

BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS, )  
 ET AL, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

Docket No. 74

Decided: April 5, 1954

Appearances:

Ralph H. Case,  
Attorney for Plaintiffs.

Maurice H. Copperman,  
with whom was Mr. Assistant  
Attorney General Perry W. Morton  
Attorneys for Defendant.

OPINION OF THE COMMISSION

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

The suit of plaintiffs is based on the Act of Congress of February 28, 1877. Plaintiffs contend that said Act took from them 7,345,157 acres of land together with other rights; that said acreage taken was a part of the Permanent Reservation described in Article 2 of the Treaty of April 29, 1868, from which valuable gold and silver mines were subsequently developed in the Black Hills region of said territory; that they received inadequate and unconscionable consideration therefor.

Plaintiffs in their original petition allege that the defendant is liable to them for said acreage and other lands and rights surrendered as follows:

1. Royalties. A fair and reasonable per cent of the value of gold, silver and other minerals extracted from the Black Hills lands from February 28, 1877, down to the date of settlement of this claim, less any deductions which this Honorable Commission may allow under the terms of the Act of August 13, 1946 \*\*\*, together with a continuing royalty on the value of the annual extraction of gold, silver and other minerals or the commuted value thereof.

2. Timber. Payment of at least \$2.50 per acre for all timber lands in Class A (within the 1868 Permanent Reservation) -- 7,345,157 acres -- together with interest thereon from February 28, 1877, to the date of settlement of this claim.

3. Unceded Lands. Payment of at least 50 cents per acre for \* \* \* 25,858,594.95 acres (which lands are designated as Class B in plaintiffs' petition), together with interest thereon from February 28, 1877, to the date of settlement \* \* \* .

4. Hunting Lands. Payment of at least 10 cents per acre for \* \* \* 40,578,123.25 acres (designated in plaintiffs' petition as Class B), together with interest thereon from February 28, 1877, to the date of settlement \* \* \* .

Plaintiffs base their claim of liability (subject to be offset by payments made to them and in their behalf over the years) upon the contention that the consideration provided in the Act of Congress of February 28, 1877, requiring the cession of land and surrender of rights, was so grossly inadequate as to be unconscionable and was not in keeping with fair and honorable dealings, and was in disregard of the duty owed by defendant as guardian to plaintiffs as its wards.

The defendant pleads several decisions and decrees by the Court of Claims and the Supreme Court as having fully adjudicated the claims asserted by the plaintiffs upon their merits and that the said decisions are res judicata of the claims asserted. The defendant also pleads that the consideration paid and promised to be paid by the defendant for the lands and rights acquired by it from the plaintiffs under the terms of the Act of February 28, 1877, was adequate compensation therefor and that it had in every way dealt fairly and honorably with the plaintiffs.

The plea of res judicata seems not to be seriously urged. In view of the decision hereby rendered on the merits, the question of whether or not the decisions are res judicata becomes immaterial.

The defendant contends that the issue as to whether or not the consideration moving to the Indians under the terms of the Act of Congress of 1877 is unconscionable is determinable by a comparison of the market or contemporary value of the lands ceded and rights surrendered at the time of their cession, to-wit, February 28, 1877, with the consideration provided by said Act of Congress.

The plaintiffs' theory of liability is that the defendant was their guardian and that as such guardian was liable to them, not for the market or contemporary value of the property at the time of its involuntary taking or cession but for what its development over the years proved its value to be; that its value by reason of the gold and silver deposits thereunder was sufficiently known in 1877 as to place upon the defendant the duty of developing it for the benefit

of the plaintiffs as the wards of the defendant, and that not having done so said defendant is now liable to the plaintiffs on the basis of what the development over the years has shown the value of its gold and silver deposits to have been. Plaintiffs admit that if the liability of the defendant is to be determined by the market value of the lands and rights at the time of their cession that they have no claim.

The only evidence submitted by the plaintiffs in support of their theory of liability is the gross value of minerals extracted from the lands involved since said lands became the property of the defendant under the terms of the Act of 1877. The other values relied upon by the plaintiffs are estimated. In this connection it is to be noted that the other values as claimed in the original petition are not urged in plaintiffs' final brief -- that filed June 19, 1953, and called an Intermediate Brief -- but that timber values are urged on a royalty basis and that the rights surrendered as to Class B and Class C lands on a rental basis. It is practically admitted that plaintiffs' claims are primarily based on the valuable minerals later extracted from the Black Hills portion of the 7,345,157 acres required to be ceded, plaintiffs contending in said Intermediate Brief (p. 8) that the "total of royalties and rentals which plaintiffs would (and should) have received from January 1, 1877 to January 1, 1953", but for the cessions and surrenders required of them by the Act of February 28, 1877, would have been \$118,912,809.00.

As contrasted with the \$118,912,809 as royalties and rents that plaintiffs allege under the proven and estimated production for minerals and rents they would have received, plaintiffs admit receiving from the defendant in actual and estimated appropriations under the terms of the Act of February 28, 1877, a total of \$57,048,106. (Intermediate Brief, p. 9).

By reason of the disparity between these figures, plaintiffs contend that they have proven that the consideration received by them under the Act of February 28, 1877, was unconscionable and that defendant is liable to them for additional compensation for the lands and rights taken from them by the defendant under the terms of said Act of Congress.

The defendant supports its contention that the market or contemporary value of the lands involved is the correct basis for determining whether or not the consideration moving to the Indians was unconscionable by citing a long line of decisions in its Memorandum filed July 30, 1953, so holding. These decisions are in keeping with what has been the uniform holdings of the Courts as the basis of the Government's liability to Indians for the taking or acquiring of their lands.

As heretofore stated, plaintiffs do not contend that the consideration received by the Indians is unconscionable if the value of the lands and rights acquired by the defendant is the market or contemporary value of same as of date February 28, 1877; but they say in the instant case that the defendant knew on February 28, 1877, that minerals in paying quantities underlay the surface of the Black Hills lands and that it was the duty of the defendant as their guardian to develop said property

as a trust for their benefit as its wards, and that not having done so it has become liable to them as its wards for a royalty on the gold and silver subsequently extracted therefrom.

If plaintiffs are correct in their contentions as to the proper yardstick by which to measure defendant's liability, which this Commission finds it unnecessary to decide, we are of the opinion that they have not shown even on their own theory of liability the right to recover. In this connection we will give consideration to the situation existing as between the defendant Government and the plaintiff Indians at the time of the passage of the Act involved; that is, February 28, 1877.

The area from which valuable mineral deposits were thereafter extracted had been set apart for the absolute and undisturbed use and occupation of plaintiff Indians by the Treaty of April 29, 1868. Under this treaty the Government assumed an obligation, among others, to provide food and subsistence for all Indians of the tribe for a period of 4 years. The population of the tribe was between 20,000 and 30,000. This obligation was fulfilled through the necessary appropriations annually for the term stipulated and was finally discharged by an appropriation of \$1,314,000 on February 14, 1873, for subsistence for the year ending June 30, 1874, -- the total amount appropriated for the 4 years being \$5,295,761.95. After that no legal obligation rested upon the Government to expend public funds for subsistence of the plaintiffs and they were at that time incapable of supporting themselves. It was known by the Indians before and at the time the treaty of 1868 was made

that the Black Hills portion of the reservation contained some gold, but the fact that the Black Hills contained gold was not known to the general public until 1874. After that date there was a tide of emigration of settlers and miners to the Black Hills region in ever-increasing numbers. Public pressure for the opening of the Black Hills for settlement and mining became very strong. Negotiations were undertaken to secure a cession or sale by the Indians of the Black Hills portion of their reservation. It proved impossible to secure as provided by Article 12 of the Treaty of 1868 the assent and signatures of three-fourths of the male adult Indians of the tribe. Finally, however, the assent and signatures of less than 10 per cent of the male adult members of the tribe were secured to an agreement which was made the basis of the Act of February 28, 1877. The chiefs and headmen of the tribe, however, were among those assenting to the terms of the agreement which were embodied in the Act of February 28, 1877.

Plaintiffs admit total appropriations made by the defendant for them under the provisions of the Act of February 28, 1877, to January 1, 1953, (actual and estimated) \$57,048,106. In addition to these appropriations the Act of 1877 gave the Indians about 917,000 additional acres of grazing land, and said Act provides a continuing obligation on the part of the defendant to appropriate and disburse such sums as should be necessary for their subsistence "until the Indians are able to support themselves." The defendant alleges that said obligation for the future, while uncertain in amount and duration, it believes appropriations in

excess of \$750,000 annually (as in the past) will be required for many more years.

At the time of the legislation which is the basis of the complaint, the Black Hills area (from which the gold and silver was extracted) was surrounded almost on all sides by white settlers; railroads were in operation, the Southern Pacific to the south and the Northern Pacific to the north, and the Missouri River carried heavy traffic in steamboats; thus facilities were open to white settlers within a short distance of the Black Hills gold fields.

Trouble had arisen in the years immediately prior thereto between the Government and certain of the Sioux Indians in connection with the survey and construction of the Northern Pacific Railroad. War was the result and during the years 1876 and 1877 military campaigns had been made against certain bands of the Sioux Indians. The famous Custer Exploration Expedition occurred in 1874 and the so-called Custer Massacre took place in July 1876. Following the Custer Exploration Expedition hereinbefore mentioned and the accounts made public in that year of the discovery of gold in that region, public pressure for the opening of the Black Hills country for mining increased. The Government through its military establishment endeavored to keep white settlers and gold prospectors out of the Black Hills territory within the Sioux Reservation but this was almost impossible. In his annual report for the fiscal year 1875 the Commissioner of Indian Affairs, reporting on the Black Hills condition, stated:



The occupation and possession of the Black Hills by white men seems now inevitable, \* \* \*

The Commissioner, in this same report, also states:

\* \* \* However unwilling we may be to confess it, the experience of the past summer proves either the inefficiency of the large military force under the command of such officers as General Sheridan, Terry, and Crook, or the utter impracticability of keeping Americans out of a country where gold is known to exist by any fear of orders or of United States cavalry, or by any consideration of the rights of others.

Said report further says with reference to the Indians:

\* \* \* They are not now capable of self-support; they are absolute pensioners of the Government in the sum of a million and a quarter of dollars annually above all amounts specified in treaty stipulations. A failure to receive Government rations for a single season would reduce them to starvation.

The report further comments with reference to the joint occupancy of the gold country by the Indians and whites, as follows:

\* \* \* So long as gold exists in the same region, the agricultural country surrounding the gold fields will be largely required to support the miners, and to attempt to bring the wild Sioux into proximity to the settlers and miners would be to invite provocations and bloody hostility.

Said report also mentions the fact that the Indians were making but little if any use of the Black Hills country.

While the treaty of 1868, as its provisions show, contemplated that the Indians, with the assistance therein provided to be rendered them by the Government, would soon become self-supporting on the reservation, the appropriation of \$1,314,000 under the Act of February 14, 1873, for the fiscal year ending June 30, 1874, was

the final obligation of said treaty for the subsistence of the Indians. Gratuity appropriations followed in the amount of \$2,350,000, but they had not become self-sustaining and would be starving unless further Government aid be provided.

Notwithstanding conditions as aforesaid, the efforts of several Commissions to negotiate an agreement in strict conformity with Article 12 of the Treaty of 1868 for the relinquishment or sale to the Government of the Black Hills had failed because more than 90 percent of the Indians refused to sell or lease the Black Hills and relinquish their hunting rights to the Government at any price. Some of the Indians were willing to lease the mining rights in the Black Hills to the Government for a consideration of \$70,000,000 or for full subsistence for every Sioux Indian (then numbered between 20,000 and 30,000) from that date, so long as the tribe existed. The agreement finally signed in October 1870 and made the basis of the Act of Congress of February 28, 1877, (which provided the consideration herein previously mentioned for the cession and relinquishments therein made by the Indians), was assented to and signed by the chiefs and headmen of the tribe but by less than 10 percent of the male adult Indians.

This Commission has taken judicial notice of the fact that the United States Government has never at any time and does not at this time require the payment of a royalty for the extraction of gold or silver from its public lands, and not until 1919 did the Government require payment of any royalty for the privilege of mining or extracting

gold and silver from the lands belonging to the Indians, -- and the royalty provided then and provided now permits the same to be as little as 5 percentum of the net value of the output of the minerals at the mine.

The negotiations over the years with the Indians showed a strenuously sincere effort on the part of the defendant Government to reach a fair basis of cession of the gold and silver producing lands by the Indians to the Government. It was obvious that the Indians could not subsist on the gold and silver that might lie buried in their hills; it was as obvious that the Indians themselves could not extract these minerals and develop commercial mines. It was equally obvious that regardless of the effort through the military or otherwise on the part of the Government to prevent the whites from emigrating into the mining territory and the development by them of the mines great hostilities would result between the whites and Indians and much bloodshed on the part of both. It was a practical necessity that the lands be acquired by the defendant and made available to the white miners, and doubtless the economy of the country was taken into consideration in the need of gold and silver bullion. These considerations together with the further fact that the Indians needed protection not only as against hostilities and their resulting bloodshed, but also from starvation by reason of lack of food -- the wild life of the region having at this time almost disappeared -- made the acquisition of the mineral lands and the payment of a fair consideration to the

Indians therefor an absolute necessity -- as much in the Indians' own interest as for any other reason.

The extent of the mineral deposits at the time were of course problematical. The prospectors were not provided with the geological and scientific information of the present date, and whether or not gold and silver of the value of 40 million or 400 million dollars or more underlay the lands involved was not determinable. Methods of mining at that time were primitive and the cost of the extraction of the minerals was almost an unknown amount.

It is obvious that no one on February 28, 1877, knew whether the consideration provided for the Indians would prove to be ten times the value of the gold taken from the hills or one-tenth of the value; but it was necessary to prevent bloodshed of whites and Indians to make lands available for mining or whatever gold and silver that could be found, and provide for the subsistence of the Indians for the future. It is obvious that no one could know whether the liability assumed by the defendant under the terms of the Act of February 28, 1877, would ever be realized by the defendant or its white citizens from the lands and rights acquired by the Act complained of. We have therefore concluded that under the circumstances and facts at that time as we find them to be, that there is no basis for a claim or claims by the plaintiffs that the compensation provided for the Indians under the Act of February 28, 1877, was inadequate or unconscionable, or that the defendant was guilty of unfair or dishonorable dealings, or failed in

its duty to the plaintiff Indians. On the contrary we think the provisions of said Act, which guaranteed the Indians funds that have amounted over the years to many millions of dollars and will provide many more millions of dollars regardless of the quantity of gold or silver that might be found in the Black Hills, were fully adequate under the circumstances required by the situation at the time.

Our Findings of Fact are lengthy and it seems unnecessary in this opinion to repeat or paraphrase any more than we have done.

WHEREFORE, the petition of the plaintiffs must be dismissed.

Edgar E. Witt  
Chief Commissioner

CONCURRING:

Louis J. O'Marr  
Associate Commissioner

Wm. M. Holt  
Associate Commissioner