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93-65 AMENDING THE INDIAN CLAIMS COMMISSION ACT
OF AUGUST 13, 1946

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HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON

INTERIOR AND INSULAR AFFAIRS
HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

H.R. 16170

A BILL TO AMEND THE ACT OF AUGUST 13, 1946
(60 STAT. 1050; 25 U.S.C. 70a)

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AMENDING THE INDIAN CLAIMS COMMISSION ACT
OF AUGUST 13, 1946

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NOTE.—The chairman of the full committee is an ex officio voting member of this subcommittee. The first listed minority member is counterpart to the subcommittee chairman.

(II)



CONTENTS

	Page
Text of H.R. 16170-----	1
Report of the Department of the Interior-----	1
Report of the Department of Justice-----	18
Statements:	
Abdnor, Hon. James, a Representative in Congress from the State of South Dakota-----	5
Denholm, Hon. Frank E., a Representative in Congress from the State of South Dakota-----	4
Kuykendall, Hon. Jerome K., Chairman of the Indian Claims Com- mission-----	44
Kyl, Hon. John, Assistant Secretary, Department of the Interior---	10
Lazarus, Arthur, Jr., Marvin J. Sonosky, and William Howard Payne, claims counsel for the Missouri Sioux (joint statement)----	30
Mileur, A. Donald, Chief, Indian Claims Section, Department of Justice-----	17
Letters:	
Kyl, Hon. John H., Assistant Secretary of the Interior, to Hon. James A. Haley, dated Aug. 2, 1974 (report)-----	1
Payne, William Howard, claims attorney, Cheyenne River Sioux Tribe, and Fort Peck Sioux Tribe, to Hon. Lloyd Meeds, dated Aug. 8, 1974-----	50
Pierce, Margaret H., acting chairman, Indian Claims Commission, to Hon. Lloyd Meeds, dated June 13, 1974-----	47
Rakestraw, W. Vincent, Assistant Attorney General, to Hon. Lloyd Meeds, dated Aug. 8, 1974 (report)-----	18

CONTENTS

1. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 1-100

2. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 101-200

3. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 201-300

4. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 301-400

5. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 401-500

6. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 501-600

7. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 601-700

8. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 701-800

9. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 801-900

10. Report of the Government of the United States on the Administration of the Government of the United States, 1917-1918, by the Honorable Woodrow Wilson, President of the United States, 1918, 901-1000

AMENDING THE INDIAN CLAIMS COMMISSION ACT OF AUGUST 13, 1946

THURSDAY, AUGUST 8, 1974

HOUSE OF REPRESENTATIVES,
INDIAN AFFAIRS SUBCOMMITTEE OF THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met, pursuant to notice at 10:15 a.m. in room 2216, Rayburn House Office Building, Hon. Lloyd Meeds (chairman) presiding.

Mr. MEEDS. The Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs will be in order for the taking of testimony on H.R. 16170, amending the Indian Claims Commission Act of 1946.

The bill and departmental report will be made a part of the record at this point; without objection it is so ordered.

[The bill and departmental report are as follows:]

[H. R. 16170, 93d Cong., Second Sess.]

A BILL To amend the Act of August 13, 1946 (60 Stat. 1050; 25 U.S.C. 70a).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of the last paragraph in section 2 of the Act of August 13, 1946 (60 Stat. 1050; 25 U.S.C. 70a), is hereby amended by striking the semicolon and the word "the" after the words "section 250 of title 28" and inserting in lieu thereof a colon and the following: "Provided, That expenditures for food, rations, or provisions shall not be deemed payments on the claim. The".

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., August 8, 1974.

Hon. JAMES A. HALEY,
*Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This responds to your request for the views of this Department on H.R. 16170, a bill "To amend the Act of August 13, 1946 (60 Stat. 1050; 25 U.S.C. 70a)."

H.R. 16170 would amend the Act which established the Indian Claims Commission (60 Stat. 1049) to provide that expenditures for food, rations, or provisions shall not be deemed payments on any claim awarded by the Commission. The effect of this amendment would be that the Commission would be prohibited from deducting such expenditures from the awards it makes to Indian tribes. (At present the Commission is required to deduct expenditures for these items if they were required under the terms of the treaty, statute, or Executive Order upon which the claim is based.)

This Department believes that from the standpoint of equity there are arguments to be made for this bill, and we wish to place these before the committee. On the other hand, the Department of Justice has raised a number of legal and other questions and considerations. We believe that the arguments which we are presenting, the views of the Department of Justice, and the opinions of witnesses representing all points of view, should be thoroughly considered and debated by the committees and the Congress.

The Indian Claims Commission was established in order to afford American Indian tribes a special forum in which to press their claims of Federal wrongdoing. Among other claims, the Commission was given jurisdiction to adjudicate "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Thus, it can be argued that the Commission is as much a court of conscience as a court of black-letter law.

Since the establishment of the Commission, required expenditures for food, rations, or provisions have been considered payments on the claim and have been deducted from the relatively few awards in which they have been adjudged by the United States. (Many claims are settled prior to adjudication; we understand that it is common for the settlement to be given as a lump sum, not broken down into individual items and without reference to deductions.) However, a good case can be made for the proposition that food-related expenditures should not be considered payments to be deducted from the Commission's awards. It can be argued that the provision of food to Indians was in many instances not in the nature of compensation but rather—even when done pursuant to a treaty—a necessary prerequisite for the survival of displaced persons. This would lead to a conclusion that for the United States both to have disrupted Indians' means of obtaining food and now to charge them for having given them the food necessary for their very survival does not comport with the role of the Indian Claims Commission as a court of conscience, in which the United States is attempting to make recompense for actions that may not have constituted "fair and honorable dealings."

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

JOHN H. KYL,
Assistant Secretary of the Interior.

Mr. MEEDS. The bill, H.R. 16170, amends the Indian Claims Commission Act by providing that food, rations, and other provisions supplied by the United States to an Indian tribe may not be considered as payments on the claim in computing government offsets against judgments of the Indian Claims Commission.

The reason that the gentleman from Ohio, myself, and others introduced the bill is that our original legislation with regard to the Indian Claims Commission Act was a mere 1-year authorization for appropriations for operation of the Commission. The Senate, however, in passage of that act, added an amendment which is the essence of H.R. 16170, standing alone. In conference the House conferees felt that, one, the subcommittee had never had an opportunity to examine the Senate amendment; and, two, the full committee would not by mere acceptance in conference have an opportunity to consider it. Therefore, the gentleman from Ohio, Mr. Regula, and I and others introduced this legislation, to have these hearings and then have a markup in the subcommittee. If the bill is reported by the subcommittee, we will take it to the full committee where all of the members of the full committee will have an opportunity to raise their opinions and register their positions.

If that, then, is accomplished, the House conferees could accept the Senate amendment, or some amendment thereto, and bring it, as part

of the conference report, to the floor where we could have separate votes; and the entire purpose of everyone's recommendation being felt in the Congress would be achieved, and we could act on the matter more expeditiously than by passing separate legislation in the House and the Senate, and then bringing it to Congress.

Although this legislation is couched in general terms to all cases before the Commission—that would be prospectively before the Commission—the amendment is directed at the Sioux claim in docket 74-B. This is the rather famous and old Indian claims case of which I think most everyone in the room is aware. It has been under litigation first in the Court of Claims and then in the Claims Commission now for over 50 years.

Some sketchy background. In an 1851 treaty, the United States recognized the Sioux right to a vast tract of land including the western half of South Dakota and extending into four adjoining States. In 1868, the Sioux entered into a treaty with the United States which (1) established the Great Sioux Reservation as all of what is now the State of South Dakota west of the Missouri River; (2) relinquished the right of the Sioux, under the 1851 treaty, to permanently occupy lands outside the reservation, but retaining the right to hunt therein; (3) required that the United States would keep unauthorized persons out of the new reservation; and, (4) provided that no more Sioux lands would be relinquished without the consent of three-fourths of the adult male population.

During this period, reports of vast gold deposits in the Black Hills area of the reservation were reported and confirmed by an official exploratory expedition into the area led by Lt. Col. Custer. Reacting to these reports, hundreds of white gold seekers poured into the area in violation of the 1868 treaty. Initially, the Army attempted to fulfill the treaty commitment by keeping them out. However, they failed.

Heavy pressure began to be exerted against the United States to secure Sioux sale of the Black Hills. Bowing to this pressure, the administration indicated it could no longer fulfill the commitment and withdrew the Army. In addition, it exerted pressure on the Congress to unilaterally acquire the Black Hills area.

Without waiting for congressional action, the administration precipitated the situation into a crisis. The Secretary of the Interior, under orders from President Grant, instructed the Indian agents for the Sioux to notify the various bands of the Sioux hunting in the so-called "Unceded Indian Territory" pursuant to their rights under the 1868 treaty, and also with permission of their agents, to return to the reservation or they would be considered hostile and subject to military action.

The Sioux refused on the grounds that (1) they were rightfully in the area that they were hunting in; and (2) the severity of the winter made travel impossible. They promised to return in the spring after the hunt.

Rejecting these grounds, the Secretary notified the Secretary of War to take appropriate military action. A massive military campaign was mounted against the Sioux in the spring of 1876 which resulted in the total defeat of Custer at Little Big Horn.

This defeat incensed the non-Indian public. In response, Congress attached a rider to the Appropriations Act of 1876 which provided that no further food or rations would be provided the Sioux unless they ceased hostilities, returned to the reservation, and agreed to cede the Black Hills area. In the words of the Indian Claims Commission, they either did so, or they would be "allowed to starve."

The President sent out a commission to negotiate the sale, and obtained the consent of less than 10 percent of the adult male population. Notwithstanding the fact that this was well less than the three-fourths consent required by the 1868 treaty, Congress ratified the agreement by an act of 1877. The agreement unilaterally took the Black Hills area along with rights-of-way for three roads across the remaining reservation. In return, the United States promised to provide the Sioux with certain food and rations.

In February of this year, the Indian Claims Commission determined that the United States had, in violation of the fifth amendment to the Constitution, unilaterally taken over 7 million acres of Sioux land which they determined had an 1877 value of \$17,100,000. In addition to the value of certain gold taken from the hills area between 1868 and 1877, the total value was set at \$17,550,000 upon which the United States was required to pay 5 percent simple interest from the time of taking.

Under the provisions of the Claims Commission Act, the Commission determined that the United States could offset food, rations, and other provisions supplied to the Sioux under the 1877 agreement. If so applied, they would almost totally, or totally wipe out any award the Sioux would try to recover.

It is from this result that the Sioux appeal, and the subject, this bill would remedy.

Now, before I introduce our first witness I would like to place in the record a statement from our colleague, Hon. Frank E. Denholm. Hearing no objection, the statement will be placed in the record at this point.

[The statement follows:]

STATEMENT OF HON. FRANK E. DENHOLM, A REPRESENTATIVE IN CONGRESS FROM
THE STATE OF SOUTH DAKOTA

Mr. Chairman and Members of the Committee: I am grateful for the opportunity to appear before you today. I support the proposed legislation to amend the Indian Claims Commission Act of 1946 to preclude a retroactive valuation of food, rations, and other provisions as partial payment of the "Black Hills Claim" pending before the Indian Claims Commission (H.R. 16170)

Mr. Chairman, I have read with interest your articulate comments concerning the proposed legislation. (Page H 7362 of the Congressional Record of July 30, 1974)

I concur with your comments concerning the proceedings of record in the matter of the Black Hills Claim and your suggestion for the full consideration of the Amendment before the House Committee on Interior and Insular Affairs prior to the approval of the Senate Amendment to authorize appropriations for the Indian Claims Commission for Fiscal Year 1975. (S. 3007)

The benefits of meager sustenance of undetermined values of the past received by the Sioux Indians through the years is totally inconsistent with precedent of record in other similar domestic and foreign matters.

I respectfully request that you and the Members of the Committee proceed to settlement of the Claim pending before the Indian Claims Commission in the interest of all native American people.

Thank you very much.

Mr. MEEDS. Our first witness is our colleague and a person who is very well grounded in the history and the effect of this problem that we confront by this legislation; he is the Honorable James Abdnor who represents probably a larger portion of the Sioux involved in this matter than any other single person in the United States.

Jim, please come forward, we are delighted to have you before this committee. Do you have a prepared statement?

Mr. ABDNOR. Yes.

Mr. MEEDS. We will put it in the record and you can proceed to summarize. Does the gentleman from New Mexico have any questions?

Mr. LUJAN. No.

Mr. MEEDS. Please proceed.

STATEMENT OF HON. JAMES ABDNOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH DAKOTA

Mr. ABDNOR. Thank you, Mr. Chairman and members of the subcommittee. I would first like to express my appreciation to the members of this subcommittee who were named as conferees to consider House and Senate differences contained in the Senate bill S. 3007, which focused the attention on the subject, the bill you are considering today, that is H.R. 16170, addresses itself.

Those members know I have been interested in that legislation for some time, and I am truly grateful that the chairman saw fit to convene hearings to consider this important matter. I have a rather detailed statement expressing why I feel the bill you are considering today ought to be enacted into law, and why time is of essence that this important matter is considered.

I am only going to briefly summarize what I feel are the most important parts of my prepared statement; Mr. Chairman, I certainly want to commend you on that excellent summary you gave which so well described the situation and problem before us.

Mr. MEEDS. Without objection the prepared statement will be made part of the record at this point.

[The full statement of the Honorable James Abdnor is as follows:]

STATEMENT OF HON. JAMES ABDNOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH DAKOTA

H.R. 16170, the bill here under consideration, would amend section 2 of the Indian Claims Commission Act to provide that expenditures by the United States for "food, rations, or provisions" shall no longer be deemed "payments" on a tribal land claim. Although couched in terms of a general change in the law, the proposed amendment actually would apply, with only insignificant exceptions, exclusively to the famous Black Hills claim of the Missouri Sioux Nation. This case, which first was filed in the Court of Claims during 1923, but which today, over 50 years later, remains pending and undecided, unquestionably represents the worst example of justice delayed being justice denied in the history of American jurisprudence.

In aboriginal times, the Missouri Sioux Nation was the dominant Indian tribe on the Great Plains, using and occupying a vast area in the present States of North and South Dakota, Montana, Wyoming and Nebraska. Over the years the Sioux landholdings have been drastically reduced, until they now occupy parts of seven reservations, six of which lie within my District in western South Dakota. Of the estimated 60,000 Missouri Sioux presently living throughout the country, approximately 30,000 are my constituents. As is the case for Indians generally, they are at the very bottom rung of the economic ladder, with poverty and unemployment rates many times the national average.

In the rapid descent of the Missouri Sioux from power and affluence to destitution, no single event played a more significant role than our Government's taking of the Black Hills pursuant to the Act of February 28, 1877 (19 Stat. at L. 254). The Indian Claims Commission, in a decision handed down earlier this year, already has determined that the 1877 Act violated the Sioux Treaty of April 29, 1868 (15 Stat. at L. 635) and thus constituted a taking of Sioux land in violation of the Fifth Amendment. Other witnesses, I believe, will supply the Subcommittee with more detailed statements concerning the historic background and legal consequences of the 1877 Act, and, of course, an excellent summary of this information appears in the report of the Senate Committee on Interior and Insular Affairs on comparable legislation, S. 3007. Suffice it to say for my purposes that the taking of the Black Hills is so important not only because we unilaterally deprived the Indians of such valuable property—7,345,157 acres inside the Great Sioux Reservation with known gold deposits of incalculable worth, plus abrogation of treaty-guaranteed off-reservation hunting rights—but more particularly because the 1877 Act marked a turning point in relations between the United States and the Missouri Sioux: the point at which the Federal Government forced the Sioux into dependency; the point at which the Sioux no longer could believe our Nation's word.

So great was the wrong, so devastating and far-reaching was the impact of the 1877 Act upon Sioux society that the Black Hills claim literally has become part of the Sioux way of life. I do not exaggerate when I say that generations of Sioux have looked to redress of that grievance as their lodestar, as the ultimate test of whether the United States in fact has changed its policies towards Indians. I need hardly add what is all too self-evident: that many of these generations have gone to their death with their hopes unrequited. Fifty years is simply too long to wait for justice. Our Government should not and, indeed, cannot afford to allow this blot upon our national honor to drag through the courts any further.

Last year's disorders at Wounded Knee may no longer be fresh in our minds. I need not remind the Members of this Subcommittee, however, that the rabble-rousers who fomented trouble there used as their rallying cry the Government's breach of the 1868 Sioux Treaty and the taking of the Black Hills. Such a siren song must have struck a responsive chord in the hearts of all the Missouri Sioux, and it is a tribute to this fine people that the overwhelming majority still placed their faith in the United States. I suggest that it makes good public policy as well as good fiscal policy now to take the rabble-rousers' slogans away. In short, let Congress take action to forestall a new outbreak, and not just leave the Executive and the courts to respond when a crisis already has arisen.

With these thoughts in mind, let me relate the language of H.R. 16170 to resolution of the Black Hills claim. As is cogently pointed out in the Senate Report on S. 3007:

"The United States never has paid the Sioux a cash consideration for the Black Hills land and minerals taken under the Act of February 28, 1877. Article 5 of the 1877 Act did provide, however, that the Government would furnish the Sioux with subsistence consisting of a ration for each individual of a pound and a half of beef (or in lieu thereof, one-half pound of bacon), one-half pound of flour, and one-half pound of corn * * * until the Indians are able to support themselves. The Commission has determined that the furnishing of rations to the Sioux constituted a payment on the Black Hills claim within the meaning of section 2 of the Indian Claims Commission Act, and thus that the value of such rations must be deducted from the value of the land in order to arrive at the amount of just compensation due the Sioux. The Government has asserted that the United States expended almost \$25 million for Sioux 'provisions' up to 1924, a figure which, if verified, would substantially wipe out the Black Hills Claim.

"The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs."

H.R. 16170 would correct the above-described inequity by amending section 2 of the Indian Claims Commission Act to provide that "food, rations, or provisions" shall not be deemed to be payments on a land claim,* and thus would insure that the Missouri Sioux be paid the full fair market value of their property as of the taking date, February 28, 1877. In the Black Hills case—and, as I previously noted, this is the only significant case affected by the proposed amendment—such a change in the law also would eliminate the necessity for a prolonged and expensive GSA investigation into the amount of rations furnished under the 1877 Act, and thus would move this long-delayed claim a substantial way further to a final decision. That result, I am convinced, clearly is in the interest of both the United States and the Sioux.

For these reasons, I urge the Subcommittee promptly and favorably to report H.R. 16170.

Mr. ABDNOR. Thank you.

This bill will amend section 2 of the Indian Claims Commission Act to provide that expenditures by the United States for food, rations, or provisions shall no longer be deemed payments on tribal land claims. With very insignificant exceptions the general language of this measure will have application only in one instance, the famous Black Hills Claim of the Missouri Sioux Nation. That claim has been pending for 50 years; and as members of this subcommittee undoubtedly know, the Black Hills Claim has become part of the Sioux's way of life. This claim, in fact, was one of the rallying cries of the militant Indians who created the disturbance last year in my district, in Wounded Knee, S. Dak., and for a time focused the Nation's attention on the plight of Indians everywhere.

In the bill that is being considered today a method is at hand to redress this serious wrong that has been pending in our court system for over 50 years. As this measure is considered, it is very important that the historical incidents surrounding the original taking of the Black Hills be seriously considered, and that the distribution of food, rations, or provisions which took place in 1877 and thereafter, be understood from the Sioux point of view.

If that understanding is achieved, I have no doubt that you will appreciate the equity of the measure that is now being considered; and you will see fit to amend the rules of the Indian Claims Commission Act to allow payment in full of the Sioux Nation's claim of the Black Hills taking without subjecting that payment to an offset, an offset that would truly be an injustice to the people that have been deprived of justice far too long already.

So, again, Mr. Chairman and members of the committee, I do appreciate this opportunity to appear. I commend you for the action, I appreciate having my written statement inserted in the record.

Mr. MEEDS. Thank you very much, Jim. Just one question, how do the people of South Dakota feel about resolving this matter in some fashion which might do it with more equity to the Sioux, than is presently described under the Indian Claims Commission?

Mr. ABDNOR. Mr. Chairman, for years this has been a real problem in South Dakota, and how many now really understand the entire

* Interestingly, if the United States had furnished rations to the Sioux gratuitously instead of pursuant to the 1877 Act, the Commission would have jurisdiction to disallow the value of such food as offsets against any recovery if "the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action. . . ." 25 U.S.C. 70a. The Commission has no discretion, on the other hand, to disallow statutory "payments" on a claim.

picture and history of it now, the younger generation at least, is questionable. But, I think it has long been understood that this land was more or less forcibly taken away from the Indians after they had reached a fair agreement with the Government. This has become a well known subject in the past year because of the Indian movement out there that I think everyone's attention is focused on it more than ever before and they would be awfully happy to see this settled and finally put to rest.

Mr. MEEDS. How much of a component in the total scheme of things that make up the militant Indians' position does the inequity of the Black Hills situation represent—a substantial portion?

Mr. ABDNOR. Yes, I think this has focused attention on this organization into operation and has given them more attention and attracted more Indians to their group than any other issue because this has been the general feeling among the people on the reservation for many, many years; and here is the first group that has come out and stood up and fought for what they feel is right. And this alone, I think, has accounted for most of the following that the group has.

Mr. MEEDS. I think probably you above all people are aware of the disruption, the cost in human life and economic dislocation, the effect of just this one incident at Wounded Knee.

I'd like to deal only with the material aspect of that for a minute. How much money, Jim, do you think Wounded Knee has cost the Federal Government and the people who have lost property, and were disrupted as a result of Wounded Knee?

Mr. ABDNOR. I would have to think that presently we are talking about—and this is just off the top of my head—about \$10 million, if we take minimum damage to property, let alone what it has done to lives on the Wounded Knee group; the policing that had to be done was something like \$5 million; and presently expenses are still being incurred by the Government from the trials that have been going on for months and months, and are a long ways from being over. And I am only talking about one incident, right down there, the Wounded Knee incident; the movement is far greater than that throughout South Dakota.

Mr. MEEDS. And is it your considered opinion that setting up the machinery for a more equitable resolution of the Sioux claim would withdraw from the militants perhaps their greatest rallying cry?

Mr. ABDNOR. I certainly do, Mr. Chairman because like I said, I have had many letters from my constituents on the reservation, and the one thing they had to say is that here is a group fighting for a just claim; and somehow I think they are willing to forget other things that they also stand for because they do feel that some of that fighting is for their cause.

Mr. MEEDS. The gentleman from New Mexico.

Mr. LUJAN. Talking about all this disruption and everything, it is my understanding at the time we had the hearings, what all these groups are really telling us is, "Live up to the treaty that you had with us." And this is something here not in accordance with the treaty—and I'm not talking about the merits of the case itself—but it certainly is not in accordance with the treaty. And if we did live

up to the treaty, that we would then reduce whatever bad feeling there might be.

I don't expect you to answer that, I am just making a point, that if we get these groups, the things that they do in order to prove a point, go overboard and say, live up to the treaty; but when something comes up not in accordance with the treaty say, "Well, just leave that one alone and change that part of the agreement."

I think that's all, Mr. Chairman.

Mr. MEEDS. The gentleman from Ohio?

Mr. REGULA. Thank you, Mr. Chairman.

Mr. ABDNOR, do you know what value has been established, if any as yet, on the land, that 7 million-plus acres?

Mr. ABDNOR. They do have the total figure. You mean before the—

Mr. REGULA. Before the ration allowance.

Mr. ABDNOR. Well, they have paid up to as high as \$57 million up to the year 1968 on this.

Mr. REGULA. \$57 million for the land?

Mr. ABDNOR. No, rations.

Mr. REGULA. Are you saying that—

Mr. ABDNOR. I was trying to figure the figure—I was going to say \$18 million, but it is \$17 million.

Mr. REGULA. If this figure is accurate. Are you saying the Indians claim the Commission determined the land value of the taking, the illegal taking as being that of \$17 million?

Mr. ABDNOR. At the time, yes.

Mr. REGULA. And I notice that in your statement you say that the Government has asserted that the United States expended almost \$25 million for provisions.

Mr. ABDNOR. That's right.

Mr. REGULA. Now, where does the \$57 million figure come from?

Mr. ABDNOR. This is the rations over the years—you mean where does the extra money come from?

Mr. REGULA. Yes.

Mr. ABDNOR. The interest, they figured the interest.

Mr. REGULA. Oh, the \$25 million was the actual value of the rations, and with the accumulated interest it would be \$57 million as an offset.

Mr. ABDNOR. Yes.

Mr. REGULA. OK.

Mr. ABDNOR. I would like to say, if any of you have seen the Black Hills, that is a pretty good assessment on the land, and particularly if you realize the amount of gold and metal that has come out of there.

Mr. REGULA. That's all, Mr. Chairman.

Mr. MEEDS. Just one further question, Mr. Abdnor, you are aware, are you not, that over some \$2 billion has been taken in gold alone out of the Black Hills, a portion of which was severed from the Great Sioux Reservation by the Act of 1877?

Mr. ABDNOR. Yes.

Mr. MEEDS. I hope my colleague from Ohio heard that.

Mr. REGULA. What's that?

Mr. MEEDS. That over \$2 billion in gold alone was taken from just the portion of the Black Hills severed from the Great Sioux Reservation.

Mr. REGULA. Was this \$2 billion flowing to the Government, or was this the value of gold taken by various private firms?

Mr. ABDNOR. To this date it is still the biggest gold mine in the United States, presently operating.

Mr. MEEDS. One further question, under present procedure, assuming we do nothing, the Indian Claims Commission will commence action to determine the value of the offsets you talked about—the supplies, food, and rations. It's been estimated it will take 5 years to get that information, so that the total expenditure can be determined accurately.

What would be the effect of 5 more years of delay on the settlement of this claim in terms of the situation presently existing in South Dakota vis-a-vis the Indians and non-Indians in that State?

Mr. ABDNOR. Well, of course, after all these years and the dreams they had of settling it, they would like to have it brought to a close as soon as possible. But I think the very fact that they know the U.S. Government is really acting in good faith to do justice that will do much to settle their unrest. And of course, they would like to bring it to a close as rapidly as possible.

Mr. MEEDS. Thank you very much.

Mr. ABDNOR. Thank you.

Mr. MEEDS. Our next witness will be Hon. John Kyl, Assistant Secretary for Congressional and Public Affairs, Department of Interior, a former colleague and good friend. John, we are pleased to have you with us.

STATEMENT OF HON. JOHN KYL, ASSISTANT SECRETARY, DEPARTMENT OF THE INTERIOR

Mr. KYL. Mr. Chairman, it's always a pleasure to be associated with you and the gentlemen of this committee in any respect.

Mr. MEEDS. Off the record.

[Discussion off the record.]

Mr. KYL. To my immediate right is Dennis Drabelle from the Legislative Office; Hans Walker, Office of the Solicitor; and Steve Feraca, Tribal Operations of the Bureau of Indian Affairs.

Mr. Chairman, H.R. 16170 would amend the act which established the Indian Claims Commission to provide that expenditures for food, rations, or provisions shall not be deemed payments on any claim awarded by the Commission. The effect of this amendment would be that the Commission would be barred from deducting such expenditures from the awards it makes to Indian tribes. At the present time the Commission is required to deduct expenditures for these items if they were mandated to be supplied by the treaty or other documents upon which the claim is based.

We believe that from the standpoint of equity there are arguments to be made for this bill, and we wish to place these before the committee. On the other hand, the Department of Justice has raised a

number of legal and other questions concerning the bill. We believe that all viewpoints should be thoroughly considered and debated by the committee and the Congress.

Now, the Indian Claims Commission was established in order to afford American Indian tribes a special forum in which to press their claims of Federal wrongdoing. Among other claims, the Commission was given jurisdiction to adjudicate "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." Thus, it can be argued that the Commission is as much a court of black-letter law.

Since the establishment of the Commission, required expenditures for food, rations, or provisions have been considered payments on the claim and have been deducted from the relatively few awards in which they have been adduced by the United States. I will say parenthetically that many claims are settled prior to adjudication. We understand that it is common for the settlement to be given as a lump sum, not broken down into individual items and without reference to deductions.

However, a good case can be made for the proposition that food-related expenditures should not be considered payments to be deducted from the Commission's awards. It can be argued that the provision of food to Indians in many instances was not in the nature of compensation but rather—even when done pursuant to a treaty—a necessary prerequisite for the survival of displaced persons. Long ago the United States disrupted Indians' livelihoods. Our reasoning would lead to a conclusion that it seems morally questionable today for the United States to charge Indians for having given them food necessary for their surviving this disruption.

Moreover, according to our arguments, to exact such a charge does not comport with the role of the Indian Claims Commission as a court of conscience, in which the United States is attempting to make recompense for actions that may not have constituted "fair and honorable dealings."

This, in essence, is our position in favor of H.R. 16170, which we submit for the committee's consideration. This concludes my prepared statement, Mr. Chairman. I will be pleased to try to answer any questions which you have.

Mr. MEEDS. Thank you very much, John.

When I read the first page of your statement I thought it was going to be one of those instances where we are going to be asking for a one-handed economist. You heard no doubt the story of the fellow who was required to give a report, and have it due on a certain date; and when he failed to have the report he was asked why. He said, "Because I couldn't find a one-handed economist." And the fellow said, "What do you mean, what does that have to do with this?" And he said, "Well, in trying to get the economic facts, I consulted economists and they all said, 'on the one hand this, and on the other hand that'."

[Laughter.]

Mr. MEEDS. So, he was never able to come to any conclusion. But I see you did come to a conclusion; and that you have come to the con-

clusion that this legislation should pass, based upon what I consider to be a very good rationale.

I just have one question, a philosophical question, maybe. There were actually in the 1877 legislation a number of injustices, one of which was to deprive the Sioux of their hunting areas from which they obtained their sustenance, and taking their guns away from them. And another was to take the Black Hills area away.

Now, it would seem to me if there were to be an offset for food and rations, they ought to be offset against the claim for taking of the hunting rights because that's the thing that is related—not the land, not the Black Hills area. Does that make any sense to you?

Mr. KYL. Well, as the gentleman knows, whenever there is any question as to which way I personally would move, either favoring the Indians, or in the opposite direction, my tendency is to move in favor of the Indians.

However, in a situation such as you describe, where we are trying to quantify an award, I would be nonplused to figure out a way to calculate monetary value. I don't know how we would possibly arrive at any figure, and I guess this is as good a point as any to say that in addition to doing equity for Indians, that which we have been speaking about here, we are also trying to simplify a process. It has taken governmental agencies as long as 5 years to try to figure out exactly how much money should have been involved in the food and rations, and so on, how that should be quantified. I think we would be facing a rather impossible task if we would proceed in the direction the gentleman suggests.

Mr. MEEDS. I'm not necessarily suggesting that we proceed that way, but it seems to me that from the standpoint of continuing what the United States did, the food, rations, and provisions ought to be offset against a related item that was actually taken. To offset food and rations against the land makes no sense when the real reasons for giving food and rations was that the hunting rights under which the Sioux got their livelihood and subsistence had also been taken in the same act.

That is merely my feeling. I throw it out as a concept; and I don't necessarily say it can be worked out. It is my understanding that there was a claim before the Commission by the Sioux for any hunting rights taken at that time. Has that claim been dismissed, or something; so, it is no longer possible to offset food and rations from it? But, in terms of real quid pro quo, it seems to me that action would be more equitable than what has happened.

Mr. KYL. There is, however, a considerable equity in the process which we suggest.

Mr. MEEDS. Oh, yes; I agree with that.

The gentleman from New Mexico?

Mr. LUJAN. Thank you, Mr. Chairman.

John, would you paint the big picture for us, how many different claims do the Sioux have; would you care to answer that?

Mr. KYL. Yes, and Steve Feraca of the Tribal Operations Section can do that. I believe, however, that to be absolutely sure of this, and to have one set of figures before you, that those representatives of the

Indian Claims Commission can provide those figures with great exactitude when they testify in just a moment. Perhaps I can ask them right now.

Mr. LUJAN. I don't want an exact figure, or anything; I just want an idea as to whether in this particular frame that we are talking about, the \$17 million, does that include all of the land that the Sioux have claimed that they occupied, that they have original rights to.

Would you identify yourself, please?

Mr. HYDE. My name is Donald Hyde, I'm one of the staff attorneys of the Commission.

At this time there are claims for lands, Sioux lands, pending in docket 74-B, docket 74, which claimants are what the witness has, the preceding witness has called the Missouri Sioux, or sometimes called the Dakota Sioux; and there are a few accounting claims—

Mr. LUJAN. A few what?

Mr. HYDE. Accounting claims by these same claimants. They are claims relating to funds and property that has been under the control and management of the U.S. Government, acting in a sort of trustee, or guardian capacity for the Indians. Those claims are pending, and there are some other—there are some land claims being asserted in a docket that is numbered 363 in behalf of some of the Eastern Sioux who are not involved in this Black Hill matter. I believe it would be correct to say that.

They are asserting four causes of action, and three of those relate to land in docket 363; but they are not the lands involved in the matter that you are now considering.

Mr. LUJAN. So, when we are talking about \$17½ million, then, that is in question, we are not talking about all of these claims that are pending.

Mr. HYDE. No, sir; we are just talking about the land that the United States took from the Sioux under the 1877 act.

Mr. LUJAN. So, what you are really saying is that prior to 1877 the Federal Government—at least the Sioux claim to have original rights prior to 1877, that the Government has taken a vast amount of land; and then, in 1877, the Government took more land.

Mr. HYDE. That is correct.

Mr. LUJAN. And we are dealing here only with the 1877 one.

Mr. HYDE. That is correct.

Mr. LUJAN. Have those claims for lands taken prior to 1877, have those been settled already?

Mr. HYDE. They are in the process of being adjudicated, sir.

Mr. LUJAN. They have not been settled.

Mr. HYDE. Well—no, they have not been settled. As a matter of fact, the claims for large aboriginal land areas and lands recognized by the Treaty of Laramie belonging to the Missouri Sioux is now before the Court of Claims on appeal from the Commission's determination on boundaries and parties to pursue that claim.

Mr. LUJAN. All right. Is the change contemplated in this legislation going to affect those claims for lands taken prior to 1877; do we have a food and ration problem there, an offset problem there on those lands taken prior to 1877?

Mr. HYDE. Well, there may be some item of consideration that could possibly be claimed for rations, food and rations because in the treaty, the 1877 treaty there was a provision in there to supply, provided the Sioux move off the reservation, to supply food and rations.

Mr. LUJAN. But that would be only for the period from 1868 to 1877.

Mr. HYDE. It would probably be for a shorter period than that because it was supposed to apply for a year or two when they first moved on the reservation, before they got established.

Mr. LUJAN. It's not significant, would you say, in total dollars.

Mr. HYDE. Well, I think we told the Chairman in our letter that we in an older case than the Court of Claims case figured between \$4 and \$6 million, detailed in that report, for food and rations under the 1868 treaty.

Mr. LUJAN. Thank you.

Now, we are talking, then, John, I suppose after this explanation, of this \$25 million being applicable to lands taken in 1877, and if we take the figure of \$17.5 million that they are worth, and the \$25 million of supplies and provisions given to the Sioux, what we are talking about, really, is that the Sioux get nothing for this particular claim.

Mr. KYL. If the deduction were made, that would be true, sir.

Mr. LUJAN. Do you think Interior would go after the Sioux for the other \$7½ million, or what, as an offset against some other claim?

Mr. KYL. This, sir, is not the prerogative of the Interior Department, under the law.

Mr. LUJAN. OK, the Indian Claims Commission may be using that \$7.5 million for offsetting—

Mr. REGULA. Would the gentleman yield?

Mr. LUJAN. Yes.

Mr. REGULA. Do I understand that the \$17½ million, then, has accumulated from the time of the taking, would have an amount greater than the value of the provisions plus the interest because the provisions went over an extended period of time; and therefore the interest costs on the provisions would be substantially less than the interest added to the land that was in effect originally taken; is that correct?

Mr. KYL. Well, if the payments were counted as payments on the claim against the Commission's decreed value, \$17.214 million, plus 5 percent interest, that would wipe out—here again I would prefer that the Claims Commission give you exact figures, but the figure I have here is \$102 million.

Mr. REGULA. That is the value of the land plus the interest.

Mr. KYL. We would, in effect, wipe out the value of the award.

Mr. REGULA. And the award plus the interest is apparently then also around \$102 million; is that correct?

Mr. KYL. Yes, sir.

Mr. REGULA. The \$102 million, really wouldn't be a claim, then.

Mr. LUJAN. So, what we are saying here is that if this legislation doesn't pass, the Sioux would get nothing for this particular claim.

And if it does pass, they would get something in the neighborhood of \$100 million. So, really, it's a \$100 million amendment that the Senate added on, that is what this bill calls for.

Mr. KYL. That is essentially correct, sir.

Mr. LUJAN. All right. So, now it is my understanding that past claims of the Indian Claims Commission which have taken this provision into consideration amount to some small amount when you are talking in terms of the whole operation of the Indian Claims Commission. Can you give us a figure on that, \$100,000, is that correct?

Mr. KYL. That is the figure which we have. Again, I would like to have that substantiated by the Commission.

Mr. LUJAN. But that is the figure being bandied about.

Mr. KYL. Yes, sir.

Mr. LUJAN. If we do adopt this legislation, do you think it will open it up to more than \$100,000 for past claims; could they come back and reopen cases that have already been adjudicated and ruled on?

Mr. KYL. Not unless that was specifically covered in the legislation.

Mr. LUJAN. It is not.

Mr. KYL. In this bill you deal with pending cases, and under the law, if I may read that to you, in 70(u) of title 25, United States Code: "The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."

Mr. LUJAN. All right, but it would apply to other claims, other than this Sioux claim.

Mr. KYL. That are pending.

Mr. LUJAN. That are pending.

Mr. KYL. Yes.

Mr. LUJAN. Now, is this claim any different—I am not talking about details, but generally—is it any different than most claims in the Indian Claims Commission?

Let me tell you what I am referring to. The claim made a statement about the fact that the land was unconstitutionally taken, and it is my understanding that the rules that we play by in the Indian Claims Commission is, no admission of this kind is made; that in effect out of the goodness of the Federal taxpayers' funds to correct some inequities that might have come about, that we are then awarding these moneys. Is that correct, is that the rule that we play by on the part of the Indian Claims Commission, we don't admit that legally there is a claim, but recognize that some inadequacy should be corrected?

Mr. KYL. Well, there again we would refer to those people that are here from the Claims Commission and from Justice.

Mr. LUJAN. Well, is that what the law says?

Mr. KYL. The law gave the Indians 5 years, the Indian tribes 5 years in which to file claims; and under that law they had the authority to do so. Now, if we change the rule on the configuration of those claims, then of course there could be, possibly, reason for reopening some of these other claims.

Mr. LUJAN. That's not what I am talking about, I am talking about the overall philosophy that we operate under as far as recognizing aboriginal claims are concerned. Do we admit to a violation of the constitutional rights within the Indian Claims Commission? When these claims are finally settled, is that an admission by the United States that these constitutional rights have indeed been taken away; or do we say, well, there is something wrong here and while not admitting anything, we are still going to go ahead and pay?

Mr. KYL. No, the Commission simply makes its decision under the law which established the Commission. There is, of course—and this may be what the gentleman is getting to, I'm not positive, there is probably a lack of understanding at the moment—the act was miserate, the Court of Claims is supposed to determine whether there is a valid claim; and to this time it has had to deduct certain payments of which we were speaking this morning.

Now, there is a great different between the legal right to do something, and the moral right to do it. There is a Supreme Court case, I believe *Lone Wolf v. Hitchcock*, in 1942 in which the Supreme Court said that the Government had the plenary right to do what it did in regard to the taking of Indian lands.

Now, following that are other elements of the Federal Government that have said it is a matter of *res judicata*, and therefore that is the law.

But, if you are talking about what is legal and what is the right thing to do from the moral standpoint, from the standpoint of equity, that is quite a different thing.

Mr. LUJAN. Which basis do we operate under? The only reason I'm bringing this up—and I don't want to belabor the point—is there any difference, particularly, from this claim to any other claim of the Indian Claims Commission?

Mr. KYL. Oh, there are unique features in this claim, yes, sir.

Mr. MEEDS. Will the gentleman yield? Perhaps the Chair can help a little bit. There are a number of different claims. The majority deals with the Indians' aboriginal title to an area which was taken by a treaty or other congressional action.

The Indians then go before the Indian Claims Commission and assert they were given inadequate compensation. That is the general claim before the Indian Claims Commission.

This particular situation is not that kind of claim. This is a unique claim based upon the 1877 law which arbitrarily took the lands and hunting rights from the Sioux and which the Indian Claims Commission has determined to be a fifth amendment taking.

Mr. LUJAN. So, it is different.

Mr. MEEDS. So it is different, it is unique. Unless I am incorrect, there are probably only five other cases before the Indian Claims Commission which are based on fifth amendment taking contentions.

Mr. LUJAN. Being that it's different, do you think perhaps the legislation might be applicable to this claim, should it be made applicable to this claim, rather than to all claims from here on out?

Mr. KYL. You are asking for my personal view, sir?

Mr. LUJAN. Yes.

Mr. KYL. I do not believe that it ought to fit this one particular case as a matter of law when there may be others that can easily be determined by the Claims Commission; and I don't think it would be equitable that we select one tribe for this kind of treatment if there are others that have a valid claim of this sort.

Now, it is true, a lot of them would probably be very picayune claims, where it would be doubtful they would be worth even trying.

Mr. LUJAN. Is it any more fair to pick out only the Sioux in this particular case, as opposed to all others who had claims from here on, than to pick out only those whose claims had not been settled, and exclude those whose claims had been settled, as we are doing in the legislation?

Mr. KYL. Well, again, I wouldn't want to speak to the degree, but I would say we have to consider those which are pending; and if there is an equitable case from the past, that also ought to be included.

Mr. LUJAN. Just one more question. Do you have a ballpark figure as to what that will cost, what this amendment will cost in addition to the \$100 million of the Sioux claim?

Mr. KYL. May I defer, Congressman Lujan, to the people from the Claims Commission for a moment, to see if they have worked this out? They can at least give you a figure on those which are pending at this point.

Mr. MEEDS. If the gentleman will yield. Why don't we wait until we get the people from the Commission here to answer that type of question?

Mr. KYL. We believe, from what we studied, it would be a relatively insignificant amount. But, I would like to have them respond because they work with this every day of the week, year by year; and they do have the figures.

Mr. LUJAN. I yield back the balance of my time.

Mr. MEEDS. The gentleman from Ohio?

Mr. REGULA. I think I'll just hold my questions for the Claims Commission.

Mr. MEEDS. Thank you very much, John.

Mr. KYL. Thank you.

Mr. MEEDS. The next witness will be Donald Mileur, Chief of the Indian Claims Section, Department of Justice. Please come forward, Mr. Mileur.

Mr. MILEUR. Thank you, Mr. Chairman.

Mr. MEEDS. You have a prepared statement, it will be inserted into the record.

Mr. MILEUR. Thank you, Mr. Chairman. I would like to introduce my colleagues, Mr. Craig Decker, who is my assistant chief in the Indian Claims Section; Mr. Edward Lazowska, who is legislative assistant for the Land and Natural Resources Division.

STATEMENT OF A. DONALD MILEUR

Mr. MILEUR. Assistant Attorney General Johnson had planned to come and give this statement himself, up until yesterday afternoon when something came up that made it impossible for him to be here. He does send his apologies to the committee.

Mr. MEEDS. We assume that something came up for a lot of people yesterday afternoon.

[Laughter.]

Mr. MILEUR. We do have an official report from the Department of Justice, which has been put in the record.

Mr. MEEDS. Without objection your report in response to our earlier request will be made a part of the record at this point.

Mr. MILEUR. Thank you, Mr. Chairman.

[The report of the Department of Justice is as follows:]

DEPARTMENT OF JUSTICE,
Washington, D.C., August 8, 1974.

HON. LLOYD MEEDS,

Chairman, Indian Affairs Subcommittee, Committee on Interior and Insular Affairs, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 16170 eliminating food, rations, or provisions as payments on the claim in Indian Claims Commission cases. This bill is a proposed change in the basic legislation under which the Indian Claims Commission operates.

H.R. 16170 would amend Section 2 of the Indian Claims Commission Act (Act of August 13, 1946, 60 Stat. at 1050), 25 U.S.C. sec. 70a, by prohibiting the United States from using expenditures by the United States for food, rations, or provisions as "payments on the claim." This means in practical effect, that where the United States pursuant to a treaty or agreement with an Indian tribe has purchased for them food, rations, or provisions, and the Indians are now suing us on a claim arising out of such treaty or agreement, the Government can no longer deduct such expenditures from any award made on that claim.

Section 2 of the Indian Claims Commission Act sets out the ground rules under which claims are brought, the defenses available to the United States, and the appropriate deductions for any awards made. This basic section has never been amended since its enactment in 1946. Once the decision was made to allow all Indian claims arising prior to August 13, 1946, to be litigated and finally disposed of,¹ any change in the ground rules in the middle of the process of disposing of these claims is bound to have very far-reaching implications. Before we can discuss those implications, more attention must be given to the basic structure of Section 2.

After the Commission has determined that an Indian tribe is entitled to an award, and the amount thereof has been determined, two more determinations must be made. (A) The Commission must determine all payments made "on the claim" and for all other offsets and counterclaims which would be allowable in a suit before the Court of Claims. (B) The Commission must determine gratuitous offsets. This second class of offsets are not legally offsets in ordinary litigation. Rather these are money or property given to or funds expended *gratuitously* for the benefit of the Indian tribe, i.e., having no legal connection with the particular claim on which suit is brought.² Both payments on the claim (Type A) and gratuitous offsets (Type B) have been extensively deducted from awards made under the Indian Claims Commission Act since its inception.

The proposed legislation raises the following policy questions:

(1) Why should a distinction be made between "food, rations, or provisions" and any other type of payment on the claim? We can see no merit to exempting food and not, e.g., pay of doctors, farming equipment, education expenses, per capita payments, or any of the other categories of treaty consideration which are deductible from awards.

(2) If there is no reason, then why should not all other payments on the claim be disallowed in addition to "food, rations, or provisions"?

(3) If payments on the claim, which are legal offsets, are to be disallowed, a much stronger case can be made for disallowing all gratuitous offsets, which would not ordinarily be deductible from a judgment.

¹ Section 12, 25 U.S.C. sec. 70k, provides that no claim not presented in accordance with the Act "may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by Congress."

² There are restrictions on when gratuitous offsets are allowable which we shall not develop here.

(4) If we are to stop deducting payments on the claim and gratuitous offsets for all awards made from 1974 onward, why should not those who have previously gotten awards be given equal treatment?

If it be decided as a matter of policy that all payments on the claim and gratuitous offsets should be restored to the Indians retroactive to the 1946 enactment of the Indian Claims Commission Act a further complication arises. Of the approximately 253 awards that have been made to date, 124 have been based on stipulated settlements. In some settlements the amount of the payments on the claim and gratuitous offsets are set out. In other cases, only a final amount is stipulated. It is, therefore, impossible to determine with any degree of accuracy the amount allowed against Indian awards on account of payments on the claim and gratuitous offsets.

It is indicated that a major potential beneficiary of the proposed amendment of Section 2 of the Indian Claims Commission Act would be the Petitioner in *Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151, decided February 15, 1974. The following amounts were awarded in that case:

(1) \$17,100,000 as the fair market value of land acquired by the United States under the Act of February 28, 1877, 19 Stat. 254.

(2) \$450,000 as the value of gold removed from the Great Sioux Reservation prior to February 28, 1877.

(3) The United States was held liable in both awards for a Fifth Amendment taking, entitled the Sioux Nation to 5 percent simple interest on \$17,100,000 from February 28, 1877, until paid and 5 percent simple interest on \$450,000 from November 17, 1875, until paid. Interest until the anniversary date in 1974 would amount to \$85,162,500.

(4) The United States is liable for an undetermined amount as the value of the right to construct three wagon roads through the Great Sioux Reservation.

(5) Total determined damages are \$102,712,500.

Against this award, the United States has several defenses:

(1) That there has been no Fifth Amendment taking, which would eliminate the interest claim.

(2) Lack of substantial evidence and related defenses against the claim for removal of gold.

(3) Payments on the claim, i.e., money paid pursuant to the Act of February 28, 1877, and gratuitous offsets.

A Notice of Appeal covering (1) and (2) has been filed in the Court of Claims. Our accountants are preparing a report covering (3). If the Government prevails on the Fifth Amendment claim, the monetary results are obvious and require no further comment.

A new Section 2 would prevent the Government from pursuing the payment on the claim. Article 5 of the agreement approved by the Act of February 28, 1877, provides in pertinent part:

In consideration of the foregoing cession of territory and rights * * *, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for in the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one-half pound of bacon), one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. *Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves.* * * * [Emphasis added.]

When the Sioux Nation previously brought this claim under a special jurisdictional act, the Court of Claims found the Government had disbursed provisions pursuant to the Act of February 28, 1877, in the amount of over \$39,000,000 prior to June 30, 1926, and had disbursed over \$43,000,000 prior to the date of the opinion. *Sioux Tribe v. United States*, 97 Ct. Cl. 613, 662 (1942). By 1956, in a prior appeal of the present case, it was estimated that the payments under Article 5 had risen to \$57,048,106. *Sioux Tribe v. United States*, 146 F. Supp. 229, 234, footnote 2 (Ct. Cl. 1956). Since any payments on the claim would be applied, at least in substantial part, against the \$17,100,000 principal,³ if all payments on the claim asserted by the Government were allowed, it would probably sub-

³ See 33 Ind. Cl. Comm. at 221 for the formula.

stantially wipe out both the principal and interest claims. The Indian Claims Commission in its most recent decision has made clear that it will be very difficult for the Government to prove payment on the claim.⁴ The proposed legislation would save the Government the effort of even trying to prove payment on the claim.

According to the Senate Committee's report, the basic objective of Section 2 "although couched in general terms" is to expedite "the Indian Claims Commission's disposition of the famous Black Hills case * * *."⁵ However, if the bill passes in its present form, the Government will still have its appeal on whether there has been a Fifth Amendment taking, and its liability for the removal of gold prior to February 28, 1877. In addition, the Government would still have a claim for gratuitous offsets to be litigated. The present proposed legislation does not make it clear whether, since the Government would be denied from asserting "payment on the claim," it could then present the payment of over \$57,000,000 as gratuitous offsets.

In final analysis, there is no guarantee that the proposed legislation would accomplish its "basic objective" of expediting the disposition of the Sioux Black Hills claim.

In summary, the Department of Justice believes that the following problems should be considered in deciding on the merits of H.R. 16170:

(1) By changing the ground rules under which Indian claims have been litigated for the past 28 years, it would encourage other tribes to seek similar legislative relief to "expedite" pending claims, and in the process slow down the litigation of the remaining claims while the tribes are pursuing such legislative relief.

(2) It is unfair to those tribes which have previously litigated claims under the present rules, and would lead to a request for legislation to reopen closed cases.

(3) Since there is no logical reason to limit legislative relief to payment on the claim for "food, rations, or provisions", it will lead to requests to broaden such legislative relief to all treaty consideration, other payments on the claim, and gratuitous offsets.

(4) It is doubtful that the proposal will succeed even in its "basic objective" to expedite the disposal of Docket No. 74-B, the so-called Black Hills claim, before the Indian Claims Commission.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

W. VINCENT RAKESTRAW,
Assistant Attorney General.

Mr. MILEUR. You have requested the views of the Department on H.R. 16170 which would amend section 2 of the Indian Claims Commission Act. This bill changes for the first time since 1946 the ground rules by which pre-1946 Indian claims are determined. Narrowly, the bill would eliminate "food, rations, or provisions" as "payments on the claim". This means that the United States would no longer be able to claim credit for food, rations or provisions promised and delivered to an Indian tribe under a treaty or agreement against an award the Indian tribe might obtain arising from such treaty or agreement.

However, the implications of this legislation are far broader than precise provisions of H.R. 16170. It is these broader aspects that I wish to bring to your attention.

From 1928 to 1946 Congress pondered over legislation which would allow Indians to litigate once and for all any ancient wrongs which had been done to them or their ancestors. The final result of these many years of study and debate is the act of August 13, 1946,

⁴ See 33 Ind. Cl. Comm. at 219-220.

⁵ S. Rept. 93-863, p. 2.

and section 2, which H.R. 16170 would amend, is the heart of the act. Section 2 establishes the basis on which these ancient claims may be brought and the defenses and offsets available to the United States.

Over 600 separate original or amended petitions have been filed before the Indian Claims Commission since 1946. Of the total, final awards or dismissals have been entered in 455 dockets leaving less than 200 dockets to be disposed of. The Commission has entered final awards of almost \$539 million.

Having carefully studied and instituted a system of settling ancient wrongs done to Indian tribes, and approximately three-fourths of the dockets having been litigated under that system, Congress should be very careful in changing it so near the end of the process.

Presently, when an Indian tribe has received an award the Commission is required to determine all payments made "on the claim", and all other offsets and counterclaims which would be allowable if a citizen were suing in the Court of Claims. In addition, the Commission is required to determine gratuitous offsets. This second class, gratuitous offsets, are not legally offsets in ordinary litigation. Rather these are money or property given to or funds expended gratuitously for the benefit of the Indian tribe. Both classes, payments on the claim and gratuitous offsets, have been extensively deducted from awards made under the Indian Claims Act since its inception.

If Congress should now see fit to change the rule with respect to reductions of awards for one limited category of payments on the claim, it is not difficult to envision that Congress will be requested to extend the precedent thus established in at least three ways.

First, it may be argued with some logic that if food, rations or provisions are not to be deducted from awards then no payments on the claim should be deducted. It is not easy to tell an Indian tribe that if in a treaty they were promised grist mills, or school buildings, or tools, plows, service or doctors, teachers or farmers, per capita payments or any of the myriad types of material things promised, they must be deducted from their award, but if they were so farsighted as to ask for food, rations or provision, they are not to be charged anything.

Second, if payments on the claim, or some types of payment on the claim, may not be deducted from the award, a much stronger argument can be made that no gratuitous offsets should be deducted from the award. Gratuitous offsets are simply gifts made to Indian tribes. Except for the express provisions of section 2, such gifts would not be a proper offset. A defendant cannot in ordinary litigation ask credit for a gift voluntarily made to reduce the plaintiff's award. However, if H.R. 16170 is enacted, Indian tribes have a precedent on which to petition Congress, ultimately, to remove all payments on the claim, offset, counterclaims and gratuitous offsets.

Third, if from 1974 forward all or certain types of payments on the claim and gratuitous offsets are no longer to be deducted from the award to an Indian tribe, those plaintiffs in 253 dockets which have received awards since 1946 may justifiably ask that these

awards be reopened to allow them credit for the same type of deduction. I do not know how much such additional awards would amount to. It would depend, of course, on what types of payments on the claim and offsets are eventually reimbursed to the tribes, and the forum provided in which to litigate the question.

I do know that it would be extremely difficult, if not impossible, to determine fairly how much has been deducted from previous awards for payments on the claim and gratuitous offsets. Final awards have been entered by stipulation in 124 cases—excuse me, dockets, for a total of \$242 million, rounded. In many of these stipulated awards the parties did not specify how much was allowed for payment on the claim or offsets. The difficulty is illustrated by our most recent settlement in the Kiowa, Commanche, Apache case, dockets 257, 259-A. The parties stipulated a final award in that case of \$35,060,000. In our internal deliberations in the Department of Justice we noted that payment on the claim might have been as much as \$1,743,000, but the Department considered that the amount allowed probably would not exceed \$1,495,000. Similarly with gratuitous offsets, the Government might have claimed as much as \$4,149,000, but realistically considered that no more than \$2,735,000 would have been allowed at the maximum. Of course, the Commission might have allowed anything between zero and the higher figures. We do not know what the Indians considered possible or probable.

The report of the Senate Committee on Interior and Insular Affairs suggests that this legislation was introduced "to correct an inequity" the *Sioux Nation v. United States*. Parenthetically, let me suggest that the background of that case is fairly stated in *Sioux Tribe v. United States*, 97 Ct. Cl. 613. Whatever injustices the Sioux Nation has endured, they are different only in details from the other ancient wrongs of which Indian tribes complain, and to hear them, Congress established the Indian Claims Commission as a forum in 1946. If the Sioux hold out the facts of one of their claims as particularly egregious, most other Indian tribes can come in with other facts requesting that section 2 be amended to insure under each one's peculiar circumstances a sufficiently large recovery. Indeed, some tribes maintain that for various reasons they did not file a claim at all before the statute of limitations ran in 1951, and therefore the period for filing new claims should be reopened.

But, Congress was quite specific in section 12 of the act that no claim existing before 1946, and not presented by 1951, "may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress."

If Congress at this late date, with the Commission due to expire on April 10, 1977, is to begin to amend the basic statute because of the inequity of a particular case, it would be fair to do so comprehensively by eliminating as deductions from awards all payments on the claim, offsets, counterclaims and gratuitous offsets. Should Congress want to change the ground rules in Indian Claims Commission litigation, such provision should be made retroactive to 1946, to

cover final judgments already entered, even though this would entail considerable additional litigation to determine.

Thank you. Here is the end of Mr. Johnson's statement; and we are happy to answer any questions which you may have.

Mr. MEEDS. Thank you very much, Mr. Mileur. I think you have done a pretty workman-like job of constructing a mountain out of a mole hill, if you don't mind my saying so.

You start from the premise that if we provide a prohibition to offsetting food and rations, and leap from that to the premise that we therefore could provide a prohibition against payments actually made on the claim, and gratuities, so as to wipe out all offsets that have ever been made before the Indian Claims Commission. Isn't that about where you go?

Mr. MILEUR. That's right. What I'm saying—

Mr. MEEDS. Do you seriously think that the members of Congress are so naive that they are going to take the same step that you have taken?

Mr. MILEUR. I won't characterize the members of Congress, Mr. Chairman. But I say that it establishes a precedent. That is my point. Then the next tribe comes along with a slightly different fact situation, slightly different inequity, slightly different injustices; and they come in and say, "Look what you have done for the Sioux—"

Mr. MEEDS. You are a lawyer now, Mr. Mileur. Does precedent establish a method of operation for dissimilar situations for the future, or for similar situations?

Mr. MILEUR. Well, I am suggesting that the situations would be similar.

Mr. MEEDS. Will you tell me how much money in claims is pending for similar claims?

Mr. MILEUR. I don't have that information, Mr. Chairman.

Mr. MEEDS. Don't you think maybe you ought to know, if you are talking about precedent, how much it will affect? Are you aware that we are talking about less than \$100,000 in the past, and probably less than \$2 million in the future?

Mr. MILEUR. You are speaking about the precise language of the bill, as it is now before you; is that correct?

Mr. MEEDS. Yes.

Mr. MILEUR. As I said, I don't know. I doubt that—well, I don't know.

Mr. MEEDS. You are talking about precedent, now. Let's be precise.

Mr. REGULA. Will the gentleman yield?

Mr. MEEDS. I would be glad to yield.

Mr. REGULA. You said \$100,000 for prior claims.

Mr. MEEDS. Yes.

Mr. REGULA. Is that the total?

Mr. MEEDS. For food, rations, as offset on claims, yes.

Mr. REGULA. That is the total?

Mr. MEEDS. Yes.

Mr. REGULA. How about gratuities?

Mr. MEEDS. Are you aware of that, that we are talking about less than \$100,000 in the past?

Mr. MILEUR. I have not broken out gratuities, consideration or payments on the claim for food, rations, and provisions. I don't know that.

Mr. MEEDS. Wait a minute, you talk right there, in that one statement, about three areas, consideration, payment on the claims, and food and rations. They are three different things, are you aware of that?

Mr. MILEUR. I don't believe they are, Mr. Chairman, if I may disagree with you. Food and rations are the considerations, or they might be the payment on claim, if they were promised in a treaty.

Mr. MEEDS. What about gratuities?

Mr. MILEUR. Gratuities, that is something else.

Mr. MEEDS. As a matter of fact, gratuities are kind of a favor of the Federal Government.

Mr. MILEUR. As I said in my statement, they wouldn't be allowed in ordinary litigation.

Mr. MEEDS. Exactly, if you had an ordinary law suit, they would not count, would they?

Mr. MILEUR. That's right, they are allowed only because of the express provision of section 2.

Mr. MEEDS. So, we are talking about, in past claims by the Indian Claims Commission's testimony, and the information it supplied the committee, approximately \$100,000 in the past in food and rations, which would be considered as offset against the claim. And except for two cases on the Sioux the Commission has told us that it's effect in the future would be minimal. Are you aware of that?

Mr. MILEUR. I'm aware of the Commission's statement on what the amount is, yes.

Mr. MEEDS. So, if we follow precedent very closely, then the precedent we are setting deals with food and rations offset on the claim, right?

Mr. MILEUR. That's correct.

Mr. MEEDS. And we are talking about, in the past, \$100,000 and in the future very "minimal". Now, is that such a terrible precedent?

Mr. MILEUR. If it's limited to that, no.

Mr. MEEDS. Now, if you are talking about setting the precedent of the U.S. Congress by legislation, changing a law which was passed in 1946, then you know, I have to agree with you, that this can open the door.

And then my question is, should the Congress not change laws that were passed in 1946, 1846, and indeed 1973?

Mr. MILEUR. Obviously we defer to Congress on this, Mr. Chairman. We simply point out what we feel are some of the implications on what you are doing now; the ultimate judgment is of course for you to make.

I might say that while I did not make any breakdown on food, or rations, I did have my staff do a hasty calculation on total consideration that has been allowed in the past, and that figure comes to \$23 million; that is for all types of considerations that I could find.

Mr. MEEDS. Now, wait a minute. There are two different things, again. Consideration is one thing, payment on the claim is another thing.

Mr. MILEUR. Legally there is no distinction between those two, Mr. Chairman.

Mr. MEEDS. Well, I think the Claims Commission distinguishes between them.

Mr. MILEUR. As far as being deducted, they are both deducted from the award on the same terms.

Mr. MEEDS. Yes, and once they have determined that those food and rations should be payment on the claim, they must be deducted; that's why we are here.

Mr. MILEUR. That's right.

Mr. MEEDS. I defer to the gentleman from New Mexico.

Mr. LUJAN. Mr. Mileur, what you are really saying your point is, that if today we exempt food, rations, and provisions, then in all probability what will happen is that next year someone will come and say, "You have already take out food, rations and provisions, take out gratuities now", and once that happens, there is no question in my mind that that is exactly what is going to happen, that next year we will have a bill because somebody representing an Indian tribe will say, "You ought to take out gratuities" to whoever is going to introduce the bill.

To be very honest with you, there is very little doubt in my mind that it would pass this committee, it probably would pass this committee, and probably would pass Congress, also.

And then, the following year somebody will say, "Well, this poor tribe isn't going to get any money because we are taking into consideration that years ago we made some kind of a payment, so we ought to take that out of that. And pretty soon we will have tribes whose claims have already been settled come in and say, "Here, look at this, look what you have done for them, you have left it out"; and then pretty soon we'll have the whole thing way off because someone could say, and could say right now, "Well, we didn't file a claim because we felt that the food, ration, and provision would knock us out and we would not get any money."

So, now in all fairness, we just would open it up to go on, and on, and on. And one of the things we have been trying to do in this committee is shut down the Indian Claims Commission because it's already gone 25 years beyond the time that it should have.

Now, in order to avoid these problems that you are talking about, Mr. Mileur, do you think that it might be perhaps a good idea for this committee to consider limiting it only to this particular claim. This is no more unjust than limiting some others.

Mr. MILEUR. This is, of course, up to Congress, to have a private relief bill that will take care of the Sioux and nobody else. That is obviously open to Congress.

Mr. LUJAN. That might eliminate some of the problems you are speaking of.

Mr. MILEUR. Yes, it would.

Mr. LUJAN. Thank you.

Mr. MEEDS. The gentleman from Ohio.

Mr. REGULA. Thank you, Mr. Chairman.

Mr. MILEUR, as I understood it earlier, there are not too many of these claims based on fifth amendment taking.

Mr. MILEUR. There are not as many fifth amendment claims as there are aboriginal title claims. There are however, many fifth amendment claims. I don't have the exact number at my finger-tip, but there have been several, and I might say the trend—with apologies to the commissioners who are here—if I could project the trend as I see the trend to be, that there will be more fifth amendment claims as we come along. There may well be more in the future than there have been in the past. But, there have been several.

Mr. REGULA. Well, really there are three classes, and one is a private bill route which stipulates—it fits only this situation; or, second, the general language that we now have, which in your judgment opens up potential for other claims retroactively; or, third, the possibility to limit this general language to fifth amendment taking. Would that have any potential?

Mr. MILEUR. Well, obviously, the more limitations you put in the provision, the fewer cases you would get that would come under that umbrella. So that I would have to agree that it is likely that fewer claims would come under it if the language were limited to fifth amendment taking.

I might point out that we, the Government, has an appeal pending on whether this was, or was not a fifth amendment taking; and therefore, in considering this, the Commission should obviously have that in mind, too. If they feel the Sioux should be awarded something, they should—

Mr. REGULA. If the Government were successful, would that wipe out the claim altogether?

Mr. MILEUR. If the Government were successful, it would knock out the interest only, at this point. In other words, instead of having an award for \$17 million, plus \$80-some million interest, or a total of \$102 million, the Sioux would have a claim only for the \$17 million.

Mr. REGULA. Are you saying to me—and I'm new—are you saying to me that based on aboriginal claims, there is no interest?

Mr. MILEUR. Well, the distinction in this case is not between aboriginal and recognized treaty title. In this case, we are only dealing with a treaty or reservation title. But, it is not every case of reservation or treaty title that constitutes a fifth amendment taking.

Mr. REGULA. Well, if this were not a fifth amendment taking, then what kind of a taking would it be?

Mr. MILEUR. It would just be an ordinary taking in violation of clause 3, or clause 5 of the Indian Claims Commission Act, which is not necessarily a fifth amendment taking.

Mr. REGULA. Why is there no interest if it's that kind of taking? I'm just curious.

Mr. MILEUR. Well, that is a very complicated question, and all I can say is, this is the way the court decided it. If I had a couple of hours of your time, I might go into it.

Mr. LUJAN. Will the gentleman yield?

Mr. REGULA. I yield.

Mr. LUJAN. Wouldn't it be, basically, if you recognized an aboriginal one, that we are correcting a moral wrong, that a legal wrong; would that sum it up, with maybe a lot of flaws?

Mr. MILEUR. I'm not sure I understand your question, Mr. Lujan.

Mr. LUJAN. Because, if we are recognizing aboriginal title, there is nothing in any law that says we have to recognize that; and all we are doing is correcting a moral injustice, and not a legal injustice.

Mr. MILEUR. The law, as I see it, is that prior to the Indian Claims Commission Act no court of the United States recognized any compensable interest in aboriginal title. It was consistently held that aboriginal title does not give rise to any sort of a legal claim.

After the Indian Claims Commission Act there was some litigation in the early years, and finally a case, *Otoe and Missouri*, went to the Court of Claims, and it finally decided that under the Indian Claims Commission Act Congress had intended to make aboriginal title compensable; not as a fifth amendment taking, but simply for the value of the land as of the date aboriginal title was extinguished.

And therefore you are basically correct, it has been a moral undertaking by Congress in the Indian Claims Commission Act, and not a requirement of the fifth amendment.

Mr. LUJAN. A little salve from Congress.

Mr. MILEUR. Yes.

Mr. LUJAN. Do you of your knowledge know what portion of the \$500-some million has already been paid on aboriginals, that is without interest, as opposed to how much of these claims—or how much of this amount represents fifth amendment takings?

Mr. MILEUR. I'm sorry, sir; I don't have that information.

Mr. LUJAN. I have one last comment. Your statement here is of course a typical lawyer's, and you find all the problems and raise all the red flags, and I think that is part of our responsibility. But, would it be out of order to request the Department to come back with a way in which we might achieve this objective without creating all these pitfalls that you outlined, and still remedy what appears to be an injustice?

Mr. MILEUR. Well, I can't speak for the Department on that. Speaking as an individual, I would say the private relief act is the way to do it; but I emphasize, that is my own personal opinion, not the Department's position.

Mr. LUJAN. That is all, Mr. Chairman.

Mr. MEEDS. Thank you.

Mr. DECKER. Mr. Chairman, I just wanted to correct something in the record. Earlier you were speaking, if you recall, to the fact that rations and provisions didn't seem to be a very logical offset to land, but that it would be more logical to offset these against the hunting rights of the Sioux Indians.

Mr. MEEDS. Well, if you will pardon me, I think I qualified it a little more than that. I said that when the hunting rights were taken, by the same instrument that took both hunting rights and land—

Mr. REGULA. Will the gentleman yield?

Mr. MEEDS. No, let me finish.

Then it would seem to me the quid pro quo would be provisions and rations—

Mr. DECKER. Yes.

Mr. MEEDS [continuing]. Which would be made necessary by taking the hunting rights.

Mr. DECKER. Yes, I wasn't arguing one way or another about that. I just wanted to clear up that at the conclusion of that you concluded that the Sioux hunting rights claim under the 1877 act had been disposed of, or dismissed.

Mr. MEEDS. Yes.

Mr. DECKER. That's not so; that claim is still pending before the Indian Claims Commission.

Mr. MEEDS. Well, I asked counsel to ask them, maybe we'd better—

Mr. DECKER. They may have a different answer.

Mr. MEEDS. They told me that it was not. Will someone from the Claims Commission clarify that, someone who knows?

Mr. LAZARUS. Mr. Chairman, I'm the next witness, and I can answer your question.

Mr. MEEDS. If you gentleman would please remain, I have one final question.

Mr. Lazarus?

Mr. LAZARUS. Yes, the answer is that the hunting right claim has been taken up in docket 74-B; and the Commission has ruled that the hunting right was granted under the 1868 treaty; it was abrogated under the 1877 act, and that the Sioux have no claim unless the hunting right was worth more in 1877 than it was worth in 1868. And since the number of buffalo were declining, that means it is washed-out.

So, although you can say the claim is still in the case, the decision of the Commission has washed it out.

Mr. MEEDS. I see. I apologize, then, for being so specific and saying that it had been dismissed, obviously it has not been dismissed.

Mr. DECKER. I might just add, speaking once again as a lawyer, I would feel much safer as a defense lawyer if the claim were expressly dismissed. These claims do bounce around through the years, and what looks like a no-judgment claim to start with, hangs around, and pretty soon it comes out in a very sizable judgment.

Mr. MEEDS. I agree.

Mr. REGULA. Will the gentleman yield? I was trying to clarify this, Mr. Chairman. Apparently hunting rights extend beyond the land in question, is that true?

Mr. MEEDS. Yes, that's right. To answer the gentleman's question, in 1851 the United States entered into a treaty with the Sioux, all the Sioux, in which the Sioux retained a vastly large area, what we are dealing with here today. And they also retained in the 1868 treaty the right in the treaty to hunt buffalo in much of what was the 1851 area. And in 1877 Congress not only took a lot of land, but also took the right to hunt in that 1851 area.

Mr. REGULA. Which was beyond the lands taken.

Mr. MEEDS. Clear into Montana, and Nebraska, and other places.

Mr. REGULA. I think that is an important point that I wasn't aware of.

Mr. MEEDS. You mentioned, Mr. Mileur, the Kiowa-Commanche-Apache Case. Now, how much of the \$1,743,080 claim for payment on the claim was offset as attributable to the rations? You used that as an illustration.

Mr. MILEUR. I don't have that broken down.

Mr. MEEDS. You don't know that.

Mr. MILEUR. No, the \$1,700,000 was the total amount that we considered as possible payment on the claim. Now, how much of that was food and rations, or some other type of payment on the claim, I don't know.

Mr. MEEDS. But again, we are dealing here just with food and rations.

Mr. MILEUR. That's correct, the bill as it is now written.

Mr. MEEDS. And the Claims Commission has already told us that these pending claims with food and rations would be considered as minimal. Now, I can't help but be struck—do you know who the Attorney General of the United States was in 1945? I don't recall.

VOICE. Tom C. Clark.

Mr. MEEDS. Clark?

Mr. MILEUR. In 1945 it was——

VOICE. McGrath.

Mr. MEEDS. Well, whoever he was, he said, "The Government does not lose any case if by its results justice is done".

Mr. MILEUR. A famous statement, yes, quoted to us frequently by everybody. And when we lose a case, that makes us feel good. [Laughter.]

Mr. MEEDS. Well, I don't wish you any bad luck——

[Laughter.]

Mr. MEEDS [continuing]. Or good luck.

Thank you, gentlemen.

Mr. MILEUR. Thank you.

Mr. LUJAN. Before you call the other witness, may I read something particularly important to what we are doing here, what the intent was of Congress at that time; and when we run into a case like this, we change it.

The hearings in House Committee on Indian Affairs on March 2d, 3d and 11th, and June 11th and 14th, 1945, I just would like to quote from them, at that time Senator Jackson was the chairman of the committee.

"If we are going to settle these claims, we cannot settle them by applying only rules of law and equity."

And Mr. Cohen, who was the Interior solicitor said, "That is my judgment."

So therefore:

The chairman goes on to say:

There might be a vast majority that can't be decided strictly on legal grounds. It would occur to me that we certainly cannot be too narrow in our approach to this problem along purely legal and equitable rules; either that, or we are not going to settle them.

Here again is recognition that the vast majority of claims could be justly decided on purely legal and equitable situations. Hard cases might appear

where the application of the guidelines of the Commission would render an injustice. This could well lend itself to remedy by the ultimate review authority of the Congress.

So, I think the legislative history clearly shows that the Congress intended for us to do this sort of thing if we come upon cases of hardship.

Mr. MEEDS. The gentleman is precisely correct and draws to the question that both the gentleman from Ohio and I were trying to get at in these cases; a vast number of them are for compensation for underpayment of land. But, those were under treaty where you had, presumably, a willing seller and a willing buyer. But, fifth amendment taking is totally different, and yet, we have to deal with them, under the machinery we have, as the same. Therefore it does present the kind of hardship the gentleman is talking about.

Our next witnesses are attorneys for the Sioux, Arthur Lazarus and Marvin Sonosky. Gentlemen, welcome to the committee.

JOINT STATEMENT OF ARTHUR LAZARUS, JR., MARVIN J. SONOSKY, AND WILLIAM HOWARD PAYNE

Mr. LAZARUS. Thank you, Mr. Chairman, members of the committee. With me also today is Mr. William Howard Payne, the three of us are claims counsel for the Missouri Sioux before the Indian Claims Commission.

I have a prepared statement, Mr. Chairman, which has been submitted to the committee, in which I had set forth in some detail the legal and factual background of the Black Hills claim, and in which I have also set forth in some detail the history, the 50-year history of the Black Hills claim in the court. With your permission, Mr. Chairman, and in view of the short time remaining before the committee, I would appreciate your having that statement introduced into the record as if read; and I will try to summarize it, and in particular further respond to some of the questions the members of the committee have asked during the course of the hearings this morning.

Mr. MEEDS. Without objection your prepared statement will be made a part of the record at this point.

[The complete statement of Arthur Lazarus is as follows:]

JOINT STATEMENT OF ARTHUR LAZARUS, JR., MARVIN J. SONOSKY AND WILLIAM HOWARD PAYNE, CLAIMS COUNSEL FOR THE MISSOURI SIOUX NATION

My name is Arthur Lazarus, Jr., and I am a member of the law firm of Fried, Frank, Harris, Shriver & Kampelman, which serves as claims counsel for the Oglala Sioux Tribe of the Pine Ridge Reservation in South Dakota. I am appearing before the Subcommittee today strongly to endorse H.R. 16170 and to urge that the bill be promptly and favorably reported. In making this statement I am authorized also to speak for my fellow counsel in the representation of Missouri Sioux Tribes before the Indian Claims Commission, Marvin J. Sonosky and William Howard Payne.

H.R. 16170 would amend section 2 of the Indian Claims Commission Act (25 U.S.C. 70a) to provide that expenditures by the United States for "food, rations, or provisions" shall no longer be deemed "payments" on a tribal land claim, and thus no longer may be deducted from the compensation otherwise payable to a tribal claimant. Although couched in general language, this proposed change in the law really is directed to a single specific objective—expediting the Indian Claims Commission's disposition of the famous Black

Hills case which has been under consideration in the courts without a final decision since 1923. I believe the Subcommittee already has in its possession a memorandum from the Commission, which my own independent research has confirmed, that no other claim which it has decided or which remains pending will be materially affected by the amendment embodied in H.R. 16170. In passing upon the merits of this legislation, therefore, the basic and, for all practical purposes, the only issue is whether Congress now will take a demonstrably necessary step to ensure long-delayed justice for the Missouri Sioux.

The plaintiffs in the Black Hills case (Docket No. 74-B) are eight Sioux groups in the States of North and South Dakota, Montana and Nebraska which have, including off-reservation members scattered throughout the country, a combined population of over 60,000. The legal and factual background of the Black Hills claim, as shown by the evidence on file with the Commission and as more particularly described in findings of fact and an opinion issued by the Commission earlier this year (*Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151, decided February 15, 1974), makes clear why the case is so emotionally and economically significant to the Sioux. The history of the Black Hills claim in the courts—over 50 years of litigation, highlighted mainly by frustration and delay—makes equally clear why Congressional action to move the case is today so essential. For the information of the Subcommittee, I shall develop each of these points in some detail.

I. LEGAL AND FACTUAL BACKGROUND OF THE BLACK HILLS CLAIM

(1) *The Treaty of September 17, 1851*: In aboriginal times the Teton and Yanktonais (Missouri) Sioux were the dominant Indian tribes on the Great Plains, feared and respected by all their neighbors. Their territory stretched from the Minnesota-Dakota line west to the Rocky Mountains, embracing major portions of North and South Dakota, Montana, Nebraska, Wyoming and parts of Colorado and Kansas. The Sioux had a buffalo-hunting culture, and each year three great migratory bodies of buffalo moved along three separate routes through Sioux country, following the grass northward in the spring and returning south during the winter.

The United States early entered into treaties with the Teton and Yanktonais Sioux, designed primarily to establish trade relations and to obtain recognition of the United States, rather than Great Britain, as the protecting sovereign.¹ The discovery of gold in California during 1849, and the attendant wave of westward migration, however, impelled the Federal Government also to negotiate with the Missouri Sioux in order to secure safe passage for its citizens through Sioux territory. Under the resultant Treaty of Fort Laramie,² the Sioux and six other Indian Nations granted certain rights of passage to emigrants through Indian country, and agreed among themselves, and with the United States, upon the borders of their respective tribal lands. In terms of legal consequences, the Fort Laramie Treaty constituted a recognition of Sioux title to over 60 million acres of land west and south of the Missouri River, including the Black Hills.³

(2) *The Treaty of April 29, 1868*: For eight years after the 1851 Treaty, relations between the United States and the Missouri Sioux were, in a comparative sense, tense but reasonable peaceful.⁴ Then, in 1859, gold was discovered in Colorado, and a tremendous increase took place in emigration through the country used and occupied by the Sioux, including their hunting grounds south of the North Platte River. Two years later, in 1861, another and even more serious disruption of the normal Sioux way of life occurred with the discovery of gold in Montana. In this instance, the major line of emigrant travel lay along the Bozeman Trail, running from Fort Laramie, Wyoming, through the valley of the Powder River, across the Yellowstone River and into Montana, or, in other words, through the heart of the rich Powder River country later described as "the Indians' last, best hunting ground." The intru-

¹ See, e.g., the treaties of July 19, 1815 (7 Stat. 125), June 22, 1825 (7 Stat. 250), July 5, 1825 (7 Stat. 252), and July 16, 1825 (7 Stat. 257).

² Treaty of Fort Laramie of September 17, 1851. (11 Stat. 749).

³ *Sioux Tribe v. United States*, 15 Ind. Cl. 577, 601 (1965).

⁴ On September 3, 1855, a Federal cavalry force under the command of General Harney, in a surprise attack, surrounded a Brule village within the country recognized as belonging to the Sioux under the Fort Laramie Treaty, and massacred 136 of its occupants. During the summer of 1856, the Sioux protested, but did not physically oppose, a military expedition into the center of the Black Hills.

sion of trespassers into Sioux territory, and their wanton slaughter of the buffalo there, led to repeated disturbances, disputes and conflict.⁵

In an effort to re-establish peace and safe passage for westward-bound emigrants, Congress authorized, and representatives of the United States in 1865 negotiated, nine treaties, one with each of the seven bands of Teton Sioux and one with each of the two bands of Yanktonais Sioux.⁶ Each of the treaties provided for the cessation of hostilities, for the end of opposition to roads, for annuities for a term of years and one, with the Lower Brule Band of Teton Sioux, also provided for a reservation on the west side of the Missouri River. The Upper Brule, Oglala and Hunkpapa who lived in and controlled the Powder River-Yellowstone River country, through which the emigrants passed on the Powder River Road to the Montana gold fields, however, refused to participate in the treaty councils and were not parties to or bound by the treaties.

At the same time that negotiation of the nine peace treaties was initiated, Congress also authorized construction of two wagon roads through Missouri Sioux country.⁷ Notwithstanding the absence of consent from the Teton Sioux directly concerned, the United States undertook to take possession of the Powder River country, set up three military posts along the Bozeman Trail, and permitted and protected miners, settlers and other emigrants in their travel through Sioux territory. The Sioux, under the leadership of Chief Red Cloud, resisted, and the so-called Powder River War of 1866-67 ensued.

The Powder River War (especially Sioux successes in the campaign) led, in turn, to appointment of the Special Indian Commission of 1867 and, upon its recommendation that peace on the Great Plains was far preferable to war, subsequently to passage of the Indian Peace Commission Act of July 20, 1867 (15 Stat. 17). After protracted negotiations, the United States and the Teton-Yanktonais Sioux entered into the Treaty of April 29, 1868 (15 Stat. 635), under which, *inter alia*: (a) the United States confirmed in the Sioux Nation recognized title to a tract of land which consisted essentially of all the present State of South Dakota west of the Missouri River, and which became known as the Great Sioux Reservation (Article 2); (b) the Sioux surrendered all rights in their country outside the Great Sioux Reservation, including approximately 14 million acres east of the Missouri River,⁸ subject to Articles 11 and 16 of the Treaty (Article 2); (c) the United States promised the Sioux an off-reservation right to hunt on certain lands in Kansas and north of the North Platte River (Article 11); and (d) the United States recognized a Sioux right to continue to use, but not permanently to inhabit, an area about twice as large as the Great Sioux Reservation "north of the North Platte River and east of the summits of the Big Horn Mountains . . ." (Article 16). Under Article 2 of the 1868 Treaty, the United States further guaranteed that the Great Sioux Reservation was "set apart for the absolute and undisturbed use and occupation" of the Teton-Yanktonais Sioux, and did "solemnly" agree "that no persons except [Federal personnel] authorized to enter upon Indian reservations . . . shall ever be permitted to pass over, settle upon, or reside" on the reservation.

⁵ *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. 613, Fdg. 2, (1942), certiorari denied 318 U.S. 789 (1942).

⁶ See table below:

Sioux band	Date	Citation
"Minneconjou"-----	Oct. 10, 1865	14 Stat. 695.
"Lower Brule"-----	Oct. 14, 1865	14 Stat. 699.
"Two Kettles"-----	Oct. 19, 1865	14 Stat. 723.
"Blackfeet"-----	do-----	14 Stat. 727.
"Sans Arcs"-----	Oct. 20, 1865	14 Stat. 731.
"Onkoapah" (Hunkpapa)-----	do-----	14 Stat. 739.
"Yanktonais"-----	do-----	14 Stat. 735.
"Upper Yanktonais"-----	Oct. 28, 1865	14 Stat. 743.
"O'Gallala" (Oglala)-----	do-----	14 Stat. 747.

⁷ Act of March 3, 1865, 13 Stat. 516, 517.

⁸ *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419 (1970), affirmed ----- Ct. Cl. ----- (July 19, 1974).

(3) *The Act of February 28, 1877*: The famous Black Hills country of South Dakota lay in the western part of the Great Sioux Reservation, and was well known to be valuable for timber, farming, grazing and minerals, primarily gold, long before execution of the 1868 Treaty.⁹ Beginning in 1867, and continuing through 1872, various individuals and organizations formed parties with the intention of entering into the Black Hills for mining activities. These plans generally were thwarted by the United States Army which at that time was intent upon enforcing the terms of the 1868 Treaty and thus on keeping unauthorized persons out of the Great Sioux Reservation. Accordingly, in 1873, the Dakota Territorial Legislature petitioned Congress to remove the Sioux to the eastern portion of the reservation and to open the Black Hills to white settlement.¹⁰

Responding to the miners' pressure, the Secretary of the Interior in early 1874 established a commission, known as the Special Sioux Commission, to negotiate with the Brule and Oglala Sioux for abandonment of their rights under Articles 11 and 16 of the 1868 Treaty and for agreement to confine their activities to the Great Sioux Reservation. The Commission met with no success.¹¹ Even while the Special Sioux Commission was negotiating with the Sioux, the Secretary of War directed Lt. Col. George Armstrong Custer to explore the Black Hills for gold. Custer, with approximately 1,000 men, left Fort Abraham Lincoln in northern Dakota on July 2, 1874, circled the northern limits of the Black Hills, and entered the area from the west. On this expedition, gold was found in paying quantities, although the exact extent of the field was not fully determined. Reports of the gold find were widely circulated and greatly exaggerated by the press, and, as a result of these reports, white miners began to invade the Black Hills in great numbers.¹²

The public excitement occasioned by the discovery of gold so increased during the winter of 1875 that the Commissioner of Indian Affairs concluded, as a practical and political matter, that the miners could not be kept out of the Black Hills, and that the United States should buy the land from the Sioux. To prepare for the negotiations, President Grant ordered Walter P. Jenney, a mining engineer and geologist, to investigate and report upon minerals and other resources of the Black Hills area. The Jenney expedition was in the Hills during the late spring and summer months of 1875, and his frequent dispatches, noting the discovery of extensive and valuable gold deposits and the presence of many miners, received national coverage.¹³

In May of 1875, about the time the Jenney expedition entered the Black Hills, a large Sioux delegation was brought to Washington to discuss the surrender of that country to the United States as well as the extinguishment of the off-reservation rights they possessed under Articles 11 and 16 of the 1868 Treaty. President Grant met with the delegation on June 3, 1875. The President made clear that the Government would encounter "trouble in keeping white people from going there [the Black Hills] for gold," and that, if the Sioux refused to sell, "strong efforts might not be made to keep them [white people] out."¹⁴ Two weeks later, a commission, known as the Allison Commission, was sent west to negotiate further with the Sioux for the right to occupy the Black Hills "for mining purposes."¹⁵

The Allison Commission dickered with the Sioux throughout the month of September 1875 without success. Shortly after the Commission reported its failure in November 1875, President Grant, with the concurrence of the Secretary of War and the Secretary of the Interior, decided that, although non-Indians still were forbidden from entering the Black Hills, the Army no longer would seek to enforce the law; moreover, the Army secretly would be withdrawn from the Black Hills, and no further military opposition was to be

⁹ *Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151, 245-47 (1974).

¹⁰ 23 Ind. Cl. Comm. at 247.

¹¹ Report of the Special Sioux Commission, printed in the Report of the Commissioner of Indian Affairs for 1874, at pp. 87-97.

¹² 23 Ind. Cl. Comm. at 248.

¹³ *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. 613, 634 (Fdg. 9), 639-40 (Fdg. 13), 644-46 (Fdg. 14) (1942); Parker, Watson, *Gold in the Black Hills*, Univ. of Okla. Press: Norman, 1966, pp. 63-4.

¹⁴ *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. at 630-32 (Fdg. 7), 642-43 (Fdg. 14); 33 Ind. Cl. Comm. at 251-52.

¹⁵ 97 Ct. Cl. at 636-38 (Fdg. 11); 1875 Report of the Commissioner of Indian Affairs, pp. 184-200.

offered to the invading miners. No official announcement was made of this drastic policy change.¹⁶

In November of 1875, the Grant Administration also began to pressure Congress for unilateral action to acquire the Hills. In his 1875 report, the Commissioner of Indian Affairs noted that the Sioux were receiving about \$1.25 million in rations annually, which the United States was under no legal obligation to provide. He observed that failure to receive these rations would reduce the Sioux to a state of starvation, and expressed the opinion that the Government was entitled to receive some consideration from the Sioux in return. The Secretary of the Interior, carrying this thought one step further, recommended to Congress that the Sioux rations be cut off unless the Indians agreed to give up the Black Hills.¹⁷ Congress failed quickly to approve this cruel proposal, and what happened next is best expressed in recent words of the Indian Claims Commission:

"Without waiting for congressional action, the executive branch precipitated the Sioux situation into a crisis. On December 3, 1875, the Secretary of the Interior instructed the Commissioner of Indian Affairs to direct agents at all agencies in Dakota and at Fort Peck to notify the Sioux in the Yellowstone and Powder River areas in the unceded Indian territory that unless they returned to their reservations by January 31, 1876, they would be declared hostile and would be treated accordingly by the Army. Most of the Sioux who were in the unceded territory during the winter of 1875-76 were hunting with the permission of their agents, as they had a right to do under Article XVI of the 1868 treaty. Furthermore, the severity of the winter made it impossible for them to return to their agencies. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that his order had not been complied with, and that the Sioux were being turned over to the Army for appropriate military action.

*"In the spring of 1876 the Army commenced military operations against the Sioux. On June 25, 1876, the Seventh Cavalry, under the command of George A. Custer, was defeated in a battle with the Sioux, in which 259 soldiers, including Custer, were killed. When news of the battle reached Washington, Congress was so incensed that it attached a rider to the appropriation act of August 15, 1876, which provided that the Sioux would receive no further rations until they ceded the Black Hills to the United States. *Because most of the Sioux had been disarmed and were thus unable to hunt, the provision meant that unless the Sioux surrendered the Black Hills they would be allowed to starve.*" (33 Ind. Cl. Comm. 151 at 160-62; emphasis supplied; footnote omitted.)*

Finally vested with his long-sought power to dictate sale or starvation, President Grant appointed yet another Commission to treat with the Sioux for the surrender of the Black Hills and the relinquishment of their other valuable rights. Article 12 of the 1868 Treaty provided that no cession of the Great Sioux Reservation would be valid unless approved by three-fourths of the adult male Sioux. Despite the ultimatum contained in the 1876 Appropriations Act, the Commission proved unable to get more than 10% of the adult male Sioux to assent to a cession agreement. Nonetheless, in the Act of February 28, 1877 (19 Stat. 254), Congress effectuated the acquisition by the United States of the Black Hills and "abrogated" all off-reservation rights possessed by the Sioux under Articles 11 and 16 of the 1868 Treaty. The Commission has determined that the 1877 Act constituted a taking of Sioux land in violation of the Fifth Amendment.¹⁸

The traumatic impact of the Black Hills taking upon Sioux society cannot be measured exclusively in terms of money or property. February 28, 1877, marks the date when the United States reduced the Sioux to a state of helpless dependency. This was a blow, indeed a betrayal, from which the Missouri Sioux have never recovered, and from which they never will recover until justice is done.

¹⁶ 33 Ind. Cl. Comm. at 161, 252-53. The Army began its withdrawal from the Black Hills on November 17, 1875. Thereafter, miners flocked into the area in ever increasing numbers and, by January 1876, more than 4,000 whites were reported there. 33 Ind. Cl. Comm. at 253.

¹⁷ 97 Ct. Cl. at 644 (Fdg. 14), 646-47 (Fdgs. 15-16); 33 Ind. Cl. Comm. at 253-54.

¹⁸ 33 Ind. Cl. Comm. at 216-18.

II. HISTORY OF THE BLACK HILLS LITIGATION

For many years after 1877, the Sioux sought permission from Congress to present the Black Hills claim to an impartial tribunal. The doors of the Court of Claims initially were closed to the Sioux (as well as to other Indians) because at the time that Court was given general power to render judgments against the United States, a special exception was created to bar Indian tribes from maintaining suit against the Government based upon any treaty or agreement. When Congress enlarged the jurisdiction of the Court of Claims in 1887, the same ban against Indian tribal claims unfortunately was carried forward.¹⁹

Thus, since no suit could be filed unless Congress passed a special statute waiving sovereign immunity and granting jurisdiction to the Court of Claims, the Sioux' only hope lay in petitioning Congress for appropriate discretionary relief. Moreover, Indian tribes were not permitted to make contracts with lawyers for services to bring their claims to public attention, or to prosecute tribal claims, unless the contracts were approved by the Commissioner of Indian Affairs and the Secretary of the Interior.²⁰ Since the grievances of the Indians usually were grievances against the very officers who had to approve their attorney contracts, the Indians effectively were deprived of one of the most basic rights known to Anglo-Saxon law, the right to free choice of counsel for the redress of wrongs.²¹

Finally, in 1920, Congress passed a special statute giving the Sioux permission to sue the United States in the Court of Claims.²² Thirteen cases were presented, mostly in 1923, covering a total of 18 claims. One case, filed on May 7, 1923, involved the Black Hills claim and the land acquired by the United States under the 1868 Treaty. The Court of Claims dismissed all 13 cases between 1938 and 1949. The Black Hills-1868 Treaty case was dismissed in 1942, about 19 years after the suit first had been filed, on the ground that the claim fell outside the Court's jurisdiction conferred by the special Sioux jurisdictional act.²³

In 1946, Congress created the Indian Claims Commission,²⁴ a new forum to hear all tribal grievances which previously had arisen, and the Sioux resubmitted the Black Hills-1868 Treaty claims on August 15, 1950. Four years later, in an early opinion, the Commission dismissed that suit, saying that the Sioux Nation had failed to prove its case.²⁵ On appeal, the Court of Claims affirmed the dismissal. At this point, the Sioux retained new counsel—my firm and Mr. Sonosky. On subsequent motion of the Sioux, the Court of Claims in 1958 set aside its affirmation and returned the case to the Indian Claims Commission for further hearings.²⁶

The Commission first scheduled a trial limited to the issue of whether the Sioux owned land on the east and west sides of the Missouri River outside the Great Sioux Reservation—i.e., the 1868 Treaty claim. The trial was completed in 1962, and the case was submitted for decision on February 7, 1964. Over a year later (August 1965), the Commission decided that the Sioux owned the Fort Laramie land west of the Missouri River,²⁷ and more than six years after the trial (August 1970), the Commission finally held that the Sioux owned approximately 14 million acres east of the Missouri River.²⁸ The trial on valuation in the 1868 Treaty was completed in 1972, but further proceedings have been stayed by the Commission pending the outcome of a Government appeal on liability issues.²⁹

¹⁹ Act of March 3, 1863 (12 Stat. 765); sect 1 of the Tucker Act of March 3, 1877 (24 Stat. 505), codified in 28 U.S.C. 1491.

²⁰ Act of March 3, 1871 (16 Stat. 544); Act of May 21, 1872 (17 Stat. 136); 25 U.S.C. 81-84.

²¹ *Federal Indian Law*, p. 114 (GPO, 1954).

²² Act of June 3, 1920 (41 Stat. 738).

²³ *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. 613 (1942), certiorari denied 318 U.S. 789 (1942).

²⁴ Act of August 13, 1946 (60 Stat. 1049), codified at 25 U.S.C. 70 *et seq.*

²⁵ *Sioux Tribe v. United States*, 2 Ind. Cl. Comm. 646 (April 6, 1954).

²⁶ *Sioux Tribe of Indians v. United States*, Appeal No. 4-55, 146 F. Supp. 229 (Ct. Cl. 1956); see 182 Ct. Cl. 912-913, and *Sioux Tribe v. United States*, _____ Ct. Cl. _____ (July 19, 1974; slip opinion, pp. 29-30).

²⁷ *Sioux Tribe v. United States*, 15 Ind. Cl. Comm. 577 (1965).

²⁸ *Sioux Nation v. United States*, 23 Ind. Cl. Comm. 419 (1970).

²⁹ Within the past month, the Court of Claims rejected the Government's appeal on all counts. *Sioux Tribe v. United States*, _____ Ct. Cl. _____ (decided July 19, 1974). The Government has since indicated that it may petition for a rehearing.

During 1969 and 1970, the Commission conducted hearings on the value of the Black Hills, including the gold deposits, as of February 28, 1877, the valuation date which the Commission previously had fixed. The Sioux expert witnesses testified that the 1877 value of the land (comprising 7,345,157 acres) and minerals amounted to about \$28 million, while defendant's witnesses testified that the same property in 1877 was worth only \$4.7 million. The case was submitted to the Commission for decision in May 1972. Early this year, on February 15, 1974, to be precise, the Commission ruled that the Black Hills land and minerals had a value on February 28, 1877, of \$17.1 million³⁰—a holding, however, which the United States recently has appealed to the Court of Claims. Even under the best of circumstances, therefore, the Sioux still stand many years away from a final judgment on the Black Hills claim and, as I regret to point out, the best of circumstances do not exist in this case.

Specifically, the United States never has paid the Sioux a cash consideration for the Black Hills land and minerals taken under the Act of February 28, 1877. Article 5 of the 1877 Act did provide, though, that the Government would furnish the Sioux "with subsistence consisting of a ration for each individual of a pound and a half of beef (or in lieu thereof, one-half pound of bacon), one-half pound of flour, and one half pound of corn . . . until the Indians are able to support themselves." In the same decision which established the value of the Indians' property, the Commission also determined that the furnishing of rations to the Sioux constituted a payment on the Black Hills claim within the meaning of section 2 of the Indian Claims Commission Act, and thus that the value of such rations must be deducted from the value of the land in order to arrive at the amount of just compensation due the Sioux.³¹ The Government has asserted that the United States expended almost \$25 million for Sioux "provisions" up to 1924, a figure which, if verified,³² would substantially wipe out the Black Hills claim.

CONCLUSION

The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in food should not be stretched to cover both wrongs.

As I noted at the beginning of this statement, H.R. 16170 is designed to correct this inequity by amending section 2 of the Indian Claims Commission Act to provide that "food, rations, or provisions" shall no longer be deemed "payments" on a tribal land claim, and thus no longer may be deducted from the compensation otherwise payable to a tribal claimant. In the Black Hills case, such a change in the law also would eliminate the necessity for a prolonged and expensive GSA investigation into the amount of rations furnished under the 1877 Act, and thus would move this long-delayed claim a substantial way further towards a final decision. That result, I submit, is in the long-range best interest of both the United States and the Sioux.

To conclude, the equities in the Black Hills claim are undisputed, and relief is long overdue; indeed, the case literally cries out for immediate and generous action on the part of the United States. Secondly, if Congress takes no action

³⁰ *Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151 (1974). More than \$1 billion in gold actually has been taken from the area involved in the Sioux Black Hills claim, principally from the Homestake Mine.

³¹ Interestingly, if the United States had furnished rations to the Sioux gratuitously, instead of pursuant to the 1877 Act, the Commission would have jurisdiction to disallow the value of such food as offsets against any recovery if "the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action. . ." 25 U.S.C. 70a. The Commission has no discretion, on the other hand, to disallow statutory "payments" on a claim.

³² GSA has estimated that it will take 5-15 men working at least a year (and probably longer) to prepare a report on what the Government spent for the rations provided under the 1877 Act, and even then the absence of necessary data may prevent the preparation of a complete and fully accurate report. My experience with accounting cases before the Commission indicates that the GSA estimate is optimistic, and that 3-5 years will be needed to complete its study.

to expedite consideration of the claim, the Sioux clearly will be forced to wait yet another generation before the litigation comes to an end. Lastly, if Congress takes no action to declare that food is not payment for land, the Black Hills claim will turn to ashes—an award so small and so meaningless as to leave in Sioux mouths a taste even more bitter than the original taking.

I urge this Subcommittee not to allow the United States again to break faith with the Missouri Sioux. I urge that H.R. 16170 be approved.

Mr. LAZARUS. The first point I would like to make is to reemphasize the point you, Mr. Chairman, have been making, which is, there is a substantial difference between this case and other cases before the Commission.

This is a case where the Indians did not bargain for food, rations, or provisions. This is a case where the United States unilaterally said, "Fellows, this is what you are going to get," and there was no participation by the Indians in that process whatsoever. That makes a complete distinction between this case and other cases before the Commission.

I would also, if I may, give you some of the background of the *Black Hills* case in the court, and where we stand with it today. As I am sure the members of the committee are well aware, when the Court of Claims first was established, and its jurisdiction was established, there was a special exception carved out, and Indian tribes were specifically barred from going into the court of claims to file suit on the basis of violation of a treaty or agreement.

As a result Indian tribes had to petition Congress for a special jurisdictional act in order to present their claims. The Sioux did so. The Sioux petitioned Congress for many years for redress of grievances; and in 1920 Congress finally passed a special jurisdictional act for the Sioux. Thirteen cases were filed under that jurisdictional act, most of them in 1923; one of them being the *Black Hills* case, filed in May of 1923. In 1942, 19 years later, the Court of Claims dismissed the Black Hills claim on the ground that it did not lie within the scope of the special jurisdictional act. The Congress, in 1946, passed the Indian Claims Commission Act, which was to cover all claims that has arisen before 1946.

The Sioux refiled the *Black Hills* case before the Indian Claims Commission. This was one of the early cases heard by the Commission, and in a decision in 1950 the Commission dismissed the Black Hills claim on the ground that the Sioux had not made out a case.

That was appealed to the court of claims, and the court of claims affirmed the dismissal. At this point the Sioux employed new counsel, in particular my firm, and Mr. Sonosky.

Mr. MEEDS. Almost 27 years too late.

Mr. LAZARUS. Yes, and 2 days before that Court of Claims decision was going to become final. On motion by new Sioux counsel the Court of Claims ultimately vacated the affirmance and referred the case to the Commission for further hearing. We have held hearings since that time, both in the 1868 treaty case, and in the 1877 Black Hills claim. Those are the two land claims which the Sioux have before the Indian Claims Commission, and some on appeal before the court of claims. Those are the only cases the Sioux have, two land cases; there are several small accounting cases, but we are talking there about relatively insignificant things.

I want also to emphasize that the provisions of the legislation here under consideration do not affect the 1868 treaty case.

Now, the witness from the Commission pointed out, quite properly, that the Government has claimed that it spent money for rations under the 1868 treaty. But, the treaty language—that is an accounting report, an old accounting report—which merely says how much money the Government spent; it does not say whether the money the Government spent was consideration, was a payment on the claim, or was a gratuity.

And, in the 1868 treaty case the article 10 of the treaty is quite clear, that what the United States spent under the treaty for food and provisions was not consideration for land, it was a substitute for prior cash annuities that the Sioux had under various treaties entered into in 1865. But, right on the face of the treaty it is not consideration for land.

So, again I make the point that when we talk about the 18—when we talk about food, rations, and provisions, the only Sioux case involves is the Black Hills claim. And, I also point out, as the chairman has emphasized, that there is a report that the committee has from the Indian Claims Commission that shows that food, rations, and provisions as payments on the claim have not amounted to more than \$100,000 in all previous cases; and that the amount will be minimal in all pending cases other than the *Black Hills* case. I have independently researched that, and my research confirms the Commission's findings.

Mr. LUJAN. Excuse me, when you refer to the *Black Hills* case, would that be Indian Claims Commission docket No. 74-B?

Mr. LAZARUS. That's correct.

Mr. LUJAN. Go ahead.

Mr. LAZARUS. Another matter that has come up as a result of questioning is, what is the amount of rations that actually constitute payments on the claim. Nobody knows the answer to that question at this point because the Commission has not yet made that determination, and one of the purposes of this legislation is to avoid having to make that determination because the estimate we have from GSA that it would take 5 to 15 accountants at least 1 year to come up with a report. And when they come up with a report they have absolutely no assurance it will be complete.

Now, our experience with accounting cases says, it's not going to be 1 year, it's going to be 5 to 15, working 3 to 5 years. But we are agreed that the report will not be complete because the 1877 act itself said that "No rations shall be supplied to children between the ages of six and sixteen unless they are in school;" and GSA has absolutely no way of telling whether those children were in school, or not. And it has no way of telling how much rations went to children between 6 and 16. So, we don't know what's the payment on the claim, and what's the gratuity.

In addition to that able-bodied males who lived on tillable land are not entitled to rations. GSA has absolutely no way to determine which able-bodied males among the Sioux lived on tillable land. Yet, rations to them were not payment on the claim, they were gratuity.

So, no one here can tell the committee what the amount of rations are. The Government has claimed some \$25 million in expenditures up to 1924; and then they take an extrapolation from 1924 until the current day and say that's another, what, \$32 million, but it didn't go that way. If you look at the accounting report you see there is a very sharp tail-off after 1924. And so, the amount of rations involved—

Mr. SONOSKY. About \$4 million.

Mr. LAZARUS. Yes, about \$4 million after 1924. That \$57 million figure is a fiction, it is something taken from a concession, from a statement made by Sioux prior counsel who then thought he had a \$900 million claim and another \$30 million or so, didn't make any difference. But, it is not anything based upon evidence in the record.

In the statement of one man, Mr. Hyde, from the Indian Claims Commission he mentioned a suit, a land claim, I believe 363, or 336 was the docket number. I want to make clear that there are two groups of Sioux, the Mississippi Sioux and the Missouri Sioux. We are here talking about the Missouri Sioux; the case that Mr. Hyde mentioned involves the Mississippi Sioux who are an entirely different group; and that is totally irrelevant as far as the record is concerned.

I think the chairman has very effectively pointed out that the position taken by the Department of Justice is a pyramid and parade of horrors. We start with legislation that is expressly limited to food, rations, and provisions. And then the Government says, "Oh, but that could lead Congress to disallow all payments on the claim. And then, if you disallow all payments on the claim, then you would very likely disallow all gratuitous offsets; and if you disallowed all gratuitous offsets and payments on the claim for future cases, and you are going to do it for past cases, and then we have a tremendous cost to the United States, and isn't that terrible."

Well, I think the chairman has very neatly pinpointed that what we are talking about is a special case, and a specific food rations and provisions, and the committee will make its determination on what is before it; and when the "horrible" comes along next year, you can cope with that when that legislation, if any, is proposed.

Finally I would like to point out also, as the Chairman has himself emphasized, that in 1877 the United States committed two wrongs; it took from the Sioux their land, and it took from the Sioux their livelihood. In return, all it gave back was food. And we submit that food should not stretch to cover both wrongs. It should be addressed to the loss of the livelihood, and should not be addressed to the value of the land. And that means that we have under the Indian Claims Commission Act one of these inequities that Congressman Lujan was talking about, one of these cases where the guidelines set down by the Commission in 1946 don't fit, and it is appropriate for Congress to change the rule.

Mr. MEEDS. Thank you very much, Mr. Lazarus. You are speaking for Mr. Sonosky, also?

Mr. LAZARUS. Yes. Do you have anything to add?

Mr. SONOSKY. Just a tidbit. I might add that the rations that Mr. Lazarus mentioned to you in regard to able-bodied males, in addition

to the problem of able-bodied males, at that time the regulations of the Department provided specifically, and it's in the law, 25 U.S.C. 123, that no food or rations, or supplies should be given to any able-bodied male ages 18 to 45 unless he worked for it; and if he worked for it, of course, it no longer was a payment on the claim, if he was earning it.

The General Services Administration has to figure out which of those people got the rations, too. And after they make their report, I would like to add, it would take another 5 years after we got the report to hassle through an accounting such as this. And I say this based on past experience in other cases.

Mr. MEEDS. Just for our personal consideration, I know it's in your statement, Mr. Lazarus, but could you lay out chronologically very briefly one, what the various treaties were, when they were signed; and their basic provisions.

Mr. LAZARUS. Yes, Mr. Chairman.

Mr. MEEDS. And then, finally, the act.

Mr. LAZARUS. Yes. The first treaty of the United States with the Missouri Sioux was in the 1820's. And those were mainly treaties regulating trade and insuring that the United States would be the protecting sovereign. It was the effort of the United States to tie the Sioux to us, and not to Great Britain.

The first really important treaty from our point of view is the famous Treaty of Fort Laramie in 1851. At this time gold had been discovered in California, and the immigrants were flowing westward through the country of the Sioux and other Indian tribes. The United States brought seven Indian nations together at a grand council, and they agreed upon certain conditions for the immigrants to go through Indian country, and particularly they defined the country of each of the seven Indian tribes, one of which was the Sioux, or Dakota Nation.

Under the 1851 treaty the United States, the courts have held, recognized Sioux title to an area of land west and south of the Missouri River of about 60 million acres, and that included the Black Hills. So, we start with treaty title in the Black Hills for the Sioux in 1851.

Now, there was a period of relative peace, but then in 1859 gold was discovered in Colorado, and in 1861 gold was discovered in Montana; and there was a tremendous influx of immigrants through the Sioux country in violation of the 1851 treaty. An effort was made at peace, and nine peace treaties were entered into with the Sioux in 1865; and those are the ones I mentioned that provided the annuities that in 1868 were turned into food.

In 1866 the United States built three forts on the Bozeman Trail, leading from Fort Laramie in Wyoming up into Montana, all three in violation of the 1851 treaty. That led to the Powder River War, which in turn led to the Indian Peace Commission of 1867, which negotiated the treaty of 1868 with the Sioux. The treaty of 1868 was a treaty that the United States wanted very much more than the Sioux. And what the 1868 treaty did, it established and set aside for the permanent use and occupation of the Sioux the Great Sioux Reservation; that is, essentially, all of the present State of South

Dakota west of the Missouri River; and it said, "That's for the exclusive use of the Sioux" and the United States promised that it would keep everybody else from entering or settling in that reservation with the exception of authorized Federal personnel.

Under the 1868 treaty, under article 11, the United States guaranteed the Sioux a right to hunt on what's the Republican Fork of the Smoky Hill River, and the North Platte River. These are areas down in Nebraska and Kansas, outside the reservation. Under article 16 of the 1868 treaty the United States agreed to hold a very large area of land, even larger than the Fort Laramie tract, as unceded Indian country. This was to be an area for the Indians into which they could go and hunt, but they could not settle there permanently; they could use it as their hunting grounds. So, those are the major provisions of the 1868 treaty. And the Black Hills was the western part of the Great Sioux Reservation.

At the time of the 1868 treaty the Black Hills was already known for gold, and there were repeated accounts in the files of the Court of Claims that miners tried to get in to the Black Hills, and in the period from 1868 to 1873 the Army kept them out. Some people slipped through, and enough slipped through to confirm that there was gold there. However, it was the policy of the Army to keep them out in conformance with the 1868 treaty.

Then we had a period from 1874 to 1875 when the pressure of the miners was so great that the Government position was, let's try to get the Sioux to cede the Black Hills, and there were two treaty commissions, the one in 1874 and one in 1875 that tried to get the Sioux to give up the Black Hills, and they refused to do so.

There was increasing pressure, and the Government got frustrated, and in 1875 President Grant even told them, "If you don't sell, I don't know how I'm going to keep the white people out, and I may not even try."

But the Sioux still refused to sell. When the 1875 Peace Commission failed, then the Grant administration secretly changed its policy. It withdrew the Army from the Black Hills and it said, "We will no longer attempt to keep the miners out." That was in November of 1875 that that secret decision was made. By January of 1876 there were 4,000 miners in the hills. At the same time that they withdrew the troops, the administration went to Congress and said, "Look, we are providing some assistance to the Sioux, they are not doing anything for us; let's cut off the assistance and force them to sell."

Congress didn't buy it, it didn't buy it in 1875. So, the next thing the administration did, as the chairman read, they precipitated the situation into a crisis. They ordered the Sioux who were off hunting in the article 11 and article 16 lands, with the permission of their agents, and as they had a treaty to do, they ordered them back to the reservation. This was in December of 1875.

Mr. MEEDS. The 1875 Gulf of Tonkin.

Mr. LAZARUS. Yes.

They made such a short deadline that the messenger who went out to tell the Sioux to come back himself didn't even get back until after the deadline passed. The Sioux couldn't get back. One, they

were hunting and needed the food; and two, the winter was so bad they couldn't move. They had families, this was not just men, this is the whole, men, women, and children, whole groups.

So, when they didn't get back by the deadline the President had them declared "hostile" and sent the Army after them. Now, what hostile means is not that you just round people up, hostile means you shoot them on sight, and that is exactly what the Army set out to do. Custer made a mistake, and the result was that at Little Big Horn Custer and 259 soldiers were killed. And, as the chairman reported, when the reports of that got back, the public became so incensed, and so much pressure was on Congress that Congress did what it had refused to do a year earlier, it passed the Sell or Starve statute; it cut off rations from the Sioux until they agreed to sell the Black Hills.

Now, even with that they sent another Treaty Commission out and they got 10 percent of the adult males to sign up. The 1868 treaty said that no cession of the Great Sioux Reservation shall be valid unless you get three-quarters of the adult males to sign. Even with the threat of starvation they got 10 percent.

Now, that is what the Commission has held made that a violation of the fifth amendment because you did not have a treaty that was valid under the 1868 agreement. Nonetheless, when they came back with this so-called agreement, Congress enacted it in the Act of February 28, 1877.

Now, the 1877 Act redefined the boundaries of the Great Sioux Reservation to exclude the Black Hills. There was a taking there of approximately 7,300,000 acres. In addition to that the United States unilaterally abrogated—and that's the word in the statute—abrogated articles 11 and 16 of the treaty. So, it took away the hunting right off the reservation.

Mr. LUJAN. If you are wondering why we are smiling, the maps that were just passed, there it was, the reservation; and this is what happened.

Mr. SONOSKY. And there is one more after that.

Mr. MEEDS. Well, thank you for that background, that gives a graphic illustration of what happened.

The gentleman from New Mexico.

Mr. LUJAN. I would like to clarify one point because I'm still thinking about this question of limiting it to the particular case at hand. You say you are only representing one portion of the claimants.

Mr. LAZARUS. No, the three attorneys here represent all of the Missouri Sioux. There is another wholly independent group that has nothing to do with this.

Mr. LUJAN. Has nothing to do with this land claim?

Mr. LAZARUS. That's correct.

Mr. LUJAN. So, if we were limiting it to only this particular case we are talking about with reference to Indian Claims Commission Docket 74-B, that would be the proper legal language to insert in this.

Mr. LAZARUS. That is correct.

Mr. LUJAN. One more question. You said that part of that \$25 million—if that's the figure we are going to use—were gratuities. Are you satisfied with the word "gratuities" not being in the exceptions?

Mr. LAZARUS. Yes. As I read the language of the bill, the Congress would be saying that food, rations and provisions shall not be payments on the claim. The Commission has held that what the United States provided may be payment on the claim, and as far as I'm concerned that just wipes that out.

Now, to the extent that what the United States furnished may be a gratuity, the Commission has discretion to disallow it as an offset. That's the interesting thing. If it's a payment on the claim the Commission has no discretion, it must deduct it from the award. If it is a gratuity, the Commission has discretion either to deduct it, or not to deduct it. And the discretion is to be exercised on the basis of the course of dealings between the United States and the claimant.

I have no doubt in my mind that to the extent that payments may have been gratuities, the Commission will disallow them because relations between the United States and the Sioux in this particular case in good conscience doesn't allow the deduction.

Mr. LUJAN. But they have that option.

Mr. LAZARUS. Yes.

Mr. LUJAN. To either offset them, or not, as they see fit.

Mr. LAZARUS. To the extent that they are gratuities. But, to the extent they were payments on the claim, they would be wiped out.

Mr. SONOSKY. Mr. Chairman, may I address myself to that for just a moment because the question raised by Congressman Lujan has occurred to me; and it would be helpful if language in the committee report would reflect that because, certainly, if the committee intended that there be no deduction for payment on the claim, it would be incongruous to think that they would deduct gratuities for the same thing.

Mr. MEEDS. Thank you.

The gentleman from Ohio?

Mr. REGULA. No questions.

Mr. MEEDS. Thank you very much, gentlemen. I also want to mention that Mr. Payne is also Sioux counsel and joins in this statement.

Mr. PAYNE. Yes, sir, Mr. Chairman.

Mr. MEEDS. Thank you very much.

Mr. LAZARUS. Thank you, Mr. Chairman.

Mr. MEEDS. Mr. Kuykendall?

Mr. KUYKENDALL. Yes, Mr. Chairman; the hour is late—

Mr. MEEDS. Why don't you introduce your fellow commissioners?

Mr. KUYKENDALL. On my immediate right is Commissioner Pierce—and I'm not making the introductions according to seniority—next to her is Commissioner Blue, who is our Indian member; and on my left—to your right—is Commissioner Yarborough; and next to him is Commissioner Vance. We have Mr. Donald Hyde, the attorney who has spoken previously, here with us also.

Mr. MEEDS. You have a rather lengthy statement, perhaps you would like us to insert it in the record and you could summarize.

Mr. KUYKENDALL. All right, very well.

Mr. MEEDS. Without objection the complete statement and the letter of June 13, 1974 to the chairman, answering two questions, will be made part of the record at this point.

[The complete statement of Jerome K. Kuykendall and letter of June 13, 1974, are as follows:]

STATEMENT OF JEROME K. KUYKENDALL, CHAIRMAN OF THE INDIAN CLAIMS COMMISSION

Mr. Chairman and Members of the Subcommittee:

My fellow Commissioners and I are happy to be here in response to the invitation of the Chairman to testify concerning H.R. 16170 which contains the same language as that contained in section 2 of S. 3007. S. 3007 has passed the Senate. The language in question is as follows:

"SEC. 2. The first sentence of the last paragraph in section 2 of the Act of August 13, 1946 (60 Stat. 1050; 25 U.S.C. 70a) is hereby amended by striking the semicolon and the word 'the' after the words 'section 250 of title 28' and inserting in lieu thereof a colon and the following: Provided, That expenditures for food, rations, or provisions shall not be deemed payments on the claim. The."

When we testified before the Senate Subcommittee on Indian Affairs on March 26, 1974, Chairman Abourezk requested the technical assistance of this Commission's staff in drawing an amendment to the authorization bill to provide that "... no expenditures for food, rations or provisions, hereafter shall be offset against any award as a payment on the claim or as a gratuity." Our staff, in pursuance of that request, submitted a draft of a bill "To amend the Indian Claims Commission Act so as to eliminate the use of gratuities as offsets against awards in favor of Indian tribes." This draft as its title indicates, went to the elimination of all gratuitous offsets both retrospectively and prospectively, at an estimated cost to the Government of approximately \$10,000,000. It did not purport to make any changes in the Indian Claims Commission Act with respect to the mandatory requirement that all "payments on the claim" be deducted from any award. We discuss hereinafter the matter of "payments on the claim." The estimate of \$10,000,000 was based on a study made by our Commission staff of offsets contained in adjudicated cases as well as offsets which were disposed of in cases which had been compromised and settled.

There was a further provision in the draft prepared by the Commission staff which instructed the Commission to review each claim previously reported to Congress and to submit a report to the Congress showing the amount by which each final award in favor of a plaintiff had been reduced by the offset of gratuities. That report would then have the effect of increasing any final award previously reported by the amount it had been so reduced and authorizing the appropriation of such sums as might be necessary to pay the increased awards. These estimated sums comprise the amount referred to above as being approximately \$10,000,000. We do not find it possible to give this Committee an accurate estimate of the total sum which may be set off in future cases under the law as it now stands.

The Senate Subcommittee on Indian Affairs rejected the draft prepared by our staff in favor of the amendment which this Subcommittee is now considering. As noted above, the bill before you merely provides "... that expenditures for food, rations or provisions shall not be deemed payments on the claim."

To determine the varying effects of these two proposed amendments we must analyze three types of payments made by the United States to the Indian tribal claimant and for which the Government may obtain credit or have deducted from a monetary award to such claimant. They are known as (1) consideration, (2) payments on the claim and (3) gratuities or gratuitous offsets.

The first one, "consideration," is not truly an offset. In the typical land cession case the United States paid something in money, lieu lands, or goods, for the ceded land in accordance with the treaty or agreement it had made

with the Indian tribe. The Commission tests the conscionability of the transaction by comparing the then fair market value of the land with the amount of consideration paid. If the transaction is determined to be unconscionable because the treaty consideration is so grossly less than the value of the ceded land, the Indian claimant is entitled to an award of the difference between the two sums, but the consideration paid by the United States is credited against the gross fair market value to determine the net award to the plaintiff tribe. It is inherent in a conscionability claim that credit will be given for the consideration paid in order to reach a fair result. It is our understanding that there is no proposal before the Congress to change the existing practice of crediting consideration paid.

"Payments on the claim" are those sums, goods and services provided to the tribe by the United States in response to a claim or grievance asserted by the tribe. As distinguished from consideration, payments on the claim are made unilaterally by the United States not because of any treaty obligation to do so, but in acknowledgment by the government that some compensation is due the tribe for past specific acts. Such payments are usually authorized by statute. Like consideration, but unlike gratuities, Sec. 2 of our act as it stands, requires that payments on the claim be deducted from any award to the Indian tribal claimant. Payments on the claim have appeared rather rarely in Indian claim litigation, and usually have consisted of money or land given to a tribal claimant rather than food or provisions. Our staff has previously furnished you with an estimate that in cases which have been adjudicated by the Commission the amount of money credited as payments on the claim, which represents the cost of provisions supplied, is probably less than \$100,000.

However, in the pending Sioux Black Hills case, now on appeal in the Court of Claims, the Commission held that the cost of rations supplied to the Sioux Nation pursuant to an 1877 statute should be treated as a payment on the claim. It appears that the United States may have spent more than 57 million dollars supplying rations to the Sioux pursuant to this statute. It is not now possible for us to estimate the amount of money which will be deducted from awards in future cases as payments on the claim, but our experience indicates that the amount will be small.

"Gratuitous offsets" are those monies or goods given by the United States to the tribe where there was no statutory or treaty obligation to do so and where the gifts had no relation to the claim being asserted by the Indian tribe. Under Sec. 2 of our Act, certain types of these gifts may be deducted from a judgment attained by an Indian tribe under certain circumstances. The Commission has some discretion in allowing or disallowing these kinds of offsets. It is not possible for the Commission to estimate accurately the amount of money which will be set off as gratuities in cases yet undecided. The existing ratio of \$10 million in gratuities already set off against awards to \$525 million of net awards will probably remain approximately the same. In that event gratuities set off would amount to somewhat less than 2% of the total amounts awarded minus the gratuitous offset.

It should be pointed out that, if in the Sioux Black Hills case, the Commission should find that any or all of the \$57 million spent for rations for the tribal claimant do not qualify as "payments on the claim," the Government might then contend that such amounts constituted gratuities and as such therefore should be deducted from the award.

A number of choices are presented to the Congress in considering any amendment with the thrust of the one contained in H.R. 16170. Given the apparent intent of Congress to provide a more generous standard for adjudicating Indian claims by reducing the offsets allowed to the Government, a choice must be made as to whether gratuitous offsets or payments on the claim or both are to be barred. We would suggest that if Congress is contemplating barring credits in favor of the Government for payments on the claim made to provide the tribal claimant with "food, rations, or provisions", consideration should also be given to barring credit for similar expenditures which constitute gratuitous offsets under the Act and the decided cases. The gratuitous offsets which have been judged deductible from an award are not confined to expenditures for food, rations, and provisions, but represent all sorts of goods and services furnished "gratuitously" to the tribal claimant in carrying out the general Indian programs of the United States. It could not have been contemplated at the time the gifts were made that they would ever be asserted as allowable offsets

against an award made in response to some later asserted tribal claim. We know of no other field of law in which such gratuities can be offset against a judgment. On the other hand, "payments on the claim" do have some relation to the claim being asserted by the tribe since they represent a prior attempt by the Government to right the matter on which the claim is based by at least partially compensating the tribe. If Congress should determine that payments on the claim for food, rations or provisions should not be deducted from awards, the reasoning which brought about that decision would seem to apply with even greater force to all money or property given gratuitously, i.e., "gratuities", and thus require that they not be deducted from awards either.

Addressing ourselves for the moment to the matter of gratuities which may or may not be deducted from an award under the terms of our statute, several things might be of interest to this Committee in its current deliberations. While "food, rations, or provisions" are often the largest category of gratuities asserted by the Government as allowable offsets against an award, every case has a large number of small amounts expended gratuitously for the tribe in such widely varied categories as agricultural implements, clothings, seeds, fertilizer, livestock, fuel and light, hardware, glass, oil, paint, household equipment, building materials, care and feeding of livestock, transportation of supplies furnished to the tribe and almost innumerable other services. The assertion of these small amounts by the Justice Department through elaborate and voluminous accounting reports and the adjudication by the Commission is required on an item by item basis under a decision of the Court of Claims (*United States v. The Delaware Tribe of Indians et al.*, 192 Ct. Cls. 385, 427 F. 2d 1218 (1970)), reversing in part Indian Claims Commission Docket Nos. 27-A and 241, 21 Ind. Cl. Comm. 18 (1969)). In our decision then under review by the Court, the Commission had attempted to find an equitable and expeditious manner of dealing with the time consuming problem of adjudicating offsets. Although sympathizing with our problem and expressing some admiration for our ingenuity, the Court rejected our solution and advised us that we must adjudicate gratuities asserted by the Government as offsets on an "item-by-item and a case-by-case basis." The Court further stated:

"... We know that this is burdensome and time-consuming. This is quite apparent when you consider that the gratuities in each of 28 of the years involved in this case were under \$500, those in 19 were less than \$100, and during 11 of the years they were less than \$10. In 1913 the gratuity was seven cents and in 1911 it was exactly five cents! Imagine the frustration the Commission must feel in having a full scale hearing to determine whether a seven cent (bag of peanuts) gratuity or a five cent (bar of soap) gratuity (or whatever else the minuscule gratuities may have been) should be allowed as an offset on an award in the sum of \$607,680. Because of these absurd situations, multiplied many times no doubt in many cases, it is easy to understand that the Commission initiated this rule to expedite its work and to ease the burden of its heavy case load. We appreciate these worthy objectives. However, for all of the reasons set forth in the foregoing paragraphs, we have concluded that we have no alternative except to disapprove the rule and remand this portion of the case to the Commission for a consideration of the gratuities (including the five cent and seven cent items) on an item-by-item basis under its equity and good conscience powers under the Act to determine whether or not each of them shall be allowed or denied as an offset to the award."

It is impossible to estimate the actual cost to the Government of asserting these gratuity offsets, to the Commission in adjudicating them, to the Court of Claims in reviewing the adjudications on appeal, or to the Indian claimants both in attorney expenses incurred in defending such offsets and in the ultimate amounts deducted from the awards made. It would probably be no exaggeration to state that the whole gratuity offset portion of the Commission's jurisdiction has cost far more than it was or will be worth. Accordingly, if the Congress should conclude that food, rations, or provisions given to a tribal claimant gratuitously should not be an allowable offset, it might also consider the wisdom of providing that neither should all the other types of gratuities asserted be allowable offsets, as they are minor in importance but are voluminous and costly to assert and adjudicate.

Finally, we respectfully suggest that the Committee may wish to consider whether any amendment to the Act relative to prohibiting the deduction from awards of any or all payments on the claim or gratuities should be prospective

only, or should also be retroactive to insure that all tribal claims can be said to have been adjudicated by the same standards. The Senate amendment speaks solely to "payments on the claim" for food, rations, or provisions, and is prospective only. Since there have been very few past adjudications where payments on the claim representing food, rations, or provisions, have been deducted from awards, we see no great inequity in the fact that the proposed Senate amendment would apply to future awards. On the other hand, the application of such a provision retroactively would be difficult. In prior cases the matter of whether the asserted payments on the claim were for food, rations, or provisions or for other benefits to the tribal claimants, was not in issue because the statute required that *all* "payments on the claim" regardless of their nature, be deducted from the gross award to the tribal claimant. Therefore, it might not always be possible to isolate definite sums deducted in a particular case as "payments on the claim" as expenditures for rations, food or provisions, and in such cases a retroactive determination could only be made by reopening the case for further proceedings to determine the exact nature of the deducted payment on the claim. As to gratuities, we have pointed out that approximately \$10 million have been deducted as gratuitous offsets of all kinds (not limited to food, rations and provisions) in prior cases, and the ratio of this amount to the \$525 million award figure will probably not change. If Congress should decide to eliminate gratuity offsets both prospectively and retroactively, the data in the prior cases is sufficiently detailed so that, except in cases compromised without a specific gratuity offset figure revealed to the Commission, the Commission could determine and issue awards for the previously allowed gratuity offsets without undue delay.

In discussing these various aspects of the two amendments under consideration, we wish to make it clear that the Commission is not expressing a position for or against any amendment the Congress may consider. As a decision making body involved in the process of adjudicating the claims, we are willing to attempt to apply fairly any standards Congress sets.

My colleagues on the Commission may wish to add to what I have said, and we are all available to answer questions.

INDIAN CLAIMS COMMISSION,
Washington, D.C., June 13, 1974.

HON. LLOYD MEEDS,
Chairman, Indian Affairs Subcommittee of the Committee on Interior and Insular Affairs,
The House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to the two questions presented in your letter of June 6, 1974, in regard to a provision in the bill S. 3007 as passed by the Senate on May 28, 1973, that would amend section 2 of the Indian Claims Commission Act to provide "that expenditures for food, rations, or provisions shall not be deemed to be payments on the claim."

Question 1. What effect, if any, would this amendment have had on claims which have already been disposed of by the Commission?

Answer. Having checked as carefully as possible in the time available the pertinent treaty provisions and the amounts allowed by the Commission as payments on the claims in the 450 cases in which final determinations have been made, which include claims in 253 dockets on which final awards totaling more than \$524,800,000.00 have been entered, and claims in 197 dockets that have been dismissed, we think the amendment would have had a minimal effect. Such allowed amounts that could be identified as expenditures for food, rations, or provisions totaled less than \$100,000.00.

Question 2. What effect, if any, would this amendment have on any claims currently pending before the Commission or on appeal from any final decision of the Commission?

Answer. In some of the cases in this group the Commission has ruled on the defendant's claimed payments on the claim. After examining the amounts allowed by the Commission as payments on the claim in these cases, and the pertinent treaty or statutory provisions applicable to the other claims involved in question 2 for potential claims for payments on the claim on account of dis-

bursements for food, rations, or provisions, we think again on the basis of as careful a check as we were able to make that the effect of the amendment would be minimal, except in two cases of the Sioux Nation, the Black Hills claim in Docket 74-B and the claims under the Treaty of April 29, 1868 (15 Stat. 635) in Docket 74.

The Sioux cases in Dockets 74-B and 74 are currently pending on appeals before the United States Court of Claims. The government's claim for credit on account of payments on the claim is yet to be heard by the Commission in both of them. We understand, however, that such claim in Docket 74-B will include a substantial amount expended for provisions under the Act of February 28, 1877 (19 Stat. 254) on which the Black Hills claim is based. An existing General Accounting Office report of such expenditures through June 30, 1925, shows a total of \$24,436,333.81. We expect that in the presentation of the government's claim in Docket 74-B that there will be added to this total the amounts expended for provisions under the 1877 act since June 30, 1925.

Information culled from a General Accounting Office report of disbursements for the benefit of the Sioux Tribe of Indians pursuant to a meat and flour stipulation in Article 10 of the above-cited 1868 Treaty on which the claim in Docket 74 is based shows disbursements for meat, flour and other rations during fiscal years 1871 through 1874 amounting to \$4,475,623.56. The same accounting report also shows \$2,872,066.25 disbursed for provisions for the Sioux during fiscal years 1875 through 1877.

I hope these answers will be helpful to the Committee and that you will call upon us if we can be of any further assistance.

Sincerely,

MARGARET H. PIERCE,
Acting Chairman.

STATEMENT OF JEROME K. KUYKENDALL

Mr. KUYKENDALL. The Commission would like to point out that offsets which might not be payments on a claim are not to be set off by the Commission under the amendment as now written. It would be logical also to provide that all gratuities, provisions, and smaller items also not be set off. That is a matter of discretion of course, with this committee and Congress because we have been setting them off for all these years and we can continue to do it.

During all this time about \$10 million has been set off as gratuities. The corresponding awards amount to about \$550 million. The gratuities set off against awards amounts to something like 2 percent of the awards, so far. We could not tell you what the ratio would be in the future, but it would probably be reasonable to assume that it would be approximately the same ratio, particularly when what will be done is added to what has been done before. Which means that the setoffs of gratuities are a minor expense, in relation to the awards made. We think the value of such offsets may not be greater than the costs of the Government in obtaining them.

Mr. MEEDS. This is primarily your reason for supporting that position, is it not, that you feel it is more difficult to determine gratuities, to trace them for all these past years, than it is simply to refuse to allow them?

Mr. KUYKENDALL. Yes, sir.

Mr. MEEDS. That you probably save money in the long run.

Mr. KUYKENDALL. That's our judgment. I cannot tell you exactly just how much money the Government spends on doing this, including our work, the work of the Department of Justice, and the accountants who do this work.

Mr. MEEDS. What is your best judgment, Mr. Commissioner, on the cost of the amendment before us, both as to the docket No. 74-B, and any other matter that is pending before the Commission?

Mr. KUYKENDALL. I can't tell you, except I can tell you that so far on awards \$550 million, I believe it is, about \$10 million have been offset, about 2 percent.

Mr. MEEDS. And on provisions and rations?

Mr. KUYKENDALL. I cannot give you that.

Mr. MEEDS. What I'm saying, on \$550 million in claims thus far, you have had claims made, and have offset some \$100,000.

Mr. KUYKENDALL. As payments on the claims.

Mr. MEEDS. Rations and provisions.

Mr. KUYKENDALL. Yes, but those aren't the only items, of provisions that have been set off; most of them have been included in the \$10 million figure as simple gratuities.

Mr. MEEDS. I understand.

Mr. KUYKENDALL. I cannot give you a breakdown of that \$10 million.

Mr. MEEDS. If we were going to attempt, however, to restrict this legislation to the narrowset scope, we could, and still do justice to the Sioux claim, it would be better for us to follow the proposed amendment, would it not, than opening it further and excepting gratuities.

Mr. KUYKENDALL. If that is your judgment. We can and will abide by any legislation this committee enacts. I have noticed, rather to my surprise, that the Department of Justice seems to take about the same position that we do, thinking that it might be wise to eliminate all offsets if you are going to eliminate any.

But, I would like to read this, if I may, next to the last paragraph, which expresses our attitude in the matter. In discussing these various aspects of the two amendments under consideration, we wish to make it clear that the Commission is not expressing a position for or against any amendment the Congress may consider. As a decision-making body involved in the process of adjudicating the claims, we are willing to attempt to apply fairly any standards Congress sets.

Mr. MEEDS. We understand that.

Mr. KUYKENDALL. We can live with any legislation on this subject that you choose to enact.

Mr. MEEDS. What I am asking you is, in view of the past history of \$100,000 being used as setoffs against the claim in rations, food, et cetera, and some \$10 million in grautities, if we want to restrict this to the least opening of the flood gate, as the Justice Department indicated, we would be better served by using the language which we propose in the amendment, than by going to the extent you are suggesting, and also excluding gratuities; would we not?

Mr. KUYKENDALL. Yes. I think the question you asked, really, I have answered it. Apparently on the figures today there is a difference of about \$10 million to \$100,000.

Mr. MEEDS. Right.

The gentleman from New Mexico?

Mr. LUJAN. No questions, Mr. Chairman.

Mr. MEEDS. The gentleman from Ohio?

Mr. REGULA. I have no questions.

Mr. MEEDS. Thank you very much, Commissioner for appearing, and we thank your fellow commissioners for being here.

Unfortunately we have to run to answer a quorum call, but your entire statement sufficiently explains the situation.

Mr. KUYKENDALL. That's most agreeable with me.

Mr. MEEDS. The subcommittee stands adjourned.

[Whereupon, at 12:20 p.m., the subcommittee adjourned, subject to the call of the Chair.]

[The following letter was received for the record following the hearing:]

WILLIAM HOWARD PAYNE,
LAW OFFICES,
Washington, D.C. August 8, 1974.

HON. LLOYD MEEDS, *Chairman,*
Subcommittee on Indian Affairs,
House of Representatives,
Congress of the United States,
Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your letter invitation to attend and participate this morning during the hearing on the above Bill.

Arthur Lazarus made a most concise and knowledgeable summary of the Joint Statement of the three Sioux attorneys.

I served for approximately eight years, beginning in the early 1930's, with the Committee on Indian Affairs of the House when it then was a full standing committee, having been established during the Administration of President John Adams.

This may be an admission against interest with respect to my age, but I fully believe that unless the above Bill is enacted into law, the claims of the Great Sioux Nation will remain undecided for a period of five to fifteen years, impossible as to strict proof of "food, rations and provisions," and at a cost to the Sioux Indians and the Government of millions for research and investigation.

There comes a time when it is the better part of wisdom and the exercise of good judgment to conclude litigation. I know of no case that has been litigated as long as the Sioux claims, approximately fifty years.

The importance of the proposed legislation was highlighted by the presence of all Commissioners of the Indian Claims Commission and by the remarks of Chairman Jerome Kuykendall.

With great respect and best wishes to you and your colleagues, I remain,

Very truly yours,

WILLIAM HOWARD PAYNE,
Claims Attorney,
Cheyenne River Sioux Tribe of South Dakota,
Fort Peck Sioux Tribe of Montana.

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