BEFORE THE INDIAN CLAIMS COMMISSION

THE MIAMI TRIBE OF OKLAHOMA, also known as THE MIAMI TRIBE,

HARLEY T. PALMER, FRANK C. POOLER and DAVID LEONARD, as representatives of THE MIAMI TRIBE and all of the members thereof,

IRA S. GODFROY, et al., MIAMI INDIANS of Indiana,

Petitioners,

THE UNITED STATES OF AMERICA, Defendant.

Docket No. 256 (Consolidated with Dockets 124-D, 124-E, and 124-F)

Decided: Dec. 18, 1964

Appearances:

Edwin A. Rothschild, and Louis L. Rochmes, Attorneys for Petitioners in Docket 256.

Walter H. Maloney, Attorney for Petitioners in Docket Nos. 124-D, 124-E, and 124-F.

Ralph A. Barney, with whom was Mr. Assistant Attorney General Ramsey Clark, Attorneys for Defendant.
OPINION OF THE COMMISSION

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

The petitioner in Dockets 124-D, E, and F, The Miami Indians of Indiana, and the petitioner in Docket 256, The Miami Tribe of Oklahoma, have brought timely actions under the Indian Claims Commission Act (60 Stat. 1049) against the defendant, the United States. The causes of action in Dockets 124-D, E, and F were identical with that of Docket 256 and so they were consolidated for trial by order of this Commission dated December 19, 1958.

In previous cases such as this when these two petitioners had identical causes of action which were consolidated for trial by the Commission, the right of petitioners in Dockets 124-D, E, and F to represent the Indiana Miamis was not disputed and where an award was given it was made to both petitioners on behalf of the aboriginal Miami tribe. In this case it was also agreed, initially, that both petitioners were entitled to participate in any award made by the Commission (Tr. 8). However, petitioner in Docket 256 now contends that the Miami Tribe of Oklahoma should be the sole representative before this Commission of the Miami tribe that existed at the time of the subject treaties and that any award by the Commission should be made only to the Miami Tribe of Oklahoma on behalf of the Miami tribe as it existed as of the treaty dates.

Petitioner in Docket 256 cites the Court of Claims' recent Minnesota
Chippewa decision (Appeal No. 11-61, decided April 5, 1963) and Section 10 of the Indian Claims Commission Act as supporting this position.*

* Mr. Rothschild: That is why I suggest, on the basis of that case, that the Miami of Oklahoma, not the individuals which were also petitioners in all the Miami Dockets, suing on behalf of everybody but the Miami Tribe—under Minnesota Chippewa seem to me to be the recognized tribe who should represent the people entitled to share in the award granted under the Miami Treaties of 1834, 1838, and 1840.

Properly speaking, that should be, if seems to me, the exclusive representative of the people entitled to share in the judgment, because it is the same Tribe. There is only one tribe, and the fact that individuals separated into a recognized group—I do not think it can be called more than an identifiable group at that—would not justify their representing the people who were entitled to share in the judgment. That is, at least, my present view of Minnesota Chippewa. I think that is what it holds. That would apply to Mr. Palmer and some of the individuals joined with the Miami Tribe in Docket 254. I think it would also apply to Mr. Godfrey and the other individuals who Mr. Maloney represents and who purport to act on behalf of the Miamis of Indiana. I cannot say it with any definiteness of certainty, but I have studied the decision with some care and that seems to be where it comes out. In other words, I do not think that we can exclude individual Miamis living in Indiana from participation, if that is appropriate, but I think we can exclude any other representatives than the organized tribe itself, and that is what I think Minnesota Chippewa holds.

Commissioner Holt: You think that Section 10 applies?

Mr. Rothschild: I think that Section 10 applies, when you take it together with Minnesota Chippewa. Granted, it is not free from doubt. I think that McGhee permits anybody to come in, but that the final judgment, under Minnesota Chippewa, should be the organized tribe as representative of the Miami tribe, as it existed in 1838 and 1840.

Commissioner Watkins: It would be a question, then, of representation?

Mr. Rothschild: That is what I think it would be, yes.

(Tr. pp. 106-108, June 27, 1963)
Section 10 is as follows:

Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

We cannot agree with this interpretation of the Minnesota Chippewa decision or of Section 10 of the Act. We will discuss, first of all, the question of representation. Previous to the Minnesota Chippewa decision the law controlling the issues involved here seem fairly clear. As early as May 1949 this Commission said:

(There is) ** * a third class of claimants, namely, a class which can be identified as a group, that is, a body of Indians having similar rights which are not shared by other Indians, even though of the same tribe or band to which such group may belong. The controlling question is whether or not the claimant group can be identified and that it has a common claim. If such a group can be identified and it has a common claim, it is, in our opinion, an "identifiable group of American Indians" within the intent of the Act and it need not be a political group in character ** * (Emphasis supplied.)

The Loyal Band or Group of Creek Indians v. The United States, 1 Ind. Cl. Comm. 122, 129 (1949)

The Court of Claims upheld this same concept in C. W. McGhee, et al, v. The United States, 122 C. Cls. 380, 391, (1952) quoted below. In reversing this Commission's holding that the Creek Nation East was not an identifiable group of Indians because they had no common claim but rather had individual claims which they wished to settle in a common suit, the court said:
To identify is to establish the identity of, and if a group presenting a claim under the Act is capable of being identified as a group of Indians consisting of the descendants of members of the tribes or bands which existed at the time the claim arose, the jurisdictional requirements of the statute, in our opinion have been met. It would, we think, be a strained and unwarranted interpretation of the Act to say that Congress intended by the term "identifiable group" that the group making the claim must be identical, as a distinct entity, with the tribe or band existing at the time the claim arose.

As thus defined the petitioner in Docket Number 124 herein would be at least an identifiable group if not a tribe or band. The petitioner in Docket Number 256 conceded this point during the oral argument. (Tr. 106, June 27, 1963)

In the Western (Old Settler) Cherokee Indians v. The United States, 1 Ind. Cl. Comm. 165, decided by this Commission in September 1949, the rights of an identifiable group to present a claim under Section 10 of the Act were explained at length. In that case the defendant contended that the western Cherokee could not prosecute a claim under the Act because they were members of the Cherokee Nation or Tribe which had a tribal organization recognized by the Secretary of Interior as having authority to represent all its members, which included the western Cherokees, and therefore had, under Section 10, the exclusive privilege of representing the western Cherokees. After stating that the western Cherokees were an identifiable group and quoting Section 10 of the Act in full, the Commission went on to explain the application of the "exclusive privilege of representing" clause of this section. The Commission said, and I quote at length:
It will be noticed that the statute refers to "tribal organization" as being accorded the exclusive privilege of representing the claimant, be it a tribe, band, or identifiable group. Identifiable groups are rarely, if ever, organized like a tribe or band, which are generally of a political character, in fact no organization of an identifiable group has been brought to our attention, except organizations formed for the purpose of presenting claims, but we are not aware of any cases where such an organization has been recognized by the Secretary of the Interior, and it can hardly be said that an organization created for the purpose of presenting a claim is a "tribal organization" as that term is generally understood. So, it would appear that what Congress had in mind was to give "tribal organization" the exclusive right to present tribal claims of the tribe or band it is organized to represent. Considered in this sense there would be a sound and logical reason for accord the tribal organization the exclusive privilege of pressing its claim rather than permitting a member of the claimant group to do so, for it would be the orderly and representative way to handle claims of an organized tribe, band or identifiable group, and, as we have stated above, it is to such claims the provisions we are considering apply. But the fact that a tribal organization shall have the exclusive privilege (in the absence of fraud, collusion and laches) to present tribal claims does not lead to the conclusion that the provision was intended to give the tribal organization the exclusive right to present a claim of an unorganized identifiable group composed of a segment of the members of an organized tribe. Identifiable groups (as we indicated in the Loval Creek Case, Docket No. 1) are not organized as are tribes or bands, but may have collective rights which are enforceable, if they can be established, by a representative suit under the express provisions of the first part of Section 10; we find nothing in the subsequent provisions of the section that changes the right to submit claims through the medium of members of the unorganized group. The statute authorizes submission of claims by such groups (Sec. 2) by a member thereof (Sec. 10) and through attorneys retained to represent its interests (Sec. 15); language much more definite than that used would be necessary to convince us that the Congress intended that only a tribal organization may represent an identifiable group within a tribe and thus control the handling of a claim which neither it nor its full membership have an interest in. (Emphasis supplied.)

The Western (Old Settler) Cherokee Indians v. The United States, 1 Ind. Cl. Comm. 165, 175, 176 (1949).
In the McGhee case the Court of Claims gave this same interpretation of Section 10. The holding by this Commission that the western Creeks, since they were an organization recognized by the Secretary of Interior, had the exclusive privilege under Section 10 of the Indian Claims Commission Act to represent all Creek Indians having an interest in this claim, was reversed by the Court. It said:

The Creek Nation in Oklahoma has only been recognized by the Secretary of Interior as having authority to represent the Creek Indians in Oklahoma. It has never been recognized as having authority to represent the unorganized but identifiable group of Creeks east of the Mississippi, and therefore is not entitled under the Indian Claims Commission Act to the exclusive right of representing such Eastern Creeks. Accordingly, the group of Eastern Creeks are entitled to be represented separately by representatives of their choosing.

C. W. McGhee et al., v. United States, 122 C. Cls. 380, 394 (1952)

The decisions of this Commission and the Court of Claims prior to the Minnesota Chippewa case interpreted Section 10 of the Act as giving an identifiable group of American Indians the right to its own representation before this Commission, whether it was organized or unorganized, or even though it may have been a segment of a tribe which existed at the time of the events from which the cause of action arose.

As applied to the case in issue, the Miami Indians of Indiana, petitioner in Docket Nos. 124-D, 124-E, and 124-F are not members of the Miami Tribe of Oklahoma nor can they become members, according to the restrictions placed on membership by the constitution and by-laws of the Miami Tribe of Oklahoma. (Cl. Ex. 5, Docket No. 256)

The Secretary of Interior has never recognized the Miami Tribe of Oklahoma as the representative of the Indiana Miamis but on the contrary
has approved a contract between the Indian Miamis and their attorney to prosecute the present suit.

In addition, the interests of the two groups of Miamis are not the same. It is to the interest of the Miamis of Oklahoma to be the full successor in interest to the original Miami Tribe and thus to keep any award within the corporate entity. They have made this claim in their petition and during the oral argument. It makes no difference that petitioner in Docket No. 256 declares it will represent all individuals entitled to share in a judgment and that some of the individual Indians in Indiana can participate in an award "if that is appropriate."

The Minnesota Chippewa case did not change in any way the previous statements of this Commission and the Court of Claims regarding the application of Section 10 of the Act. The Court in Minnesota Chippewa was not dealing with the question of representation at all but rather with the Commission's use of the word "descendants" in the Findings and Order of that case. The Court declared that "The purpose and structure of the Act *** specifically demands that claims be on behalf of the entity not individuals ***." For this reason the Court said the Commission's order and findings should be modified to delete the references to "descendants". This necessitated an explanation by the Court of its language in the McGhee case which said in effect that a "particular claim 'belonged' to 'descendants' of the whole Creek Nation as it existed in 1814." The Court then explained that this language was "inapplicable to a case, like this, (i.e. Minnesota Chippewa) in which suit
is brought on behalf of all interested groups, bands or entities."

Petitioner in Docket 256 apparently has interpreted this as meaning
that since petitioner in Docket 256 has said that the Miami tribe of
Oklahoma will represent all who may be entitled to any part of an award,
including the Indiana Miami "if that is appropriate", and since peti-
tioner in Docket 256 is a tribe recognized by the Secretary of Interior,
that under Section 10 of the Act petitioner in Docket 256 should be the
exclusive representative for the subject claim.

We believe this is an unwarranted interpretation of the Minnesota
Chippewa case. First of all, the facts in Minnesota Chippewa are dif-
f erent than the present case. In Minnesota Chippewa there were no other
interested parties who wanted to be represented. The Mississippi, Pill-
ager, and Winnibigoshish bands, therein represented by the Minnesota
Chippewa Tribe, are not present day entities who could choose their own
representation before the Commission though descendants of these three
bands belong to the Minnesota Chippewa tribe today. Secondly, the fact
situation in the present case is similar to the McGhee case which
Minnesota Chippewa explicitly did not overrule on its facts. Just as
in McGhee, the claim in the present case belongs to the "descendants" of
the whole Miami tribe as it existed at the time the subject treaties
took place, that is, the claim belongs to such "descendants" in the sense
that a present day group composed of such "descendants" has a right to
present that claim before the Commission though they may not have an
individual interest therein. We have found, therefore, that petitioners
in Dockets 124-D, E, and F have a right to representation of their own
choosing before this Commission.
The question of who is entitled to the judgment is closely allied
to that of representation. We cannot say that petitioner in Docket 256
is the sole successor in interest to the original Miami tribe even if
we assume that said petitioner has continued as a tribal entity from
the treaty dates of the subject case to the present time. In C. W. 
McChee, et al. v. United States, 122 C. Cl. 380 (1952), the Court of
Claims said, in reversing the holding by this Commission that the Creek
Nation of Oklahoma had the exclusive right to prosecute the claim for
the 1814 injury to the Creek Nation,

We believe that the rights of the Western Creeks to sue for
the injury arising out of the cession of the eastern land
in 1814, arise rather by virtue of the membership of their ancestors in the tribe recognized by the United States in
1814 as the owner of that land, and that those rights are
in no way superior to nor different from the rights of the descendants of all members of the Creek Nation as it was
constituted at the time the 1814 treaty was executed.

Later, in Pottawatomi Nation of Indians v. United States, 143 C. Cls.
144-145 (1956) the Court of Claims said, "Loss of membership in the tribe
brings a loss of rights in the tribal community property and of partici-
pation in the proceeds of any subsequent sale, distribution, or allotment
of tribal property." This Commission followed both the McGhee and
Pottawatomie cases in Eastern Band of Cherokee Indians v. The United
States, 7 Ind. Cl. Comm. 140 (1958). In that case we said, in contrast-
ing communal and individual rights,

By foregoing the tribal way of life in withdrawing from the Cherokee Nation, the Eastern Band of Cherokees, necessarily
relinquished its tribal and communal rights to the property and assets of the Cherokee Nation from that time forward, and this was true of every individual Cherokee Indian who
left the community.
It must be observed that in the above Cherokee case, the petition and cause of action were based on events which occurred prior to the departure of petitioners' ancestors from the Cherokee Nation. We then went on to say:

**Accepting the proposition that abandonment from the tribe causes forfeiture of all tribal rights from that day forward, it does not follow that such an occurrence has a retroactive effect. It is this retroactive effect that the defendant wishes to apply in defense of these claims. The law, however, does not support defendant's position. (Emphasis supplied.)**

Both petitioners in this case, the Miami Tribe of Oklahoma and the Miami Indians of Indiana, are composed of individuals whose ancestors were members of the Miami tribe which made the treaties with the United States upon which the causes of action in this case are based. The division in the Miami tribe was subsequent to the date when the subject treaties were made. We have found, therefore, that neither of the petitioners is the full successor in interest to the original Miami tribe with whom the treaties were made insofar as these treaties are concerned. Consequently, both petitioners are entitled to participate in the award and said award shall be made to both petitioners on behalf of the Miami tribe as it existed at the time the subject treaties took place. This is in accord with Minnesota Chippewa which made it clear that awards are to be made, "**not to individual descendants of tribal members at the time of the taking, but to the tribal entity or entities today**".

Petitioners claim that they should recover from the United States under the Indian Claims Commission Act for land cessions made to the United States under three treaties negotiated in 1834, 1838 and 1840
respectively. In short, petitioners claim they did not receive the fair market value for said lands. Defendant concedes that the Miami tribe had recognized title to the subject lands at the time of the treaty dates but disputes petitioner's claims of improper treatment. There is no dispute between petitioner in Docket 256 and the defendant as to the acreage involved in the three cessions. (Tr. 10) Petitioner in Dockets 124-D, E, and F includes Royce areas 199 and 256 in its claim in addition to the areas claimed by petitioner in Docket 256. However, under the pertinent treaties these two areas were expressly excepted from the three cessions involved herein. For that reason we have accepted the position of petitioner in Docket 256 insofar as the amount of acreage involved in this case is concerned.

Petitioners have argued at various places in their briefs that the United States acted less than fair and honorably in effecting the subject treaties with Miami tribe wherein it allegedly obtained land cessions from said tribe at far below their fair market value. Specifically, petitioners charge that representatives of the United States government bribed the Miami chiefs and thus were able to obtain the above cessions. The facts cited by petitioners for this allegation is that the United States granted special reservations to the aforementioned chiefs which resulted in favorable cessions to the United States. It is true that without the special reservations granted to certain individual Miami chiefs it would have been very difficult, if not impossible, to negotiate these treaties. It is also true that the President objected
to such grants as a general rule. However, it is evident that these provisions relating to individual grants or reservations were made known to the Miami tribe as a whole during the treaty negotiations and there is no record of any Indians objecting to these reservations. In addition, there is no evidence that the Chiefs sacrificed the interests of the tribe for their own personal gain as a result of these grants. Nor is there any evidence to show that these grants were the cause of the Miami tribe being defrauded.

On the contrary, there is every indication that the Miamis reposed great trust and confidence in their chiefs. John B. Richardville in particular was thought of as a common benefactor of the tribe. It was said of him by Treaty Commissioners Porter and Marshall in 1833:

The utmost confidence is reposed in him, & his influence is so great, as to control generally, the affairs of the tribe. Yet his people are jealous, & he is obliged to act with much circumspection. His fondness for money, inclines him personally, to sell, yet his apprehension of the consequences, if he appears too prominently in a transaction which, frequently, in moments of drunken regret, excites revengeful feelings in these people, against the principal actors, operates as a strong restraint upon him, & he therefore will not come forward publically, to advocate such a measure. Yet he is well aware of the favorable location of their lands, & of their increasing value, from the improvements making about them, & he is not of a temper to forego any pecuniary advantage. (Pet. Ex. 89)

In 1838, according to Agent Pepper, Richardville's

*** influence with his people is commensurate with his superior skill and wisdom. His opinions are so authoritative, that an attempt at negotiation with the tribe without securing his concurrence would prove fruitless. (Pet. Ex. 109)
The 1840 treaty negotiators Milroy and Hamilton, in speaking of special grants to individual Indians, said:

This has been avoided in the present instance, except as related to the Chief Richardville, who has been a common benefactor to his people. This reservation made for his benefit, will enable him to do justice to individuals of the tribe, who heretofore have not received a due share of the money arising from former sales of their land. (Pet. Ex. 113)

In conclusion, the assembled Miamis approved the subject treaties with a knowledge of the provision of special reservations for certain of their chiefs. The Miamis were not induced to so do by the representatives of the United States. The granting of these individual reservations were tribal matters which had been demanded by the Miamis, who in council with their chiefs, had so decided. Furthermore, the Commission has found no fraud, duress, undue influence, or a lack of fair and honorable dealings on the part of the United States in its negotiations with the Miami tribe for the subject lands.

Petitioners also claim that the consideration for the above land cessions was unconscionable and, therefore, that they are entitled to recover under clause (3) of Section 2 of the Indian Claims Commission Act. The term "unconscionable consideration" under the Indian Claims Commission Act has been defined by the Court of Claims as:

That consideration which is so much less than the actual value of the property sold that the disparity shocks the conscience **

*Sioux Tribe of Indians v. United States, 146 FS 229, Appeal No. 4-55, C. Cls., decided Nov. 7, 1956*

Disparity of price alone can support a finding of unconscionable consideration if the disparity between the fair market value and the consideration paid is "very gross." *(Osage Nation of Indians v. United States,*
As to how great this disparity must be the Court of Claims has recently said:

It is true there is no exact dividing line between what is conscionable and what is not. The disparity between the price paid and the fair market value must be very great. We think that the Commission was correct when it said in this case that payment of less than half the true value is unconscionable. (The Miami Tribe of Oklahoma v. United States, 150 C. Cls. 725, 736 (1950))

In the course of determining whether or not the consideration paid for the respective cessions involved herein was unconscionable, it was necessary to evaluate the subject lands, determine the amount of consideration which the United States paid petitioners for these lands, and decide other legal and factual issues relevant to these basic questions.

However, the Commission's ruling on defendant's motion to dismiss the petition has been challenged by defendant. Therefore, before proceeding to other matters we will discuss the merits of this motion. Defendant contends that petitioners have failed to make a prima facia showing that the consideration the United States paid for the subject lands was unconscionable. This failure, says defendant, is because petitioners have not presented any valid evidence of value showing that the consideration was, in fact, unconscionable. Petitioners' evidence is not valid for this purpose, continues defendant's argument, because the documents introduced in evidence by petitioners, without the accompanying opinion of an expert appraiser interpreting these documents, are not of themselves evidence of a particular value of the subject lands as of the valuation dates. (Def. Brief pp. 157-173) And as a necessary corollary
of this view, defendant asserts that the Commission itself is without legal competence to interpret such documents to determine the value of the several cessions in the absence of an opinion of value expressed by an expert appraiser. (Tr. 21)

We cannot agree with defendant's view in this regard. Of course, defendant's assertion that petitioners' have the burden of proving their case is undisputed. However, we cannot see the merit of defendant's argument which, in effect, would make an expert appraiser an indispensable part of petitioners' cases in all valuation proceedings before this Commission. We have previously said that:

The purpose of submitting the reports and testimony of real estate appraisers is to aid the Commission in making this determination. The determination itself, however, is to be made by the Commission on the facts established by the evidence. An appraisal by an expert is no more than his opinion. Opinion evidence is received when the person is a qualified expert in his field, however, "opinion evidence is not evidence of fact." The weight to be given opinion evidence depends upon the qualifications of the witness in the field in which he testifies and whether he takes all relevant facts into account and the correctness of the facts, upon which the opinion is based; and whether the assumptions made by the witness are proper and supported by facts. ***(The Miami Tribe of Oklahoma v. The United States, 4 Ind. Cl. Comm. 346, 401-402.)*

We do not wish to minimize the fact that expert appraisers have played an important role in valuation proceedings before this Commission.

However, petitioners have made a *prima facie* showing of unconscionable consideration when the evidence presented by them is sufficient to establish the fact unless rebutted. In this case the Commission is the judge of the sufficiency of this evidence. Petitioners have here presented documentary evidence which relates to the value of the subject
lands as of the time of the treaty dates. In examining this evidence we have determined that petitioners have made a prima facie showing of unconscionable consideration.

As to defendant's argument that petitioners' documents are not competent evidence of value from which the Commission can properly draw a conclusion of value, it is sufficient to observe that most of the evidence presented in valuation cases of the kind brought before this Commission, whether the subject of expert opinion or not, is documentary evidence and must necessarily be so by the very nature of the cases themselves. The logical result of defendant's reasoning would make the use of any such evidence improper unless first explained or made the basis of an opinion by an expert in one field or another depending on the issues involved. We cannot accept this line of reasoning. The purpose of the expert witness in these cases is to aid the Commission, not replace it.

The defendant has also asserted that even if the evidence is competent and petitioners have made a prima facie case, that the lack of an expert appraiser on the part of petitioners requires the Commission to adopt the conclusions of defendant's expert. The Commission has rejected this view on several occasions and has reiterated the fact that the opinion of the expert witness is only one of many factors considered by the Commission in arriving at an ultimate determination as to value and, unless based on relevant facts, need not be given any weight at all.

We have examined the authorities relied on by defendant for its point of view on the above matters but are not persuaded. The Commission does not consider itself "inexperienced" or without any "knowledge or experience upon which it could exercise an independent judgment" as far as the documentary evidence in this case is concerned. Furthermore, the fact that the Commission refuses to follow an expert's opinion as to the specific value of a given tract of land, even in the absence of an expert for the opposing party, does not mean that it has "arbitrarily disregarded" that expert's opinion or that the expert's opinion has been of no value to the Commission. On the contrary, the Commission can accept many of the opinions of an expert appraiser on the various subjects which must be considered in determining fair market value and still refuse to follow his opinion on the ultimate question of value after considering all the evidence and the record as a whole.

Defendant also objects to petitioners' case on the ground that petitioners are asking the Commission to find "fair compensation" rather than fair market value. We regard this objection as merely one of terminology. Regardless of what petitioners request the Commission is bound to determine fair market value as we have defined it. In The Yakima Tribe v. The United States, 4 Ind. Cl. Comm. 294-296, we said:

Rather than be concerned over the terms to be used in a valuation, it seems to us that the important thing is to have a
clear statement of the factors that may be properly and fairly considered and the determination of value based thereon can well be considered "fair market value."

An important element of petitioners' case has to do with the question of consideration. The amount of consideration for each of the three cessions is in dispute. Petitioners claim $208,000 as the total consideration for the cession under the 1834 treaty. The defendant says $235,015.65. Under the 1838 treaty petitioners claim $335,680 as the total consideration. The defendant claims $345,409.55. Petitioners' claim $550,000 as the total consideration for the land cession under the 1840 treaty. The defendant claims disbursements of $575,930.86 in cash plus the fair market value of 324,796.88 acres of land in Kansas to which the Miamis emigrated in 1846. We shall consider these conflicting claims in the above order.

The pertinent articles of the 1834 treaty are as follows:

Article 2

For and in consideration of the cession made in the first article of this treaty, the United States agree to pay the Miami tribe of Indians the sum of two hundred and eight thousand dollars; of this sum fifty-eight thousand dollars to be paid within six months from the ratification of this treaty, fifty thousand dollars to be applied to the payment of the debts of the tribe, and the remaining sum of one hundred thousand dollars in annual instalments of ten thousands dollars per year.

Article 6

The United States agree to have the buildings and improvements on the lands ceded by the first article of this treaty valued. To cause a similar amount in value, laid out in building, clearing and fencing ground, for the use of the Indians, on such place or places as their chiefs may select,
and that the Indians have peaceable possession of their houses and improvements, on the lands ceded in the first article of this treaty, until the improvements are made as provided for in this article.

Article 7

The United States agree to pay the Miami Indians fifteen hundred dollars, for horses heretofore stolen from them by the whites.

Petitioners assert that the entire consideration for the cession under the 1834 treaty was agreed to in Article 2. Defendant submits that the consideration includes disbursements made pursuant to all three of the above articles. Defendant makes the following claims under Article 2.

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<td>Annuity, cash</td>
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<tr>
<td>Expense of investigating claims</td>
<td>$3,675.98</td>
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<tr>
<td>Payment of debts</td>
<td>$50,326.25</td>
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<tr>
<td><strong>Total consideration under Article 2</strong></td>
<td><strong>$225,850.90</strong></td>
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Defendant lists the following as consideration under Article 6 of the treaty:

<table>
<thead>
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<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clearing, breaking and fencing land</td>
<td>$1,121.26</td>
</tr>
<tr>
<td>Digging wells and well equipment</td>
<td>$200.00</td>
</tr>
<tr>
<td>Expenses of valuing buildings and improvements on ceded lands</td>
<td>$308.00</td>
</tr>
<tr>
<td>Payments for improvements</td>
<td>$5,363.49</td>
</tr>
<tr>
<td>Planting and harvesting crops</td>
<td>$672.00</td>
</tr>
<tr>
<td><strong>Total consideration under Article 6</strong></td>
<td><strong>$7,664.75</strong></td>
</tr>
</tbody>
</table>

Defendant claims the $1,500 disbursed to the Miamis under Article 7 as part of the consideration for the ceded lands under the 1834 treaty.

It is clear that under Article 2 of the treaty the United States was only obligated to expend $158,000 in cash and annuities and $50,000
for payment of tribal debts. Any additional amounts expended by the United States pursuant to this article either in the form of cash or expenses of investigating claims against the Miami tribe prior to paying them do not constitute part of the consideration for the cession.

Under Article 6 the United States agreed to indemnify the Miami Indians for the buildings and improvements on the ceded lands. This obligation including the valuing of the buildings and improvements on the ceded lands was an integral part of the overall agreement and, therefore, part of the consideration for the cession. The "buildings and improvements" in Article 6 includes buildings, wells, well equipment, and the clearing, breaking, and fencing of land. However, it is difficult to see how planting and harvesting crops could be considered "improvements" under this article. It is, therefore, disallowed as part of the consideration. The consideration under this article then, would be $1,121.26 for clearing, breaking and fencing land, $200.00 for digging wells and well equipment, $308.00 as expenses of valuing buildings and improvements on ceded lands, and $5,363.49 as payments for improvements for a total of $6,992.75.

The United States had no legal or fiduciary obligation to compensate the Miamis for horses heretofore stolen from them by the whites. The fifteen hundred dollars promised them under Article 7 of the treaty, therefore, became part of the consideration for the cession.

For the above reasons we have found, as indicated in Finding 32 herein, that the consideration for the cession made by the Miami tribe
under the 1834 treaty was $208,000 under Article 2, $6,992.75 under Article 6, and $1,500 under Article 7, for a total consideration of $216,492.75.

The 1838 treaty makes the following provisions bearing on the question of consideration:

Article 3

In consideration of the cession aforesaid, the United States agree to pay the Miami tribe of Indians three hundred and thirty-five thousand six hundred and eighty dollars; sixty thousand dollars of which to be paid immediately after the ratification of this treaty and the appropriation to carry its provisions into effect; and the residue of said sum after the payment of claims hereinafter stipulated to be paid, in ten yearly installments of twelve thousand five hundred and sixty-eight dollars per year.

Article 4

It is further stipulated that the sum of six thousand eight hundred dollars be paid John B. Richardville; and the sum of two thousand six hundred and twelve dollars be paid Francis Godfroy; which said sums are their respective claims against said tribe prior to October 23, 1834, excluded from investigation by the late Commissioner of the United States, by reason of their being Indians of said tribe.

Article 5

The said Miami tribe of Indians being anxious to pay all their just debts, at their request it is stipulated, that immediately after the ratification of this treaty, the United States shall appoint a commissioner or commissioners, who shall be authorized to investigate all claims against said tribe which have accrued since the 23rd day of October 1834, without regard to distinction of blood in the claimants; and to pay such debts as, having accrued since the said period, shall be proved to his or their satisfaction, to be legal and just.

Article 6

It is further stipulated that the sum of one hundred and fifty thousand dollars out of the amount agreed to be paid
said tribe in the third article of this treaty, shall be set apart for the payment of the claims under the provisions of the fourth and fifth articles of this treaty, as well as for the payment of any balance ascertained to be due from said tribe by the investigation under the provisions of the treaty of 1834; and should there be an unexpended balance in the hands of said commissioner or commissioners after the payment of said claims, the same shall be paid over to the said tribe at the payment of their next subsequent annuity; but should the said sum so set apart for the purpose aforesaid, be found insufficient to pay the same, then the ascertained balance due on said claims shall be paid in three equal instalments from the annuities of said tribe.  ***

Article 7

It is further stipulated, that the United States will cause the buildings and improvements on the land hereby ceded, to be appraised, and have buildings and improvements of a corresponding value made at such places as the chiefs of said tribe may designate: and the Indians of said tribe are to remain in the peaceable occupation of their present improvements, until the United States shall make the said corresponding improvements.

Article 9

The United States agree to cause the boundary lines of the land of said tribe in the State of Indiana, to be surveyed and marked within the period of one year after the ratification of this treaty.

Petitioners claim that the $335,680 consideration in the third article of said treaty was the total consideration. Defendant's position is that petitioners were given consideration under all the articles quoted above. In addition to the $338,021.68 paid under Articles 3, 4, and 5, defendant claims $3,931 under Article 5 as the cost of investigating the claims against the Miami tribe, $3,060.50 under Article 7 for improvements, and $396.37 for survey costs under Article 9, for a total of $7,387.87 consideration under these three articles.
The amount paid to the Miamis pursuant to Articles 3, 4, and 5 was $338,021.68, which, when added to the $7,387.87 makes up the total of $345,409.55 claimed as consideration by defendant. However, under Articles 3, 4, and 6 of the treaty defendant was only authorized to spend $335,680. Therefore, the $2,341.68 overpayment, whether it be considered as paying debts or annuities, cannot be viewed as consideration for the cession.

In Article 5 the Miamis expressly requested the appointment of a Commission to investigate all claims against the tribe, including those of tribe members themselves, which had accrued since October 23, 1834. The United States undertook this obligation with a consequent expenditure of $3,931.00. As implied in Article 4, Article 5 was designed primarily for the benefit of the individual Miami Indians who were creditors of the Miami tribe. The commissioner who had investigated the claims paid under the 1834 treaty had excluded such creditors from his investigation. Therefore, we consider this expenditure part of the consideration for the cession. We view the $3,060.50 expended for improvements under Article 7 in the same light as we did a similar expenditure under Article 6 of the 1834 treaty, that is, as part of the over-all consideration for the cession. The cost of surveying the boundaries of the remaining Miami land in Indiana, in this case $396.37, was a benefit derived by the Miami tribe under Article 9 of the treaty. It was, therefore, part of the over-all consideration paid for the cession. This brings the total consideration paid by the United States to the Miami Tribe pursuant to the various articles of the 1838 treaty to the sum of $343,067.87 as we have indicated in Finding 32 herein.
The provisions of the 1840 treaty bearing on the question of consideration are as follows:

Article 2

For and in consideration of the cession aforesaid, the United States agree to pay to the Miami tribe of Indians the sum of five hundred and fifty thousand dollars. Three hundred thousand dollars of which sum to be set apart, and applied immediately after the ratification of this treaty and an appropriation is made by Congress to carry its provisions into effect, to the payment of the debts of the tribe, as hereinafter stipulated. And the residue, two hundred fifty thousand dollars, to be paid in twenty yearly instalments.

Article 3

The Miamies, being desirous that their just debts shall be fully paid; it is hereby, at their request stipulated, that immediately on the ratification of this treaty, the United States shall appoint a Commission or Commissioners, who shall be authorized to investigate all claims against any and every member of the tribe, which have accrued since the 6th day of November, 1838, or which may accrue before the date of the ratification of this treaty, without regard to distinction of blood in the claimant or claimants. And whose duty it shall be to inquire into the equity and legality of the original cause of indebtedness, whether the same now is, or may then be in the form of judgments, notes, or other evidence of debt, and report for payment out of the money set apart by this treaty for that purpose, such claims only, or parts of claims, as shall be both legal and just. And his or their award when approved by the President of the United States shall be final. Two hundred and fifty thousand dollars of the sum set apart in the second article of this treaty shall be applied to the payments of debts contracted before the 28th day of November, 1840; and the residue of said sum, after such debts are satisfied, being fifty thousand dollars, to the payment of debts contracted between the last named date and the time of the ratification of this treaty by the Senate of the United States; giving preference, in the application of said sum of fifty thousand dollars, to debts contracted for provisions and subsistence.

Article 4

It is further stipulated that the sum of twenty-five thousand dollars be paid to John B. Richardville. And the sum of fifteen thousand dollars to the acting executor of Francis Godfroy
deceased, being the amount of their respective claims against the tribe; out of the money set apart for the payment of their debts by the second article of this treaty.

**Article 6**

It is further stipulated, that the sum of two hundred and fifty dollars shall be paid annually by the United States, and accepted by the MIamies in lieu of the labour stipulated to be furnished by the fourth article of the treaty of the 23rd of October 1826, for the purpose of preventing the dissatisfaction, occasioned heretofore, in the distribution of said labour amongst the different bands.

**Article 8**

It is hereby stipulated, that the Miami tribe of Indians shall remove to the country assigned them west of the Mississippi, within five years from this date; the United States paying every expense attending such removal, and to furnish rations to said tribe for twelve months after their arrival at said country. And the United States shall also cause four thousand dollars to be expended to best advantage in supplying good merchantable pork and flour to said tribe, during the second year of their residence at their new homes. Which sum is to be deducted from their annuity of that year.

**Article 12**

It is hereby stipulated, that the United States provide for the payment of the expense which may be necessarily incurred in the negotiation of this treaty.

**Additional Article**

The United States hereby stipulate to set apart and assign to the MIamies, for their occupancy west of the Mississippi, a tract of country bounded on the east by the State of Missouri, on the north by the country of the Weas and Kaskaskias, on the west by the Pottawatomies of Indiana, and on the south by the land assigned to the New York Indians, estimated to contain five hundred thousand acres.

Petitioners claim that the $550,000 recited in the second article of the 1840 treaty constitutes the entire consideration for this cession.
Defendant, in addition to disbursements of $467,244.46 under Article 2, claims expenditures of $5,018.38 for investigation of claims against the Miamis under Article 3, $40,000 under Article 4 for payments to chiefs Godfroy and Richardville, $7,971.91 paid out under Article 6, $55,017.50 under Article 8, treaty expenses of $678.61 under Article 12, plus the value of the land in Kansas to which the Miamis emigrated in 1846. Thus, defendant has arrived at a cash figure of $575,930.86 which amount was disbursed, according to undisputed General Accounting Office records, under the 1840 treaty and has called it consideration for the treaty. However, the sum of the cash disbursements made by the United States pursuant to various articles of a treaty is not necessarily the sum allowable as consideration for the particular cession. In the case of this treaty, article 2 called for a cash consideration of $550,000.00 with $300,000 allocated for payment of debts and $250,000 for annuities. Part of the $300,000 was to be used in paying $40,000 in debts to Chiefs Richardville and Godfroy as provided in article 4. The United States, however, disbursed $384,861.14 ($344,861.14 under article 2 and $40,000 under article 4) in payment of debts under articles 2 and 4, and only $122,383.32 in payment of annuities. Since only $300,000 was allowable for payment of debts under these two articles, we have found that the Miami tribe received $422,383.32 cash consideration under articles 2 and 4 of this treaty. The $5,018.38 expense of investigating debt claims is allowable as consideration for the same reasons as heretofore given for such allowance under a similar provision in the 1838 treaty.
Article 6 was separable from the over-all treaty in that it provided:

* * * that the sum of two hundred and fifty dollars shall be paid annually by the United States, and accepted by the Miamies in lieu of the labour stipulated to be furnished by the fourth article of the treaty of the 23d of October 1826, for the purpose of preventing the dissatisfaction, occasioned heretofore, in the distribution of said labour amongst the different bands.

This article merely substituted cash for services due under an existing treaty obligation. Therefore, none of the disbursements allocated under this article could properly be part of the consideration paid for the land cession. Of the $55,017.50 disbursed under article 8 only $49,947.52 could be termed consideration paid for the cession. This figure includes $35,947.52 for removal expenses, $10,000 for rations which the United States provided during the Miamis first year in Kansas, and $4,000 spent for flour and pork during their second year in their new home. Defendant has listed $9,069.98 expended on flour and pork during the second year but the treaty article only called for an expenditure of $4,000 which was to be deducted from the Miami annuities for that year. This appears to have been done. Petitioner has objected to the inclusion of removal expenses as part of the consideration for the land cession and has urged that the Commission reverse its earlier ruling to this effect in Absentee Delaware Tribe of Oklahoma v. United States, 9 Ind. Cl. Comm. 346, 356. However, petitioner has not convinced us that our holding on this point in the Absentee Delaware case was in error. We have, therefore, included these removal expenses as part of the consideration for the cession. As part of the treaty agreement, the United States stipulated in article 12
to pay for the expenses "necessarily incurred in the negotiation of this treaty". As a concession which the United States made to the Miami in a treaty transaction which was beneficial to both parties, the $678.61 expense incurred in fulfilling this obligation must necessarily be included as part of the over-all consideration for the ceded lands. This brings the total cash consideration paid for the 1840 treaty cession to the sum of $478,027.83 and we have so indicated in Finding 32 herein.

In the "Additional Article" of the 1840 treaty, the United States stipulated to assign the Miami a tract of land, generally described, which was located west of the Mississippi River in the State of Kansas. Petitioners claim that the land described in this "Additional Article", to which the Miami removed in 1846, was not part of the consideration received by the Miami for the lands they ceded under the 1840 treaty. This land in Kansas was rather, according to petitioners', the consideration given by the United States in return for the removal of the Miami out of the ceded areas. Petitioners quote an opinion of the Attorney General of the United States to this effect. (Pet. Ex. 76) The occasion for this 1882 opinion by the Attorney General was caused by a dispute between the Miami who had emigrated west to Kansas and those who, for one reason or another, were still living in Indiana. The dispute concerned the question of whether or not the Indiana Miami had claim to any part of the proceeds of the sale of the Kansas land to which the tribe had emigrated in 1846 in accordance with the provisions of the 1840 treaty.
After quoting Article 10 of the treaty of November 6, 1838, in which the United States promises "to possess the Miami Tribe of Indians, and guaranty them forever a country west of the Mississippi River, to remove to and settle on when the said tribe may be disposed to emigrate from their present country," the Attorney General's opinion then states:

The land was promised on the implied condition that the tribe would remove to and settle on it.

There is no guaranty or promise to those who should refuse to emigrate.

The opinion goes on to say that the specific lands west of the Mississippi were assigned to the Miamis under the treaty of February 25, 1841:

** in fulfillment of the promise made by the treaty of 1838, and was an inducement held out to the tribe to emigrate. The lands were given to them for their occupancy. Accordingly, in the year 1846, the Miamies, as a tribe, did emigrate and took possession of the lands so assigned for their use, and which were intended for the benefit of those only who should settle upon them. (Emphasis supplied.)

We think the Attorney General was correct in his conclusion that the Kansas lands belonged only to those Miamis who removed and settled on them. However, we do not agree that the article of the 1840 treaty assigning these lands in Kansas to the Miamis was done in fulfillment of the 1838 treaty obligation. The entire course of the treaty negotiations between the United States and the Miami tribe during the 1830's up until the conclusion of the 1840 treaty was designed to accomplish two purposes; to obtain a cession of all the Miami lands in Indiana and to effect the removal of the Miami Indians to a location west of the Mississippi River. The reasons are obvious. There was a great demand
among the white settlers for these Indian lands and the Government wanted to avoid, if possible, the strife that would inevitably arise between the Indians and the whites if they lived in close proximity to one another. The United States treaty commissioners tried from the beginning to accomplish both of these purposes but were only partially successful. When the Miamis refused to sell all their lands it was because they did not want to move. The commissioners then obtained a land cession under the 1834 treaty. The same thing happened in the negotiations leading up to the 1838 treaty. The United States then obtained a land cession only, but in trying to induce the Miamis to move west, which would also result in cession of all Miami lands, the commissioners inserted in the 1838 treaty an article promising "to possess the Miami Tribe of Indians, and guaranty them forever a country west of the Mississippi River, to remove to and settle on when the said tribe may be disposed to emigrate from their present country." This promise in the 1838 treaty was given when the Miamis were under no treaty obligation to move. They still had land in Indiana and had declared their intention to stay, though the possibility of a future removal seemed more favorable than before. (Cl. Ex. 109) This article was separable from the rest of the treaty to take effect only if and when they decided to move, and even then presupposed additional negotiations in order to effect a definite agreement relative thereto. It was not a bilateral agreement which the petitioners urge was fulfilled by the further clarification in the 1840 treaty and the move west, but was only an offer given on the implied condition that the tribe would
cede the rest of their lands in Indiana as well as emigrate west of the Mississippi.

This offer was too indefinite to have any legal significance standing alone. It did not specify clearly where the country west of the Mississippi River was located nor the extent of territory intended. It needed further clarification, and this clarification took the form of the 1840 treaty which was separate and distinct in all respects from the 1838 treaty. That the Kansas land was part of the consideration for their Indiana lands was understood by the Miamis themselves. In a letter of Big Legs and others to G. W. Manypenny, dated May 29, 1854, the Indians stated:

* * * We were promised previous to our removal from Indiana, at the formation of our last treaty, a country west of large extent equal if not greater in quantity to the amount we disposed of, which was some 1/2 million of acres * * *

* * * We desire our Father to treat with us for the estimated number of acres, clearly defined in the ratification of our last treaty by Congress. The fact that the boundaries only contain a little over half of the estimated amount of land is no basis on which Government should deprive its ward, of their just and equitable rights. The U. S. have received full and ample compensation for the estimated amount of territory in the valuable lands you have obtained of us situated in the most fertile and desirable portion of Indiana. * * *

(Pet. Ex. 166, Underlining supplied.)

Petitioners also quote the opinion of this Commission in The Miami Tribe of Oklahoma v. United States, 6 Ind. Cl. Comm. 564, wherein we said that,

* * * A cursory examination of the 1840 treaty discloses the Kansas land was not part of the recited remuneration for the 1840 cession; * * *
The above statement is correct and is not in conflict with our holding in the present case. This statement does not constitute a ruling by the Commission that the Kansas land was not part of the over-all consideration given for the ceded lands. It says that the Kansas lands were not part of the "recited remuneration". This means that the treaty agreement does not specifically label the assigned lands in Kansas as "consideration" as it does the $550,000 figure expressed in article 2. We have found that the consideration paid under the 1840 treaty is not determined by what is recited in the treaty articles but rather by the value of what was actually received by the Miamis in exchange for their lands. This determination is in accord with the previous decisions of this Commission in similar matters. Absentee Delaware Tribe of Oklahoma v. The United States, 9 Ind. Cl. Comm. 346, 356; Cheyenne-Arapaho Tribes of Oklahoma v. The United States, 10 Ind. Cl. Comm. 1. The 1840 land cession, the removal west, and the lands granted the Miamis in Kansas were all part of the same transaction and cannot be separated as petitioners have tried to do. They were interrelated and all were vital to effecting the treaty. It was not until later that the argument was made by petitioners that the land in Kansas was not part of the consideration for the 1840 treaty cession, and then it was made against those Miamis who did not emigrate to Kansas according to the treaty agreement but who still wanted to participate in the proceeds from the sale of the Kansas lands. (Pet. Exs. 44, 45) The cession, the removal, and the promise of the Kansas land were all part of the same agreement. We have found,
therefore, that the consideration for the 1840 treaty cession by the
Miami Tribe of Indians was $478,027.83 plus the fair market value of
the 324,796.88 acres of land in Kansas received by the Indians pursuant
to said treaty. The valuation of these lands as well as the date of
such valuation will have to be determined by further proceedings before
this Commission.

As to the proper dates of the evaluation of the three cessions the
petitioners and defendant disagree in part. Defendant contends that the
proper date to evaluate the 1834 cession is October 23, 1834, whereas
the petitioners say it should be November 10, 1837. Defendant asserts
that the evaluation date for the 1840 cession should be February 25,
1841, and petitioners contend for May 15, 1841, as the proper date.
Both agree that the 1838 cession should be valued as of January 23,
1839, and the Commission is in accord with this date.

Regarding the 1834 treaty, the defendant's position is that though
the original 1834 treaty provided that it was to become effective when
"ratified by the President, and Senate of the United States," the treaty
as amended in 1837 continues to describe the treaty as having been con-
cluded "on the 23rd day of October, 1834," and since this amended treaty
did not provide for any effective date, the treaty should be treated as
if it was negotiated October 23, 1834, with no provision as to when it
was binding. Thus, in accordance with previous rulings by the courts on
such questions, the effective date of the treaty would relate back to
the negotiation date regardless of the date of ratification. Petitioners say, on the other hand, that the amended treaty was, in effect, a new treaty to become effective when approved by the Miami Tribe as provided in the resolution of the Senate accompanying the treaty.

We agree with petitioners as to the effective date of the treaty.

The treaty of 1834, as originally concluded, provided:

This treaty to be binding, when ratified by the President, and Senate of the United States. (7 Stat. 458, 461)

However, the treaty was unacceptable to the President who, therefore, did not submit it to the Senate for ratification. In 1836 Commissioner Ellsworth made an unsuccessful attempt to get the Miamis to agree to a treaty which would be acceptable to the President. The next year, another treaty Commissioner, Jonathon Kellar, succeeded in obtaining the agreement of the leading Miami chiefs to the original treaty with certain substantial amendments. On October 12, 1837, the Senate ratified the original treaty of October 23, 1834, with the following introductory remarks and resolution:

And whereas the said treaty with explanatory documents from the Department of War, having been submitted to the Senate for its advice in regard to the ratification of the original treaty, with the amendments proposed by the Secretary of War, the treaty, with the amendments, in the event of its ratification by the United States, to be again submitted to the Chiefs and Warriors of the Miami tribes for their sanction or rejection, the Senate did on the twelfth day of October, one thousand eight hundred and thirty seven, resolve as follows viz:

* * * That the Senate do advise and consent to the ratification of the treaty between the United States of America and the Miami tribe of Indians, concluded at the Forks of the Wabash, in the State of Indiana, on the twenty-third-day of October, one thousand eight hundred and thirty-four; with the
following amendment: Provided, that the Chiefs and Warriors of said tribe, shall in General Council, as on the occasion of concluding the aforesaid treaty, agree to and sign the same: (Underlining supplied) (7 Stat. 463)

An unratified agreement or treaty is only an offer until accepted or ratified and the acceptance or ratification of such offer must be without substantial qualification. The Kiowa, Comanche and Apache Tribes of Indians v. The United States, 1 Ind. Cl. Comm. 520, 527. The ratification here of the 1834 treaty was with substantial amendments and conditional upon the treaty being accepted by "the Chiefs and Warriors of said tribe * * * in General Council, * * *" (7 Stat. 458-463). This was, in effect, another offer of agreement which the Miami tribe could accept or reject. It, therefore, became effective when they accepted it November 10, 1837.

The difference between the effective dates claimed by petitioners and defendant regarding the 1840 treaty is less than 90 days. We deem it immaterial which date is considered as there was no material change in the value of the subject lands of that treaty during this period. (The Shoshone Tribe of Indians v. The United States, 3 Ind. Cl. Comm. 333, 336)

Petitioner in Docket 256 finds the fair market value of the 1834 cession of 239,588 acres to be $1,050,670 or approximately $4.38 per acre. Defendant values this land at $84,800 or an average of $.35 per acre. The 209,650 acre cession of 1838 is valued by petitioner in Docket 256 at $1,475,951 or approximately $7.04 per acre. Defendant values the same cession at $157,190 or about $0.75 per acre. This same
petitioner claims $2,172,192 or about $4.39 per acre as the fair market value of the 473,000 acre cession of 1840. The same tract is valued by defendant at $94,600 or about $0.20 per acre. Petitioner in Dockets 124-D, E, and F, values all three cessions as a whole at $5.50 per acre for a total value of $4,962,309 or a $263,485 increase over the total valuation claimed by petitioner in Docket 256.

On the basis of all the evidence and testimony presented in this case, we are convinced that neither the petitioner nor the defendant is correct in their claims as to the fair market value of the subject lands. Said lands, as a whole, were neither as outstanding as petitioners claim nor as worthless as defendant asserts, though there were some tracts which would undoubtedly fall into both of these categories. It is apparent from the evidence that the fair market value of the three cessions was much greater than the prices suggested by the defendant.

The subject lands were regarded generally as being very valuable both by reason of their quality and location. It was recognized as early as 1829 by the Indiana legislature that they represented "a large space of the best soil" and that the Indian's title to the lands needed to be extinguished so as not to impede the State's plans for internal improvements. (Pet. Exs. 78, 79) The Commissioner G. B. Porter wrote Secretary of War Cass in 1833 that:

The lands contained in the Miami reservations are very valuable and as the line of the Canal which the State of Indiana is constructing passes through a large body of them, it is very desirable as well for this as other obvious reasons that a Cession of them should be obtained **.

*     *     *     *     *     *
I cannot, however, believe that these Indians will dispose of the whole of their lands -- nor are they willing now to move west of the Mississippi -- nor is fifty cents per acre a sufficient price. Chief Richardville knows, as well as anyone else their value. They are worth at least two dollars per acre. *(Pet. Ex. 86)

Earlier in the same year Cass had been informed by Commissioner Schermerhorn that:

According to the best information I can obtain, the Miamis have in their several Reservations upwards of 800,000 acres. From what I have seen, and from the last information I can obtain, the lands are among the best in the State, and will find a ready sale, at a considerable advance of the Government price. ***(Pet. Ex. 84)

The citizens of Indiana in a memorial to the treaty commissioners dated November 9, 1833, said:

The lands they propose to cede are well worth from one to two dollars per acre; much of it would command in market a higher price than we mention. *(Pet. Ex. 88)

After their failure to effect a treaty with the Miamis in the fall of 1833, the treaty Commissioners reported to Secretary of War Cass the results of their negotiations and after stating that the Indians had offered to cede 187,680 acres at five dollars per acre, said:

These were terms to which the Commissioners could not accede. We have no doubt however, that this quantity could be purchased at about two dollars per acre, which is less than the actual value, if they were quietly assembled & the proposition made, without the parade of public Councils. The land is steadily rising, & this accession, the government must sooner or later meet. ***(Pet. Ex. 89, p. 7)

Agent Marshall wrote Secretary Cass in September 1834 concerning these same lands. He said:

Taking into consideration the public spirit of the enterprise of the Canal, the fertility of the soil thro' which it passes, and the superior water privileges everywhere to be seen thro' that portion of the Country, they desired to sell,
the land if purchased at $1 to $1.25 per acre, will, I am con-

fident, after it is surveyed and brot into market sell from $3
to $5 pr. acre. (Pet. Ex. 97)

Approximately two years after the treaty of 1834 has been negotiated
and refused by the President, Commissioner Ellsworth attempted to make
a treaty with the Miamis which would be more in accordance with the
President's views. After talking to the Miamis Ellsworth reported to
Cass that:

* * * hereafter another treaty may be made but as to the terms
cannot of course venture a prediction-- The lands embraced in
the treaty already made, have increased in value in consequence
of the internal improvements of the State and the same cause
will continue to operate to advance the price still higher--
* * * (Pet. Ex. 102, p. 4)

Commissioner Crawford, in reporting on the 1838 treaties with the Miamis,
said:

* * * By it the United States have extinguished the
Indian title to 177,000 acres of land, as well as it can be
computed, for which we stipulated to pay $335,680, * * *
The price given appears to be high, and more than is usually
paid for the occupant right of what may be called wild land,
but it is situated in the midst of a settled country has a
different value from Indian districts generally in its loca-
tion and circumstances, and it is said to be of fine quality.
* * * (Pet. Ex. 112) (Emphasis supplied.)

Concerning the 1840 cession from this same tribe, Crawford said:

The extinction of Indian title throughout all Indiana
was justly regarded to be of great consequence to that common-
wealth. The lands acquired are of superior quality and situ-
ated in what must become a rapidly improving part of the State.
(Pet. Ex. 118)

The General Land Office, in their report of 1844, commented on the three
foregoing cessions as follows:

In the State of Indiana, as in Ohio, the only consider-
able body of land remaining to be brought into market is in
an Indian reserve. The Miamies of the Wabash entirely dis-
posed of this reserve to the General Government by treaty of November 28, 1840, reserving to themselves five years from that time to remove, and consequently by this restriction it cannot be kept much longer out of the market. It contains 983,892 acres, is very fertile, and eligibly situated, and should be attached to some land district at once, that steps may be taken by this office in due season to place it in the possession of those who will cultivate and improve it. **

(Pet. Ex. 134)

The location of the subject lands generally, was choice because of their proximity to the Wabash and other rivers and streams, the Wabash and erie Canal, and other transportation facilities. During the 1830's there was a continuous and sometimes rapid increase in the population of the counties surrounding the Miami lands. This constant influx of settlers and the substantial proportion of improved farms in the surrounding counties increased the demand for unimproved land in this area and tended to make the subject lands more valuable than public lands generally. This population increase was both a cause and an effect of the great demand for Indiana lands during this general period as evidenced by the rapid sales of public lands in Indiana during this time in comparison with such sales in other parts of the United States.

As early as October, 1830, lands which had been granted to the State of Indiana to finance the building of the Wabash and Erie Canal, were sold at public auction. These lands were unimproved, comparable in quality to the Miami reserves, and situated within five miles of the projected Wabash and Erie Canal. Although the number of sales and some of the prices were disappointing, 41,931.41 acres of these lands sold for an average of about $1.70 per acre. In their 1833 report to the
General Assembly of the State of Indiana, the Wabash and Erie Canal Commissioners estimated the value of the 354,317.14 acres of these canal lands, both sold and unsold, to be $826,664.85 or about $2.33 per acre. This estimate included lands classified as first and second rate and also Indian reserves. The estimated values varied from $1.50 to $3.50 per acre. The Indian reserves were estimated at $3.00 per acre. Again, these lands were comparable in quality to the Miami reserves and a good portion of them were comparable to the Miami reserves with respect to location. During the period from 1830 through 1844, 316,421.12 acres of these canal lands were sold for $737,143.08 or an average of about $2.33 per acre. During the years 1838 through 1841, 31,086.95 acres of the same lands were sold for a total of $126,391.74 or an average of slightly over $4.00 per acre. Whether these lands were first, second or third rate we have been unable to determine.

Generally speaking, the Miami reserves were not available for public sale until 1846, when the Miamis removed to Kansas. However, most of Royce areas 192 and 198 were granted by the United States to the State of Indiana as canal lands and were sold in 1842 or shortly prior thereto. These lands were rated at from $2.00 to $5.00 per acre. Of the 23,528 acres contained in Royce area 192, 20,199 acres were rated at an average of $3.49 per acre. Of these 20,199 acres, 12,784 were sold for an average of $3.44 per acre. Royce area 198 contained 164,750 acres, of which, 119,909 acres were rated at an average of $3.49 per acre. Of these 119,909 acres, 110,879 were sold at an average price of $3.50 per
acre. (Cl. Exs. 247, 247-A) The fact that most of Area 198 was much nearer the principal rivers, towns, and the Wabash and Erie Canal undoubtedly explains why a much higher percentage of this area was sold in comparison with Area 192.

The defendant introduced evidence of many private sales of land in counties contiguous to the Miami reserves. We conclude from Finding 28, which was based on this evidence, that during the 1836-1838 period 468 private sales involving 52,206 acres of land were made in ten counties contiguous to those Miami reserves ceded by the 1834 treaty which became effective November 10, 1837. These private lands sold for an average of between three and four dollars per acre. Undoubtedly, some improvements are represented in these average prices but the majority of the value would be in the land itself because of the fact that the period between the time of first entry and the date of the sale of the majority of these acreages varied from a few months to only two years. This would give little opportunity, in most cases, to make substantial improvements. During the 1838-1841 period, 640 private sales were reported by defendant in twelve counties contiguous to those Miami reserves ceded under the 1838 and 1840 treaties. These transactions involved 69,911 acres and brought an average of over $3.50 per acre. Where the dates of entry and sale were indicated in these transactions, the period between these two dates averaged about four years per sale. The length of time between the date of first entry and the time of the sale does give some indication as to the possible improvements on the land. However, this factor can be misleading. A very short period of time between
the dates of first entry and sale would usually indicate few improvements. On the other hand, a long period of time between the dates of first entry and sale would not necessarily mean that valuable improvements had been added to the property. For example, in Finding 28 we pointed out that one 320 acre sale made fifteen years after the date of first entry brought $6.25 per acre whereas another sale of 40 acres made seventeen years after the date of first entry sold for only $1.00 per acre. It is apparent that at least during this period the most important factors bearing on the value of these private sales generally were the quality and location of the land rather than any improvements made thereon. This is evidenced by the wide variance in the sale price of lands that were clearly unimproved. For example, in the case of unimproved lands set aside to be sold for the benefit of public schools, one 80 acre tract in Cass county sold for $1.48 per acre in 1837. Five other 80 acre tracts were sold in Clinton county the same year for an average of $3.60 per acre. Location was particularly important as pointed out by Mr. Theodore L. Carlson, one of defendant's experts.

The value of frontier land was not determined so much by its fertility and the labor expended on it, as by its location in relation to navigable rivers for commercial use. Without markets, labor applied on the land was of little value in itself in assuring great economic development. (Def. Ex. 6, p. 28; Def. Ex. 1, p. 113)

Defendant takes the position that the subject lands had great potential value as of the treaty dates but that this value could not be realized for many years and at great expense. Summarized below are the general principles which Mr. Hoyt, defendant's expert appraiser, used
to reach his conclusions as to the fair market value of the subject lands. (Def. Ex. 1, pp. 1-9; 100-132)

(1) Most of the sales reported in adjacent counties were of small tracts with improvements, whereas, the subject lands were unimproved with a dense forest cover. (Mr. Hoyt then lists fifteen different types of public and private improvements normally made on unimproved land of this kind and goes in to detail showing the high cost of such improvements.)

(2) During this period the sales of small tracts were usually sales of the best locations along rivers and on high ground so that the prices for these private sales cannot be compared to large tracts including lowlands and swamps.

(3) The value of heavily timbered wet lands was less than the value of lands with a combination of open prairie and timber.

(4) The best use a buyer could make of the subject lands would be to resell them in small tracts with all the problems and expense attending such a business venture.

(5) The financing of such large tracts of land would be extremely difficult, particularly during this period of financial distress when the interest rates varied from 9% on well secured mortgages to 25% on more speculative ventures.

(6) The competition of vast amounts of public lands soon to be opened to the public at $1.25 per acre would add to the difficulty of selling the subject lands.
(7) Because of the transportation problem, lands not located directly on a river navigable by steamboat had virtually no economic value based on the sale of crops but were, rather, subsistence type farms.

(8) During the 1834-1840 period there was no stable currency in the United States and the prices paid for the private transactions reported in this case were not necessarily in gold and silver but in state bank notes of varying degrees of depreciation or discount.

By using these general principles, and, of course, the evidence supporting them, Mr. Hoyt arrives at a price per acre for which the subject lands could be sold in small tracts. He then divides this price in half to reach the fair market value of the subject lands as a whole. The difference represents the buyer-seller's expenses and profit. However, the Commission has never accepted this formula as a means of arriving at fair market value. It is true, and the Commission has so found in other cases, that a large tract of land brings less per acre when sold as a unit than when it is sold in small tracts. However, though this factor could be very significant in cases involving several million acres, it is of less importance in the present case where many different tracts, thirteen in all, are variously located and relatively small in size.

An underlying premise which Mr. Hoyt uses in reaching his ultimate conclusion as to the fair market value of the subject lands is that the private sales in the general area are not comparable to the subject lands because these private lands had improvements and were of the best locations. However,
there is no evidence of the type or extent of improvements on these private lands. On the other hand, there is evidence that unimproved comparable lands sold at a price much higher than Mr. Hoyt's estimate of value for the subject lands. Neither is there evidence that these private lands, as a whole, had any more select locations or less low-lands and swamps than the Miami reserves. This is speculation on the part of defendant's expert. Perhaps heavily timbered wet lands were less valuable than lands with a combination of open prairie and timber, even so defendant has not shown that the private and public sales nearby were of lands with such a combination or that they were appreciably less heavily timbered and wet than the subject lands. As for the problem of raising the money to buy the land, we do not see that this should be a major factor in a case of this kind because one of our assumptions in these cases is that our prospective buyer is able to buy. However, as Mr. Hoyt has stated, interest rates would effect the fair market value of land. He does not explain exactly how the high interest rates of the period affected the fair market value of the subject lands other than producing the general effect of making land in general more difficult to sell and thereby lowering the price. On the other hand, the fact that the lands in this area were selling rather rapidly in spite of the high interest rates gives some indication as to the demand for land.
The competition of public lands available at that time and in the foreseeable future at $1.25 per acre was an important factor bearing on the fair market value of all lands, including the subject lands, during the 1830-1840 period. Consequently, it would have no greater effect on the fair market value of the subject lands than it would on the sales prices of the private and canal lands sold in nearby areas. Again, relative to the transportation problem, Mr. Hoyt has not shown how this factor has made the subject lands less valuable than the land in contiguous areas. Certainly, the majority of the Miamis reserves had good transportation facilities for that time and place. These facilities were at least as good as, if not better than, those of lands with which we are comparing them. The future promised to be even better. On Mr. Hoyt's final point, we have no way of knowing what form of currency was used in the purchase of the private and canal lands with which we are comparing the Miamis reserves, and in the case of Royce areas 192 and 198, the reserves themselves. We cannot assume for purposes of evaluating the subject lands, that the currency used was depreciated bank notes which did not fairly represent the fair market value of said lands.

Despite the evidence which defendant has introduced and the testimony of defendant's expert witnesses, we conclude from the statements of reputable contemporary individuals about the value of the subject
lands, the location and quality of the Miami reserves, the private sales of lands in counties surrounding the reserves, the sales of comparable canal lands, the sales of part of the subject lands as canal lands, and other private transactions in the area, that there is substantial and convincing evidence that defendant's conclusions as to the fair market value of the subject lands are grossly inadequate.

On the other hand, the evidence does not justify the prices requested by petitioner. Although the subject lands were undoubtedly choice by reason of their quality and location, they were unimproved and heavily forested. To create more than a subsistence farm it was necessary for the settlers to expend a great amount of time and effort or money to clear, fence and drain these lands. The average prices received for private lands in the counties contiguous to the subject lands undoubtedly reflected, to a certain extent, improvements in one form or another whereas the Miami reserves were unimproved. Lands nearby, both public and private, improved and unimproved of both good and poor quality, were available for purchase and served to keep the prices of even the choice lands competitive. Certain of the private sales, including those pointed out in Finding 30, were of lands especially valuable by reason of their location and the prices received for them do not reflect the fair market value of the subject lands as a whole. The above considerations, as well as the appraisal and sale of canal lands in this area, indicate to us that petitioners' valuation of the subject lands as a whole is too high.
After considering the many factors necessary in determining the fair market value of the subject lands as of the effective dates of the treaties, including the location of the lands, their size, topography and soil, the highest and best use, demand for them, comparative sales, competitive lands, the rate of population increase in the area, the economic conditions, and other relevant matters as reflected in the findings of fact herein and the record as a whole, we have made the following conclusions respecting the fair market value of the subject lands. These conclusions are contained in Finding 34 herein.

As of November 10, 1837, the lands ceded under the 1834 treaty comprising 239,588 acres, had a fair market value of $598,960 or an average of $2.50 per acre. We have found that the $216,492.75 paid for the said lands is unconscionable under the Indian Claims Commission Act. Therefore, under the 1834 treaty, petitioners are entitled to a judgment in the amount of $382,467.25 less any offsets which are properly deductible therefrom. The United States paid $339,611 for 208,650 acres of land under the 1838 treaty, but as of the effective date of January 23, 1839, these lands had a fair market value of $730,275, or $3.50 per acre. We have concluded that the consideration paid was unconscionable under the Indian Claims Commission Act. Therefore, petitioners are entitled to a judgment in the amount of $390,664 under this treaty less any offsets which are properly deductible therefrom. Under the above two treaties petitioners are entitled to a judgment in the amount of $773,131.25 less any offsets which are properly deductible therefrom. An order will be entered accordingly.
We have found that as of the period between February 25, 1841 and May 15, 1841, the lands ceded under the 1840 treaty had a fair market value of $1,300,750 or $2.75 per acre. However, we have also found that in addition to $478,027.83 in cash, petitioners received 324,796.88 acres of land in Kansas for the lands ceded under this treaty. Therefore, the issue as to whether or not this consideration is unconscionable cannot be determined until these Kansas lands are valued. It will be necessary, therefore, to hold a hearing wherein evidence can be presented bearing on the fair market value of these Kansas lands and the date of valuing said lands.

/s/ Arthur V. Watkins
Chief Commissioner

We concur:

/s/ Wm. M. Holt
Associate Commissioner

/s/ T. Harold Scott
Associate Commissioner