

## BEFORE THE INDIAN CLAIMS COMMISSION

THE MIAMI TRIBE OF OKLAHOMA, also known	)	
as THE MIAMI TRIBE, et als.,	)	Docket No. 251
Petitioners,	)	
IRA SYLVESTER GODFROY, et al., on relation	)	
of THE MIAMI TRIBE, et al.,	)	Docket No. 124-A
Petitioners,	)	

vs.

THE UNITED STATES OF AMERICA,	)
Defendant.	)

Decided: July 14, 1958

## Appearances

Edward P. Morse, Attorney  
for Petitioners in Docket No. 251Walter H. Maloney, Attorney  
for Petitioners in Docket No. 124-A

W. Braxton Miller, with whom was  
associated Mr. Assistant Attorney  
General Perry W. Morton, Attorney  
for Defendant.

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the Opinion of the Commission.

Dockets Nos. 124-A and 251 were consolidated as each presents identical claims involving the Miami Indian reservation in Kansas and the commutation of tribal annuities under the treaty of June 5, 1854, 10 Stat. 1093.

The petitioners in Docket No. 251 are descendants of those Miami who moved to Kansas after the treaty of November 28, 1840, 7 Stat. 582,

and who now reside in Oklahoma. They claim they are the only Miami whose ancestors acquired an interest in the Kansas reservation, and that the Miami Indians of Indiana were not entitled to participate in tribal assets after 1846 except as specified in the Treaty of June 5, 1854, 10 Stat. 1093, and except for certain individuals who were entitled to draw a proportionate share of the tribal annuities in Indiana under the treaties of November 6, 1838, 7 Stat. 569 and November 28, 1840, supra. The petitioners in Docket 124-A are those Miami whose ancestors remained in Indiana when the tribe migrated to Kansas in 1846, and include descendants of Miami Indians who went to Kansas and later returned to Indiana. They assert they are part of the Miami tribe and entitled to share in its assets.

Both petitioners claim that the Kansas reservation contained fewer acres than were promised the tribe and that they are entitled to recover for this shortage; and that the consideration paid for that portion of the reservation ceded in 1854 was unconscionable. It is claimed that the commutation of tribal annuities in 1854 was unfair, and that defendant should be charged with interest upon funds diverted from the tribal annuities and upon the value of certain Kansas reservation land wrongfully allotted to non-Miami persons.

The defendant does not controvert the right of either petitioner to institute these actions and does not participate in the membership dispute between petitioners. It is agreed that the Kansas reservation assigned the Miami tribe in 1840 contained 324,796.88 acres; that the tribe retained 70,638.54 acres in 1854 and ceded 254,158.34 acres to the United States.

The issues presented at this time may be said to be: (1) Did the Miami Indians residing in Indiana after 1846 have an interest in the Kansas land; (2) Was the consideration paid in commutation of annuities unconscionable; (3) May the petitioners recover interest on principal sums refunded to them on March 3, 1891, 26 Stat. 1000. on account of allotments and payments granted to spurious or unqualified Miami Indians; (4) Are petitioners entitled to recover because of a shortage of acres in the Kansas reservation, and, (5) Was the consideration paid for the acreage ceded to the United States in 1854 unconscionable?

#### Ownership of the Kansas Reservation

We shall first consider what, if any, interest the petitioners in Docket No. 124-A acquired in the Kansas land.

It is evident that the tribal unit with its inherent power and authority moved to Kansas in 1846, although its membership is not known. An additional 61 individuals migrated in 1848, leaving about 100 Miami Indians then in Indiana. Upon the tribe suffering a heavy numerical loss due to illness, many individuals returned to Indiana, and these, together with those who had remained in that state totaled 302 in 1854 as compared to 248 who then resided in Kansas.

According to the Miami treaties of 1838 and 1840 and the representations of the tribal delegation in Washington during 1854, only three families had tribal permission to remain in Indiana after the tribe moved to Kansas. These were the family of Chief John B. Richardville, whose health prohibited him from embarking upon the western journey,

the family of Chief Francis Godfroy who was then deceased and whose property could not be sold until his youngest child reached the age of 21 years, and Me-shing-go-me-sia and his brothers. Nor does it appear that this separation was intended to be permanent. It was a tribal custom to award land grants to members for meritorious services rendered to the tribe. These grants were ordinarily quickly converted into cash for wider distribution by the grantees, and both Richardville and Godfroy had received title to a number of acres in this manner. The treaty commissioner's reports and the treaty terms clearly imply the departure of the Richardville and Godfroy families: awaited only the death of Richardville which occurred in 1841, the maturity of the Godfroy children and the sale of their respective lands. The 1840 treaty provided that the reservation set aside in 1838 for Ma-to-sin-ia's band should be patented in trust to his son, Me-shing-go-me-sia, and the treaty commissioner's report stated that some of the Ma-to-sin-ia band might remain upon this reservation, but that their eventual removal was to occur, we think, is a logical conclusion to be drawn from the fact that no provision was made for payment of tribal annuities to them in Indiana after the tribe moved to Kansas.

Since the 1840 treaty expressly committed the tribe to move from Indiana to Kansas, those members refusing to accompany it and who did not have the tribe's consent to remain in Indiana, and those who moved with the tribal unit to Kansas but later returned to the State of Indiana, separating themselves from the tribe, and having no further participation in the tribal consultations of transactions, must, we

think, be held in accordance with previous decisions of this Commission, to have deliberately severed their tribal relationship and to have lost the accompanying right of participation in tribal assets. Prairie Band of Potawatomi Indians vs. United States, Docket 15-J, et al., 4 I.C.C. 473. This group also included those 34 persons who Congress by Joint resolutions directed be paid a proportionate share of the Miami annuity funds, but who were not recognized by the tribe in Kansas or by the Miami Indians in Indiana as being Miami Indians and entitled to participate. The record indicates that all of the Miami Indians in Indiana subsequently united, and that they have conducted themselves as a unit, and as independent of the tribal entity.

This separation of the Indiana Miami from the tribe and the termination of their interest in the tribal land in Kansas seems to have been recognized and acquiesced in by both the Miami in Indiana and the Miami in Kansas at the time of the negotiations in 1854 which terminated in the treaty of that year. The Miami tribe and those Miami Indians having tribal consent to live in Indiana had each complained that the tribal annuities were being paid to persons who were not entitled thereto. Five headmen of the Indiana group came to Washington in May, 1854, to discuss this matter with the Commissioner of Indian Affairs, and to meet with and discuss it with a delegation of the Kansas Miami or the "Western Miami" as they were called which

was then in Washington and authorized to negotiate a cession of the Kansas land. Under the supervision of the Commissioner of Indian Affairs and these representatives of the Indian group, a list of 302 persons as representative of all those of Miami blood residing in Indiana and entitled to participate in tribal annuities was prepared and attached to the treaty of June 5, 1854, when it was submitted to the Senate for ratification. Petitioners in Docket 124-A deny that they are bound by this treaty, asserting that the Miami Indians in Indiana never approved, agreed to, or authorized the execution of it, although they accepted the attached list as correct and received their share of the commuted funds according to that list. We think they err in contending this treaty was not binding on them, for it was executed by an authorized representation of the Miami tribal unit and if petitioners in Docket 124-A were a part of that unit, as they allege, they were necessarily bound thereby.

It is quite clear, however, that the Indiana residents approved and participated in this treaty entirely as a separate and distinct unit apart from the Miami tribe. The preamble (Pet. Ex. 36, p. 175, Dkt. 251) to the 1854 treaty sets out as the negotiating parties the Commissioner of Indian Affairs representing the United States, and five duly authorized delegates representing the Miami tribe in Kansas. There are then listed five additional persons who are described as "Miami Indians, residents of the State of Indiana, being present, and assenting, approving, agreeing to and confirming said articles of agreement and convention."

The first three articles provide for the cession of the Kansas land; reserve 70,640 acres of it, and specify its future disposition; set out the consideration and manner of payment agreed upon and specifically provide that no part of the money payable under that article of the treaty or arising in event of the subsequent sale of any of the reserved land should ever be paid the Indiana Miami; limit the allotments provided for to Miami Indians "now residing on said lands". The 4th, 5th, and 6th articles deal with the commutation of annuities. As the treaty was worded when originally executed, Article 4 provided that if the Indiana Miami so desired, the United States would retain their proportionate share of the principal fund resulting from such commutation, \$231,004, and pay them an annual interest, and their representatives agreed to submit this proposition to their people for consideration, with their decision thereon to be immediately conveyed to the Commissioner.

The evidence of record discloses that the Indiana Miami thereafter met in open council and that the same five individuals who signed the treaty on their behalf were thereafter dispatched to Washington to represent the Indiana Miami in reference to the treaty which was then pending ratification. It was at the request of the delegation that Article 4 was amended to provide for the United States to retain said \$231,004, at annual interest 25 years and to make disbursement of the accruing interest and eventually the principal to only those persons whose names appeared upon the corrected list of June, 1854, and their descendants, unless other persons were added to that list "by the consent of the said Miami Indians of Indiana, obtained in open council".

The Senate also inserted a paragraph in Article 4 finding the delegation was a duly authorized deputation of the Miami Indians of Indiana and, as so amended, the treaty was ratified in August of 1854.

There is no direct evidence of the full powers which were granted to the second delegation from Indiana, but we believe it is quite unlikely it would have been given anything less than full authority to represent the Indiana Miami in all aspects of the pending treaty which was of vital importance to them.

The treaty clearly refutes their present claim of interest in the Kansas land, and we think the Indiana Miami are bound by it; that by assenting/<sup>to</sup>and participating in it, they divided the tribal property with the Kansas unit and that such action amounted to a recognition upon the part of the Indian Miami that they possessed no interest in the Kansas land.

The defendant had no interest in the settlement of any claims of the two petitioner groups which were wholly against each other. It accounted according to the division agreed upon by them. There is no evidence of fraud, duress, undue influence or coercion upon the part of the defendant or any benefit to be derived by it from a division of the tribal assets between the petitioners; that petitioners did not understand the effect of the treaty provisions; or any good reason why the division of the property rights as provided by the 1854 treaty should be disregarded. It follows that the petitioners in Docket No. 124-A have no interest in any claim which is based upon a claimed interest in the Miami reservation in nsas.

Commutation of Annuities

All parties are agreed that the annuities commuted in 1854 for the sum of \$421,438.68 represented a \$25,000 cash annuity established in the treaty of 1826, and other annuities of merchandise or labor having the following actual cost:

\$320	salt	per treaty of 1803, 1818
770	iron, steel, tobacco	" " " 1826
200	agricultural aid	" " " 1818
250	laborers	" " " 1840
<u>\$1,540</u>		

Defendant has not denied the validity of these obligations, but it claims that the 1826 treaty which limited the \$25,000 annuity to "as long as they (the Miami) exist together as a tribe" makes it less than a perpetual annuity and consequently reduced its cash value in 1854.

The parties agree that the present value of an annuity is that sum necessary at current interest rates to annually produce the amount of the annuity. Petitioners say, however, that in arriving at the present value of these annuities as of 1854, six per cent per annum rather than five per cent per annum would, over some periods, more accurately reflect the varying rates of interest. Interest rates have been consistently applied at five per cent per annum prior to 1934 and at four per cent per annum thereafter when interest has been used as a measure of just compensation in these Indian suits against the Government, and we see no good reason for departing from these recognized rates which were fixed by the Court of Claims after an exhaustive examination into the history of interest rates. Shoshone Indians vs. United States, 85 Ct. Cls. 313, 380; Alcea Band of Tillamooks vs.

United States, . 115 Ct. Cls. 463, 518; Yakima Tribe vs. United States, 5 I. C. C. 630, 660. On this basis the present cash worth of a permanent annuity of \$26,540 is \$530,800.

It is true that Article 4, Treaty of 1854, recites that the \$421,438.68 stipulated to be paid is in commutation of these annuities and in satisfaction of all claims or damages on account of non-fulfillment of any treaty terms or for injuries or damages to, or loss of property due to wrongful acts of citizens or agents of the United States. There is nothing disclosing what, if any, claims were presented or agreed to by the parties, and we must assume the \$421,438.68 represents the consideration paid for the commutation. However, that is not all the Miami received, for by the next article it was stipulated the defendant should pay the \$25,000 annuity in 1854 and in 1855. So, what the Miami actually received was \$471,438.68 for a release of an obligation having the present cash value of \$530,800, if the annuity of \$25,000 is considered one in perpetuity.

We can not say that an annuity which is terminable upon a future contingency, however improbable that contingency may be, is permanent in its nature, and it follows that its value is something less than that of an annuity in perpetuity. We do not believe, however, that it is necessary to the final determination of this matter that we attempt to fix upon any definite figure as representing the 1854 value of this \$25,000 annuity.

It is evident that none of the parties participating in the commutation negotiations contemplated the perpetual existence of the Miami

tribe. More than half of the Miami Indians then living were no longer tribal members, and those who were members were taking allotments of the tribal land as quickly as it could be surveyed and their selections made, with all excess acreage in the 70,640 acres reserved for this purpose to be sold and the proceeds divided upon request of a majority of the tribe. Undoubtedly the individual members considered it more beneficial under these circumstances to receive their proportionate share of the agreed consideration (which would be some \$850) during this time, than an annuity of approximately \$48 per person indefinitely.

Whatever may have been the controlling inducement, there is no evidence of over-reaching, of fraud, duress, coercion, or misunderstanding. In satisfaction and release of a claim of indefinite value, the parties agreed upon a specific sum which was forthcoming at a time when the tribe was passing from a communal mode of living to that of individual allotments and was faced with the expense incident thereto. Under the circumstances disclosed, we can not say that the \$471,438.68 consideration was unfair or dishonorable, or that it fell so far short of the true value of the annuities commuted as to be unconscionable. The petitioners may not recover upon their claims arising out of the commutation of annuities under the Miami treaty of 1854.

#### The Interest Claims

Petitioners have submitted Proposed Findings for an award of interest computed upon funds wrongfully diverted from annuities due the Miami Indians and paid under Act of June 12, 1858, 11 Stat. 329, 332 to

non-Miami individuals, and upon the amount paid by defendant as compensation for certain allotments of reservation land made to such non-Miami persons under that Act. Under a proposed finding denying recovery on the ground that the allotments and disbursements were wrongfully made under apparent mistakes of law and fact but did not involve a taking or appropriation for public purposes under the Fifth Amendment, defendant cites as supporting evidence that the claim pleaded in Docket No. 251 is not based upon that amendment, and is not specifically pleaded at all in Docket No. 124-A.

We are unable to find any pleadings on the part of the petitioners in either Docket 251 or 124-A whereby claim is made for interest based upon an alleged taking or appropriation for public purposes under the Fifth Amendment. As a matter of fact, it is difficult to construe any of the allegations of liability on the part of the defendant which appear in either petition as alleging a claim based upon failure to pay interest, although Section 7 of the Commission's Rules of Procedure requires a clear presentation of all claims being asserted.

In their briefs petitioners do not refer to any language in their respective petitions as covering a claim for interest, nor do their requested findings refer to any language in the petitions under which their right to interest is asserted.

In any event, even if the language in the petitions may be construed as making a claim for interest, the facts show only a misapplication of funds and an erroneous assignment of allotments. They do not, in our opinion, show a constitutionally approved appropriation

of property for public purposes. Restitution of the funds and payment of the determined value of the land at the time of its allotment are shown to have been made. Congress has never authorized the payment of interest in either instance, and the Commission is without authority to grant an award for interest resting upon such facts as are shown.

#### Alleged Shortage of the Kansas Reservation

The petitioners contend that the defendant promised them in 1840 as many acres in Kansas as the tribe ceded by the 1840 treaty or, in any event, 500,000 acres, and that the tribe was placed in possession of but 324,796.88 acres in Kansas. A cursory examination of the 1840 treaty discloses the Kansas land was not part of the recited remuneration for the 1840 cession; nor is it so presented by the petitioners in Docket 124-A in their companion case, Docket 124-F wherein they seek additional compensation for the Indiana land, and Mr. Rothchild, Attorney for the Petitioners in Docket 251, stated during final argument before this Commission on April 9, 1958 (Trans. p. 462) :

In other words, the consideration for the Big Reserve was money; the consideration for moving West was the Kansas land. This was earned when the tribe moved West, and it was earned by those who moved west.

So petitioners seek to recover the difference between the acreage allegedly promised in consideration of the tribe moving west, and the actual acreage assigned to it, computed at a sum per acre equal to the average per acre value of the Kansas land when it was ceded to the United States in 1854. Clearly this claimed shortage or taking was known before 1854 and could have occurred, if at all, only when the tract was assigned to

and accepted by the Miami in 1841, at which time the tribe approved the amended treaty. It could represent only land contiguous to the 324,796.88 acres received by the tribe and lie on one or more of the north, south or western sides of that acreage. Passing, however, the fact that no evidence has been presented concerning the 1840 or 1841 value of any land in Kansas, and the difficulty of fixing a value on any tract so indefinite of location, we reach the problem of how much land the Miami were entitled to receive in Kansas.

The defendant first approached the Miami seeking to secure the tribe's removal from Indiana in 1833. It was not until 1838, however, when Chief Richardville expressed his concern that the tribe was surrounded by white settlements and that its removal was necessary if it was to remain extant, that the Miami evinced any interest in moving west. The tribe made no firm commitment but in the treaty of that year it agreed to send a delegation at the Government's expense to explore the western country, where the defendant promised "to possess, the Miami tribe of Indians of, and guaranty to them forever, a country west of the Mississippi river, to remove to and settle on, when the tribe may be disposed to emigrate \* \* \* sufficient in extent and suited to their wants and condition and \* \* \* in a region contiguous to that in the occupation of the tribes \* \* \* from the States of Ohio and Indiana". The record does not indicate whether this delegation had explored the land here involved or any other western land before the tribe agreed in 1840 to move within five years to the country assigned to it in the west, or when it accepted the land selected for its future home by its approval in May, 1841, of the Senate Amendment to the 1840 treaty which amendment designated the particular tract

here involved as the tribe's future home.

An agreement calling for a specific acreage of western land is not indicated by the evidence. A westward migration was not considered at all in 1833 or 1834 and the fact that the 1838 and 1840 treaties each fail to describe the western land as a 500,000 acre tract or as equivalent in area to the acreage being ceded in Indiana, instead of the much more lengthy and more general description of the country promised to the tribe which the 1838 treaty specified should be within a certain region and suitable in area for certain purposes, is strongly indicative that there was no agreement that the western tract should contain any specific acreage. When the Senate, by inserting Article 12 in the 1840 treaty, tendered the tribe a specifically described tract which tract met with these specifications and the Miami tribe accepted that tract by approving the amended treaty after the effect of such action upon their part had been explained to them, the tribe must be said to have accepted the described tract. That it ceded some 254,000 acres of such tract in 1854 and thereafter continued to reside upon 70,638.54 acres of it is an effective argument that the Kansas land was "sufficient in extent, and suited to their wants and conditions." That the tract was within the region designated is not disputed. That the United States did not guarantee it to contain a definite acreage is established by the use of the word "estimated" in Article 12, and that the Miami tribe understood this is evidenced, we think, by the fact that no complaint was made of the size of the tract when the tribe went into possession and none was presented until negotiations were pending for the sale of a part of the land in 1854.

From the several reasons stated we think the Government promised the Miami tribe an indefinite location in the west; that in 1840 it offered the tribe a particular tract and the tribe accepted that tract as meeting its specifications for a country within the region occupied by other Indian tribes from Indiana and Ohio, and sufficient in size for its wants. It is evident that the Kansas reservation met these requirements.

There appears to be no basis here for a recovery on the grounds of unfair and dishonorable dealings. The movement of the Miami into Kansas was beneficial to the United States who desired to free Indiana from the presence of the tribe, but it was also essential to the welfare of the tribe that it move from its location within a ring of white settlements, By purchasing the tribal land within this unsatisfactory area and by placing the tribe in possession of a tract within a region preferred by it and containing 254,000 acres more land than sufficient for its wants (as evidenced by the subsequent cession), we think defendant fulfilled every requirement of fair and honorable dealings.

#### 1854 Value of the Kansas Land

The Miami tribe contends that the land ceded on June 5, 1854, had a reasonable value of \$2.40 per acre (\$609,980.00) and that it received an actual consideration of \$121,974.23. Defendant values the land on June 5, 1854, at from 35¢ per acre (\$89,035.42) to 50¢ per acre (\$127,079.17), and claims a consideration paid of \$200,000. This variation in the amount of consideration claimed to have been paid results from the defendant using the consideration recited in the treaty, whereas petitioner tribe has treated the installment payments as an annuity

which it has commuted back to the treaty date. The propriety of its action in so doing becomes material when determining whether the consideration paid was unconscionable.

In Miami Tribe vs. United States, Docket 67, the United States was permitted to offset against an award based upon the Miami treaty of 1818 only the sum of the commuted value of certain annuities forming a part of the treaty consideration instead of the total sum it had paid out to meet the annuity obligations. However, we do not find that situation analogous to the one before us. There the annuity promises were the consideration for the cession, and it was necessary to determine the value of those promises as of the date they were made. Here the consideration is clearly stated: \$200,000. Whatever arrangement was agreed upon concerning the method of its payment, that sum was the consideration passing between the parties, and upon its payment the obligation was satisfied according to the treaty terms. The fact that the greater portion was paid in installments did not convert the installment payments into an annuity, and to so treat them would in effect constitute an interest charge when the treaty is silent in that respect. The Crow Tribe vs. United States, 6 I.C.C. 98. Receipt of payments totaling \$200,000 is not denied, and we turn to a consideration of whether that sum approximately represents the fair and reasonable value of the Miami land.

This value is to be determined as of June 5, 1854, the treaty date, for it is a principle of international law which has been applied to treaties or agreements between Indians and the United States, where

individual rights are not involved, that when the instrument is silent as to the time it shall become operative the rights of the parties relate back to the date of signing and not to the date of ratification, unless the instrument provides otherwise in which event the stated terms control. Coeur d'Alene Tribe vs. United States, Dkt. 81, <sup>6</sup>I.C.C. 38, 46.

The parties hereto each rely upon information contained within the original survey notes of 1856-7 as a basis for the classification of the Miami tract. Those notes disclose the reservation was classified at that date as 13.3% Class I land, 65.7% Class II and 21% Class III. Class I was bottom, terrace, and upland, having 2% or less slope, with alluvial and dark residual prairie soil. Class II encompassed the present-day Soil Classifications of the United States Governmental Departments of Classes V, VI, and VII, having slopes up to 12%, and dark residual prairie soil over a clay subsoil. These four soil types are all good agricultural lands and under the climatic conditions prevalent in eastern Kansas are well suited to the growing of small grains. Class III is land unsuited for agriculture, but produces a good prairie hay. There was a 40% overall timber coverage of walnut, hickory, elm, sugar maple and other hardwoods on the uplands with sycamore along the streams. Within the tract exclusive of the 70,638-acre reserved area, this coverage dropped to 15%. The land is drained by the Osage River and its tributaries, which generally flow south and southeast through the tract. There is some flood history along the Osage within a limited distance of the stream. Limestone outcroppings are found in the southeast quarter of the reservation. Iron ore, coal and tar springs (indicating the possible presence of petroleum) were noted by the surveyors as present

throughout the entire tract but there is no evidence that either contributed to the land values.

Timber and limestone were considered attractive as materials for the construction of crude homes and fences but in 1854 possessed no value apart from the land. The highest and best use of this land was for small-farm agriculture, and a timber site with adjacent prairie was considered preferable.

Clearly the present instance is one where our valuation can not rest upon market value alone for the size of the tract and its location in the unsurveyed Indian country, limited any immediate purchaser to the United States Government. In the absence of an ordinary market value, we must turn to a consideration of other factors which demonstrate a present or potential value and thereby establish a basis of evaluation. Our findings of fact are therefore somewhat voluminous. They are designed to cover all factors influencing value, such as soil, climate, classification of land, natural resources and economic or potential value; water, rail, and wagon transportation systems; population; economic conditions and potential agricultural use. We have also given careful consideration to the testimony of the expert witnesses which were called by both parties hereto.

On behalf of the petitioner Ida Fox testified concerning historical documents and events prior to 1857 and Professor John Long testified concerning information found in the notes of the original survey run of the Miami reservation and of the Peoria trust lands, a 208,585.69-acre tract adjoining the original Miami reservation on the north. Neither

itness placed a monetary value on the Miami land but petitioners rely primarily upon Mr. Long's testimony of comparability between the Miami and Peoria land and the sales history of the Peoria land to establish a value for the Miami tract under the conditions prevailing as testified to by Miss Fox. Defendant's witnesses, Richard B. Hall and Dr. William Gordon Murray, had also studied the notes of the original survey run of the Miami tract as well as those covering the survey of a 350,000-acre tract in Missouri adjacent to the Miami land, and taking into consideration the rate of transfer of the Missouri land, comparability of the tracts, state of development, economic conditions and other factors, Dr. Murray valued the Miami land ceded in 1854 at 50¢ per acre as of 1854. Mr. Hall's valuation of 35¢ per acre was based upon the fact that similar and contiguous land in Missouri had been on the market for years at \$1.25 per acre; that a hypothetical purchaser would have considered himself entitled to 25% profit because of time involved in realizing upon his investment; would need consider 25% of the land must be given away to finance transportation facilities and internal improvements, that 25% would go to advertising, sales promotion and carrying expense; and 25% would remain to care for the original purchase. He did not estimate the time necessary to complete the disposal program. Factors contributing to his net valuation included the Graduation and Military Bounty Acts, neither of which was in existence on June 5, 1854. However, since legislation similar to the Graduation Act had long been pending, a prospective purchaser would have been aware of the probability of this or similar legislation being enacted. The Military Bounty Act of 1855

increased the supply and made military warrants assignable but both warrants and script had been in existence since 1820. The value of opinion evidence, as we said in Miami Tribe vs. United States, (4I.C.C. 436) depends upon the qualifications of the witness, the correctness of the facts upon which opinion evidence is based and whether all relevant factors have been taken into account.

Evidence concerning the so-called Peoria trust land (that land ceded by the Kaskaskia, Peoria, Piankeshaw and Wea tribes in 1854 for sale by the United States on behalf of the Indians) is that it was 208,585.69 acres in size, adjoined the Miami reservation on the north, was very comparable to the Miami tract in climate, soil, topography, timber coverage, best potential use, want of mineral values and lack of improvements. It lay between the Miami tract and the town of Kansas City and was hence nearer to Kansas City and to Leavenworth than the Miami land; the Fort Leavenworth-Fort Scott Trail also crossed its eastern edge and the Santa Fe Trail ran within a few miles of its northwest corner. It was surveyed in 1856 and appraised at an average \$1.66 per acre. All but 700 acres sold in small tracts at public sale within a period of less than a month in 1857 for an average \$1.67 per acre. The tracts not claimed by pre-emptors at \$1.25 per acre brought generally \$3.00 per acre.

Petitioners also point out that in 1857 pre-emption claims in the Miami reservation were reputedly bringing \$5.00 to \$7.00 per acre near Sugar Mound within the Sugar Creek valley, and that claims within the Osage River valley brought \$1.25 to \$3.12 for prairie land and \$1.87 to \$6.25 per acre for timber land; that Iowa trust land, along the Kansas-Nebraska state line, sold for an average of \$2.35 per acre in June, 1857;

Delaware trust land within 50 miles of the Miami tract, including much land in the valleys of the Kansas and Missouri rivers, sold for an average \$2.00 per acre in 1867 when pre-emption purchasers and combines and speculators were reported to have acquired the land for less than the free market value. A 2,571-acre tract of well-timbered land, within an area where timber was scarce, sold to the Christian Indians in 1854 for \$2.50 per acre. There is no comparability as to size between either of the small-tract trust sales or the Christian Indian tract and the 254,158.34 acres under consideration. There is no soil, topography or stream data concerning any of these lands for comparison use, but the Christian Indian tract lay within two miles of Leavenworth, the most rapidly developing community in Kansas where agricultural produce had a market. The chief commercial road to the west bisected the tract, and it could be expected that rail transportation would soon follow it westward, whereas the Miami tract was 45 miles from the closest settlement in Kansas, was serviced by a dirt road over which transportation was difficult, and there was no apparent reason to expect railroad service within its vicinity in the near future.

The relative size of the tracts and the sale dates require consideration when these respective sales are compared with the Miami tract. It is the 1854 value of the entire Miami tract that we must ascertain and not the total of the values of the innumerable smaller units into which it may be divided. A 160-acre tract, as the trust lands were offered for sale, is usually purchased for a home, but a 254,000-acre purchase becomes a speculation, with the purchaser confronted with the expense of financing, surveying, advertising, carrying expenses, the sure knowledge

that the land will be picked over and culled by the first of his purchasers, and that an indefinite time will pass before he will realize a return or profit from his investment, whereas a quicker and more certain return and profit could be derived from negotiable paper or other investments.

Petitioners also point out that in 1891 the Court of Claims, upon a question submitted to it by a Congressional Committee, certified to that Committee its finding that 14,533,38 acres within the 70,638.54 acres reserved in 1854 by the Miami Indians had an average value in November, 1859, of \$3.00 per acre.

The unexpectedly rapid settlement of eastern Kansas, its early attainment of statehood, and its corresponding economic development, its increase in population and the roads, markets and railroad facilities developed during the next decade, are all elements of hindsight which were not available to a prospective purchaser of the Miami land in 1854, yet each contributed to a much higher market for the Kansas land in 1859 than existed in 1854.

Taking into consideration the fact that 85% of the Miami land sold to the defendant was without timber, that a vast amount of public land was available in the United States and particularly within the adjoining state of Missouri, and the vast acreages in Kansas which had been ceded to the United States outright or in trust by the Delaware, Shawnee, Iowa, Sac and Fox, Kickapoo, and the United Tribes of Kaskaskia, Peoria, Piankeshaw and Wea, immediately prior to the Miami purchase, which land a prospective purchaser could expect would appear on the market in small units within the immediate

future, and such other elements bearing upon value as appear from the entire record, with due consideration being given the reasonings and conclusions of the expert witnesses, it is our conclusion that on June 5, 1854, the 254,158.34 acres of Kansas land ceded by the Miami Tribe to the defendant were reasonably worth \$1.25 per acre or \$317,697.93.

The question next arises: Does the payment of \$200,000 or .7867¢ per acre for land worth \$1.25 per acre or \$317,697.93, being about 63% of its value, constitute an unconscionable consideration?

Webster's New Collegiate Dictionary defines "unconscionable" as: "1. Not conscionable; unreasonable; as, an unconscionable charge. 2. Not guided or controlled by conscience; unscrupulous; as, an unconscionable rascal." Webster's International Unabridged Dictionary also likens it to "outrageous", "egregious", and "exorbitant". Black's Law Dictionary defines an unconscionable bargain as "A contract which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other", and cites the case of Hume vs. United States, 132 U. S. 406, 10 Sup. Ct. 134, 33 L. ed 393.

It appears that there is no hard and fast rule for determination of what is or is not an unconscionable consideration. The sole criterion is whether or not the consideration is so out of line with the true value of the property as to "shock the conscience". The Supreme Court said in Klamath and Modoc Tribes vs. United States, 286 U.S. 244, when considering whether a release was invalid which was granted for less than four per cent of the value of the land involved:

Even if judicially cognizable, as would be a like contention in ordinary litigation between individuals, plaintiff's insistence that inadequacy of consideration invalidates the release

could not have been sustained. That is so because the findings fail to show that any person acting for the United States deceived or misled plaintiffs as to the value of the land or, indeed, had knowledge of any fact bearing upon its value that was not well known by plaintiffs when they made the settlement and gave the release. Mere inadequacy of consideration is not enough. \* \* \*

Payment of less than half the true value appears to be unconscionable. 3 Pomeroy's Equity Juris., (5th ed., 1941), p. 637; Butler v. Miller, 1 Ir. Eq. 195, 211, 15 W. R. 779; Kussleman v. Knott, 7 Ky. L. Rep. 380. Yet the courts have fixed no exact division line and what one person may think unconscionable, another may well consider otherwise. The present record does not indicate that petitioners were deceived or misled by defendant as to the value of the land, or that any fact bearing upon its value was withheld from them, that the delegation did not fully understand the effect of its action, or was lacking in freedom of action. Nor is there proof that the tribe was so destitute and suffering such financial embarrassment as to place it at the mercy of defendant during the treaty negotiations. Under the circumstances we do not think an unconscionable consideration has been established within the meaning of the Indian Claims Commission Act. (Osage Tribe v. U. S., 119 C. Cls. 592; Otoe and Missouri v. U. S., 131 <sup>C. Cl.</sup> U.S. 593).

Petitioners have plead alternatively under Section 2 (5) of the the Act. In order for the transaction to be unfair and dishonorable and entitle petitioners to relief under this section, some mistreatment must exist other than mere inadequacy of price. When relief, if granted, must be based upon inadequacy of consideration alone, such inadequacy must be such as may be characterized "unconscionable". The Commission

is of the opinion that the facts and circumstances shown here disclose no ground for relief other than an inadequacy of consideration which in itself alone falls short of the requirements of our Act for the granting of relief. Wherefore petitioners' prayer in this respect must be denied.

/s/ Edgar E. Witt  
Chief Commissioner

/s/ Louis J. O'Marr  
Associate Commissioner

/s/ Wm. M. Holt  
Associate Commissioner