BEFORE THE INDIAN CLAIMS COMMISSION

THE YANKTON SIOUX TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 332-C
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: August 31, 1978

Appearances:

Angelo A. Iadarola, Frances L. Horn, John M. Facciola, Charles A. Hobbs and Robin A. Freidman, Attorneys for Plaintiff, Wilkinson, Cragun and Barker were on the briefs.

Craig A. Decker, with whom was Assistant Attorney General James W. Moorman, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

The central issue before the Commission in this docket is the extent of the defendant's liability, if any, to the Yankton Sioux Tribe for the cession of its interests in certain lands pursuant to the provisions of the Treaty of April 19, 1858, 11 Stat. 743.

The lands in question are two contiguous tracts, one, an 11,168,371 acre tract located in the southeast quadrant of the state of South Dakota, north and east of the Missouri River and east of the Big Sioux River, the other, an enormous tract of land of some 60,308,000 acres on

the west side of the Missouri River whose boundaries include the western half of South Dakota, the northwest corner of Nebraska, and smaller portions of eastern Wyoming, southeastern Montana and southwest North Dakota.

In earlier proceedings this Commission determined that, as of February 16, 1859, the effective date of the 1858 treaty of cession, the Yankton Sioux were the aboriginal owners of the smaller tract, more readily identified as the "Royce 410 lands" or "Royce 410 area", 24 Ind. Cl. Comm. 236 (1970), and that the tribe held an undivided 7 percent interest in the larger 60 million acre tract, better known as the "Sioux Fort Laramie lands." 15 Ind. Cl. Comm. 577 (1965), 24 Ind. Cl. Comm. 147 (1970), 40 Ind. Cl. Comm. 454 (1977), 41 Ind. Cl. Comm. 160 (1977).

Plaintiff claims that under the 1858 treaty the United States paid the Yankton Sioux tribe an unconscionable consideration for the relinquishment of its tribal interest in the above lands and that it is entitled to additional compensation from the defendant to the tribe of $28,875,000. As the plaintiff tribe sees it, the Royce 410 lands were worth $20,715,000 in 1859 and the Yankton Sioux interest in the Sioux-Fort Laramie lands had an 1859 fair market value of $8,160,000.[1/] The

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1/ The above figure is based on a 48 million dollar 1859 fair market value for the Sioux-Fort Laramie lands and a 17 percent Yankton Sioux interest therein. However, plaintiff's proposed findings of fact and brief in this docket were filed prior to our most recent determination that the Yankton Sioux had only a 7 percent undivided interest in the Sioux-Fort Laramie lands. In Docket 74, Sioux Nation of Indians v. United States, 38 Ind. Cl. Comm. 409 (1976), the Commission had occasion to value the bulk of the Sioux-Fort Laramie lands outside of the Great Sioux Reservation. At that time we concluded that in 1869, the Sioux-Fort Laramie lands consisted mostly of grazing land worth about $0.78 per acre with the balance being agricultural land valued at $1.76 per acre.

plaintiff tribe would also deny the defendant any offsets against the above values, be they payments on the claim or gratuities.

The defendant concedes liability in this docket but says that it owes the plaintiff tribe only an additional 2.2 million dollars or 2.9 million dollars depending on how the Commission decides the defendant's offset claims. The defendant fixes the 1859 value of the Royce 410 area at $4,170,000, and the Yankton interest in the Sioux-Fort Laramie lands at $2,040,000.[2/] From the above values the defendant wants offset credits of either $3,261,285.22 or $4,020,554.29. In any event, the gross disparity between the 1859 land value estimates as suggested by the parties leaves the Commission no choice but to search the record for more reasonable figures between these extremes.

Despite the 1858 Yankton Sioux treaty, only the Royce 410 area was free of Indian title. The bulk of the Sioux-Fort Laramie lands west of the Missouri River still remained the principal home and hunting grounds of the "Sioux or Dakota Nation", and would remain so until the ratification of the 1876 Sioux agreement by the Act of February 28, 1877, 19 Stat. 254.[3/]

In 1859, the Royce 410 area is presented as a large glaciated, relatively flat but gently rolling featureless plain whose minimal relief

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2/ Like the plaintiff, the defendant had filed its proposed findings and brief in this docket prior to the Commission's determination that the Yankton Sioux had only a 7 percent undivided interest in the Sioux-Fort Laramie lands.

3/ References to the "1876 Sioux agreement" or "1876 Agreement" in this case are for identification purposes only. The Commission has already determined that there was never any valid 1876 agreement between the Sioux Nation and the United States with respect to a Sioux cession of the Black Hills portion of the Great Sioux Reservation. The extinguishment of Sioux interests in the Black Hills was accomplished under the Act of February 28, 1877, supra. Sioux Nation of Indians v. United States, Docket 74-B, 33 Ind. Cl. Comm. 151 (1974).

rarely exceeded 30 feet or so except along its rivers and streams. The Missouri, James, and the Big Sioux were the major rivers draining the subject tract. Only the Missouri River could be considered navigable. In severe drought conditions both the James River and the Big Sioux River have been known to dry up completely. A smaller river, the Vermillion, empties into the Missouri River near the town of Vermillion in the southeast corner of the tract. In addition to the rivers and streams there are some inland lakes and ponds.

Annual precipitation averages 17 to 25 inches in the subject tract. Snow accounts for 25 percent of the annual precipitation and accumulations of 35 to 50 inches of winter snow are a common occurrence. The annual temperature averages 50° with mean summer temperatures in the 70° to 73° range and mean winter temperatures varying from 15° to 24°. A relatively short growing season is sandwiched between the last spring freeze, usually in May, and the first fall freeze around the end of September.

Soil conditions in the subject tract are ideally suited for agricultural pursuits. The soils predominantly "glacial till" can be rated good to excellent. Throughout the tract are found thick stands of several varieties of nutritious grasses valuable for grazing. In contrast, timber is very scarce with limited stands found along the river beds. The richest and most desirable of the Royce 410 lands would be the bottom lands in the southeast corner of the tract. The southeast corner of the tract was also the most accessible to the prospective settler, the Missouri River offering an immediate avenue of access. Steamboat traffic had been

moving up the Missouri River for a number of years prior to the 1858 Yankton Sioux cession. The future townsite of Yankton did provide an excellent landing site on the Missouri River. Penetration into the interior of the tract would have required use of Indian trails since there were no roads into the subject tract at this time. In 1859, the Royce 410 lands were best suited for subsistence homestead farming in the southeast portion of the tract with the balance of the area more suited for a combination of a general farming and grazing.

The plaintiff tribe relied upon Mr. Neil A. Thomas, an appraiser from Denver, Colorado, to establish an 1859 fair market value for the Royce 410 lands and the Sioux-Fort Laramie lands. Mr. Thomas submitted an appraisal report and also testified for the plaintiff tribe in support of his value conclusions. As a result of his efforts, Mr. Thomas concluded that in 1859, the agricultural lands in the Royce 410 area were worth $20,075,000 or $1.80 per acre. He also was of the opinion that potential townsites in the subject tract were worth an additional $640,000.

In valuing the Royce 410 area, Mr. Thomas adopted a somewhat modified comparable sales approach wherein he set up a 12 year (1859-1870) sales program aimed at subdividing and retailing the entire tract to small purchasers. The key element in establishing a wholesale market price for the subject area was Mr. Thomas' $4.60 average per acre retail price, or sales index, for the subject lands over the 12 year period.

To reach a $4.60 retail sales index figure for the subject tract, Mr. Thomas relied upon data gathered from three groups of private land

sales. First he selected a group of private land sales from four counties in northeast Nebraska, which lands are situated on the south side of the Missouri River opposite the Royce 410 lands. The average sales price for these Nebraska lands was $2.30, and the average sales date, 1858. From western Iowa, he selected sales in Woodbury County and three adjacent counties on the east side of the Big Sioux River. The Woodbury County land sales reflect an average per acre price of $3.86, the other Iowa land sales, $3.06 per acre. The average dates of sale for the Iowa lands was 1858. Finally, Mr. Thomas turned to post-1858 treaty sales in the subject tract. There he selected private land sales from Bon Homme, Clay, Union, and Yankton counties in the southeast corner of the subject tract. These Dakota land sales show an average per acre sales price of $5.06 and an average sales date of 1867.

Mr. Thomas made an upward adjustment to compensate for the difference in price with the subject tract. This difference resulted from a land classification operation performed on the subject tract by Dr. Thomas M. Griffiths, a geographer and another member of the plaintiff's appraisal team. Based upon an aerial inspection of the subject tract and present day usage of the lands, Dr. Griffiths concluded that 60 percent of the subject tract consisted of "Class A Land," 28 percent is "Class B Land," and 12 percent is "Class C Land." On the basis of "current land use information" the three types of land are depicted in Mr. Thomas' appraisal report as follows:

Class A Land: Western corn belt. Intensive livestock feeding, hogs, dairy, poultry production. Corn, oats, soybeans, main crops. Wheat, flax, and barley may be important cash crops in peripheral parts of the area. Average annual rainfall from 20 inches to 26 inches.

Class B Land: Transition area between cash grain on the north and west and livestock ranching on the south and west. Cash grains, principally wheat in the north. Beef production dominates in the southwest. Average rainfall from 18 inches to 22 inches.

Class C Land: Transition area. Wheat is the dominant crop. About 60 percent of the land is in pasture and hay. Average annual rainfall from 18 inches to 20 inches.4/

Mr. Thomas was of the opinion that the Nebraska and Iowa lands with the exception of Woodbury County, Iowa, were equivalent to the Class C and Class B lands in the Royce 410 area.

To his projected $4.60 per acre average retail sales price for the Royce 410 lands, Mr. Thomas applied a cumulative 57 percent discount to cover such items as improvements, term sales, survey and administrative costs, size of the subject tract and a reasonable profit. The resulting $1.98 per acre wholesale price for the best lands in the subject tract was further adjusted to accomodate Dr. Griffiths' land classification figures. The final figure was $1.80 per acre as the 1859 fair market value for the Royce 410 lands.

4/ Pl. Ex. A-1, Volume 1, p. 91, 92.

After giving due consideration to Mr. Thomas' appraisal report and his testimony, the Commission has concluded that, except for the valuation of several townships sites discussed herein, his 1859 evaluation of the Royce 410 lands is not supported on the record. The main fault with Mr. Thomas' appraisal is that he has relied too much on post-1859 sales data and kindred evidence in order to forecast an 1859 value for the subject lands. Over 65 percent of the private sales data of record involves post-1859 transactions. Obviously these and other data relative to modern day agricultural uses of land were not available to the 1859 hypothetical purchaser of the subject tract. The proper role of such post cession treaty land sales data is to confirm a value conclusion not to forecast one. Iowa Tribe v. United States. 5/ We have also taken notice of the small sampling of private sales from Iowa which Mr. Thomas heavily favored. According to his appraisal report the Iowa land sales represent only 5 percent to 10 percent of the recorded transactions for the time periods involved. Use of such a small sample of select sales can raise more questions than provide answers about the conditions of the Iowa private sales market. We realize, of course, that the plaintiff's appraisal witness has attempted to develop the most optimistic of land markets for the 1859 period. However, when a few selected sales are woven into a convenient formulae that lead to precise value conclusions, we deem the evidence too speculative.

5/ Docket 153, 22 Ind. Cl. Comm. 285, 405 (1970).

Even the average per acre prices taken from Mr. Thomas' Woodbury County, Iowa, samples leave something to be desired. For example--there are 30 usable private sales taken off of tract book "A" for the years 1858-59 wherein it shows a total of 5,207 acres being sold for $16,271, or at an average per acre price of $3.14. If four of the transactions totalling 320 acres are eliminated, the remaining 26 sales average out at $2.54 per acre. An even more striking sample is the group of transactions selected from tract book "B". In this ample, 32 private sales are listed for the years 1857-58 wherein it shows that a total of 5,846 acres were sold for $22,069, or at an average price of $3.78 per acre. By removing just two sales totalling 200 acres, the remaining 30 transactions average out at $2.66 per acre.

We also must reject, as exaggerated, plaintiff's conclusion that eight sites in the Royce 410 lands should be valued as townsites. There is support in the record for valuation of a few areas as townsites, but not eight, and not for the aggregate valuation of $640,000 that plaintiff suggests.

Mr. Vern A. Englehorn, an appraiser from Phoenix, Arizona, was the defendant's expert witness on value. Mr. Englehorn filed an extensive appraisal report with the Commission and also testified in support of his value conclusions.

In valuing the subject tract, Mr. Englehorn followed a comparable sales or market value approach. However, in the final analysis, his comparable sales fall into two categories, land in north central Iowa

that was purchased just prior to 1859 with the use of discounted military scrip at roughly $0.60 per acre, and lands that were sold in 1864 in southeast Nebraska for $0.42 per acre through the use of agricultural college scrip. Such a minimal sales index of value which was further discounted (10 percent for size and 10 percent for location and rainfall) produced a minimum 1859 value for the subject tract. We think Mr. Englehorn's failure to consider the other relevant sales data of record is fatal to his 1859 value conclusion and we have rejected the same as not supported by the evidence.

The Commission has concluded from all the evidence that the 11,168,371 acres in the Royce 410 area had an 1859 fair market value of $13,557,477.

In settling on this figure the Commission made certain preliminary determinations that we believe are reasonable, are supported by the evidence, and generally reflect the 1859 market conditions that would have influenced the hypothetical purchaser of the subject tract. Despite evidence in the record of modern day analytical and statistical data relative to soil conditions and land usage, we believe that the prospective purchaser of the subject tract in 1859 would have viewed the Royce 410 lands as generally comparable with the adjoining land in northeast Nebraska and western Iowa. We have therefore given due weight to the limited number of private land sales in these neighboring areas that occurred at or prior to the 1859 valuation date. We also know that these private land sales occurred at a time when there was considerable quantity of nearby public land for sale at $1.25 per acre.

The record shows that, apart from townlot sales, the pre-1859 private sales of small tracts of farmland in Nebraska averaged out at slightly less than $2.00 per acre. In western Iowa, especially in Woodbury County, similar private land sales show an average per acre price of nearly $3.25 per acre.

The higher average per acre sales price for the Woodbury County and all Iowa sales can be attributed in part to a higher and broader based improvement factor than the one involved in the Nebraska land sales. Iowa, of course, had been a state since 1846. Public land sales had done well in eastern and central Iowa in the 1830's and 1840's. Iowa Tribe v. United States, supra. By 1850 there were almost 200,000 people in Iowa and by 1860 nearly 675,000. The improvement factor for the Iowa land sales would therefore encompass more than the ordinary improvements made by the land owner since it would include those public improvements that are generated by state and local government such as new roads, bridges, schools, public buildings, etc. In Nez Perce Tribe of Indians v. United States, the Court of Claims suggested an improvement discount[6/] in the range of 25 percent to cover what it termed the "real" cost of improving the ceded lands where it found that the comparable improved lands had premium value. The broadened improvement discount factor in Nez Perce was intended to make more meaningful the comparison between the ceded lands to be valued and the comparable improved lands. In the

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6/ 176 Ct. Cl. 815 (1966), affirming in part, reversing in part, Docket 175-B, 13 Ind. Cl. Comm. 184 (1964).

instant case the public improvement factor present in the comparable Iowa lands is not present in the subject lands. Thus, when compared to the subject lands, the Iowa lands have premium value above that brought about by any actual improvements made by the landowners. Under these circumstances a significant improvement discount is justified.

The question is: how much of a discount is warranted?

As the plaintiff has aptly noted, the parties have no evidence of the actual costs of improvements in this case. This is the normal situation in practically all cases where fair market value is premised for the most part on comparable private sales data that involves small tracts whose locale and price range suggest the presence of improvements. Without any evidence of the actual value of the improvements in the comparable sales data, other methods are still available upon which reasonable estimates of the percentage of improvement value can be predicated.

The plaintiff has concluded that the contemporaneous comparable sales data calls for no more than a 5 percent discount for all improvements, be they structures on the land, the costs of breaking the sod and preparing the land for cultivation, or the presence of public improvements such as roads, schools, bridges, and the like. Plaintiff's suggested 5 percent maximum discount is the work product of Mr. Thomas, plaintiff's appraiser. As explained by the plaintiff, Mr. Thomas uncovered some "archival assessors' records" from Bon Homme, Douglas, and Charles Mix counties, South Dakota, in the 1890's--about 35 years after the valuation date. Then, on the basis of these assessors' reports plaintiff's witness approximated the percentage

of the sale price of land that was attributable to improvements. What Mr. Thomas' calculations ultimately showed was that improvement values represent only 2.2 percent to 3.2 percent of the overall assessment value or sales price of these particular properties in these particular counties during this particular period. As an accommodation for improvements other than "structures" Mr. Thomas raised the overall discount figure to 5 percent, a figure which plaintiff freely characterizes as "generous." Having mathematically determined a 5 percent improvement discount factor, the plaintiff applied it without qualification across the board to the 1859 comparable sales data, reasoning that,

> it is uncontrovertable that land in 1859 could not possibly have been more improved than it was in 1890, yet Mr. Thomas applied the 1890 data to 1859 without downward adjustment. 7/

While the above statement may have some merit with respect to the land in those three counties in South Dakota as of some earlier date, we have serious doubts as to its efficacy elsewhere. As a matter of fact we are unable to see any relevancy whatsoever between the 1890 South Dakota tax assessors' data and the 1859 comparable private sales data from Nebraska and Iowa.

The defendant has taken a different tack in discounting the comparable sales for possible improvements. Defendant has cited the contemporaneous cost of making specific improvements to land, such as labor costs for breaking sod, building houses, barns, fencing, digging wells, etc. These are discount factors that the Commission has certainly taken into

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7/ P. 35, "Plaintiff's Requested Findings of Fact on Value and Brief. Vol. II"

consideration in the past in dealing with the problem of improvement discount. Sac and Fox Tribe of Indians, et al. v. United States, 20 Ind. Cl. Comm. 439, 478 (1969). However, the defendant's application of these cost factors in this case seemingly results in an improvement discount of more than 70 percent, a figure that the plaintiff challenges as excessive, and we think, rightly so.

The fault with the defendant's discount factor is that it is based upon a dubious assumption that only land purchased in the private market at the lowest prices, to wit, near the $1.25 per acre government price, can be presumed to be unimproved land. With such a low average per acre figure for unimproved land as a base, it is obvious that adding a $200 house to a 160 acre tract originally purchased at $1.25 to $1.40 per acre results in a 47 percent to 50 percent improvement discount factor. The addition of any other improvements to the same tract will, of course, raise the discount factor even more. Such examples are only illustrative of the problem of estimating improvement discounts in the absence of real evidence of the extent and value of the improvements in the comparable sale lands and is so whether we choose to follow the plaintiff's method or the approach adopted by the defendant.[8/]

8/ The example involving the $200 house also demonstrates the vulnerability of the plaintiff's 5 percent minimal improvement discount figure. Thus, if 160 acres of the subject lands are purchased at plaintiff's suggested $4.60 per acre retail price and the house is included in the sale, it represents 27 percent of the overall value of the property; if the house is a post sale addition to the land, it would represent 21 percent of the overall value of the property.

In the absence of any real documentation upon which to formulate an improvement discount figure, the Court of Claims in Nez Perce has given its approval to another tried and true method, namely, conjecture, ". . . the reasonableness of which is largely a matter of common sense."[9/] Without any other recourse, and in order to reach a compromise between the extremes urged upon us by the parties, the Commission is of the opinion that 25 percent represents a reasonable improvement discount figure in this case. Thus, the value of the Iowa lands minus the improvement factor is $2.44 per acre.

Improvements were much less of a factor in Nebraska at this time than they were in Iowa. Whereas Iowa was being developed, Nebraska still lay beyond the pale of most settlers and developers. In 1860, the population of the portion of Nebraska where Indian title had been extinguished was only 28,841, or approximately 4 percent of Iowa's population. We feel that, on the whole, improvements in Nebraska at this time were negligible. Therefore, we do not deem it warranted to deduct any improvement factor from Nebraska lands.

The combined overall average, then, for the Nebraska and Iowa sales is roughly $2.18 per acre for the 1859 period.

If a purchaser of the subject tract intended to compete in the Nebraska and Iowa private land market he would have to make certain downward adjustments in the $2.18 average per acre retail sales price in order to fix his price for the lands in the subject tract.

9/ 176 Ct. Cl. 815, 825.

With this in mind the Commission is of the opinion that a 25 to 30 percent discount for size and location of the subject tract is reasonable. Even under the most optimistic conditions it is difficult to imagine an active entrepreneur actually retailing in small tracts all the saleable Royce 410 lands in less than 15 to 20 years. Congressional enactment of the 1854 Graduation Act would have put our hypothetical purchaser on notice that the largest landowner of all, the United States, was experiencing difficulty in selling off the public domain at $1.25 per acre after such public lands had been in the market for 10 or even 20 years. Our 1859 hypothetical buyer would also have been aware of the fact that the subject lands were not in the direct path of the new westward migration that was moving across Nebraska. Some sort of sales promotion or related activity would be needed to focus attention on the lands in the subject tract.

In addition to the above, there should be at least a minimum discount of 10 percent to cover managerial and other administrative costs including financing. Finally, the hypothetical purchaser must realize a profit. However, a small 10 to 12 percent margin seems more realistic. We are therefore talking about a cumulative discount of roughly 46 percent to our $2.18 per acre retail price. This leaves a wholesale per acre price of $1.18 per acre. We think this a reasonable compromise between the value figures suggested by the parties, and one that is fully supported on the record.

Finally, with regard to potential townsite locations in Area 410 lands, we believe that three small tracts should be valued as townsites.

Shortly before the 1858 Yankton Sioux cession several groups of land speculators in Iowa had been promoting new townsite locations in the soon-to-be-ceded area. The two most promising sites were at Sioux Falls on the Big Sioux River and at the present town of Yankton. Vermillion, on the bottom lands along the Missouri River, and a one-time trading post, was a third location rich in potential. In 1858, following the conclusion of the 1858 treaty, a large number of speculators, squatters, and townsite developers did invade Royce Area 410 lands despite the risk of resistance from the Sioux and ejection by the Army. The Sioux and the military did, in fact, drive out most of the trespassers and destroyed their dwellings and other improvements. At the future townsite of Yankton, however, which would soon become the mother town of the Dakotas once the territory was organized in 1861, a few enterprising individuals had managed to stake out individual claims in the latter part of 1858. These squatters were not disturbed by the military authorities and managed to retain their claims.

Activity in Royce 410 by town colonizers continued. The upper Missouri Land Company erected its company's site at Yankton, and the Dakota Land Company hoped to locate the capital of the new territory at Sioux Falls. These land companies attempted to erect buildings and sought to have their townsites surveyed.

It is clear from the foregoing that several townsites in Royce 410 would be easily recognized as such by a potential buyer in 1859. These

townsites would, of course, be much more valuable than the other land in Royce 410.

Plaintiff's expert would have us value eight tracts as townsites. We do not feel this is supported by the evidence, but we feel the sites of Yankton, Sioux Falls, and Vermillion should be valued as townsites.

From a survey of townsite development in nearby Sioux City, Iowa, plaintiff's appraiser has arrived at a weighted average for price per townsite lot of $225. After deducting from the calculations more than 50 percent of the lots as unsaleable, it is estimated that the anticipated revenue from Yankton would be $375,750, and from each Sioux Falls and Vermillion, $234,900. These figures are subject to further discounts for time, expenses, and developers' profits, the discounts totalling 55 percent. Taking the sum of the townsite revenues and applying this discount leaves $380,498 as anticipated townsites' sale price. The Commission feels this is the best estimation of the value of the three townsites in question.

We therefore conclude that a reasonable compromise between the value figures suggested by the parties for Royce Area 410 is $380,498 for the three townsites (1,440 acres) and $13,176,979 ($1.18 per acre times 11,166,931 acres) for the remaining land, or a total of $13,557,477.

Turning now to the Sioux-Fort Laramie lands we find that the parties are in agreement on at least one point: that, except for the Black Hills area, the 60,138,000 acres of the subject tract in 1859 was best suited for grazing purposes. The plaintiff, however, has assigned an 1859 mineral value to the Black Hills region. The defendant has pictured this same area as timbered country but of no present market value since the standing timber was inaccessible and too far from any appreciable settlements. Both parties have relied exclusively on post-1859 sales data to establish surface values for the subject tract. The plaintiff has concluded that, as grazing land, the Sioux-Fort Laramie lands were worth a minimum of $0.60 per acre in 1859. The defendant's appraisal was approximately $0.20 per acre for the same lands.

We note from the record that the 1858 Yankton Sioux treaty of cession had realized only a partial extinguishment of Indian tribal interests in the Sioux-Fort Laramie lands. It was not until the Treaty of April 29, 1868, 15 Stat. 635, coupled with the Act of February 28. 1877, supra, terminating Sioux title to the Black Hills, that final extinguishment was accomplished. Thus, in 1859, there was no open market for Sioux-Fort Laramie lands. Under these circumstances the expert witnesses on both sides relied exclusively

on post-1859 land sales in estimating an 1859 surface value for the subject tract. For his 1859 value analysis, Mr. Thomas, the plaintiff's witness, selected the Atlantic and Pacific Railraod and Union Pacific Railroad sales for the years 1884-1887, the Trinchera and Costilla estates sales of 1869 and 1871, the 1870 Maxwell Land Grant, and finally the 1883 Hat Creek Ranch sale. Mr. Englehorn, the defendant's witness, relied upon the 1874 Charles Goodnight land purchases in Texas as the basis for his 1859 appraisal. The Commission, however, has rejected the value conclusions of both expert witnesses because they are bottomed exclusively on hindsight sales data that could not have been available to a prospective purchaser of the Sioux-Fort Laramie lands.

As the Commission sees it, there was no actual market for 60,138,000 acres of Sioux-Fort Laramie lands in 1859, and there are no contemporaneous comparable sales of record. This situation would seemingly call for the value approach laid down in the case of United States v. Emigrant New York Indians, 177 Ct. Cl. 236 (1966). In Emigrant New York Indians, the Court spelled out certain physical and economic factors that should be considered in reaching a value estimate where the market value or comparable sales method is not applicable. The relevant criteria in the Emigrant New York Indians case applicable in whole or in part herein are: (a) "the prevailing economic situation and condition of the money market," (b) "the population level and physical

development of the area, along with general desirability to prospective settlers," (c) "the relative ease of accessibility to the area," (d) "the prevailing climate within the claimed tract," (e) "the fertility of the soil within the area" and finally (f) "the proximity of the land to markets, distribution centers, and transportation facilities."

Since it is conceded by both sides that the subject lands, except for the Black Hills region, could be best utilized for grazing purposes, the reference to that part of criteria (b) above, to wit ". . . general desirability to prospective settlers" is not applicable to the subject lands. In addition, certain other criteria set forth in Emigrant New York Indians, such as the extent of timber and the presence of minerals, would be of little or no probative worth in fixing an 1859 surface value for lands having a highest and best use for grazing purposes.

With the above criteria as a guide our 1859 prospective purchaser would find that the physical attributes of the subject lands were a definite plus for grazing purpose. The climatic conditions and the overall fertility of soil did produce excellent grasses for cattle and other grazing animals. Accessibility to the tract was more than adequate for the purposes intended.

On the other hand, the economic facts of life in 1859 would in the Commission's view have been a serious negative factor in the eyes of our prospective purchaser. There being no actual market for the subject

tract in 1859, he would be faced with an indeterminate holding period before being able to market his purchase. Even if it were marketable in 1859, there was no immediate demand for these lands.

With a huge 60,138,000 acre non-marketable tract of grazing land available for purchase in 1859, our prospective purchaser would be contemplating a long holding period and, therefore, a very low acquisition price. To formulate such a price he would be looking for some dollars and cents starting point or sales index of value applicable to the subject lands. The aforementioned physical and economic factors that influence fair market value do not supply a sales index of value figure. They are but necessary adjustments to be made later on.

In the absence of any apparent sales index of value, the Commission has selected the prevailing minimum $1.25 per acre price for public lands as a reasonable starting price. Knowing that $1.25 per acre will buy relatively small tracts of public land wherever situated, our hypothetical purchaser would have no illusions that he could retail larger tracts of grazing land at this same price. With this in mind substantial discounts are in order. Accordingly, under the most ideal conditions the Commission believes a minimum 25 percent discount for the size of the tract is not unreasonable, nor is an additional 25 percent discount out of line to cover lack of immediate demand and remoteness from current markets. While development costs to prepare grazing land for market would be negligible, still a minimum discount of 7 to 10 percent should be taken

to cover administrative costs including surveying. With a cumulative discount of roughly 57 percent from the $1.25 sales index figure, an optimistic, but informed purchaser, might be willing to pay $32,415,550 for the entire tract, or $0.5375 per acre. We find this to be the 1859 surface value for the subject lands.[10/]

Despite plaintiff's contentions to the contrary the Commission is unwilling to add any additional mineral value for the alleged presence of gold in paying quantities in the Black Hills region as of 1859. We have found from the evidence that in 1859, an informed purchaser of the subject tract would not have known of the presence of any gold in paying quantities until long after the 1859 valuation date. The most that could be said in 1859 is that there were only rumors of gold in the Black Hills. Plaintiff's entire 1859 mineral valuation of the Black Hills is based on the premise that undiscovered gold certainly would have been

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10/ Our 1859 evaluation herein of the Sioux-Fort Laramie grazing lands comports favorably with the Commission's earlier determination in Docket 74, Sioux Tribe, et al. v. United States, supra, that, in 1869, a goodly portion of these same grazing lands were worth $0.78 per acre. Apart from the fact that the Sioux valuation was 10 years later when the Sioux-Fort Laramie area was free of Indian title, the difference in the grazing land value figures in Sioux and the instant case can be attributed in part to the valuation approach adopted in the former. In Sioux the Commission, as did the plaintiff, utilized a comparable sales approach adjusted by the value attributed to grazing land as a result of ranching operations and the estimated cattle carrying capacity of such lands. In the instant case both sides relied exclusively upon post-1859 comparable sales.

discovered if a team of trained geologists had explored the area following the 1858 Yankton Sioux treaty of cession.

In Northern Paiute Nation v. United States, we rejected a similar attempt to establish mineral value, stating therein:

> "We cannot in making our determination enter the vast area of conjecture and speculation of that which 'might have been' if a qualified mineral evaluator had made a thorough exploration of the area and if he had observed the mineralized outcropping and if [309] he had correctly analyzed his findings and if he had been able to define or limit the extent of the underlying minerals." 11/

In Tlingit and Haida Indians v. United States, 12/ the Court of Claims, after ruling that proof of actual profits from an existing mine or prospective profits from a potential mining area establishes the mineral value of an area, went on to list "unacceptable factors" in valuing gold properties. Among these were such things as unverified reports of sales for large sums, optimistic newspaper reports based largely on the statements of owners and operators, and even the presence of low grade minerals with no significant exploration or any reasonable assurance of profitable mining. In the instant case, plaintiff's appraiser had only rumors of gold in 1859. In sum, the Court of Claims in Tlingit and Haida found that:

> "The staking of claims, newspaper accounts based largely on statements of the prospectors themselves promising specimens, are in themselves insufficient bases for the establishment of mineral values." 13/

11/ 16 Ind. Cl. Comm. 215, 308, 309.

12/ 182 Ct. Cl. 130 (1968).

13/ Ibid., p. 172.

For these reasons the Commission has rejected as pure speculation any 1859 mineral value for the Black Hills area of the subject lands.

We have already determined that the Yankton Sioux tribe had a 7 percent undivided interest in the Sioux-Fort Laramie lands as of the 1859 valuation date. With a $32,415,550 fair market value for the subject tract, the plaintiff's interest was worth $2,269,008.50. Coupled with an 1859 fair market value for the Royce 410 lands of $13,557,477, the Yankton Sioux cession of the two tracts had an 1859 value to the Yankton Sioux Tribe of $15,826,485.50.

In exchange for the subject lands the United States under the 1858 treaty promised to pay the plaintiff tribe $1,662,500 in goods and services. When compared to the 1859 fair market value of the subject lands we find the promised 1858 treaty consideration to be unconscionable within the meaning of Section 2(3) of the Indian Claims Commission Act. The defendant is therefore liable to the plaintiff in an amount measured by the difference between the 1859 value of the subject lands and the treaty consideration paid to the Yankton Sioux, less any other payments on the claim or allowable gratuitous expenditures.

The defendant's offset claims in this docket total between 2.4 and 4 million dollars depending on how the Commission decides certain expenditures made pursuant to the provisions of the 1868 Sioux Treaty and the 1876 Sioux Agreement. In support of its offset claims the defendant has introduced in evidence a three volume accounting report

prepared by the General Services Administration in addition to numerous government vouchers and related data.

It is the plaintiff's view that the defendant is not entitled to any credit for either payments on the claim or gratuitous expenditures made for the benefit of the Yankton Sioux Tribe. Plaintiff alleges that there was so much fraud, corruption, malfeasance, misfeasance, nonfeasance, and sheer incompetence on part of the Yankton Sioux Indian agents from 1859 to 1901, that the cumulative effect of such pervasive conduct warrants the Commission to find that

> "Because of it, there is no support for the conclusion that the Yankton receive the benefit of the government's expenditures."

and further,

> "The Government has not shown, in light of the historical record, which expenditures were misappropriated by government employees and which actually reached tribal members."

and therefore, the defendant, having failed to meet its burden of proof ". . . all of its offsets, both payments on the claim and gratuities, should be disallowed."[14/]

Assuming for sake of argument that the entire course of dealings between the parties prohibited the defendant from claiming any gratuitous expenditures, such conduct in and of itself is irrelevant to the issue of payments on the claim. The Indian Claims Commission Act mandates the deduction of any payments on the claim from any putative award. If the

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14/ P. 13, plaintiff's objections to defendant's proposed findings of fact and plaintiff's brief - Oct. 15, 1976.

defendant proves such legal offsets, they must be deducted. The Commission has scrutinized all the claimed legal offsets cited by the defendant and has allowed those properly supported in the record. In so doing, we have followed the prohibition spelled out in the 1974 amendment to our Act which denies any credit for those payments on the claim that involve expenditures for food, rations, or provisions.[15/] We have also rejected defendant's argument that the 1858 treaty consideration payments are not "payments on the claim" within the meaning of the 1974 Amendment. Prairie Band of the Pottawatomie Tribe of Indians v. United States, Appeal No. 6-76 (Ct. Cl., Oct. 19, 1977).

Equally without merit is the defendant's further contention that disallowance of any of the claimed legal offsets results in a double payment to the Yankton Tribe because of the prior settlement of the plaintiff's accounting claims in a companion case. Docket 332-B, 28 Ind. Cl. Comm. 367 (1972).

We have allowed the defendant a credit of $556,560.67 for payments on the claim. Since our findings of fact also include our reasons for either allowing or disallowing the claimed expenditures, it is unnecessary to repeat them in this opinion.

The matter of gratuitous expenditures puts the question of course of dealings in a different picture. The plaintiff has submitted in evidence reams of documentary and historical material in support of its charges of fraud, maladministration, etc. on the part of the United States

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15/ "Provided, That expenditures for food, rations, or provisions, shall not be deemed payments on the claim," Act of October 27, 1974, Public Law No. 93-494, 88 Stat. 1499.

in its dealings and accounts with the Yankton tribe particularly at the agency level. While only a few instances of fraud and tribal deprivation of benefits have been sustained during the post treaty years, there is much in the record to question the overall conduct of defendant's agents in their dealings and accounts with the Yankton tribe. While the Commission is not obligated to make specific findings on the question of course of dealings, we did set forth in our findings some of the more notorious practices in which the agents were apparently engaged. We need only to be convinced that, after carefully examining the nature of claim and the entire course of dealings and accounts, the sum total of events warrants either the allowance or disallowance in part or in toto of the claimed gratuities. United States v. Assiniboine Tribe of Indians.[16/] We think the circumstances in this case in good conscience warrant a denial of all the gratuitous offsets claimed by the defendant.

From a tentative award of $15,826,485.50, which is based upon the 1859 value of the Yankton Sioux interests in the Royce 410 area and the Sioux-Fort Laramie lands, the defendant is entitled to offset credits of

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16/ 192 Ct. Cl. 679 (1970), affirming, Docket 279-A, 21 Ind. Cl. Comm. 310 (1969).

$556,560.67. The plaintiff is therefore entitled to a final award against the defendant in this docket in the amount of $15,269,924.83.

John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner