

BEFORE THE INDIAN CLAIMS COMMISSION

THE PONCA TRIBE OF OKLAHOMA,)
)
 and)
)
 WILLIAM OVERLAND, METHA COLLINS,)
 and JOHN WILLIAMS, as repre-)
 sentatives of the PONCA TRIBE)
 and all the members thereof,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 322

Decided: February 4, 1969

ADDITIONAL FINDINGS OF FACT

Introduction. The Commission has in this matter heretofore decided that the petitioners, the Ponca Tribe of Indians of Oklahoma, et. al., held aboriginal Indian title to certain lands in what are now the States of South Dakota and Nebraska which they ceded to the United States by the Treaty of March 12, 1858 (12 Stat. 997), and that the said date of the Treaty was the effective date for the extinguishment of said title (12 Ind. Cl. Comm. 265, 292, 300). The lands found to have been exclusively used and occupied by petitioners herein are set out and described in Finding 25(e) of our prior decision. These lands will hereinafter be referred to as the subject tract or the Ponca tract. The present phase of the proceedings has been held for the purpose of determining the value of the Ponca tract as of March 12, 1858.

The Commission makes the following additional findings of fact which are supplemental to findings numbered 1-25, inclusive, heretofore made herein:

26. Evidence on Value. Hearings for the reception of evidence in this phase of the proceedings were held on February 27, 28, and March 1-3, 1967. Dr. John Sherman Long, Assistant Dean of the School of Humanities and Sciences and Associate Professor of History at Southern Methodist University, and Professor Roger K. Chisholm, who teaches economics at the Graduate School of Business at Northwestern University testified as experts for the petitioners. Mr. Richard B. Hall, a real estate consultant and appraiser, testified as an expert for the defendant. Mr. Hall submitted an appraisal report.

Numerous documents and maps which were basic evidence collected and used by these experts were received in evidence. These consisted of contemporary historical and other writings, including official state and federal government reports. Among these are U. S. Surveyors' reports, soil surveys of the U. S. Department of Agriculture, U. S. Geological Survey studies, reports of the U. S. General Land Office, U. S. Census reports, Atlas publications, topographical maps, soil maps and other relevant maps, as well as many other valuable documents.

The testimony and reports of these expert witnesses, the basic evidence upon which these were founded, and the briefs and oral arguments of respective counsel for the parties, have received our careful study and consideration.

27. The Valuation Problem. Although a small portion of the land was surveyed in 1859, the year following the treaty cession, and some was surveyed during the next twelve years, the great majority was not surveyed until after 1870. In the treaty with the Sioux dated April 29, 1868 (15 Stat. 635), a portion of the area was reserved to those Indians. From a practical standpoint, therefore, there were no comparative sales within the subject area near our valuation date. Relevant facts for the determination of value, however, are of record herein, as, for example, natural resources of the land ceded, including those pertaining to climate and precipitation, topography, streams and drainage, soil characteristics and uses, timber, wildlife and game, transportation potential, present and potential economic values, general conditions and such other items as a well informed purchaser would consider in determining what he could afford to pay for the land as of the valuation date.

28. The Ponca Area. The Ponca tract is mostly in northcentral Nebraska with an extension into South Dakota, and lies to the south and west of the Missouri River. It is irregular in shape and extends from about two or three miles east of the 98th Meridian of longitude west and northwest about 100 miles to its most westerly point, a mile or two west of the 100th Meridian. The division between the Nebraska and South Dakota portions is the 43° latitude line. The eastern boundary of the tract is about 33 miles long, and its western boundary is about 55 miles. Its maximum width, toward the west, is about 60 miles.

In Nebraska the tract comprises the western portion of Knox County, northwestern Antelope County, most of Boyd County, the eastern half of Keya Paha County, the northern parts of Holt and Rock Counties, and the northeastern corner of Brown County. In South Dakota it covers the southwest and southeast corners, respectively, of Gregory and Tripp Counties.

The Ponca tract contains 2,411,000 acres, as described in our Finding No. 25(e). This includes, however, 77,000 acres reserved to the Poncas. The net acreage, therefore, to be valued is the difference which is 2,334,000 acres.

29. General Characteristics. The original surveys of the lands contained in the subject tract were made by U. S. Government surveyors between 1858 and 1900. Excerpts from most of these survey notes are in the record. The physical features of the subject tract are generally well described in the notes. Any possible omissions of such survey notes are not of sufficient importance to materially affect our considerations.

Our study of these notes has indicated that these lands had a potential for livestock raising, as they were well balanced between good grazing and good land for the raising of feed for livestock; that the area was interlaced with streams; that there were areas which tended to be broken and therefore unsuited for the raising of crops, but would be available for grazing; that there were some limited areas in the western and southwestern portion of the tract that were less adaptable to livestock raising by reason of their semi-arid nature; that the majority of the area was of the rolling prairie lands

suiting for agriculture and grazing; and that there was abundance of timber along the various streams available to the needs of the early settlers.

The parties introduced U. S. Department of Agriculture soil surveys of the various counties involved. These soil surveys are more detailed and therefore more accurate and complete in the representation of the lands involved. However, we find from our study of them that they tend to confirm in a general way the statements made in the survey notes. A detailed description of the subject tract in each county is possible.

30. Knox County. (a) Eleven out of thirty townships of Knox County are in the subject tract. These are Niobrara, Western, Washington, Bohemia, Sparta, Jefferson, Verdigris, Walnut Grove, Logan, Miller, and a portion of Raymond. These are at the eastern end of the subject tract and in the western part of the County. This area is bounded on the north by the Missouri River and the State of South Dakota. It is interlaced with streams, including Ponca Creek, Verdigris Creek and the Niobrara River. It comprises approximately 41% of the area of the County, or approximately 299,520 acres of land. The area which we have found in our prior decision herein (Finding No. 25e) to which the petitioners had aboriginal title included the area in this County of 77,000 acres which was reserved to the Poncas between Ponca Creek and Niobrara River. (See Treaty of March 12, 1858, as modified by Treaty of March 18, 1865.)

(b) The land involved was in 1858 virgin prairie land for the most part. Its topography was gently rolling. The streams were heavily timbered. Native

trees, including elm, ash, oak, hackberry, boxelder, cottonwood, and willow occupied strips adjacent to the streams in all the larger valleys. Trees were especially numerous on many of the lower slopes of the bluffs bordering the Missouri River bottom lands. These have been of use locally as lumber. Their chief value has been for posts, building early structures and fuel.

Alluvial lands lie along the rivers and streams. Terraces occur at several distinct levels. The majority of the land is upland and is well drained.

The quality, depth, and supply of well water differs in different parts of the area. Throughout most of the loess-covered uplands an abundant supply of good water occurs in sandy materials immediately beneath the loess and is reached at a depth ranging from 50 to 250 feet.

The County has an average elevation of 1600 feet above sea level. The highest elevation, about 2000 feet, is in the uplands in the southeastern area of the County. The general slope of the County is toward the north and east.

The first permanent settlement was made near the present site of Niobrara in 1856. The population which has developed is rural in nature.

The climate is typical of northeastern Nebraska and is well suited to grain growing and livestock raising. The mean annual temperature is 49.1° F., and the mean annual precipitation is 24.10 inches. The average length of the frost-free season is 151 days.

31. Antelope County. (a) Antelope County lies in the northeastern part of Nebraska about 90 miles west of Sioux City, Iowa. Its northern border is bounded by the western half of the southern border of Knox County. The portion of the County within the subject tract thus joins the area of the subject tract in Knox County. It is approximately 19.5% of the total size of the County, or about 107,275 acres. This includes all of Sherman, Verdigris and Eden townships and the northern tier of sections in Garfield, Royal and Ellsworth townships.

The characteristics of this portion of the County are largely the same as those set out above in Finding No. 33 for Knox County.

(b) This area of the County is drained by the Verdigris and Bazile Creeks. These afford ample drainage. Well water of excellent quality is readily available.

Native timber occurs along the larger streams. It consists chiefly of elm, ash, boxelder, cottonwood, and willow. It has been used chiefly for firewood, post material and the needs of the early settlers.

(c) The first settlements in the County were in 1868. The County was organized by the State Legislature in 1871. The population is rural.

(d) The climate is favorable for the production of the common staple crops, such as corn, oats, rye, wheat, barley, and alfalfa. The average date of the last killing frost in the spring is May 21, and that of the first in the fall, September 29. This gives an average growing season of 148 days,

which is ample for the maturing of all farm crops common to the region. The mean annual temperature is 46.7° F., and the mean annual precipitation is 25.12 inches.

32. Boyd County. (a) Boyd County is adjacent to the northwest portion of Knox County. It lies in northern Nebraska adjoining South Dakota. Except for a small area in the northeastern part, the County lies within the subject tract. It is approximately 48 miles in length and has an average width of 10 miles from an irregular shape which varies in width between 7 and 13 miles. Its southern and northeastern boundaries are the Niobrara and Missouri Rivers, respectively. The land area of the County comprises 342,400 acres. The excluded area includes the northern portions of Bush, Mullen and Morton townships, and much of the land excluded is classified in the soil survey as rough broken land along the Missouri River. The excluded portion approximates 10% of the area of the County, leaving an approximate net area of 308,160 acres.

(b) The County is bounded on the south by the Niobrara River. Ponca Creek runs through the middle of the County for 38 miles, leading to the north into South Dakota. The Keya Paha River branches off the Niobrara River in the western part of the County. Timber grows along these streams and in the valleys.

(c) The climate is characterized by rather high summer and moderate to low winter temperatures. The mean annual precipitation is 22.19 inches, and the mean annual temperature 47.8° F. The relative humidity is rather

regularly about 70%. The average altitude is about 1650 feet above sea level.

(d) The first permanent settlements in the area of the County were made along the Keya Paha River about 1880. The area was then known as Dakota Territory. It was annexed to Nebraska in 1882 and Boyd County was established and organized in 1891. All the population is classed as rural.

(e) The soils range from moderately to highly productive of the crops for which they are used. They differ widely in their crop adaptibilities, however, according to differences in their composition and relief. All, except those developed on the most recently exposed or deposited geologic materials, have dark surface layers, owing to an abundance of organic matter.

33. Holt County. (a) Holt County was organized in 1876. It adjoins Boyd County on the south. The Niobrara River forms an irregular boundary line between the two counties. Most of the northern half of the county and a small portion of the southern half are within the subject tract.

The County has an area of 1,538,560 acres; the portion in the subject tract comprises approximately 641,280 acres.

(b) The subject tract is deeply entrenched by the Niobrara River and its tributaries; most of the drainage therein is northward to that stream. The county has an average elevation of 2,050 feet above sea level. Native trees, including elm, ash, oak, hackberry, boxelder, cottonwood, and willow appear in the valleys and along the streams. These served the early settlers and have been used for fence posts and fuel.

(c) The climate is continental and is characterized by a wide range between winter and summer, in both temperature and precipitation. The mean annual temperature is 46.5° and the mean annual precipitation is 21.43 inches.

(d) The following soils are found in this area of the subject tract: Marshall fine sandy loam and very fine sandy loam; Holt fine sandy loam; Ewing loamy sand; Cass loamy fine sand; Dune sand, O'Neill loamy sand, sandy loam (upland phase), loam (upland phase), and gravelly loam (upland phase); Thurman loamy sand and fine sandy loam; and Valentine loamy sand and Vaneltine sand.

These soils in Holt County range in their best utilities in three broad groups, namely those best for general farming, those best for hay farming, and those best for grazing.

34. Keya Paha County. (a) This County adjoins Boyd County on the west. Its northern boundary is the State of South Dakota. It is bounded on the south by the Niobrara River. It is roughly rectangular in shape. The average width is about 16 miles and it is 48 miles in length. The total area is 496,000 acres. The portion of the county within the subject tract comprises approximately 340,000 acres. The Keya Paha River runs through the northeast portion of the county.

(b) The elevation averages about 2100 feet above sea level. The climate is characterized by rather high summer and moderate to low winter temperatures. The mean annual precipitation is about 20 inches and the

mean annual temperature is about 47° F. Occasionally severe droughts occur, sometimes accompanied by dust storms.

(c) Good well water is readily obtained, except in areas where the Pierre shale formation is at or near the surface of the ground. Water in this shale is scarce and for the most part alkaline. The upland wells range from 80 feet to about 150 feet in depth, and those in the alluvial lands from 10 to 60 feet. Drainage is eastward through the Niobrara and Keya Paha Rivers and their tributaries.

(d) The area included is part of a formerly smooth to rolling plain formed on soft light-gray sandstone, in places containing beds of harder rock. Erosion into and locally through the sandstone by wind and water, followed by extensive deposition of sand, gravel, and loess from areas to the northwest, north, and northeast, and by a later period of erosion have considerably altered the surface of the former plain. Most of the upland is deeply covered with sand or a mixture of sand and gravel, and the relief ranges from nearly level to strongly rolling. This surface configuration is modified in numerous places by high buttelike hills and promontories where the harder sandstone beds have resisted erosion. A nearly level loess-capped tableland, part of a larger table to the east and north, covers a few square miles in the extreme northeastern part of the county, and small outlying areas of this tableland continue nearly to the western county line. In the Niobrara and Keya Paha River Valleys in the southern and

northeastern parts of the county, these rivers and their tributaries have removed the sandstone and overlying deposits, they have become deeply entrenched in the underlying Pierre shale formation, and an extremely rough and broken surface has resulted.

Alluvial lands, including the terraces and flood plains, occur chiefly along Niobrara and Keya Paha Rivers and along some of the larger creeks in the northern and northwestern parts of the county. All the alluvial lands have nearly level or gently undulating relief.

The county is in the western part of the tall-grass prairie section of the United States. In well-drained virgin areas, the leading grasses on the finer textured soils are little bluestem, gramma, buffalo grass, and neatgrass and on the sandy or gravelly soils Stipa and big bluestem. Mixed stands of scrub conifers and broad-leaved trees grow on the valley slopes along Niobrara River.

The soils over the greater part of the county are so sandy, gravelly, or shallow, or have such uneven surfaces, that they are best suited for pasture or wild hay. The better drained, less eroded, and finer textured soils range from moderately to highly productive of the crops commonly grown.

(e) Prior to 1870, the area now included in Keya Paha County was inhabited chiefly by Indians, trappers, and hunters. The early agriculture, beginning about 1871, consisted almost entirely of cattle raising. Water and grass were abundant; the rough forested land in the Niobrara and Keya

Paha River Valleys afforded protection to the cattle during severe weather; there were no fences; the range was free; and cattle raising was very profitable. With the establishment of Fort Niobrara to the west in 1880 and the trail leading to this fort, the farming possibilities of this section became apparent. By 1885, farmers had taken up most of the better farming land under the Homestead and Timber Culture Acts, and by 1890 there were nearly 4,000 inhabitants in the county.

35. Rock County. (a) Rock County is immediately south of the eastern half of Keya Paha County. It is bounded on the north by the Niobrara River. It is bounded on the east by Holt County, and on the west by Brown County. The portion within the subject area is slightly over one-third of the entire size of the county, or approximately 224,000 acres in the northern portion of the county.

(b) Rock County, situated in north-central Nebraska, has a continental climate characterized by rather low, though well-distributed, rainfall and by a moderate mean annual temperature, with cold winters and warm summers. The native vegetation consists almost entirely of grasses, with some forest growth in a few of the stream valleys. The climatic conditions are not altogether favorable for diversified farming, and most of the soils are either too coarse and unstable or are too poorly drained for cultivated crops.

(c) Although this county is in the Chernozem soil region of the United States, its more extensive soils are so unstable and have been subjected to such constant wind erosion that they have accumulated very little

organic matter and are prevailing light in color. Practically none of these lightcolored soils is suited for cultivated crops. The poorly drained soils are dark, and some of them are well suited to certain tame hay crops, but they are much less extensive than the lightcolored soils, and practically none of them can be profitably used for grain production. The only soils containing an abundant supply of organic matter and in addition sufficiently stable and well drained for the production of grain crops occupy small nearly level bodies, chiefly in the northern one-fourth of the county. In most of these bodies the soil is rather sandy and somewhat droughty, but in some it is composed largely of silt or clay and is highly retentive of moisture. The combined area of all bodies in which the soils are suited to grain crops is not large, and these soils are of minor importance in Rock County.

(d) Although the sand hill division occupies about 65% of the county, this division is chiefly in the southern portion of the county outside of the portion within the subject tract.

(e) Well water of good but medium-hard quality is readily obtained in most sections. The only places where it is difficult to obtain an abundant supply of well water are in the valleys of Niobrara River and its tributaries and on parts of the high Niobrara terrace. In these localities the Pierre shale formation is exposed or lies near the surface of the ground, and only a scanty supply of rather alkaline water is available in this formation.

Wells on the Holt table range from 70 to 90 feet in depth. These areas are in the subject tract. In the prairie plains area, water suitable for livestock lies within a depth of 10 or 15 feet, but most of the farm wells in this area extend to a depth ranging from 40 to 60 feet, where the water is free from impurities.

(f) Although the county is in the prairie region of the United States, a rather dense growth of native forest, consisting of willow, cottonwood, burr oak, western yellow pine, red cedar, basswood, walnut, elm and ash trees occurs in the valleys of the Niobrara River and its tributaries in the northern portion of the subject tract. These have been used chiefly for firewood and fence posts.

(g) The county was organized and established in 1888 from a part of Brown County which now adjoins it on the west. The early settlers came largely from the east-central states. It is classed as rural. Settlement is densest in the northern portion of the county which is that portion within the subject area.

36. Brown County. (a) Brown County is roughly rectangular, although its northern boundary, formed by Niobrara River, is somewhat irregular. Its width from east to west is 26 miles, and its length is about 48 miles. It comprises an area of 1,215 square miles, or 777,600 acres, with the northern 400,000 acres in the subject tract

(b) Some of the earliest settlements within the area now included in Brown County were made by cattlemen who located in the Long Pine Creek

Valley in 1879. The Fremont, Elkhorn & Missouri Valley Railroad reached Long Pine in October 1881, and by the fall of 1882 nearly every quarter section (160 acres) of tillable land was either homesteaded, preempted, or taken as a timber claim.

The county was established and organized in 1883. Parts of it were taken in 1884 and 1888 to form Keya Paha and Rock Counties, respectively, leaving its boundaries as they now are. It adjoins Rock County on the west. Rock County was formed from the original boundary of Brown County. The early settlers came mainly from eastern and southeastern Nebraska. The population is classed rural.

(c) The county is part of a former nearly level to rolling constructional plain on which stream dissection and wind erosion have produced considerable relief. It comprises all or parts of four rather well-defined physiographic divisions: Niobrara Valley, Ainsworth table, Long Pine table, and the sand-hill section.

The county, as a whole, is well drained, although the water table is near or above the surface of the ground in some of the sand-hill valleys and pockets and in spots on the valley floors along some of the drainageways.

The elevation ranges from about 2,450 feet to 2,620 feet above sea level. The land slopes gradually to the south and east.

The climate is continental, with a mean annual temperature of 47.7° F. and a precipitation of 25.23 inches. The rainfall generally is well distributed in early summer, but dry spells are common during July and August.

(d) The sand hill section of the county begins in the southern portion of the subject tract.

(e) The county as a whole is well drained. The water table is near or above the surface of the ground, however, in several of the enclosed valleys and pockets throughout the sand hills where it produces numerous wet hay flats, marshes, ponds and lakes. Local patches of poorly drained land bordering most of the larger streams are subject to occasional overflow. In the northern part, drainage is effected to the north and east through Niobrara River and its tributaries. The only land in the county which has been subjected to severe water erosion is on the breaks south of Niobrara River and on the valley slopes bordering the larger tributaries of that stream.

Well water of good but medium-hard quality is readily obtained throughout most sections. In places immediately south of the Niobrara River on parts of the uplands and high terraces where the Pierre formation is either exposed or near the surface, however, the water supply is low and of poor quality. Wells on the Ainsworth and Long Pine tables range from 30 to 80 feet in depth, and those throughout the more elevated parts of the sand hills range from 40 to 90 feet. Good water is obtained within a depth of 30 feet in most of the valleys throughout the sand hills. Springs occur along most of the streams. In the Niobrara Valley the flow originates at or near the contact zone of the Pierre and Tertiary formations and for the most part is free, but elsewhere most of the springs seep rather slowly from water-filled sands.

37. South Dakota -- Tripp and Gregory Counties. (a) The subject tract extends northward from Nebraska as a triangular shaped area formed by the southeastern portion of Tripp County and the southwestern portion of Gregory County. These comprise approximately 370,000 acres of land.

(b) The South Dakota area is an extension in many relevant respects of the lands in Boyd and Keya Paha Counties in Nebraska covered above in Findings No. 32 and 34.

(c) The Ponca River and its tributaries interlace this portion of the subject tract. The Keya Paha River flows through the southwest portion of the area. Drainage is good throughout the South Dakota area to these streams.

(d) The division between the tall and short grass plains area is roughly at the western edge of this area. The native characteristic of the Prairie grassland is a turf of tall grass, chief of which is the big bluestem specie. These have a deep root system adapted to subhumid conditions. The line of demarcation between the tall grasses and the short grasses is almost identical with the western edge of the Chernozem or dark soils and follows closely the 18 inch rainfall line. This line coincides closely with the western edge of this portion of the subject tract.

(e) The southeastern portion of this South Dakota area in Gregory County is divided between the 22 to 24 inch annual precipitation zone and the 20 to 22 inch zone. The Tripp County portion is wholly within the 20 to 22 inch zone.

This, the central part of the State, is the transitional zone in which the Prairie Plains features merge into the great plains.

Variations in rainfall within the same locality are as significant for agriculture as the variations between the different regions. Normally three-fourths of the precipitation occurs between April and September, during the growing season.

The average temperature of Tripp County is 49.2 degrees; and for Gregory County 48.9 degrees. The average number of days without killing frost approximates 150.

(f) The soils of these counties have been classified as "very dark brown light loams to loamy sands of the subhumid grassland." They are deep to shallow silt loams, loams, sandy loams and loamy sands with some underlain by gravel of undulating to rolling uplands. From 45 to 60 percent of these are in cropland within the land use legend.

Surveyors' notes for South Dakota are a part of the record. These were made in 1896 and later. They tend to corroborate the above findings covering the same factors.

(g) The area is now devoted to the raising of livestock in much the same way as we have found above pertaining to the adjacent counties to the south in Nebraska. The typical pattern of the crops of grain, hay, etc., for feed in the late fall, winter, and early spring, and grazing in the balance of the year prevails.

38. Soil Uses. Dr. Long, the expert for the petitioners, testified that the United States Soil Surveys for Keya Paha, Boyd, Brown, Holt, Rock, Knox, Antelope, Tripp, and Gregory counties, show that the soils of the allowed area are adaptable to the following agricultural uses:

<u>Soil Use</u>	<u>% of Acres of Allowed Area</u>
Crop land	37%
Mixed crop, hay and grazing	21%
Grassland grazing	35%
Timber grazing	7%

Petitioners contend that the soil use percentages are reflected in the economy of the allowed area today; that it is a generally diversified farming and grazing area -- an area of mixed agriculture with corn, hay and other and small grain crops; and that the region, part of the corn belt, is an extension of the agricultural pattern found in Western Iowa.

Defendant contends these are inaccurate and irrelevant in relation to fair market value in 1858, and contends that the Nebraska Atlas (Def. Ex. 3) demonstrates the fallacy of petitioners' assertions, both as to present soil capabilities and their reflection in today's economy; that page 47 gives the following percentage of land area in cropland (including rotation pasture and tame hay land) in the Ponca tract counties:

<u>County</u>	<u>Percent</u>
Keya Paha	10-30
Boyd	30-50
Brown	0-10
Rock	0-10
Holt	10-30
Knox	50-70
Antelope	50-70

Defendant also contends that these percentages add up to far less than the 37 percent computed by Dr. Long; that when it is remembered that he also assigns 21 percent to mixed crop, hay and grazing land, and that the definition of cropland used in the Atlas includes rotation pasture and tame hay, which would be included in Dr. Long's 21 percent, the discrepancy is even clearer; and that page 43 of the same exhibit shows that every county in the area has at least twice as many livestock farms and ranches as it does cash-grain farms, and that since the latter type of farm is generally smaller, once more the Atlas demonstrates the inaccuracy of Dr. Long's computations.

We find that neither set of percentages can be said to be wholly accurate; but that greater precision than the general indication given by the evidence is unnecessary.

39. Climate and Rainfall. We have dealt with these factors county by county on the basis of official figures. We find the climate and rainfall are favorable to livestock raising and supportive agriculture.

As shown by the figures, the annual precipitation ranges from 21 to 26 inches. The growing season is an average of 148 frostfree days per year. The average annual mean temperature is 47.7 degrees.

40. Timber. As shown by the official soil surveys we have summarized above by counties, this was not an area in which there was commercial timber. However, there was timber along the streams and valleys which interlace the area which served local uses of the type of particular value to the early settlers.

41. Transportation. Because the subject tract was not, from a practical standpoint, opened for settlement for many years after 1858, the taking date, the consideration to these factors which we give in this finding is governed by what a well-informed prospective purchaser would have considered. In 1858, there was water transportation up the Missouri River to the village of Niobrara. There also had been provision for the necessary military roads into the general area incident to the defendant's jurisdictional duties regarding Indians.

Such a well-informed prospective purchaser would also have taken into consideration the general topography of the area as this may have had a relationship to the building of roads, etc. We find that from the standpoint of potential that the necessary access was apparently possible and practical without undue physical problems.

42. Highest and Best Use. We find the highest and best use of the area to be for livestock supported by existent grazing and cultivation of crops for feeding between the grazing seasons.

43. General Business Conditions in the United States. From all the evidence in the case, we conclude that general economic conditions in the United States encouraged the prevalence of an optimistic outlook for agriculture, although a decline was in progress in 1858. Although agriculture did not increase during the period 1839-1889 as much as manufacturing and all industries, it did increase substantially.

The value added series for agriculture, measured in 1879 prices, shows for the period 1839-1879:

<u>Date</u>	<u>Value Added</u>
1839	\$.79 billion
1844	.94 "
1849	.99 "
1854	1.32 "
1859	1.49 "

(No estimate for 1864 -- Civil War Period)

1869	1.72 "
1874	1.98 "
1879	2.60 "

The price index for farm products, with the base period of 1910 to 1914 equaling 100:

<u>Date</u>	<u>Price Index</u> <u>(1910-14=100)</u>
1839	-
1844	52
1849	62
1854	93
1859	82

(No estimate for 1864 -- Civil War Period)

1869	128
1874	102
1879	72

44. Contemporaneous Land Sales. During the 1850's, Indian tribes in neighboring Kansas also ceded their land to the United States. Under the Act of March 3, 1853 (10 Stat. 226, 239), the President was authorized to negotiate with the tribes west of Missouri and Iowa to secure "..... the

assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, for the purposes of extinguishing the title of said Indians in whole or in part to said lands." Pursuant to that Act, negotiations led to treaties of cession with various Kansas Indian tribes.

Three of these treaties -- those made by the Iowa, Delaware and Peoria tribes -- provided that the cessions were in trust to the government, to be sold at auction for the benefit of these tribes respectively. The Iowa trust lands (Royce Area 323, Kansas 2) comprised approximately 79,000 acres, adjacent to the Kansas-Nebraska border. The Peoria trust lands (Royce Area 326-327, 328, Kansas 2) extended approximately 32 miles west from the Missouri border and consisted of approximately 208,000 acres. The Delaware trust lands (Royce Areas 316, 317, Kansas 2) comprised more than 560,000 acres.

These trust lands were appraised prior to sale and the records in those cases produced contemporaneous sales prices. The defendant objects to the comparison because of the difference in location and climate.

Petitioners contend that a study of the Peoria, Miami and Ponca cessions shows that, while differences exist between the three tracts, there are also marked similarities; that the surveyor's notes from all three areas indicate similar terrain; rolling prairie with interspersed woodland along the streams and tributaries; that the soil in each area varies from

third-rate to first-rate; and that all three tracts are part of the same general geographical region, the tall grass area of the mid-western prairies.

We find, however, that despite these similarities, the Kansas lands were relatively better lands and being further to the south they were not only, as we have noted, in the stream of westward migration, but were more favorably situated for agriculture. The sales do indicate a ready market for that agricultural land at prices above \$1.25 per acre, but cannot be said to be directly comparable to the subject tract.

45. Consideration for the Cession. For the area ceded by the Ponca Indians, the defendant agreed by Article II of the Treaty of March 12, 1858, 12 Stat. 997, to the following considerations:

Clause 1: To protect the Poncas in possession of their reservation, their persons and property;

Clause 2: To pay \$12,000 per annum for 5 years, \$10,000 per annum for the next 10 years, and \$8,000 per annum for 15 years thereafter;

Clause 3: To pay \$20,000 for subsistence for the first year;

Clause 4: To pay not to exceed \$5,000 a year for 10 years for education and training;

Clause 5: To pay not to exceed \$10,500 for a mill, together with not to exceed \$7,500 a year for 10 years, 'or during the pleasure of the President' for aid and assistance in agricultural and mechanical pursuits;

Clause 6: To pay \$20,000 to settle existing obligations of the Poncas, including depredations.

Appropriations under Clause 5 continued in fact for 17 years, although payments during the last two years were reduced to \$5,000 each. In addition, because of spoliation committed upon the Indians, the defendant indemnified the Poncas to the extent of \$15,080 under Article II, Clause I, as provided in Article 3 of the Treaty of March 10, 1865, 14 Stat. 675, and in the Appropriation Act of July 27, 1868, 15 Stat. 198. These latter payments beyond the amounts required by the 1858 Treaty are not part of the treaty consideration.

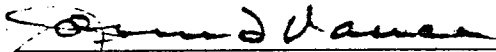
In Ponca Tribe v. United States, 15 Ind. Cl. Comm. 573 (1965) this Commission has found that the defendant has appropriated all sums agreed to be paid under the 1858 treaty and that all sums appropriated were properly expended except for \$1,289.99. However, the United States has already paid this latter sum to petitioners pursuant to the decision in that case and the Act of May 13, 1966, 80 Stat. 141, 150 (H. Doc. 414, p.23, 89th Cong. 2d sess.). It cannot twice be charged against the Government.

Therefore, the consideration for the cession of the subject tract is found to be \$455,500.00.

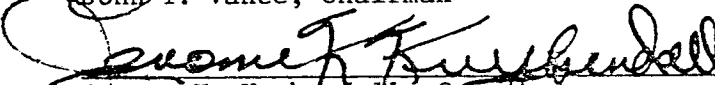
46. Valuation Conclusion. Based on the above findings as to the facts and the record as a whole, we find the Ponca tract had a value as of March 12, 1858, of \$1.00 per acre, or a total of \$2,334,000.00. We also find the consideration paid in the amount of \$455,500.00 to be unconscionable. We,

therefore, find the net sum after the deduction of said consideration to be \$1,878,500.00. An order will be entered accordingly.

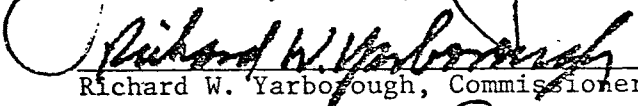
The matter now will proceed to the consideration of whether the defendant is entitled to offsets from this recovery and to any other necessary matters that may be presented by the parties.



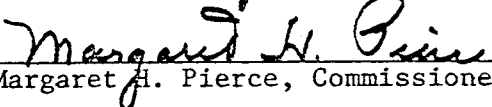
John T. Vance, Chairman



Jerome K. Kuykendall, Commissioner



Richard W. Yarborough, Commissioner



Margaret H. Pierce, Commissioner

Theodore R. McKeldin, Commissioner