, the highest and best use for all the subject enclaves in 1795 was as subsistence farmlands. From this base figure of $1 per acre we have deducted 10 percent to reflect the isolation of these tracts. We have then added or subtracted varying percentages for such positive factors as potential as townsites or trading posts and strategic value and such negative features as non-productive water-covered lands. We do not believe that the size of any of the tracts would, in and of itself, have affected what a hypothetical buyer and seller would have considered to be the value of the tract. Furthermore, potential as toll roads does not have a separate value. Northern Paiute Nation v. United States, Docket 87, 16 Ind. Cl. Comm. 215, 322 (1965), aff'd 183 Ct. Cl. 321 (1968). Finally, we have considered Commission valuations of surrounding lands (as of years reasonably close to our 1795 valuation date) as tending to confirm the values we have assigned to the various enclaves. In the special case of Fort Massac (Royce Area 27, Illinois) we have assigned a significantly higher per acre value to reflect the fact that a good portion of the 20 acre tract had been cleared, a garrisoned fort existed and the fort controlled access to the Mississippi River from the Ohio River.

Using the methods we have described above, we have determined the values of the 15 separate enclaves to be as follows:

	Enclave	Title Holder	Acreage	Per Acre Value	Total Value
1.	Royce Area 16, Indiana	Miami - 2/3 Wea - 1/3	23,040	$1.08	$24,883.20
2.	Royce Area 17, Indiana	Miami - 2/3 Wea - 1/3	2,560	1.08	2,764.80
3.	Portage Road from Royce Area 16 to Royce Area 17, Indiana	Miami - 2/3 Wea - 1/3	2	1.25	2.50
4.	Six miles square at Ouatanon or Old Wea Towns (unnumbered red line in west-central Indiana on Royce's map)	Miami - 2/3 Wea - 1/3	23,040	1.08	24,883.20
5.	Royce Area 18, Ohio	Ottawa	92,160	1.13	104,140.80
6.	Royce Area 19, Ohio	Ottawa	17,280	1.13	19,526.40
7.	Royce Area 20, Ohio	Wyandot	2,560	0.90	2,304.00
8.	Six miles square at Fort Sandusky (unnumbered dotted black line near Sandusky, Ohio, on Royce's map)	Wyandot	23,040	0.75	17,280.00
9.	Royce Area 24, Illinois	Potawatomi	23,040	1.17	26,956.80
10.	Portage Road from Royce Area 24 to Illinois River	Potawatomi	8	1.25	10.00
11.	Area west of the Illinois River at the Old Piorias fort and village	Potawatomi	7,460	1.08	7,948.80

	Enclave	Title Holder	Acreage	Per Acre Value	Total Value
12.	Area east of the Illinois River at the Old Piorias fort and village	Kickapoo	15,680	$1.08	$16,934.40
13.	Area west of the Illinois River at its mouth	Potawatomi	22,000	1.08	23,760.00
14.	Area east of the Illinois River at its mouth	Kickapoo	85,000	1.08	91,800.00
15.	Royce Area 27, Illinois	Kaskaskia	20	75.00	1,500.00
		Total			$364,694.90

As we have consistently held in the past, inflation and consequent devaluation of the dollar cannot be taken into account in our valuation. Eg. Saginaw Chippewa Tribe v. United States, Dockets 59, et al., 41 Ind. Cl. Comm. 327, 338 (1978).

Plaintiffs contend that the defendant is not entitled to credit for consideration against the award in this case, nor is defendant entitled to claim any amount as consideration in the determination of unconscionability.

Plaintiffs have several grounds on which they base the above argument, to none of which defendant makes any answer. Plaintiffs concede that Article 4 of the treaty provides that goods to the amount of $20,000 were to be delivered by the United States to the Indian signatories and that a perpetual annuity in specified amounts would be paid each tribe, having a total value yearly of $9,500. The Wyandots, the Delawares, the

Shawnees, the Miamis, the Ottawas, the Chippewas, and the Pottawatomies, were to receive $1,000 annuities each, and $500 annuities were to go to the Kickapoo, the Wea, the Eel River, the Piankashaw, and the Kaskaskia tribes. These perpetual annuities were to be delivered in the form of goods "suited to the circumstances of the Indians." It was also provided that if any of the tribes should thereafter at an annual delivery of their share of the goods, desire that part of the annuity be furnished in domestic animals, implements of husbandry, and other utensils convenient for them, and in compensation for "useful artificers" who might reside with or near them and be employed for their benefit, that could be done at subsequent annual deliveries.

Plaintiffs also concede that the Treaty of Greeneville was at least in part a treaty of cession but urge that it was designated rather to fill other objectives such as the acknowledgement of sovereignty of the United States over the Indians, the right of preemption in the United States to buy the Indians' land at a future time, or to approve the buyer, and first and foremost peace between the Indians and the United States. From this plaintiffs reason that there is no way of telling how much of the consideration was for the land cessions and how much for the other equally, if not more important, objects of the treaty. Plaintiffs also point out that the division of the consideration among the signatory tribes had no relation to the ownership of the land being ceded. That is, tribes ceding a great deal of land received the same consideration as tribes ceding a small amount of land. Plaintiffs see this as further

evidence that the payments were primarily related to the end of peace rather than as payment for land.

Turning first to plaintiffs' argument that the most important objective of the United States in negotiating the Treaty of Greeneville was peace and the acknowledgment of the sovereignty of the United States and the submission of the Indians to the protection of the United States rather than to procure a cession of land in the Northwest Territory, there are several things to be considered. We know of no instance prior to this treaty when the United States paid consideration to an Indian tribe in a peace treaty. In the Treaty of Fort Stanwix, October 22, 1784, 7 Stat. 15, the United States and the Senecas, Mohawks, Onondagas, and Cayugas agreed to peace and to a return of hostages and prisoners. Those four members of the Six Nations had, along with most of the Indians east of the Mississippi River, fought with the British during the Revolutionary War. In Article 4 of that treaty, goods were given to the Indians "in consideration of the present circumstances of the Six Nations, and in execution of the humane and liberal views of the United States upon the signing of the above Articles." Although the four formerly hostile tribes of the Six Nations were required to cede all their lands east of Niagara on Lake Ontario and to agree to a boundary line on the west, relinquishing all their claims to land west of that line and also to six square miles around Fort Oswego, there was clearly no payment for this relinquishment and cession in that treaty.

In the Wyandotte Treaty of January 21, 1785, the Wyandottes, Delawares, Chippewas, and Ottawas also made peace with the United States after having fought on the side of the British during the Revolutionary War, and they likewise agreed to boundaries and to the relinquishment of certain lands to the United States for its use. The post at Detroit and the post at Michilliamachinac were reserved to the United States. All the Indians received was a distribution of goods "in pursuance of the humane and liberal views of Congress, upon this treaty's being signed . . . to be distributed among the different tribes for their use and comfort."

On November 28, 1785, the United States entered into the Treaty of Hopewell with the Cherokee Indians, 7 Stat. 18. This was another peace treaty setting boundaries between lands allotted to the Cherokee Indians for their hunting grounds and land claimed by the United States. No goods or provisions were given to the Cherokees for such peace and friendship.

On January 3, 1786, 7 Stat. 21, the United States signed a peace treaty with the Choctaw Indians. This treaty, in addition to providing for the return of prisoners and hostages, set boundaries for the land which the United States was willing that the Choctaw Nation should control and reserved to itself certain areas for trading posts. No goods or presents were delivered in return for this treaty. On January 10, 1786, 7 Stat. 24, the United States entered into a similar treaty with the Chickasaw Nation and again paid nothing for the peace

it obtained. On January 31, 1786, 7 Stat. 26, the United States entered into a treaty with the Shawnee Indians providing for peace between the parties and for the delivery of hostages until prisoners were returned. This treaty also set boundaries for the Shawnee lands and a relinquishment of Shawnee lands beyond those boundaries. No presents or goods were given in return for the commitments on the part of the Indians.

At the end of the Revolutionary War and until 1795 the official policy of the United States was to evict the Indians from any areas where they could be removed and to secure the land for white settlers. This policy was evidenced by the 1784 Treaty of Fort Stanwix and reiterated in the treaties mentioned above. In 1787 the Northwest Ordinance was enacted. It permitted the organized settlement and civil government of the lands west of the Ohio River although those lands were well occupied by Indians. As we noted in finding 13 of the title phase of this case, 31 Ind. Cl. Comm. 89, beginning at page 175, the United States under the Articles of Confederation first took the position that the United States had acquired title to Indian lands by right of conquest and that the Indians, having allied themselves with the British, were accordingly dispossessed of their lands in Ohio and the remainder of the Northwest. This was the position taken at the treaties mentioned above with the various tribes held in the 1780's, and no consideration was paid for the treaties of peace and boundaries and the relinquishment of Indian claims to land. As pointed out in our finding in the title phase, this policy did not work and hostilities in the Northwest Territory increased. The Indians,

encouraged by British agents from Detroit and Canada, deeply resented the treaties they had been forced to execute, and they continued to regard all the territory west of the Ohio River as theirs. Until 1795 the British did whatever they could to preserve their Indian fur trade and their future interest in the ownership of lands within the territory lost at the 1783 Treaty of Paris. The British who had retained their posts at Detroit and a fort on the Maumee River even after the Battle of Fallen Timbers in 1794, were constantly furnishing the Indians with ammunition, supplies, and encouragement.

On August 9, 1787, a Congressional Committee reported to the Continental Congress that since the United States did not want another Indian War on a large scale it would be best to replace the policy that lands in the Northwest Territory were held by right of conquest, with the policy by which the Government would negotiate with the Indians on the basis of purchasing their lands. Thereafter Congress authorized Arthur St. Clair, Governor of the Northwest Territory, to hold a general treaty with the western Indians to remove causes of controversy and to settle boundaries. The Indians were claiming the Ohio River as the Indian-American boundary line, but St. Clair, acting on behalf of the United States, attempted to negotiate a line far to the north of the Ohio River as the boundary. There were a number of efforts and actual treaties negotiated with the Northwest Indians setting the boundary line wished by the United States, but because many of the principal chiefs were not present, the treaties were never really effective. The majority of the

Indians continued to insist on the Ohio River as the dividing line and the United States continued to work toward a line much further north. After the defeat of the Indians at the Battle of Fallen Timbers in 1794, and the Jay Treaty of November 19, 1794, 8 Stat. 116, in which the British promised to evacuate the border posts by June 1, 1796, General Wayne was able to bring together the Northwest Indians to negotiate the Treaty of Greeneville.

It is true, as plaintiffs point out, that the United States wished to have peace with the Northwest Indians. It is equally true that the Northwest Indians wished to have peace with the United States, and after hearing certain provisions of the Jay Treaty read to them during the treaty negotiations, they were well aware of the fact that they could no longer hold out against the armed forces of the United States. They would not be able to count on British assistance. During the course of the treaty negotiations the chiefs of the Nations participating complained bitterly about the so-called Greeneville line and attempted again to obtain the Ohio River as the dividing line, but it is clear that they realized their cause was lost. On the basis of the facts which have been related many times in these Greeneville cases, it is true that peace was an object sought by both the Indians and the United States. However, the land cessions acquired by the United States were desired only by the United States and not desired in the least by the Indians. The promise of substantial funds by way of perpetual annuities plus a lump sum payment at the time of the treaty signing, represented

the Government's new policy of purchasing lands from the Indians rather than relying on acquisition through peace treaties containing relinquishment clauses and no consideration.

Plaintiffs point to the fact that it was an important objective of the United States sought by Wayne and conceded by the Indians, that the Indians acknowledge the sovereignty of the United States and submit themselves to the protection of the United States, and also that the United States sought and was granted the important right of preemption to purchase the lands retained by the Indians. Plaintiffs note that this right of preemption necessitated a corresponding restriction on the Indians who could sell their lands only to the United States and to no other party. We are under the impression that even under the Articles of Confederation the United States considered that it had the right of preemption in all lands occupied by Indians outside the borders of the several states, and that it had acquired the legal title to such land by conquest. In the various treaties negotiated between 1783 and 1789 the United States acted on this premise giving peace to the Indians and requiring that they give portions of their land for no consideration at all. At that point the United States was willing only to respect Indian use and occupancy in some of their lands. The Indian Trade and Intercourse Act enacted in 1790, 1 Stat. 137, 138, provided that no sale of lands by any Indians, or any nation or tribe of Indians within the United States, "shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the

same shall be made and duly executed at some public treaty, held under the authority of the United States." A later amendment was added in 1793, which made violations to that provision punishable by fines and imprisonment. Except in the case of New York State, the Government generally enforced the provisions of the Indian Trade and Intercourse Act. Accordingly, it appears that the United States did not need to bargain and pay for its sovereignty over the Northwest Indians nor for the right of preemption to their lands. The language in the Greeneville Treaty which provides that when the tribes should be disposed to sell their lands or any part of them, they would be sold only to the United States, has been interpreted by this Commission and by the Court of Claims as one of the several indications that the United States intended to recognize treaty signatory tribes' title in the lands retained by them in the Treaty of Greeneville. Miami Tribe of Oklahoma, et al., v. United States (Docket 67) 146 Ct. Cl. 421.

Plaintiffs' greatest emphasis is on the fact that the United States wished to insure peace with the Northwest Indians and that this purpose was paramount to all others in the Treaty of Greeneville. As plaintiffs put it, "no better way to insure peace existed than to put the Indians on the payroll of the United States; that is, by making them depend upon income from the United States for a substantial part of their subsistence. The purchase of peace was also the purchase of docility, and the payment of the consideration by means of annuities was assurance of continued docility." As we have stated above, the United States was not in the

habit of paying annuities in return for peace from formerly hostile Indians. And this was true even where the peace treaties required the Indians to relinquish their claims to certain lands. However, by 1789 or 1790, the United States had come to the conclusion that the relinquishment of lands were not going to "stick" and that it would be a better policy to purchase the lands which they wanted from the Indians and pay them some consideration. We believe that this is exactly what the United States did in the Treaty of Greeneville and that the consideration mentioned was for the cession of the lands and not for the peace which both sides desired equally.

Finally we do not believe it significant that the division of the consideration among the signatory tribes had no relation to the ownership of the lands being ceded. As plaintiff concedes, at the time of the treaty, Wayne found it impossible to follow his instructions to draw a boundary between the various tribes, and therefore the treaty was concluded without the Government knowing exactly what interest any of the tribes had in the land being retained or being relinquished. This was not an uncommon circumstance in early Indian treaties, but that fact did not prevent the amount named as consideration and paid for the cession being consideration and therefore creditable in favor of the Government against the award. See Pawnee Indian Tribe v. United States (Docket 10) 124 Ct. Cl. 324 (1953) in which the Pawnees received consideration for their 1833 cession of all the lands south of the Platte River, without further deliniation of the boundaries.

For the purpose of determining the unconscionability of the consideration paid to each of the plaintiffs in this case, we will consider the capitalized value of the promised and paid annuities which were perpetual and in the amount of $1,000 for four of the plaintiffs and $500 for the other four plaintiffs. For those plaintiffs who were promised the $1,000 annuities the capitalized value is $20,000, and for those plaintiffs who were promised the $500 annuities the capitalized value is $10,000. To these values we will add a pro rata share of the $20,000 in goods, paid to the signatory Indians at Greeneville.

Defendant has presented evidence which shows that the annuities were dispersed partly in goods as promised by the treaty and partly in cash. In most instances the annuities were paid in cash and not in goods. The United States argues that it is therefore entitled to deductions as payments on the claim of the total amount of the capitalized value of the perpetual annuities in the case of each plaintiff. In the light of the so-called Sioux Amendment, 88 Stat. 1499 (1974), which prohibits deductions of payments made for goods, rations, or provisions, we cannot allow defendant to have a deduction representing the capitalized value of annuities which were for the specific purpose of providing these tribes with goods, i.e., food, rations, and provisions. The treaty promise was that the tribes would receive perpetual annuities in necessary goods and the value of such goods may not, under the Sioux Amendment, be deducted from the final award as payments on the claim. The fact that the actual payments were in many instances paid in cash does not make them deductible or exempt them from the restrictions of the Sioux

Amendment since it will be presumed that what was paid to the tribes in fulfillment of the perpetual annuity obligation was in lieu of goods. We conclude, therefore, that neither the value of the goods distributed at the treaty nor the capitalized value of the tribal annuities may not be deducted from the final awards in these cases.

In summary, at the Treaty of Greeneville the Miamis ceded enclaves having a value of $35,022.47 for consideration of $33,220.00; the Weas ceded enclaves having a value of $17,511.23 for consideration of $11,120.00; the Ottawas ceded enclaves having a value of $123,667.20 for consideration of $22,100.00; the Wyandots ceded enclaves having a value of $19,584.00 for consideration of $22,100.00; the Pottawatomies ceded enclaves having a value of $58,675.60 for consideration of $22,100.00; the Kickapoos ceded enclaves having a value of $108,734.40 for consideration of $11,120.00; and the Kaskaskias ceded an enclave having a value of $1,500.00 for consideration of $11,120.00.

We therefore conclude that the consideration received by the Miamis, Weas, Wyandots, and Kaskaskias under the Treaty of Greeneville was not unconscionable and that the plaintiffs representing these tribes are not entitled to any recoveries.

The consideration received by the remaining tribes, however, was unconscionable and these tribes are entitled to recover from defendant the following sums less any offsets, as determined in subsequent proceedings, to which the defendant may be entitled: to the Ottawa

plaintiffs, the sum of $123,667.20; to the Pottawatomi plaintiffs, the sum of $58,675.60; and to the Kickapoo plaintiffs, the sum of $108,734.40. An order will be entered accordingly.

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarbrough, Commissioner

Brantley Blue, Commissioner