BEFORE THE INDIAN CLAIMS COMMISSION

THE KICKAPOO TRIBE OF KANSAS
THE KICKAPOO TRIBE OF OKLAHOMA
ET AL.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 316

Decided: May 4, 1962

Appearances:

Louis L. Rochmes, with whom was
Allan Hull, attorneys for the
petitioners.

W. Braxton Miller, with whom
was Mr. Assistant Attorney
General Ramsey Clark, attorneys
for the defendant.

OPINION OF THE COMMISSION

Watkins, Chief Commissioner, delivered the opinion of the Commission.

The Kickapoo Tribe ceded all their lands in Missouri to the United
States under the Treaty of October 24, 1832, and the Supplemental Article
of November 26, 1832. As a result of this treaty the Kickapoos were to
receive in addition to other valuable consideration, at least twelve hundred
square miles of land in northeast Kansas for their lands in Missouri. The
provisions of the second article of the treaty are as follows:

... It is hereby agreed that the country within the
following boundaries shall be assigned, conveyed, and
forever secured, and is hereby so assigned, conveyed and
secured by the United States to the said Kickapoo Tribe,
as their permanent residence, viz: Beginning on the
Delaware line, six miles westwardly of Fort Leavenworth, thence with the Delaware line westwardly sixty miles, thence north twenty miles, thence in a direct line to the west bank of the Missouri, at a point twenty six miles north of Fort Leavenworth, thence down the west bank of the Missouri River, to a point six miles nearly northwest of Fort Leavenworth, and thence to the beginning. (7 Stat. 391-392, October 24, 1832)

In Article XIV of the same treaty the United States agreed,

. . . at the particular request of the Kickapoos, that a deputation of their tribe shall be sent, with one or two of the Commissioners to view the lands hereby ceded to them, which deputation and commissioners jointly agreeing, shall have power to alter the boundary lines so as to make a selection of a body of land not exceeding twelve hundred square miles, adjoining to, and lying between the Big Nemaha river and the Delaware lands, and of changing the lines of the land hereby ceded in the second article of this treaty, not exceeding half the front on the Missouri between the mouth of Big Nemaha and Fort Leavenworth, so as to include a suitable site for a mill seat, should it be desired by said tribe and appear necessary to the commissioners. And it is understood, that if the commissioners, on viewing the land ceded in the second article of this treaty, shall find it of good quality and sufficient for said tribe, then the aforesaid second article to be as binding on the contracting parties, as if this article had not been inserted. (7 Stat. 393, October 24, 1832) (Underscoring supplied)

Slightly more than a month later a supplemental article was drawn up and agreed upon making the boundaries and total area more specific. It states:

The undersigned, commissioners on the part of the United States, and a deputation of Kickapoos, on the part of the Kickapoo tribe of Indians, having visited the lands assigned to the said tribe by the second article of a treaty with the said tribe, concluded at Caster Hill, in the country of St. Louis, and State of Missouri, on the twenty fourth day of October, one thousand eight hundred and thirty two, and by authority of the powers vested in the said commissioners,
and the said deputation, by the fourteenth article of the aforesaid treaty, have agreed that the boundary lines of the lands assigned to the Kickapoos, shall begin on the Delaware line, where said line crosses the left branch of Salt Creek, thence down said creek to the Missouri river, thence up the Missouri river thirty miles when measured on a straight line, thence westwardly to a point twenty miles from the Delaware line, so as to include in the lands assigned to the Kickapoos, at least twelve hundred square miles.

(7 Stat. 393, 394, Nov. 26, 1832) (Underscoring supplied)

It is clear from the supplemental article quoted above that pursuant to the provisions of Article XIV the boundaries were altered by the consent of both parties to the treaty. The western boundary was to be fixed at the particular point which would give the Kickapoos "at least twelve hundred square miles" or 768,000 acres. Needless to say, by the terms of Article XIV of the treaty itself as well as by the rules of statutory construction, the provisions of the Supplemental Article relative to area and boundaries takes precedence over any earlier provision in the treaty to the contrary. This conclusion is conceded by the defendant both in the hearings before this Commission (Tr. p. 94, 95) and in the briefs submitted. Furthermore, irrespective of any concessions by the defendant on this point, the federal courts have uniformly held that treaties between the United States and Indian tribes should be construed most favorably to the Indians. On this point the U. S. Supreme Court has said:

In treaties made with them the United States seeks no advantage for itself; friendly and dependent Indians are likely to accept without discriminating scrutiny the terms proposed. They are not to be interpreted narrowly as sometimes may be writing expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them. . . . As transactions between a guardian and his ward are to be construed favorably to the latter, doubts, if there were any, as to ownership of lands, minerals or timber would be resolved in favor of the tribe. / (United States v. Shoshone Tribe, 304 U.S. 111, 1938)
Therefore, whether the treaty is understood as giving the Kickapoos "not exceeding" 1200 square miles of land as in Article XIV or "at least" 1200 square miles as it appears in the Supplemental Article, and regardless of whether or not the description of the boundaries was such as to include less than this amount, the Kickapoos were still entitled to 1200 square miles or 768,000 acres under the treaty of 1832 and we have so held in Finding 2.

After having been entitled to 768,000 acres of Kansas lands under the treaty of 1832, the Kickapoos ostensibly ceded 618,000 acres of these lands to the United States by the treaty of 1854, reserving 150,000 acres in the western part of the tract for their own use. The ceding of 618,000 acres, which is the subject of this claim, is not specifically mentioned in the treaty of 1854 but has been calculated from the terms of the treaty wherein the Kickapoos ceded all their lands in Kansas, that is, the 1200 square miles or 768,000 acres, to the United States except 150,000 acres in the western part which they reserved for themselves. (10 Stat. 1078, May 18, 1854) Subtracting 150,000 acres from the original grant of 768,000 acres leaves 618,000 acres.

There is no argument as to the total acreage to which the Kickapoos were entitled under the 1832 treaty nor a disagreement as to the acreage ceded to the United States by the Kickapoos in 1854. There is, however, a dispute between petitioner and defendant as to the acreage in Royce Area 325. Royce Area 325 allegedly represents the 618,000 acre tract which the Kickapoos ceded to the United States under the 1854 treaty, that is,
the 768,000 acre tract to which they were entitled under the terms of the 1832 treaty less the 150,000 acres which they reserved. Both parties con-
ceded that Royce Area 325 contains less than the 618,000 acres contemplated by the treaty of 1854. How much less, is the dispute. Both parties agree that the subject of this claim involves 618,000 acres. The exact location of those acres is disputed. In any event, for purposes of this proceeding the deficiency acreage of whatever amount is to be directly west of the Kickapoo 150,000 acre reserve and we have so indicated in Finding 3. The Kickapoo reserve is represented by Royce Areas 436 and 437. The acre-
age of Royce Areas 325, 436 and 437 plus the deficiency area total 768,000 acres.

The petitioners' expert cartographer testified that Royce Area 325 contained 534,730 acres leaving 83,270 acres west of the Kickapoo reserve (Tr. 18). This estimate was derived from the application of a planimeter to Royce Area 325 as it appeared on a general agricultural survey map of the State of Kansas. This map was a duplicate of petitioner's exhibit No. 12 (Tr. 21, 22). On the other hand, the defendant's expert appraiser derived an estimate of 500,127.25 acres for Royce Area 325 leaving 117,872.75 acres west of the Kickapoo reserve (Tr. 95). This estimate was based on an examination of each of the official township plats (Tr. 99-100). The majority of the township surveys gave the acreage of each particular township. However, the acreage of nine townships had to be estimated (Tr. 95). Defendant's expert also obtained a written estimate of the acreage of Royce Area 325 from the Department of Interior. This estimate was 502,125 acres and was also based on an examination of the official town-
ship plats (Tr. 98).
It seems evident that the application of a planimeter to a map such as petitioner's exhibit No. 12 could only produce a rough estimate of the actual acreage. The map is comparatively small and hence, there would be a large margin for error regardless of the expert qualifications of the cartographer. We feel that an estimate based on the official township plats where the acreages were calculated, for the most part, by those surveying the land and where, in addition, there is some corroboration, is more likely to be correct. We find, therefore, that the acreage of Royce Area 325 is 502,125 acres. This conclusion along with the corollary finding of 115,875 acres in the deficiency area west of the Kickapoo reserve is stated in Finding 3.

That the Kickapoo Cession was very favorably and strategically located there can be little doubt. The Missouri river, which was the main artery of transportation from above St. Joseph to St. Louis, bordered the entire cession on the west making steamboat facilities available to a large section of this area. (Pet. Ex. No. 10) Emigrants traveling to California or other far western points embarked either from St. Joseph or Leavenworth, both of which were adjacent to the Kickapoo lands. A constant stream of emigrants were passing through the Kickapoo lands at this time via the St. Joseph or Leavenworth emigrant roads and there was every indication that emigration westward through this area would continue for years to come. Senator Atcheson of Missouri, in reversing his earlier stand against the organization of Kansas and Nebraska territories, said in 1853, that

"... in a very few years, if it is not doing it now, the
tide of population in defiance of this government, will pass the frontier and take possession of every habitable spot in Nebraska territory. You cannot keep them out. (Pet. Ex. 24)

Government surveyors surveyed the Kickapoo Cession between September 1855 and May 1856. As part of the survey township summary evaluations were made covering soils, topography, minerals, water and timber. (Pet. Ex. 174-194) From these and other reports of eye witnesses the area would be classified as gently to steeply rolling prairie land with timber scattered throughout, particularly along the watercourses. Mention is made of numerous springs and streams. An area three townships in width at the widest point and extending along the entire length of the cession next to the Missouri river is described as "rolling to hilly throughout with deeply entrenched drainageways and few smooth or gentle slopes." (Pet. Ex. 13) The most heavily timbered area was also along the Missouri River. A majority of the townships either had a small amount of timber or none at all. Typical comments of the surveyor regarding such townships are:

There is a small body of timber at the head of a small creek near the center of the township, but not timber of any consequence below.

This township is poorly watered and poorly timbered.

Timber is scarce not enough on any quarter section for farming purposes.

There is but a small portion of timber in this township, mostly in sec. 9 and secs. 30 and 31. (Def. Ex. 1, pp. 34-39)

The good timber that did exist was mostly along the major streams.

... There is very little timber in it except on the streams which are small ...

Timber chiefly Oak, Hickory, Walnut, Elm and Linn principally lying upon Independence and Deer Creeks, a large
portion of which is good quality.  
(Def. Ex. 1, p. 36)

The surveyors reported sufficient limestone for building purposes in over half of the 25 townships in the subject tract. They found coal in four townships and in one of these;

There is a valuable coal mine being worked on the South East Quarter of Section 9 by John Kimberlin who holds and occupies it by preemption claim.  
(Def. Ex. 1, p. 42)

The petitioners have not claimed that the minerals in the Kickapoo tract had any commercial value in 1854.

The petitioners claim and the defendant concedes that the land in question lay in the most fertile area in Kansas. (Def. Ex. 1, p. 23) This fact was well known in 1854. The government surveyors classified the soil as mostly first rate and numerous travelers of the period have commented on the richness of the soil. (Def. Ex. 1, p. 24; Pet. Ex. 155)

It must be pointed out, however, that an area three townships wide at the widest point extending along the entire length of the cession next to the Missouri river contained the richest soil. This was also the roughest part of the cession and contained "few smooth or gentle slopes." Adding to the above facts concerning location, soil, and topography a climate favorable to general crop and livestock farming, the highest and best use of the Kickapoo Cession in 1854 would have been for general farming on family-sized tracts varying from 80 to 160 acres. (Def. Ex. 1, pp. 25-29)

This conclusion would have been obvious to a well informed buyer in July 1854.

Such a buyer would also have recognized that settlers preferred
some timber on their farm rather than one composed entirely of prairie land. This conclusion is supported by the following notes in the surveyor's reports:

Timber is scarce not enough on any quarter section for farming purposes.

There is now settlers at all places where timber exists.

The township will not admit of a large settlement on account of the scarcity of timber.

The township is well watered by a branch of the Grasshopper and small streams, but will not be thickly settled on account of the scarcity of timber.

(Def. Ex. 1, pp. 34-39)

Agent McCaslin, in a letter to Commissioner Manypenny dated November 26, 1855, wrote as follows concerning the occupation of the Indian Trust lands which were adjacent in the Kickapoo Cession on the south:

The lands thus occupied, are amongst the best in this part of the territory. They are generally selected along the watercourses, and consequently they embrace the finest timber, which is undoubtedly a valuable item in this country. . . The prairie will likely not be much sought after if the timber lands are pre-occupied. (Pet. Ex. 45)

Agent McCaslin would undoubtedly have had the same opinion concerning the value of timber in the Kickapoo lands. Another writer living at this time expresses the opinion that the deficiency of timber in Kansas would be an obstacle in getting the lands settled but he minimizes the difficulty by stating that he thought there was more timber than met the eye and that perhaps the limestone could serve as a substitute for building purposes. (Pet. Ex. 134) Be that as it may, the farms or sections with
timber sufficient for building and fuel were considered the choice tracts and thus were in much greater demand than the bare prairie land.

That the potentialities of Kansas lands in general were well known in 1854, there can be little doubt. The Secretary of War as early as 1844 could report that.

The eastern section of the region embraced by these boundaries from the Missouri river, westward, for two hundred and fifty miles, is of great agricultural beauty and facilities, thickly timbered on the numerous tributaries of the Kansas, Osage and Neosho rivers; fertility equal to the best land in Missouri. (Pet. Ex. 18)

Commissioner Manypenny, in 1853, described the area west of Missouri as

...the best lands in the Indian country. The quality of the soil, for the most part, is of a very superior character, but portions of the land are entirely destitute of timber. A number of roads to New Mexico, to California and Oregon, pass through this country over these lands, and are traveled by numerous bodies of emigrants every year. (Pet. Ex. 28)

It is clear, however; from the evidence submitted, that the glowing descriptions of Kansas lands are general descriptions and do not purport to describe the Kickapoo Cession specifically or to distinguish it as being more desirable than other Indian lands bordering on the Missouri river. It is also evident that much of the exuberance of such writers had to do with the well timbered areas bordering on streams.

The official census of Kansas territory in the fall of 1854 indicates that the majority of the population was settled in the northeast section of the territory along the principal rivers. However, the people were more concentrated south and east of Fort Leavenworth. (Pet. Ex. 249)

The demand of the settlers for choice lands was a basic consideration of the United States Government causing it to effect the removal of the
Indians from what later became Kansas Territory. But there were also other important considerations contributing to this action. The emigrants thronging through the Indian country frequently were subject to the depredations practiced by the Indians. On the other hand, for their own mercenary purposes, the whites often contributed to the darkened state of the Indians when at the same time the government and others were attempting to civilize them. It was believed that a territorial government would help to alleviate both these problems. (Pet. Ex. 28) In addition, there was a need to have some of this territory settled so that food and supplies could be provided for the western emigration. As early as 1851, in urging the settlement of these lands, Mr. F. A. Rice made the following comments to A. H. Stuart, "Secretary to the Indians",

Bear in mind that there is nothing raised in the way of food for man or beast on the routes to Santa Fe, Salt Lake, Oregon &c and that Thousands of dollars worth of Stock perish every winter on their return to this state after having Traveled further than they would have to travil without Com. if the Indian country was settled. (Pet. Ex. 20)

This need would be even more apparent by 1854.

It is difficult to ascertain with certainty the prospect for railroad building west of the Missouri river in 1854. This much, however, seems clear. The prospect was sufficiently vague that it would not have had any substantial effect on the value of Kansas lands, and particularly, the Kickapoo Cession. Any work that had been done to devise a possible route to the west coast was merely exploratory. (Pet. Ex. 30) Special Commissioner Relfe, in a confidential letter to Commissioner Manypenny as late as June 1856, remarked,

No one at all familiar with the great plains west of
this territory, and north of the Canadian Fork of the Arkansas River, can dream of the construction of a Rail Road through it during the present generation if even it can be done. (Pet. Ex. 58)

The evidence does not sustain the contention of petitioners that a good portion of the subject lands were settled prior to the ratification date of the Kickapoo treaty of 1854. The evidence submitted by petitioners on this point is secondary with no indication as to the primary source material upon which such secondary evidence is based. To the contrary, George Manypenny, Commissioner of Indian Affairs, in his report on an extended tour he had made into the Indian lands west of the Missouri River including the Kickapoo lands, from August 18 to October 11, 1853, said:

On the 11th of October, the day on which I left the frontier, there was no settlement made in any part of Nebraska. From all the information I could obtain, there were but three white men in the territory, except such as were there by authority of law, and those adopted by marriage or otherwise into Indian families. (Pet. Ex. 28)

Furthermore, the United States Census Report of November 1854 credited the Kickapoo Cession with a population of less than two thousand. (Pet. Ex. 11, 249) There is some information to the effect that all of present Doniphan County from ten to twenty miles back from the Missouri river was claimed as early as June 26, 1854, less than a month after the organization of the territory. (Pet. Ex. 136) But even if this were true, which is extremely doubtful, most if not all, of these claims were by speculators who crossed the Missouri river to claim land and then returned across the border to wait prospective clients. It had little to do with settlement itself.
Although there were no actual settlements on the subject lands prior to the Kickapoo treaty, it is clear that the whites had been trespassing on these lands since 1849 and had made inroads into the area at least two miles west of the Missouri river, cutting and selling the timber. In 1853 the Kickapoos complained to Col. B. S. Beale at Fort Leavenworth that a number of whites were "intruding into their lands" and that some were trying to settle. (Pet. Exs. 19, 25) In the fall of 1853 during his trip through these lands Commissioner Manypenny observed that there was considerable discussion concerning whether or not the Indian lands were available for settlement at that time. He also noted that some individuals were even exploring the area with the intention of settling. However, he reported that the whites who were exploring with this intention had returned from the Indian lands to await "the action of the Executive Department." (Pet. Ex. 28)

We find that the throngs of people coming to and passing through during this general period were affected and motivated like any other group. All came looking for something, either land or opportunity. Some found what they were looking for; others did not. Some were greatly impressed, and consequently stayed. Others were discouraged and either returned home or emigrated farther west. Some found lands to their liking and settled. Others found that the choice lands were already taken and so renewed their search in other areas. (Pet. Ex. 151) As a result the choice tracts were settled rather rapidly while the other sections were taken up more gradually. A well informed buyer could have forecast such a result in 1854.

A well informed buyer in 1854 would have known that the choice public
lands in eastern Kansas were worth more than the statutory price of $1.25 per acre as we have stated in Finding 14. He would also have known that rumors of thirty, fifty and one hundred dollars per acre had reference to townsites, lands immediately adjacent thereto, or were clearly exaggerated. (Pet. Ex. 78, 130, 131, 136, 248) This conclusion is supported by a resolution of the citizens of Platte county dated July 17, 1854, wherein they stated,

Whereas the location of the seat of government for Kansas Territory at Fort Leavenworth, and its peculiar features for a townsitc, have given to the lands within the reserve (Military Reserve) a value far greater than that of other lands within the territory, and have rendered it unwise to apply the general laws relative to preemptions to such lands. (Pet. Ex. 248)

Even a price of five or six dollars per acre would have been recognized as relating to a small choice tract or to a less desirable farm with improvements. In this connection Agent Clarke reported to Supt. Cumming in November 1854 that the Kansas Half-breeds had been offered five and six dollars per acre for their tract. This was a choice tract comprising twenty three sections (640 acres to a section) located on the north side of the Kansas river. Concerning these same lands Agent Clarke further states that,

The fact of these reservations being laid along the margin of the river for twenty three miles, a high value is set upon them. (Pet. Ex. 41)

He admits that,

Whether these lands are intrinsically worth as much or more than have been offered for them it is not in my power to give an opinion as value is set upon land in Kansas altogether according to their peculiar localities. (Pet. Ex. 41)

However, he concludes that these lands were worth much more than the
sixty or seventy cents per acre that the speculators were paying the
Half-breeds. Clarke's letter of November 7, 1854, quoted above was written
to call Supt. Cumming's attention to such unconscionable and illegal
transactions. (Pet. Ex. 41)

Commissioner Manypenny wrote the Department of Interior January 13,
1855, on the same subject. He mentioned several sales by the Half-breeds
to others at a rate varying from $1.25 to $3.00 per acre. In addition to
declaring such transactions illegal he also said:

I am also convinced, from the testimony of gentlemen
entitled to the fullest credit, that the consideration
named in these contracts is entirely inadequate and below
the true value of the reserves mentioned. (Pet. Ex. 248)

Another factor to be considered in arriving at the fair market value
of the subject property is the availability of other lands, their location
and the price of such lands. A well informed buyer would have been aware
of the impending passage of the Graduation Act. Congress had discussed
the idea of graduating the price of public lands for some time. As early
as February 23, 1844, the Committee on Public Lands reported favorably on a
proposal to reduce and graduate such prices. (Def. Ex. 5-b) The Graduation
Act was passed August 4, 1854, less than three weeks after the ratification
date of the Kickapoo treaty. It reduced the price of public lands which had
been on the market ten years or more. Prior to this Act all public lands
sold at a minimum of $1.25 per acre. Under the Act, the prices of public
land varied from $1.00 per acre for lands on the market over ten years to
$0.12½ per acre for those on the market thirty years or more.

The passage of this Act had a tendency to reduce the demand for the
less desirable public lands which were not subject to the Act and which were, therefore, still priced at $1.25 per acre. It also had the tendency to reduce the price of other less desirable unimproved lands subject to private ownership. During the first year after the passage of the Graduation Act 8,720,475 acres of public lands were sold at graduated prices and averaged $0.27 per acre. (Def. Ex. 7(a) (b)) However, the Graduation Act had little effect on the demand for choice lands in Eastern Kansas since the price of even the choice tracts was only part of the expense involved in creating a profitable farm from unimproved land. (Def. Ex. 10) For this reason, it would have been less expensive, in many cases, to pay a higher price for choice tracts rather than to acquire less desirable sections at a nominal sum.

As of June 30, 1854, there were over 160,000,000 acres of unsold and unappropriated public land lying east of Kansas. Forty million acres of these lands were in Iowa and Missouri, states immediately adjacent to Kansas. Public lands which had been on the market over ten years and remained unsold totalled 77,561,000 acres. Although a majority of this 77,561,000 acres of graduated land lay in the southern states including Missouri, 13,850,000 acres of it lay in Missouri which was adjacent to the Kickapoo Cession. (Def. Ex. 5)

The Miami and Shawnee ceded over 1,600,000 acres of land to the United States in May 1854. The Potawatomi tract had been ceded to the United States in 1846 but was not opened for public sale or settlement until the opening of Kansas territory in 1854. These three cessions comprised over 2,500,000 acres of Kansas land and were available at $1.25 per acre at the
time of the Kickapoo treaty ratification. Although not immediately adjacent to the subject lands, most of this territory was in close proximity thereto and would have been available to the same settlers.

In May 1854 the Iowas and Delawares, with lands bordering the Kickapoos, concluded a treaty with the United States wherein they conveyed these lands to the United States under a trust agreement. The substance of this agreement was that the land was to be surveyed and then sold at public auction to the highest bidder. The lands not sold at public auction were to become available for private settlement at $1.25 per acre. (10 Stat. 1048, 1069). The Indian Appropriation bill of March 3, 1855, provided further that the above lands were to be "classified and valued" prior to their being offered for public sale and that "said lands shall not be sold at public or private sale for a less price than that fixed by the valuation aforesaid." (Pet. Ex. 56)

Pursuant to this bill a special commission was appointed and the above lands, totalling approximately 656,000 acres, were appraised between April and November of 1856, approximately two years after the date of the Kickapoo treaty. (Def. Exs. 56, 78) They were sold between November 1856 and August 1857. (Pet. Exs. 118, 226, 228, 231, 232, 233) The quality and availability of these lands would also have entered into the calculations of a well informed buyer interested in purchasing the Kickapoo Cession.

The petitioners have introduced evidence of the sale and appraisal of these trust lands as bearing on the fair market value of the Kickapoo Cession in 1854. They further contend that land prices in Kansas were no higher in 1856-7 than in 1854. The defendant, on the other hand, objects to the
materiality of this evidence on the ground that conditions in Kansas were so radically changed in the three years following the Kickapoo treaty that such evidence is necessarily irrelevant and, therefore, should not be considered in this case.

Generally speaking, this was a period of unrest and violence in Kansas history. The Act creating the territory of Kansas provided that the status of slavery in the territory was to be determined by the popular vote of its citizens. Consequently, shortly after the organization of Kansas Territory outside elements attempted to promote their own interests by encouraging the emigration to Kansas of those supporting their particular views regarding the institution of slavery. In his annual report of November 1855, Commissioner Manypenny remarked that,

Many of the emigrants to, and settlers in the Territory of Kansas, are engaged in bitter controversy and strife in relation to the institutions to be formed there, as applicable to the conditions of the African race; yet, the hostile factions seem to have no sympathy for the red man; but, on the contrary, many of both sides appear to disregard his interests and trespass upon his rights with impunity. (Pet. Ex. 50)

In a letter dated June 28, 1855, Agent McCaslin wrote Commissioner Manypenny as follows:

The main cause of a large portion of the emigration here; and which seems to determine them to stand their ground, arises from a question: the agitation of which is not confined within the limits of this territory--although it should be--yet its vibrations are felt at the remotest boundaries of the Union. Circumstances and the state of affairs here generally justify the inference; that these are leading 'Spirits' on both sides of this most dangerous, and perplexing question: urging emigration of persons hither which they think will best suit their peculiar political views--whilst no doubt they stand between these, whom they induce to locate here, and any damage or less, to which, they may be exposed by the enforcement of the laws, cf the U. S., against them. (Pet. Ex. 45)
The same influences are running to an extraordinary extent in inducing as many as possible of the innumerable immigrants, that are daily arriving here, to occupy their lands at every hazard. It seems to be a push for precedence, by the opposite conflicting parties, who are contending for the ascendency in the Territory, and therefore exceedingly hard to control. A large number are now emigrating from the South, and perhaps an equal number from the North, and no laws nor treaties seem to be a barrier to some men, nor are there any pause made at misstatements. The outsiders feel no responsibility, and go every length to induce the immigrants to stop on these lands." (Pet. Ex. 57)

Granted, there was constant agitation and strife in Kansas during the 1854-1857 period, during which time a few lives and a large amount of property was destroyed. However, there is no indication that these events had such a radical effect on the appraisal or sale of the Indian trust lands as to render evidence of such sales and appraisals irrelevant to the task at hand. Even the "so called" war at Lawrence and the Potowatomie Creek Massacre were more effective in arousing tempers and political fervor than in raising the price of land in Kansas. Furthermore, most of such events took place south of the trust lands and the Kickapoo Cession was even farther north. (Def. Ex. 12)

We find, therefore, that in spite of the unsettled and troubled conditions existing during this period which undoubtedly affected land values, the conditions were not so unsettled nor the time of the sale and appraisal so far removed from the valuation date of the Kickapoo Cession that proper adjustments can not be made so as to give the proper weight to this evidence. This is not to say that we accept petitioner's claim that land values in Kansas were the same during this period. On the contrary,
land values undoubtedly increased to some extent. We are saying, however, that such increases as may have occurred were not so extreme as to render evidence of the appraisal and sale of the trust lands valueless in this case. In further support of this view, there is no indication that the Special Commissioners appraising the trust lands considered conditions to have changed so radically that this appraisal called for a new approach to an old problem. It is also unreasonable to suppose that there could have been a great dissimilarity in land prices from 1854 to 1856 without some hint to this effect by the Commissioners in their numerous communications to their superiors on the subject of these appraisals.

The petitioners not only maintained that land prices were no higher in Kansas in 1857 than in 1854, but they also contend that neither the appraisal value nor the sales price of the Indian trust lands represent the fair market value of those lands at the times which they were made; and furthermore, that the lands should have been both appraised and sold for much more. One of the implications of this contention is that the United States Commission designated to appraise these trust lands did not render a fair appraisal.

This special Commission appraised the Iowa and Delaware trust lands during the period from April to November of 1856, approximately two years after the date of the Kickapoo Cession. (Pet. Exs. 56, 78) There is every indication they were well qualified for this task. Commissioner James H. Relfe describes himself as "being familiar with land sales for almost forty years" (Pet. Ex. 58) and was chosen for his knowledge and ability in this field. (Pet. Ex. 61) After their appointment the Commissioners were instructed to use the following criteria as a basis for
their evaluation.

(a) Eligibility and quality of the lands
(b) Proximity to the Missouri or Kansas rivers or other watercourses
(c) Timber and leading roads
(d) Position relative to eligible town or city sites
(e) Other advantages bearing on value
(f) Improvements were not to form a part of the evaluation
(g) All property deemed to be worth less than $1.25 per acre was not to be appraised.

(Pet. Ex. 56)

Although the Commissioners only made a general exploration and observation of the trust lands, they used the survey notes and when they were deemed inadequate, called

"... to their aid the different agents and ... (employed) intelligent Indians for guides, made carefui examination and inspection of the different townships, taking such notes and observations, as will enable them, without a review of the tracts, to make an appraisalment, on the tables annexed to the plats." (Pet. Ex. 62)

It is true the special Commission expressed a belief that a competitive sale of the trust lands would be best calculated to give the Indians the fair value for their lands. (Pet. Ex. 62) However, this is merely one way of saying that a competitive sale would give the fair market value whereas any appraisal is merely an approximation of that value, and we have so construed this statement of the Commissioners. As we concluded in Finding 17, not only were these appraisals based on traditional concepts of land evaluation but there is every evidence that they were made in good faith and do not merely represent some arbitrary minimum price as contended by the petitioners.

In a letter dated June 24, 1856, to George W. Manypenny, Commissioner of Indian Affairs, this appraisal Commission expressed the view that the Indian trust lands were comparable to the Kickapoo tract. (Pet. Ex. 62)
Their judgment was confirmed by Phillips, who, writing in 1856, comments that

"The Kickapoo Reserve lies between the Kaw and the Missouri. It is a tract of some ten by twenty miles. It touches the headwaters of the Grasshopper and the Stranger Creek. This is a fine prairie country, resembling in all essential points the Delaware reserve. The Kickapoos, unlike the 'rangers' of the same name, are comparatively civilized; but it is Indian civilization at best." (Pet. Ex. #160)

We have incorporated this conclusion in Finding 17.

However, with respect to the sales of the Iowa and Delaware trust lands, we concluded in Finding 18 that the sales price per share did not represent the fair market value of those lands at that time, that is, in 1857. The reason for this is that the majority of these lands were not subject to competitive bidding. Prior to the public sale of these lands it had been announced by the Commissioner of Indian Affairs that all persons who had settled on the land and had made "valuable and lasting improvements" thereon could obtain the land at the public sale by paying the appraisal price. (Pet. Ex. 69) This action was to prevent "the speculator who would seek, by bidding more than the fair value for the land without its improvements, to possess himself of the earnings and labor of an individual who may have entered upon a quarter section of these lands, or upon one of the town lots, and made lasting and valuable improvements thereon". (Pet. Ex. 69) Agent McCaslin, an eyewitness, wrote to Supt. Cumming June 4, 1857, reporting that,

"Almost every quarter section of the lands to be sold (the Indian trust lands) has an improvement of some description on it, for the purpose of fending off competition to get the land at the appraisal. There are a few bona fide Settlements--houses built--ground
fenced and occupied by families; but the great majority of the improvements were mere foundations, and little temporary shanties built of poles without any person occupying them" (Pet. Ex. #99; see also Pet. Ex. #58)

While the Commission has considered the fact that these sales may not have been entirely indicative of the prices which some of the lands might have brought on a free and open market, we do consider that these prices are some indication of value in 1857, and we have so indicated in Finding 18.

And now, with regard to the events leading up to the treaty of May 18, 1854, between the Kickapoo tribe and the United States Government, petitioners in their brief have implied that Commissioner Manypenny, who negotiated this treaty on behalf of the United States, deliberately deceived the Indians as to the value of their lands. We cannot agree with this interpretation of the evidence.

In the latter part of 1853, George W. Manypenny, Commissioner of Indian Affairs, made an extended trip into the Indian lands west of the Missouri river for the purpose of negotiating treaties with the various Indian tribes to effect their removal from these lands. Although some of the tribes seemed willing to negotiate, the Kickapoos "refused peremptorily to sell any portion of their lands". (Pet. Ex. #28) However, early in 1854 the Kickapoos sent word to Commissioner Manypenny that they were now ready to discuss this matter and Manypenny arrived for the preliminary treaty negotiations in May of the same year. (Pet. Ex. #31)

During the week of discussions that followed the Kickapoos were given free rein to express themselves and to deliberate at various times among themselves concerning their points of disagreement with the Government
representatives. They had asked for two dollars per acre but had been advised that such a price was "out of the question" and that the whole tract could not be valued "by a few acres of the best". (Pet. Ex. #33) Although it was Manypenny's desire to buy all of the tract belonging to the Kickapoos, he compromised with them and allowed them to reserve 150,000 acres of land in the western part of their tract as a permanent home for the tribe. The Kickapoos finally agreed to cede their lands to the United States for the sum of $300,000 even though Manypenny had told them that if they were not satisfied with his offer the United States would sell the lands and give the Kickapoos the selling price. (Pet. Ex. 33) One hundred thousand dollars of the consideration was to be invested at 5% interest with the interest to be used for educational and other purposes. The remainder was to be paid in varying installments over a period of twenty years. (Pet. Ex. 33) The above agreement was formalized in the treaty of May 18, 1854, and was ratified July 17, 1854. The latter date is the date on which the above lands are to be evaluated for purposes of this claim.

The petitioners have said that Commissioner Manypenny deceived the Indians by representing that he would appraise their land and that the Indians thought the $300,000 offer was a result of such an appraisal which was in fact, never made; and that the Kickapoos accepted this offer relying on such an appraisal. The treaty minutes of May 9, 1854, bearing on this contention are as follows, and the Commissioner is speaking:

It is not worth while, however, for them to talk about $2 per acre - It is out of the question. Understand its value and will give it. The Indian mind has been
disturbed about the value of their land. Will rate the land and if they don't like the amount he will agree that they shall receive all their Great Father can sell it for. (Pet. Ex. 33)

All Manypenny says here is that he will not pay $2.00 per acre but will estimate the value of their land and if they don't like this offer the United States Government will sell their lands for them and give them the proceeds. There is no promise of a formal appraisal as the petitioners have maintained. Furthermore, the Indians could not have been relying on any such appraisal because the treaty was signed nine days later. Even the Indians would have known that a formal appraisal either could not have been made or had not been made during that period of time. Manypenny made no attempt to deceive them. When he was asked how much less than two dollars per acre the offer of the government was, he replied, "For the whole it is much less...their land cannot be valued by a few acres of the best...their Great Father could perhaps get little or nothing for some of it." (Pet. Ex. #33)

The Kickapoos, as a tribe, had had dealings with the United States Government since 1819 respecting their lands. In 1838 they were described as being progressive not only agriculturally but in the marketing of their produce among the whites. (Pet. Exs. #16, 17) Agent Richardson reported in 1851 that they were a "thriving and prosperous people, and some of their farms would not suffer in comparison with a majority of their white neighbors." (Pet. Ex. #22) In his annual report of 1853 Commissioner Manypenny said the Kickapoos were "more advanced than any other tribe in the Great Nemaha Agency" (Pet. Ex. #29) and other contemporary accounts
indicate that they carried on extensive business dealings with the whites by selling cordwood to the steamboats and by charging a toll for emigrants using a road which they had built through their territory. (Pet. Ex. #31)
Throughout the treaty negotiations of May 1854 the Kickapoos took an active part and gained some concessions from the Government. They spoke intelligently of principal, interest, and other business matters relating to earlier treaties.
However, in spite of their earlier experience and progress, the Kickapoos were at a distinct disadvantage during these negotiations. Based on their experience of the past, they could not help but feel some compulsion to accept Commissioner Manypenny's offer. Several years earlier in the fall of 1851, Agent Richardson, in advising the removal of the Sac and Fox from the area immediately adjacent to the Kickapoos on the north, said, "They (the Sac and Fox) are laboring under a well grounded impression that they cannot long retain their present location, which from its fertility and contiguity to the Missouri River, they know must soon yield to the enterprise of the white man. Judging the future by the past, the conclusion is inevitable." (Pet. Ex. 22; see also 31)
The Kickapoos, doubtless, would have had this same impression, particularly by 1854. This explains their categorical refusal to sell their lands in the fall of 1853 followed by a message to Commissioner Manypenny early in 1854 indicating their willingness to discuss such a sale. Then, too, the compulsion of economic need would be a factor causing them to knowingly accept a bad bargain.
Therefore, realizing the weakness of their bargaining position, the Kickapoos repeatedly expressed their reliance on the good faith of the Government. (Pet. Ex. 33) That Commissioner Manypenny, who negotiated the subject treaty with the Kickapoos, understood this condition of the Indians is evidenced by his annual report of 1853 wherein he said:

There is no absolute necessity for the employment by the Indian tribes of attorneys or agents to attend to their business at the seat of government. In the dependent condition of the Indians, it is the duty of the government, as their guardian, to cause all matters of a business character with them to be so conducted as to preclude the necessity of the intervention of this class of persons. (Pet. Ex. 29)

In accordance with the above conclusions on this question, we have pointed out in Finding 21 that although the negotiations between the Kickapoos and the Government do not indicate any wilful deceit on the part of the Government representatives, yet the disparity between the fair market value of the Kickapoo Cession and the treaty consideration was so great as to render the consideration unconscionable.

In making the findings of fact in this case we have read and carefully considered all of the evidence presented by both the petitioners and defendant, including evidence of the appraisal and sale of the Iowa and Delaware trust lands. Based on all the evidence presented in this case and upon the record as a whole, we have found that the fair market value of the 618,000 acres involved in the Kickapoo Cession to be $1,236,000 or $2.00 per acre as of July 17, 1854, and have so stated in Finding 20.

We have also found that the consideration paid the Indians for said cession was $300,000 and that sum should be deducted from the said $1,236,000
the value of said land at the time it was ceded, and that an order should be entered determining that a balance of $936,000 should be payable to said Indians from which should be deducted the offsets, if any, to be hereafter determined in accordance with the rules of the Commission.

Let an order accordingly be entered.

Arthur V. Watkins  
Chief Commissioner

We Concur:

Wm. M. Holt  
Associate Commissioner

T. Harold Scott  
Associate Commissioner