BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX NATION OF INDIANS, consisting in part of the SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION, NORTH AND SOUTH DAKOTA; THE SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE LOWER BRULE INDIAN RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION, NEBRASKA; AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION, MONTANA,	)	Docket No. 74-B
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: February 15, 1974

Appearances:

Arthur Lazarus, Jr., William Howard Payne, Marvin J. Sonosky, Attorneys for Plaintiffs.

Craig A. Decker, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

The plaintiffs have brought this claim under various clauses of

Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1970), seeking additional compensation for their lands and other interests obtained by the United States under the Act of February 28, 1877, 19 Stat. 254. The plaintiffs have also amended their petition, by leave of the Commission, to include a claim for compensation for minerals removed from plaintiffs' lands by nonIndians prior to February 28, 1877.

BACKGROUND OF THE CLAIM AND ISSUES TO BE DETERMINED

The original petition in Docket 74 was filed by the plaintiffs on August 15, 1950. On April 5, 1954, after a trial and the filing of briefs by the parties, the Commission issued an order dismissing Docket 74. Sioux Tribe of Indians v. United States, 2 Ind. Cl. Comm. 646. This determination of the Commission was affirmed by the Court of Claims on July 7, 1956, 146 F. Supp. 229.

After obtaining new attorneys, the plaintiffs filed before the Court of Claims motions for a new trial and to vacate the court's judgment of affirmance. In support of their motions, plaintiffs alleged (1) that because of ineffective and inadequate counsel their claims had been decided by the Commission on the basis of an incomplete record; (2) that the Commission erred in not independently investigating their claims; (3) that some of the Commission's findings of fact were not supported by any evidence; and (4) that plaintiffs' rights should not be prejudiced by an erroneous concession of fact by plaintiffs' prior counsel. The court granted the plaintiffs' motions to the extent it vacated its judgment of affirmance and remanded the case to the Commission with instructions that the Commission

determine

> (1) whether the claimant Indian tribes are entitled on the basis of the statements made in support of the above motions to have the proof in this case reopened, and (2) if so, to receive the additional proof sought to be offered and on the basis thereof, together with the record already made, reconsider its prior decision in this matter.

Sioux Tribe of Indians v. United States, App. No. 4-55 (Ct. Cl., Nov. 5, 1958).

In accordance with the court's instructions, on November 19, 1958, the Commission decided to reopen the proof in Docket 74 and announced that it would reconsider its previous decision. Subsequently, on November 4, 1960, the Commission allowed the plaintiffs to amend their petition, with the result that the claims based on the Act of February 28, 1877, 19 Stat. 254, were segregated into Docket 74-B, and the claims based on the Treaty of April 29, 1868, 15 Stat. 635, remained in Docket 74.

On October 29, 1968, the Commission ordered that three questions be set for determination in Docket 74-B, as follows:

> 1. What land and rights did the United States acquire from the Sioux by the Act of February 28, 1877, C. 72, 19 Stat. 254, 1 Kappler 168, and what were the exterior limits (a) of the land so acquired and (b) of the area subject to the rights so acquired?
>
> 2. Was there any consideration for defendant's acquisition of land and rights under the 1877 Act and, if so, what constituted such consideration.
>
> 3. If there was no consideration for defendant's acquisition of lands and rights under the 1877 Act, was there any payment for such acquisition?

In response to the first question, plaintiffs submitted a memorandum asserting that under the 1877 act the United States acquired:

> (1) The Black Hills portion of the Great Sioux Reservation containing about 7,345,157 acres, in which petitioners held recognized title pursuant to Article 2 of the Treaty of April 29, 1868, supra. . . .
>
> (2) The right of the Sioux under Article 11 of the 1868 Treaty "to hunt on any lands north of the [sic] North Platte, and on the Republican Fork of the Smoky Hill River, as long as the buffalo may range thereon in such numbers as to jusitfy the chase. . . ."
>
> (3) The lands, interests in lands and other rights held by the Sioux north of the North Platte River and east of the summits of the Big Horn Mountains pursuant to Article 5 of the 1851 Fort Laramie Treaty and Article 16 of the 1868 Treaty. . . .
>
> (4) Three rights-of-way for roads through the Great Sioux Reservation, and the right of free navigation along the Missouri River through the reservation. [Plaintiffs' Memorandum Defining Lands and Rights Acquired by the United States Under the Act of February 28, 1877, pp. 7-9.]

Plaintiffs' memorandum stated that the extent of the rights asserted in paragraphs (2) and (3) would be determined in Docket 74.

In its response to plaintiffs' memorandum, defendant acknowledged that it had obtained from plaintiffs the Black Hills portion of the Great Sioux Reservation, but denied that it had obtained any other compensable interest under the 1877 act.

In decisions entered in Docket 74 on July 8, 1970, Sioux Tribe v. United States, 23 Ind. Cl. Comm. 358, and in Dockets 74 and 74-B on November 30, 1970, Sioux Nation v. United States, 24 Ind. Cl. Comm. 98, the Commission determined that under Articles XI and XVI of the 1868 treaty the plaintiffs had the right to hunt over certain territories described in the opinions. The Commission further determined that the plaintiffs could recover for the loss of these

rights in Docket 74-B only if they could prove that the rights had a greater value in 1877 than when the plaintiffs obtained them. On December 29, 1970, plaintiffs notified the Commission that they did not intend to pursue their claims for loss of Articles XI and XVI hunting rights, and did not desire that a trial be set on the question whether any further compensation was due them for the loss of those rights.

The remaining issue under question 1 of the Commission's order of October 29, 1968--plaintiffs' claim based on the alleged acquisition by defendant of rights of way and the right to free navigation through plaintiffs' reservation--was not briefed by the parties until they were instructed to do so by the Commission's opinions of September 13, 1972, 28 Ind. Cl. Comm. 425, 430-31, and November 29, 1972, 29 Ind. Cl. Comm. 180, 184-86. That issue will be determined in this decision.

In response to questions 2 and 3 of the Commission's order of October 29, 1968, plaintiffs' submitted a memorandum asserting

> (1) that there was no "consideration" for the lands and rights which the United States acquired under the Act of February 28, 1877 . . . ; (2) that moneys expended by the United States under the 1877 Act were gratuities and were not payments on a purchase price for the lands the United States acquired pursuant to the 1877 Act . . . ; and (3) that even if any new benefits conferred upon petitioners by the 1877 Act were treated as either consideration or payment for Sioux lands, interests in lands and other rights, such consideration or payment (as the case may be) at a maximum consisted of the 1877 capitalized value of the Government's promises with respect to subsistence, less the 1877 capitalized value of the Government's unfulfilled obligations under the Treaty of April 29, 1868. . . . [Plaintiffs' Memorandum Defining Consideration Paid by the United States Under the Act of February 28, 1877, pp. 11-12.]

In its reply to plaintiffs' memorandum, defendant asserted that there was consideration for its acquisition of lands and rights under the 1877 act, which consisted of all monetary and property interests that passed from the defendant to the plaintiffs under the terms of the act. Defendant contended that through June 30, 1951, plaintiffs had received $52,139,223.93 in consideration, in addition to the 900,000 acre tract of land which they received under the 1877 act.

In its memorandum on the consideration issue, defendant also raised the issue whether the decision of the Court of Claims in Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943), bars the plaintiffs from asserting that the 1877 act constituted a Fifth Amendment taking of their lands. In their reply memorandum, plaintiffs asserted that the res judicata issue was raised prematurely, and did not respond to it.

On December 18, 1973, the Commission heard oral argument on the res judicata issue and the other issues presented in the parties' consideration memoranda. We shall determine all these issues in this decision.

Trial on the 1877 fair market value of the Black Hills portion of the Great Sioux Reservation was held in two parts, in November 1969 and May 1970. In this decision we shall determine the value of plaintiffs' land.

By its order of November 29, 1972, 29 Ind. Cl. Comm. 180, 187, the Commission permitted the plaintiffs to amend their petition to include a

claim for compensation for minerals removed from the Great Sioux Reservation prior to Februarv 28, 1877. In this decision we shall determine the extent of the liability, if any, of the United States for minerals removed from plaintiffs' land prior to its acquisition by the United States.

THE LAND ACQUIRED BY THE UNITED STATES UNDER THE ACT OF FEBRUARY 28, 1877

In Article II of the Treaty of April 29, 1868, 15 Stat. 635, 636, the United States confirmed in the Sioux Nation recognized title to a tract of land which became known as the Great Sioux Reservation, and which consisted mainly of all of the present State of South Dakota west of the Missouri River. Under the Act of February 28, 1877, the United States acquired from the Sioux the Black Hills portion of the Great Sioux Reservation, which is the subject area of the valuation in this decision. It contains 7,345,157 acres and may be defined as follows:

> Beginning at the intersection of the 103rd meridian of west longitude with the northern boundary of the State of Nebraska, then north along the 103rd meridian to the south fork of the Cheyenne River, then down the south fork to its junction with the north fork (Belle Fourche River), then up the north fork of the Cheyenne to the 103rd meridian, then north along the 103rd meridian to the 46th parallel of north latitude, then west along the 46th parallel to the 104th meridian, then south along the 104th meridian

to the northern boundary of the State of Nebraska,
then east along the northern boundary of Nebraska
to the point of beginning.

The subject area is composed of two distinct topographic areas--the Black Hills and the surrounding plains. The Black Hills are a series of mountains ranging in elevation from 4,000 to more than 7,000 feet. There are four separate topographic divisions of the Black Hills. At the center is a core area known as the Crystalline Basin. It is surrounded by a plateau-like region known as the Limestone Plateau. Farther out from the center is the Red Valley, which is surrounded by a ring of high ground known as the Great Hogback Ridge. Outside of the Black Hills, the tract is typical Great Plains, with elevations ranging upward from about 2,000 feet, the lowest points being in the east.

The subject tract has a four season temperate climate with hot summers and cold winters. The mean annual temperature averages about 45°F. Average annual precipitation ranges from 11 to 18 inches on the plains, and from 16 to 30 inches in the Black Hills. In the winter this precipitation falls mainly as snow. The average growing season ranges from 120 to 140 days on the plains, and from 100 to 120 days in the hills.

In general the tract is well watered. Several major rivers traverse the tract, as do many lesser streams and creeks. However, there are some areas on the plains where water supplies are intermittent, and where storage dams or wells have had to be constructed to provide adequate water for year-round stock raising.

The central core area of the Black Hills and the Limestone Plateau contain predominantly gray wooded soils. The mountainous areas and the Hogback consist mostly of rock outcrop with some lithosols. The Red Valley contains mainly chestnut soils. The plains area contains various types of chestnut soils, Regosols, and Solonetz. The soils are well to excessively drained and have a generally brown loamy surface.

The dominant types of grasses in the subject tract are true prairie grasses, such as June, Spear, and Wheat grass, and short grasses, such as Buffalo and Grama. Other grass varieties grow locally in different sections of the tract.

The Union Pacific-Central Pacific Railroad passed to the south of the tract. The closest stops were at Sidney, Nebraska, 120 miles from the tract, and at Cheyenne, Wyoming, 140 miles from the area. The Northern Pacific Railroad terminated at Bismarck, Dakota, which was about 120 miles northeast of the tract. In addition, a variety of stage-coach routes entered the subject area on or before the date of valuation. These lines ran to Deadwood, the major city in the tract, from Sydney, Nebraska; Cheyenne, Wyoming; Bismarck, Dakota; and southeastern Dakota.

HISTORY

Long before its acquisition from the Sioux by the United States, the potential value of the subject area was known to Americans. During the 1850's and 1860's official government expeditions and private explorers and prospectors portrayed the Black Hills as an excellent potential agricultural and grazing area, and reported significant discoveries of gold.

In May of 1874 Lt. Colonel George A. Custer commanded an exploration expedition into the Black Hills. Members of the expedition discovered gold in paying quantities. The extent of the gold field, however, was not determined. Reports of the gold find were widely circulated and greatly exaggerated by the press. As a result of these reports, and despite a more pessimistic report by a later government explorer, large numbers of American prospectors and miners began to invade the Black Hills. In addition, pressure began to be asserted against the Government to open the Black Hills to white settlement.

In 1875 government officials decided that it would be advisable for the United States to acquire the Black Hills from the Sioux. In order to determine what would be a fair price to the Sioux for the Black Hills, President Grant ordered that a topographical and geological survey be conducted. He appointed Walter P. Jenney, a mining engineer, to head the survey. Jenney was instructed to report on the mineral, timber, and agricultural resources of the Black Hills. After completing his explorations, Jenney reported that he had discovered gold, that the gold field covered an area of not less than 800 square miles, that there was sufficient timber and flowing water for mining operations, that the soil in the area was rich and fertile, that at least one-twentieth of the Black Hills area was susceptible of cultivation, and that there were many other large areas which would afford fine grazing.

In June 1875, the Secretary of the Interior, acting under instructions from President Grant, appointed a commission to negotiate with the Sioux

for the cession of the Black Hills and for the surrender of certain Sioux hunting rights. The commission, which became known as the Allison Commission, met with the Sioux during September 1875. The government negotiators offered a lower price for the Black Hills than the Sioux were willing to accept, and the negotiations ended in failure.

After the failure of the Allison Commission to reach agreement with the Sioux, the Grant Administration altered its policy. In November 1875 the President decided that the United States would no longer fulfill its obligation under Article II of the 1868 treaty to keep unauthorized persons out of the Great Sioux Reservation. He ordered that the Army be removed from the Black Hills, and that no further opposition be offered to miners attempting to enter the hills. In addition, President Grant, and members of his administration, began to assert pressure against Congress for unilateral action to acquire the Black Hills.

Without waiting for congressional action, the executive branch precipitated the Sioux situation into a crisis. On December 3, 1875, the Secretary of the Interior instructed the Commissioner of Indian Affairs to direct agents at all agencies in Dakota and at Fort Peck to notify the Sioux in the Yellowstone and Powder River areas in the unceded Indian territory 1/ that unless they returned to their reservations by January 31, 1876, they would be declared hostile and would be treated accordingly by

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1/ Article XVI of the 1868 treaty provided that the area north of the North Platte River and east of the Big Horn Mountains was to be held and considered to be unceded Indian territory

the Army. Most of the Sioux who were in the unceded territory during the winter of 1875-76 were hunting with the permission of their agents, as they had a right to do under Article XVI of the 1868 treaty. Furthermore, the severity of the winter made it impossible for them to return to their agencies. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that his order had not been complied with, and that the Sioux were being turned over to the Army for appropriate military action.

In the spring of 1876 the Amry commenced military operations against the Sioux. On June 25, 1876, the Seventh Cavalry, under the command of George A. Custer, was defeated in a battle with the Sioux, in which 259 soldiers, including Custer, were killed. When news of the battle reached Washington, Congress was so incensed that it attached a rider to the appropriation act of August 15, 1876, which provided that the Sioux would receive no further rations until they ceded the Black Hills to the United States. Because most of the Sioux had been disarmed and were thus unable to hunt, the provision meant that unless the Sioux surrendered the Black Hills they would be allowed to starve.

Despite the ultimatum contained in the appropriations act, the commission which was appointed to negotiate with the Sioux was unable to get more than 10% of the adult male Sioux to assent to a cession agreement. Article XII of the 1868 treaty provided that no cession of any portion of the Great Sioux Reservation would be valid unless approved by three-fourths

of the adult male Sioux. Although the 1876 agreement did not satisfy the requirements of this section, Congress effectuated its terms by enacting the Act of February 28, 1877, supra.

VALUATION OF THE SUBJECT AREA

Plaintiffs' general appraiser was Mr. Donald D. Myers. Mr. Myers is a well qualified land appraiser and has appeared previously before the Commission as an expert witness. In his appraisal report Mr. Myers divided the tract into several highest and best use areas. He assigned 1,500 acres to townsites, 24,000 acres to mineral land, 200,000 acres to agricultural land, 750,000 acres to timberland, and the remaining 6,369,675 acres to grazing land.

Defendant's general appraiser was Mr. Harry R. Fenton. Mr. Fenton is a well qualified land appraiser and has appeared previously as an expert witness before the Commission. Mr. Fenton appraised the surface land of the tract as a single area.

We have decided that Mr. Myers' approach is the better one in this docket, and we shall examine separately the various use areas of the subject tract.

Townsites. The subject area contained many towns on the date of valuation. The largest of these was Deadwood, in Lawrence County, which had a nonIndian population of 4,000 to 5,000. Other major communities were Central City in Lawrence County, with a population of 1,500 to 2,000;

Lead City in Lawrence County, with a population of about 1,000; Crook City in Lawrence County, with a population of about 300; Galena in Lawrence County, with a population of about 300; and Custer City in Custer County, with a population of about 250. At the valuation date most of these communities were experiencing a period of economic boom. These townsites contained 1,000 acres.

The record contains evidence of sales of townlots within Deadwood during the years 1876 and 1877. There were 52 transactions, involving 68 townlots, in which the deed did not indicate that the property being sold contained improvements. The total consideration in these sales was about $25,000, with individual prices ranging from $3 to $3,000 per lot.

Mr. Myers, plaintiffs' appraiser, assigned value to five of the Black Hills townsites--Deadwood, Central City, Lead City, Rapid City, and Custer City. His valuation method is quite complex, and we have summarized it in finding of fact 15.

Mr. Myers' townsite valuation centered on the Deadwood townsite. Initially, he estimated that the Deadwood townsite contained 3,500 townlots measuring 100 feet long and 25 feet wide. In the deed records of Lawrence County for 1876 and 1877 Mr. Myers found evidence of 73 sales of townlots in Deadwood. The deeds for 55 of these sales did not indicate whether or not the lot involved contained improvements. Mr. Myers

assumed that these sales involved unimproved lots. He then organized the sales data according to the Deadwood street upon which the sold lot was located, and calculated the average sale price per lot on each street. Then, assuming that each street contained 250 lots in the core area of the city, Mr. Myers calculated the total value of each street. Adding these values he arrived at a value for the core area of the city of $637,500.

Mr. Myers then used a second appraoch. He assumed that Deadwood contained 750 prime commercial lots worth $350 each, 1,250 lots of secondary commercial value worth $175 each, and 1,500 residential lots worth $100 each. These figures resulted in a total value of $631,259 for the entire town.

Applying a discount to the value he had obtained by each method, on the assumption that a purchaser would pay less for the entire town than for individual lots, Mr. Myers concluded that the fair market value of Deadwood was $600,000. Then, comparing the population of Deadwood with those of the other towns, Mr. Myers extrapolated the following values: Central City - $100,000; Lead City - $100,000; Rapid City - $10,000; Custer City - $10,000.

The Commission is unable to accept Mr. Myers' township valuation. Initially, his estimate of 3,500 townlots is inconsistent with the evidence. An official plat of the Deadwood townsite, completed in the summer of 1877,

is in the record as part of defendant's exhibit M-61. We have carefully examined this plat and are convinced that Deadwood contained only about 800 townlots.[2/]

Furthermore, we believe that Mr. Myers was incorrect in assuming that all 55 of the sales he used involved unimproved lots. The disparity among the selling prices of lots on the same street, and the instances where selling prices of lots known to be improved were less than those of lots presumed to be unimproved, leads us to conclude that some of these 55 sales probably involved improved lots. Although Mr. Myers testified at the trial that he excluded from his calculations lots with extremely high prices, there is no indication in his written report that he did so. In addition, several of the sales listed in exhibit CB-136 are duplications.

Mr. Myers' street by street analysis is unacceptable. Examination of the Deadwood plat indicates that none of the streets in Deadwood contained as many as 250 lots. Sherman Street, which was by far the longest street in Deadwood, contained only about 200 townlots. Moreover, with regard to several of the streets in Mr. Myers' analysis, the number of sales was so few, or the range of prices was so extreme, that the accuracy of the average lot value must be doubted.

2/ This conclusion is not inconsistent with finding of fact 14, which indicates that there were 1,500 buildings in Deadwood in July 1877. Undoubtedly this figure included various types of outbuildings. Those townlots which had been developed by July 1877 most likely contained more than one building each.

Mr. Fenton, defendant's appraiser, assigned no value to the townsites in the subject tract. He stated that his appraisal was based on the premise that the United States was purchasing virgin unimproved lands, and that he did not consider any increase in value which may have resulted from the activities of miners or settlers in the tract. The premise under which Mr. Fenton valued the tract is erroneous, and we must reject his conclusions on townsites. See Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130, 146 (1968).

In its proposed findings of fact, defendant stated its position that the townsites did not justify a separate use value, but merely provided a plus value for the tract as a whole. The Commission does not agree.

In valuing the Deadwood townsite, the Commission relied upon the evidence of townlot sales in 1876 and 1877. We excluded those sales that appeared to be duplicates. In addition, to account for the likelihood that some of the lots sold contained improvements, or that some of the sales were not arms length transactions, we excluded those sales at the extreme ends of the range of prices. We also applied a slight discount in our calculations, because the prospective purchaser would have been buying the entire township rather than an aggregate of individual lots.

In valuing the remaining townsites in the tract, for which the record contained no sales evidence, we adopted Mr. Myers' method based on respective populations. We concluded that Central and Lead Cities had per capita values 2/3 that of Deadwood, and that Crook, Galena, Rapid, and Custer Cities had per capita values 1/4 that of Deadwood.

The Commission concludes that the townsites in the subject tract would have contributed $250,000 to the fair market value of the entire tract.

Agricultural land. Prior to the valuation date it was generally known that the subject tract contained areas of excellent agricultural land. Agricultural development remained minimal before the date of valuation, however, because farmers were especially vulnerable to Indian attacks, and because farm equipment was not yet available in the subject tract. After the extinguishment of Indian title these impediments were removed, and agricultural activity expanded.

There is some conflict in the evidence concerning the extent of the agricultural land in the subject area. After weighing this evidence, including the expert opinion of Mr. Myers, we have found that on the valuation date the subject tract contained 200,000 acres of excellent farmland.

The nearest sales of agricultural land to the subject tract around the date of valuation occurred in Clay, Union and Yankton Counties in southeastern Dakota. The record contains evidence of 209 of these sales in the years 1875, 1876, and 1877. These sales involved a total of 31,567 acres, and were sold for an aggregate consideration of about $150,000. The average price was about $4.80 per acre.

The record also contains data on sales of state school lands. By 1877 Minnesota had sold nearly 600,000 acres of its school lands at an average price of over six dollars per acre. Nebraska had sold over 100,000 acres by the beginning of 1877, at an average price in excess of nine dollars per acre. Kansas school land sales through June 1878 totalled over 200,000 acres at an average of over four dollars per acre.

Sales data of railroad grant lands are also included in the record. This evidence shows that millions of acres of railroad lands were selling for average prices in excess of four dollars per acre.

The method used by Mr. Myers, plaintiffs' appraiser, to value the agricultural land is summarized in finding of fact 20. Mr. Myers based his calculation of the amount of agricultural land in the tract on his estimates for the farm acres in the valleys of each of the major rivers and streams of the subject tract. We find that his

conclusion as to the extent of the agricultural land is supported by the evidence, and we have adopted his approach.

In valuing the agricultural lands, Mr. Myers relied primarily on his analysis of the 209 sales of southeastern Dakota farmland. For these sales he calculated an average price of $4.80 per acre, a mean price of $5.69 per acre, a median price of $4.62 per acre, a mode price of $4.50 per acre, and a weighted average of $5.05 per acre. He made similar calculations for these sales on a county by county basis. Mr. Myers also examined state school land sales and railroad grant sales in his evaluation. After comparing the lands involved in all these sales with the agricultural land in the subject area, Mr. Myers concluded that the latter had a fair market value of five dollars per acre, or a total of $1,000,000.

Mr. Myers' appraisal of agricultural land suffers from several flaws. In his calculations, for example, he made no allowance for the likelihood that some of his 209 sales involved improved lands. Thus, although he stated that 13 sales for average prices in excess of $12.50 per acre (as well as five sales for average prices less than $1.25 per acre) probably did not represent arms length sales of unimproved lands, he did not exclude these sales from his calculations. Had he excluded the 13 sales with per acre prices in excess of $12.50, his mean price per acre would have been lowered from $5.69 to $4.73, and his weighted average price per acre would have been lowered from $5.05 to less than $4.00. His median price per acre would undoubtedly have been lowered also.

In addition, Mr. Myers' entire basis of calculation resulted in inflated values. In analyzing the sales, he broke them down into ranges of three dollars each. He then used the midpoint figure of these ranges as the bases for his calculations. Thus, his mean price per acre was derived by multiplying the number of sales in each range by the midpoint of that range, and dividing the sum of the resulting figures for each range by the total number of sales. This statistical manipulation is not what is commonly defined as the mean price.[3/] It could more properly be defined as a weighted mean. Mr. Myers' mode price per acre was derived by taking the midpoint of the "$3.00-$5.99" range. This does not conform to the standard definition of mode price.[4/] The Commission is unable to determine how Mr. Myers calculated his median price per acre. However, his result indicates that he did not use a standard definition of median.[5/]

Furthermore, his division of sales into three dollar ranges was arbitrary and may have resulted in inflated values. For example, had

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3/ Appraisal Terminology and Handbook, published by the American Institute of Real Estate Appraisers, defines arithmetic mean or average as "[t]he quotient of a sum divided by the number of items in the group." The Commission calculates the mean price per acre of the 209 sales to be $5.42.

4/ Appraisal Terminology and Handbook, supra, defines mode as "[t]he most frequent value in an array of numbers." The mode price per acre of the 209 sales is $3.12.

5/ Appraisal Terminology and Handbook, supra, defines median as "[t]he value of the middle item where an odd number of items are arranged according to size. . . ." The median price per acre of the 209 sales is $3.75.

Mr. Myers grouped his sales in ranges of 2 dollars each, using his methods of calculation he would have arrived at a mean price per acre of $5.48 rather than $5.69, and a mode price per acre of $3.00 rather than $4.50. Had he grouped his sales in ranges of 4 dollars each, his mean price would have been only $4.85 per acre, and his mode price $2.00 per acre.

Finally, Mr. Myers failed to apply any size discount in his calculations. The 209 southeastern Dakota sales involved parcels ranging from 5 to 560 acres. The school land and railroad land sales undoubtedly involved relatively small tracts. The prospective purchaser of the subject area, on the other hand, would have been purchasing 200,000 acres of farmland in one transaction involving over 7 million acres, and would have been purchasing for the purpose of reselling in small parcels. Although the agricultural land was distributed in small areas throughout the subject area, the prospective purchaser would have incurred costs in holding and reselling the land, and would have expected a size discount in the sales price.

Mr. Fenton, defendant's appraiser, did not assign any value to the agricultural land in the subject area. It was his opinion that because farmland constituted such a small part of the subject tract a buyer and seller would not have given it separate consideration.

We are unable to agree with Mr. Fenton's reasoning. The potential agricultural attributes of the subject area had been extensively publicized by the valuation date, and a potential buyer and seller would have considered farmland a major factor in arriving at a price for the entire tract. The miners in the Black Hills gold fields, who were very much

isolated from external sources of supply, would have been seen as a captive market for farm produce, and thus an inducement for farmers to purchase the agricultural lands within the subject tract.

The Commission concludes that the 200,000 acres of agricultural land in the subject tract would have contributed $700,000 to the fair market value of the entire tract. In reaching this result we relied primarily on the 209 sales in southeastern Dakota. We excluded those sales with per acre prices in excess of ten dollars as probably involving improved land. In our calculations we also applied a discount for size.

Timberland. The most abundant and economically important tree in the subject tract was the Ponderosa Pine. The record indicates that on the valuation date the tract contained 750,000 acres of timberland, which contained an average of 4,000 board feet of lumber per acre.

Shipment of timber into the subject tract was impractical at the valuation date. Therefore, timber growing within the tract was the only source to satisfy the needs of the local timber and lumber market. The mining, commercial and other activities being conducted within the tract on the date of valuation created a substantial market for timber.

Mr. Myers, plaintiffs' appraiser, relied primarily on a future income approach in valuing the timberland of the subject tract. We have summarized his complicated appraisal in finding of fact 27. Initially Mr. Myers calculated the amount of wood which would have been required to build all the dwellings and commercial buildings in the subject tract

on the valuation date, and the additional buildings which would be erected in the following ten years. He also calculated the amount of wood which would be required by the mining industry for the years 1877 through 1887. Mr. Myers then calculated the gross and net incomes which would have been realized by a commercial timber operation in the subject tract. He capitalized the yearly net income at a rate of 8% per year to arrive at his value figure.

Mr. Myers also examined the timber market data in the record. He combined this information with his income analysis to arrive at his conclusion that the timberland within the tract had a fair market value of $1,875,000, or an average of $2.50 per acre.

The Commission must reject Mr. Myers' timberland appraisal. In previous cases we have rejected the future income method as applied to timberland. See, e.g., Minnesota Chippewa Tribe v. United States, Docket 18-T, 25 Ind. Cl. Comm. 146 (1971). As used by Mr. Myers in this case this method is not supported by the evidence and is based on assumptions which are very speculative. For example, Mr. Myers assumed that the construction of an average dwelling would require 3,600 board feet of lumber; that the subject tract would require one shop for every 30 people, with 5,400 board feet of lumber required to construct each shop; that the tract would require one newspaper for every 2,000 people, with 10,800 board feet of lumber required to build each newspaper office; that the tract would require one bank for every 1,000 people, with 10,800 board feet of lumber required to construct each bank. None of these, or many

similar assumptions made by Mr. Myers, are supported by the evidence.

Moreover, Mr. Myers' assumption that all of the buildings existing in the tract on the valuation date would have been constructed on that date is clearly contrary to the evidence. A buyer or seller would not have included the lumber in these buildings in calculating future demand.[6/]

In their proposed findings of fact and brief, plaintiffs assert that the timberland had a fair market value of $3,000,000, or an average of four dollars per acre. This assertion is apparently based on a stumpage price of one dollar per thousand board feet. The Commission has repeatedly rejected stumpage value as a basis for valuing timberland and therefore cannot accept plaintiffs' valuation. See, e.g., Emigrant New York Indians v. United States, Docket 75, 11 Ind. Cl. Comm. 336, 374 (1962).

Defendant's appraiser Mr. Fenton did not place any value on the timberland. He reasoned that Black Hills timber was free for the taking by anybody who wanted it, and that therefore no one would be willing to pay for it.

We must reject Mr. Fenton's reasoning. Neither a hypothetical purchaser nor a hypothetical seller of the subject tract would permit the free cutting of Black Hills timber. The prospective purchaser would be well aware that he would be acquiring ownership of all the available timber, and that he would have a ready market for timber and wood products.

6/ Further, since plaintiffs are also seeking recovery for improvements, including these buildings in an appraisal of timberland results in plaintiffs seeking double recovery for these buildings.

He would therefore be willing to pay a higher price for the timberlands.

In finding of fact 25 the Commission has examined the timberland market data in the record, and has compared the timber involved there to the timber in the subject tract. The timber in the tract was inferior in quality to the timber in the other areas. At the same time, it enjoyed a complete monopoly over the local lumber market. The timber in the other areas enjoyed greater access to outside market. The Commission concludes that the 750,000 acres of timberland in the subject tract would have contributed $1,350,000 to the fair market value of the entire tract.

Grazing land. Prior to the valuation date, it was known that the grasslands of the subject tract were excellent. After the extinguishment of Sioux title, ranchers began to move cattle in great numbers into the area.

Grazing was a use to which the land would be put if it was not adaptable to a more economically rewarding use. We have therefore included within our calculation of grazing acreage all the land within the subject tract which did not have a highest and best use for agricultural, timber, or mining purposes. The subject tract therefore contained 6,378,157 acres with a highest and best use for grazing purposes.

Mr. Myers' appraisal of the grazing lands of the tract is summarized in finding of fact 36. Mr. Myers used two methods in valuing the grazing lands--a future income method and a comparable sales approach. Each of these methods was keyed to Mr. Myers' calculation of the cattle carrying capacity of the tract. Relying on Soil Conservation Service recommended stocking rates for range sites within the subject tract, and applying a

25% discount for the hazards of the range and unequal water distribution, Mr. Myers concluded that the subject tract could support 170,000 head of cattle on a sustained yield basis. We are of the opinion that Mr. Myers was too optimistic in his calculations. In its calculations, the Commission has applied an additional 15% discount to account for the areas of the tract that were unfit for grazing.

In his future income method, Mr. Myers estimated the annual weight gain that could be expected from a 170,000 head herd on the tract, the costs of transporting cattle to the market at Chicago, the gross income to be derived from the sale of each steer, the operating expenses of a cattle business, and the yearly losses that such a business would sustain. He then calculated the net annual income which a hypothetical cattle business in the subject tract would realize. Then, estimating that an investor would expect an 8% return on his investment, Mr. Myers calculated that the fair market value of the grazing land of the tract was $7,500,000, or an average of $1.17 to $1.18 per acre.

In his comparative sales analysis, Mr. Myers relied upon sales by the Atlantic and Pacific Railroad between 1884 and 1890, and the Union Pacific Railroad in 1884. He compared these sales with the grazing lands of the subject area on the basis of their respective carrying capacities. He calculated that the A & P lands sold at a rate of $42.20 per head of grazing capacity, and that the Union Pacific lands sold at a rate of $49.27 per head of grazing capacity. Applying these figures to the subject tract, Mr. Myers calculated values of $7,174,000 ($1.12 per acre)

based on the A & P sales, and $8,375,900 ($1.31 per acre) based on the U.P. sales.

Combining his future income and comparative sales approaches, Mr. Myers concluded that the grazing lands of the subject tract had a fair market value of $7,960,000, or an average of about $1.25 per acre.

In Hualapai Tribe v. United States, 17 Ind. Cl. Comm. 456 (1966), this Commission rejected Mr. Myers' future income method of appraising grazing land as being too speculative. We are still of the opinion that a hypothetical cattle business is far too uncertain and risky a basis for a land evaluation. Therefore, we do not accept Mr. Myers' future income method.

Mr. Fenton's appraisal of the grazing land of the tract is summarized in finding of fact 37. Mr. Fenton valued the entire subject tract as a single unit, and used a market data method of valuation.

Mr. Fenton's appraisal was based on 96 sales, which Mr. Fenton divided into 7 groups, and which he compared with the subject tract. Mr. Fenton also analyzed separately several sales which he believed were particularly comparable to the subject tract. Mr. Fenton concluded that the fair market value of the subject tract was 35 cents per acre, or $2,570,805.

We are unable to accept Mr. Fenton's appraisal. Most of the "sales" used by Mr. Fenton were either not sales, not bona fide arms length transactions, too remote in time from the valuation date, or unsupported by the evidence. For example, the sales upon which Mr. Fenton put particular emphasis were not comparable sales. Sales 4, 5, and 6 apparently all

refer to the same transaction. This was a cession by Texas to the United States of its claim to sovereignty over lands in Oklahoma, Colorado, New Mexico, Kansas, and Wyoming. This was not an arms length sale but rather a political settlement. Sale 16 was the transaction in which Texas granted three million acres to the X.I.T. Ranch in exchange for an agreement to construct a state capital building. The Commission has previously rejected this transaction as not being a bona fide sale. See Ft. Sill Apache Tribe v. United States, Dockets 30 et al., 25 Ind. Cl. Comm. 352, 357 (1971), aff'd, 202 Ct. Cl. 134, 480 F.2d 818 (1973); Jicarilla Apache Tribe v. United States, Docket 22-A, 24 Ind. Cl. Comm. 123, 129 (1970).

Sale 51 was a sale by the Matador Cattle Company to the Matador Land and Cattle Company, a Scottish firm. On cross-examination Mr. Fenton admitted that this was not a good comparable sale. The Commission has previously rejected this sale. See Fort Sill Apache Tribe, supra. Sale 60 was not a sale, but merely represented the Prairie Cattle Company's estimate of their assets. In fact the company valued this land at $3.22 per acre, not the 53 cents asserted by Mr. Fenton. Sale 21 is the so-called Goodnight Sale, which we have previously rejected as unsupported by substantial evidence. See Fort Sill Apache Tribe, supra, Hualapai Tribe v. United States, Docket 90, 17 Ind. Cl. Comm. 456, 531-32 (1966). Sale 48 included land to which the seller did not have title. Cattle and improvements were included in the sale price. In addition there is some doubt in the record that this sale actually took place. On cross examination, Mr. Fenton admitted that this was not a good comparable sale. Many of the

remaining sales which Mr. Fenton used are equally unacceptable as comparable sales.

Moreover, Mr. Fenton's calculations were distorted by the fact that he excluded those sales for prices in excess of one dollar per acre. Mr. Fenton did this on the assumption "that logically the value of the subject property was below a dollar per acre." Def. Ex. F-115, p. 31. This is a clear case of assuming what one is trying to prove, and the Commission cannot accept it.

In its proposed findings of fact, defendant relied specifically on only three of Mr. Fenton's sales--Sales 48, 49 and 66. We have discussed the inadequacies of sale 48 above. Sale 49 is another instance in which the seller owned fee title to only a small fraction of the land he was selling, the remainder being public domain. Sale 66 was in fact not a sale but an inventory account, and the reported price was merely a down payment. On cross examination Mr. Fenton admitted that his analysis of this sale was erroneous.

Defendant also placed particular emphasis on the Swan sales which the Commission has previously considered in Crow Tribe v. United States, Docket 54, 6 Ind. Cl. Comm. 98 (1958). These sales are actually Mr. Fenton's sales 93, 94, and 95. Our findings in Crow, and the cross examination of Mr. Fenton in this case, indicate that sale 93--totalling 555,890 acres for an aggregate price of $460,990--included sales 94 and 95, and that the proper consideration was $0.83 per acre, rather than $0.50 per acre as asserted by defendants. At 83 cents per acre these sales do not support defendant's valuation conclusion.

In valuing the grazing land of the subject tract, the Commission has adopted Mr. Myers' comparative sales method, with some modifications. In Hualapai Tribe v. United States, supra, at 521-23, the Commission approved Mr. Myers' approach. We also discussed the effect of the checkerboard pattern of the railroad grant lands on Mr. Myers' appraisal.[7/] We shall not repeat here our detailed discussion in Hualapai. In this case we adhere to the views we expressed in Hualapai, and Fort Sill Apache, supra, at 356-57.

In addition to applying the comparable sales approach with respect to the Atlantic and Pacific and Union Pacific sales, which Mr. Myers used in his appraisal report, we also used it with respect to the 1870 Maxwell Grant sale described in finding of fact 35. In reaching our value conclusion we have also examined the sales in finding of fact 35 for which there are no cattle carrying capacity figures in the record.

The Commission concludes that the 6,378,157 acres of grazing land in the subject tract would have contributed $6,600,000 to the fair market value of the entire tract.

Improvements. In their brief, plaintiffs contend that they are entitled to recover the value of the improvements that had been constructed within the subject tract prior to the valuation date. They rely on the real property rule that buildings or other improvements attached to the land by a knowing or deliberate trespasser become the property of the owner of the land. They distinguish Washoe Tribe v. United States, Docket 288, 21 Ind. Cl. Comm. 447 (1969), in which the Commission denied recovery for improvements, on the basis that in that case the plaintiff

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7/ We stated that the effect would be to lower the appraisal value.

held the land in aboriginal title and the nonIndians were unknowing trespassers, while in the present case the Sioux had recognized title to the land and the nonIndians were deliberate trespassers. We need not decide this legal question because we believe that plaintiffs have failed to establish the value of the improvements which existed within the tract on the valuation date.

In valuing the improvements, Mr. Myers relied upon his timberland appraisal to arrive at the value of the materials contained in the buildings. In his timberland appraisal Mr. Myers estimated that the residents of the subject tract on the date of valuation would have required 2,775 dwellings, 415 shops, 6 newspapers, 50 hotels, 65 saloons, 6 theaters, 6 churches, 6 halls, 6 bathhouses, 6 firehouses, and 6 schools. He also estimated the amount of wood which would have been required to construct each of these buildings. He concluded that 16 million board feet of lumber would have been required to construct all of these improvements. On the basis of a cost of $30 per thousand board feet, he calculated that the value of the materials in these buildings would have been $480,000. Mr. Myers added 30% to reflect the value increment added by labor, and concluded that the improvements had a value of $625,000.

We must reject Mr. Myers' valuation of improvements. As we have stated above in rejecting his future income method of valuing the timberlands, Mr. Myers' assumptions as to the number of improvements existing in the subject tract, and the amount of wood needed to construct them, are speculative and are not supported by any evidence of record. His use of

these figures in valuing the improvements is equally speculative and we cannot accept his appraisal.

Minerals. The mineral area in the subject tract lies between the Belle Fourche and Cheyenne Rivers, in Lawrence, Pennington, and Custer Counties, South Dakota, and on the valuation date contained 16,000 acres.

Although gold had been discovered in the subject area as early as the 1830's, extensive mining activity did not begin until after the Custer expedition in 1874. Thereafter great numbers of miners entered the Black Hills. Significant placer gold discoveries were made in the spring and summer of 1875 in Pennington County, and in the fall of 1875 and the winter of 1876 in Lawrence County. Placer mining remained the primary activity in the area until the major Lawrence County lode deposits were discovered beginning in the spring of 1876.

Plaintiffs' mineral appraiser was Mr. Roy P. Full. Mr. Full is a well qualified mining engineer and consulting geologist, with extensive experience in mineral appraisals before this Commission, the Court of Claims, and other federal and state courts.

Defendant's mineral appraiser was Mr. Ernest Oberbillig. Mr. Oberbillig is a well qualified metallurgical and mining engineer, with 35 years experience in appraising mining properties. He has appeared as mineral expert in many cases before this Commission and before various courts.

The greater portion of the gold deposits in the subject area were

located in Lawrence County. The lode deposits in Lawrence County occurred primarily in two major areas--the mineral belt and the cement mines. Together these two areas have become one of the most productive gold mining regions in the history of the United States. In findings of fact 45 through 58 we have related in detail the history of the development of the lode gold deposits of Lawrence County.

In appraising the lode gold deposits of Lawrence County, Mr. Full relied primarily on a future income approach. We have summarized his appraisal in finding of fact 59. In his report, Mr. Full valued separately the mineral belt, the cement mines, the Bald Mountain area, the Bear Butte district, and the small mining districts, Ida Gray, Spruce Gulch, and Germania.

In his mineral belt valuation, Mr. Full first examined all of the evidence in detail. Based on this evidence he estimated that a conservative estimate of the extent of the mineral belt lode was 5,000 feet long, 30 feet wide, and 1,000 feet deep, containing a total of 12,500,000 tons of ore. He also estimated that a unified operation of the entire mineral belt would have a potential life of 25 years with an annual production of 500,000 tons, that the average ton of ore would have yielded $7.50 worth of gold, that the average ton would have cost $4.00 to process, and that preproduction costs would have amounted to $1,500,000. He then calculated the annual net profit on the operation to be $1,750,000, and, applying the Inwood premise at a 15% rate and deducting preproduction costs, he calculated the fair market value of the mineral belt to be $9,812,175.

We believe that Mr. Full's mineral belt appraisal was too optimistic. Initially, we cannot accept his projection of the mineral belt to a depth of 1,000 feet. It is our opinion that a prospective purchaser and seller would have been overly optimistic in foreseeing any depth greater then 750 feet for the lode. In addition, Mr. Full's assumption that the mines could be operated for 350 days per year is unreasonable. This would allow for only about one idle day every four weeks.

Finally, we cannot accept Mr. Full's use of the Inwood premise at a 15 percent rate. In recent cases we have commented extensively on the means for selecting the proper hazard discount factor when using the future income method in appraising mineral lands. See Goshute Tribe v. United States, Docket 326-J, 31 Ind. Cl. Comm. 225, 239-243 (1973); Western Shoshone Identifiable Group v. United States, Docket 326-K, 29 Ind. Cl. Comm. 5, 34-38 (1972). We need not repeat that discussion here. However, using the same rationale that was used in Goshute and Western Shoshone, the Commission is of the opinion that, considering the liberality of Mr. Full's estimates and the risks involved in a mining operation, the proper discount rates to be applied in valuing the mineral belt are a Hoskold factor of 15% return on investment and 3% on return of capital, or an Inwood factor of 20%.

Mr. Full used a similar method in appraising the cement mines. He estimated that the cement mines would have had an expected life of 4 years, processing 200 tons of ore daily for 350 days per year; that the average ton of ore would have yielded 12 dollars worth of gold, and would have

cost 6 dollars to process; and that preproduction costs would have amounted to $250,000. He calculated the annual net profit from the cement mines to be $420,000. Using the Inwood premise at 20% and deducting preproduction costs, he calculated the fair market value of the cement mines to be $837,254.

Again, we disagree with Mr. Full's assumption that mines could be operated on a 350 days per year basis. We also cannot accept his use of a 20% Inwood factor. Considering the liberality of Mr. Full's estimates and the risks of the cement mines, the Commission is of the opinion that proper discount rates to be applied are a Hoskold factor of 20% return on investment and 3% on return of capital, or an Inwood factor of 25%.

Mr. Full valued the Bald Mountain area at $100,000, after analyzing the area on a claim by claim basis. We must reject his valuation. As we have noted in finding of fact 55, none of the major claims in the Bald Mountain area had been discovered prior to the valuation date, and therefore a prospective purchaser and seller would have assigned no value to this area.

In appraising the Bear Butte district, Mr. Full used a similar method to the one he had used for the mineral belt and cement mines. He estimated an expected life of five years, a production of 50 tons per day for 350 day per year, a yield of $35 per ton of ore, a cost of $25 per ton of ore, and a preproduction cost of $200,000. Applying the Inwood premise at 15% and deducting preproduction costs, he valued the Bear Butte district at $386,635.

Again we cannot agree with Mr. Full's assumption of a 350 day production

year or his use of a 15% Inwood factor. We are of the opinion that the proper discount rates would be a Hoskold factor of 15% return on investment and 3% on return of capital, or an Inwood factor of 20%.

Mr. Full's appraisal of the Ida Gray, Spruce Gulch, and Germania districts at a total of $30,000 was based on his analysis of the evidence. As we have stated in finding of fact 47, the claims in the Spruce Gulch and Germania districts had not been discovered by the date of valuation and would not have been included in a value estimate by a prospective buyer and seller.

Mr. Oberbillig, defendant's appraiser, used a market data approach in valuing the Lawrence County lode deposits. He also used a future income approach to confirm his results. We have summarized Mr. Oberbillig's appraisal in finding of fact 60.

Mr. Oberbillig based his market data approach on a total of eight sales of mining claims on the mineral belt. These sales were for a total consideration of $755,000. He then assumed that the remaining claims on the mineral belt were worth about $400,000, and concluded that the fair market value of the whole belt was $1,150,000.

In his future income approach Mr. Oberbillig relied upon an analysis of the Homestake mine. Based on figures published in 1879, he estimated that the mine at that time had a remaining expected life of ten to twenty years and could be expected to realize a profit of $500,000 per year. He divided this profit, assigning half to the owners and half to the

operators. Then applying Inwood factors of 15% for 10 years and 20% for 20 years he calculated a fair market value of $1,250,000, as of July 1879. He then discounted this back to February 1877, at 25% per year compound interest, and obtained a value for the Homestake mine of $750,000. He then assumed that all the remaining claims in Lawrence County together were worth as much as the Homestake and concluded that the fair market value of the Lawrence County lode deposits was $1,500,000.

We must reject Mr. Oberbillig's appraisal. We do not believe that a market data valuation based on only eight sales can be very reliable. Moreover, Mr. Oberbillig's conclusion that all the remaining properties on the mineral belt were worth an aggregate of $400,000 is not supported by any evidence. In his future income method, the Commission cannot accept his division of profits between the owner and the operator. There is nothing in the evidence to suggest that the prospective purchaser would not itself have operated the mines. Furthermore, we believe that a time discount of 25% per year is excessive. Finally, Mr. Oberbillig's assumption that the Homestake mine accounted for one-half the value of the Lawrence County lode deposits is clearly contrary to the evidence.

In valuing the Lawrence County lode deposits, the Commission has adopted Mr. Full's appraisal, modified by our discussion above. The future income method of valuing mineral properties has been used repeatedly by this Commission (See, e.g., Goshute Tribe, supra; Western Shoshone, supra), and by the Court of Claims (see Tlingit and Haida Indians v. United States, 182 Ct. Cl. 130 (1968)). The court has again approved our use of

this method recently in United States v. Fort Sill Apache Tribe, 202 Ct. Cl. 134, 480 F. 2d 818 (1973).

The future income approach is the method usually used by mining engineers in appraising mining properties. Mr. Oberbillig himself, for example, has stated that "[a] mining property has a value equal to the present value of its future profits." Oberbillig, Appraisal of Mineral Land, XXXII Appraisal Journal 485, 489 (1964). Roland D. Parks, another noted mineral expert, has noted that

> [a] mining property has a definite value only by virtue of its ability to produce a profit over a term of years. * * *
>
> "Present value" and "present worth" are synonymous terms used to designate the capital which must be invested immediately (or at a given date of valuation) to be equivalent to the future income to be received in exchange therefor. [Baxter & Parks, Examination and Valuation of Mineral Property 157 (4th ed. R. Parks 1957).]

In other words, the value of a mineral property is the amount a purchaser would be willing to invest, and a seller would be willing to accept, in exchange for the right to receive a fixed net income for a fixed number of years. This purchase price, or fair market value, can be properly calculated by use of the future income appraisal method.

In a case like the present one where much of the official sales data has been destroyed by fire (see finding of fact 58), and where the unofficial reports of sales are often conflicting, the Commission is of the opinion that the use of a market data approach is unwarranted.

Defendant objects to Mr. Fulls' appraisal on the ground that many of the facts he relied upon were obtained from the Janin Report which was not published until July 1879, 2 1/2 years after the valuation date. The Commission agrees that much of the data used by Mr. Full, and adopted by the Commission, was not in fact known in February 1877. However, in our appraisal we are attempting to ascertain what a hypothetical knowledgeable and well informed buyer would have paid a hypothetical knowledgeable and well informed seller for the subject tract. With this as the underlying assumption of our valuation, it is not unreasonable to assume that the hypothetical purchaser and seller of the tract would have investigated before they consummated the transaction. Most of the facts reported by Janin, about those mining properties which were known to exist on the valuation date, were knowable on the valuation date. We must assume that the purchaser or seller of a tract worth millions of dollars would have hired a mining expert to ascertain the extent of what was being purchased. In accepting such an approach, the Commission is not assuming that the prospective purchaser and seller would have extensively explored the subject tract to uncover every mineral deposit. As is clear from our findings of fact, we have not assigned value to any mineral claim that had not been discovered prior to the date of valuation.

The Commission concludes that the Lawrence County lode deposits

would have contributed $6,500,000 to the fair market value of the entire subject tract.

The placer gold deposits in Lawrence County were discovered in late 1875 and early 1876. These deposits yielded the majority of the gold extracted from the Black Hills prior to the date of valuation. In finding of fact 62 we have described the development of these properties.

Mr. Full used a future income approach in valuing the placer deposits of Lawrence County. We have summarized his appraisal in finding of fact 63.

Mr. Full valued separately the deposits in the Whitewood mining district and those in the Boulder Gulch area. For the Whitewood district he estimated a remaining expected life of three years, with production decreasing each year. He calculated annual net gains for the three years of $1,053,000, $486,000, and $144,000 respectively. He then applied a discount factor of 25% (compounded) to each year's profit to account for the expected return on investment for the prospective purchaser. He concluded that the Whitewood district placers had a fair market value of $1,227,168.

Mr. Full used a similar approach for the Boulder Gulch placers, but projected a remaining expected life of only two years. He concluded that these placers had a fair market value of $49,680.

Mr. Full's appraisal of the Lawrence County placers was too optimistic. Initially, we believe that projecting an expected life for the Whitewood

placers of greater than two years is unwarranted because of the extensive mining that had already been carried out in this district. Further, although we agree with Mr. Full that the yield from mining activities would decrease after the first year, we do not agree that costs of production would also decrease. Finally, we are of the opinion that the prospective purchaser would have expected a return of from 25% to 30% on his investment, rather than the 25% that Mr. Full assumed.

Mr. Oberbillig relied on a market data approach in appraising the Lawrence County placers. We have summarized his appraisal in finding of fact 63. He listed the sales he had discovered for the placers on Deadwood Gulch. Totalling the stated consideration for these sales, he arrived at a value of $144,100 for these placers. On the assumption that the remaining placers in the county were worth as much as the Deadwood Gulch placers, Mr. Oberbillig concluded that the fair market value of all the placers in Lawrence County was $288,000.

The Commission must reject Mr. Oberbillig's appraisal. Many of the sales Mr. Oberbillig used are not adequately supported by the evidence. Moreover, his assumption that the placers in Deadwood Gulch constituted 1/2 the total value of all the placers in Lawrence County is clearly contrary to the evidence.

In valuing the Lawrence County placer deposits, the Commission has adopted Mr. Full's appraisal as modified by our discussion above. We conclude that the Lawrence County placer deposits would have contributed $1,130,000 to the fair market value of the entire tract.

The Commission has briefly related the history of the Pennington County lode deposits in finding of fact 65. As we stated there, most of the major lode claims in the county were discovered after the date of valuation. Therefore, we conclude that the Pennington County lode deposits would have contributed nothing to the fair market value of the subject tract.

The placer gold deposits in Pennington County were discovered in 1875. These deposits were located primarily along Rapid, Spring, and Battle Creeks, and along some of their tributaries. We have described the development of these placers in finding of fact 68.

In valuing the placer deposits of Pennington County, Mr. Full used the same method he had used in appraising the Lawrence County placers. In finding of fact 69 we have summarized his appraisal.

Mr. Full valued the deposits of Battle, Spring and Rapid Creeks separately. For Battle Creek he estimated a remaining expected life of three years, with production decreasing each year. He calculated annual net gains for the three years of $87,000, $54,000, and $18,000, respectively. For the Spring and Rapid Creeks Mr. Full estimated remaining expected lives of five years, with decreasing production each year. He calculated annual net gains for Spring Creek of $162,000, $135,000, $81,000, $81,000 and $81,000 for the five years; and for Battle Creek of $216,000, $162,000, $108,000, $108,000 and $108,000 for the five years. He then applied a discount factor of 25% (compounded) to the total net profit for each year to account for the prospective purchaser's expected return on investment.

He concluded that the Pennington County placers had a fair market value of $841,970.

The Commission believes that Mr. Full's Pennington County appraisal was too optimistic. Initially, we are unable to accept an estimated expected life for any of these placers of greater than three years. Moreover, we do not agree that the production costs for these placers would have decreased after the first year. Finally, as we have stated in our analysis of Mr. Full's Lawrence County placer appraisal, it is our opinion that a prospective purchaser would have expected a return on his investment of from 25% to 30%.

In finding of fact 69, the Commission has summarized Mr. Oberbillig's appraisal of the Pennington County placers. Mr. Oberbillig used a royalty on net profits approach in valuing these placers. First he assumed an annual production of $400,000 for 10 years. He then deducted annual costs of $100,000 to arrive at a net profit of $300,000. He then assumed a 10% royalty to the owner of the property. Applying Inwood rates of 15%, 20%, and 25%, he calculated values of $150,000, $126,000, and $107,000. He concluded that the Pennington placers had a fair market value no greater than $100,000.

We cannot accept Mr. Oberbillig's valuation of Pennington County placers. Initially, the Commission has previously rejected the royalty method as not amounting to a measure of fair market value. See Fort Sill Apache Tribe, supra, 25 Ind. Cl. Comm. at 360. Moreover, as Mr. Oberbillig himself has admitted, his approach was based on conjecture

and pure assumption. Neither his estimate for annual production nor his assumption for costs is supported by any evidence.

In valuing the Pennington County placers, the Commission has adopted Mr. Full's appraisal as modified by our discussion above. We conclude that the Pennington County placer deposits would have contributed $525,000 to the fair market value of the entire tract.

The Commission has described the mineral deposits in Custer County in finding of fact 71. We have also summarized the appraisals of these minerals by Messrs. Full and Oberbillig in finding of fact 72. Mr. Full valued the Custer County minerals at $40,000, based on his analysis of the evidence. Mr. Oberbillig used a royalty method, and arrived at a value of $115,000. The Commission adopts Mr. Full's method. We conclude that the mineral deposits of Custer County would have contributed $40,000 to the fair market value of the entire subject tract.

1942 COURT OF CLAIMS DECISION

Plaintiffs contend that the Act of February 28, 1877, supra, constituted a taking of the subject tract by the defendant under the Fifth Amendment without the payment of just compensation to plaintiffs. Defendant, on the other hand, argues that plaintiffs' Fifth Amendment claim is barred by the doctrine of res judicata, having been decided by the Court of Claims in Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943). For the reasons indicated below, we hold that plaintiffs' Fifth Amendment claim is not barred by the 1942 Court of Claims decision.

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits." Hughs v. United States, 71 U.S. (4 Wall.) 232, 237 (1866). As it is clear that the same parties are now before the Commission as were before the court in 1942, and that the court was faced with the same Fifth Amendment taking claim 8/ as is the Commission, the only question to be answered in determining whether or not the 1942 decision bars plaintiffs' current claim is whether that case was decided on its merits.

It is settled that the judgment of a court dismissing a suit for lack of jurisdiction is not a judgment on the merits and therefore does not bar a future suit on the same cause of action. Smith v. McNeal, 109 U.S. 426, 429 (1883); Hughs v. United States, supra; Walden v. Bodley, 39 U.S. (14 Pet.) 156, 161 (1840); see General Investment Co. v. Lake Shore & Michigan Southern Ry, 260 U.S. 261, 288 (1922). If, as plaintiffs argue, the Court of Claims dismissed their claim in 1942 for lack of

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8/ The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant, by the act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73,781,826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851.

Sioux Tribe, supra, at 657.

jurisdiction plaintiffs are not barred from reasserting that claim.

The land claim in Docket 74-B is being litigated within the confines of the Amended Petition filed by plaintiffs on November 1, 1960, and the Answer to the Amended Petition filed by defendant on June 28, 1966. See Commission's Order Designating Separate Docket Numbers, entered May 25, 1966. In paragraph 4 of their Amended Petition plaintiffs allege the following:

> The claim set forth herein accrued prior to August 13, 1946, and has never been adjudicated or otherwise acted upon by the United States or any agency thereof except as considered in Sioux Tribe v. United States, 97 C. Cls. 613 (1942), certiorari denied 318 U.S. 789 (1943). In that case, the Court of Claims ruled that it had no jurisdiction to decide this claim under the special jurisdictional Act of June 3, 1920, c. 222, 41 Stat. 738.

In paragraph 4 of its answer defendant responded specifically to plaintiffs' allegation as follows:

> Answering paragraph 4, defendant admits that the claim set forth in the amended petition accrued prior to August 13, 1946. Defendant also admits that a special jurisdictional act was passed June 3, 1920, 41 Stat. 738; that an action was brought in the United States Court of Claims under that Act but that recovery was denied to the Sioux petitioners in that case because the Court of Claims ruled that it had no jurisdiction to grant the relief requested. Defendant admits the correctness of the citations reported but denies all other allegations of paragraph 4. [emphasis added.]

It is clear that in its answer defendant has admitted that in 1942 the

Court of Claims dismissed plaintiffs' claim for lack of jurisdiction.[9/] Therefore the question whether plaintiffs' claim was dismissed on its merits or for lack of jurisdiction was resolved by the pleadings. Defendant is precluded from attempting to raise that issue now.

The Commission's reliance on defendant's admission does not result in any injustice to defendant in this instance. A close examination of the court's 1942 decision reveals that the court did dismiss plaintiffs' claim solely on jurisdictional grounds, and did not rule

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9/ Defendant's only other reference to the 1942 decision in its answer is in paragraph 39, and reads as follows:

> On May 7, 1923, petitioners herein filed a petition in the Court of Claims against the United States pursuant to the jurisdictional act approved by Congress June 3, 1920, 41 Stat. 738, 4 Kappler 270, entitled Sioux Tribe v. United States, in which they sought to recover upon numerous claims, in a single action, including the claims asserted in the present amended petition. On May 7, 1934, petitioners severed their original petition and filed separate and amended petitions setting forth in Cause No. C-531-(7), 97 C.Cls 613 (1942), the same claims here involved. This action was contested by the United States. The Court of Claims, after a full hearing upon the claim, made findings of fact on all matters now presented by the amended petition although it found that it lacked jurisdiction to grant the relief requested. There is, therefore, no genuine issue of fact presented to this Commission for determination. All matters alleged were actually litigated and determined in Sioux Tribe v. United States, 97 C.Cls. 613 (1942) and cannot be relitigated in the present case. Petitioners are estopped by the prior factual determinations of the Court of Claims from relitigating the specific issues and factual presentations urged in their amended petition.

In this paragraph defendant is alleging that plaintiffs are collaterally estopped from relitigating any of the facts found by the court in 1942. Nothing in this paragraph is inconsistent with defendant's prior admission in paragraph 4.

on the merits of the Fifth Amendment taking claim.[10/]

In stating the issue before it, for example, the court made it clear that it was concerned primarily with questions of jurisdiction. Thus in its introductory statement on page 616 it stated,

> The question now before the court under Rule 39(a) is whether, as a matter of law, the plaintiff tribe has a legal or equitable claim under section 1 of the Jurisdictional Act on which it is entitled to judgment under these treaties or any law of Congress for any amount due from the United States as for the misappropriation of any lands of said tribe, or for the failure of the United States to pay said tribe any money for other property due under any treaties or laws of Congress. [Emphasis added.]

In again stating the issue before it on page 658 of its opinion, the court used the following language:

> The facts and circumstances narrow the legal issue between the parties to the question whether under the treaties of 1851 and 1868 and the act of February 28, 1877, the plaintiff tribe has any legal and enforceable claim within the meaning of section 1 of the jurisdictional act upon which the court has authority to inquire into the wisdom of the policy pursued by the Government, pursuant to which the acts of August 15, 1876, and February 28, 1877, were enacted, and the adequacy of the consideration assumed and paid by defendant for the property acquired under those acts. [Emphasis added.]

The questions before it, therefore, as seen by the court, were whether plaintiffs' claim was enforceable under the jurisdictional act,

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10/ At oral argument, defendant's counsel asserted that a comparison of the jurisdictional act under which the Sioux claim was brought with other special jurisdictional acts indicated that the Court of Claims did have jurisdiction over a Fifth Amendment taking claim. However, the issue whether the court in fact had jurisdiction over such a claim is not material to our determination. Our only concern in determining defendant's res judicata defense is whether the court itself believed that it had jurisdiction over plaintiffs' claim.

and whether under the jurisdictional act the court had the power to question congressional policy or the adequacy of the compensation promised by the defendant under the 1877 act.

Also, at the beginning of its opinion the court set out the requirements for recovery by plaintiffs. It was again speaking in jurisdictional terms. It stated,

> If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. But if, under the circumstances disclosed by the record, Congress acted within the limits of its authority under the law and the treaty in acquiring the lands and hunting rights for which it made compensation, the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover. [p. 657-58, emphasis added.]

Thus, under the jurisdictional act, plaintiffs could not recover unless the acquisition of their property under the 1877 act was in violation of the 1868 treaty, and was outside the scope of congressional authority under the treaty and the law relating to Congress' control over Indian property. If Congress had the legal authority to acquire plaintiffs' property under the 1877 act, in the court's opinion, the jurisdictional act allowed for no recovery by plaintiffs.

After thus stating the issues before it, and summarizing the facts of the case, the court devoted more than two pages of its decision to discussing the law regarding waiver of sovereign immunity by Congress.

The court stated that special jurisdictional acts waiving such immunity must be strictly construed. It concluded that a court's jurisdiction to hear a claim must be found within the terms of its jurisdictional act, and that no suit could be maintained against the United States on a claim not clearly within the terms of that act.

The court then addressed itself specifically to the Sioux jurisdictional act.

> In the case at bar the jurisdictional act, except so far as concerned the competency of the Indian tribe to sue and the limitation on our general jurisdiction under section 259, title 28, U. S. C., as well as the statute of limitation, created no new right or claim in favor of the tribe not otherwise within the limitations of our general jurisdiction. Green v. Menominee Tribe, 233 U. S. 558, 570, 571. Whitney v. Robertson, 124 U. S. 190, 194, 195. [p. 666.]

The first of the cases cited by the court supports its conclusion that special jurisdictional acts do not create new causes of action, but rather merely permit tribes to sue. The second case it cited, however, Whitney v. Robertson, does not support this conclusion. Rather it stands for the proposition that Congress has the exclusive authority to determine whether the United States will continue to honor treaty commitments, and that the courts cannot be used as a vehicle to challenge congressional action on the grounds that that action violates previous treaties. When read in light of Whitney v. Robertson, the court's statement means that it interpreted the Sioux jurisdictional act as not giving it the power to question the judgment of Congress in violating treaty commitments to the Sioux.

The court next pronounced its holding in the case, using the following language:

> A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe." [p. 666, emphasis added.]

It was again talking in terms of the plaintiffs' right to recover under the provisions of the jurisdictional act.

In our opinion, the discussion which follows, on pages 667 through 669 of the opinion, is the key to the court's decision. The court stated as follows:

> In the case at bar the claim made by plaintiff for compensation as for a taking of its land and hunting rights is fundamentally predicated upon the provisions of articles 2 and 12 of the treaty of 1868. This claim is attempted to be sustained on the sole ground that the action of Congress, with the approval of the President, in requiring the tribe to give up a portion of its reservation and hunting rights to the Government was not in conformity with the provisions of article 12 of the treaty of 1868 with reference to the consent of three-fourths of the tribe to a cession. This is necessarily the sole ground upon which the claim could be made because there was no law of Congress relating to this claim granting plaintiff any rights which have not been faithfully fulfilled. The act of 1877 is not a law supporting the claim because everything that act promised has been given, and also because that statute was the act of the Government which gave rise to a claim of plaintiff, if it has one, under the treaty of 1868. [p. 667.]

It is clear from this paragraph that the court interpreted the jurisdictional act as giving it power only to hear legal claims against

the United States, which claims must have been based on violation of legal rights possessed by the Sioux under treaties or laws of Congress. The court was saying that plaintiffs' claim must necessarily be based on Congress' violation of plaintiffs' alleged right, under Article XII of the 1868 treaty, to refuse to cede their land, because that is the only right, granted by treaty or act of Congress, which could possibly have been violated by the 1877 act. It is apparent from this paragraph that the court did not believe it had jurisdiction to hear a claim based on violation of rights the Sioux possessed under the Constitution of the United States.

After a brief digression,[11/] the court continued its discussion as follows:

11/ On page 667, the court briefly distinguished the Sioux case from Shoshone Tribe v. United States, 299 U. S. 476 (1937), and United States v. Creek Nation, 295 U. S. 103 (1935). The court stated that in these two cases there was an arbitrary taking by the Government without payment or the assumption of an obligation to pay, and under such circumstances as to give rise to an implied obligation to pay just compensation. On the other hand, according to the court, in the Sioux case Congress in furtherance of a policy which it deemed for the best interest of the Sioux forced them to sell their property to the Government in return for what Congress deemed to be adequate consideration. In the Sioux case, the court concluded, "[t]here is, therefore, no room for the conclusion that under the act of 1877 Congress impliedly promised to pay more than what was specified therein. Baker [sic] v. Harvey, 181 U. S. 481, 492; Blackfeather v. United States, 190 U. S. 368, 373."

Neither of the cases cited by the court directly support its conclusion. Neither of them involved an alleged implied obligation to pay just compensation. At the cited page in Barker v. Harvey, the Supreme Court was discussing the fiduciary obligation owed by the Government to Indian tribes. The Court stated:

> But the obligation is one which rests upon the political department of the government, and this court has never assumed

> As we shall hereinafter attempt to show, we think there is no difference in principle insofar as any legal claim of the plaintiff is concerned between the power or authority of Congress to do what it did in this case and our authority to pass upon the justness and fairness of what it did, and what was done in other cases without the consent of the Indians and contrary to the provisions of treaty stipulations. In other words, if in the case at bar Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the interest of the Indians, as the facts clearly show was the case, the Indians have no legal right to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which has been and is being paid, and will continue to be paid until the Indians, with the assistance of the Government, become self-supporting. [p. 668, emphasis in the original.]

The court was saying that the Sioux case is controlled by decisions in other cases. These cases, according to the court, establish that with respect to plaintiffs' legal claim the jurisdiction of the court to pass on the justness and fairness of what Congress did in the 1877 act is determined by the authority of Congress to legislate as it did. Thus,

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> in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. [181 U. S. at 492.]

In Blackfeather, the Supreme Court stated that moral obligations of the Government are for Congress to recognize and that courts have no jurisdiction over them. Reading the statement of the Court of Claims in light of the cases it cites, it is apparent that the court was deciding that because Congress specified the compensation to be paid under the 1877 act the court was without jurisdiction to conclude that there was an implied promise to pay any greater sum.

if Congress had the authority to do what it did--violate Article XII of the 1868 treaty--the court is without jurisdiction to question the justness or fairness of the 1877 act, and the plaintiffs have no legal claim which the court can adjudicate under the terms of the jurisdictional act.

Relying on United States v. Kagama, 118 U. S. 375 (1886), Lone Wolf v. Hitchcock, 187 U. S. 553 (1903), and Choate v. Trapp, 224 U. S. 665 (1912), the court then decided that inherent in the 1868 treaty, as an implied condition, was the right of Congress to legislate as it saw fit with respect to the Sioux, even if such action was in violation of the specific provisions of the treaty. The court then concluded that "[i]n essence, therefore, the present claim is moral, rather than legal . . . ." p. 670. The court's reasoning in reaching this conclusion, although not specifically stated, must have been as follows: A legal claim by plaintiffs could be based only on a right they allegedly possessed, under Article XII of the 1868 treaty, to refuse to cede their land. However, under the 1868 treaty Congress had the inherent power in effect to force plaintiffs to cede their land. Therefore plaintiffs did not have the treaty right to refuse to cede their land, and the acquisition of their land by the United States without their permission could not be the basis for a legal claim under the jurisdictional act.

The court devoted the remainder of its opinion to a discussion of what it described as plaintiffs' "moral claim." It concluded that it had no jurisdiction to hear this claim. The court's language, as shown in the following quotations, clearly establishes that it was ruling solely on jurisdictional grounds:

In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the Price and Osage cases [Price v. United States and Osage Indians, 174 U.S. 313], and other cases cited, supra, was not conferred by the jurisdictional act. We must presume in the circumstances of this case that Congress acted in good faith. [p. 670.]

We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. [p. 673, quoting Lone Wolf v. Hitchcock, supra, 187 U. S. at 568.]

. . . but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, unless Congress has clearly granted to the Indians the right to do so. In our opinion this has not been done for "the [jurisdictional] act grants a special privilege to the plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms" [citations omitted]. To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act. [p. 682.]

. . . But before this general rule is applicable to Indian cases, consideration must be given to the question of policy and the extent of the plenary authority of Congress to legislate in such a way as it deems proper with reference to the management and control of the property and affairs

> of the Indian tribes and the extent to which consent to be sued has been granted, as well as to the circumstances and conditions under which an implied contract will arise under the Fifth Amendment. The facts must show not only that there has been a "taking" or "misappropriation" by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make "just compensation" [citation omitted], but that Congress had, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, and has authorized the court to determine, adjudicate, and render judgment accordingly. [citation omitted.] [p. 683-84.]
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> The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented. . . . In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. [citation omitted]. This phase of the claim clearly was not considered by Congress when the jurisdictional act was enacted and we cannot consider and adjudicate it unless and until Congress has unmistakably indicated its intention that we should do so. [p. 685.]

The court concluded its opinion with an analysis of the legislative history of the jurisdictional act, which it found sustained its ruling that it was without jurisdiction to grant plaintiff any relief.

Our conclusion that the court dismissed plaintiffs' claim for lack of jurisdiction is further supported by an examination of defendant's brief before the court, plaintiffs' motion for a new trial, and defendant's brief in response thereto. In its brief defendant set out the jurisdictional limitations which faced the court in dealing with plaintiffs'

claim. It argued that the court was constrained to assume that Congress acted in good faith and exercised its best judgment; that the court was without jurisdiction to question the exercise of legislative power; and that if plaintiffs were in fact injured by congressional action it was from Congress rather than the courts that they must seek relief. Specifically with regard to plaintiffs' allegation of inadequate compensation, defendant stated,

> Needless to say, there is no specific or even implied authorization given in the jurisdictional act which would enable the plaintiffs to raise the issue of inadequacy of consideration. The grant of jurisdiction in this case is over claims arising under treaties, agreements, or laws of Congress, and not over claims in contravention thereof. [Vol. 922 Court of Claims Printed Record, Docket C-531-(7) p. 582. Emphasis in original.]

It is clear that defendant was urging the court to refuse jurisdiction over plaintiffs' claim.

In its motion for new trial, filed July 28, 1942, plaintiffs asserted only one error of law in the court's opinion--the court's holding that it had no jurisdiction to grant any relief to plaintiffs. Plaintiffs argued that the jurisdictional act did give the court jurisdiction to determine whether plaintiffs had been paid just compensation for their lands. In its brief in response to plaintiffs' motion defendant argued that the court was correct in dismissing plaintiffs' claim for lack of jurisdiction. Thus, immediately after the court's decision both parties were of the belief that the case had been decided on jurisdictional grounds.

The court itself, only four months after its decision, stated that the Sioux case had been decided on jurisdictional grounds. In Winnebago Tribe of Indians v. United States, 100 Ct. Cl. 1 (1942), a just compensation claim was brought under a jurisdictional act similar to that under which plaintiffs had filed their claim. In its opinion, decided by Judges Whitaker, Madden, Jones, Littleton, and Chief Justice Whaley--the same five judges who had decided the Sioux case -- the court stated,

> . . .Congress, acting as the guardian of an Indian Tribe, has the power to take from it one reservation and to give to it another, if it thinks that this is for its best interest, and in the absence of express Congressional authorization this Court has not the power to determine whether or not just compensation was paid for the one taken. We went into this entire question in great detail in an opinion rendered through Judge Littleton in the case of Sioux Tribe of Indians v. The United States, No. C-531-(7), decided June 1, 1942. In that opinion the whole question was carefully and exhaustively discussed. The decision in that case is determinative of the case at bar. (97 C. Cls. 613; certiorari denied, 318 U.S. 789.) [100 Ct. Cls. at 6.]

We conclude that Sioux Tribe v. United States, supra, (97 Ct. Cl. 613), was not decided on its merits. Plaintiffs' Fifth Amendment taking claim is therefore not res judicata and may be asserted here.[12/]

12/ As an alternative ground for rejecting defendant's res judicata defense, we note that defendant's sole reference to the 1942 decision in its answer, aside from its admission in paragraph 4, was in paragraph 39, quoted in footnote 9, supra. In this paragraph defendant is alleging that plaintiffs are collaterally estopped from relitigating any of the facts found by the court in 1942. Defendant is not alleging, in paragraph 39, that plaintiffs' claim is res judicata by virtue of the 1942 decision, nor does it make such allegation elsewhere in its answer. Under sections 11(b) and 11(h) of the Commission's General Rules of Procedure, promulgated July 4, 1947, and which were in effect when defendant filed its answer in Docket 74-B, defendant's failure to affirmatively plead the defense of res judicata constitutes a waiver of that defense. Defendant is therefore precluded from asserting that defense now.

Having decided that the 1942 Court of Claims decision does not bar plaintiffs' Fifth Amendment claim, the Commission must still determine the collateral estoppel effect, if any, of that decision. Defendant argues that the Commission is bound by all the factual determinations made by the Court of Claims and cannot readjudicate them. Plaintiffs, on the other hand, argue that because the court did not have jurisdiction over their claim none of its factual determinations are binding in this litigation. The Commission concludes that neither of the parties' contentions is correct.

It is a general principal that a court of competent jurisdiction always has the power to determine its own jurisdiction over cases before it. See Stoll v. Gottlieb, 305 U.S. 165, 171 (1938); Texas & Pacific Ry. v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266, 274 (1926); 1B Moore's Federal Practice ¶ 0.405 [.4-1], at 641 (1965). It follows that the Court of Claims had the power to determine the extent of its jurisdiction to grant plaintiffs the relief they were seeking. Necessarily, it also had jurisdiction to make those factual determinations essential to its jurisdictional decision. Thus, the rule that determinations of a court lacking jurisdiction are void and not binding is not controlling here.

On the other hand, it does not follow that all of the factual determinations made by the court are binding on the Commission. In order that collateral estoppel apply, the following requirements must be met: the issue sought to be determined must be the same as that involved

in the prior litigation; it must have been actually litigated in the prior litigation; it must have been judicially determined in the prior litigation; and the determination of the issue must have been essential to the judgment in the prior litigation. Moore, supra, ¶0.443. No factual determination made by the court in 1942 is binding on the Commission unless it satisfies all of these requirements.

In adjudicating plaintiffs' Fifth Amendment claim we are concerned with three issues: (1) whether in acquiring plaintiffs' lands under the 1877 act Congress made a good faith effort to give the Sioux the full value of their lands (see Three Affiliated Tribes of the Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 340 F. 2d 686 (1968), discussed infra); (2) the amount of the compensation paid by the United States for plaintiffs' lands; and (3) whether that payment constitutes just compensation for plaintiffs lands. We are of the opinion that none of these issues was conclusively determined by the court's decision.

The issue whether Congress made a good faith effort to give the Sioux full value for their lands was not decided by the Court of Claims in these exact terms. To determine whether plaintiffs are nevertheless estopped from urging that Congress did not make such an effort the Commission must determine whether such a contention is necessarily inconsistent with the court's adjudication of any material and litigated issue before it. See Moore, supra, ¶0.443 [2], at 3903-04. We have been unable to find any such adjudication.

Initially, we doubt whether the court could have made any determination inconsistent with plaintiffs' contention. Under the court's interpretation of the Sioux jurisdictional act it lacked the power to question whether Congress was acting in good faith. At two points in its opinion the court specifically stated that it must presume that Congress acted in good faith. See pages 670 and 673 (quoting Lone Wolf v. Hitchcock, supra). Furthermore, even if the court was not precluded from doing so by its ruling on its jurisdiction, it in fact made no determination which would preclude plaintiffs' theory of recovery.

We have examined the 21 findings of fact entered by the court. We have found no factual determination relating to an effort (or lack thereof) by Congress to give plaintiffs the value of their land. In examining the court's opinion we have found only two recitations that might possibly relate to this issue. The first is on page 667. The court said,

> In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay.

The crucial words here are "pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the

Indians," and "for that which the Congress. . . deemed to be adequate consideration for what the Indians were required to give up. . . ." The first phrase does not relate to an attempt to give full value. It means only that Congress believed that restricting the Sioux to a smaller reservation would aid them in adapting themselves to farming and herding as means of subsistence, and that removal of the Black Hills from the reservation would allow the Sioux to live free from the costly warfare with white miners. The second phrase means only that Congress thought the payments it pledged were adequate compensation for the Sioux lands. It is not a determination that Congress attempted to measure these payments against the value of the Sioux lands. Certainly in both the school land portion of the Fort Berthold litigation (Three Affiliated Tribes, supra, 182 Ct. Cl. at 558-60), and in the Confederated Salish case (Confederated Salish and Kootenai Tribes v. United States, 193 Ct. Cl. 801, 437 F. 2d 458 (1971)), Congress deemed what it paid for the Indian lands to be adequate consideration. This fact did not preclude the court in either case from concluding that Congress did not make a good faith effort to give the Indians what their land was worth.

The second possibly binding determination is on page 668. There the court stated,

> Congress possessed the authority to take the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties

> there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof.

Again, the court's finding that the 1877 act was pursuant to a policy which Congress believed to be just and in the interest of the Sioux is not inconsistent with plaintiffs' contention that Congress did not in good faith attempt to pay the Sioux the full value of their land. The court's conclusion that there was no misappropriation of plaintiffs' lands, in the context of the paragraph and the entire opinion, means only that the 1877 act was not an arbitrary seizure of plaintiffs' lands.

As the question whether Congress made a good faith effort to give the Sioux the full value of their lands was not at issue and was not judicially determined in the Court of Claims litigation, plaintiffs are not collaterally estopped from arguing that Congress did not make such an effort.

Defendant argues that the Court of Claims in its 1942 decision determined the amount of "consideration" that had been paid under the 1877 act through June 30, 1926, and that the Commission is bound by that determination. In its finding of fact 20 the court found as follows:

> By article 5 of that act, the Government assumed an obligation to continue to appropriate and expend such sums as should be necessary for such subsistence "until the Indians are able to support themselves" in return for the Black Hills and hunting rights acquired, and, also added 900,000 acres of grazing land to the permanent reservation. The total of the sums annually appropriated by the Congress to June 30, 1926, in fulfillment of this purpose, for subsistence of the Indians of the Sioux Tribe, including

> the $3,055,450.53 for the fiscal years 1875 and 1876, was $39,993,962.50, for none of which any legal obligation rested upon the Government other than that assumed and provided for in the act of February 28, 1877. Amounts appropriated for subsistence subsequent to 1926 bring this total to approximately $43,000,000.

The Commission is of the opinion that it is not bound by this finding of the court.

As we have stated above, collateral estoppel does not apply unless the issue sought to be determined was actually litigated in the prior litigation. As the Sioux decision was entered under the court's Rule 39(a), which limited the issue to the plaintiffs' right to recover,[13/] the questions actually litigated in that stage of the case can be found in the parties' briefs and proposed findings. We have carefully examined the briefs and proposed findings of fact submitted to the Court of Claims by the parties. Neither party proposed any finding of fact relating to the amount of "consideration" that had been paid under the 1877 act. Neither party in their brief made any reference to the "consideration" paid under the act. We must conclude that the "consideration" issue was

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13/ Rule 39(a)

> In every Indian case unless otherwise ordered by the Court or stipulated by the parties, the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the Court shall enter its judgment adjudicating that right. If the Court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive. [This rule was promulgated by the court on May 1, 1939, as an amendment to its 1936 Rules.]

not litigated before the court and that collateral estoppel does not apply to the court's finding on this issue.

On page 685 of its opinion the court stated, "In the absence of a clear grant of authority by Congress, we have no jurisdiction. . . to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender." The court accordingly did not determine whether what Congress agreed to pay under the 1877 act constituted just compensation for plaintiffs' lands. The Commission is therefore free to make its own determination on this issue.

FIFTH AMENDMENT TAKING

In dealing with Indian property, Congress can act in either of two capacities. First, it can exercise a guardianship over the property, derived from its constitutional power over Indian affairs. Secondly, it can exercise its eminent domain power and take the property, in which case it must pay just compensation. Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 684-85, 436 F. 2d 1008, 1015 (1971); Three Affiliated Tribes, supra, 182 Ct. Cl. at 552-53. In the Fort Berthold case the court set out the proper guideline to be used in determining which of its two powers Congress has used in dealing with Indian property. If Congress has made a good faith effort to give the Indians the full value of their land, there has been no taking. Congress has merely performed the traditional fiduciary function of transmuting

property into money. If, on the other hand, Congress has failed to make such an effort, there has been a taking, and the United States can be liable if just compensation was not in fact paid. Three Affiliated Tribes, supra, 182 Ct. Cl. at 553. Application of this guideline to the facts of this case leads the Commission to conclude that the 1877 act constituted a taking of plaintiffs' property.

An examination of the terms of the 1877 act makes it clear that Congress made no effort to give the Sioux the full value of their land. The major obligations undertaken by the United States under the act are set out in Article 5, which we have quoted in finding of fact 81. In this article the United States agreed, with some conditions; (1) "to provide all necessary aid to assist the said Indians in the work of civilization;" (2) "to furnish to them schools and instruction in mechanical and agricultural arts, as provided by the treaty of 1868;" and (3) "[t]o provide the said Indians with subsistence. . . until the Indians are able to support themselves." The first of these promises was stated in such general terms that it is impossible to ascertain its value. The second promise, as it states, was not a new obligation on the part of the United States. Rather it was a reaffirmation of an obligation already owed under the 1868 treaty.

The third promise -- to feed the Sioux -- is the only promise that might have some relationship to the value of the property acquired by the United States from the Sioux under the act. However, this obligation

was undertaken subject to several conditions. First, no rations were to be supplied unless the Sioux fulfilled every obligation thrust upon them by the act. Second, rations were to be furnished only until the Sioux were considered able to support themselves. Third, no rations were to be supplied to children between the ages of 6 and 14 unless they attended school. Fourth, no rations were to be supplied to any Sioux located on lands suitable for cultivation unless those Indians also provided labor. Given these conditions, it was impossible to determine, at the time the 1877 act was enacted, the extent of the obligation being undertaken by the United States in exchange for the Sioux property. In short, the amount of money, if any, which the United States was obligated to spend under Article 5 of the act was indefinite and uncertain. The obligation undertaken by the United States under Article 5 clearly had no relationship to the value of the property it was acquiring from the Indians. Moreover, there is no indication in the record that Congress attempted to relate it to the value of plaintiffs' land.

We conclude that Congress did not make a good faith effort to give the Sioux the full value of their property. Congress was therefore not acting as guardian for the Sioux with respect to this property, but was exercising its power of eminent domain in order to allow Americans to freely use the subject area. We hold that the Act of February 28, 1877, supra, constituted a Fifth Amendment taking of plaintiffs' property.

COMPENSATION

As we have already indicated, the 1876 agreement did not comply with the terms of the 1868 treaty. It therefore did not effect a transfer of plaintiffs' property to defendant. Rather, defendant acquired plaintiffs' property by means of a unilateral taking under the 1877 act. As the concept of "consideration" necessitates a contractual relationship between the parties (see Nez Perce Tribe v. United States, Docket 175, 24 Ind. Cl. Comm. 429, 433 (1971), and authorities cited therein), it follows that no "consideration" has been paid to the plaintiffs for their lands. Whatever compensation has been received by plaintiffs must be considered payments on the claim.

In determining the extent of the compensation received by plaintiffs for their property taken under the 1877 act, defendant is entitled to credit, as payments on the claim, for the value of all property transferred to plaintiffs under the act, and for all expenditures on behalf of the Sioux made by the United States in fulfillment of the new obligations assumed under the act.

Under the Indian Claims Commission Act, the burden of proof with respect to payments on the claim is on the defendant. In the context of this case, this burden requires defendant to establish that all expenditures which it asserts as payments on the claim were actually made in compliance with the terms of the 1877 act. Defendant will receive no credit, as

payments on the claim, for expenditures not in compliance with the act. Defendant must also establish the market value of any property which it claims that it transferred to plaintiffs under the act.

In meeting its burden of proof, defendant must relate each expenditure that it claims to a specific obligation assumed under the act. General designations, such as "payment in fulfillment of the Act of February 28, 1877," will be insufficient to entitle defendant to any credit. Nor can defendant receive credit for any expenditure made in furtherance of obligations assumed under other treaties or acts of Congress.

Compensation under the 1877 act, with the exception of property actually transferred to plaintiffs by the act, was not all paid at the time of taking. Rather, under Article 5 of the act, payment of compensation was deferred over time. For the purposes of this case it will be convenient to consider the compensation as having been paid on an annual basis. Defendant is entitled to credit for this compensation as of the time it was paid.

As plaintiffs' property was taken under the Fifth Amendment, plaintiffs were entitled to receive just compensation. Such compensation consists of the fair market value of plaintiffs' property on the date of taking, plus interest on that amount from the date of taking until it is paid. See United States v. Klamath and Modoc Tribes, 304 U.S. 119 (1938); Shoshone Tribe v. United States, 299 U.S. 476 (1937); Seaboard Air Line Ry v. United States, 261 U.S. 299 (1933); United States v. Rogers, 261 U.S.

299 (1921). The proper rate of interest to be applied in Fifth Amendment taking claims before the Commission is 5%. Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-F, 28 Ind. Cl. Comm. 264 (1972), appeal docketed, No. 17-72 (Ct. Cl., December 21, 1972).

Interest on the value of plaintiffs' property (principal), as part of just compensation, began to accrue on February 28, 1877, the date of taking. Interest on the remaining unpaid principal continued to accrue each year until the time, if it has yet occurred, when the principal was fully paid. Thus, in making expenditures in fulfillment of the 1877 act, defendant was obligated to pay both principal and accrued interest.

The proper method for allocating deferred Fifth Amendment payments between principal and interest was established by the court in Uintah and White River Bands v. United States, 139 Ct. Cl. 1, 152 F. Supp. 953 (1957), and has been followed by the Commission in Ponca Tribe v. United States, Docket 323, 24 Ind. Cl. Comm. 339, 347-48 (1970), aff'd in part, remanded in part, 197 Ct. Cl. 1065 (1972), Three Affiliated Tribes, supra, 28 Ind. Cl. Comm. 264, and Lower Sioux Indian Community v. United States, Docket 363 (Second Claim, Act of 1904), 33 Ind. Cl. Comm. 51 (1974). This method apportions payments between principal and interest according to the following formula:

$$\frac{\text{Unpaid principal + accumulated interest}}{\text{Unpaid principal}} = \frac{\text{Amount of deferred payment}}{\text{Portion of payment allocated to principal}}$$

In this case it will be necessary to apply this formula on a year by year basis to determine how to apportion each year's payment between principal and interest. In this formula as applied to this case, the figure for accumulated interest will include the current year's interest accrual plus the remaining unpaid interest from previous years. If, in applying this formula on a year by year basis, the point is reached where principal has been completely paid, interest will cease to accrue, and all further payments will be charged against previously accrued interest.

We have briefly examined the accounting reports submitted by the defendant in the Court of Claims litigation and those submitted to the Commission, which reports we assume will be relied on by defendant to support its assertions of payments on the claim. We are of the opinion that these reports are not in a form which would allow the Commission to ascertain the compensation paid by defendant in accordance with the guidelines set out above. To enable us to determine the extent of defendant's payments on the claim, and thus whether plaintiff has been paid just compensation, it will be necessary for defendant to prepare a new statement in support of its assertions. Such statement should include only expenditures made in fulfillment of obligations assumed under the 1877 act. These expenditures should be broken down on a year by year basis. Each expenditure must be shown to be in strict compliance with the terms of the 1877 act.

GOLD MINED PRIOR TO FEBRUARY 28, 1877

Article II of the Treaty of April 29, 1868, supra, after describing the boundaries of the Great Sioux Reservation, provided as follows:

> . . . and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, . . .

This treaty provision obligated the United States to use whatever means were necessary to keep unauthorized persons out of the Sioux reservation, and to remove from the reservation any unauthorized persons who may have entered the reservation. Initially, the United States fulfilled this obligation. In late 1874 and early 1875, however, either because of an inadequacy of manpower or the unwillingness of Army commanders to enforce the law, the Army was no longer successful in keeping nonIndians out of the reservation.

In November 1875 the President of the United States, knowing that such action was in violation of the Government's treaty obligation, and that such action would certainly result in thousands of nonIndians entering the Great Sioux Reservation to prospect for and mine minerals, ordered the Army to withdraw from the Black Hills and to cease interfering

with miners attempting to enter the reservation. As a direct result of the withdrawal of the Army from the Black Hills and the failure of the United States to remove nonIndians from the Sioux reservation, thousands of nonIndians entered the Sioux reservation, established towns, organized mining districts, filed and developed mining claims, and mined and removed gold from the reservation.

Plaintiffs assert that the gold removed from the reservation prior to the valuation date was taken by the United States under the Fifth Amendment, and that they are thus entitled to interest, as part of just compensation, on the in-ground value of the gold. They argue that when the Government allowed the removal of the gold it was in effect taking the gold and giving it to the nonIndian miners. Plaintiffs rely on Shoshone Tribe v. United States, supra, 299 U.S. 476, and United States v. Klamath and Modoc Tribes, supra, 304 U.S. 119, to support their contention. Although not agreeing with plaintiffs' theory, the Commission nonetheless holds that the gold removed from the reservation prior to the valuation date was taken by the United States under the Fifth Amendment. It is our opinion that President Grant's order that the Army withdraw from the Black Hills and stop interfering with miners attempting to enter therein was the act of taking.

As the Court of Claims has recently stated,

> . . . In the general law of eminent domain there is no universal test to determine, where Congress has not expressed an intention to condemn, whether and when a taking has nevertheless occurred as a result of the Federal Government's conduct; a court must always evaluate the individual circumstances of the case to answer those questions.

Klamath and Modoc Tribes v. United States, 193 Ct. Cl. 670, 685, 436 F. 2d 1008, 1015, cert. denied, 404 U.S. 950 (1971). In evaluating the particular facts of this case, however, we can look to previous judicial determinations for guidelines.

It has been held that a taking can take place even when there is no intent on the part of the Government or its agents to confiscate the claimant's property. See Eyherabide v. United States, 170 Ct. Cl. 598 (1965); Sioux Tribe of Indians v. United States, 161 Ct. Cl. 413, 315 F. 2d 378, cert. denied, 375 U.S. 825 (1963); Richard v. United States, 152 Ct. Cl. 225, 282 F. 2d 901 (1960). To constitute a taking, it is only necessary that the claimant's loss of its property be the natural and probable consequence of an intentional governmental act. Kenite Corp. v. United States, 157 Ct. Cl. 721 (1962); Richard v. United States, supra; B Amusement Co. v. United States, 148 Ct. Cl. 337, 180 F. Supp. 386 (1960). Moreover, the Government or its agent need not be aware that the action will result in claimant's loss of property;

it is only necessary that the loss was in fact the natural consequence of the action. Richard v. United States, supra.

It has also been held that a taking can take place without the Government actually acquiring or using the claimant's property. Widen Co. v. United States, 174 Ct. Cl. 1020, 1027, 357 F. 2d 988, 993 (1966); Central Eureka Mining Co. v. United States, 134 Ct. Cl. 1, 38, 138 F. Supp. 281, 302 (1956), rev'd on other grounds, 357 U.S. 155 (1958). To constitute a taking it is only necessary that the governmental action result in destruction of or substantial interference with the claimant's property rights. Widen Co. v. United States, supra; Eyherabide v. United States, supra; Societe Cotonniere Du Tonkin v. United States, 145 Ct. Cl. 426, 441, 171 F. Supp. 951 (1959), cert. denied 361 U.S. 965 (1960); Central Eureka Mining Co. v. United States, supra; see Henry Co. v. United States, 188 Ct. Cl. 39, 411 F. 2d 1246 (1969).

To constitute a taking it is necessary that the governmental action was authorized or, if unauthorized, that it was ratified by Congress. United States v. Goltra, 312 U.S. 203, 208 (1941); Confederated Salish and Kootenai Tribes v. United States, 185 Ct. Cl. 421, 401 F. 2d 785 (1968), cert. denied, 393 U.S. 1055 (1969); Societe Cotonniere Du Tonkin v. United States, supra.

The facts of this case indicate that the removal of the gold from plaintiffs' reservation was the direct and natural consequence of President Grant's order. Moreover, although such a showing is not necessary to establish a taking (see Richard v. United States, supra), it is clear that President Grant was aware that removal of the Army would result in extensive mining of gold from the Black Hills. In addition, President Grant's order resulted in a substantial interference with plaintiffs' property interest in the gold in their reservation. Finally, President Grant's order was authorized by Article 2, Section 2 of the Constitution, which declares the President of the United States commander in chief of the Army and thus grants him power to deploy troops as he sees fit. See Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1849). We conclude that plaintiffs' gold was taken under the Fifth Amendment. We hold that the date of taking was November 17, 1875, the date on which the Army began to withdraw from the Black Hills.

Plaintiffs have not received any compensation for the gold removed from the Black Hills prior to the valuation date. As the gold was taken under the United States' power of eminent domain, plaintiffs are entitled to recover, as just compensation, the in-ground value of the gold removed (its value to plaintiffs) plus interest on that amount from November 17,

1875, until it is paid. See United States v. Klamath and Modoc Tribes, supra (304 U.S. 119); Shoshone Tribe v. United States, supra; Seaboard Air Line Ry v. United States, 261 U.S. 299 (1933); United States v. Rogers, 255 U.S. 163 (1921). In Three Affiliated Tribes of the Fort Berthold Reservation v. United States, Docket 350-F, 28 Ind. Cl. Comm. 264 (1972), appeal docketed, App. No. 17-72 (Ct. Cl., December 21, 1972), we decided that the proper rate of interest in Fifth Amendment taking cases was 5 percent.

Plaintiffs, relying on the opinion of Mr. Full, assert that the in-ground value of the gold removed prior to the valuation date was $1,075,000. Defendant, relying on the opinion of Mr. Oberbillig, asserts that the in-ground value of the gold was $200,000.

We have summarized the opinions of Mr. Full and Mr. Oberbillig in finding of fact 78. Both of these opinions resulted from deducting costs of production from the gross value of the gold. The Commission is of the opinion that there is insufficient evidence to support any finding as to the actual costs involved in mining and processing the gold mined prior to the valuation date. We shall therefore adopt our rulings in Goshute Tribe, supra (31 Ind. Cl. Comm. at 246-47), and Western Shoshone, supra (29 Ind. Cl. Comm. at 56), and hold that the value to plaintiffs of the gold removed was 20 percent of the gross value of the gold.

Plaintiffs may therefore recover from defendant $450,000, plus 5 percent simple interest on that amount from November 17, 1875, until it is paid.[14/]

RIGHT OF WAY

Article 2 of the Act of February 28, 1877, supra, provides as follows:

> . . . The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

Plaintiffs contend that under this article the United States obtained from them rights of way or easements to construct three roads across the Sioux Reservation, and a right of way or easement to navigate the Missouri River through the Sioux Reservation. Plaintiffs claim that they are entitled to compensation for the acquisition of these rights. Defendant on the other hand, argues that the United States in fact never acquired the road rights of way, that the plaintiffs never possessed the right of navigation on the Missouri River and could therefore not grant it to the United States, and that therefore plaintiffs are not entitled to recover anything under Article 2 of the 1877 act. We hold that the road

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14/ Plaintiffs argue alternatively that the removal of gold from their reservation constituted a willful and deliberate trespass for which the United States is liable, and that they are therefore entitled to recover the gross value of the gold removed without any deductions for the cost of production. Since we have decided that the gold removed was taken under the Fifth Amendment, we need not address ourselves to plaintiffs' alternative argument.

rights of way were compensable interests which the United States obtained from the Sioux and for which the Sioux should have been compensated, but that defendant is not liable to plaintiffs for the alleged acquisition of the right of free navigation of the Missouri River.

In their memorandum concerning the existence and compensibility of easements acquired by the United States under the 1877 act, filed February 9, 1973, plaintiffs stated that they had been unable to find any evidence that the President had in fact "designated" routes for wagon roads through the Sioux reservation. They therefore stated that they would assume, for the purpose of their memorandum, that the three roads were never actually located on the ground. In its response to plaintiffs' memorandum, defendant argued that the rights in Article 2 of the act were subject to a condition precedent -- designation of routes by the President -- and that since plaintiffs agreed that the routes had in fact never been designated the rights of way had never been acquired by the United States.

In finding of fact 80 we have summarized evidence which indicates that the routes for the wagon roads were in fact designated by the President. We have quoted an official publication of the descriptions of these routes by the War Department. Absent any evidence to the contrary, we must assume that the publication of these route descriptions was authorized by the President. We therefore conclude that under Article

2 of the 1877 act the United States acquired and exercised the right to construct three wagon roads through the Sioux reservation.

The right to build roads across the Sioux reservation was in the nature of a right of way. See generally 3 H. Tiffany, The Law of Real Property §772 (3d ed. B. Jones 1939). A right of way is an easement, and is thus an interest in property. See United States v. Virginia Electric and Power Co. 365 U.S. 624, 627 (1961); Panhandle Eastern Pipe Line Co. v. State Highway Commission, 294 U.S. 613, 618 (1935); United States v. Welch, 217 U.S. 333, 339 (1910). An easement is a compensable property interest. United States v. Sunset Cemetery Co. 132 F. 2d 163, 164-65 (7th Cir. 1943); Lynn v. United States, 110 F 2d 586, 589 (5th Cir. 1940). The wagon road rights of way created under Article 2 of the 1877 act were therefore compensable interests.

In their memorandum plaintiffs assert that they acquired title to over 300 miles of the Missouri River under the Treaty of April 29, 1868, supra, which fixed the boundary of the Great Sioux Reservation on the east bank of the Missouri. They then argue that the right to free navigation in Article 2 of the 1877 act created an easement in the United States for which they are entitled to compensation.

The Missouri River, as it flowed through the Great Sioux Reservation in 1877 was a navigable water of the United States. See The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870); finding of fact 10, infra. As such it was under the complete control and dominion of the United States. See Wyandotte Transportation Co. v. United States, 389 U.S. 191, 201

(1967); United States v. Rands, 389 U.S. 121, 122-23 (1967); United States v. Twin City Power Co., 350 U.S. 222, 224-25 (1956); Gibsen v. United States, 166 U. S. 269 (1897). Any right which the Sioux might have in the banks of the river or its bed is subordinate to the United States' power over navigable waters originating in Article I Section 8 of the Constitution. United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 62 (1913); Gibsen v. United States, supra.

Plaintiffs argue that their recognized title under the 1868 treaty included the right to control the Missouri River, citing Choctaw Nation v. Oklahoma, 397 U. S. 620 (1970). In Choctaw, however, the court held only that the Indians had title to the stream bed. The court recognized that the United States had a navigational easement over the surface of the river. See 397 U. S. at 635. In construing grants of land by the United States, we are faced with the strong presumption that the sovereign never intends to cede control over navigable water to private parties. United States v. Oregon, 295 U. S. 1, 14 (1935); Massachusetts v. New York, 271 U. S. 65, 89 (1926). There is no language in the 1868 treaty, or any evidence in the record, which rebuts this presumption. We conclude that the United States had the right to free navigation of the Missouri River prior to the 1877

act, and is therefore not liable to plaintiffs for such right under Article 2 of the 1877 act.

This case shall proceed to a determination of the amount of compensation received by plaintiffs under the 1877 act, including the value of any property transferred to plaintiffs under the act; and to a determination of the value of the road rights of way acquired by the United States under the 1877 act.

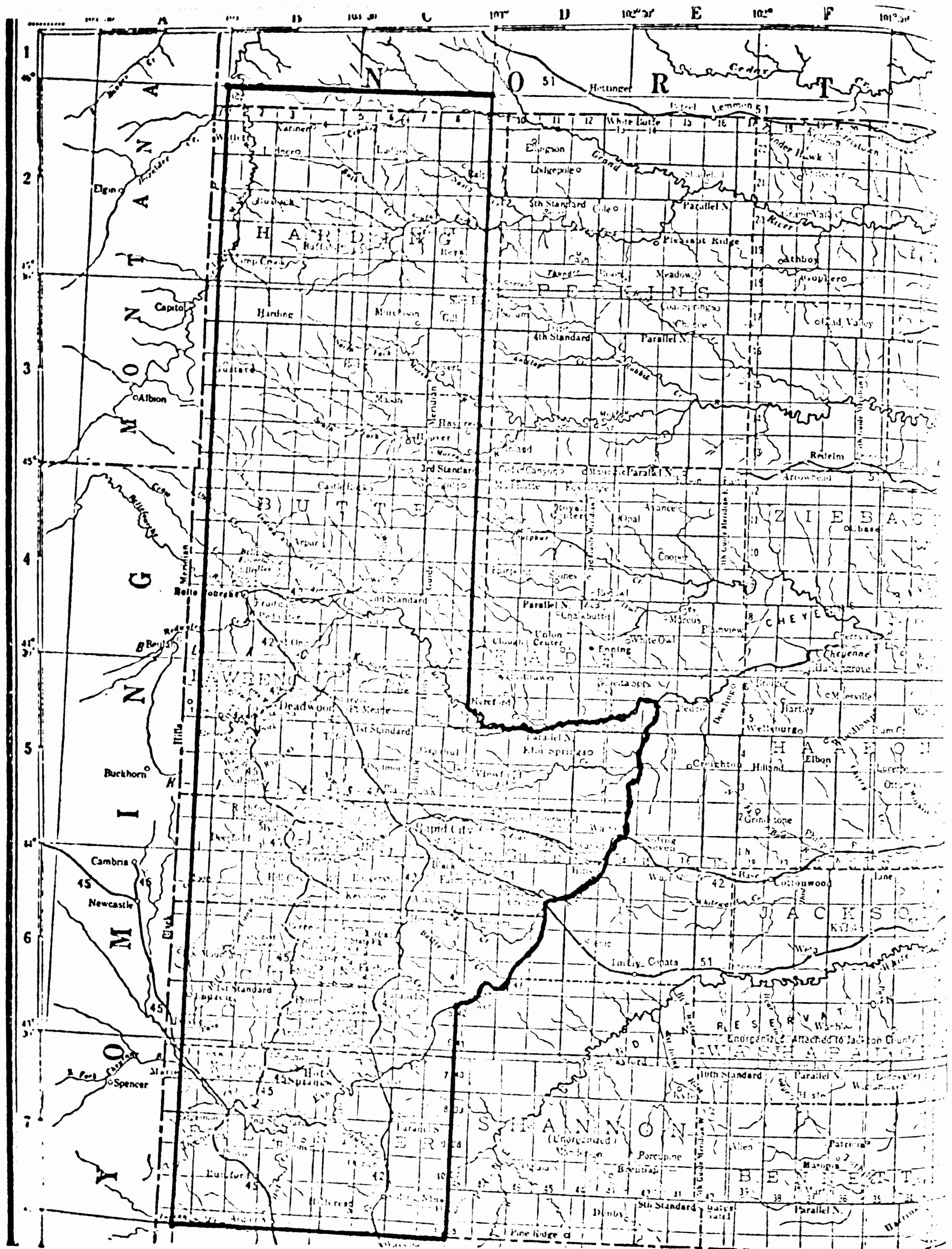
John T. Vance, Commissioner

We concur:

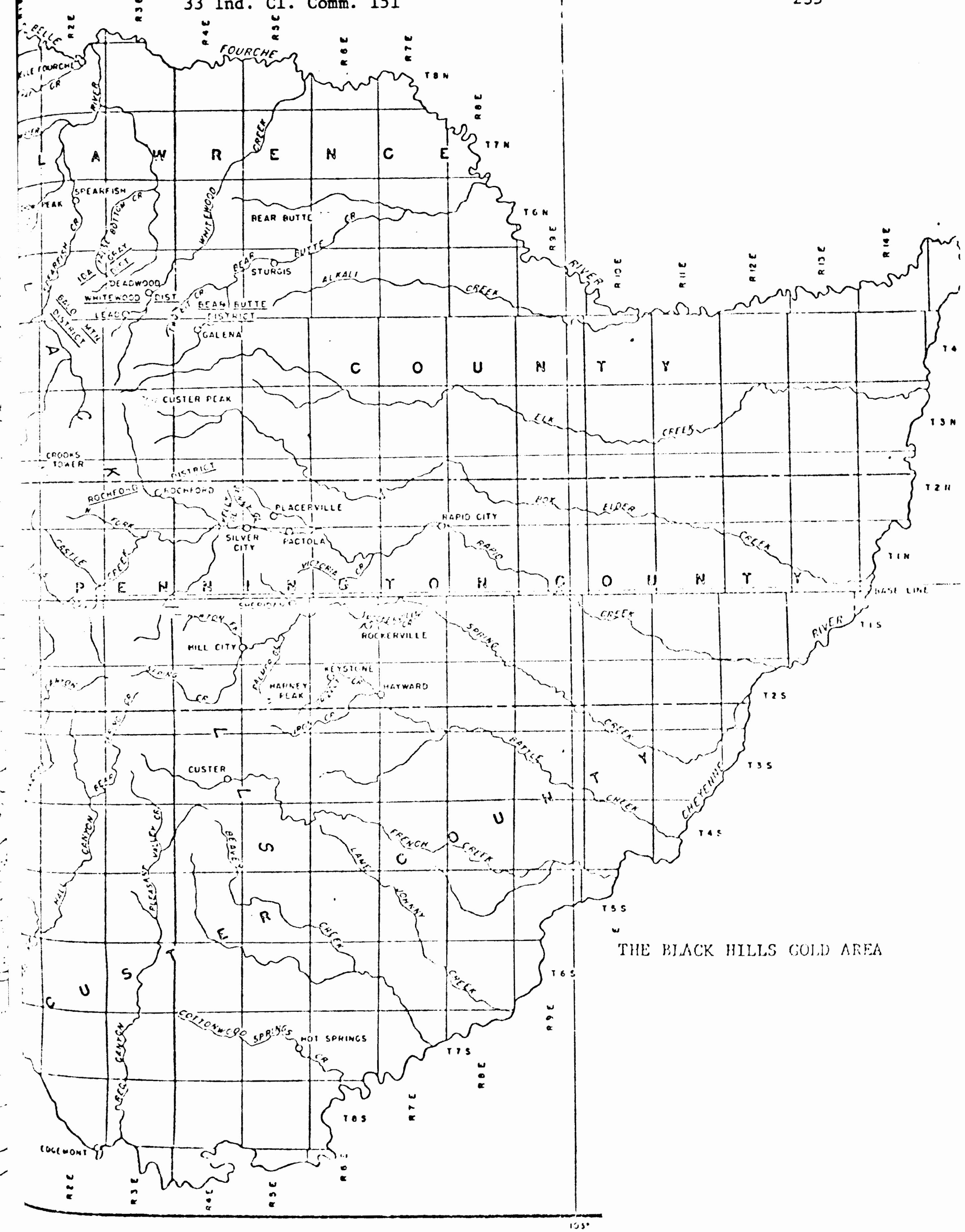
Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner



LAND ACQUIRED BY THE UNITED STATES UNDER
THE ACT OF FEBRUARY 28, 1877



THE BLACK HILLS GOLD AREA

Kuykendall, Chairman, dissenting in part:

I disagree with the majority's conclusion that the plaintiff's Fifth Amendment claim is not barred by res judicata by virtue of the opinion and decision of the Court of Claims in Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943).

When the Court of Claims' decision is considered as a whole it becomes clear that the court squarely ruled on and denied the Sioux claim that there was a Fifth Amendment taking and dismissed any "moral claim" on jurisdictional grounds. In support of this view, I set forth below some of the pertinent language of the court together with my comments. The quotations from the court's opinion are single spaced.

The claim which the Sioux Tribe brought before the Court of Claims pursuant to the Jurisdictional Act of June 3, 1920, was based on the contention that the Act of February 28, 1877, constituted a taking of a portion of the Sioux reservation under the Fifth Amendment without the payment of just compensation to the Sioux.

> Plaintiff seeks to recover $189,368,531.05, together with an additional amount measured by interest as a part of just compensation amounting in all to approximately $739,116,256 for the alleged taking by the defendant in 1877 of certain lands, and rights in lands of the plaintiff, amounting to 73,781,826.19 acres, alleged to have been contrary to and in violation of provisions of treaties of September 17, 1851, 11 Stat. 749, and April 29, 1868, 15 Stat. 635. [p. 616]
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> * * * * *
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> The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant by the

> act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73,781,826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851. [p. 657]

The Court of Claims had jurisdiction of the claim, and the Sioux Tribe would have been entitled to recover if their contention was valid.

> If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. [pp. 657, 658]

The Court of Claims considered the merits of the Sioux Fifth Amendment taking claim and determined that the Sioux were not entitled to recover.

> A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe." [p. 666]

The Court of Claims determined that the Sioux claim was moral rather than legal.

> In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the Price and Osage cases, and other cases cited, supra, was not conferred by the jurisdictional act. [p. 670]

The court held it did not have jurisdiction to consider moral claims.

> . . . To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act. [p. 682]

* * * * *

> The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented. Compare Choctaw Nation v. United States, 119 U.S. 1, 2, 28, 29; Winton v. Amos, 255 U.S. 373, and Seminole Nation v. United States, 316 U.S. 286 (No. 348), decided May 11, 1942. While in a proper case the court may adjudicate a claim on equitable principles relating to fraudulent acts of those charged with the duty of administering the property and affairs of the Indians under treaties and acts of Congress -- Seminole Nation v. United States, supra; Ross v. Stewart, 227 U.S. 530; United States v. Wildcat, 244 U.S. 111; Campbell v. Wadsworth, 248 U.S. 169 -- no fraud is alleged in this case and there is no basis for such an allegation with respect to the action of Congress in August 1876 and February 1877. In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. [p. 685]

I cannot agree with the majority's view that the Court of Claims decided the Sioux's Fifth Amendment claim on the ground that since Congress had the legal authority to acquire its property under the 1877 act, the jurisdictional act allowed for no recovery by plaintiffs. The

court considered the case of Lone Wolf v. Hitchcock, 187 U. S. 553 (1903), to be almost identical to the Sioux case, not only on its facts but also with respect to the treaty and statutory provisions. The court carefully reviewed the principles announced by the Supreme Court in Lone Wolf, and subsequent cases, in ascertaining the proper criteria for determining ary liability of the United States under the Sioux's legal claim. The court noted that Congress possessed plenary power over Indian tribes and, when necessary, the authority to legislate in whatever way it might choose with reference to the management and control of the property and affairs of the Indians, even though such action should be in conflict with some treaty provision and against the desire of the Indians. But the court also found it well established that:

> . . . the United States cannot, through Congress or otherwise, arbitrarily deprive the Indians of their lands or monies secured to them by a treaty or law of Congress, or to appropriate the lands of Indian tribes to its own purposes or give them to others without rendering or assuming an obligation to render just compensation therefor. [pp. 673, 674.]

The court entered detailed findings with respect to the United States' efforts to secure a relinquishment by the Sioux of a part of their reservation and to compensate the Indians therefor. The court concluded

> . . . In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for

> what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay. [p. 667.]
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> * * * * *
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> In other words, if in the case at bar, Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the interest of the Indians, as the facts clearly show was the case, the Indians have no legal right to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which Congress stipulated should be paid and which has been and is being paid, and will continue to be paid until the Indians, with the assistance of the Government, became self-supporting. Congress possessed the authority to take the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof. [p. 668.]

Thus the Court of Claims adjudicated the Fifth Amendment claim on its merits in accordance with the applicable case law relating to legal claims for the taking of Indian lands.

The Court of Claims was well aware of the fact that Indian tribes could prevail in such claims and secure awards of "just compensation." The court discussed two such cases which were relied upon by the Sioux in support of their claim. Both cases, United States v. Creek Nation, 295 U. S. 103 (1935), and Shoshone Tribe of Indians v. United States, 299 U. S. 476 (1937), had recently been decided by the Supreme Court on writs of certiorari to the Court of Claims. In both cases the Supreme Court reversed the Court of Claims--holding that the Creek and the Shoshone were

entitled to awards of just compensation for takings by the United States within the meaning of the Fifth Amendment. The jurisdictional acts in both the Creek and Shoshone cases were virtually the same as the Sioux jurisdictional act. As the Court of Claims observed, the Creek and Shoshone cases "were clearly and unquestionably legal claims" [p. 673]. The Indian plaintiffs recovered in those cases because, as the court stated in Sioux, "Congress exercised an arbitrary power . . . . which deprived the Indians of their property without rendering, or assuming an obligation to render compensation therefor." [p. 673.] Thus, the Court of Claims distinguished Creek and Shoshone from the Sioux situation wherein Congress had acted in a manner which Congress deemed--and as the court found the facts clearly showed--was for the interest of the Indians and for what Congress deemed to be adequate consideration.

The Sioux failed to recover on their legal claim in Sioux Tribe v. United States, supra, (97 Ct. Cl. 613) because the facts did not as matter of law permit a finding that the United States had taken the Sioux lands under the Fifth Amendment. It was not, as the majority have it, because of any jurisdictional bar to a recovery on legal claim.

The Court of Claims in 1956 considered that the legal claim of the had been decided by 97 Ct. Cl. 613 and that the only suit which the could bring before the Indian Claims Commission was one based on es (3) and (5) of Section 2 of the Indian Claims Commission Act.

> . . . Category (2), we think, involves a claim already decided by this court, Sioux Tribe of Indians v. United States, 97 C. Cls. 613, cert. denied, 318 U.S. 789 (1943), when this identical case was tried and decided before this court under a special jurisdictional act, 41 Stat. 738, authorizing the Court of Claims "to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon." The Court there held that the claimants had no legal right to any compensation other than that which was provided for by the Act of February 28, 1877, and stated that the only claim the Sioux Indians had, if they had one at all, was moral and until the court was given jurisdiction by the Congress to hear a moral claim it could not act. The Commission has been given the jurisdiction to hear moral claims under categories numbered (3) and (5). The appellant in this case can bring suit only under those categories. It has done so and relief has been denied. [Sioux Tribe v. United States, 146 F. Supp. 229, 239-240 (1956), aff'g Docket 74, 2 Ind. Cl. Comm. 646 (1954).]

This decision was later vacated and the case remanded to the Commission for a determination of whether the plaintiff was entitled to have the proof in the case reopened. Therefore, the opinion has no force as a precedent. Nevertheless, my confidence in the correctness of my position is reinforced by the fact that in 1956 five judges of the Court of Claims unanimously reached the same conclusion I have reached. I note also that four of these judges participated in the unanimous 1942 decision with which we are now concerned.

Jerome K. Kuykendall, Chairman