BEFORE THE INDIAN CLAIMS COMMISSION

THE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, ET AL., Plaintiffs,	)	
v.	)	Docket No. 363 (Second Claim) (Act of 1904)
THE UNITED STATES OF AMERICA, Defendant.	)	

Decided: June 30, 1973

Appearances:

Marvin J. Sonosky, Attorney for Plaintiffs. Emerson Hopp was on the brief.

Bernard M. Sisson with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

This is an action for just compensation under the Fifth Amendment of the Constitution for the taking of reservation lands of the Lower Sioux Indian Community in Minnesota, et al., known herein as the Sisseton and Wahpeton Sioux Bands of Indians. The reservation was known as the Devils Lake Reservation in North Dakota. The taking occurred as a result of disposals of such land by the United States without the consent of the bands, and included certain land excluded from the reservation by erroneous survey in 1875.

Plaintiffs filed a timely claim in two parts on August 11, 1951. The

First Claim concerned certain lands lying on both sides of the Minnesota River in Minnesota and South Dakota. The Second Claim was for an accounting by defendant as to all of the plaintiffs' property, real or personal. An accounting report was filed by defendant in June 1960 to which exceptions were filed by plaintiffs in September 1968.

On October 6, 1969, the plaintiffs filed two amended petitions, the effect of which was to state a claim for just compensation under the Fifth Amendment for the taking of land and the use of land forming part of the Devils Lake Indian Reservation in North Dakota, established for plaintiffs by article 4 of the Treaty of February 19, 1867, 15 Stat. 505. The Commission concluded, on December 10, 1969, that the two additional claims were asserted in the broad language of the original Second Claim. 22 Ind. Cl. Comm. 226 (1969).

The parties subsequently attended a pretrial conference on March 12, 1970. By pretrial order dated March 25, 1970, the Commission ordered that trial be limited to the issues of liability, the measure of damages or compensation, and valuation of the property in question at Devils Lake. Further, the Commission determined that the subject matter of the trial pertained to certain items, all arising under the acquisition or loss of the Devils Lake Reservation in North Dakota, sometimes referred to as the Fort Totten Indian Reservation, as follows:

1. Claim for use of 11,420 acres for a military reserve (1867-1890).

2. Claim for 64,000 acres excluded from the reservation by erroneous survey in 1875.

3. Claim for Sections 16 and 36 in each township of the reservation, or lands in lieu thereof, granted to the State of North Dakota by Section 5 of the Act of April 27, 1904, c. 1620, 33 Stat. 319.

4. Claim for not to exceed 900 acres reserved for church, mission, and agency purposes and 1,600 acres reserved for the Fort Totten Indian School, under Section 4 of the Act of April 27, 1904, supra.

5. Claim for 960 acres the President reserved for a public park by proclamation dated June 21, 1908, pursuant to Section 4 of the Act of April 27, 1904, supra.

6. Claim for all the unallotted lands of the Devils Lake Indian Reservation, including the Fort Totten Military Reserve, disposed of under the general provisions of the homestead and town-site laws of the defendant, at prices fixed by the 1904 Act, pursuant to Section 4 of the Act of April 27, 1904, supra, excepting lands identified in Items 2 through 5 above.

Trial pertaining to the items listed above was held on May 14, 1971, and evidence was submitted with respect to liability, measure of damages or compensation and valuation of the lands claimed, as listed in the pretrial order of above date.

The defendant raised certain objections in its brief concerning the propriety of the present claim asserted by plaintiffs for just compensation under the Fifth Amendment for the taking of reservation lands.

I.

The defendant asserts that the instant claim is actually a late filed claim, and, as such, is barred by the limitation of actions specified in the Indian Claims Commission Act, 25 U.S.C. Sec. 70k.

The Commission finds, however, that our previous opinion on this question in this case, 22 Ind. Cl. Comm. 226, is controlling, and that the claim herein is not a late filed claim but one within the scope of the original complaint or petition filed by plaintiffs in 1951. We concluded our earlier opinion by stating: "We therefore hold that the allegations set forth by plaintiffs in their amended petition were included in the original timely petition."

II.

The defendant asserts that a Fifth Amendment taking cannot be asserted in an accounting claim against the United States for the reason that an accounting claim and a claim for a Fifth Amendment taking are mutually exclusive and give rise to findings on different causes of action.

The Commission again finds, however, that our previous opinion in this case is controlling. In that opinion we determined that the original petition's language was very broad, "apparently intending thereby to encompass any claims plaintiff might have against defendant." The amended claim, for the taking of the Devils Lake Reservation, which we permitted thereby and which is now before us, is a claim distinct from plaintiffs' accounting claim. We therefore reject defendant's argument.

III.

The defendant also asserts that the claim for a Fifth Amendment taking of approximately 64,000 acres[1/] excluded by the erroneous survey of 1875 is

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1/ Actually 64,908.22 acres. See footnote 2, Section VI below.

res judicata. Defendant refers to Sisseton and Wahpeton Indians v. United States, 58 Ct. Cl. 302 (1923), cert. denied, 275 U.S. 528 (1927), aff'd on appeal, 277 U.S. 424 (1928), and states that the present plaintiffs filed the petition in the Court of Claims pursuant to a special jurisdictional act of Congress approved April 11, 1916, 39 Stat. 47; and that the issues in that action were the same as those in issue herein.

On March 17, 1917, the Sisseton and Wahpeton Bands filed a petition in the Court of Claims pursuant to the aforesaid jurisdictional act. The petition included several claims, among them a claim based on the loss of the 64,000 acres excluded from the Devils Lake Reservation by the erroneous survey of 1875. The court dismissed the petition for reasons more particularly discussed hereafter.

The defendant refers to the finding by the Court of Claims that plaintiffs had been paid $1.25 per acre, or $80,000.00, for the 64,000 acres of land. The court also found plaintiffs had been paid $421,850.21 up to 1917 for loss of the unallotted lands of the Devils Lake Reservation, as well as for the claim growing out of the erroneous survey and timber taken from the reservation by the Military Forces of the United States. Such payment was made pursuant to an agreement between the bands and the United States on November 2, 1901, which was "amended and confirmed" by the Act of April 27, 1904, 39 Stat. 47. The Court of Claims concluded that the claim for the value of the erroneous survey lands was without merit for the reason that the bands had already been paid twice for this portion of the claim.

The Commission finds that res judicata does not apply here. The aforesaid jurisdictional act of Congress, conferring jurisdiction on the Court of Claims to hear, determine and render judgment in claims of the Sisseton and Wahpeton Bands of Sioux Indians against the United States, provided, among other things, as follows:

> . . . That all claims . . . shall be submitted . . . for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also any legal or equitable defense, set-off, or counterclaim which the United States may have against said Sisseton and Wahpeton bands . . . 39 Stat. 47.

The Court of Claims stated in Sisseton and Wahpeton Indians, supra, at page 329, as follows:

> The plaintiff Indians manifestly misapprehended the scope and character of the jurisdictional act and the limitations of the court thereunder . . . Our jurisdiction is limited to rights which may or may not accrue under treaties and acts of Congress. When Indian rights of property are fixed by the terms of treaties and statutes we are bound to accept them as so fixed . . . .

The Commission finds that the jurisdictional act conferring jurisdiction on the Court of Claims in Sisseton and Wahpeton Indians, supra, was strictly construed by the court to cover only those claims which might arise under the terms of treaties or laws of Congress; and that a decision regarding claims thereunder asserted cannot be res judicata in connection with the instant claim filed under the Indian Claims Commission Act of 1946 for just compensation based not on laws or treaties, but on a Fifth Amendment

taking. Creek Nation v. United States, 168 Ct. Cl. 483, 495 (1964).

Since we are able to dispose in this way of the defense of res judicata raised by defendant, we need not deal with the question raised by plaintiff of the effect of the pretrial order on the subsequent course of action of the case. (The case was tried on the issues and facts set forth in the pretrial order of March 25, 1970. The issue of res judicata was not raised at the pretrial hearing or at the trial, and no argument or evidence was previously offered to support defendant's contentions.)

IV.

The defendant contends that the measure of damages for the use of the Fort Totten lands from 1867 to 1890 by the United States Army is the fair market value of the land in 1867 less its sales price in 1904. The defendant states that after General A. H. Terry took possession of the reserve in July 1867, a general order (No. 55 of June 30, 1869) was issued by the Department of the Army whereby the boundaries of the military reservation were defined; and on January 11, 1870, the President of the United States signed an Executive order, adopting the Army boundary description and proclaiming Fort Totten to be a military reservation. Thus, the defendant contends that the acquisition of the area was permanent

and unconditional as of 1867, and that any title the plaintiffs had to this portion of their reservation was extinguished at that time. Defendant further maintains that funds received in 1904 and thereafter from the sale of the lands in question exceeded the value of such property in 1867, and that therefore the defendant owes nothing for the acquisition of the military reserve in 1867.

The Commission previously determined, 22 Ind. Cl. Comm. 226, that this issue consisted of a claim for use of the 11,313.08 acres as a military reserve during the years 1867 through 1900, and the pretrial order of March 25, 1970, required the parties to try this issue. Defendant made no objection at that time. As noted above, defendant's objection now is untimely.

In any event, the United States Government cannot take title to another's land by issuing an order or orders to establish a military post or reservation without incurring the obligation of paying just compensation to the owners. The plaintiffs had secured title when by the Treaty of February 19, 1867, supra, the Devils Lake Reservation was established, and therefore are entitled to just compensation for its subsequent taking by defendant for a military reserve.

Thus the contentions of defendant with respect to evaluation of the loss of use of the Fort Totten military reservation land for approximately 23.25 years are not valid, and the Commission rejects such contentions.

V.

Under Article IV of the Treaty of 1867, supra, defendant set apart for the Sisseton and Wahpeton Bands, and others, the Devils Lake Reservation. In 1875 the agents of the defendant erroneously surveyed the western boundary of the aforesaid Devils Lake Reservation, and approximately 64,000 acres of land were thus excluded from the reservation area. The Indian Agent at Devils Lake discovered the error and reported to the Commissioner of Indian Affairs in 1883 that trespassers (settlers) were occupying portions of the excluded acreage. But the Commissioner instructed the Devils Lake agent during September 1883 that no change would be made to the western boundary, then known as "Armstrong's Line." The Commissioner stated that a large number of settlers had, in good faith, settled on the land believing the area to be a part of the public domain. Thereafter, by Act of March 3, 1891, 26 Stat. 989, 1010, Congress appropriated $80,000.00 to provide compensation to the plaintiffs, computed at $1.25 per acre for the loss of the 64,000 acres.

In 1901, pursuant to the Indian Appropriation Act of March 3, 1901, 31 Stat. 1058, 1077, an Indian inspector negotiated an agreement with the Indians of the Devils Lake Reservation for the cession of their reservation lands. The agreement provided that certain areas were reserved for future allotments to the Indians; and that the entire tract of unallotted reservation land was to be ceded to the defendant for the consideration

of $345,000.00, including as a part of the consideration the settlement of any tribal claim growing out of the erroneous survey, and a claim for timber taken by the military from 1867 to 1890. This agreement was referred to Congress for approval on December 12, 1901, but no further action was taken thereon until 1904. At that time, by Act of April 27, 1904, supra, Congress unilaterally amended the 1901 Agreement, and, as amended, adopted it in the 1904 Act.

In brief, the cession and sale of the lands, as provided by the 1901 Agreement, was substantially changed in the Act of 1904. Sections 4 and 5 of the 1904 Act provided: for the grant of all sections 16 and 36 of the reservation townships, or equivalent lands, to North Dakota for school lands; for donation of certain areas of reservation land to churches and missions; for setting aside of lands for agency, Indian school, and public parks purposes; and, for the sale of all remaining lands not needed for the allotments to the Indians, under the provisions of the homestead and townsite laws at $4.50 per acre, with installment terms provided, with the President of the United States having power to reduce the price within his discretion. The defendant was to reimburse the bands $3.25 per acre for the school lands and for other designated areas, except for the public park, known as Sully's Hill, for which no reimbursement was provided. There is no evidence to establish that the Indians at Devils Lake Reservation were consulted concerning, or consented to, the provisions of the 1904 Act.

Thereafter, by proclamation dated June 2, 1904, 33 L.D. 1, the President defined the tribal lands which were reserved in the statute for public

or charitable purposes, and all remaining lands not held for Indian allotments were opened for disposition under the homestead and townsite laws. The land was not classified, such as cropland or pasture, and no appraisal procedure was provided whereby the land could be evaluated. All unallotted and saleable land, according to the statute, was offered to settlers for a maximum value per acre of $4.50, with authority conferred on the President to lower the price if all lands were not sold at the maximum price per acre.

VI.

The pretrial order of March 25, 1970, described above, listed the items to be considered in this proceeding, including acreage figures, stating that such acreages were taken from the Court of Claims, Sisseton and Wahpeton Indians decision, supra. However, the order also provided that such acreages were subject to further clarification and confirmation by the parties to this action.

The parties agreed, for the most part, on the acreages and value dates for each of the items subject of these proceedings listed hereinafter. With respect to value dates concerning Item 1, loss of use of reservation land, comprising 11,313.08 acres, and Item 2, the loss of 59,143.08 acres in the excluded area to homesteaders, the parties agreed to median dates of January 1, 1880, and January 1, 1897, respectively.

With respect to the Item 4 and 5 lands, the Commission has determined that the date of valuation is June 2, 1904, the date of the Presidential proclamation defining the area reserved.

The defendant asserted that the proper valuation date for Item 6,

reservation land comprising 90,138.15 acres, is January 1, 1906, the median date of entry for the various parcels, rather than January 1, 1910, the median date of issuance of the subject patents.

In United States v. Creek Nation, 302 U.S. 620 (1938), the Supreme Court stated that the issuance of patents was deemed to be ". . . the most accredited type of conveyance known to our law." The Court also stated at page 622:

> A fair approximation or average of values may be adapted to avoid the burdensome detailed computation of value as of the date of disposal of each separate tract.

More recently, in Three Affiliated Tribes of Fort Berthold Reservation v. United States, 182 Ct. Cl. 543, 565 (1968), aff'g in part, rev'g in part, Dkt. No. 350-F, 16 Ind. Cl. Comm. 341 (1964) (hereinafter Fort Berthold), the Court of Claims in a discussion of this question reaffirmed that the date of patents issued is applicable as the valuation date in instances of Fifth Amendment takings, although dates of entry may be the preferable valuation date in other contexts. (See part VII, infra.

The Commission finds that the appropriate value date for Item 6 is the date when the final appropriation of the parcels took place through change of ownership consummated by the issuance of patents. Since the parties have agreed that the median date of issuance of patents was January 1, 1910, this date is determined to be the proper value date for this item.

The Commission accordingly adopts the following acreages and valuation dates for the land items in this case:

Item Nos.	Disposal	Acres	Valuation Dates
1	Rental military reserve	11,313.08	1/1/80
2a	Homestead, etc.	59,143.68	1/1/97
2b	State institutions	269.99	1/7/97
2c	State institutions	1,903.70	10/10/95

Item Nos. [2/]	Disposal	Acres	Valuation Dates
2d	School sections	1,280.00	2/5/85
2e	School sections	2,310.85	2/23/85
3a	School sections	5,774.01	7/15/04
3b	School sections	6,713.94	7/8/04
4	Agency, church, mission, Indian school reserves	2,433.75	6/2/04
5	Sully's Hill	779.45	6/2/04
6	Homestead, etc.	90,138.15	1/1/10

VII.

The plaintiffs assert that with respect to Item 1, they are entitled to a judgment for an annual fair market rental value for 24 years, from 1867 to 1890, together with interest at 6 percent by way of just compensation from the median date of rental to the date of payment. Further, plaintiffs contend that for all of the remaining items, including land erroneously excluded from the 1875 survey and land within the reservation, they are entitled to fair market values, together with interest at 6 percent from dates of such losses to day of payment. Thus, plaintiffs have asserted that the taking or loss of use of lands included herein are all within the contemplation of the Fifth Amendment to the Constitution of the United

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2/ Defendant and plaintiffs used different numerical and letter designations with respect to items 2 and 3. The item numbers of plaintiffs are adopted by the Commission as being most consonant with our pretrial order. Items 2a to 2e, inclusive, totaling 64,908.22 acres, comprise the excluded reservation land area resulting from the erroneous survey of 1875. Items 3a through 6, totaling 105,839.30 acres, comprise the unallotted reservation lands.

States, which provides for "just compensation" for land "taken for public use" by the government.

The Commission must determine whether plaintiffs' lands were taken, temporarily or permanently, for public use without just compensation, within the meaning of the Fifth Amendment to the Constitution. The lands under discussion include three categories: (1) loss of use of the 11,313.08 acres utilized by the military at Fort Totten from 1867 to 1890; (2) loss of the 64,908.22 acres excluded from the reservation by erroneous survey in 1875, including 59,143.68 acres disposed of under homestead law and 5,746.54 acres set aside for State institutions or school lands; and (3) loss reservation lands, comprising 105,839.30 acres, including 15,701.15 acres set aside for school, park, Indian agency, or other uses.

Defendant's contentions with respect to the correct measure of damages for the Fort Totten lands (Item 1), utilized by the military from 1867 to 1890, were discussed under Part IV, above. With respect to the remaining items, defendant contends that the takings of the property through transfer to others of those lands included in the excluded or reservation areas were not Fifth Amendment takings. Defendant reasons that the lands were purchased by the defendant or that Congress was acting in the exercise of its plenary powers, as a trustee, to dispose of the lands or convert such lands into money for the benefit of the plaintiffs.

Whether there is a Fifth Amendment taking is determined largely through resolving a seeming conflict in two well-established lines of cases, as was discussed in depth by the Court of Claims in Fort Berthold, supra.

One line, emphatically asserting the plenary power of Congress to control tribal property, stresses the power of Congress to deal with tribal property as in its wisdom it deems just. Existing side by side with the above line of cases asserting the plenary powers of Congress, on the other hand, is another line of cases holding that governmental dispositions of Indian lands were Fifth Amendment takings. The distinguishing factor made by the court between the two types of cases was whether Congress made "a good faith effort to give the Indians the full value of the land . . . a mere substitution of assets . . ." (Id., at 553). The court, at page 557, summarized:

> In short, it is concluded that it is the good faith effort on the part of Congress to give the Indians the full value of their lands that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its powers of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking.

At page 559, the court, in commenting on the significance of payment for the land by the defendant, stated:

> . . . . It is the attempt to pay the full present market value of the land which gives the transaction the character of a a trustee's conversion of one asset to another. There is no basis in reason to distinguish between no compensation, minimal compensation, or compensation arbitrarily determined. If Congress pays the Indians a nominal amount, or (as it did here) an amount arbitrarily arrived at with no effort to ascertain if it corresponds to the true market value of the land, then it cannot be said that Congress is merely authorizing the conversion

> of one form of tribal property to another. A necessary corollary to a mere change in the form of property is that both forms have the same, or at least nearly the same, value.

Briefly, in Fort Berthold, some land was disposed of under a statute which provided that the land could not be sold for less than the values determined by an impartial three-man commission. There was evidence to establish that the appraisal commission acted "carefully" and in good faith to give the Indians the full money value of that land. The court concluded that there was due regard for Indian rights and no Fifth Amendment taking of the property was made. With respect to other land disposals, such as tracts designated for school lands or a national monument, the court determined that payment to the Indians was based on an arbitrarily determined valuation of the land, and that this action did amount to a taking within the meaning of the Fifth Amendment.

We will now examine the takings in the instant case in light of Fort Berthold.

(1) The Commission holds that the taking of 11,313.08 acres of reservation land, without payment to or the consent of the plaintiffs, for utilization as a military reserve for approximately 23.25 years, including rights to remove timber, was an appropriation of trust property by the defendant for its own purposes, without regard for Indian rights, and constituted a Fifth Amendment taking. The purpose of the taking was governmental in all respects, namely, "to keep the peace" and protect non-Indians and Indians by maintenance of law and order on the trails in and outside of the reservation.

There may be a Fifth Amendment taking by temporary use or occupancy. The Fifth Amendment is " . . . addressed to every sort of interest the citizens may possess." General Motors Corporation v. United States, 323 U.S. 373, 378 (1945). The measure of damages is the rental that could have been obtained in a free bargaining between the owner and a hypothetical lessee of the interest taken. Id. at 382; Kimball Laundry Company v. United States, 338 U.S. 1, 6-7 (1949).

(2) Defendant first contends with respect to the erroneous survey lands that there is no evidence to establish that defendant ever took possession of the lands or that plaintiffs complained about the loss. The Commission concludes that Congress chose to permit the settlers or trespassers to remain on the excluded acreage even though it was tribal land; that the defendant could have taken steps to eject the settlers but chose not to do so because the settler-trespassers assertedly staked out claims in good faith; and, that by taking such action Congress proceeded thereafter as if the excluded lands were public lands available under the homestead laws. The law is clear in these circumstances that there is a Fifth Amendment taking and that the plaintiffs are entitled to just compensation. Creek Nation v. United States, 295 U.S. 103, 110-111 (1934).

Defendant then argues, however, that when the error was discovered plaintiffs were paid $80,000.00 under the Act of March 3, 1891, supra, which was a fair compensation, and that the land was thus acquired by defendant by purchase in the conventional sense. Defendant cites Pawnee Indian Tribe of Oklahoma v. United States, 157 Ct. Cl. 134, 141, 301 F. 2d 667, 670, cert. denied, 370 U.S. 918 (1962), (aff'g in part, rev'g in part, Docket 10, 9 Ind. Cl. Comm. 82 (1961)) in support of its contentions.

In the Pawnee Indian Tribe case the primary issues pertained to proper evaluation of the land on the dates of cession, and to credits to which the defendant might be entitled. The court, in addition to dealing with these questions, included a brief determination, without explanation or discussion, that the defendant acquired this acreage by purchase in the conventional sense and not by condemnation as a Fifth Amendment taking.

In Fort Berthold, supra, at 560, the court discussed the Pawnee Indian Tribe decision, and stated as follows:

> In our opinion, the court was not implying by the quoted statement that any payment automatically prevented the United States from being liable for a taking under the Fifth Amendment. Rather, the court was relying upon the particular facts of the case to reach the conclusion that there was no taking because the land was acquired by "purchase" in the conventional sense - i.e., acquired for a consideration pursuant to an agreement by both parties. The court apparently based its conclusion upon the explicit holding by the Commission that there was "an implied agreement between the United States and the Pawnees that the * * * [land] should be taken by the United States with payment of compensation to the Pawnees for the area taken." 8 Ind. Cl. Comm. 648, 756 (1960).

The Commission finds that there is no suggestion of an implied agreement by the parties in the instant case, and that Pawnee can therefore be distinguished. Furthermore, the payment of $80,000.00 to plaintiffs was based on an arbitrary valuation of the land at $1.25 per acre, with no attempt to determine the full present market value of the land. We conclude therefore that defendant fails to meet the Fort Berthold test, and that this was a Fifth Amendment taking.

(3) The unallotted reservation lands comprised a total area of

105,839.30 acres, including 90,138.15 acres sold under the 1904 Act at $4.50 or less per acre, and 15,701.15 acres designated for school sections, state institutional use, park, Indian agency, school or church purposes, disposed of at $3.25 per acre pursuant to the 1904 Act. The defendant contends that such unallotted lands of the reservation were acquired by purchase through the 1904 Act; and that provisions of the 1904 Act were simply an exercise of the plenary power of Congress to convert land into money for the benefit of the plaintiffs.

The cession and sale, or purchase of the subject lands, as proposed under the 1901 Agreement between the parties was substantially changed by the 1904 Act, and a wholly different plan was thus adopted for disposing of the land.

The plaintiffs did not consent to the 1904 Act. The evidence shows that no plan was devised in the act to classify the land, as crop, pasture, or other land, so that the highest return could be obtained from each type; and that no appraisal system was provided and no distinction in value was made on the basis of the quality or highest and best use of the land. All of the acreage, regardless of quality, was offered for sale at the arbitrarily set figures of $4.50 or $3.25 per acre. The Act also provided that the President or an authorized officer could dispose of all remaining land if no more land could be sold at the statutory price; and, that such price would be determined on such conditions as he deemed best. On June 8, 1907, three years after the lands were opened at $4.50 per acre, the President's proclamation reduced the price to $2.50 per acre. Clara F. Moran, 39 L.D. 434, 435 (1910).

Tribal interests were not protected, there being no provisions to protect burial grounds, tribal farms, power sites or the forest preserves, as was done under Sections 3, 4, 5 and 10 of the 1910 Act, 36 Stat. 445. Fort Berthold, supra, 16 Ind. Cl. Comm. 341, Finding 14, pp. 350-51, Finding 16, p. 352.

It is abundantly clear that the United States dealt with the plaintiffs' property in this case as if it were its own. The general objectives, provisions and results of the 1904 Act clearly establish that Congress was not acting in the role of a good faith trustee. On the contrary, the provisions of the Act indicate that the defendant dealt with the reservation lands as the government saw fit with perfunctory regard for the interests of the plaintiffs.

Accordingly, the Commission finds that the losses, included in Items 1 through 6, were Fifth Amendment takings.

VIII.

We will now review factors affecting valuation of the subject lands. Historically, nomadic Indian tribes who lived by the hunt or who supplemented their food supply with vegetables, such as corn, occupied the Dakota Territory for many centuries. They lived primarily near Devils Lake or the great streams, such as the Missouri and Red Rivers, where water, timber, good land and game were abundant. However, from the Lewis and Clark Expedition in 1804 to the building of the railroads in the latter part of the 19th century, there was a movement away from tribal hunting, fur trading and attributes of an Indian civilization, into the beginnings of

extensive settlement on the land and a farming economy. With the advent of the white man pushing west and settling in the western territories, including Dakota, Indian unrest brought military expeditions and forts, and the transfer of the Indians to reservations in the 1860's. Thus, large tracts of Indian lands became available, north and south of the Devil's Lake area, for settlers.

The Dakota Territory was organized in 1861, and North Dakota became a state in 1889. The Devils Lake Reservation and the Fort Totten military reserve, located on reservation land, are in the east-central part of North Dakota, south of Devils Lake, with the major part of the reservation located in Benson County, and small portions in Eddy, Nelson, Ramsey and Wells counties. The land is rolling to gently rolling, with the lowest elevation at the north and south boundaries, rising to the highest point in the central portion of the reservation.

The Great Northern Railway reached Devils Lake on July 4, 1884, and on the same day steamboat service was inaugurated on the lake. Supplies and produce could thus be transported by train or steamboat.

The settlement of the Devils Lake area under consideration here coincided with the great boom of 1879-1886. Land speculators were everywhere, with "boomers" promoting railroad station sites or town sites, and the railroad personnel promoting bonanza farms and the general sale of land in the area. Bad weather, the end of railroad expansion and decreasing availability of good land brought the depression of 1886. This was followed by fairly good crop years from 1887 to 1889, but with a failure of rainfall in 1889

there was general suffering by the settlers in 1889 and 1890. The economy rebounded in the late 1890's, finally climaxing a general upswing with the beginning of World War I.

The general population trend indicated that North Dakota was increasing in population at a rapid rate. The 1870 census, showing North Dakota as a part of the Dakota Territory, designated a population of 2,405. Later censuses designated 190,983 for the State of North Dakota by 1890, 319,146 for 1900 and 577,056 in 1910. Benson County was created as a county on March 9, 1883, and had a population of 2,460 in 1890, 8,320 in 1900 and 12,681 in 1910. Thus, the settlement of the area was rapidly increasing during the period under consideration here, indicating a demand for land which was facilitated by the availability of Indian land, improved transportation, and factors discussed hereafter.

The city of Minneapolis gradually emerged in the 1870's as the largest milling center in the United States, with roller milling and other improved milling techniques. The demand for Dakota wheat was constant, especially for the hard red spring wheat which often surpassed the red winter wheats in baking strength.

The growth in cultivated areas in the vicinity of the subject lands was impressive between 1890 and 1909. In Benson County, wheat production increased from 155,221 bushels on 29,430 acres in 1890, to 1,184,470 bushels on 94,705 acres in 1899, to 3,146,229 bushels on 242,449 acres in 1909, with corresponding increases in the other counties where the subject lands are partially situated.

Even with falling wheat prices, dry years and other adverse conditions, development of farming in North Dakota expanded through the late 1880's and early 1890's, with a mild boom thereafter to World War I. The census of 1910 clearly indicates large increases between June 1900 and April 1910 in the number of all farms, development of farms and acreages, and in the value of all real and personal properties on such farms.

IX.

The soil in the subject area is considered fertile, with sufficient rainfall, and can produce bumper crops of grain. The area near Devil's Lake is in the center of a primary amber durum wheat production area, and is also a center for production of hard red spring wheat, with high gluten quality.

There was a limited amount of timber in North Dakota, largely a treeless area. During settlement of the state timber was valuable, not only for fuel and fencing, but for log buildings and rough types of furniture. The reservation had several groves of timber, not only in Fort Totten and along the Devils Lake shores, but by the streams, such as the Sheyenne River. The military reservation was situated in an area where much of the desirable timberland was located, comprising burr oak, with sycamore and green ash. In many places in the subject area, according to the Tenth Census of the United States, the trees were described as being large, and these were considered especially valuable for housing at that time.

In the excluded area, comprising 64,908.22 acres, 51 percent of the

land is first rate for agricultural purposes, with 47 percent considered first and second rate, or second and third rate, with only 2 percent fourth rate. In the reservation area of approximately 105,839.30 acres, 69 percent of the land is first rate, 29 percent second rate and only 2 percent third rate.

North Dakota has a four season climate. The average growing season in Benson County is 109 days, with an average annual precipitation of 15.79 inches and average annual temperature of 39.4 degrees. The other counties, where small portions of the subject lands are located, have growing seasons slightly longer than Benson and enjoy slightly more precipitation. The amount of rainfall is uncertain in any given year. Consequently, in North Dakota precipitation is considered the most important single climatic factor, as sufficient rainfall, especially in the crop season, is vital to those dependent upon the soil.

The climate, topography, soil, and native vegetation, together encourage a farming program broadly devoted to wheat and other grains in this temperate plains area, but successful production is in direct ratio to rainfall. Other important factors determine the use of the land, such as transportation, wheat prices, cash inflow into the state, interest rates and cash reserves of the settlers for poor farming years.

The entire area of the subject land is basically agricultural, varying between level to rolling cropland, to the steeper grazing or pasture areas, largely unsuited for crops. There are some hardwood timber areas and marsh lands interspersed throughout the reservation and excluded areas. An 1887 report of the Commissioner of Immigration of the Terriotry indicated that

"nearly all" of the soil in Benson County was susceptible to cultivation. Thus, the highest and best use of the land was for agriculture.

X.

The plaintiffs have asserted that they were the beneficial owners of the land opened for disposal under homestead-townsite laws, and that such ownership was effective until they were divested of title. Plaintiffs further assert that they did not sell the land to the defendant by the 1904 Act, which specified that the defendant was a trustee, to dispose of the lands and to pay the proceeds to the plaintiffs. Thus, plaintiffs contend that the subject lands were "surplus lands," with title in the United States only in trust for the Indians until the lands were disposed of by homestead procedures or by sale, and that therefore they are entitled to the value of the land with any improvements, including those made by settlers before the valuation date (i.e., the date of patent).

In the case of United States v. Northern Paiute Nation, 183 Ct. Cl. 321 (1968), the Court of Claims concluded that the Indian plaintiffs were not entitled to the value of improvements made on their land in good faith by others asserting an interest in the land. Id. at 340-42. In Washoe Tribe v. United States, 21 Ind. Cl. Comm. 447 (1969), this Commission relied on the Northern Paiute decision in determining that the tribe could not recover for improvements placed on its land by the taker, and that improvements placed on its land by miners were to be treated as if placed there by the government. Id. at 450. We therefore

conclude that plaintiffs may not recover the value of improvements placed by settlers on plaintiffs' land in this case, and reject plaintiffs' contention in this regard.

XI.

Defendant refers to the disposal of large tracts of land, stating that such tracts must be subdivided and sold over a long period of time, involving surveying and development costs, taxes, insurance, commissions, interest loss and other charges. Defendant concludes that Items 2(a) and 6 qualify as such tracts, and that the valuation of these items should be reduced by 50 percent for size.

In Nez Perce Tribe v. United States, Docket 175-B, 13 Ind. Cl. Comm. 184, 244-45 (1964), aff'd in part, rev'd in part on other grounds, 176 Ct. Cl. 815 (1966), cited by defendant in support of its contention, the Court of Claims considered the questions of discounts as applied to an unallotted tract of reservation land, totalling 549,559 acres, located in an undeveloped, remote, and virgin territory. The Court stressed the difficulties involved in converting the land in saleable tracts, due to size and remoteness, and concluded that certain discounts were appropriate, specifically a 20-25 percent discount for remoteness and inaccessibility, and a 20-25 percent discount for size.

Items 2(a) and 6 herein, approximately 60,000 and 90,000 acres, respectively, were located in an area where the great land boom of 1879-1886 was a reality, with continuing demand for land in a comparatively well developed, readily accessible area, popular as one of the best wheat growing

regions in the United States. These two tracts were not, moreover, disposed of as units. Rather, they were disposed of under homestead laws in separate 160 acre parcels over a number of years. The two valuation dates, as we have indicated above, are only medians of numerous dates of patent for 160 acre lots. The Nez Perce decision concerning discounts for size is not applicable to the facts of the instant case, and we therefore reject defendant's contention.

XII.

In valuation of the excluded and reservation lands, the appraisers, William H. Muske (plaintiffs) and Gordon E. Elmquist (defendant), utilized detailed studies of contemporaneous and comparable private sales of land. Practically all of the sales were transfers of the lands in suit. Thus, conclusions were reached concerning the fair market value of the subject lands on the pertinent dates in question. The appraisers used some 1,057 comparable sales as recorded in Benson and Eddy counties from 1895 to 1915. Each appraiser eliminated over 400 of the sales which they deemed for various reasons to be unreliable in meeting acceptable criteria of comparability.

Although the two appraisers started with the same comparable sales data, they reached different conclusions. However, it is to be noted that both appraisers concluded that the market value is slightly in excess of $2,000,000.00. The difference in their valuation totals for the unimproved lands is only approximately $190,000. The figures are as follows:

Item	Disposal	Acres	Value Date	Value without buildings or other improvements	
				Plaintiffs	Defendant
2a	Homestead, etc.	59,143.68	1/1/97	$ 402,347	$ 375,000
2b	State institutions	269.99	1/7/97	2,200	1,800
2c	" "	1,903.70	10/10/95	12,100	7,100
2d	School sections	1,280.00	2/5/85	3,500	4,500
2e	" "	2,310.85	2/23/84	6,700	8,000
3a	" "	5,774.01	7/15/04	81,600)	129,000
3b	" "	6,713.94	7/8/04	87,225)	
4	Agency, church mission, Indian school reserves	2,433.75	6/2/04	38,950	23,200
5	Sully's Hill	779.45	6/2/04	7,000	4,700
6	Homestead, etc.	90,138.15	1/1/10	1,701,092	1,600,000
	TOTAL:			$2,342,714	$2,153,300

The difference between the appraisers' totals occurs chiefly with respect to the two large tracts, Items 2(a) and 6. Mr. Muske found that consideration of unimproved land sales alone did not produce a dependable indication of the market value of those items, and so included sales of improved lands, discounted for improvements. Mr. Elmquist determined which sales involved land with improvements by utilization of county records, General Land Office survey data, and a 1910 platbook, and excluded from the comparable sales data all transactions involving lands with improvements.

Defendant's appraiser, by omitting from consideration sales of improved lots, omits sales of the most desirable land. Thus his conclusions tend to be biased toward a valuation slightly lower than is correct.

The comparable sales selected by plaintiffs' appraiser, including sales of both improved and unimproved land, represent a wider cross section of the land under consideration here. Improved land must be considered along with unimproved land, for the "best land" is often that land which is first improved by the settlers. Appropriate deductions then must be made for buildings or other improvements to such land included in comparable sales.

Plaintiffs' appraiser based his calculations as to deductions for buildings on census data. Census data is subjective and open to error, and a valuation based on such data is not wholly reliable. See Nez Perce, supra. However, given the lack of a better basis for estimating the proper discount for improvements, it is not unreasonable to take census data into account. Three Affiliated Tribes of Fort Berthold Reservation v. United States, Docket 350-F, 28 Ind. Cl. Comm. 264, 276 (1972).

However, the census data does not show the value of improvements to the land other than buildings, for example, breaking the land, fencing, wells and access. Although the parties disagree on the proper method of computing the value of these improvements, the sum of plaintiffs'

appraiser's deductions exceeds the sum of defendant's appraiser's deductions. We therefore hold that plaintiffs' appraiser's computations are acceptable.

We consequently conclude that plaintiffs' appraiser's valuation method is persuasive, and that on the respective valuation dates the Item 2(a) lands had an unimproved value of $402,347, and that the Item 6 lands had an unimproved value of $1,701,092.

With respect to the appraisal of the remaining items herein, except Item 1, the defendant's appraiser made deductions from the value of "unimproved" land. We conclude that such deductions would not apply to land chosen by the appraiser as unimproved. We find that the evaluations as made by the plaintiffs' appraiser, based on comparable sales of unimproved land, without deductions for improvements to the land, are indicative of the true value of the subject tracts. We adopt them as our findings. A recapitulation of the value of all items, as determined by the Commission, is set forth hereinafter under XIV.

XIII.

This leaves for determination, among other things, the rental value of 11,313.08 acres of reservation land which was utilized by the United States Army as a military reservation from on or about July 17, 1867, until abandonment of the fort on or about October 1, 1890, a period of approximately 23.25 years. The parties have agreed that the median date of rental loss is January 1, 1880.

Most of the Fort Totten land was about equally divided between crop and pasture, but also included were about 1,311.59 acres of timber

and about 620 acres of marshlands. The State of North Dakota has a limited supply of timber, and this area included one of the few tracts of timber in the entire state. The tract's proximity to the lake, with timber to afford protection and fuel in the winter, and with fish and game, created a favorable site for the fort and for the maintenance of troops.

The defendant's appraiser found that the value of the land in the Fort Totten area was $2.50 an acre on the median date of loss; that the prevailing interest rate with respect to land sales in 1877 and 1883, as well as 1877 to 1908, including 1880, was 7 percent; and that while rental data was not available for this period in North Dakota, it was reasonable that a fair rental would be a return at the prevailing rate of interest on the value of the land if converted into money. Thus, he computed that the total value of 11,313.08 acres, at $2.50 an acre, would be a sum in the total amount of $28,282.70, rounded to $28,500.00; and that 7 percent interest for 23 years on this sum would total $45,S85.00, rounded to $46,000.00, as a fair rental for the period in question.

The plaintiffs' appraiser utilized the same approach to evaluate the fair rental value of the land. He concluded that due to the favored position of the reservation on the lake, with extensive timber, the value of the land was $3.00 an acre on the median date of loss. The appraiser concluded that a 10 percent rate of interest prevailed in 1870 and 1873; that the fair rental value was 30 cents per acre per annum; and

that computing such sum for 24 years on 11,313.08 acres, resulted in a fair rental value for 24 years of $81,600.00.

The Commission has determined that there are no comparable rental figures available for land in this area during the period in question; that the value of the land as adopted by findings of the plaintiffs' appraiser at $3.00 an acre is fair and reasonable, due to the favored location of the military reservation on the lake; and that the prevailing rate of interest on the median date of loss was 7 percent. Thus, the 11,313.08 acres, at $3.00 an acre, had a value of $33,939.24 in 1880; and annual interest at 7 percent results in the yearly rental of $2,375.75, with the total sum of $55,236.19 hereby determined to be a fair rental value of the reservation land held by the United States Army for approximately 23.25 years.

XIV.

Based on the entire record, and for the reasons heretofore detailed, the Commission finds the various items of the subject lands had, on the respective valuation dates, fair market values as follows:

Item	Disposal	Acres	Valuation Dates	Value without buildings or other improvements
1	Rental military reserve	11,313.08	1/1/80	$ 55,236.19
2a	Homestead, etc.	59,143.68	1/1/97	402,347.00
2b	State institutions	269.99	1/7/97	2,200.00
2c	" "	1,903.70	10/10/95	12,100.00
2d	School sections	1,280.00	2/5/85	3,500.00
2e	" "	2,310.85	2/23/84	6,700.00
3a	" "	5,774.01	7/15/04	81,600.00
3b	" "	6,713.94	7/8/04	87,225.00
4	Agency, church, mission, Indian school reserves	2,433.75	6/2/04	38,950.00
5	Sully's Hill	779.45	6/2/04	7,000.00
6	Homestead, etc.	90,138.15	1/1/10	1,701,092.00
	TOTAL			$2,397,950.19

XV.

As discussed previously, the lands "taken" temporarily for a military reservation, or, for transfer to homesteaders or purchasers, or public and charitable purposes, were taken in contravention of a Fifth Amendment to the Constitution of the United States. Where there is a failure to pay just compensation for lands taken in contravention of this amendment, interest will run on such claims against the United States. United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); Nez Perce, supra, 176 Ct. Cl. at 829.

Interest is a part of the just compensation. "Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added." United States v. Creek Nation, 295 U.S. 103, 111 (1935). Thus, the question must be resolved as to what constitutes a "reasonable rate" or what other standard is suitable in the light of all circumstances.

Plaintiffs contend that 4 or 5 percent interest unjustly discriminates against Indian tribes because most litigants in all other Federal courts of original jurisdiction receive 6 percent; that only tribal claimants are subjected to the impact of the 4 percent retroactive features; and that these rates violate the impersonal call of the Fifth Amendment for just compensation, which is without regard to the identity, status or business ability of the owner, and without regard to his relationship to the United States.

The defendant contends that just compensation, and hence interest, is not an issue in the case, but that if the Commission determines that the subject lands were taken under the Fifth Amendment, the question of proper interest has been decided. The proper rate of interest was established in the case of Rogue River Tribe v. United States, 116 Ct. Cl. 454, 486 (1950), cert. denied, 341 U. S. 902 (1951), where a 5 percent rate 1934, and 4 percent thereafter from 1934 to the date of judgment, was all

The Commission recently decided a case, very similar in nature to the instant case, whereby the rate of interest was determined to be 5 percent from value to the date of settlement. Fort Berthold, supra, 28 Ind. Cl. Comm. at 298-301, and Finding 50(e), at 323. Accordingly,

the Commission hereby determines that a rate of interest of 5 percent will be applicable as the measure of just compensation in this proceeding.

XVI.

Plaintiffs are entitled to recovery from defendant under Clause 1, Section 2, of the Indian Claims Commission Act. The Commission having determined the fair market value of the several parcels involved on the respective dates of valuation, and the measure of just compensation, the case will now proceed for a consideration of payments made by the defendant, and allowable offsets.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner