

BEFORE THE INDIAN CLAIMS COMMISSION

CHEYENNE-ARAPAIHO TRIBES OF	)	
INDIANS OF OKLAHOMA, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 329
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	
THE CHEYENNE AND ARAPAIHO	)	
TRIBES OF INDIANS, et al.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 348
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: December 6, 1961

Appearances:

R. G. Wiggernhorn, John W. Cragun, John M. Schiltz, and William Howard Payne, Attorneys for Petitioners.

John D. Sullivan, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

Petitioners herein are the Cheyenne-Arapaho Tribes of Oklahoma in Docket No. 329, the Northern Cheyenne Tribe of Indians on the Tongue River

Reservation, Montana, and the Northern Arapaho Tribe of Indians of the Wind River Reservation, Wyoming, in Docket No. 348. Each of the three petitioners is a duly organized tribe of American Indians with a tribal organization recognized by the Secretary of the Interior as having authority to represent said tribe, and each is authorized to maintain this action under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, and is an identifiable tribe of American Indians residing within the territorial limits of the United States.

The petitions in this proceeding were duly filed with the Commission. Since the petitions in these cases contained claims, among others, pertaining to the cessions of the same land to the United States they were consolidated for trial by order of the Commission of May 5, 1952, following the filing of a stipulation to consolidate by the respective petitioners. Subsequently, the Commission on November 28, 1958, ordered certain additional claims set forth in Docket No. 329 to be severed and filed in a separate petition designated Docket No. 329-A.

Petitioners on August 31, 1955, filed a motion for partial summary judgment with respect to the proper construction and effect of the Treaty of Fort Laramie of September 17, 1851, 10 Stat. 749. The Commission, after considering the contentions of the parties and documentary evidence with regard to the negotiation and purpose of the said Fort Laramie treaty, made certain findings of fact on November 1, 1955, which are set forth in full in the findings of fact herein made. The Commission found that by the Treaty of Fort Laramie of September 17, 1851, "and the manner

of its negotiation and the acts and conduct of the defendant, the United States of America, immediately before and after the execution and ratification of said treaty, defendant accepted, acknowledged, ratified and confirmed petitioners' aboriginal Indian title and right of occupancy and use of the territory described in Finding 1."

Since the Commission determined the petitioners had recognized title to the area described in Finding No. 1, it was not necessary to prove exclusive use and occupancy of the area under Indian title. The action thereupon proceeded to the valuation stage wherein hearings were held and evidence received with respect to the value of the lands involved herein.

By a stipulation filed with the Commission on January 31, 1958, the parties stipulated and agreed that "the date upon which defendant acquired petitioners' interests, if any, in land described in the Fort Laramie Treaty for evaluating said land, shall be October 14, 1865."

The lands designated as "the territory of the Cheyennes and Arrapahoes" in the Fort Laramie Treaty of 1851 consist of an enormous area which the parties agree contained 51,210,000 acres situated in what are now the States of Colorado, Wyoming, Kansas and Nebraska. The lands involved will be referred to herein as the subject tract. They are located in the heart of the western part of central United States, bounded on the north by the North Platte River; on the south by the Arkansas River; on the west by the Continental Divide

of the Rocky Mountains; and on the east by a line roughly midway between the 100th and 101st meridians. Plains lands make up at least eighty-five percent of the total area; the remaining fifteen percent is composed of mountain peaks, mountain parks and mountain plateaus. The plains area has an average altitude of 4,500 to 5,000 feet and ranges from 3,500 feet on the eastern border to 5,000 or 5,500 feet at the base of the mountain plateaus. The mountain plateaus range from 6,000 to 8,000 feet and some of the mountains exceed 14,000 feet. Three major watersheds are in the area, the North Platte, South Platte and Arkansas Rivers.

The bulk of the subject tract is a great plains area which is classified as semi-arid. Along the streams at the base of the mountains are to be found the agricultural lands of the tract which required irrigation. Virtually no timber was to be found on the plains. The timber in the region was found in the mountainous portion. By the date of evaluation the characteristics of the subject tract were generally well known. Early explorations of officers and agents of the United States had taken these men through the tract. The Oregon and Santa Fe trails bordered the northern and southern boundaries of the area and the Smoky Hill trail traversed the heart of the tract. The gold rush in 1859 brought thousands of people into the region.

Prior to the discovery of gold there were few settlers in this vast region. This was Indian country and on the great plains roamed the buffalo. Tens of thousands had passed over these plains along the Oregon

Trail on the North Platte River by 1850. The plains area was not attractive to the settlers because of its semi-arid nature and the scarcity of wood and water. Along the trail, however, some small settlements in the way of road ranches where the emigrants could exchange their worn down cattle were in early existence. These may be said to be the beginning of the cattle industry in the plains region.

Although the subject tract was Indian country recognized as the territory of the Cheyenne and Arapaho Indians by the Fort Laramie Treaty of 1851, there was little respect for their ownership of the tract by the whites following the discovery of gold in 1858. In 1859 the great Pikes Peak gold rush saw some 100,000 persons entering the mining areas and an estimated 40,000 remained through the 1859-1860 winter season. Supply depots established at the base of the mountains developed quickly into the cities or towns of Denver, Boulder, Colorado City and Pueblo. Numerous mining towns and camps were built in a short time. In 1865 the population of Colorado Territory was somewhere between 28,000 and 34,000 persons located for the most part within the subject tract principally in the towns and mining areas. The early settlers soon discovered that along the stream at the base of the mountains, near the mining camps in the hills, irrigated agriculture could be profitably undertaken. The farmers found a ready local market for their produce in the towns and mining camps.

As of 1865 there were no railroads in the subject tract. There was great expectation that within the reasonably foreseeable future the tract would benefit from such service. The Union Pacific which had commenced

construction at Omaha, Nebraska, in 1863 by the end of 1865 had built only 40 miles of track west of that point. The Kansas Pacific which was planned to be built through the heart of the subject tract had constructed its line only 40 miles west of Kansas City by 1865. The settled portions of the tract found in a narrow belt along the base of the mountains and the mining camps were serviced in 1865 by animal-drawn freight and stage lines. Freight for the most part was transported from Plattsmouth, the mouth of the Platte on the Missouri, across the plains to these settlements. Some 62,500 tons of freight were hauled into Colorado in 1865.

The appraisal witnesses for the parties agree that the lands of subject tract may be classified as having multiple highest and best uses in 1865. The Commission has found these to be grazing, agricultural, mineral and town-site lands. There is no dispute between the parties that the bulk of the area had a highest and best use of grazing lands. This range or grazing land consisted of 50,252,320 acres. The Commission also found the balance of subject tract contained 400,000 acres of land suitable for agriculture, 550,000 acres of land suitable for mineral development or potentially mineral land, and that 7,680 acres of land would be adequate in the subject tract for town-site purposes.

#### Grazing or Range Land

The fact that the plains area was a vast pasture land was evidenced in the great herds of buffalo which roamed over the region providing meat and skins for the Indians. Government officials and others in the subject tract in 1865 and prior thereto recognized the natural advantages

of the country for stock raising. Samuel Bowles in his book "Across the Continent" published in 1865 noted that what he called the Central Desert of the Continent was not a desert and worthless by any means. The soil, he observed, yielded a coarse, thin grass that was green or dry and that it made the best food for cattle that the continent offered. Bowles considered it the great pasture of the nation and concluded, "This is its present use and its future profit." He believed that when railroad transportation became available the plains would feed the country beef and mutton and supply large quantities of wool and leather for the nation.

As previously stated the cattle industry in or adjoining subject tract may be said to have had its beginning with the road ranches established along the Oregon Trail. The embryonic business gained impetus upon the discovery of gold with the establishment of towns and mining camps providing a market for beef. The early herds of the northern ranges were the product of the road ranches, the train-cattle of the freight companies, and the stock of the settlers. The ranches established to meet the local demand for cattle were located along the South Platte River. In 1861 Iliff who was to become the first "cattle king" of the northern ranges was supplying the mining towns with beef from a herd that ranged up and down the South Platt for 75 miles or more. By 1866 the herds on the South Platte numbered about 20,000 head. The cattle industry in Colorado, which was at first a small business with but local markets, came into its own and expanded greatly with the advent of the railroad and the source of cheap cattle from Texas after the Civil War which could be fattened for eastern markets on the vast pastoral resources of Colorado.

Mr. Jeffrey Holbrook, a qualified appraiser, appeared as a witness for petitioners and his appraisal report was received in evidence as petitioners' exhibit 112. Mr. Holbrook was of the opinion that subject tract had a fair market value of \$40,968,000, or at the rate of \$0.80 per acre on October 14, 1865. In the judgment of petitioners' witness there was no market data--in the strictest sense of the term--available to aid in evaluating subject tract; that is, that although there were sales of land within and around the tract, these fell short of the data necessary to evaluate it solely on a direct comparison basis. Many of the sales were remote as to distance and not comparable to any degree. None were comparable in size. The witness recognized the lack of comparability but was of the opinion they were value indications which could be used to show (1) that there was a demand for large tracts of land; (2) that if subject lands were offered at a favorable price they would sell in one tract; and (3) that a buyer could resell the lands in smaller tracts at prices equal to the value indicated by the comparable sales. From his analysis of eight large sales and appraisals in Kansas, New Mexico and Oklahoma, Mr. Holbrook concluded that these would set the upper limit of price (exclusive of minerals) for the subject tract which he stated was about 97 cents an acre. Petitioners' appraiser was of the opinion that subject land (not considering mineral values) would have ample demand if priced below what he believed to be the general market levels. He therefore made an adjustment which he considered would compensate for size and proximity of subject tract to market and concluded

that taking into account all general facts a minimum valuation of \$0.50 per acre, or \$25,605,000 for subject lands exclusive of minerals, was nominal.

The Commission has considered the selected large land sales or appraisals in Kansas, New Mexico and Oklahoma which were studied by Mr. Holbrook. The lack of comparability as to size, location and character of the land (agricultural) in these transactions, except the Spanish and Mexican land grants, greatly effects the weight to be given them when considering an enormous acreage, such as subject tract, consisting almost entirely of grazing or range land, which was remote from markets and lacked comparable transportation facilities. While the land grant transactions are not comparable in size and are subsequent to the appraisal date, the sales of the Costilla estate in 1869 and the Maxwell grant in 1870, both of which contained large acreages of grazing land, do indicate that at or near the date of evaluation there was a market for large tracts of land.

Two of the most important factors in considering the value of the grazing lands of subject tract are (1) the open or free range concept and Public Domain policies existing at the date of valuation and for many years thereafter, and (2) the great amount of grazing land available to a prospective purchaser outside of subject tract at the time. The free range practice, under which an individual, partnership or corporation could run privately owned cattle on the public domain without cost, was in existence at the time of valuation. Cattlemen by acquiring possession of land with water

thereon could control large blocs of grazing land on the public domain. This resulted in curtailing the demand for grazing lands for extensive ranch operations. Snake or Piute Indians, etc. v. United States, 7 Ind. Cl. Comm. 526, 559; Pawnee Indian Tribe v. United States, 8 Ind. Cl. Comm. 648, 721, 722. The vast amount of grazing land available for free use and the public domain policies which made it difficult to assemble large acreages under the homestead and preemption laws limited the demand for grazing land.

The railroads by virtue of their land grants earned millions of acres of land along their routes of alternate sections. The Union Pacific Railroad which by 1870 had completed its track through Colorado and Wyoming had received 4,600,000 acres in Wyoming, 700,000 in Colorado, 4,700,000 acres in Nebraska and 1,100,000 acres in Utah. As of 1873 the railroad had sold no lands west of Grand Island, Nebraska. The line had sold none of its grant lands in Colorado and only 2,520 acres in Wyoming by 1883 and of its acreage in Nebraska there remained 2,580,000 acres unsold, almost all of it west of the hundredth meridian. The Kansas Pacific Railroad completed to Denver and Cheyenne in 1870 received a grant of about 6,000,000 acres with 2,600,000 being located in Colorado and 3,600,000 acres in Kansas. As of 1879 this road had available for sale about 2,000,000 acres in Western Kansas between Manhattan and Grinnell and some 2,800,000 acres between Grinnell and Denver. Sales of large acreages of railroad grazing lands did not take place until long after the valuation date when the railroads disposed of considerable land to cattle companies in about the middle 1880's in and adjoining the subject

tract at prices of fifty cents to one dollar per acre (see Shoshone Tribe v. United States, 3 Ind. Cl. Comm. 313, 330-331; and Hoyt Reporter, Def. Ex. 2, pp. 114-119).

Mr. Homer Hoyt, a qualified appraiser, was an expert witness for defendant and prepared a valuation report which was received in evidence as defendant's exhibit 2. This witness divided subject tract into two areas excepting all mineral rights which were evaluated separately. Area A, totaling about 49,000,000 acres, contained for the most part all the grazing or range land. Hoyt's Area B consisted of the balance of subject tract and is a narrow portion of the tract, extending north and south of Denver, which included the surveyed lands and areas adjacent to these surveyed lands. Mr. Hoyt was of the opinion that the lands in his Area A had a value in 1865 of \$980,000, or 2 cents an acre. In reaching this conclusion defendant's appraiser relied mainly on the sales of interests in certain Spanish land grants.

The transactions involving the sales of fractional interests in the land grants recite considerations ranging from a few cents an acre to 43 cents and 80 cents an acre. These sales are entitled to little weight as market data. At the time of the transactions the acreages of many of the grants had not been determined. The fractional interests in some of the grants were numerous. The Mora Grant had been made to some 76 persons in 1835. With respect to the knowledge of the size of the grants, William A. Keleher in his book "Maxwell Land Grant" states that it is doubtful if Maxwell had the faintest conception, when he first settled on that grant,

of its potential acreage, "being under the impression probably for many years that it contained between 32,000 acres and 97,424 acres, or twenty-two Spanish leagues. Nevertheless, people of Maxwell's time lived to see the day when the Grant was legally declared to embrace a total of 1,714,764.93 acres. \* \* \*" Keleher also was of the opinion:

"It is quite probable that at the time the trades /Maxwell's purchase/ were being made for the outstanding interests neither Lucien B. Maxwell nor any of his in-laws or even Guadalupe Miranda knew or understood what the future held for the Grant in the way of acreage."

During the 1860's there were hundreds of Mexican settlers and American squatters on the grants claiming rights in the lands. Even after confirmation of the grants by Congress these people continued to claim such rights and court actions to test the legality of the grants were numerous.

The history of the many transactions regarding the purchase of interests in the grants is involved and obscured with the passage of time. These sales of fractional interests do demonstrate, however, that at or near the valuation date there were men, speculators to be sure, who were willing to gamble by investing a small sum not only on the legality of the grants and their size but also on the risk of being able to dispose of them quickly. The very size of the grants were a detriment to the speculator in finding a ready market for them and the threat of possible taxation of the lands made it imperative that the lands be quickly disposed of.

Sales involving three grants (subsequent to the valuation date in this case) were made after all, or virtually all, interests had been

obtained. These included sales of the Nolan Grant, the Maxwell Land Grant and the Costilla Estate of the Sangre de Cristo Grant. The Nolan grant lands were selected lands primarily adapted to irrigated agriculture. The Maxwell grant, located 80 miles south of subject tract, consisted of 1,714,755 acres of land. Comparatively speaking, the Maxwell Land Grant may be said to be somewhat of a miniature replica of the subject tract. The majority of its acreage was adaptable to grazing. The percentage of lands adaptable to agriculture was larger. The grant had settlements thereon and there was both placer and lode mining activities being carried on at the time of the transactions resulting in the sale of the grant. Maxwell, in 1869, entered into an agreement giving an option to certain persons to purchase the grant for \$650,000.00. They elected to exercise their option and a performance bond was delivered to them by the Maxwells, and they then sold and assigned their right, title and interest under the bond to the Maxwell Land Grant and Railroad Company. The consideration paid by the Company was \$1,350,000.00 of which sum the Maxwells received \$650,000.00. The Maxwells conveyed the grant to the Company on April 30, 1870, reserving certain lands and interests in mining properties.

Some 55 miles south of the subject tract was the northern boundary of the Sangre de Cristo Grant which contained about one million acres. The greater portion of this grant is located in south central Colorado and the balance in north central New Mexico. Prior to 1865 William Gilpin, former territorial Governor of Colorado, had purchased a five-sixth interest in this grant for \$41,000.00. In 1865 he sold fractional

interests for considerations averaging about 43 cents and 80 cents an acre. Herbert O. Brayer in his book "The Spanish American Land Grants" questions the validity of the recited consideration in one of the sales averaging about 43 cents an acre. One-half of the grant, called the Costilla Estate, was sold in 1870 at an average price of \$1.00 an acre. The grant consisted of grazing lands, agricultural lands in the San Luis Valley and mineral potentials.

The market data with respect to the Spanish-Mexican land grants disclose that at or near the date of valuation there was a demand for large tracts of land at a reasonably low price; that the threat of taxation of a very large parcel of land such as the subject tract would require its re-sale in much smaller tracts in a relatively short period of time; and that financial sources were interested in securing tracts with multiple existing or potential uses which could be developed. The availability of public and railroad grant lands and the open range policy would weigh heavily in setting the market value of subject tract at a reasonably low price. The prospective purchaser, however, would know that in re-selling in smaller tracts he would have the advantage of being able to offer to ranchers title to large blocs of land which were difficult to amass under the public land policies and the alternate sections system of granting lands to railroads.

#### Agricultural Land

There were 400,000 acres of land on subject tract on which crops could be raised with irrigation and they were located along the streams.

Crops raised on some 50,000 acres under cultivation included wheat, potatoes and corn.

Petitioners' appraiser, Mr. Holbrook, stated he had examined 8,645 land transfers in Colorado for the period 1860-1865. From these he extracted 558 transfers for size--160 acres or more. The average price per acre paid in these selected sales was \$3.63 per acre. The bulk of these sales were in the Denver area and the remainder in and around Pueblo. Mr. Holbrook adjusted this average price per acre by deducting 91 cents to allow for improvements and a further discount for size. Petitioners' appraiser concluded that the crop land had a nominal fair market value of \$1,000,000.00 without improvements or at the rate of \$2.50 per acre. The adjustment for improvements made by this witness was based on the average improvement cost made in an appraisal of the Cherokee Neutral Lands in Kansas in 1866. No allowance is made for the fact that the Cherokee lands were agricultural and did not need irrigation while the crop lands of subject tract required irrigation which was said to involve much expense and labor. This Commission also noted in The Osage Nation of Indians v. United States, 3 Ind. Cl. Comm. 217, 339, 340, that the value of improvements upon the Cherokee Neutral Lands was considerably in excess of the amount allowed by petitioners' appraiser in the instant case.

Mr. Homer Hoyt, defendant's appraiser, analyzed some 118 sales transactions in Colorado from 1862 to 1866. These were farm sales practically all being in the irrigated area along the streams. He found them to have sold for an average of \$2.00 an acre with an average of 160

acres for each sale. These sales, he reported, were the prices paid for the best improved, irrigated farms on streams. He was of the opinion that not over 50,000 acres along the streams were in cultivation as of 1865 and placed a value of \$1.00 an acre on these lands as of the evaluation date, or \$50,000.00. For 370,000 acres of unimproved lands along the streams which could be irrigated the Government's witness concluded they had a fair market value of \$89,000.00, or at the rate of twenty cents an acre.

In Hoyt's "Area B" there was in addition to the 420,000 acres along streams an additional 1,008,000 acres of lands in townships which had been surveyed with section lines defined. These lands, he reasoned, while having a lower value than lands along streams, had a higher value for grazing or for possible future townsites than the unsurveyed lands in the Great Plains, since they were located near the farms, cities and mining areas. On these 1,008,000 acres he placed a value of ten cents an acre. For 707,000 acres in "Area B" in which township lines had been laid down and other adjacent areas that were to be surveyed within the next few years after 1865 he reached a valuation figure of five cents an acre.

The only sale of record of a large tract of agricultural land similar to the crop land on the subject tract in the immediate vicinity of the area being evaluated is the sale of the Nolan Grant in 1872. Congress confirmed this grant in 1870 but limited the area to eleven square leagues, the statutory limitation under Mexican law, and provided the grantees could select the confirmed tract of some 48,000 acres from within the claimed 300,000 acres

of the original boundaries set forth in the grant. The Nolan heirs prior to confirmation sold the grant in 1869 for \$10,000.00. Also, before confirmation, the purchaser from the heirs sold undivided third interests for \$5,000.00 each. The holders of these interests in 1872 sold this "floating grant" for \$130,000.00. The purchaser, Central Colorado Improvement Company, exercised the right conferred by Congress and selected the 48,000 acres "with the greatest care, leaving out all hills or poor land and taking only the pick of that lying along the South Bank of the river opposite the town of Pueblo." The Nolan Grant adjoined the subject tract on the south bank of the Arkansas River and was considered in 1872 to be almost entirely adapted to cultivation by irrigation. After confirmation the heirs and later purchasers of the estate continued to claim the larger area of 300,000 acres.

#### Townsites

An area the size of subject tract in 1865 required a minimum of six townsites of 1280 acres each. Mr. Holbrook for petitioners did not evaluate the towns then existing but instead sought to ascertain the fair market value of six arbitrary townsites as of October 14, 1865. The value of these he said was difficult to estimate in view of the assumption that no towns existed at the time. To arrive at a value he reasoned that there would be limitations of value consideration, that is, the value of townsite acreage would be appreciably higher than crop or range land but lower than speculative lot prices. Mr. Holbrook relied on certain

market data which he stated narrowed value consideration and was indicative of value. He considered as an indication of value the estimate of \$50.00 per acre for townsites placed upon lands in 1871 by a land company formed by organizers of the Denver and Rio Grande Railroad. He also considered the purchase of the original townsite of Manitou in 1871 for \$30,000.00 and the listing in 1875 of town lots in said town at \$25 to \$100 each. He further used as a value indication the annual report of the directors of the National Land and Improvement Company of December 1878 which contained a recapitulation of land bought and sold and which showed, he states, an average sale price per acre from organization of the company to that date of \$78.70. Mr. Holbrook concluded that a reasonable estimate of price per townsite acre would approximate \$50.00 or \$384,000 for the six townsites.

According to Herbert O. Brayer in his book "Early Financing of the Denver and Rio Grande Railway" the lands purchased by the land company, formed by the organizers of the railway, which was estimated by the land company in 1871 to be worth \$50.00 an acre had originally cost the company \$7.88 per acre. Mr. Brayer in a footnote commenting on this \$50.00 per acre estimate of the value of the tillable and townsite land observed:

This was land along the right of way from Denver to Colorado Springs. The valuation quoted, approximately \$50.00 an acre, was out of all proportion to the true value of the land. Most of the property lay along the railroad, but was unsettled and undeveloped. Based upon similar land sold along the right of way of the Kansas Pacific, Denver Pacific, and Union Pacific, an evaluation of from \$10.00 to \$15.00 per acre for the entire tract would not have been considered an underestimate.\* \* \*

Mr. Brayer's observations clearly show the danger of using estimates of value per acre as indications of value.

The purchase price of \$30,000.00 for Manitou, according to Brayer, included the purchase of mineral springs and an adjacent tract of 400 acres. The land company that made the purchase had also secured some additional lands of about 8400 acres at \$8.81 per acre which included the future sites of Colorado Springs, Palmer Lake, and Monument, Brayer's study reveals.

Defendant's expert Hoyt in his study of the townsite valuation classified the townsites into (a) developed commercial property, (b) lots with buildings on them and (c) unimproved lots. He stated it was necessary to separate the sites from the improvements or buildings on them and that most sales in 1865 were for improved property for which it was impossible to separate the value of the site from the building. For commercial property on the subject tract in towns, which he said was limited in 1865, defendant's land appraiser estimated a total front footage of 3,000 feet and a value of \$30,000.00 at \$10.00 a foot. For improved residential properties with dwelling houses thereon, Hoyt estimated there would be 2,000 lots with a value of \$15.00 a lot, or \$30,000.00, and 4,000 unimproved lots on the townsites with a value of \$10.00 a lot for a total of \$40,000. Mr. Hoyt was therefore of the opinion that the townsites on the subject tract had a fair market value of \$100,000.00 as of 1865.

The record is far from satisfactory as to market data concerning the sales of comparable townsites at or near the valuation date and with respect to the sales of unimproved lots within the then existing towns on the subject tract. The parties agree that the existence of townsites upon the tract should be taken into consideration. The evidence available does show, however, that the townsites would enhance the value of the tract and that the acreage value for townsites would be greater than for grazing or agricultural lands.

#### Mineral Lands

The discovery of gold on a branch of Cherry Creek in 1858 and the ensuing "Pikes Peak Gold Rush" in 1859 was the fuse that ignited the permanent settlement of the subject tract. Without this important strike the area would no doubt have been destined to distant and slow development. Even after the discovery, settlement for the most part was limited to a narrow belt along the front range of the mountains and concentrated near the centers of population, Denver and Pueblo, and in the mining camps for a number of years.

The gold rush in 1859 brought a reported 100,000 persons into the area in that year and some 40,000 remained the first winter. For the first few years placer mining was the type of operation engaged in by the miners. In this method of mining by means of pan, rocker and sluice recovery was profitable and comparatively simple. By the end of 1863 placer mining had gradually died away because the gulches, most of

them worked over three or four times, had become virtually exhausted. Lodes had been discovered during the early days of activity. During the period of recovery from the "gossan" (secondary or oxidized) ore lode mining was profitable also although a good percentage of the gold from the ores of the gossan was lost through the inefficiency of the stamp mill. Extremely rich ore had to be mined to give economic value to the final product. As the mines grew deeper the decomposed ore was depleted, miles filled with water and the ore (primary or unoxidized) which was refractory in character caused serious curtailment of mining in the area.

In the years 1859 through 1865 it is reliably estimated that the total mineral production on subject tract, mostly gold but with some silver, was about \$15,300,000.00. The mines in Gilpin County accounted for 80% of lode production during this period and for more than 50% of the lode and placer recovery. The mineral-bearing area in the subject tract consisted of lands in the present day counties of Larimer, Boulder, Gilpin, Park, Lake, Chaffee, Clear Creek, Jefferson, Fremont and Teller. All mining areas were not successful or worked for very long. Besides the refractory character of the quartz, other factors intervened to bring about the depressed condition of mining in Colorado in 1865, following the sale of many of the mines to eastern mining companies in the speculative craze which started in 1863. These conditions are succinctly set forth by Ovando J. Hollister in "The Mines of Colorado," published in 1867 (Def. Ex. 13):

The reasons why capital has been required in Colorado are, that the expense of living and of mining, and the loss in value from the inadequate treatment of the refractory ores, were so great as to exhaust the profits of surface mining, instead of leaving them to be used in furnishing the more costly apparatus required in for deeper mining. The great reason that the companies organized with ample capital in 1864, have made out so poorly, and now, ere they have had any dividends, are called on for more capital, is that the cost of living and work advanced immediately upon the inauguration of their operations one hundred per cent, and nothing until very lately could in the least make it recede.\* \* \*

Hollister, who was editor and owner of the Colorado Mining Journal, blamed the high cost of living and labor on the shortage of manpower caused by the Civil War; on transportation costs to Colorado located 500 to 1,000 miles "from civilization in any direction--from any source of supplies;" the extensive and protracted drought of 1863; the severe winter of 1863-1864 which hindered transportation; floods in the spring of 1864; and Indian trouble on the plains in 1864 which interfered with transportation and communications. This observer also noted that inexperience and extravagance of the operators was a contributing factor to the depressed condition of mining. Hollister, in 1867, however, was of the opinion that "a considerable degree of prosperity and improvement may not unreasonably be looked forward to in the immediate future."

As of 1865 the stamp mills recovered only about one-fourth of the gold in the primary ores, wasting all the copper and silver. Hollister stated that the veins in the mines increased in size, richness and uniformity as they descended into the earth but a cheap and practicable process was needed to make the mines as profitable as they were in recovering

from the gossan ore. Samuel Bowles who visited the mining area in 1865 noted that not more than 20 or 25 of the 100 stamp mills in the territory were operating and that mining hardly paid expenses. Hollister reported 40 of the 95 stamp mills in the territory running in 1867. While the art of smelting was known in 1865 and had been practiced in Wales for many years, it was not introduced into Colorado until 1867. Although difficulties were at first encountered the smelting process proved to be the method that saved a very high percent of the richer mineral ore. The main bulk of the ores, however, were too poor to admit of treatment except in the quartz mills. Well developed gold mines in Gilpin county sent from one-tenth to one-fortieth of their ore to the smelter. The success of mining in Colorado has been said to have come about with the advent of the railroad to the mining districts, the use of the smelting systems, improved mining and milling and the determination of the miners.

The general land appraisers for the parties engaged mining experts to make studies of the value of the mineral lands or the minerals on subject tract. Petitioners' mineral expert was Charles C. O'Boyle, a consulting geologist, who made an engineering appraisal of the mining region and came to an opinion of the intrinsic worth of said region as of October 14, 1865. Mr. O'Boyle prepared a valuation study (Pet. Ex. 110) and testified at length before the Commission.

Petitioners' mineral expert evaluated the mining region as a unit and not as an individual mine or group of mines. His report states that the time-honored methods in valuing minerals are concerned primarily with

individual mines or comparatively small units of property and that the concepts underlying the philosophy of such evaluations are only broadly applicable to large tracts of mineral land containing varied resources and potential uses. According to O'Boyle, an engineering evaluation of a mine or an entire mineral region is based on the fact that the minerals contained therein are a "depleting asset" and the magnitude of value is controlled by the anticipated income to be derived during the productive life of the asset and such evaluation determines the "intrinsic" value of the minerals and does not reflect the additional speculative value given by the comparable sales method. Mr. O'Boyle relied entirely on the work of G. W. Henderson, published in 1926, for production figures in the mining area. These figures indicate, as previously stated, the gross mineral production for the period 1859 through 1865 was about \$15,000,000.00. Henderson's work did not break down early production on a year to year basis nor did it indicate whether production came from lode or placer deposits. It was necessary therefore for petitioners' mineral expert to make such an allocation. From this study Mr. O'Boyle determined that these production figures showed that it would be anticipated that the gross annual product of the mining region could conservatively be placed at \$2,800,000.00.

Having arrived at his yearly anticipated production figure this witness studied the royalty rates in the west and concluded that a royalty of 25% of gross proceeds would not be excessive and therefore an anticipated income of \$700,000.00 per year would be produced by the 25% royalty

on the annual gross income of \$2,800,000.00. Mr. O'Boyle then used the capitalization process known as the Hoskold formula, which was in use at the valuation date, to determine the basic or intrinsic value of the mining region as of October 14, 1865. The mathematical formula requires certain known factors to be used in making the computation. This formula involves taking into consideration such factors as the gross annual production, the earnings from such production (net profit), the number of years such earnings will continue, what interest rate an investor would want on his money and the going discount rate at the time. The interest rate to the purchaser on his capital investment used by Mr. O'Boyle was 5% and the interest rate on redemption of capital one of 3½%. The expert determined that 20 years was a reasonable period within which an investor would want his money returned to him. Applying these factors, Mr. O'Boyle concluded that the basic or intrinsic value of the mining region of subject tract as of October 14, 1865; was \$8,200,750.00.

The actual mathematical solution of the Hoskold Formula is an exact problem. The calculated valuation figure for a mining property, however, depends entirely on the validity of the data for the factors considered in the formula. In the instant case if the "interest rate to purchaser on his capital investment" was 20% instead of 5% and the "practicable interest rate on redemption of capital" was 4% instead of 3½% then the intrinsic value of the mineral lands on subject tract would be computed to be \$2,996,840.00 instead of \$8,200,750.00. Assuming the interest rate on capital investment to be 10% and the redemption of capital interest rate to be 4% the computation would be \$5,240,270.00. Any change in the data

with respect to the "annuity to be purchased" due to the use of a different yearly production or royalty figures would change the result. If the annuity were \$400,000.00 at ten percent interest rate on capital investment and 4% interest rate on redemption of capital the intrinsic value would be \$2,994,440.00.

Mr. O'Boyle testified that he used the 5% interest rate figure for the return on investment because he found that for the period 1865-1885 the average bond yield was 5.39 per cent, and that for 1871 to 1885 the average stock yield was 5.68 per cent. He concluded 5 per cent to be a fair equitable value for return of capital because "we had something that was even better, in my opinion, than a railroad. We had an entire mineralized region which was an entity in itself, which we controlled, and it would be a very sound investment, without any risk."

In using the Hoskold formula the interest rate factor is the vehicle used to express all the hazards of an enterprise. Baxter and Parks in their work "Examination and Valuation of Mineral Property," 3d edition, 1949, quote from Hoskold's book "Engineers' Valuing Assistant" (1877) as follows:

Every purchaser of mining property should have allowance made upon his purchase, but the amount of such an allowance, as a percentage, must depend upon a point difficult to calculate--

In case of unopened mines it has been my practice in deducting the present value deferred, to allow 20 per cent to a present purchaser, and redeem capital at 3 per cent per annum; which I consider in a general way is a safe mode of dealing with any mine with average prospects; although in special cases where a mine has a more certain character, I have allowed a percentage as low as 14, and in some of less certainty, as high as 25.

A rule cannot be laid down expressing the attendant risk of mining adventure, as nearly all mines exist under circumstances differing widely from each other. It is a matter of experiment; each mine must, therefore, stand upon its own merits, and the amount of percentage to be allowed must also be varied according to the circumstances of each particular case.

In view of the depressed condition of mining on the subject tract at the valuation date in 1865, the frontier conditions then existing, the problem of developing and testing a process to permit profitable operations of the mines and the fact that we are determining the value of a mining region rather than a single mine, there is substantial evidence of record pointing to considerable risk involved in the purchase of such a large mineral area as of the valuation date. As of 1865 it would also be known that production had fallen off in the Colorado mines. The collapse of the speculative craze in Colorado resulted in the lack of interest in Colorado mining in eastern financial circles. On or near the valuation date, however, European investors became interested in American rail and mining securities. These were looked upon favorably since they offered not only six to eight percent interest but from their being sold below face value the interest rate was proportionately higher.

Defendant employed the engineer consulting firm of Barton, Stoddard and Milhollin of Boise, Idaho, to evaluate the minerals on subject tract. This firm engaged Mr. Ernest Oberbillig, a mining engineer, who carried the principal burden of making the valuation study under the supervision of the partners of the firm. Mr. Sherwin M. Barton and Mr. Oberbillig, both of whom testified for defendant, are qualified mining engineers.

Defendant's mineral report was received in evidence as defendant's exhibit one and shall be hereinafter referred to as the BSM report.

Defendant's mineral experts used a valuation method which they called a direct evaluation method. Based upon mining articles appearing in the Black Hawk Journal and a review of written materials such as Hollister's book they sought to reconstruct the conditions existing on the important mining properties in the mining districts in 1865. These mineral experts believed that the valuation could be determined by giving consideration to ten factors for each of the mines located on the lodes which included past production; blocked ore, grade of ore, costs such as pumping, mining and transportation and sales recorded for the mine or parts thereof. As with the use of the Hoskold formula employed by petitioners' mineral expert, the validity of the approach used by defendant's mining engineers depended upon the availability and accuracy of the data obtained for the factors to be considered. For many of the mining properties little data with respect to the ten factors is set forth in the BSM report. While such an approach might be helpful in determining the worth of a single mine or a group of mines if all data was available it is not one suited to an historic evaluation such as in this case. Defendant's experts concluded that the mineral value, gold and silver, of the subject tract on October 14, 1865, was \$1,215,000.00 and including miscellaneous minerals such as coal, iron, clay, salt and oil the total mineral value was \$1,420,100.00 as of the evaluation date. Although, for the reasons previously stated, the approach used has its shortcomings, the BSM study

does include many facts with respect to some of the operating mines as to their state of development, past production, existence of blocked ore, and profits, if any, taken therefrom which permit one to understand somewhat the state of mining activity in 1865.

Petitioners' general appraiser, Mr. Holbrook, who valued the mineral lands at 14 million dollars in 1865, did not adopt the valuation amount for mineral lands arrived at by petitioners' mining expert, Mr. O'Boyle. Holbrook accepted O'Boyle's acreage and estimated future production but while using the 5 per cent interest rate for capital investment he made no allowance for an interest rate for redemption of capital. In addition to the capitalization approach he considered the cost approach which he discarded as fallacious and the market data approach based upon a consideration of sales of mining claims in subject tract. Data with respect to the transfers of mining claims was collected by Mr. O'Boyle. His statistics show the transfer of some 1800 acres of mining claims in Gilpin County in 1865 for a total consideration of \$5,000,000.00, or at a rate of \$2,500.00 an acre. Mr. O'Boyle in his report notes that if this figure, or any reasonable fraction thereof, were applied to the entire mineral-bearing region the value derived thereby would be unrealistic. In view of the speculative nature of the sale of mining claims and the sparse supporting data in the record concerning these transactions they are entitled to little weight except to show that properties were changing hands in 1865. The speculative character of claims transactions at or near the valuation date is described in History of Denver, edited for the Denver Times by Jerome C. Smiley, 1901, as follows:

\* \* \*

When one good or fairly good mine was sold to misguided 'parties from the east,' a hundred other claims in the same locality would be put on the market, and successfully in the majority of instances.

Collusion between claim-owners who 'inspected' each other's claims, 'salted' lodes, bogus or misleading certificates, assays of ore of uncertain origin, were used to tempt and gratify the insatiable appetite of inexperienced people for sudden wealth. It was estimated that in about three years the amount of eastern capital invested in Colorado mines approximated the total output of all the diggings from the time of Gregory's discovery to the 1st of July, 1866, when the end of the speculative craze may be said to have come. Much the larger part of the vast sum became a hopelessly permanent investment.

\* \* \*

Defendant's general appraiser, Mr. Hoyt, used the capitalization of royalty on production approach in valuing the mineral deposits. This witness figured an estimated anticipated yearly production for the mineral lands of approximately two million dollars. He was of the opinion that a buyer could be found who would be willing to pay the present value of the royalty on production. To arrive at this present value Hoyt used a royalty of 10 per cent of the gross product capitalized at an interest rate of 25 percent. Defendant's appraiser valued the mineral deposits of subject tract as of October 14, 1865, at \$1,000,000.00.

These different approaches, or variations thereof, and the ultimate conclusions as to the value of the mineral lands or mineral deposits reached by the expert witnesses for the parties clearly disclose the difficult task of reaching a valuation of such a large mineral area at a remote time. A well informed prospective purchaser of subject tract in 1865

would have realized the mineral lands appreciably enhanced the value of the tract as a whole. This purchaser would have been able to ascertain that while many of the mines were shut down a small number were still operating profitably. He could anticipate that in the not too distant future economic conditions would improve, and better methods of processing and transportation facilities would probably be available. Such a purchaser, however, would be amply aware of the risk involved in the purchase of such a large mining area then in a depressed condition, located in a frontier area and depending for its success upon the development of improved processing and mining methods. The risk involved would control the interest rate either on the money he borrowed to purchase the tract or the return which he would expect on his capital. The cost of development of the existing mines and the prospecting for new lodes would be high and reflected in his net profit or in the royalty rate which could be secured if the lands were leased to others. Finally, while the prospective purchaser would be aware of the optimism for the area expressed by some mining men interested in the region he would be conservative in considering the amount of profit he would be able to make from the transaction.

#### Fair Market Value

The Commission based on the findings of fact herein made and taking into consideration the whole record concludes that the fair market value of subject tract as of October 14, 1865, was \$23,500,000.00.

Consideration

As previously set forth the stipulated valuation date of October 14, 1865, in this case is an arbitrary date. In order to ascertain the consideration paid for the subject tract it is necessary to determine by what treaties or agreements the lands were ceded to the United States by the Cheyenne and Arapaho Indians. Defendant urges the Commission to allow the consideration paid to the Indians under the Treaty of Fort Laramie, September 17, 1851, 10 Stat. 749, II Kapp. 594, the treaties of February 18, 1861, 12 Stat. 1163, October 14, 1865, 14 Stat. 703, October 28, 1867, 15 Stat. 593, May 10, 1868, 15 Stat. 655, and the Agreement of September 26, 1876, ratified by the act of February 28, 1877, 19 Stat. 254. Defendant claims as payments on the claim sums totaling \$7,244,556.85 as shown by a report of the General Accounting Office (Pet. Ex. 113). Of this total sum, the GAO Report shows disbursements in goods and services pursuant to the treaties directly to petitioners in the amount of \$6,740,556.59 and additional payments jointly to petitioners and other Indians in the sum of \$540,615.33. Defendant agrees that certain items totaling \$36,615.07 listed in the GAO Report are not proper items of consideration. Defendant also contends that certain lands set aside for the Southern Cheyenne and Arapaho Indians were part of the consideration for the cession of subject tract.

Petitioners urge that only the proper disbursements made pursuant to the treaties of February 18, 1861, October 14, 1865 and May 10, 1868 are items of consideration. It is also the contention of petitioners that no

lands set aside by the various treaties relied on by defendant as reservations for the Cheyenne and Arapaho Indians are part of the consideration for the cession of subject tract and that only the "cash value" of the items found to have been disbursed pursuant to treaties ceding the tract should be allowed as consideration. Petitioners further contend that each of the respective petitioners had their own interests in subject tract, that is, petitioners the Cheyenne-Arapaho Tribes of Oklahoma at the time of the 1861 and 1865 treaties, and at all times prior thereto, owned and occupied an undivided 50.61 percent of the tract or the equivalent of 25,917,381 acres; the Northern Cheyenne Tribe at the time of the May 10, 1868 treaty, and at all times prior thereto, owned and occupied an undivided 25.32 percent thereof or the equivalent of 12,966,372 acres; and the Northern Arapaho Tribe at the time of the 1868 treaty, and at all times prior thereto, an undivided 24.07 percent thereof or the equivalent of 12,326,247 acres. The percentages used by petitioners are based on a stipulation made among the parties petitioner and the figures are based on the respective populations as of November 14, 1958. Petitioners further urge that the Commission should determine the consideration paid to the separate petitioners under the treaties of cession (allocating said consideration to the tribes where payments were not made to one of them directly) and then compare the consideration so paid to each with their respective interests in the subject tract to ascertain whether the consideration paid each was unconscionable.

Defendant takes issue with petitioners' contention that the Southern Cheyennes and Arapahos, the Northern Cheyennes, and the Northern Arapahos, as three separate entities, owned three separate interests in the subject area. It is defendant's position that the Fort Laramie treaty of 1851 which this Commission held constituted an acknowledgment or recognition of petitioners' aboriginal title made no distinction as to any separate groups or subdivisions of Cheyenne and Arapaho Indians and that there is no proof of exclusive possession of all or any part of the subject area by separate groups of Cheyenne and Arapaho Indians or of separate and undivided interests in the subject tract by groups within the Cheyenne and Arapaho Indians.

Article 5 of the Fort Laramie treaty of 1851 defines the boundaries of the lands in subject tract as "The territory of the Cheyennes and Arapahoes." The treaty itself did not on its face recognize separate interests in said territory in any separate entities of Cheyenne and Arapaho Indians. In order to be fair and equitable it is necessary therefore to ascertain whether at or near the time of the Fort Laramie treaty and the subsequent cessions of subject tract there did exist any separate entities among these Indians which maintained and asserted separate interests in the tract.

In 1854 the Indian agent for the Upper Platte agency stated the Arapaho were divided into two bands of about equal strength. "One party," he reported, "lives on the Arkansas, the other on the North Platte River, about five or six hundred miles apart, and some years ago the head chief

of the Arkansas band was killed by the North Platte Band, and since that time they have never met." The Cheyenne according to this agent were divided into three bands in 1854, one residing on the Arkansas River, one on the South Platte River and the last on the North Platte River and these had never been together since the treaty (1851?). The Indian agent was of the opinion that the Arapahos could never be induced to live together as one nation since they were as hostile to each other as almost any other tribe on the plains.

In "The Cheyenne Indians" by James Mooney, an article in Memoirs of the American Anthropological Association, Volume 1, 1905-1907, the author's historical sketch notes that in 1811 an overland expedition met the Cheyenne camped about the eastern base of the Black Hills. According to Mooney, when the Bent brothers established a trading post on the Arkansas River at the present Pueblo, Colorado, the Cheyenne, decided to move to that vicinity. The main body of the tribe removed permanently to the upper Arkansas in 1833 and the remainder of the tribe continued to rove about the headwaters of the North Platte and Yellowstone. Mooney wrote "The separation was made permanent by the treaty of Fort Laramie in 1851, the two sections being now known respectively as Southern and Northern Cheyenne, but the distinction is purely geographic, although it has served to hasten the destruction of their former compact tribal organization." (See Def. Ex. S-68 in Docket 22-A).

The continuing existence of separate groups of Cheyenne and Arapaho Indians and evidence of separate interests may also be found in the report

of Indian agent W. W. Bent in 1859. In writing of the territory assigned these Indians by the Fort Laramie treaty in 1851 the agent reported the country to be very equally divided into halves by the South Platte. According to Bent a confederated band of Cheyennes and Arapahos, who were intermarried, occupied and claimed exclusively the half of the territory between the South Platte and the North Platte while a similar confederated band distinctly occupied the southern half between the South Platte and Arkansas Rivers.

A study of the reports of the Indian agents discloses that while there were these divisions among the Cheyenne and Arapaho tribes and the confederations noted in both the northern and southern groups the respective tribes each were represented by their own chiefs, that is the southern Arapaho had their own chief and the southern Cheyenne likewise. There was a close relationship, however; not only in each respective group but between the two groups. While one of the confederations may have considered a certain part of the territory as its customary home all Cheyennes and Arapahos believed they had a right to roam throughout the whole of subject tract.

The division of the Cheyenne and Arapaho Indians into these confederated bands was noted by government officials and agents when they entered into treaty negotiations providing for a cession of subject tract to the United States. In the 1861 treaty made with the southern Cheyenne and Arapaho tribes provision was made in the treaty for the remaining Cheyenne and Arapaho to come in and accept under it. The United States, however, was

unable to acquire a treaty of cession from the Northern Cheyenne and Northern Arapaho tribes until 1868. This reluctance on the part of the northern bands or tribes is mentioned in the Commissioner of Indian Affairs Report for 1862 where it is stated "There never having been any boundary between the bands of Cheyenne and Arapaho on the plains, who extended from the Arkansas to the Platt rivers, this treaty of the Upper Arkansas [1861] is imperfect and indefinite as to the extent of the cession, unless these bands are induced to accept under it. \* \* \* I would urge its immediate settlement by negotiation with the disaffected bands who frequent the Platte river country, that the title to the unperfected portion of Colorado Territory may be perfected."

Officials of the United States were well aware of the fact that they were dealing with two separate and distinct groups in extinguishing the title to subject tract. This is further demonstrated by the fact that the Commissioners negotiating the 1865 treaty informed the Southern Cheyenne and Arapaho Indians that the treaty then being contemplated related wholly to those bands present and that as others came in under it the annuities would be increased accordingly. Each of these confederated groups owned equal rights in the tract. If the United States had dealt with but one of them for the cession of the subject tract and paid the consideration solely to that group the other certainly would have a just claim today under the Indian Claims Commission Act. It necessarily follows that the consideration paid to each must be taken into account in ascertaining whether the amount received by each was unconscionable for the cession of its undivided half interest in subject tract.

As previously stated the petitioners contend that no payments made under the provisions of the Fort Laramie Treaty of September 17, 1851, the treaty of October 28, 1867 and the Agreement of September 26, 1876 should be allowed as consideration. By Article 2 of the 1851 treaty the Indian parties to the treaty, recognized the right of the United States to establish roads, military and other posts within their respective territories. In consideration of these rights and privileges acknowledged in Article 2, the United States, in Article 3, agreed to protect the Indian nations against depredations by people of the United States. By Article 7 the United States "In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, \* \* \*" agreed to furnish certain goods and services for a period of ten years which at the discretion of the President could be extended for an additional five years. The Fort Laramie treaty contains no cession of land to the United States of any of subject tract but merely acknowledges a right in the United States to build roads and posts with the government agreeing to pay damages for such right or privilege.

The Treaty of October 14, 1867, however, must be included as one of the treaties wherein the consideration passing to the southern tribes was for a cession of their interests in subject tract. Under the provisions of Article 2 of the 1865 treaty as negotiated a described reservation was to be set aside for the tribes east of subject tract. When this 1865 treaty came to the United States Senate for ratification, however, the Senate amended Article 2 to add thereto:

Provided, however, That as soon as practicable, with the assent of said tribe, the President of the United States shall designate for said tribes a reservation, no part of which shall be within the State of Kansas, and cause them as soon as practicable to remove to and settle thereon, but no such reservation shall be designated upon any reserve belonging to any other Indian tribe or tribes without their consent.

The greater part of the lands described in Article 2 as a reservation were within the State of Kansas and the balance was in the Cherokee Outlet and belonged to the Cherokee Nation. Another treaty was therefore necessary with the southern Cheyenne and Arapaho since they were permitted under the 1865 treaty by Article 3 to reside and range on subject tract until required by the President to remove to the reservation.

The 1867 treaty provided in Article 2 for a reservation for the Cheyennes and Arapahos much of which was in the Cherokee Outlet. The United States by the Treaty of July 19, 1866, 14 Stat. 804, with the Cherokee Nation had in the meantime obtained the right under Article 16 to settle friendly tribes in the Cherokee Outlet but the treaty also provided that until such lands were occupied by the tribes and payment therefore made to the Cherokee Nation the Cherokees were to retain the right of possession and jurisdiction over the lands. The southern Cheyenne and Arapahos refused to go on the reservation designated by the 1867 treaty contending they did not understand the location of the boundaries at the time of the treaty and desired lands to the south along the North Fork of the Canadian River.

Upon the recommendation of the Secretary of the Interior and the Commissioner of Indian Affairs, the President of the United States on

August 10, 1869, by executive order approved the setting aside of a tract on the North Fork of the Canadian River as a reserve for the Southern tribes. By the Act of May 29, 1872, 17 Stat. 190, the Secretary of the Interior was authorized to negotiate with the Southern Cheyennes and Arapahos for the relinquishment of their claim to the land ceded to them by the second article of the 1867 treaty said relinquishment to be in consideration of a permanent location for them on lands previously ceded to the United States by the Creeks and Seminoles. Subsequently, the United States and the Arapahos on October 24, 1872, entered into an agreement whereby the Southern Arapaho relinquished all their right to the land described in Article 2 of the 1867 treaty and in lieu thereof it was agreed there would be set apart a separate reservation for them between the North Fork of the Canadian River and the Cimarron River. Later negotiations were entered into with representatives of both the Southern Cheyenne and Arapaho Tribes and agreements were made with them on November 18, 1873, whereby they ceded all their rights to the 1867 treaty reservation and the United States, in lieu thereof, agreed to set apart separate reservations for these two tribes--for the Cheyennes the country between the Cimarron River and the Salt Fork of the Arkansas River, and for the Arapaho the tract of country west of 98° and between the Cimarron and the Canadian Rivers. None of these agreements were ratified by Congress and the Southern Cheyenne and Arapaho tribes remained on the reservation set apart for them by the executive order of the President issued on August 10, 1869. These tribes were still on said reservation at the time of the Agreement of October, 1890, ratified by the Act of

March 3, 1891 (26 Stat. 989). By this agreement the tribes in Article I agreed to "cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands embraced \* \* \*" in Article 2 of the 1867 treaty. The tribes by Article II of the 1890 agreement also ceded and relinquished all their claim, title and interest in the tract set aside by the 1869 executive order subject to allotment of land in severalty for the individual members of the Cheyenne and Arapaho Tribes. The agreement provided that the allotments were in part consideration for the cession of lands and that as a "further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest" in and to lands the United States would pay the tribes \$1,500,000.00.

While the 1867 treaty gave to the Southern Cheyenne and Arapaho Tribes rights to the reservation described in Article 2 thereof the failure of these tribes to exercise said rights was due to their own reluctance to accept the lands. The United States by the provisions of the 1865 and 1867 treaties had promised these tribes a reservation. While the Senate of the United States did amend the 1865 treaty and thereby foreclose the designation of the lands described in Article 2 of that treaty as a reservation, it did, however, authorize the President of the United States with the assent of the tribes to select a reservation for these Indians. A reservation was provided for the tribes by the 1867 treaty but they were dissatisfied with its location and as a result the President in 1869 by

executive order set aside a tract, desired by the Indians, for their use and occupation. It is true that this action of the President would not give the tribes reservation title in the legal sense unless his authority to select a reservation may be attributed to the 1865 treaty which required him to designate a tract with the assent of the Indians. While the 1867 treaty attempted to give these Indians a new reservation it was not to their liking and the action of the President fulfilled the promise of a reservation originally made in the 1865 treaty. In any event, possessory rights of the tribes in the tract set aside by executive order were recognized by the United States by the 1890 agreement which permitted the members of the tribes to take allotments in severalty and provided for the payment of a large sum of money for the cession of the lands. For all these reasons the Commission concludes that the lands described in the Executive Order of August 10, 1869, were given to the Southern Cheyenne and Arapaho Tribes in lieu of those lands promised in the 1865 and 1867 treaties as reservations and as such constituted consideration for the cession of subject tract. The annuities in goods and services promised in the 1867 treaty were in lieu of those promised in the 1865 and previous treaties and as such must be regarded as consideration for the cession of subject tract.

Defendant claims as consideration disbursements made pursuant to the provisions of the Agreement of September 26, 1876, ratified by the act of February 28, 1877, 19 Stat. 254. By this treaty with the different bands of the Sioux Nation of Indians and also the Northern Cheyenne and Arapaho Indians, the Indians in Article 1 agreed to a reduction of a reservation

which had been set aside by Article 2 of the Treaty of April 29, 1868, with the Sioux Indians, 15 Stat. 635, II Kapp. 998, and also agreed to relinquish and cede to the United States all territory outside the diminished reserve including all privileges of hunting. This treaty contains no cession of subject tract which had already been ceded by the Northern Cheyenne and Northern Arapaho Indians by the Treaty of May 10, 1868, 15 Stat. 665. The "Treaty of 1868" referred to in Articles 3 and 5 of the 1876 agreement refers to the Treaty of April 29, 1868, with the Sioux and not to the 1868 treaty with the Northern Cheyenne and Northern Arapaho. The 1876 agreement is in no way supplementary to the Treaty of May 10, 1868, and the consideration provided for therein was not in lieu of that promised by the Treaty of May 10, 1868.

With respect to the items claimed as consideration under those treaties which were found to have included cessions of petitioners' interests in subject tract the Commission has painstakingly analyzed each of the many disbursements to determine whether they were such as were authorized by the provisions of the treaty. Detailed findings of fact (40-46) have been made on the question of allowable items and need not be reiterated herein. The Commission found that the allowable items under the Treaties of February 18, 1861 and October 14, 1865, with the Southern Cheyenne and Arapaho Indians totaled \$276,595.89, and under the Treaty of October 28, 1867, with the same tribes they totaled \$1,157,535.49. Defendant is entitled to credit as payments on the claim the 1865 discounted value of these allowable items. In addition defendant is entitled to credit against

the southern Cheyenne and Arapaho the fair market value of the reservation set aside for the southern tribes by the Executive Order of August 10, 1869. As to the Northern Cheyenne and Northern Arapaho Tribes the defendant is entitled to credit as payment on the claim the 1865 discounted value of the allowable items disbursed pursuant to the Treaty of May 10, 1868, totaling \$1,162,016.42.

The payment of a sum which when discounted will be less than \$1,162,016.42 to the Northern Cheyenne and Arapaho Indians for their half interest in subject tract of 51,210,000 acres which had a fair market value as of October 14, 1865, of \$23,500,000.00, was unconscionable. Petitioners, the Northern Cheyenne Tribe and the Northern Arapaho Tribe are entitled to recover of and from the defendant the sum of \$11,750,000.00, less the 1865 discounted value of the allowable items of consideration totaling \$1,162,016.42, and less whatever offsets, if any, defendant may be entitled to under the provisions of the Indian Claims Commission Act. The parties in Docket No. 348 will submit a computation of the discounted value of the allowable items of consideration and the respective tribes will be charged with such sums as payments on the claim according to the allocation of the consideration between the Northern Cheyenne and Northern Arapaho Tribes as agreed upon by said tribes (see Finding 42 S and T).

With respect to the Southern Cheyenne and Arapaho Tribes, petitioners in Docket No. 329, the case will proceed to a further hearing to determine the fair market value of the reservation set aside for said tribes by Executive Order of August 10, 1869, and the parties will also submit a

computation of the 1865 discounted value of the allowable items of consideration under the Treaties of February 18, 1861, October 14, 1865 and October 28, 1867. In view of the determination of the issues involved in this proceeding, the Commission will this day enter an order dissolving the consolidation for trial which was ordered on May 5, 1952.

Wm. M. Holt  
Associate Commissioner

We concur:

Arthur V. Watkins  
Chief Commissioner

T. Harold Scott  
Associate Commissioner