521 F. Supp. 1072, *; 1981 U.S. Dist. LEXIS 9948, **

28 Fed. Cl. 768, *; 1993 U.S. Claims LEXIS 107, **

139 Ct. Cl. 1, *; 1957 U.S. Ct. Cl. LEXIS 89, **;
152 F. Supp. 953, ***

1 of 3 DOCUMENTS

The UTE INDIAN TRIBE, Plaintiff, v. The STATE OF UTAH, defendant in intervention, Duchesne County, a political subdivision of the State of Utah, Uintah County, a political subdivision of the State of Utah, Roosevelt City, a municipal corporation, and Duchesne City, a municipal corporation, Defendants, United States of America, Amicus Curiae, Paradox Production Corporation, a Utah corporation, Amicus Curiae

Civ. No. C 75-408

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

521 F. Supp. 1072; 1981 U.S. Dist. LEXIS 9948

June 19, 1981

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff Indian tribe filed suit seeking declaratory and injunctive relief establishing the exterior boundaries of the Uintah and Ouray Reservation, defining the force and effect of the Ute Tribe's Law and Order Code within those boundaries, and restraining defendants, state and associated divisions, from interfering with enforcement of the Code.

OVERVIEW: Plaintiff Indian tribe sought declaratory and injunctive relief to establish the exterior boundaries of the Uintah and Ouray Reservation, to define the force and effect of the Ute Tribe's Law and Order Code within those boundaries, and to restrain defendants, state and associated divisions, from interfering with enforcement of the Code. The court held that the express language, legislative history, and surrounding circumstances of 33 Stat. 1905 justified the conclusion that plaintiff's reservation was diminished by the withdrawal of timber lands for national forests. The court held that the record wholly lacked the clear expression of congressional intent to disestablish plaintiff's reservation and the hard evidence necessary to overcome the construction of ambiguities in favor of plaintiff was simply not there. The overall tone of the evidentiary record harmonized with a finding that plaintiff's reservation continued in Indian reservation status, diminished only by the national forest and strawberry project withdrawals.

OUTCOME: The court held that congressional intent was lacking to disestablish plaintiff Indian tribe's reservation and that the reservation continued, diminished only by national forest and strawberry project withdrawals.

CORE TERMS: reservation, allotment, tribe, opening, tribal, opened, river, mineral, public domain, forest, acre, settlement, valley, treaty, unallotted lands, restored, homestead, cession, proclamation, grazing, jurisdictional, forest reserve, disestablishment, timber, map, territory, band, restoration, legislative history, townsite

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

Governments > Native Americans > Authority & Jurisdiction
[HN1] See 28 U.S.C.S. § 1362.

Governments > Native Americans > Authority & Jurisdiction
Real Property Law > Trusts > Holding Trusts
[HN2] Ute Law and Order Code § 1-2-2 (1975) states that the jurisdiction of the courts of the Ute Indian Tribe shall extend to the territory within the original confines of the Uintah and Ouray Reservation as set forth by Executive Orders of October 3, 1861, and January 5, 1882, and by the Acts of Congress approved May 27, 1902, June 19, 1902 and March 11, 1948, and to such other lands without such boundaries as have been or may hereafter be added to the reservation or held in trust for the tribe under any law of the United States or otherwise. The jurisdiction of the courts of the Ute Indian Tribe shall extend beyond the territorial limitation set forth next above, to effectuate the jurisdictional provisions set forth below, to the greatest extent permissible by law.

Criminal Law & Procedure > Jurisdiction & Venue > General Overview
Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
[HN3] Ute Law and Order Code § 1-2-5 states that subject to any contrary provisions, exceptions, or limitations contained in either federal law, or the tribal constitution, the courts of the Ute Indian Tribe shall have jurisdiction over all civil causes of action, and over all offenses prohibited by this code except the courts of the Ute Indian Tribe shall not assume jurisdiction over any civil or criminal matter which does not involve either the tribe, its officers, agents, employees, property or enterprises, or a member of the tribe, or a member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the tribe or its members may be directly or indirectly affected.

Governments > Native Americans > Property Rights
[HN4] See 18 U.S.C.S. § 1151.

Criminal Law & Procedure > Jurisdiction & Venue > General Overview
Governments > Native Americans > Authority & Jurisdiction
[HN5] Exclusive federal criminal jurisdiction over Indians in "Indian country" includes all persons found to be "Indian" under federal law, notwithstanding specific tribal membership or lack thereof. The Ute Law and Order Code § 1-2-5 (1975), includes any federally recognized Indian within its subject-matter jurisdiction.

Governments > Native Americans > Authority & Jurisdiction
[HN6] That definition currently in force defines "Indian country" in terms of the boundaries of an Indian reservation, regardless of title. 18 U.S.C.S. § 1151(a).

Governments > Native Americans > Authority & Jurisdiction
[HN7] Congress has primary authority over and bears overall responsibility for Indian affairs. Such power governs the results of reservation boundary litigation.

Governments > Native Americans > Authority & Jurisdiction
[HN8] A congressional determination to terminate a reservation must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.

Governments > Native Americans > Authority & Jurisdiction
[HN9] When Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress. The congressional intent must be clear, to overcome the general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation,

dependent upon its protection and good faith. Accordingly, the court requires that the congressional determination to terminate be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history. In particular, courts stress that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the government for the Indians' benefit.

Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN10] It is fundamental that extinguishment of Indian title to lands within a reservation by itself does not withdraw those lands from a reservation.

Governments > Federal Government > Executive Offices
Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
[HN11] 33 Stat. 1905 provides that before the opening of the Uintah Indian Reservation the president is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, such portion of the lands within the Uintah Indian Reservation as he considers necessary.

Governments > Native Americans > Property Rights
Governments > Public Lands > General Overview
[HN12] While it is true that Congress may disestablish or diminish an Indian reservation by restoring the lands to the public domain, it is also true that Congress may diminish an Indian reservation by withdrawing and reserving the lands for an inconsistent purpose.

Governments > Native Americans > Property Rights
[HN13] See 18 U.S.C.S. § 1165.

Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
Real Property Law > Trusts > Holding Trusts
[HN14] Tribal jurisdiction over hunting and fishing to be confined to Indian-owned and "trust" lands.

Governments > Native Americans > Authority & Jurisdiction
[HN15] 43 U.S.C.S. § 851 provides that such selections may not be made within the boundaries of said reservation, if the reservation continues to exist.

Governments > Native Americans > Authority & Jurisdiction
[HN16] See 43 U.S.C.S. § 851.

Evidence > Hearsay > Exceptions > Reputation > General Overview
[HN17] Trustworthiness in reputation evidence is found when the topic is such that the facts are likely to be inquired about and that persons having personal knowledge disclose facts which are discussed in the community; and thus the community's conclusions if any has been found, is likely to be a trustworthy one.

Evidence > Hearsay > Exceptions > Reputation > General Overview
[HN18] To have significant probative value, the matter in question must be one of general interest, so that it can accurately be said that there is a high probability that the matter undergoes general scrutiny as the community reputation is formed.

Evidence > Hearsay > Exceptions > Reputation > General Overview

[HN19] The facts for which such an opinion or reputation can be taken as trustworthy must be such facts as have been of interest to all members of the community as such, and therefore be so likely to receive general and intelligent discussion and examination by competent persons, so that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality.

Governments > Legislation > Interpretation
[HN20] Statutes passed for the benefit of dependent Indian tribes are to be liberally construed, doubtful expressions being resolved in favor of the Indians. In determining congressional intent, courts are cautioned to follow the general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.

Governments > Native Americans > Property Rights
[HN21] When Congress establishes a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.

Contracts Law > Types of Contracts > Lease Agreements > General Overview
Governments > Native Americans > Authority & Jurisdiction
Real Property Law > Landlord & Tenant > Lease Agreements > Commercial Leases > General Overview
[HN22] Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
Public Health & Welfare Law > Social Services > Native Americans
[HN23] A tribe may retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Governments > Native Americans > Authority & Jurisdiction
[HN24] While it is clear that tribal reservation sovereignty is not congruent with state sovereignty, such sovereignty as the tribes do possess is entitled to recognition and respect both by state and federal governments.

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Stewart M. Hanson, Jr., Salt Lake City, Utah, for Paradox Production Corp.

Lance **[**2]** Wilkerson, Duchesne, Utah, Dennis Draney, Roosevelt, Utah, for Duchesne Co.

OPINION BY: JENKINS

OPINION

[*1075] The Ute Indian Tribe filed a complaint with this Court on October 15, 1975, seeking declaratory and injunctive relief establishing the exterior boundaries of the Uintah and Ouray Reservation, defining the force and effect of the Tribe's Law and Order Code within those boundaries, and restraining the defendants from interfering with the enforcement of that Code. [1] The Tribe, a federally recognized, sovereign Indian tribe, [2] operates under a constitution and by-laws adopted in 1936 and approved by the Secretary of the Interior in 1937. [3] Article I of the tribal constitution defines the territory claimed by the Tribe for jurisdictional purposes:

1 This Court has jurisdiction of this action pursuant to [HN1] 28 U.S.C. § 1362:

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

Before it was served with process as a defendant, the State of Utah filed a motion to intervene on November 26, 1975, and a subsequent motion to quash the service of process accomplished on December 17, 1975. On January 15, 1976, this Court granted both motions. Since by its motion to intervene, the State waived its Eleventh Amendment immunity in this action, there is no further need to consider that jurisdictional issue. See Petty v. Tennessee-Missouri Bridge Comm., 359 U.S. 275, 276-82, 79 S. Ct. 785, 787-790, 3 L. Ed. 2d 804 (1959). Venue is proper. 28 U.S.C. § 1391(a) (1976).

[3]**

2 Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 143, 100 S. Ct. 2069, 2075, 65 L. Ed. 2d 10 (1980).

3 The tribal constitution was adopted pursuant to Section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476. Additionally, the Tribe is chartered as a federal corporation pursuant to § 17 of that Act, 25 U.S.C. § 477.

The jurisdiction of the Ute Indian Tribe of the Uintah and Ouray Reservation shall extend to the territory within the original confines of the Uintah and Ouray Reservation as set forth by Executive Orders of October 3, 1861 and January 5, 1882, and by the Acts of Congress approved May 27, 1902, and June 19, 1902, and to such other lands without such boundaries as may hereafter be added thereto under any law of the United States, except as otherwise provided by law. (Emphasis added.)

Among the powers vested in the Tribal Business Committee, the Tribe's elected governing body, are the following:

Article VI Powers of the Tribal Business Committee

Section 1. Enumerated powers. The Tribal Business Committee **[**4]** of the Uintah and Ouray Reservation shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this Constitution and By-laws, and subject to review **[*1076]** by the Ute Bands themselves at any annual or special meeting:

(h) To levy taxes upon members of the Ute Indian Tribe of the Uintah and Ouray Reservation, and to require the performance of community labor in lieu thereof, and to levy taxes and license fees, subject to review by the Secretary of the Interior, upon non-members doing business within the Reservation.

(i) To exclude from the territory of the Uintah and Ouray Reservation persons not legally entitled to reside therein, under ordinances which shall be subject to review by the Secretary of the Interior.

(j) To enact resolutions or ordinances, not inconsistent with Article II of this Constitution governing adoption and abandonment of members, and to keep at all times a correct roll of the members of the Ute Indian Tribe of the Uintah and Ouray Reservation.

(k) To promulgate and enforce **[**5]** ordinances, which shall be subject to review by the Secretary of the Interior, governing the conduct of members of the Ute Indian Tribe of the Uintah and Ouray Reservation, and providing for the maintenance of law and order and the administration of justice by establishing a Reservation Indian Court and defining its duties and powers.

(l) To safeguard and promote the peace, safety, morals and general welfare of the Ute Indian Tribe of the Uintah and Ouray Reservation by regulating the conduct of trade and the use and disposition of property upon the Reservation, provided that any ordinance directly affecting nonmembers of the Reservation shall be subject to review by the Secretary of the Interior.

(m) To charter subordinate organizations for economic purposes, and to regulate the activities of co-operative associations of members of the Ute Indian Tribe of the Uintah and Ouray Reservation by ordinance, provided that any such ordinance shall be subject to review by the Secretary of the Interior.

(n) To regulate the inheritance of property, real and personal, other than allotted lands, within the territory of the Uintah and Ouray Reservation, subject to review **[**6]** by the Secretary of the Interior.

(o) To regulate the domestic relations of members of the Ute Indian Tribe of the Uintah and Ouray Reservation by ordinances which shall be subject to review by the Secretary of the Interior.

(p) To provide for the appointment of guardians for minors and mental incompetents by ordinances or resolutions which shall be subject to review by the Secretary of the Interior.

For many years, it seemed to the Ute's non-Indian neighbors that these powers, as well as others, lay dormant as far as non-Indian affairs were concerned. To many, the concept of Indian tribal government seemed wholly irrelevant to their businesses and daily lives. Over those same years, however, the Ute Indian Tribe did not remain passive. The Utes, with the support and encouragement of their trustee, the United States government, have made continuous efforts to improve the sophistication and effectiveness of their tribal institutions in response to changing times and circumstances. [4] Naturally, as the Utes have gained the economic wherewithal to do so, they have sought a greater share of autonomy and control over their own lives and community affairs. It was inevitable **[**7]** that this quest for tribal autonomy would find expression in the promulgation of tribal law. [5]

4 See F. O'Neil & J. Sylvester, eds., Ute People: An Historical Study 113-15 (3d ed. 1970); Ten Year Development Program for the Ute Indian Tribe (1957), JX No. 465.

5 E. g., Trial transcript at 44-87 (Testimony of Wm. F. Streitz).

The Tribe operated a tribal government and an Indian court for many years prior to **[*1077]** 1975. [5A] As tribal operations expanded and the demand on tribal institutions increased, the Tribe sought to recodify and expand its growing body of ordinances, resulting in the enactment and publication of the Law and Order Code of the Ute Indian Tribe (hereinafter "Ute Law and Order Code") which was approved by the Secretary of the Interior through the Phoenix Area Director of the Bureau of Indian Affairs, Trial Transcript at 55 (Testimony of Wm. F. Streitz), and became effective on September 15, 1975. [6]

5A See Ute Indian Tribal Court, 1964 Report, Plaintiff's Exhibit 3.

[8]**

6 The statement of tribal policy introducing the new code is enlightening as to the purposes intended to be served:

§ 1-2 1. Jurisdiction Tribal Policy.

It is hereby declared as a matter of Tribal policy and legislative determination, that the public interest and the interests of the Ute Indian Tribe demand that the Tribe provide itself, its members, and other persons living within the territorial jurisdiction of the Tribe as set forth in Article I of the Constitution of the Ute Indian Tribe with an effective means of redress in both civil and criminal cases against members and non-Tribal members who through either their residence, presence, business dealings, other actions or failures to act, or other significant minimum contacts with this Reservation and/or its residents commit criminal offenses against the Tribe or incur civil obligations to persons or entities entitled to the Tribe's protection.

This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the Tribe, its members, and other residents of the Reservation and other persons and entities over which the Tribe has not previously elected to exercise jurisdiction. The jurisdictional provisions of this Law and Order Code, to insure maximum protection for the Tribe, its members and other residents of the Reservation, should be applied equally to all persons, members and non-members alike.

[9]** Promulgation of the Ute Law and Order Code raised immediate protest from the defendant municipalities, Duchesne and Roosevelt, and defendant Duchesne County, all of which are within the original boundaries of the Uintah Indian Reservation. [7] The defendants complained that they were wrongfully included within the territorial jurisdiction of the Ute Tribe under the Ute Law and Order Code [8] and officials of the **[*1078]** defendants urged their constituents to resist the enforcement of the new code. The State of Utah complained that its authority was likewise impaired. [9]

7 See e.g., Exhibit I-1A (map).

8 The territorial extent of tribal jurisdiction is defined by [HN2] Ute Law and Order Code § 1-2-2 (1975) as follows:

Territorial Jurisdiction.

(1) The Jurisdiction of the Courts of the Ute Indian Tribe shall extend to the territory within the original confines of the Uintah and Ouray Reservation as set forth by Executive Orders of October 3, 1861, and January 5, 1882, and by the Acts of Congress approved May 27, 1902, June 19, 1902 and March 11, 1948, and to such other lands without such boundaries as have been or may hereafter be added to the Reservation or held in trust for the Tribe under any law of the United States or otherwise.

(2) The jurisdiction of the Courts of the Ute Indian Tribe shall extend beyond the territorial limitation set forth next above, to effectuate the jurisdictional provisions set forth below, to the greatest extent permissible by law.

(The personal jurisdiction asserted by the Tribe is expressed in expansive terms by § 1-2-3.)

The subject-matter jurisdiction of the Tribe, in contrast, is carefully limited:

[HN3] § 1-2-5. General Subject Matter Jurisdiction; Limitations.

Subject to any contrary provisions, exceptions, or limitations contained in either federal law, or the Tribal Constitution, the Courts of the Ute Indian Tribe shall have jurisdiction over all civil causes of action, and over all offenses prohibited by this Code except the Courts of the Ute Indian Tribe shall not assume jurisdiction over any civil or criminal matter which does not involve either the Tribe, its officers, agents, employees, property or enterprises, or a member of the Tribe, or a member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the Tribe or its members may be directly or indirectly affected. (Emphasis added.)

Far from attempting a wholesale appropriation of governmental authority in the Uintah Basin, the Ute Indian Tribe expressed limitations on its own authority that presaged the latest expression on the subject by the Supreme Court. See Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 1257, 67 L. Ed. 2d 493 (1981). Further, it is interesting to note that at least one defendant municipality had agreed years before to a limited exercise of tribal jurisdiction over Indians within the city limits. See Memorandum of Agreement between Roosevelt City and the Ute Tribe, Jan. 11, 1972, Joint Exhibit No. 476.

[10]**

9 See Letter of Governor Calvin L. Rampton to Attorney General Vernon B. Romney of Oct. 14, 1975, attached to Answers to Plaintiff's First Interrogatories, filed April 16, 1976.

The Tribe, faced with mounting opposition to the exercise of its jurisdiction, commenced the above-entitled action in this Court against the named governmental defendants. The State of Utah intervened as a defendant and the United

States of America and Paradox Production Corporation have subsequently entered these proceedings as amici curiae. By stipulation of the parties in the Pretrial Order, Uintah County, another political subdivision of the State of Utah, was joined as a defendant. [10]

10 By further stipulation it was agreed that "Grand County and/or Wasatch County, both political subdivisions of the State of Utah, may, without objection from the parties, petition the Court to be joined herein as parties" upon conditions. Pretrial Order at 7 (Apr. 2, 1979). Neither county has sought leave to intervene and consequently they are not parties to this case.

[11] I. CLAIMS OF THE PARTIES**

To paraphrase the Pretrial Order, the plaintiff Ute Indian Tribe asserts that the Uintah and Ouray Indian Reservation was created by the Executive Order of October 3, 1861, [11] as confirmed by the Act of May 5, 1864, 13 Stat. 63, by the Executive Order of January 5, 1882, [12] and by the Act of March 11, 1948, 62 Stat. 72, and that the original exterior boundaries as thus established continue to exist undiminished for purposes of defining the present boundary of the Uintah and Ouray Reservation. Plaintiff further asserts that all of the lands encompassed by that boundary are "Indian country" as defined by federal statute [13] and that the defendants may not exercise jurisdiction over members of the plaintiff Tribe for any criminal offense committed therein as that jurisdiction is reserved to the United States, or to the Tribe itself, [14] and that the Tribe may exercise the full panoply of its governing powers within those same boundaries free from interference by the defendants. [15]

11 Reprinted in I C. Kappler, Indian Affairs: Laws and Treaties 900 (2d ed. 1904) (hereinafter cited as " -- - Kapp. -- -").

[12]**

12 I Kapp. 901. Copies of these Executive Orders and Acts of Congress are annexed hereto in Appendix "A" of this Opinion.

13 [HN4] 18 U.S.C. § 1151 (1976) provides:

Indian country defined.

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

See United States v. John, 437 U.S. 634, 647-49, 98 S. Ct. 2541, 2548-2549, 57 L. Ed. 2d 489 (1978).

14 Language in the Pretrial Order notwithstanding, it has long been held that [HN5] exclusive federal criminal jurisdiction over Indians in "Indian country" includes all persons found to be "Indian" under federal law, see United States v. Broncheau, 597 F.2d 1260, 1262-64 (9th Cir. 1979), cert. denied, 444 U.S. 859, 100 S. Ct. 123, 62 L. Ed. 2d 80 (1980), notwithstanding specific tribal membership or lack thereof. See e.g., id., at 1263; United States v. Indian Boy X, 565 F.2d 585, 594 (9th Cir. 1977), cert. denied 439 U.S. 841, 99 S. Ct. 131, 58 L. Ed. 2d 139; United States v. Ives, 504 F.2d 935, 953 (9th Cir. 1974) vacated on other grounds, 421 U.S. 944, 95 S. Ct. 1671, 44 L. Ed. 2d 97 (1975); Ex parte Pero, 99 F.2d 28, 30 (7th Cir. 1938). The Ute Law and Order Code § 1-2-5 (1975), supra note 8, includes any federally recognized Indian within its subject-matter jurisdiction.

[13]**

15 While strictly speaking, 18 U.S.C. § 1151 (1976) defines "Indian country" for the Federal Criminal Code, it is well-settled that its definition applies as well to questions of civil jurisdiction. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2, 95 S. Ct. 1082, 1084, 43 L. Ed. 2d 300 (1975), accord, McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 177-78 n.17, 93 S. Ct. 1257, 1265, 36 L. Ed. 2d 129 (1973); Kennerly v. District Court of Montana, 400 U.S. 423, 424 n.1, 91 S. Ct. 480, 481, 27 L. Ed. 2d 507 (1971); Williams v. Lee, 358 U.S. 217, 220-22 nn. 5, 6, & 10, 79 S. Ct. 269, 270-271, 3 L. Ed. 2d 251 (1958).

[*1079] In defense, all defendants assert that "Indian country" in the Uintah basin is confined to lands held in trust for individual Indians or for the Ute Indian Tribe, and beyond that, the area defined by the Act of March 11, 1948, 62 Stat.

72, more commonly known as the Hill Creek Extension. The State of Utah asserts alternatively that the original Uintah Valley Indian Reservation described in the Executive Order of October 3, 1861, is diminished by national **[**14]** forest and reclamation withdrawals and that diminished area combined with the Hill Creek Extension comprises "Indian country" under tribal and federal jurisdiction. See State's Post-Trial Brief at 55. All defendants assert that the Uncompahgre Reservation, delineated by the Executive Order of January 5, 1882, no longer exists. Implicit in the defense is the issue of the enforceability of the Ute Law and Order Code as against non-Indians, particularly on lands held in fee simple "fee lands" rather than on lands held in federal trust for use and occupancy by the Indians "trust lands".

While plaintiffs seek both declaratory and injunctive relief, no claims for damages have been asserted by any party.

II. PRELIMINARY INJUNCTION

This Court has already granted preliminary equitable relief to a limited extent in the above-entitled action. In an action arising in state court among persons who are not parties to these proceedings, some of the same jurisdictional questions were presented to the state court as are presented here. In a broadly worded opinion in Brough v. Appawora, 553 P.2d 934 (Utah 1976), a majority of the Utah Supreme Court held that a state district court had jurisdiction **[**15]** of a tort claim against a member of the Ute Indian Tribe arising from an automobile accident occurring within the original exterior boundaries of the Uintah Valley Reservation as defined by the Executive Order of October 3, 1861.

The plaintiff sought a temporary restraining order and a preliminary injunction forbidding the defendants or their officers, employees, etc. from (1) proceeding to enforce the judgment in Brough v. Appawora, or (2) relying on that decision to justify interference with the Tribe's asserted jurisdiction. The temporary restraining order was entered on September 6, 1976, and the preliminary injunction on October 14, 1976. [16] By its preliminary injunction this Court did not seek to enjoin the state proceedings in Brough v. Appawora or otherwise overrule that decision by the Utah Supreme Court, recalling that "lower federal courts possess no power whatever to sit in direct review of state court decisions." Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 296, 90 S. Ct. 1739, 1747, 26 L. Ed. 2d 234 (1970). Rather the preliminary injunction was issued to maintain the status quo in this litigation, avoiding potentially destructive conflicts **[**16]** among the parties hereto until this Court was able to conclusively resolve these jurisdictional questions upon the merits.

16 By its terms, the preliminary injunction was narrower in scope than was the TRO; the defendants, their officers, employees, etc., were restrained from "exercising or assuming any form of criminal or civil jurisdiction based on the case Brough v. Appawora, or otherwise, ... pending a final determination of this action, ..."

Of course, this Court is in no way bound to follow the rule of Brough v. Appawora ; the parties herein were not parties to that case, eliminating any question of res judicata or collateral estoppel, see Kline v. Burke Const. Co., 260 U.S. 226, 230, 43 S. Ct. 79, 81, 67 L. Ed. 226 (1922), nor is this Court bound by the doctrine of stare decisis to follow state court interpretations of federal law, Kansas City Steel Co. v. Arkansas, 269 U.S. 148, 46 S. Ct. 59, 70 L. Ed. 204 (1925).

Any persuasive effect the opinion in Brough v. Appawora may have had was effectively **[**17]** negated by the United States Supreme Court, which vacated the opinion and remanded "for further consideration in light of Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 **[*1080]** (1977)." Appawora v. Brough, 431 U.S. 901, 97 S. Ct. 1690, 52 L. Ed. 2d 384 (1977). The threat of injury addressed by the preliminary injunction arguably became moot following the Supreme Court's action, and the preliminary injunction shall therefore be dissolved upon entry of final judgment in this action.

III. TRIAL

The above-entitled action came before this Court for the purpose of trial without a jury on August 1 and 2, 1979. Testimony was taken from 18 witnesses and more than 800 documentary exhibits were admitted, [17] totaling more than

3,000 pages of text, plus photographs and dozens of maps. Besides giving careful scrutiny to these documents and the record at trial, this Court has studied the extensive pretrial memoranda and post-trial briefs submitted by the parties and the United States as amicus, and has examined numerous historical documents authenticated in the discovery process but not included in the compilation of joint exhibits offered at trial, and other **[**18]** learned treaties and historical works that are relevant to this Court's determinations.

17 In this Opinion, documents shall be both described specifically and referred to by their assigned exhibit numbers to avoid confusion. The 485 joint exhibits of the parties shall be cited as "JX (number)." The documents included in the Joint Compendium of Legislative Documents shall be cited as "LD (number)." Other documents, items, etc. shall be assigned similar designations, e.g., such as those found in defendant's first request for admissions. "DFRA (number)."

IV. HISTORICAL INQUIRY

In large part, the questions to be decided by this Court turn on the discovery of the intent of the United States Congress in the course of its dealings with the Ute Indians and their non-Indian neighbors, particularly as that intent has found expression in numerous statutes. As Chief Justice Marshall announced long ago, "Where the mind labors to discover the design of the Legislature, it seizes everything from which aid can be derived..." **[**19]** United States v. Fisher, 6 U.S. (2 Cranch) 358, 386, 2 L. Ed. 304 (1905). In this case, this Court has been compelled to assemble and synthesize multiple fragments of a complex era of history in an attempt to reinfuse the words of the old documents we are considering with the weight and meaning they once carried and to do so "courts, in construing a statute, may with propriety recur to the history of the times when it was passed." United States v. Union Pac. R.R., 91 U.S. 72, 79, 23 L. Ed. 224 (1875). Courts in cases such as this one must of necessity refer to that history to resolve the issues before them. See Missouri-Kansas-Texas R.R. Co. v. Early, 641 F.2d 856, 857 (10th Cir. 1981). As one distinguished commentator warned years ago: "Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored." N. Margold, Introduction, in F. Cohen, Handbook of Federal Indian Law at xxxvii (U.N.M. ed. 1971). In a very real sense history controls the meaning of law in this case. [18]

18 See Deloria, "Indian Law and the Reach of History," 4 J.Contemp.L. 1 (1977). In Mohegan Tribe v. State of Connecticut, 638 F.2d 612 (2d Cir. 1981), the United States Court of Appeals for the Second Circuit commented:

As the Supreme Court has noted with respect to Indian legislation and treaties, "(these) instruments ... cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206, 98 S. Ct. 1011, 1019, 55 L. Ed. 2d 209 ... (1978); accord, Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666, 99 S. Ct. 2529, 2537, 61 L. Ed. 2d 153 ... (1979). Certainly, courts should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are as deeply embedded in American history as are those relevant here.

Id., 638 F.2d at 621 (citations omitted).

[20]** At the same time, however, neither history nor the law that it creates remain static, fixing words with a particular meaning assigned by the thinking of a particular era. Notions of jurisdiction, sovereignty, of enlightened governmental policy evolve in a state of flux generated by the changing perceptions and experiences of the people by whom these ideas are defined. Justice **[*1081]** requires that courts temper the meaning of the fundamental documents with interpretations that serve the needs of people in circumstances beyond the imagination of those who framed the statutory language decades ago. [19] The architects of the policy of allotting Indian reservation lands in severalty to tribal members in no way foresaw the stubborn survival of American Indians as distinct, cultural and political communities who "cling so tenaciously to their lands and traditional tribal way of life." Federal Power Comm. v. Tuscarora Indian Nation, 362 U.S. 99, 142, 80 S. Ct. 543, 567, 4 L. Ed. 2d 584 (1962) (J. Black, dissenting). Their concerns over matters of policy seem to have been much more immediate than dictating what would be the precise boundaries of an Indian reservation 80 years later. **[**21]** As Justice Marshall observed in a recent case raising similar issues,

19 For example, in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979), the Supreme Court confronted the problems of enforcement of Indian fishing rights under treaties signed in the 1850's in the context of regulation of an international salmon fishery. Justice Stevens commented that

In sum, it is fair to conclude that when the treaties were negotiated, neither party realized or intended that their agreement would determine whether, and if so how, a resource that had always been thought inexhaustible would be allocated between the native Indians and the incoming settlers when it later became scarce.... Unfortunately, that resource has now become scarce and the meaning of the Indians' treaty right to take fish has accordingly become critical.

Id. 443 U.S. at 669, 99 S. Ct. at 3066.

The Court proceeded to decree a practical mathematical apportionment of the resource based upon an equitable reading of the broad purposes of the treaty language. Id., 443 U.S. at 674-685, 99 S. Ct. at 3069-3074.

[22]** Ultimately, what the legislative history demonstrates, as co-counsel for the state has aptly concluded, is that Congress manifested an "almost complete lack of ... concern with the boundary issue." [20] The issue was of no great importance in the early 1900's as it was commonly assumed that all reservations would be abolished when the trust period on allotted lands expired. There was no pressure on Congress to accelerate this time table, so long as settlers could acquire unused land. Accordingly, Congress did not focus on the boundary question.

20 At his footnote 20, Justice Marshall cites Comment, New Town et al.: The Future of an Illusion, 18 S.D.L.Rev. 85, 117 (1973). One author of that Comment, Tom Tobin, is also defense counsel in these proceedings.

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 629, 97 S. Ct. 1361, 1384, 51 L. Ed. 2d 660 (1977) (J. Marshall, dissenting).

The task facing this Court is plagued by a similar lack of definitive expression by Congress on the specific boundary issues. The Court must make its own reasoned construction of the relevant statutory language based **[**23]** upon a careful evaluation of multiple factors, namely history, legal doctrine and precedent, public policy, past and contemporary circumstances of people, and common sense. Legal analysis of the evidence and issues in this case is further complicated by the fact that over the years, Congress has changed the rules defining the territorial limits of federal, state and tribal jurisdiction in a reservation context. Historical events that are now material to the question of jurisdiction were not material to the question of jurisdiction at the time those events occurred.

For example, "Indian Country" as a jurisdictional concept was first defined in general terms by Congress in the Indian Trade and Intercourse Act of 1834:

Be it enacted, that all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purpose of this Act, be taken and deemed Indian country. [21]

21 Act of June 30, 1834, § 1, 4 Stat. 729 (emphasis added). Prior to this time, the Supreme Court had held that lands the Indian title to which had been extinguished by treaty were not "Indian country" for the purposes of the Indian Trade and Intercourse Act of 1802, Act of Mar. 30, 1802, 2 Stat. 139. American Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 7 L. Ed. 450 (1829). Though sections of that Act referred to "Indian country" or "Indian territory", it made no effort to give a general definition of those terms, choosing instead to delineate a single boundary line which was variable by treaty provision.

[24]**

[*1082] This statutory definition remained in force until it was repealed by the failure to include it in the U.S. Revised Statutes in 1874. [22] However, a number of other federal statutes were retained in the Revised Statutes which still made reference to transactions in "Indian country." See e.g., R.S. §§ 2127-2148, 2150, 2152-2154 (1878). Notwithstanding the repeal of the statutory definition in the 1834 Act, the courts continued to apply the general thrust of that definition in cases arising under statutes which

were retained. In Bates v. Clark, 95 U.S. 204, 24 L. Ed. 471 (1877), the Supreme Court first dealt with the problem of defining "Indian country" under the Revised Statutes. Justice Miller, writing for the Court, reviewed the 1834 Act's definition and commented:

> 22 See R.S. § 5596 (1878). The 1878 edition of the Revised Statutes corrected certain errors in the first edition and "remained the standard and only official compilation of federal statute law" until 1901. A. Beardsley and O. Orman, Legal Bibliography and the Use of Law Books 77 (2d ed. 1947); See Act of Mar. 2, 1877, § 4, Ch. 82, 19 Stat. 268.

[25]**

The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

95 U.S. at 208. In Bates the Court found the 1834 definition to be easily applied to the case before it:

> Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of states and the formation of territorial governments, Congress has not thought it necessary to make any new definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fines, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offenses **[**26]** were not committed in the Indian country as established by law. These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian country, in the Act of 1834, such an adaptability to the altered circumstances of what was then Indian country as to enable them to ascertain what it was at any time since then.

95 U.S. at 207. Thus it was that the 1834 definition of "Indian country" became a matter of federal common law. [23] The Court continued to apply the title-dependent definition of Indian country set forth in Bates v. Clark for a number of years, as in the case of Ex parte Crow Dog, 109 U.S. 556, 3 S. Ct. 396, 27 L. Ed. 1030 (1883), in which Justice Matthews wrote:

> 23 See H. Hart & H. Wechsler, The Federal Courts at the Federal System (2d ed. Bator 1973) at 770: "We will use the term, federal common law, loosely, ... to refer generally to federal rules of decision where the authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command."

[27]**

In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of the Indians, ...

> This definition though not now expressed in the Revised Statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. **[*1083]** It would be otherwise impossible to explain these references, or give effect to many of the most important provisions of existing legislation for the government of Indian country.

109 U.S. at 561-62, 3 S. Ct. at 399. In Crow Dog, the court held Sioux lands within the Dakota Territory to be "Indian country" for jurisdictional purposes. United States v. LeBris, 121 U.S. 278, 280, 7 S. Ct. 894, 895, 30 L. Ed. 946 (1887), extended "Indian country" to include lands held under Indian title within the boundaries of a state.

This title-dependent conception of what for jurisdictional purposes comprised "Indian country" governed, or should have governed, the perceptions of persons contemporaneous to the "opening" **[**28]** of the Uncompahgre Indian Reservation in the 1890's and the Uintah Valley Reservation in 1905. Indian title, rather than reservation boundaries, was the material jurisdictional fact. [24]

> 24 As with many generalizations, there is at least one exception: the Seven Major Crimes Act, Act of Mar. 3, 1885, § 9, ch. 341, 23 Stat. 362, extended federal jurisdiction to specified offenses by Indians against Indians and other persons "within the limits of any Indian reservation," rather than within Indian country. See United States v. Kagama, 118 U.S. 375, 377-78, 6 S. Ct. 1109, 1110, 30 L. Ed. 228 (1886); United States v. Celestine, 215 U.S. 278, 285, 30 S. Ct. 93, 94, 54 L. Ed. 195 (1909).

This distinction between "Indian country" and lands within the boundary of a reservation was acknowledged by the Supreme Court in United States v. Celestine, 215 U.S. 278, 30 S. Ct. 93, 54 L. Ed. 195, decided in 1909, four years after the Uintah Valley Reservation was "opened" by Congress to settlement. In that case, the Court, **[**29]** referring to the 1834 statute defining Indian country, observed:

> Construing this section, it was decided, in Bates v. Clark, 95 U.S. 204, 209, (24 L. Ed. 471) that all the country described in the act as "Indian country" remains such "so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." The section was repealed by Rev.Stat., § 5596. Still, it was held that it might be referred to for the purpose of determining what was meant by the term "Indian country" when found in sections of the Revised Statutes which were reenactments of other sections of prior legislation. Ex parte Crow Dog, 109 U.S. 556, (3 S. Ct. 396, 27 L. Ed. 1030); United States v. Le Bris, 121 U.S. 278, (7 S. Ct. 894, 30 L. Ed. 946). But the word "reservation" has a different meaning, for while the body of land described in the section quoted as "Indian country" was a reservation yet a reservation is not necessarily "Indian country." The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It **[**30]** may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide, and when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress.

215 U.S. at 285, 30 S. Ct. at 94 (emphasis added).

Support for any inference on the question of reservation boundaries cannot be drawn blindly from evidence of jurisdictional practice at the time the reservations were opened. Evidentiary exhibits that express contemporaneous opinions on jurisdiction are properly considered only within the context of the governing law as perceived at that time. [25]

25 In Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977), the majority opinion seems to overlook this distinction. In Rosebud the majority finds that because Congress expressly extended the operation of the Indian liquor laws to the "opened" areas of the reservation, Congress thought that those lands were no longer within the boundaries of the reservation a weighty construction of the opening legislation. Of course, the Indian liquor laws addressed themselves to "Indian country", which at that time was defined by land title rather than reservation boundary.

> "(T)he most reasonable inference from the inclusion of this provision is that Congress was aware that the opened unallotted areas would henceforth not be "Indian country," because not in the reservation.
>
> Id., 430 U.S. at 613, 97 S. Ct. at 1376 (footnote omitted).

The appropriate inference would seem to have been that Congress included the liquor provision in the 1910 Rosebud Act because Congress was aware that the opened areas of the reservation would cease to be "Indian country" because land titles were to change hands, Indian to non-Indian.

The Rosebud majority draws its differing inference by overlooking or blurring the distinction between Indian country and reservations lands elucidated by the Court in United States v. Celestine, decided in 1909:

> Indian country, however, did not apply to territory on which "the Indian title had been extinguished, and over the inhabitants of which ... the jurisdiction of the state was full and complete" Dick v. United States, (208 U.S. 340, 28 S. Ct. 399, 52 L. Ed. 520 (1908),) supra, at 352, (28 S. Ct. at 402). Land remaining within the boundaries of a reservation, of course, would not be subject to the "full and complete" jurisdiction of the state ... While prior to the statutory definition in 18 U.S.C. § 1151, the defined areas of Indian country may have been a bit vague, ... Dick was the most recent pronouncement on the subject at the time of the 1910 Act, and clearly defined Indian country with reference to state jurisdiction.
>
> 430 U.S. at 614-15 n.47, 97 S. Ct. at 1376-1377 (emphasis added and citations omitted). The Dick opinion exhibits no such emphasis on state jurisdiction; it cites Bates v. Clark and Ex parte Crow Dog as authority for the statement quoted in Rosebud, both of which define "Indian country" by land title. The Rosebud majority seems to overlook the careful distinctions expressed at that time by the court in Celestine as well as a revealing comment in Clairmont v. United States, 225 U.S. 551, 32 S. Ct. 787, 56 L. Ed. 1201 (1912), at 558-59, 32 S. Ct. at 789:
>
> But, as was pointed out in Bates v. Clark, supra, ... "When the Indian title is extinguished it ceases to be Indian country, unless some such (statutory) reservation takes it out of the rule." The same principle of decision was recognized in Dick v. United States, 208 U.S. 340, 28 S. Ct. 399, 52 L. Ed. 520. (Emphasis added.)

The Court in Clairmont makes no reference to "full and complete" state jurisdiction or to the termination of reservation status in defining "Indian country" under the liquor laws. Continuing reservation status and state jurisdiction were not necessarily inconsistent. See e.g., Louie v. United States, 274 F. 47, 49 (9th Cir. 1921). That extinguishment of Indian title defined "Indian country" in 1910 renders it difficult for this Court to infer that Congress was aware of any other controlling principles in dealing with the Sioux, or the Utes, however meaningful that other rule is today. See Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 623-24 n. 12, 97 S. Ct. at 1381-1382 (J. Marshall, dissenting).

[31]**

[*1084] A few years later, the Supreme Court expanded the judicial definition of Indian country to include lands once a part of the public domain which have been reserved and set apart as an Indian reservation by Executive Order, [26] Donnelly v. United States, 228 U.S. 243, 269, 33 S. Ct. 449, 458, 57 L. Ed. 820 (1913). After Donnelly, reservation boundaries rather than unextinguished Indian title became the material jurisdictional facts, at least in some cases. The courts continued to expand the definition of Indian country [27] until 1948, when Congress codified these judicial expressions into statutory law as 18 U.S.C. § 1151. [28]

26 Both the Uintah Valley and the Uncompahgre Reservations were created by Executive Orders.

27 See e.g., United States v. Sandoval, 231 U.S. 28, 34 S. Ct. 1, 58 L. Ed. 107 (1913) ("Indian country" includes "dependent Indian communities"); United States v. Pelican, 232 U.S. 442, 34 S. Ct. 396, 58 L. Ed. 676 (1914) (individual Indian trust allotments); Pronovost v. United States, 232 U.S. 487, 34 S. Ct. 391, 58 L. Ed. 696 (1914) (Indian reservation); United States v. McGowan, 302 U.S. 535, 58 S. Ct. 286, 82 L. Ed. 410 (1938) (Reno Indian colony).

[32]**

28 See United States v. John, 437 U.S. 634, 648-49 & n.18, 98 S. Ct. 2541, 2548-2549, 57 L. Ed. 2d 489 (1978); text of section at note 13, supra.

[HN6] That definition is the one currently in force, defining "Indian country" in terms of the boundaries of an Indian reservation, regardless of title. 18 U.S.C. § 1151(a) (1976). It must be recalled that during this whole dynamic chain of events, federal, state and tribal officials were attempting to administer policies in light of the then-governing law. To be sure, as a practical matter, the subtle distinctions described above were sometimes lost upon those who actually lived and worked in the areas on or near the Indian reservations; the remote offices of an Indian agent or county prosecutor were not the likely repositories of complete **[*1085]** sets of United States Reports. [29] Conflicting jurisdictional practices of federal and state authorities in 1897, or 1905, or for decades thereafter may have institutionalized the erroneous exercise of jurisdiction as well as the valid exercise of jurisdiction. [30] The extensive "jurisdictional history" **[**33]** offered at trial by the parties is far more probative of the existence of an ongoing boundary conflict which requires resolution than it is evidence that one asserted boundary line prevails over another.

29 The administrative process was often complicated by specific statutes that extended state jurisdiction within reservation boundaries. E. g., Louie v. United States, 274 F. 47, 49 (9th Cir. 1921).

30 The complex problems this Court has faced in evaluating the jurisdictional history of the Uintah and Ouray Indian Reservation only reaffirm the wisdom of an observation by Nathan Margold:

(If) the laws governing Indian affairs are viewed as lawyers generally view existing law, without reference to the varying times in which particular provisions were enacted, the body of the law thus viewed is a mystifying collection of inconsistencies and anachronisms. To recognize the different dates at which various provisions were enacted is the first step towards order and sanity in this field.

Introduction, in F. Cohen, Handbook of Federal Indian Law xxviii (N.M. ed. 1971).

[34]**

V. GOVERNING PRINCIPLES

Litigation of the unique complexity of an Indian reservation disestablishment suit demands the application of specially adapted rules of statutory construction. Over the years, courts adjudicating such cases have formulated such principles. [31] This Court has carefully reviewed the bulk of existing case law on reservation diminishment [32] in an effort to distill an analytical approach to the legal and historical materials in this case that would seem to make sense.

31 Compare e.g., Hatten v. Hudspeth, 99 F.2d 501 (10th Cir. 1938) with Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977).

32 See Rosebud Sioux Tribe v. Kneip, 375 F. Supp. 1065 (D.S.D.1974) affirmed, 521 F.2d 87 (8th Cir. 1975), affirmed, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975); Mattz v. Arnett, 412 U.S. 481, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973); Seymour v. Superintendent, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962); Clairmont v. United States, 225 U.S. 551, 32 S. Ct. 787, 56 L. Ed. 1201 (1912); United States v. Celestine, 215 U.S. 278, 30 S. Ct. 93, 54 L. Ed. 195 (1909); Dick v. United States, 208 U.S. 340, 28 S. Ct. 399, 52 L. Ed. 520 (1908); Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980); United States v. Minnesota, 466 F. Supp. 1382 (D.Minn.1979), affirmed, 614 F.2d 1161 (8th Cir. 1980) (per curiam); United States v. A Juvenile, 453 F. Supp. 1171 (D.S.D.1978) reversed sub nom. United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated and remanded as moot, 446 U.S. 980, 100 S. Ct. 2959, 64 L. Ed. 2d 836 (1980); United States v. Wounded Knee, 596 F.2d 790 (8th Cir. 1979) cert. denied, 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed. 2d 289; United States v. Long Elk, 410 F. Supp. 1174 (D.S.D.1976), reversed 565 F.2d 1032 (8th Cir. 1977); Beardslee v. United States, 541 F.2d 705 (8th Cir. 1976); United States ex rel. Cook v. Parkinson, 396 F. Supp. 473 (D.S.D.1975), affirmed, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982, 97 S. Ct. 1677, 52 L. Ed. 2d 376 (1977); United States ex rel. Condon v. Erickson, 344 F. Supp. 777 (D.S.D.1972), affirmed, 478 F.2d 684 (8th Cir. 1973); New Town v. United States, 454 F.2d 121 (8th Cir. 1972); Ellis v. Page, 351 F.2d 250 (10th Cir. 1965); Hilderbrand v. United States, 327 F.2d 205 (10th Cir. 1964); Tooisgah v. United States, 186 F.2d 93 (10th Cir. 1950); Kills Plenty v. United States, 133 F.2d 292 (8th Cir. 1943); United States v. Frank Black Spotted Horse, 282 F. 349 (D.S.D.1922); United States v. Kiya, 126 F. 879, 882 (D.N.D.1903); Confederated Salish v. Kootenai Tribe v. Namen, -- - F. Supp. -- -, No. 2343, et al. (D.Mont. Filed Sept. 20, 1979).

[35]**

It is recognized as fundamental that [HN7] Congress has primary authority over and bears overall responsibility for Indian affairs. [33] Decades ago, the Supreme Court recognized that such power governs the results of reservation boundary litigation. In United States v. Celestine, 215 U.S. 278, 30 S. Ct. 93, 54 L. Ed. 195 (1909), Justice Brewer, writing for a unanimous Court, declared that, "(W)hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." Id. 215 U.S. at 285, 30 S. Ct. at 94. This basic precept **[*1086]** forms the foundation of the body of case law dealing with reservation disestablishment.

33 See e.g., 1 American Indian Policy Review Comm'n, Final Report at 106-107 (comm. print 1977).

In Seymour v. Superintendent, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962), the Supreme Court, quoting the passage from Celestine, supra, held that the boundaries of the southern half of the Colville Indian Reservation **[**36]** remain intact notwithstanding the opening of the reservation to non-Indian settlement by Act of Congress in 1906, and the prior disestablishment of the northern half of the reservation. [34] Unlike the 1892 Act, which provided that the north half be "vacated and restored to the public domain," [35] the 1906 Act [36] and the 1916 Presidential Proclamation [37] implementing the Act did not "purport to affect the status of the remaining part of the reservation..." Id., 368 U.S. at 354, 82 S. Ct. at 426. Rather, the 1906 Act merely "opened" the Colville Reservation to non-Indian homesteading, consistent with the purposes of the allotment policy:

34 See Id. 368 U.S. at 354-59, 82 S. Ct. at 426-429. Generally speaking, reservation disestablishment cases arise as a consequence of the efforts of Congress over a 30-year period to abolish the Indian reservation system by allotting tribal lands in separate parcels to individual tribal members and opening any surplus reservation lands remaining to non-Indian entry and settlement. In addition to the Dawes Act, or General Allotment Act of 1887, Act of Feb. 8, 1887, 24 Stat. 388, which provided general authority for allotment of reservations, Congress enacted 108 separate bills directing the allotment of specific reservations, some times under the provisions of the Dawes Act, often under their own specific terms. See 2 Task Force No. 9, American Indian Policy Review Comm."s, Report on Indian Law Consolidation, Revision and Codification (Appendix) 235-246 (comm. print 1976). The purpose of the allotment program was to promote the assimilation of Indians into the dominant society by impressing them into the lifestyle of the yeoman farmer. An idealistic near-crusade by the "friends of the Indian" joined by railroads and mining companies, the allotment program was generally disastrous. See D. Otis, The Dawes Act and the Allotment of Indian Lands (Prucha ed. 1973). Between 1887 and 1934, when allotment ceased, 60 million acres of "surplus" reservation land had been sold to non-Indians, as had 27 million acres of lands allotted to individual Indians. W. Washburn, Red Man's Land White Man's Law 145 (1971). The allotment policy although repudiated as long ago as 1934, continues to have a profound effect on Indian reservation land tenure, having often created a "checkerboard" pattern of land ownership and given rise to boundary and jurisdictional disputes such as the case at bar.

[37]**

35 Act of July 1, 1892, § 1, ch. 140, 27 Stat. 62, 63, I Kapp. 441-43 (2d ed. 1904). Proceeds from the sale of the restored lands were to go to the government, not the Indians. Id. § 2.

36 Act of Mar. 22, 1906, ch. 1126, 34 Stat. 80, III Kapp. 163-165 (1913).

37 Proclamation of May 13, 1916, 39 Stat. 1778, IV Kapp. 966-69 (1929).

Consequently, it seems clear that the purpose of the 1906 Act was neither to destroy the existence of the diminished Colville Indian Reservation nor to lessen federal responsibility for and jurisdiction over the Indians having tribal rights on that reservation. The Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.

Id. 368 U.S. at 356, 82 S. Ct. at 427. [38] Even townsites within the opened reservation were held to remain a part of the reservation, and therefore, "Indian country" under 18 U.S.C. § 1151. Id. 368 U.S. at 358-59, 82 S. Ct. at 428-429.

38 The opening of the reservations to non-Indian settlement was theorized to be helpful to the Indians as they could learn by example the farming of their own allotments by observing the practices of their "civilized" white neighbors. It would promote co-operation between Indians and whites and ease tensions in reservation communities. The influx of whites, it was believed, would create markets and transportation facilities, would build schools and otherwise be advantageous to the Indians. See D. Otis, The Dawes Act and the Allotment of Indian Lands 17 (Prucha ed. 1973); H.Rep.No. 660, 53d Cong., 2d Sess. 3 (1894); 26 Cong.Rec. 6236 (remarks of Rep. Coffeen) (June 13, 1894).

[38]**

Important to the Court's determination of whether the Colville Reservation had been disestablished by the entry of non-Indians were several factors: (1) the express language of legislation effecting the reservation; **[*1087]** (2) the deposit of proceeds from the sale of reservation lands to non-Indians into tribal funds rather than the general funds of the United States; (3) subsequent legislation acknowledging by reference the continuing existence of the reservation; and (4) subsequent administrative determinations by the Department of the Interior and the Department of Justice recognizing continuation of reservation status.

The Supreme Court did not again decide a controversy involving reservation disestablishment until 1973 in the case of Mattz v. Arnett, 412 U.S. 481, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). In Mattz, a unanimous Court held that the Klamath River Indian Reservation continued to exist within its defined boundaries despite a number of attempts to end the reservation. Reaffirming the fundamental policy expressed in Celestine and Seymour, the Court in Mattz set forth this standard:

> [HN8] A congressional determination to terminate (a reservation) must be expressed **[**39]** on the face of the Act or be clear from the surrounding circumstances and legislative history. See Seymour v. Superintendent, 368 U.S. 351(, 82 S. Ct. 424, 7 L. Ed. 2d 346) (1962); United States v. Nice, 241 U.S. 591(, 36 S. Ct. 696, 60 L. Ed. 1192) (1916).

Id. 412 U.S. at 505, 93 S. Ct. at 2258 (footnote omitted). The Mattz opinion adds the factors of legislative history and "surrounding circumstances" to the criteria expressed in Seymour. [39] The court may thus look behind the written words of statutory law to determine their meaning and purpose within the spirit of their time, but that historical inquiry is to be carefully channeled. Repeated unsuccessful efforts by members of Congress to terminate a reservation cannot persuade a court that the ultimate legislation opening a reservation was intended to diminish its boundaries without an additional showing of consistent intent. In Mattz, for example, the House had tried repeatedly to terminate the Klamath River Reservation but had failed at every attempt. In 1892, the House passed a bill ending the reservation. H.R. 38, 52d Cong., 1st Sess. See 23 Cong.Rec. 125, 1598-99 (1892). That bill was struck out by the Senate which **[**40]** substituted a more moderate bill mandating allotment of the reservation under the General Allotment Act of 1887, 23 Cong.Rec. 3918-19 (1892), a bill supported by the Interior Department. At conference, the Senate version as agreed to, with amendments, and then passed, becoming the operative legislation opening the reservation. [40] The Mattz Court cautioned against reliance on the legislative history of the unsuccessful House bills:

39 In footnote 23, the Court cites with apparent approval the opinion in United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) in which that court concluded, id., at 689, that a ruling favoring continuing reservation status "is required unless Congress has expressly or by clear implication diminished the boundaries of the reservation opened to settlement" (emphasis in original). 412 U.S. at 505 n.23, 93 S. Ct. at 2258.

40 Act of June 17, 1892, ch. 120, 27 Stat. 52, I Kapp. 439 (2d ed. 1904).

(T)he respondent's reliance on the House Report and on comments **[**41]** made on the floor of the House is not well placed; although the primary impetus for termination of the Klamath River Reservation had been with the House since 1871, this effort consistently had failed to accomplish the very objectives the respondent now seeks to achieve.... The legislative history relied upon by the respondent does not support the view that the reservation was terminated; rather, by contrast with the bill as finally enacted, it compels the conclusion that efforts to terminate the reservation by denying allotments to the Indians failed completely.

Id. 412 U.S. at 503-504, 93 S. Ct. at 2257.

The Court further refused to draw a negative inference as to the effect of the actual allotment statute:

A second conclusion is also inescapable. The presence of allotment provisions in the 1892 Act cannot be interpreted to mean that the reservation was to be terminated.... More significantly, throughout the period from 1871-1892 **[*1088]** numerous bills were introduced which expressly provided for the termination of the reservation and did so in unequivocal terms. Congress was fully aware of the means by which termination could be affected. But clear termination **[**42]** language was not employed in the 1892 Act. This being so, we are not inclined to infer an intent to terminate the reservation. [22]

22 Congress has used clear language of express termination when that result is desired.... (Examples omitted.)

Id. 412 U.S. at 504, 93 S. Ct. at 2257. [41]

41 The stringent care with which the Court treats the legislative history of a conflict between houses in Mattz is of material importance to the case at bar. The 1905 Act that ultimately opened the Uintah Valley Reservation was a Senate substitution for a prior House bill containing clear language of disestablishment. See 1127-1131 infra. Mattz requires this Court to scrutinize the legislative history relevant herein with great care.

The Mattz opinion also treats with great care the subsequent legislative and administrative references to the Klamath **[**43]** River Reservation. Noting that "(although) subsequent legislation usually is not entitled to much weight in construing earlier statutes, United States v. Southwestern Cable Co., 392 U.S. 157, 179, 88 S. Ct. 1994, 2006, 20 L. Ed. 2d 1001 (1968), it is not always without significance," id., 412 U.S. at 505 n.25, 93 S. Ct. at 2258, the Court found support in legislation by which Congress extended the trust status of allotments within the reservation and restored undisposed-of lands within the boundaries to tribal ownership. At the same time, the Court discounted past-tense references to the reservation (e.g., to "what was the Klamath River Reservation") in legislation as indicating disestablishment, noting that Klamath River had been annexed at that time to the larger Hoopa Valley Reservation and concluding that the past-tense reference "is not to be read as a clear indication of congressional purpose to terminate." Id., 412 U.S. at 498, 93 S. Ct. at 2254. [42] Mattz, like Seymour, found additional support for continuing reservation status in federal administrative treatment of the reservation.

42 The defendants herein emphasize past-tense references to the Ute reservations in various acts and documents as indicative of congressional intent that only the trust lands remain a reservation. See e.g., State of Utah Post-Trial Brief at 18 & fig. 2, 42 & fig. 4; defendant Counties' Post-Trial Brief at 100-101. Mattz requires this Court to evaluate those references carefully in light of the specific history of the Ute lands.

[44]**

Mattz elaborated upon the criteria set forth in Seymour setting the stage for decisions that followed. In 1975 the Supreme Court decided DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975), dealing with the Lake Traverse Indian Reservation in South Dakota. In 1891, Congress passed a law ratifying an 1889 agreement with the Sisseton and Wahpeton bands of the Sioux Nation which provided for the allotment of Lake Traverse Reservation lands to the Indians and the unqualified cession of the unallotted "surplus" lands to the United States in return for a sum-certain payment. [43] Those lands were subsequently opened to white settlement with disastrous consequences for the Indians. See D. McNickle, They Came Here First 220-224 (2d ed. 1975). In DeCoteau, a majority of the Court led by Justice Stewart found a number of factors that militated against a finding of continued reservation status: contemporaneous views of white and Indians alike tended strongly towards the conclusion that ratification of the 1889 Agreement would end the reservation. The Agreement recited cession language that was "precisely suited" to disestablishment by cession. [44] The 1889 **[**45]** Agreement was ratified in the same bill with similar agreements, the sponsors of the bill acknowledging that the agreements would return the ceded lands to the public domain. The "jurisdictional history" of the

reservation offered little support for a finding of continuing **[*1089]** reservation status. Id. 420 U.S. at 431-449, 95 S. Ct. at 1086-1095. [45]

43 Act of Mar. 3, 1891, §§ 26-30, 1, ch. 543, 26 Stat. 989, 1036, I Kapp. 429-32 (2d ed. 1904).

44 Cf. Clairmont v. United States, 225 U.S. 551, 556, 32 S. Ct. 787, 788, 56 L. Ed. 1201 (1912).

45 That the Indians were compensated for the cession of the unallotted lands by sum-certain payment of $ 2.50 per acre seemed material to the majority's conclusions in DeCoteau. See id., 420 U.S., at 448, 95 S. Ct., at 1094. But sum-certain payment proved not to be an effective talisman for determining disestablishment in Rosebud, supra, 430 U.S. at 598-599 n. 20, 97 S. Ct. at 1368-1369. At best, sum-certain payment is a relevant "disestablishment factor" with meaning supplied by surrounding circumstances.

[46]**

This Court does not lightly conclude that an Indian reservation has been terminated. [HN9] "(W)hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." United States v. Celestine, 215 U.S. 278, 285(, 30 S. Ct. 93, 94, 54 L. Ed. 195). The congressional intent must be clear, to overcome "the general rule that "(doubtful) expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174, (93 S. Ct. 1257, 1263, 36 L. Ed. 2d 129), quoting Carpenter v. Shaw, 280 U.S. 363, 367(, 50 S. Ct. 121, 122, 74 L. Ed. 478). Accordingly, the Court requires that the "congressional determination to terminate ... be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Mattz v. Arnett, 412 U.S. at 505(, 93 S. Ct. at 2258). See also Seymour v. Superintendent, 368 U.S. 351, (82 S. Ct. 424, 7 L. Ed. 2d 346), and United States v. Nice, 241 U.S. 591(, 36 S. Ct. 696, 60 L. Ed. 1192). In particular, we have stressed that **[**47]** reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit. Mattz v. Arnett, supra, and Seymour v. Superintendent, supra.

> But in this case, "the face of the Act," and its "surrounding circumstances" and "legislative history," all point unmistakably to the conclusion that the Lake Traverse Reservation was terminated in 1891. The negotiations leading to the 1889 Agreement show plainly that the Indians were willing to convey to the Government, for a sum certain, all of their interest in all of their unallotted lands.

Id. 420 U.S. at 444-445, 95 S. Ct. at 1092-1093.

The DeCoteau majority was not deterred by the fact that a finding of disestablishment left the Indians with only their allotments:

> It is true that the Sisseton-Wahpeton Agreement was unique in providing for cession of all, rather than simply a major portion of, the affected tribe's unallotted lands. But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the **[**48]** Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs. In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments.

Id. 420 U.S. at 446, 95 S. Ct. at 1094 (citations omitted). [46]

46 Justice Douglas, joined by two more Justices, dissented. Particularly troubling to the dissent were the jurisdictional effects of disestablishment:

If this were a case where a Mason-Dixon type of line had been drawn separating the land opened for homesteading from that retained by the Indians, it might well be argued that the reservation had been diminished; but that is not the pattern that took place after 1891. Units of land suitable for homesteaders were scattered throughout the reservation. It is indeed difficult, looking at a current map, to find any substantial unit of contiguous Indian land left. The map picture, as stated in oral argument, shows a "crazy quilt pattern." The "crazy quilt" or "checkerboard" jurisdiction defeats the right of tribal self-government guaranteed by Art. X of the 1867 Treaty, 15 Stat. 510, and never abrogated.

If South Dakota has its way, the Federal Government and the tribal government have no jurisdiction when an act takes place in a homesteaded spot in the checkerboard; and South Dakota has no say over acts committed on "trust" lands. But where in fact did the jurisdictional act occur? Jurisdiction dependent on the "tract book" promises to be uncertain and hectic. Many acts are ambulatory. In a given case, who will move the State, the tribe, or the Federal Government? The contest promises to be unseemly, the only beneficiaries being those who benefit from confusion and uncertainty. Without state interference, Indians violating the law within the reservation would be subject only to tribal jurisdiction, which puts

> the responsibility where the Federal Government can supervise it. Checkerboard jurisdiction cripples the United States in fulfilling its fiduciary responsibilities of guardianship and protection of Indians. It is the end of tribal authority for it introduces such an element of uncertainty as to what agency has jurisdiction as to make modest tribal leaders abdicate and aggressive ones undertake the losing battle against superior state authority.
>
> Id., 420 U.S. at 466-67, 95 S. Ct. at 1103.

[49]**

[*1090] Two years following DeCoteau, the Court decided Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977). Rosebud presented the most complex factual situation considered by the Court so far, and required the construction of three separate Acts of Congress. In 1904, 1907 and 1910 Congress opened portions of the Rosebud Indian Reservation to non-Indian entry and settlement. [47] In determining whether the three acts diminished the boundaries of the Rosebud Indian Reservation, Justice Rehnquist, writing for the majority, synthesized the following guiding principles:

> 47 Procedurally, at least, the opening of the Uintah Valley Reservation in 1905 was deliberately patterned after the opening of the Gregory County portion of the Rosebud Reservation in 1904. See 1124-1125 & note 158, infra.

In determining whether or not the 1889 Reservation boundaries were subsequently diminished by congressional enactments, we are guided by well-established legal principles. The underlying **[**50]** premise is that congressional intent will control. DeCoteau v. District County Court, supra, (420 U.S.) at 444, 449 (95 S. Ct. at 1092, 1095); United States v. Celestine, 215 U.S. 278, 285 (, 30 S. Ct. 93, 94, 54 L. Ed. 195) (1909). In determining this intent, we are cautioned to follow "the general rule that "(doubtful) expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 174 (, 93 S. Ct. 1257, 1263, 36 L. Ed. 2d 129) (1973), quoting Carpenter v. Shaw, 280 U.S. 363, 367 (, 50 S. Ct. 121, 122, 74 L. Ed. 478) (1930); see also Mattz v. Arnett, supra, (412 U.S.) at 505 (, 93 S. Ct. at 2258). The mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status. Mattz v. Arnett, supra ; see also Seymour v. Superintendent, 368 U.S. 351 (, 82 S. Ct. 424, 7 L. Ed. 2d 346) (1962). But the "general rule" does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. DeCoteau v. District County Court, **[**51]** supra. In all cases, "the face of the Act," the "surrounding circumstances," and the "legislative history," are to be examined with an eye toward determining what congressional intent was. Mattz v. Arnett, supra, (412 U.S.) at 505 (93 S. Ct. at 2258).

Id., 430 U.S. at 586-587, 97 S. Ct. at 1362-1363.

Applying those principles to the facts of that case, the majority in Rosebud found that "the Acts of 1904, 1907 and 1910 did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation." Id. at 587, 97 S. Ct. at 1363. In 1901 the Indians had consented to a cession of a portion of their reservation on terms similar to those in DeCoteau. [48] That **[*1091]** Agreement failed of ratification in the Congress because of disagreement over the "sum-certain" method of payment. From this unratified Agreement, Justice Rehnquist discerned "an unmistakable baseline purpose of disestablishment." Id. at 592, 97 S. Ct. at 1366. A modified version of the Agreement was submitted to the Sioux in 1903 garnering only a simple majority of the Indians' approval. Though lacking the three-fourths majority previously understood to be required, [49] Congress enacted **[**52]** the 1903 "Agreement" into the 1904 Act, relying upon the Supreme Court's decision in Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903) for authority. [50] Noting that the 1904 Act contained cession language that seemed "precisely suited to disestablishment" under DeCoteau, the Rosebud majority found requisite congressional intent to diminish the reservation. The opinion buttresses this finding by observing that Congress provided that state school sections be selected in the opened area and by noting the "long-standing assumption of jurisdiction by the State" over the opened area. Id. 430 U.S., at 599-601, [51] 603-605, 97 S. Ct. at 1369-1370, 1371-1372. The majority further found that the same intent to diminish was embodied in the 1907 and 1910 Acts. [52]

> 48 See Agreement, dated Sept. 14, 1901, between James McLaughlin, on the part of the United States, and the Sioux Tribe of Indians belonging on the Rosebud Reservation:
>
> ARTICLE I. The said Indians belonging on the Rosebud Reservation, South Dakota, for the consideration hereinafter named, do hereby cede, surrender, grant, and convey to the United States all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated within the boundaries of Gregory County, South Dakota ....

ARTICLE II. In consideration of the land ceded, relinquished, and conveyed by Article I of this agreement, the United States stipulates and agrees to expend for and pay to said Indians, in the manner hereinafter provided, the sum of one million and forty thousand (1,040,000) dollars.

S.Doc. No. 31, 57th Cong., 1st Sess., 28 (1901).

[53]**

49 Article 12 of the Fort Laramie Treaty of Apr. 29, 1868, 15 Stat. 635, II Kapp. 998, 1002 (2d ed. 1904), provides in part,

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying or interested in the same; .... (Emphasis added).

The three-fourths ratification requirement was followed in most subsequent agreements with the Sioux including the 1901 Agreement. See Act of Mar. 2, 1889, § 28, ch. 405, 25 Stat. 888, I Kapp. 328, 339 (2d ed. 1904); Agreement of Sept. 14, 1901, Art. VI, S.Doc. 31, 57th Cong., 1st Sess. 28 (1901). But see United States v. Sioux Nation of Indians, 448 U.S. 371, 382-384, & nn. 13-14, 100 S. Ct. 2716, 2723-2724, 65 L. Ed. 2d 844 (1980), discussing the Act of Feb. 28, 1877, ch. 72, 19 Stat. 254, I Kapp. 168-172 (2d ed. 1904).

50 See Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, III Kapp. 71-75 (1913). According to Justice Rehnquist,

(As) Inspector McLaughlin had explained to the Tribe, Congress understood that it was not bound by the three-fourths-consent requirement of the 1868 Treaty with the Sioux Nation. In Lone Wolf v. Hitchcock, 187 U.S., at 566, 568, (23 S. Ct., at 221, 222), this Court dealing with the validity of a cession of tribal lands enacted in contravention of a treaty requiring three-fourth Indian consent, held:

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress ....

"... In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."

Although Inspector McLaughlin failed to garner the signatures of three-quarters of the Indians in consent of the proposed changes, Congress understandably relied on this holding as authorizing it to diminish unilaterally the Reservation boundaries.

Id., 430 U.S. at 599, 97 S. Ct. at 1369 (footnote omitted).

Inspector McLaughlin similarly relied upon Lone Wolf in dealing with the Utes at Uintah. See Minutes of Council held with the Utes, May 18-23, 1903, JX 162.

[54]**

51 It is interesting to note that state sections were not selected within the Uncompahgre Reservation area until the 1960's, and within the Uintah Reservation not at all. See 1146-1147 infra. The "jurisdictional history" is also far less clear herein. See 1146-1147 & notes 200-201A, infra.

52 See Act of Mar. 2, 1907, ch. 2536, 34 Stat. 1230, III Kapp. 307 (1913); Act of May 30, 1910, ch. 260, 36 Stat. 448, III Kapp. 459 (1913); Rosebud, supra, 430 U.S. at 605-615, 97 S. Ct. at 1372-1377. Justice Marshall, joined by Justices Brennan and Stewart (the author of DeCoteau) dissented, arguing that the evidence of congressional intent as to the Rosebud Reservation "is palpably ambiguous," 430 U.S. at 618, 97 S. Ct. at 1379.

[*1092] Reading all of these cases together, this Court has sought to evaluate the record in this case pursuant to the following ladder of priorities: (1) the express language of Congress as found in the relevant statutes and its legal effect; (2) the legislative history of a statute, particularly where the language of the statute is ambiguous; (3) contemporaneous **[**55]** interpretations by the President and the executive branch; subsequent congressional and administrative actions and interpretations; other "surrounding circumstances," including school lands selections, "jurisdictional history" (disputed as it is), the intent and understanding of the Indians; and other factors, all weighed against the unique historical context in which they arise. At all times, the effort of this Court has been to harmonize its analysis herein with the principles expressed in Rosebud, DeCoteau, Mattz and Seymour, and by other courts in other cases, see note 32, supra, to the extent that an analogy can be drawn from each case based upon its particular facts. All of the factors considered in this case have been measured by the principle mandated by the Supreme Court as recently as

Rosebud, supra, that " "(doubtful) expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' " Id., 430 U.S. at 586, 97 S. Ct. at 1362, quoting Carpenter v. Shaw, 280 U.S. 363, 367, 50 S. Ct. 121, 122, 74 L. Ed. 478 (1930). Rosebud requires that "a congressional determination to terminate (an Indian **[**56]** reservation) must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." Id., 430 U.S. at 586, 97 S. Ct., at 1362, quoting Mattz, supra, 412 U.S., at 505, 93 S. Ct., at 2258. [53] Other cases generate a presumption that Congress does not intend the impractical result of "checkerboard jurisdiction" over trust and fee lands absent specific language to that effect. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 478, 96 S. Ct. 1634, 1643, 48 L. Ed. 2d 96 (1976); Seymour v. Superintendent, supra, 368 U.S. at 358, 82 S. Ct. at 428; United States v. Long Elk, 565 F.2d 1032, 1039 & n.12 (8th Cir. 1977).

53 Counsel for the defendant counties asserts that Rosebud and DeCoteau "represent a significant departure from the approach taken in Seymour v. Superintendent and Mattz v. Arnett." Defendant Counties Post-Trial Brief at 6-11. The arguments presented are not persuasive. Referring to Seymour and Mattz, the majority opinion in DeCoteau commented,

> The Court of Appeals thought that a finding of termination here would be inconsistent with Mattz and Seymour. This is not so. We adhere without qualification to both the holdings and the reasoning of those decisions. But the gross differences between the facts of those cases and the facts here cannot be ignored.
>
> Thus in finding a termination of the Lake Traverse Reservation, we are not departing from, but following and reaffirming, the guiding principles of Mattz and Seymour.

DeCoteau, supra, 420 U.S. at 447, 449, 95 S. Ct. at 1094 (emphasis added).

While the dissenting opinions extensively quoted by counsel indicate a disagreement, it is much more a disagreement among the Justices as to the application of accepted standards to specific facts than a demonstrated retreat from established principles. See Rosebud, supra, 430 U.S. at 586-588 & n.4, 97 S. Ct. at 1362-1363.

[57]**

This Court's task has been to apply in a reasoned manner the principles described above to the historical record herein and to determine whether that record provides "the hard evidence necessary to overcome the general presumption against an intent to disestablish a reservation," United States v. Long Elk, 565 F.2d 1032, 1040 (8th Cir. 1977).

The pages that follow report this Court's findings and conclusions.

IV. EARLY HISTORY OF THE UTE RESERVATIONS

At the time that Europeans made their first significant contact with the Ute Indians, the Utes dwelled within a territory that included large portions of Colorado, Utah and Northern New Mexico. The Ute economy was based largely upon hunting and gathering of food.

> As hunters, the Utes used areas far beyond their borders, especially in the plains area around the eastern area of **[*1093]** their residing area. The game which formed their principal subsistance included large game such as elk, deer, bear, antelope and buffalo. A wide variety of smaller animals were also a part of their diet, as well as trout, berries, and a variety of seeds.

F. O'Neil, "A History of the Ute Indians of Utah Until 1890," at 1 (unpub. Ph.D. dissert., **[**58]** Univ. of Utah 1973).

The Ute people were generally organized into several bands, which included (ca. 1830): Tumpanuwac, Pahvant (now Uintah), Yamparka (White Rivers), Wiminuc (now Ute Mountain), Taviwac (or Tabeguache, now Uncompahgre), Kapote (now Capote), and Muwac (Muache). [54] The plaintiff Ute Indian Tribe is comprised of the present Uintah, White River and Uncompahgre Bands.

54 J. Jorgensen, "A Ethnohistory and Acculturation of the Northern Ute" at 18 (unpub. Ph.D. dissert., Univ. of Indiana 1965). The Ute Mountain, Capote and Muache Bands of the Ute Indians reside on reservations located in southern Colorado and are not parties to this litigation. See generally, N. Wood, When Buffalo Free the Mountains (1980). Other Ute Bands designations have included Parianuche (or Grand River, consolidated at Uintah and Ouray Reservation), Timpanogos (now Uintah), Sambuawac (part of White River Band), Sheberetche (most killed; survivors scattered) and Weber (partly included in Uintah). F. O'Neil, "A History of the Ute Indians ...," supra, at App. A.

[59]**

While the Utes maintained significant contact with the Spanish settlements to the south, Spanish activities had negligible effect on the extent of the Ute territory. Trade and commerce dominated the relationship. [55]

55 See e.g., Tyler, "The Spaniard and the Ute," 22 Utah Historical Quarterly (Oct. 1954); Hill, "Spanish and Mexican Exploration and Trade Northwest from New Mexico into the Great Basin," 3 Utah Historical Quarterly (Jan. 1930).

The arrival thereafter of Anglo-American fur trappers and explorers heralded a different course of events. The early decades of the nineteenth century saw a scattering of white explorers, adventurers and mountain men burgeon into a steady flow of white intruders into Ute country. Conflicts developed between Indian and white, and relations decayed until the economic collapse of the fur trade in the 1840's. [56] The mountain men were followed by the Mormons, who sought to settle upon lands in Ute country and make them their home. The struggle for possession of the most **[**60]** fertile lands, those in Utah Valley and other locations commenced soon thereafter:

56 F. O'Neil, "A History of the Ute Indians ...," supra, at 16-23.

The arrival of white settlers was not particularly disturbing to Utah's Indians since the Great Salt Lake was a border area between the Utes and the Shoshoni bands which ranged over the Great Basin west of there. As the Mormons moved south, however, taking up new land, the Indians were crowded off their central settlements, in Utah Valley and elsewhere. This southern thrust prompted Ute resistance first at Battle Creek in 1850 and then the so-called "Walker War" of 1853-54.

O'Neil, "The Reluctant Suzerainty: The Uintah and Ouray Reservation," 39 Utah Historical Quarterly 129, 130 (Spring 1971).

Fort Utah, which became Provo, Utah, for example, was founded upon the central campsite of the Tumpanuwac Band of Utes. The lands were of considerable value to the Utes, being abundant in fish, game, forage for horses and fresh water. The Utes resisted and **[**61]** were either killed, or captured and removed from their homelands. [57] For a time, the federal Indian Agent for Utah, Dr. Garland Hurt, established a small system of three Indian farm reserves which were intended to provide support and sustenance for the Utes, Paiutes and others. [58] **[*1094]** However, the farms were plagued by disorganization and funding problems and became entangled in the conflict between the Mormons and the federal government that surged in the late 1850's. Many Ute people died of starvation and exposure during the bitter winters of 1859-60 and 1860-61. [59] When a new federal Superintendent of Indian Affairs, Benjamin Davies, arrived in Utah in early 1861, the Utes were, according to Davies, in a "state of nakedness and starvation, destitute and dying of want." [60] Davies was forced to close the farms, selling the implements to buy food for the Indians.

57 Id. at 27-41; cf. A. Neff, History of Utah, 1847 to 1869, at 364-409 (1940).

58 Agent Hurt intended that the farms be made permanent reservations by treaty. As it stood, the farms rested solely upon the Agent's authority. Id. at 42-44. Agent Jarvis established a fourth "reservation" for the "Snakes and Gosi Uta," the Shoshones and Goshiutes, at Deep Creek in western Utah in 1859. C. Royce, Indian Land Cessions in the United States 831 (1900). The farm reserves have the designations Royce Area 449-452 and are described, id. at 830, and mapped id. at pl. 165 "Utah 1" (map).

[62]**

59 Id. at 42-50.

60 Letter from Sup. Davies to Comm. Dole of June 30, 1861, in Report of the Commissioner of Indian Affairs, 1861, at 129. Historian Hubert Howe Bancroft writes of those times:

The natives had no alternative but to steal or starve; the white man was in possession of their pastures; game was rapidly disappearing, in the depth of winter they were starving and almost unclad, sleeping in the snow and sleet, with no covering but a cape of rabbit's fur and moccasons (sic) lined with cedar bark.

H. Bancroft, History of Utah 629 (1890).

By 1860, the traditional solution of Indian removal could no longer be delayed. The Mormon towns and villages had been generous in supplying food, but this could not serve as a permanent arrangement. After an experience of general disagreement, the federal officials and the Mormon settlers finally agreed that the Indians must be moved.

F. O'Neil, "A History of the Ute Indians of Utah ...," supra, at 51.

The valley of the Uintah Basin had already been proposed as a possible reservation for the Indians of Utah by Superintendent Davies' **[**63]** predecessor. At the suggestion, Governor Brigham Young delegated a survey team to the basin to see whether the lands were suitable for settlement by the Mormons. Receiving a negative report, [61] the Governor did not oppose the federal officials' request to Washington that the basin be set aside as an Indian reservation. Less than a month after the survey team's return President Lincoln approved the Secretary of the Interior's proposal and designated the Uintah Basin as a reservation by the Executive Order of October 3, 1861. [62]

61 Upon return, the team reported its findings:

UINTAH NOT WHAT WAS REPRESENTED

The exploring and surveying party have returned with a very unfavorable report ... The fertile vales, extensive meadows, and wide pasture ranges so often reported to exist in that region were not found ... The amount of land at all suitable for cultivation is extremely limited.

Deseret News, Sept. 25, 1861. The Secretary of the Interior, on the other hand reported the Uintah Basin was "abounding in valleys of great fertility..." Rept. of the Secretary of the Interior, 1864, JX 1, at 161. Agents delegated to the reservation gave no such glowing description. See e.g., J. J. Critchlow to Commissioner Walker, Sept. 1, 1872, in Rept. of the Secretary of the Interior, 1872, at 673.

[64]**

62 See I Kapp. 900 (2d ed. 1904), or Appendix A, infra, for text.

The federal government initially made little effort to provide a viable agency establishment on the Uintah Valley Reservation or to afford the Utes any incentive for moving there. Combined with the closing of the Indian farms, the Indian Bureau's neglect at Uintah left the Utes to their own devices. The bands scattered into loose associations of families which hunted, gathered and raided for food. A number of Utes prosecuted a series of raids upon white livestock and settlements.

Acting pursuant to congressional directive, O. H. Irish, new Superintendent of Indian Affairs for Utah, succeeded in securing the presence of many of the Utes at a treaty council at the old Indian farm at Spanish Fork, Utah, which was held in June, and included the presence of ex-Governor Brigham Young. [63] On June 8, 1865, **[*1095]** the assembled Utes concurred in a draft of a treaty by which they ceded all right, title and interest in their lands in Utah in return for the guarantee of possession of the Uintah Valley Reservation, to which they agreed **[**65]** to remove. [64] The treaty also made detailed provision for the staffing and operation of the Uintah Agency, and provided that the 291,480 acres of Indian farm reservations be sold, proceeds to be applied to improvements at the Uintah Reservation. [65] Superintendent Irish held a similar council with the **Weber Utes,** securing their agreement to the terms of the Spanish Fork Treaty under Article I of an abbreviated treaty of October 30, 1865. [66]

63 Brigham Young was a key figure in the negotiations. On prior occasions Young had visibly been at odds with the federal agents in their dealings with the Utes. At Spanish Fork, Young and Irish presented a united front, which pleased the Indians assembled:

KON-OSH (Geo. Bean, Interp.): * * * I like this good friendly council, I always liked a council where it is good and friendly and where all agree together; and my friends like it. It pleases me very much to see Supt. Irish and Brigham agreeing on this treaty and traveling together and talking to the Indians. In former times it has been when an agent came here President Young would stay at one side; and I was sorry that they could not agree. * * *

Quoted in F. O'Neil, "A History of the Ute Indians ...," supra, at 66.

[66]**

64 "In 1864, the Utah Legislature memorialized Congress for asking for the removal of the Indians to as far south as Sanpete. The document asked that the Indians be removed to the Uintah Valley which had been set apart as an Indian reservation by executive order of Abraham Lincoln in October, 1861."

Ute People An Historical Study 26 (O'Neil & Sylvester ed. 1969). By the treaty, the white people of the territory would have had what they wanted.

65 See V Kapp. 695-698 (1938), LD 6, or Appendix A, infra, for text.

66 See V Kapp. 698-699, or Appendix A, infra, for text.

While Irish and Young were adamant in their insistence that the Indians sign the treaty, they apparently failed to indicate to the Indians that there was doubt as to ratification of the treaties by the Senate. After all, Congress on February 23, 1865 had authorized a budget of $ 25,000 to finance the negotiation of these treaties. [67] A year earlier, Congress had mandated the sale of the small "farm" reservations and had confirmed the establishment of the Uintah Valley Reservation. [68] Yet when submitted, the treaties **[**67]** failed of ratification. [69]

67 See Act of February 23, 1865, ch. 45, 13 Stat. 432, LD 5. This Act authorized the President to enter into land cession treaties with Indian tribes in the Utah Territory, provided that any reservations created by treaty "shall be selected at points as remote as may be practicable from the present settlements in Utah Territory." Id., § 1.

68 Act of May 5, 1864, ch. 77, 13 Stat. 63, LD 4; see Appendix A, infra, for text.

69 It is very likely that the conflict between the Mormons and the federal government interfered, but it is also true that Congress failed to ratify other treaties as well. The Mormons had "sat out" the Civil War. Less than two score of the Saints from Utah served that conflict, and those who did serve did so against the advice of Mormon leaders.... Congress was ill-disposed toward the Mormons; that was perfectly clear. How much that ill-disposition was involved in preventing the ratification of the treaty will remain conjecture.

F. O'Neil, "A History of the Ute Indians ...," supra, at 67-68.

[68]**

The uneasy peace generated by the Spanish Fork Council and agreement to the treaty by the Indians soon decayed again into armed conflict. Rejection of the treaty left the Utes without the promised economic support and with a strong sense of betrayal. The brush fire war that continued in the territory for the next four years came to be known by the name of its leader: the Black Hawk War.

> The war was costly. Bancroft wrote that "more than fifty of the Mormon settlers were massacred, and an immense quantity of livestock captured, and so widespread was the alarm that many of the southern settlements were for the time abandoned, the loss to the community exceeding $ 1,000,000." (H. Bancroft, History of Utah 632-33 (1889).) The war dragged on until the Indians were forced into defeat by the superior power of the territorial militia. Under the leadership of Chief Tabby, who favored peace, the reluctant natives were removed to the Uintah Valley...

[*1096] O'Neil, "The Reluctant Suzerainty: the Uintah and Ouray Reservation," 39 Utah Historical Quarterly 129, 131 (Spring 1971), JX 475.

Even those Indians who had removed to the Uintah Valley Reservation in 1866 were compelled **[**69]** by conditions there to venture on raids into the Heber Valley in search of food needed for bare survival. Even after hostilities had largely ceased, the early farming efforts at the parsimoniously funded Uintah Agency were largely a failure, leaving the Utes to hunt and forage for food, or continue raiding on a sporadic basis. On January 3, 1871 the Deseret Evening News published an editorial, "Brethren, Don't Kill the Deer," urging non-Indians to leave the available wild game for hunting by the Utes.

A new agent, J. J. Critchlow, was sent to the Uintah Agency in February, 1871. Over the next dozen years, Critchlow struggled to develop a viable agricultural economy on the reservation, constantly entreating the Utes to stay on the reservation long enough to farm so that they need not leave in search of food. He also engaged in an unending effort to secure adequate federal funding for agency operations. Critchlow's efforts soon began to bear fruit as some of the Utes made Uintah Valley their permanent residence. [70] In 1875, a federal surveyor, went to the Uintah Valley Reservation to delineate its boundaries. [71] Though the survey did no more than define those boundaries to a great **[**70]** extent, it added credibility to rumors circulating at the Uintah Agency that the reservation would soon be "opened" to white settlement. Agent Critchlow stiffly rebuffed any such effort:

70 See e.g., Letter from J. J. Critchlow to E. P. Smith, of Sept. 25, 1873, in Rept. of Comm. of Ind. Aff., 1873 at 628 (1873).

71 The surveyor, Charles L. DuBois, delineated the first authoritative boundary for much of the Uintah Valley Reservation. See Field Notes of a Survey of the (Uintah Valley Reservation), JX 2 (1875). The DuBois survey was "accepted and approved" on December 24, 1875. Letter of Commissioner of Indian Affairs (hereinafter "Comm. of Ind. Aff.") to the Secretary of the Interior of Mar. 25, 1898, JX 101. See also letter from Commissioner of the General Land Office to Comm. of Ind. Aff. of Mar. 11, 1902, JX 130.

One Great source of discouragement and uneasiness (among the Utes) is the constant apprehension that some radical change, either in their location or in the administration of their **[**71]** affairs, will take place, and thus interfere with all their industrial pursuits. They are afraid that this reservation will be thrown open to white settlers, they be removed to some other place, and thus lose all their labor.... My own opinion is that any such change would work great injury and injustice to these Indians, yet I know that many in this Territory would do anything to bring it about....

Report of J. J. Critchlow to Commissioner of Indian Affairs, August 15, 1878, in the Rept. of Comm. of Ind. Aff., 1878, at 624. By 1880 the Utes were already feeling pressure upon their boundaries; trespassing was becoming a problem on the western end of the reservation, and the rise of non-Indian towns such as Ashley (now Vernal) presaged a growing white presence near the Utes.

At that same time, pressure on the Utes of Colorado at their large reservation created by the Treaty of March 2, 1868, 15 Stat. 619, II Kapp. 990 (2d ed. 1904), LD No. 7, was growing to firestorm proportions. The battle-cry "The Utes Must Go!" echoed across that state, fired by a combination of outrage over the 1879 killing of Nathan Meeker, the utopian Agent to the Colorado Utes, and his family by the **[**72]** White River Utes, and persistent rumors of mineral wealth underlying the Colorado Ute Reservation. In the view of Colorado's Governor Pitkin the Utes should either be removed or killed:

> My idea is that, unless removed by the government, they must necessarily be exterminated.... The state would be willing to settle the Indian trouble at its own expense. The advantages that would accrue from the throwing open of 12,000,000 acres of land to miners and settlers would more than compensate all the expenses incurred.

[*1097] Quoted in D. Brown, Bury My Heart at Wounded Knee 366 (1970).

Custer's defeat at the Battle of the Little Big Horn having happened a mere three years before, sympathy for the Indians was still scarce among influential politicians. The "Meeker Massacre" joined "Custer's Last Stand" as a popular pretext for coercing the cession of vast expanses of Indian real estate previously guaranteed by treaty. [72] Besides securing the removal of the White River Utes from Colorado and placing them upon the Uintah Valley Reservation over the protests of Agent J. J. Critchlow, [73] the government also secured the "consent" of the Uncompahgre Utes to a removal agreement **[**73]** signed March 6, 1880 and ratified by Congress on June 15. See Act of June 15, 1880, 21 Stat. 199, LD 11.

72 See R. Andrist, The Long Death 331 (pap.ed. 1964); Sprague, "The Bloody End of Meeker's Utopia," 8 American Heritage 36, 94 (Oct. 1957):

> The punishment of the alleged guilty was all the land-grabbers could have asked. The two White River Bands were branded as criminals en masse by political commission without any judicial powers whatever. Though only twenty White River Utes had staged the massacre, all 700 were penalized in that money owed to them by the government was paid instead to the relatives of the victims. Chief Ouray's Uncompahgre Utes, who had nothing to do with the massacre or the "ambush" were held equally responsible. The 1868 treaty right of all three bands were cancelled. Their right to be Americans under the Fourteenth Amendment were ignored. Title to their ancient Colorado homeland was extinguished and they were moved at gun point to barren lands in Utah. By these means the last and largest chunk of desirable Indian real estate was thrown open to white settlement.

[74]**

73 See Rept. of the Comm. of Ind. Aff., 1881, JX 5, at 215.

The text of that agreement provided for a new home for the Uncompahgres and White Rivers:

> The Uncompahgres Utes agree to remove to and settle upon agricultural lands on Grand River near the mouth of the Gunnison River in Colorado, and such other unoccupied agricultural lands as may be found in that vicinity and in the territory of Utah.
>
> The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

While the Uncompahgres Utes were originally intended to be resettled near the present location of Grand Junction, Colorado, [74] a federal commission selected a rectangular area of land in eastern Utah bordering on Colorado's western boundary. [75] The reservation selected for the Uncompahgres was largely comprised of arid lands barren of fertile soil, a sharp contrast to the rich forests, meadows and ranges that the Utes left behind in Colorado. [76]

74 See F. O'Neil, "A History of the Ute Indians ...", supra at 147.

[75]**

75 See Rept. of the Comm. of Ind. Aff., 1881, at 37.

76 With great irony, the Uncompahgres, who had remained at peace with their white neighbors and who had intervened in 1879 to avoid further violence involving the White River Band following the Meeker incident, were moved to a near-desert while the more contentious White River Band was moved to the relatively fertile acreage of the Uintah Valley Reservation. See also Rept. of the Comm. of Ind. Aff., 1881, JX 5, at 2.

The Ute Commission, which selected the lands for the Uncompahgres, made an important recommendation:

> Until the Indians can be made somewhat familiar with their new relations, it is ... of vital importance to maintain the exterior boundary limits of the lands upon which they dwell as a reservation, and within which white men may not be allowed to locate. This protection may be secured by legislation or possibly by executive order. For years to come these Indians should certainly have the aid of the government in protecting them from collision with white men.

Report of the Commissioner of Indian Affairs, 1881, **[**76]** at 383. An agency was established at Ouray in 1881 as well as a military post, Fort Thornburg. Non-Indians living in the region were paid the value of their **[*1098]** improvements and removed. [77] By an Executive Order dated January 5, 1882 President Chester A. Arthur set apart the Uncompahgre lands as an Indian reservation. I Kapp. 901 (2d ed. 1904), LD 12 (see Appendix A for text).

77 O'Neil and MacKay, "A History of the Uintah-Ouray Ute Lands," at 14 & n.56 (Am.West Center Occas. Pap. 1977), JX 483.

The removal of the Uncompahgre Band to their new home in eastern Utah was plagued with a number of difficulties. In spite of the fact that the Uncompahgres were expected to found an agricultural economy upon lands that were "a wild and ragged desolation," [78] Ouray Agent J. F. Minniss in his first report described the Uncompaghres as "orderly, quiet and peacefully disposed with a disposition to their welfare." [79] The reservation would not support them, their attitude notwithstanding; a number of Uncompahgre **[**77]** Utes ventured back into Colorado to hunt, giving rise to no small amount of excitement among the white settlers. See, e.g., O'Neil, "The Reluctant Suzerainty ..., supra, JX 475 at 136-137; Annual Rept. of the Secretary of the Interior, 1887, JX 14, at 283-286.

78 H.Rep.No.3305, 51st Cong. 2d Sess. 4 (1890). Prophetically the reporting agent found the land "valuable for nothing unless it shall be found to contain mineral deposits" which, indeed, it was.

79 Letter of J. F. Minniss to Comm. of Ind. Aff. of Aug. 30, 1882, in Rept. of the Comm. of Ind. Aff., 1882, at 208.

In 1886, the military post of Fort Duchesne was established and the Uintah Agency and the Ouray Agency were consolidated under its roof. [80] The move was made partly for administrative efficiency but also to enable the federal officials to exercise greater direct control even military control over all the bands. The Utes had barely begun to settle down on their reservation homes and farms when they began to feel the pressure of white **[**78]** encroachment upon their remaining lands.

80 Annual Rept. of the Comm. of Ind. Aff., 1886, JX 12, at 127-129, O'Neil, "The Reluctant Suzerainty ...," supra, JX 475 at 137.

As in Colorado, it was the discovery of mineral deposits in Utah which forced the Utes to lose more land. The mineral was gilsonite. Although the presence of gilsonite was well known in the 1860-1870's, it was not until the 1880's that two promoters, Sam Gilson and Bert Seabolt, publicized the materials and found uses for it. In January, 1886 Seabolt filed the first recorded gilsonite claims all of them in the Carbon Vein, which was located on the Uintah Indian Reservation. He organized a group to begin commercial mining.

O'Neil and MacKay, "A History of the Uintah-Ouray Ute Lands," supra, JX 483 at 15 (footnote omitted).

The government opened a series of roads across the Uintah Valley Reservation. Ashly Valley, east of Fort Duchesne, was settled beginning in 1878 by a group of Mormon settlers. Even the establishment of Fort **[**79]** Duchesne attracted unsavory characters to Indian country, creating additional problems. See O'Neil, "A History of the Ute Indians ...," supra, at 181. The Utes also felt pressure on their western boundary as white ranchers from Heber ran their livestock onto the lands in the Strawberry Valley. Agent

T. A. Byrnes confronted the cattlemen, demanding either payment of an informal "lease" fee or removal of stock. Byrnes estimated that there were 6,000 cattle illegally grazing on the Uintah Reservation in 1887 alone. Id., at 183-184. The "familiar forces" [81] of non-Indian ranchers, farmers, miners, railroads, etc. were closing in on Ute country as they had in other places, forcing the eventual reduction of the Indian land base. [82]

81 DeCoteau v. District County Court, 420 U.S. 425, 431, 95 S. Ct. 1082, 1086, 43 L. Ed. 2d 300 (1975).

82 See e.g., Act of Mar. 3, 1887, ch. 368, 24 Stat. 548, LD 14 (granting railroad right-of-way).

VII. THE 1888 CESSION

In response to Ute complaints about white trespassing **[**80]** in the eastern end of the **[*1099]** Uintah Valley Reservation, Agent Byrnes recommended that the "Gilsonite Strip" be removed from the reservation; after all, the lands "are not, nor have they been, used or occupied by the Indians, for the reason that they are not fit for agricultural or grazing purposes." Letter of Agent Byrnes to J. Atkins of Feb. 18, 1888, quoted in JX 483 at 15. [83] Speaking of the Gilsonite Strip, Captain J. Randlett of Fort Duchesne observed:

83 It apparently did not occur to Byrnes or others that the Indians might benefit from these mineral deposits in the same manner as their non-Indian neighbors. See e.g., remarks of State Inspector of Mines Thomas Lloyd in an article in the Salt Lake Tribune of March 11, 1897:

Certain sentimentalists have said it was a shame to rob the red man out of what the Government had set aside for his benefit.... Tell me how a man who has located a gilsonite claim has robbed an Indian? Why the loafer never was known to dig for anything, and can never be taught to....

Attachment to the letter of Agent Randlett to Comm. of Ind. Aff. of Mar. 15, 1897, JX 69. Of course, the Utes since then have pursued mineral development for years.

[81]**

(Detachment) by sale will occasion no inconvenience to the tribes. If the Gilsonite enterprise proves a success, the Indians will see how profits are made from industry and will also to some extent find at the mines a market for their own products... It will be very agreeable to the isolated garrison to have a settlement near it.

Letter of Capt. Randlett to Agent Byrnes of Feb. 18, 1888, quoted in JX 483 at 15.

Congress soon joined in the view that the best interests of everyone would be served by excising the Gilsonite Strip from the Uintah Reservation. See H.Rep.No.791, 50th Cong., 1st Sess. (1888) LD 15; S.Rep.No.1198, 50th Cong., 1st Sess. (1888) LD 17; 19 Cong.Rec. 1927-1929, 3776, 3821 (1888), LD 16. By the Act of May 24, 1888, ch. 310, 25 Stat. 157, I Kapp. 271 (2d ed. 1904) LD 18, Congress mandated that the 7,040-acre triangular Gilsonite Strip be "declared to be public lands of the United States and restored to the public domain." Id. § 1. The Act directed the Secretary of the Interior to procure the approval of a three-fourths majority of the adult male Indians on the reservation and upon such ratification, to sell the lands at not less than $ 1.25 an acre. **[**82]** Id. §§ 2, 3. After "much proselyting" [84] the ratification by the Indians was secured on October 8, 1888, and on October 22, the Secretary of the Interior restored the land to the public domain and ordered surveys to be conducted. See Letter of Acting Comm. of Ind. Aff. to Secretary of the Interior of Sept. 9, 1899, JX 116; Report of Uintah and Ouray Agency in Rept. of the Comm. of Ind. Aff., 1890, JX 18, at 280. By letter of July 9, 1895, JX 45, the Commissioner of Indian Affairs reported to Agent J. Randlett that sale of some of the lands had been completed and that the United States Treasury had credited $ 3,340 to the Utes. Other sales followed. It is abundantly clear to this Court that the 1888 cession area, known as the Gilsonite Strip, was restored to public lands status and that the boundaries of the Uintah Valley Reservation were diminished to that extent. [85] A congressional intent to diminish the reservation was indeed "expressed on the face of the Act" and is "clear from the surrounding circumstances and legislative history." Mattz v. Arnett, 412 U.S. 481, 505, 93 S. Ct. 2245, 2258, 37 L. Ed. 2d 92 (1973); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586, 97 S. Ct. 1361, **[**83]** 1362, 51 L. Ed. 2d 660 (1977). The Ute Tribe asserts a contrary view, citing some congressional debate on whether the effect of the 1888 Act was to restore the strip to the public domain, [86] and arguing that only a **[*1100]** change of land title was intended. Plaintiff's Post-Trial Brief at 57-59. In Rosebud Sioux Tribe v. Kneip, supra, the Supreme Court acknowledged the authority of the cases holding that ceded lands can remain in trust for the Indians until actually sold. See Ash Sheep Co. v. United States, 252 U.S. 159, 166, 40 S. Ct. 241, 242, 64 L. Ed. 507 (1920); Minnesota v. Hitchcock, 185 U.S. 373, 395, 401-402, 22 S. Ct. 650, 661, 46 L. Ed. 954 (1902); accord, Hanson v. United States, 153 F.2d 162, 163 (10th Cir. 1946) (Uintah lands). But the Rosebud majority found that question to be "logically separate from a question of disestablishment." Rosebud, supra, 430 U.S. at 601 n.24, 97 S. Ct. at 1370. While an inference can justifiably be drawn from the continuing trust status of the affected lands, that factor is one among many "surrounding circumstances." Here it is soundly refuted

by clear expressions of legislative intent, the use of language precisely suited to disestablishment, **[**84]** cf. Seymour v. Superintendent, 368 U.S. 351, 354, 82 S. Ct. 424, 426, 7 L. Ed. 2d 346 (1962), and unconflicting contemporaneous interpretations of the effect of the Act. In a November 18, 1895 letter to the Secretary of the Interior, the Commissioner of Indian Affairs comments that the 1888 Act

84 O'Neil & MacKay, "A History of Uintah-Ouray Ute Lands," JX 483, at 15 & n.65 (1977).

85 See C. Royce, "Indian Land Cessions in the United States," JX 119, at 926-927 (1900). Royce designates the 1888 cession within area No. 431 and it is depicted as a scarlet triangle on Pl. 165, the "Utah 1" map in that volume.

86 See e.g., 19 Cong.Rec. 1928 (1888) (remarks of Rep. Holman), LD 16:

> If we buy (the lands) from the Indians, paying them a fair valuation for them, of course, the general land laws would apply. But here we are selling the land belonging to the Indians for the benefit of the tribe these Utes and we are not proposing to divest them of the title, but our proposition is to sell them as their trustee for their benefit, ... So it does not become in any sense a part of the public domain. (Emphasis added.)

[85]**

had been fully executed in accordance with its intent so far as the securing of the consent of the Indians to the diminution of their reservation and the restoration of said strip of land to the public domain, and that, therefore, the jurisdiction of the United States Indian Agent are the same ceased from and after October 22, 1888....

Id., JX 50 at 1 (emphasis added). In fact, the federal officials had come to regret the withdrawal of the strip from the reservation because of problems caused by the influx of squatters onto the lands. [87] When several Uncompahgre Utes selected allotments that were found to be within the 1888 cession area, officials sought instructions on how to protect their rights. See Letter from Comm. of Gen. Land Off. to the Register and Receiver of April 27, 1899, JX 114. This evidence of the circumstances surrounding the 1888 cession is uncontroverted by the plaintiff and compels the conclusion that the strip was severed from the Uintah Reservation in 1888. See Rosebud Sioux Tribe v. Kneip, supra. [88]

87 See O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 15:

> Because the strip was a part of federal lands, but off the Indian and military reserves, it was not controlled by officials at Whiterocks or Fort Duchesne, nor by state, territorial, local or country (sic) authorities. This seemingly lawless territory "became the location of a tough class of squatters men and women without means of existing except gambling, selling whiskey to Indians and prostitution." Indian agents and military men came to regret the strip's existence. It remained a wide-open area until it was sold by the government in May, 1906, at $ 1.25 per acre.
>
> See also, Letter from Comm. of Ind. Aff., JX 50, supra ; Letter from Acting Comm. of Ind. Aff. to Secretary of the Interior of Sept. 9, 1899, JX 116.

[86]**

88 This conclusion as a practical matter excludes the town of Gusher from the Uintah and Ouray Reservation. See Exhibit I-1A (map); Appendix B, infra.

VIII. THE UNCOMPAHGRE RESERVATION

Contemporaneous with the 1888 cession, gilsonite veins were discovered on the Uncompahgre Reservation, touching off another drive to have the mineral lands ceded by the Indians.

> George W. Gordon was sent by the Interior Department in June (1889) to inspect the area. In his report of July 31, he described the area as containing second or third-rate pasture land, barren mountains, hills and alkaline patches. The report gave support to the rationale that the lands could be removed since "the Indians do not, and probably never will, need the lands embraced therein or make any use of them whatsoever."

O'Neil & MacKay, "A History of Uintah-Ouray Ute Lands," JX 483, at 16 (footnote **[*1101]** omitted); see H.Rep.No.2967, 51st Cong., 1st Sess. LD 21 (1890). Almost immediately, Congress sought to excise a 12-mile strip of gilsonite lands from the Uncompahgre Reservation. See S. 1762, 51st Cong., 1st Sess., **[**87]** reprinted in S.Ex.Doc.No.157, 51st Cong., 1st Sess. (1890). On June 17, 1890, the bill was vetoed by President Harrison, who found it to be detrimental from a policy standpoint. See Veto Message of the President, June 17, 1890, LD 20. Three months later, S. 4242 was introduced "to change the boundaries of the Uncompahgre Reservation," see H.Rep.No.3305, 51st Cong., 2d Sess., LD 22 (1890), but it died at the end of the session. A similar

bill, S. 574, was favorably reported by the Committee on Indian Affairs in February of 1892, see S.Rep.No.240, 52d Cong., 1st Sess. (1892), as was H.R. 69, another bill to "change the boundaries of the Uncompahgre Reservation." See H.Rep.No.1076, 52d Cong., 1st Sess. (1892). Neither of the bills passed.

At the same time, it was apparent to Robert Waugh, Indian Agent at Fort Duchesne, that any plans for allotment at Uncompahgre would face difficulties. See letter of Agent Waugh to Comm. of Ind. Aff. of Dec. 19, 1892, JX 29. But concern for the gilsonite and other minerals easily outweighed concern for the Utes in the minds of Washington officials. In 1893 the Secretary of the Interior secured the opinion of Assistant United States Attorney General Hall **[**88]** on the status of the Uintah and Uncompahgre lands. While Hall determined that the Uintah reservation was "owned" by its Indian residents,

> It is clear to my mind that the Uncompahgre Utes have not title to the lands they occupy; that they occupy these lands as a temporary reservation, until such time as the President may require them by virtue of the agreement, and the Act of 1880, to take their allotments within the limits of said reservation.

Letter from Asst. Atty. Gen. Hall to Secretary of the Interior of Oct. 23, 1893, JX 30, at 8. [89] Hall relied upon language in the Agreement of 1880, LD 11, which indicated that the Uncompahgre lands were reserved for the purposes of making allotments and a provision requiring that the allotted lands be paid for out of a fund generated from the sale of the Ute lands in Colorado at the rate of $ 1.25 an acre.

89 Hall's opinion contradicted the views of the Commissioner of Indian Affairs Morgan that the Uncompahgres "owned", or held compensable title to, their lands, at least for the purposes of the Indian Leasing Act, Act of Feb. 28, 1891, ch. 383, 26 Stat. 794, I Kapp. 56, 57 (2d ed. 1904), LD 23, and could lease their lands for mining purposes, though mining operations might be undesirable for other reasons. Letter from Comm. of Ind. Aff. to Secretary of the Interior of Dec. 30, 1892, JX 36. Congress had already provided for compensating the Uintahs and the Uncompahgres for lands granted as a right-of-way to the Utah Midland Railway Co. Act of Mar. 3, 1887, ch. 368, 24 Stat. 548, I Kapp. 255-256 (2d ed. 1904), LD 14.

This contrast between the status of the Uintah and the Uncompahgre Reservations was to be relied upon again and again by those who advocated the extinguishment of the Uncompahgre Reservation. E. g., H.Rep.No.660, 53d Cong., 2d Sess., LD 30 (1894); 30 Cong.Rec. 107, 714-715, 718, 817, 831, (1897), LD 45.

[89]**

In 1894, three bills were introduced providing "for opening the Uncompahgre and Uintah reservations." H.R. 4511, 6557; see S.Rep.No.450, 53d Cong., 2d Sess., 4027 (1894). [90] Though these bills were not enacted, [91] the Indian Appropriations Act for that year included H.R. 6557, with changes:

90 Pressure for the opening of both reservations was mounting. See e.g., "Petition to President Cleveland from Certain Uintah County Residents," JX 32 (1894).

91 Congressional debates on the bills focused more on the "rights" of those who had earlier located the gilsonite, asphaltum, etc. at Uncompahgre than upon the rights of the Utes whose reservation the minerals were located upon. See 26 Cong.Rec. 7032-7033, 7256-7260 (1894). The Commissioner of Indian Affairs recommended against passage of the bills. Report of the Comm. of Ind. Aff., 1894, JX 33, at 90.

Sec. 20. That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to **[**90]** the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the **[*1102]** treaty of eighteen hundred and eighty, as follows:

> "Allotments in severalty of said lands shall be made as follows: To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: Provided, That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location: And provided, That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado **[**91]** as provided by their contract with the Government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what

portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided."

Sec. 21. That the remainder of the lands on said reservation, shall, upon approval of the allotments by the Secretary of the Interior, be immediately open to entry under the homestead and mineral laws of the United States: Provided, That no person shall be entitled to locate more than two claims, neither to exceed ten acres, on any lands containing asphaltum, gilsonite, or like substances: Provided, That after three years actual and continuous residence upon agricultural lands from the date of settlement the settler may, upon full payment of one dollar and fifty cents per acre, receive patent for the tract entered. If not commuted at the **[**92]** end of three years the settler shall pay at the time of making final proof the sum of one dollar and fifty cents per acre.

Sec. 22. That said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.

Sec. 23. That said commissioners shall receive six dollars per day each, and their actual and necessary traveling and incidental expenses while on duty, and to be allowed a clerk, to be selected by them, whose compensation shall be fixed by said commissioners, subject to the approval of the Secretary of the Interior: Provided, That the cost of executing the provisions of this Act shall not exceed **[**93]** the sum of sixteen thousand dollars, which sum is hereby appropriated for that purpose out of any moneys in the Treasury not otherwise appropriated.

Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 337-338, I Kapp. 546 (2d ed. 1904), LD 35. (emphasis added).

Agent Randlett soon informed the Secretary of the Interior that there were insufficient agricultural lands available on the Uncompahgre Reservation to fully comply with the intended allotment program. Randlett suggested that additional lands be made available on the more hospitable Uintah reservation. Letter of Agent Randlett **[*1103]** to Secretary of the Interior of Dec. 12, 1894, JX 35. [92] However, a three-man commission was appointed to carry out the 1894 Act provisions and began meeting with the Uncompahgre in January 1895. The Ute Commission struggled with a number of problems, including substantial Indian opposition to the Act's provisions. [93] The Commission's effort to carry out the 1894 Act failed. See H.Doc.No.191, 54th Cong., 1st Sess., LD 39 (1896); S.Doc.No.161, 54th Cong., 1st Sess., LD 41 (1896). The Commission was relieved of its duties on February 4, 1896, S.Doc.No.32, 55th Cong., 1st Sess., LD 46, at **[**94]** 3 (1897), while the Secretary sought additional funds to commence negotiations with the Utes at Uintah, see H.Doc.No.28, 54th Cong., 1st Sess., LD 40 (1896), which were appropriated in June. Act of June 10, 1896, ch. 398, 29 Stat. 321, 341-342, I Kapp. (2d ed. 1904), LD 42. By resolution of January 16, 1896, the House of Representatives asked of the Secretary the probable time for execution of statutes providing "for a restoration to the public domain of certain lands within the Uncompahgre Indian Reservation in the Territory of Utah." The Secretary recommended appointment of another commission to negotiate with the Uncompahgres. See 1 Report of the Secretary of the Interior, 1896, H.Doc.No.5, 54th Cong., 2d Sess., JX 52, at xlviii-li. [94]

92 Capt. Randlett expressed another relevant view:

I am of the opinion it will be unjust and it will be positively contrary to my sense of good faith on the part of the government to ask these Indians of the Uintah Reservation at the present time or in the near future to relinquish interest in their lands to any further extent than I have suggested. The minerals that have been or may be discovered on the remaining lands are the property of these Indians. The timber lands will eventually become very valuable and are their legal possessions; these possessions should not be taken from these Indians to their pecuniary disadvantage.

Id., JX 35 at 3-4. The Commissioner of Indian Affairs later concurred in Randlett's view. See Letter from Comm. of Ind. Aff. to Secretary of the Interior of Jan. 14, 1896, JX 51 at 13.

[95]**

93 See e.g., Letter from Ute Commission to Comm. of Ind. Aff. of Mar. 22, 1895, JX 43, reporting that survey of Uncompahgre lands to identify surplus lands had been impossible due to heavy snow; Report of Agent Randlett, 1895, JX 47; Rept. of the Comm. of Ind. Aff., 1895, JX 49, at 32-33.

94 See Letter from Comm. of Ind. Aff. to Secretary of the Interior of Mar. 3, 1896, JX 54, at 2 (re: appropriations bill for Uncompahgre negotiations).

In the meantime, the Uncompahgre Reservation remained under pressure from trespassers and the "familiar forces" of local non-Indian interests. [95] The trespass problem worsened in 1897; the agency found that a number of reservation boundary markers had been moved, necessitating resurvey of the lines. [96] One party of trespassing prospectors was financed by the Governor of Utah, and others, in order to provoke litigation testing the legality of the reservation itself. Report of Capt. Day, 9th Cavalry, JX 70; Letter from Agent Randlett **[*1104]** to Comm. of Indian Aff. of March 15, 1897, JX 69. Federal prosecution of trespassers was repeatedly recommended **[**96]** [97] and federal troops were requested to support Agent Randlett. [98]

95 E. g., Letter from Agent Randlett to Comm. of Ind. Aff. of Sept. 16, 1896, JX 56 (even Governor, Sec'y. of State involved in mineral location at Uncompahgre Reservation); Letter of Agent Randlett, Feb. 27, 1896, article, Salt Lake Tribune, Feb. 25, 1896 (opening of Uncompahgre lands demanded), JX 53; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Aug. 13, 1895, JX 46. Considerable distrust and anxiety arose among the Utes concerning "opening" of the reservations. See Report of Agent Randlett, 1896, JX 55.

96 Letter from Agent Randlett to Comm. of Ind. Aff. of Jan. 19, 1897, JX 60; Letter from Comm. of Ind. Aff. to Agent Randlett of Feb. 11, 1897, JX 62. See also, Letter from Acting Comm. of Ind. Aff. to Agent Waugh of May 5, 1892, JX 26; Letter from Agent Randlett to Comm. of Ind. Aff. of Feb. 22, 1897, JX 64; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 24, 1897, JX 72; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 4, 1898, JX 97; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 25, 1898, JX 101; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 22, 1898, JX 105; Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of Oct. 11, 1898, JX 110; Letter from Comm. of Ind. Aff. to Agent Myton of May 26, 1900, JX 120; Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior, July 28, 1900, JX 121; Letter from Comm. of Gen. Land Office to Comm. of Ind. Aff. of Mar. 11, 1902, JX 130.

[97]**

97 E. g., Telegram from Gen. Wheaton to Adj. Gen. of Mar. 14, 1897, JX 68; Letter from Comm. of Ind. Aff. to Ass't. U. S. Atty. of Sept. 9, 1897, JX 82.

98 Letter from Agent Randlett to Comm. of Ind. Aff. of Jan. 13, 1897, JX 59; Letter from Comm. of Ind. Aff. to Secretary of the Interior of Jan. 30, 1897, JX 61; Letter from Comm. of Ind. Aff. to Agent Randlett of Mar. 6, 1897, JX 66; Letter of Comm. of Ind. Aff. to Secretary of the Interior of Mar. 6, 1897, JX 67; see also Letter from the Comm. of Ind. Aff. of Oct. 6, 1897, JX 86; of Oct. 27, 1897, JX 87; of Nov. 15, 1897, JX 88; of Oct. 1, 1897, JX 85.

After extensive debate, which dealt more with the disposition of the Uncompahgre mineral deposits than with the welfare of the Uncompahgres, [99] Congress enacted provisions that mandated the allotment and opening of the Uncompahgre Reservation:

99 See 30 Cong.Rec. 102-108, 712-720, 725, 814-821, 826-833, 1070, 1110-1120, 1130, 1208-1211, 1245, 1253, 1468 (1897), LD 45.

[98]**

The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Ute Indian Reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah Reservation or elsewhere in said State. And all the lands of said Uncompahgre Reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances.

Act of June 7, 1897, ch. 3, 30 Stat. 62, 87, I Kapp. 621 (2d ed. 1904), LD 49 (emphasis added).

Allotment of the Uncompahgre Reservation was to be conducted under the 1897 Act, the 1894 Act and the 1880 Agreement, considered together. See Opinion of Ass't. Atty. Gen. Van Devante, 25 I.D. 97, JX 76 (1897). [100] It quickly became apparent that the allotment process at Uncompahgre could not be completed within the time allowed. When Agent Randlett reported on June 30, 1897, no allotments had yet been **[**99]** made. See Report of Agent Randlett in Rept. of the Comm. of Ind. Aff., 1897, JX 81, at 286. [101] The Uncompahgre Commission, James Jeffreys, Ross Guffin and Howell Myton, were directed to proceed with assignment of allotments under instructions approved August 27, 1897. See id.; Instructions to Uncompahgre Commissioners of Aug. 26, 1897, JX 77; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Aug. 26, 1897, JX 78; Letter from the Comm. of Ind. Aff. to the Uncompahgre Commission of Aug. 31, 1897, JX 79; Rept. of the Comm. of Ind. Aff. 1897, JX 75 at 92-93. Troubled by these events, the Uncompahgres sent a delegation to Washington, D. C., [102] where they tentatively **[*1105]** agreed to accept allotments on the Uintah Valley Reservation if adequate land could not be found at Uncompahgre. See Rept. of the Secretary of the

Interior, 1897, H.Doc.No.5, 55th Cong., 2d Sess. at xlii-xliii. Even with tentative agreement by all three Ute bands to this allotment program, [103] it was clear to those involved that additional time was still needed. Id.; Letter from Acting Agent Cornish to Comm. of Ind. Aff. of Feb. 17, 1898, JX 93 (more time "absolutely essential to enable allotments **[**100]** to be made"). Deep snow and poor weather rendered the work of the Commission impossible for months. [104]

100 Cf. Rept. of the Comm. of Ind. Aff., 1897, JX 75 at 92-93. Plaintiff asserts that the 1897 Act repealed the 1894 Act and any intent therein to restore the unallotted lands to the public domain was thereby negated. Plaintiff's Post-Trial Brief at 46-47. The 1897 Act arguably voided entry into gilsonite lands as provided for under the 1894 Act. See 30 Cong.Rec. 1208, LD 45, (1897). However, plaintiff cites no language indicating that Congress intended to preserve for the Indians anything more than the promised allotments as "an adequate fulcrum for tribal affairs." DeCoteau v. District County Court, 420 U.S. 425, 446, 95 S. Ct. 1082, 1094, 43 L. Ed. 2d 300 (1975).

101 Capt. Randlett commented further:

It is true, as asserted in substance before Congress by an advocate for opening the Uncompahgre Reservation, men can be found that would make allotments to the Indians by shorthand process, but it is not believed that Congress intended or that the Secretary of the Interior will permit the wickedness of allotting lands on paper....

Id. See also Rept. of the Secretary of the Interior, 1897, JX 89, at xli-xliii.

[101]**

102 The Utes apparently paid their own way as well. See Letter from Acting Comm. of Ind. Aff. to Acting Agent Beck of Oct. 6, 1897, JX 86. The stated reason for the trip is significant:

The Indians gave as a reason for desiring the delegation that the lines of their reservation have been established by a man who said he came from Washington and now these lines were taken away ; that they had signed many papers, but Washington says now they were not good. But if their chiefs and headmen could stand face-to-face with the Secretary and hear the words spoken, and he said for them to do so, they would take allotment.

Telegram of J. Jeffreys, Uncompahgre Commissioners, to Comm. of Ind. Aff. of Oct. 5, 1897, quoted in O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483 at 21 (emphasis added). The greatest obstacle to allotment was not the boundary question; it was still the requirement that the Uncompahgres pay $ 1.25 an acre for their allotments. See Rept. of the Secretary of the Interior, 1897, JX 89, at xlii-xliii.

103 See Letter of Acting Comm. of Ind. Aff. to J. W. Davenport, Esq. of Feb. 8, 1898, JX 92 (tentative agreement with Uintah, White River Utes to allow Uncompahgre allotments at Uintah Reservation); S.Doc.No.80, 55th Cong., 2d Sess., LD 51 (1898) (text of agreement).

[102]**

104 In its December 22, 1897 report the Commission complained:

The distance from proper shelter to Indian settlements over this reservation varies from 10 to 60 miles, the majority of the settlements being between 40 and 60 miles, and with the thermometer registering from zero to 36o below zero, it will be seen that camping out, even if the commission was provided with a camping outfit, would be dangerous to the health of the commission....

Quoted in Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 4, 1898, JX 98. One can only wonder as to how the Indians fared that winter, so far from "proper shelter."

While the Indian Department had some success in pushing a six-month delay through the Senate, [105] the effort ultimately failed. The Uncompahgre Commission was so informed by telegram [106] and the "opening" went ahead on April 1, 1898 as scheduled. Federal troops were again called to the reservation, this time to keep order and prevent anyone from making unlawful claims. [107] The Uncompahgre Commission had failed to make a single allotment within the Uncompahgre **[**103]** Reservation prior to April 1. Rept. of the Comm. of Ind. Aff., 1898, JX 108, at 42, in H.Doc. No. 5, 55th Cong., 3d Sess. The Commission proceeded in May to make 75 allotments on the Uncompahgre Reservation, but the Commissioner of Indian Affairs doubted the legality of making Indian allotments after the April 1 opening date, the lands having become a part of the "public domain." Id. at 43. By separate legislation, Congress ultimately confirmed 83 allotments made within the Uncompahgre Reservation. See Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 940-41, I Kapp. 686 (2d ed. 1904), LD 61; Letter from Comm. of Ind. Aff. to Secretary of the Interior of Apr. 12, 1899, JX 113; Rept. of the Comm. of Ind. Aff., 1899, JX 117, at 43-44. 584 Uncompahgre allotments on the Uintah Reservation were finally approved in 1905. See Rept. of the Comm. of Ind. Aff., 1905, JX 323, at 146; Letter from Secretary of the Interior of July 7, 1905, JX 281.

105 Letter from Acting Comm. of Ind. Aff. to F. Kreider, Esq. of Feb. 24, 1898, JX 95 (six-month extension approved by the Senate); Letter from Acting Comm. of Ind. Aff., JX 98, supra, note 100.

[104]**

106 Telegram of Comm. of Ind. Aff. to Comm. J. Jeffries of Mar. 31, 1898, JX 102.

107 See Letter from Comm. of Ind. Aff. to Acting Agent Cornish of Apr. 6, 1898, JX 103; Letter from Secretary of War to the Secretary of the Interior of Apr. 8, 1898, JX 104.

At the urging of the Secretary of the Interior, and after lengthy debate, Congress had withheld the gilsonite and other mineral lands from entry, frustrating the major object of the opening of the Uncompahgre Reservation. Over a year following the "opening" not a single non-Indian homestead entry had been made upon the Uncompahgre **[*1106]** Reservation. The Agent (and former Uncompahgre Commissioner), H. P. Myton, recommended that either the lands be returned to the Utes, or the gilsonite and other mineral lands be opened. Report of Agent Myton, 1899, JX 115. In the meantime, the Uncompahgres ranged into Colorado hunting for food. Letter from the Comm. of Ind. Aff. of Dec. 11, 1899, JX 118. The lands were not then returned, nor were the mineral lands opened to entry until 1906. See Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 998, **[**105]** IV Kapp. 17-18 (1913), JX 332 (even-numbered sections of mineral land opened); Interior Dept. Circular of June 25, 1906, 34 I.D. 6 (1907), JX 333.

The plaintiff Ute Indian Tribe argues herein that the original exterior boundaries of the Uncompahgre Reservation remain intact notwithstanding events that transpired at the turn of the century. Review of the applicable legislation, its legislative history and contemporaneous as well as subsequent interpretations of the legislation and of the status of the reservation compel this Court to conclude that the boundaries of the Uncompahgre Reservation set forth in the Executive Order of January 5, 1882 were extinguished by Congress under the Act of June 7, 1897.

The express terms of the Act of August 15, 1894, 28 Stat. 286, 337, LD 35, expressed in plain language congressional intent to disestablish the Uncompahgre Reservation following the distribution of allotments in severalty; the "surplus" unallotted lands were to be "restored to the public domain." 28 Stat. at 337. Express language restoring most of an Executive Order Indian Reservation to the public domain is plainly suited to disestablishment. In Seymour v. Superintendent, 368 U.S. **[**106]** 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962), a similar statute "vacated and restored to the public domain" the north half of the Colville Reservation in the State of Washington, diminishing the reservation to that extent. [108] Id., 368 U.S. at 354-356, 82 S. Ct. at 426-427. The proponents of the 1894 Ute legislation repeatedly characterized the reservation as a temporary one, intended to endure only until agricultural and grazing lands could be allotted to the Uncompahgre Utes. Correspondence contemporaneous with the establishment of the 1882 reservation supports the proponents' argument. For example, in a letter from the Commissioner of Indian Affairs to the Secretary of the Interior of July 18, 1884, it was said:

108 Act of July 1, 1892, ch. 140, 27 Stat. 62, 63, I Kapp. 441 (2d ed. 1904). See also United States v. Pelican, 232 U.S. 442, 445-446, 34 S. Ct. 396, 397, 58 L. Ed. 676 (1914).

As a matter of fact the Uncompahgre Reservation so-called, was set apart simply to enable the Department to control **[**107]** without interference from white settlers, a sufficient quantity of land to give each individual Indian the quantity which it was agreed he should have by the terms of the Ute agreement (of 1880). I do not think it was intended as a permanent reservation, and I presume that whenever the Indians are settled upon their allotments, the reservation as present existing will be discontinued.

Quoted in Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426, at 4. The 1894 Act was intended to fulfill that purpose, releasing the remaining lands for non-Indian exploitation. The plaintiff correctly observes that the 1894 Act was not successfully executed; allotments were not assigned, nor were the gilsonite deposits opened to lawful mining.

The reservation instead was opened under the provisions of the Act of June 7, 1897, 30 Stat. 62, 87, LD 49. The 1897 Act did not precisely mirror the "public domain" language of the 1894 Act. Plaintiff argues that the 1897 Act repealed the 1894 Act, defeating any "baseline purpose" of disestablishment arising from the public domain language. See Plaintiff's Post-Trial Brief **[**108]** at 45-47. However, the 1897 Act provides that the unallotted lands of the reservation were to "be open for location and entry under all the land laws of the United States," excepting lands containing gilsonite and related minerals. 30 Stat. at 87. **[*1107]** The language is not identical, but the result under the 1897 Act would be the same as under the 1894 Act as far as the reservation is concerned. Restoring land "to the public domain" as a practical matter opens the land to location and entry under "all of the land laws" of the United States; "The words "public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." Newhall v. Sanger, 92 U.S. 761, 763, 23 L. Ed. 769 (1875). Statements in the congressional debate on

the 1897 Act indicate that the main thrust of the 1897 Act was to mandate the execution of the purposes of the 1894 Act by the Executive Branch. See 30 Cong.Rec. 716-717, 817, 826 (1894), LD 45.

The significant change enacted in the 1897 Act dealt with the gilsonite and related mineral lands; limited entry was permitted under the 1894 Act, but was forbidden under the 1897 Act. To this extent the 1897 **[**109]** Act repealed the 1894 Act, as plaintiff asserts. The manner of disposition of these lands is, however, irrelevant to the question confronted here because in either instance, Congress intended that from the date of "opening" under either act the unallotted lands would no longer be part of an Indian reservation.

The Tribe relies upon statements in congressional debates on the legislation for support for a narrower view of the 1897 Act. Clearly the legislation raised doubts and inspired opposition. See 30 Cong.Rec. 712-720, 814-821, 826-833 (1897) LD 45. The simple fact is that those who questioned, doubted and opposed the legislation lost ; the "familiar forces" prevailed, regardless of the apparent fairness or suitability of the legislation as far as the Indians were concerned. Plaintiff cites no statement by the proponents of the 1897 Act indicating that the Uncompahgre Reservation was intended to survive the opening, and this Court has found none.

That Congress was "satisfied that the retention of allotments would provide an adequate fulcrum for tribal affairs." DeCoteau v. District County Court, 420 U.S. 425, 446, 95 S. Ct. 1082, 1094, 43 L. Ed. 2d 300 (1975), is borne out by the **[**110]** subsequent events surrounding the Uncompahgre lands. Counsel for the defendant state and counties have catalogued the past-tense legislative references to "the former Uncompahgre Reservation" in the briefs. [109] The treatment of the Uncompahgre lands following opening on April 1, 1898 confirms the above interpretation of the 1897 Act with startling uniformity. The record in this case offers no jurisdictional history contrary to the view that the 1882 boundaries were dissolved in 1897. Far from evidencing continuing recognition of the whole reservation, the administrative treatment of the lands following April 1, 1898 reflects the concern that even the few allotments reserved to the Uncompahgres would soon fail, leaving the Indians with nothing. The proposed solution was to consolidate the Uncompahgre band on allotments within **[*1108]** the Uintah Valley Reservation, abandoning the 1882 lands altogether. [110] In large part, the Uncompahgres were given allotments on the Uintah Valley Reservation following agreement by the Uintah and White River Bands to the arrangement. [111] See Act of June 7, 1897, ch. 3, 30 Stat. at 87, I Kapp. 621, LD 49. Though some Indians continued to assert **[**111]** the claim that the 1882 reservation still existed, the Bureau of Indian Affairs apparently made a formal determination in 1929 that the reservation no longer existed. [112] Similarly, the Justice Department, appearing herein as amicus curiae representing the United States, has remained silent on the continued reservation status of the 1882 lands. In other proceedings, the United States has steadfastly denied the reservation's continuing existence. [113] The plaintiff finds little support in the circumstances surrounding the opening of the 1882 reservation; the Tribe's interpretation of events and language is strained at best.

109 See Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 998, LD 91 ("... the former Uncompahgre Indian Reservation.") H.Doc.No.33, 58th Cong., 1st Sess., LD 92, at 1-2, 10 (1903); S.Doc.No.159, 58th Cong., 3d Sess., LD 101, at 16 (1905); 39 Cong.Rec. 1181 (Jan. 21, 1905) (remarks of Rep. Howell), LD 103; Act of Mar. 1, 1899, ch. 324, 30 Stat. 924, 940, LD 61; Act of Apr. 30, 1908, Pub.L., 60-104, 35 Stat. 70, 95, LD 135; S.Rep.No.1002, 63d Cong., 3d Sess., LD 150, (1915) ("Gilsonite Lands Within the Former Uncompahgre Indian Reservation, Utah"); H.Rep.No.642, 64th Cong., 1st Sess., LD 151 (1916); 53 Cong.Rec. 7862 (May 12, 1916) (remarks of Rep. Howell); H.Rep.No.2399, 74th Cong., 2d Sess., LD 174 (1936); S.Rep.No.749, 80th Cong., 1st Sess., LD 184 (1947); H.Rep.No.1372, 80th Cong., 2d Sess., LD 186, at 4 (1948); Act of Mar. 11, 1948, Pub.L. 80-440, 62 Stat. 72, 77, LD 187. A number of these "legislative" past-tense references are quotations from administrative materials. This does not deprive them of their persuasiveness; it reflects congressional concurrence in the consistent administrative view that the "old" or "former" Uncompahgre Reservation did not survive its opening under the 1897 Act. See e.g., Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, 1931, JX 426; Letter of Comm. of Ind. Aff. to the Secretary of the Interior of June 12, 1933, JX 428; Ann. Rept. of the Comm. of Ind. Aff., 1898, JX 108, at 43; Ann. Rept. of the Comm. of Ind. Aff. to the Secretary of the Interior of April 12, 1899, JX 113; same, of July 27, 1903, JX 168.

[112]**

110 See Letter from Acting Agent Mercer to Comm. of Ind. Aff. of Sept. 9, 1903, JX 174; Letter from Agency Clerk to the Agent of Aug. 31, 1903, JX 173; Letter from the Comm. of Ind. Aff. to Acting Agent Mercer of July 28, 1903, JX 170; Letter from Acting Agent Mercer to Comm. of Ind. Aff. of Apr. 20, 1904, JX 180; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 30, 1904, JX 181; Letter from the Comm. of Ind. Aff. to Agent Hall of July 6, 1904, JX 186. See Letter from the Comm. of Ind. Aff. to Agent Hall of Mar. 13, 1905, JX 232. On July 1, 1904, the Secretary of the Interior authorized the allotment of lands for the Uncompahgres on the Uintah Valley Reservation. Letter from Secretary of the Interior to the Comm. of Ind. Aff. of July 1, 1904, JX 185.

111 See H.Doc.No.80, 55th Cong., 2d Sess., LD 51 (1898). The Commissioner of Indian Affairs submitted a schedule of 591 Uncompahgre allotments at Uintah for secretarial approval by letter of July 15, 1905, JX 287. See also S.Rep.No.951, 57th Cong., 1st Sess., LD 69, at 3 (1902).

112 See "Statement Concerning the Uncompahgre Grazing Reserve," Feb. 6, 1943, JX 451, at 4:

While the Ute Indians maintained that they still had a legal claim to the 1,800,000 acres of the old Uncompahgre Reservation, the Office of Indian Affairs had determined in 1929 that the action of Congress in 1897 returning the unallotted lands of the reservation to the public domain had extinguished the legal claims of the Indians to the land, ...

See also, Memorandum Relating to the Proposed Withdrawal of Certain Lands for Uncompahgre Ute Indians, Office of Indian Affairs, 1931, JX 426, at 12:

It is apparent from the foregoing that the Uncompahgres, in accordance with the 1880 agreement, were entitled only to allotments, and had no right to the surplus land within the Executive Order Reservation, ... It unquestionably would have been greatly to the interest of the Indians, from a financial standpoint, if they had been recognized as owners of the 2,000,000 acres included in the Executive Order Reservation. But for the Government to have taken such position would have been entirely contrary to the facts.

[113]**

113 In Andrus v. Utah, 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980), the Justice Department filed a memorandum on behalf of the Secretary of the Interior which commented as follows:

(In) the view of the United States, the Tribe's claim that the Uncompahgre Reservation survives is both erroneous and irrelevant.

The fact is that, for several decades at least, the Department of the Interior has considered the Uncompahgre Reservation as disestablished. That remains its view today. Our own review of the evidence affords no basis for disagreeing with that conclusion....

We simply list some of the impediments to the Tribal claim: (1) Both in the abortive 1894 Act ... and in the 1897 Act ..., Congress treated the Uncompahgre Reservation as a mere temporary asylum for the Ute Band of that name, denying them any claim to the proceeds derived from the sale of the surplus lands opened to entry; (2) in 1899 and 1903, after the Reservation was opened, it was referred to as "the former Uncompahgre Indian Reservation" ...; (3) in 1948, Congress extended the Uintah and Ouray Reservation by including lands situated within the boundaries of the former Uncompahgre Reservation, a futile act if the latter reservation still subsisted ... (6) at no time since 1897 does it appear that the Department of the Interior (or any other government agency) has treated the Reservation as still in existence ...

Memorandum for the Petitioner in Response to the Motion of the Ute Indian Tribe, Andrus v. Utah, 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (citations omitted).

[114]**

In this Court's opinion, any colorable ambiguity in the historical record is laid to rest **[*1109]** by the express language used by Congress in the Act of March 11, 1948, Pub.L. 80-440, 62 Stat. 72, VI Kapp. 375-381 (1980), LD 187. That Act provides as follows:

> Be it enacted ..., That the exterior boundary of the Uintah and Ouray Reservation in Grand and Uintah Counties, in the State of Utah, for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation, is hereby extended to include the following area:

Omitted here is the legal description of the body of lands known as the Hill Creek Extension of the Uintah and Ouray Reservation. The described lands fall largely within the original boundaries of the Uncompahgre Reservation. If that reservation still remained intact, what purpose was served by the metes-and-bounds description of the "exterior boundary" of the Uintah and Ouray Reservation by Congress in the 1948 Act?

The legislative [114] and administrative history [115] that culminated in the 1948 legislation consistently regards the area of grazing lands set apart in the Hill Creek Extension as the "new" Ute Reservation, a restoration of a portion of the **[**115]** "old" Uncompahgre Reservation to Indian use. For example, in response to an inquiry by the Interior Department's Director of Grazing regarding the status of the "old" reservation, Assistant Commissioner of Indian Affairs William Zimmerman, Jr., reported that "it is the belief of this office that the undisposed of lands within the former Uncompahgre Indian Reservation, Utah, have the status of public lands of the United States," temporarily withdrawn in aid of legislative efforts resulting in the 1948 Act, Letter from Ass't. Comm. of Ind. Aff. to Director, Div. of Grazing of Aug. 8, 1939, JX 447.

114 See H.Rep.No.1372, 80th Cong., 2d Sess., LD 186 (1948); S.Rep.No.749, 80th Cong., 1st Sess., LD 184 (1947); see also S.Rep.No.1188, 78th Cong., 2d Sess., JX 182 (1944); H.Rep.No.143, 78th Cong., 1st Sess., JX 181 (1943); S.Rep.No.243, 77th Cong., 1st Sess., JX 180 (1941); H.Rep.No.70, 77th Cong., 1st Sess., JX 179 (1941); H.Rep.No.2399, 74th Cong., 2d Sess., JX 174 (1936).

115 Office of Indian Affairs Memorandum, JX 426, supra ; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of June 12, 1933, JX 428; Id., JX 429; Memorandum by the Director of Forestry, JX 433; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of July 19, 1925, JX 435; Letter from Ass't. Comm. of Ind. Aff. to the Secretary of the Interior of Nov. 17, 1936, JX 436; Letter from the Director of Forestry to Agency Superintendent of Dec. 4, 1936, JX 437; Report on Grazing Resources on Uintah and Ouray Reservation, JX 443 (Nov. 1938); Letter from Agency Superintendent to Bill Stringham of Mar. 21, 1939, JX 445; Letter from Agency Superintendent to the Comm. of Ind. Aff. of Oct. 18, 1939, JX 448; Letter from the Regional Forester to the Agency Superintendent of Oct. 25, 1939, JX 449; Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 19, 1941, JX 450; contra, Memorandum of Feb. 6, 1935, JX 434.

[116]**

The same opinion is expressed in the committee reports explaining the enacted bill. See H.Rep.No.1372, 80th Cong., 2d Sess., LD 186 (1948); S.Rep.No.749, 80th Cong., 1st Sess., LD 184 (1947). The purpose of the bill, explains the House Committee Report, was "to enlarge the Uintah and Ouray Reservation by some 510,000 acres," LD 186, at 2, and, indeed, that is what the 1948 Act did. It did not establish a grazing reserve within an existing Indian reservation [116] because no such reservation remained **[*1110]** in existence. [117]

116 Cf. Plaintiff's Post-Trial Brief at 55. The Tribe's rationale regarding the 1948 Act is tenuous and unconvincing. The Tribe is correct when it points out that "title ownership to the beneficial Indian interest (in lands) is different from reservation status." Id., at 54. Congress understood this at that time, as evidenced by the fact that it defined "Indian Country" by reservation boundaries rather than title in that same year. Act of June 25, 1948, ch. 645, 62 Stat. 683, 757 codified at 18 U.S.C. § 1151(a). The 1948 Act extends the boundaries of the Uintah and Ouray Reservation; title to the Hill Creek Extension was restored to the Tribe by other means, such as purchase using tribal funds. H.Rep.No.1372, LD 186, supra, at 2.

The distinction between title and territorial boundaries makes it unnecessary for this Court to reach the question of whether lands within Executive Order Indian Reservations may be expropriated by the Government without obligation to compensate the affected Indians. Cf. Northern Paiute Nation v. United States, 225 Ct. Cl. 275, 634 F.2d 594, 601-604, (Ct.Cl.1980); Ute Indians v. United States, 330 U.S. 169, 176, 67 S. Ct. 650, 653, 91 L. Ed. 823 (1947); Sioux Tribe v. United States, 316 U.S. 317, 331, 62 S. Ct. 1095, 1101, 86 L. Ed. 1501 (1942); Note, 69 Yale L.J. 627 (1960).

[117]**

117 Other circumstances surrounding the 1882 reservation lands harmonize with this conclusion: For example, (1) in 1965, the Ute Indian Tribe stipulated to a settlement of its claim before the Indian Claims Commission that the United States failed to provide the Uncompahgre Band with a reservation pursuant to the Agreement of 1880. 14 Ind.Cl.Comm. 707 (Dkt. No. 349, 1965). While the stare decisis effect of a settlement agreement is necessarily extremely limited, the claim itself is indicative of the Tribe's prior understanding of historical events. (2) The 1882 boundaries do not appear on any recent map exhibit offered to this Court. (3) Article I of the Ute Tribal Constitution, LD 176, speaks of the Ute territory as including the 1882 reservation but does so "except as otherwise provided by law," see page 2, supra, rendering the language ambivalent at best. The works of learned scholars mirror the view that the conclusion that the 1948 boundaries rather than the 1882 boundaries define the extent of Ute territory in that area. See e.g., O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 37 (1977). (4) Bills introduced prior to 1948, though not enacted, uniformly speak of extending the boundaries of the Uintah and Ouray Reservation to include the Hill Creek grazing lands. See e.g., H.R. 9156, 74th Cong., 2d Sess.; H.Rep.No.2399, 74th Cong., 2d Sess., LD 174; beginning in 1965 the State of Utah began selecting indemnity school lands within the 1882 boundaries as well as elsewhere. (5) Under Utah's Enabling Act, Act of July 16, 1894, § 6, ch. 138, 28 Stat. 107, 109, LD 34, such selection is not permissible unless the 1882 Uncompahgre Reservation "shall have been extinguished and such lands (have been) restored to and become a part of the public domain." See Andrus v. Utah, 446 U.S. 500, 502-503 & n.1, 100 S. Ct. 1803, 1804-1805, 64 L. Ed. 2d 458 (1980). (6) Rather than providing for a sum-certain payment to the Uncompahgre Band for the expropriation of the unallotted lands, or providing that the proceeds from the disposition of the unallotted lands were to be credited to the Utes by the U. S. Treasury, the 1897 Act makes no provision for paying the Uncompahgres at all. Restoration of Executive Order reservation lands to the public domain with no provision for payment of the Indians has been held to accomplish disestablishment of the restored lands. See Seymour v. Superintendent, 368 U.S. 351, 354-356, 82 S. Ct. 424, 426-427, 7 L. Ed. 2d 346 (1962); United States v. Pelican, 232 U.S. 442, 445-446, 34 S. Ct. 396, 397, 58 L. Ed. 676 (1914).

None of these factors standing alone could conclude the ultimate question of the Uncompahgre boundaries. Each factor, however, generates an additional inference that the Uncompahgre Reservation was disestablished by Congress in 1897.

[118]**

Agent Myton understated the situation when he wrote in his report for August 21, 1899 that "I think the Uncompahgre Indians have been treated very badly," JX 117, at 351. The reservation, which had been created for the purpose of providing allotments to the Uncompahgre Utes under the Agreement of 1880, was restored to the public domain at the insistence of non-Indian interests before a single allotment had been made. Fifty years passed before a viable Indian land base was re-established in the area by the 1948 Act. That Act, and not the Executive Order of January 5, 1882, defines the territorial extent of the plaintiff's reservation in the vicinity of the former Uncompahgre Reservation. Based upon the express language of the 1897 Act, its legislative history, contemporaneous and subsequent legislative and administrative interpretations of its effect, and the jurisdictional history of the 1882 lands this Court is compelled to conclude that the 1882 Uncompahgre Reservation was disestablished by Congress pursuant to the Act of June 7, 1897. [118] Rosebud Sioux **[*1111]** Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); Seymour v. Superintendent, 368 U.S. 351, 354-56, **[**119]** 82 S. Ct. 424, 426-427, 7 L. Ed. 2d 346 (1962).

118 This conclusion is not founded upon a simple preponderance of the evidence. The legislative and historical materials have been evaluated pursuant to the fundamental principle that doubtful expressions in legislation affecting Indians are to be construed in their favor. See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 484, 99 S. Ct. 740, 753, 58 L. Ed. 2d 740 (1979); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586, 97 S. Ct. 1361, 1362, 51 L. Ed. 2d 660 (1977); Bryan v. Itasca County, 426 U.S. 373, 392, 96 S. Ct. 2102, 2112, 48 L. Ed. 2d 710 (1976); Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7, 96 S. Ct. 1793, 1796, 48 L. Ed. 2d 274 (1976); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174, 93 S. Ct. 1257, 1263, 36 L. Ed. 2d 129 (1973); Carpenter v. Shaw, 280 U.S. 363, 366-67, 50 S. Ct. 121, 122, 74 L. Ed. 478 (1930); Choate v. Trapp, 224 U.S. 665, 675, 32 S. Ct. 565, 569, 56 L. Ed. 941 (1912); The Kansas Indians, 72 U.S. (5 Wall.) 737, 760, 18 L. Ed. 667 (1866); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 8 L. Ed. 483 (1832) (J. McLean, concurring). With the benefit of hindsight, the Congress may have been better advised to have treated the Uncompahgre Reservation differently than it did. But this Court cannot now rewrite the statutes.

For the courts to reinstate the entire reservation, on the theory that retention of more allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent.

DeCoteau v. District County Court, 420 U.S. 425, 447, 95 S. Ct. 1082, 1094, 43 L. Ed. 2d 300 (1775). In the 1897 Act Congress spoke clearly. "Some might wish they had spoken differently, but we cannot remake history." Id. at 429, 95 S. Ct. at 1085.

[120]**

IX. THE UINTAH RESERVATION

Concurrent with the drive to open the Uncompahgre Reservation was a similar effort to negotiate an agreement with the Uintah and White River Bands providing for the allotment of their lands and the cession of the unallotted "surplus" acreage. Bills were introduced in Congress in 1894 providing for the allotment and opening of both reservations. E. g., S. 1887, H.R. 4511, H.R. 6557, 53d Cong., 2d Sess. (1894); See Rept. of the Secretary of the Interior, 1894, JX 37, at 90, 469; S.Rep.No.450, 53d Cong., 2d Sess., LD 27 (1894); H.Rep.No.660, 53d Cong., 2d Sess., LD 30 (1894). As observed at pages 48-49, supra, the provisions of H.R.6557 were substantially included in the Indian Appropriations Act for 1894 as sections 20-23. See Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 337-338, I Kapp. 546 (2d ed. 1904), LD 35. Under the provisions of this Act a distinction appeared between the legislative approach to the Uncompahgre Reservation and the approach to the Uintah Valley Reservation. While section 20 of this Act ordered the appointment of a commission to proceed directly with allotment of the Uncompahgre lands, section 22 provided as follows:

> Sec. 22. That **[**121]** said commission shall also negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, and if possible, procure the consent of such Indians to such relinquishment, and for the acceptance by said Indians of allotments in severalty of lands within said reservation, and said commissioners shall report any agreement made by them with said Indians, which agreement shall become operative only when ratified by Act of Congress.
>
> The rationale for this contrasting treatment of the Uintah Reservation is expressed in House Report No. 660, LD 30, at 1-3:

The rights of the Indians upon the Uintah Reservation differ from those of the Indians upon the Uncompahgre Reservation. The Uncompahgre Indians have no title to any of the lands within the reservation, nothing more than the privilege of temporary occupancy....

As to the Uintah Indians the Assistant Attorney-General finds that the Indians are the owners of the lands within the reservation, because under **[**122]** the Act of Congress of May 5, 1864 (13 Stat. 64 (LD 4)), it was provided that the lands within the Uintah Reservation should be "set apart for the permanent settlement and exclusive occupation of the Indians." In order, therefore, to make available for settlement any portion of the lands within the Uintah Reservation, it is first necessary to obtain the consent of the Indians residing thereon. Accordingly, the bill provides that the commissioners appointed shall treat with the said Indians for the purpose of obtaining a relinquishment of their title to any lands not needed for allotment to Indians.

See also, Letter from Ass't. Atty. Gen. Hall to the Secretary of the Interior of Oct. 23, **[*1112]** 1893, JX 30; page 48 & note 89, supra. Far from unilaterally restoring all but the allotted lands to the public domain for wholly non-Indian exploitation, as was done at Uncompahgre, congressional intent in 1894 as to the Uintah Reservation pursued a different goal.

> If the consent of the Indians upon the Uintah Reservation can be obtained, by which they will accept allotments of land in severalty, and the remainder of the lands is sold and the proceeds derived are used for the **[**123]** benefit of the Indians, this condition will be much better than it is at present. These Indians have already made considerable progress toward civilization, and are entirely competent to receive lands in severalty, and are in a condition to reclaim and improve them. If the residue of the lands are settled by whites the Indians will be more directly brought in contact with civilization and be able to make greater progress by the example thus afforded them.

H.Rep.No.660, 53d Cong., 2d Sess., LD 30, at 3 (1894) (emphasis added). [119] Though primary attention was directed to restoring the mineral lands at Uncompahgre to non-Indian entry, see 26 Cong.Rec. 7032-7033, 7256-7260 (June 30, 1894), LD 33, there was some pressure to open the Uintah Reservation as well. [120] Under the Indian Appropriations Act for 1896 an additional commission was directed to negotiate with, among others, "the Indians residing upon the Uintah Reservation in the State of Utah, for the surrender of any portion of their respective reservations, or for such modification of existing treaties as may be deemed desirable by said Indians and the Secretary of the Interior; ..." Act of June 10, 1896, ch. 398, 29 Stat. **[**124]** 321, 341-342, LD 42. [121]

119 In Mattz v. Arnett, 412 U.S. 481, 496, 93 S. Ct. 2245, 2253, 37 L. Ed. 2d 92 (1973), the Supreme Court, indicated that pursuant to the General Allotment Act of 1887, 24 Stat. 388, LD 13, "Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways." Allotment under such legislation, Mattz ruled, "is completely consistent with continued reservation status." Id. at 497, 93 S. Ct. at 2254. The Supreme Court had observed in an analogous situation in Seymour v. Superintendent, 368 U.S. 351, 356, 82 S. Ct. 424, 427, 7 L. Ed. 2d 346 (1962) that the legislation

> "did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."

Congressional intent regarding the Uintah Reservation in 1894 was far more consistent with its intent in Seymour v. Mattz than it was with its intent regarding the Uncompahgre Reservation or the Lake Traverse Reservation in DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). In 1894 Congress engaged in extensive debate on the proper means to "civilize" the Indians, including civilization by example:

> Then I want to say again the Indians, like white people, learn more by example than by precept. Therefore, I shall favor ... the interspersing of white settlement all through these Indian reservations, right alongside of the Indians; not to deprive them of any rights which they have, and not in any manner to endanger the rights of the Indians in their allotments....

26 Cong.Rec. 6236 (June 13, 1894) (remarks of Rep. Coffeen), LD 32. See also id. 6234-6253, 7617, 7682-7708, 8263-8271, 9251-9253.

[125]**

120 For example, the Governor and Legislative Assembly of the Territory of Utah sent petitions to Congress on the subject. 26 Cong.Rec. 2575-2576 (Mar. 5, 1894), LD 28.

121 The commission was appointed and sent into the field, see Letter from the Comm. of Ind. Aff. to J. P. Noonan, Esq. of Mar. 22, 1897, JX 71. See also H.Doc.No.248, 54th Cong., 1st Sess., LD 40 (1896) (appropriations for execution of § 22 of the 1894 Act requested; 32 Cong.Rec. 648-652 (1899), LD 60 (progress of 1896 commission).

Progress on the negotiations was slow to commence. In a report to the Senate dated April 8, 1897, the Commissioner of Indian Affairs stated:

As a matter of fact, there was but very little correspondence between this office and the (Ute) commission directly relating to the negotiations with the Indians of the Uintah Reservation. It was made the first duty of the commission to deal with the

> Uncompahgre Indians in accordance with section 20 of the Act (of 1894). Indeed, the work of the commission never progressed beyond that point, and about **[*1113]** all of the correspondence with them **[**126]** related to the Uncompahgres the allotment of lands in severalty to them and the contemplated restoration to the public domain of the surplus not needed for allotment.
>
> (T)hey were not expected to undertake the negotiations with the Uintah Indians until they had finished their labor with the Uncompahgres.

S.Doc.No.32, 55th Cong., 1st Sess., LD 46, at 2-3 (1897), JX 73, at 3. See H.Doc.No.101, 54th Cong., 1st Sess., LD 39 (1896) ("Uncompahgre Indian Reservation"). A month later, Senator Rawlins of Utah introduced S. 1883, a bill creating a new commission to make allotments in severalty to the Indians at the Uintah Reservation and to obtain the cession of any unallotted lands. 30 Cong.Rec. 880 (May 4, 1897), LD 47. Rep. King of Utah introduced an identical bill in the House, H.R. 7760. 31 Cong.Rec. 1486 (Feb. 5, 1898), LD 50. See H.Rep.No.1172, 55th Cong., 2d Sess., LD 53, (1898). [122] The bills were enacted as the Act of June 4, 1898, ch. 376, 30 Stat. 429, I Kapp. 642-43 (2d ed. 1904), LD 54 (see Appendix A for text). [123]

122 The House Report states the bill's purpose in plain terms:

> The bill merely provides for the appointment of a commission ... to allot lands to the Indians and obtain by a treaty a cession from them to the Government of the residue of the land upon the reservation. If the Indians refuse to take allotments or to cede any portion of the reservation, then this measure becomes inoperative. On the other hand, if the Indians receive the commissioners, accept the allotments in severalty and join in a treaty of cession to the Government, then, ... if approved the Indians will be benefited, and the title ... held by the Indians will be extinguished, and the lands not occupied by them will become a portion of the public domain of the United States.
>
> In order, therefore, to make available for settlement any portion of these lands it is necessary to obtain consent of the Indians by treaty or otherwise.

H.Rep.No.1172, supra, at 2. See also 31 Cong.Rec. 511, 5155-5156, 5182-5183 (1898), LD 58, 59.

[127]**

123 The Uncompahgre Commission members were appointed as the Uintah Commission on July 14, 1898. Rept. of the Comm. of Ind. Aff., 1898, JX 108, at 36. The Uintah Commission received its instructions by letter of Aug. 6, 1898, JX 107, from the Commissioner of Indian Affairs.

Negotiations on allotment with the Uintah and White River Utes were a total failure. The White River Band particularly was unalterably opposed to the allotment and cession of the Uintah Reservation lands. E. g., Letter from Acting Agent Beck to the Comm. of Ind. Aff. of Sept. 1, 1897, JX 80. After holding meetings with "individual and influential" Uintah and White River Utes, Commissioner Ross Guffin wrote:

> The Indians were unanimous and determined in their opposition to making cession to the government of any of their lands and to allowing an Uintah or White River Indian to take and hold an allotment in severalty on said reservation.

Letter from Comm. R. Guffin to the Comm. of Ind. Aff. of Jan. 7, 1899, quoted in JX 483, at 26.

A White River and Uintah Ute delegation travelled to Washington in November, 1898, **[**128]** emphasizing their opposition to the congressional proposal:

> Our land is small and we do not want to sell it to anyone. We do not want any commission sent there; we are opposed to that. We have no more land than we want ourselves for our own use.

Statement of Sasanuckit, et al., of November 24, 1898, quoted in JX 483 at 25-26 & n. 130.

In the meantime, the Office of Indian Affairs had begun the practice of leasing parcels of land on the Uintah Reservation for grazing and mining purposes. See O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 23-26 & nn. 110-134 (1977). [124] Leasing on the Uintah **[*1114]** Reservation quickly aroused controversy; Senator Rawlins of Utah saw leasing as a major stumbling block in the path of his own legislative proposals, which sought to reduce the Uintah Reservation to merely its northeast corner, permitting the sale of the remainder. See S. 145,

57th Cong., 1st Sess. (1902) (The text of the bill is reproduced in S.Doc.No.212, 57th Cong., 1st Sess., LD 68, at 3-4 (1902).). Pressure from interested lessors rather than the Indians' own desires was perceived to be at the root of Indian opposition to the opening of the **[**129]** Uintah Reservation. [125] Hearings on leasing on the Uintah Reservation were held, see "Leasing of Indian Lands," Hearings, Sen. Comm. on Ind. Aff., S.Doc.No.212, 57th Cong., 1st Sess., LD 68 (1902), and documents were requested from the Interior Department. See S.Doc.No.154, 57th Cong., 1st Sess., LD 66 (1902); Letter from the Comm. of Ind. Aff. to Sen. Wm. Stewart, Chmn., Sen. Comm. on Ind. Aff. of Mar. 4, 1902, JX 126. At the hearings, Indian Affairs Commissioner Jones commented,

124 See also Letter from Comm. of Ind. Aff. to Agent Waugh of Mar. 1, 1892, JX 24; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 23, 1892, JX 25. Rept. of the Comm. of Ind. Aff., 1901, JX 125, at 81.

The Interior Department, anticipating the cession negotiations directed by Congress, stated as a matter of policy that no leases for any purpose on the Uintah Reservation would be approved. Letter from Comm. of Ind. Aff. to Acting Agent Cornish of Mar. 5, 1898, JX 100. Subsequent leasing and contract proposals were stalled by the Commissioner's office. E. g., Letter from Acting Comm. of Ind. Aff. to Agent Myton of Oct. 10, 1898, JX 109. See also, S.Doc.No.154, 57th Cong., 1st Sess., LD 66 (1902).

[130]**

125 See e.g., "Leasing of Indian Lands," Hearings, Sen. Comm. of Ind. Aff., S.Doc.No.212, 57th Cong., 1st Sess., LD 68 at 5:

THE CHAIRMAN: Mr. Rawlins (of Utah) says that the effort to treat with (the Utes) failed several times. How is that?

COMMISSIONER JONES: It has failed twice to my knowledge.

SENATOR PLATT, of Conn.: What do they want?

COMMISSIONER JONES: They do not want anything except to let it remain as it is.

SENATOR RAWLINS: They will not agree at all. There has been so much agitation by people interested that we can never set any agreement with them. It is not because they do not know what their own interests are, but for other reasons it is impossible.

THE CHAIRMAN: Speculators, persons wanting the land, are operating upon them?

SENATOR RAWLINS: They are operating upon them constantly.

SENATOR CLARK, of Mont.: They are trying to get a lease from them now.

SENATOR PLATT, of Conn.: But in all of the negotiations we have had with them they have simply stood mute.

COMMISSIONER JONES: No; they do not want to talk sale at all.

THE CHAIRMAN: Has there been a cash offer made to these particular Indians?

COMMISSIONER JONES: I do not know, Senator. They refuse to talk about it.

See also, Deseret Evening News, Mar. 7, 1902, JX 129 (Sen. Rawlins introduced bill prohibiting mineral leasing on Indian reservations); Deseret Evening News, Mar. 6, 1902, JX 128 (Florence Mining Co. lease on Uintah Reservation to be investigated).

[131]** There is a sort of feeling among the ignorant Indians that they do not want to lose any of their land. That is all there is to it; and I think before you can get them to agree to open the reservation, you have got to use some arbitrary means to open the land.

S.Doc.No.212, LD 68, supra, at 5. The Utah congressional delegation eagerly sought such arbitrary means. Rep. George Sutherland spoke at the hearings, arguing that the Utes did not really "own" their reservation at Uintah and therefore that Ute consent need not be obtained to accomplish a cession. Referring to the termination of the four early Indian farm reserves, which Congress restored to the public domain in 1878, [126] Sutherland asserted that the same could be done at Uintah. [127] S.Doc.No.212, LD 68, supra, at 109-120.

126 Act of June 18, 1878, ch. 266, 20 Stat. 165, LD 9.

127 Rep. Sutherland also drew as analogy the Uncompahgre Reservation. S.Doc.No.212, LD 68, at 116. The Utah delegation now tried to justify the opening of the Uintah Reservation by urging its similarity to the status of the Uncompahgre Reservation. Earlier, the opening of the Uncompahgre Reservation had been justified by the congressmen because its status was so different from the Uintah Reservation. See note 89 supra, and accompanying text.

[132]** Senator Rawlins' diminishment bill did not pass. [128] Other important language was, **[*1115]** however, included in the Indian Appropriations Act of 1902:

128 Had the Rawlins bill been enacted, the Uintah Reservation boundaries would clearly have been diminished. Compare Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977); Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980).

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: Provided, That persons entering any **[**133]** of the said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre; And provided further, That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; ...

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82 (emphasis added). The Act further provided that the mineral lessees and permittees in lieu of their leases could locate up to 640 acres of contiguous mineral lands upon the area to be restored to the public domain, with one exception: "the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease ..." Id., 32 Stat., at 264 (emphasis added). Proceeds from the entry of the restored lands were to be used first to pay the expenses incurred under the Act; the remainder to be used for the benefit of the Utes. Id. The Act additionally provided for payment of $ 60,064.48 to the Uintah and White River Utes "on account **[**134]** of the allotment of lands on the Uintah Reservation to Uncompahgre Indians," [129] and $ 10,000 for claims arising from the 1888 cession, discussed supra. Payment of the money was to be made "whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands ..." Id.

129 This was the amount paid to the United States from the Uncompahgre funds pursuant to the 1880 Agreement's and 1897 Act's requirement that they pay $ 1.25 an acre for their allotments. Id. 32 Stat. at 264; S.Rep.No.951, 57th Cong., 1st Sess., LD 69, at 3 (1902).

Though the legislative history of the 1902 Act is comparatively sparse, see 35 Cong.Rec. 3650-3651, 3711 (1902), LD 70; S.Rep.No.951, LD 69, supra, at 3, [130] it seems clear that Congress did not accept Rep. Sutherland's view that the reservation should be opened unilaterally; Indian consent conditioned all operative clauses of the Act. See Deseret Evening News, June 9, 1902, JX 148 at 1 (comments **[**135]** of Sen. Rawlins). [130A]

130 See also Deseret Evening News, Mar. 29, 1902, JX 131 at 1; Id., Apr. 2, 1902, JX 132, at 5; Salt Lake Herald, May 2, 1902, JX 134, at 1, 3; id., May 2, 1902, JX 136, at 1; id., May 8, 1902, JX 137, at 2.

130A The Tribe argues that the 1902 Act harmonizes with the provisions of the General Allotment Act of 1887, Act of Feb. 8, 1887, § 5, ch. 119, 24 Stat. 388, 389-390, I Kapp. 33 (2d ed. 1904), LD 13, whereas the Rawlins bill did not. Plaintiff's Post-Trial Brief at 67-68. This is correct. Cf. note 133, infra. From this, however, the Tribe infers that the intent of the 1902 Act necessarily intended to maintain the reservation's original boundaries. The Tribe carries the significance of the 1887 Act to the construction of the 1902 Act too far, as do the defendant counties. See pages 1150-1153 & notes 203-213, infra.

President Theodore Roosevelt signed the 1902 Act into law on May 28, 1902, 35 Cong.Rec. 6069 (1902), but not without serious concerns. The President objected **[**136]** in particular to the favored treatment that the Act afforded the mining lessees. [131] He **[*1116]** signed the bill upon assurances by influential congressmen that the Act would be amended to correct the offensive passages. [132] Some amendments were made by Joint Resolution of June 19, 1902:

131 See Salt Lake Herald, May 23, 1902, JX 140, at 2. The President also opposed making the payment to the Indians on their claims contingent upon Indian consent to allotment, and the small size of the proposed allotments. Salt Lake Herald, May 25, 1902, JX 142, at 1. An amendatory resolution was proposed in the Senate to meet the President's objections, id.; Deseret Evening News, May 23, 1902, JX 141, at 1; Salt Lake Herald, May 27, 1902, JX 143, at 1.

132 35 Cong.Rec. 6869 (June 16, 1902), LD 84 (remarks of Rep. Sherman); Deseret Evening News, June 16, 1902, JX 149, at 2. The mineral lease provisions were scandalized in the press. E.g., Deseret Evening News, June 7, 1902, JX 147, at 1.

Resolved ... That **[**137]** the provisions of the Act (of 1902) ... are hereby supplemented and modified as follows:

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live stock.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

The item of seventy thousand and sixty-four **[**138]** dollars and forty-eight cents appropriated by the Act which is hereby supplemented and modified, to be paid to the Uintah and White River tribes of Ute Indians in satisfaction of certain claims named in said Act, shall be paid to the Indians entitled thereto without awaiting their action upon the proposed allotments in severalty of lands in that reservation and the restoration of the surplus lands to the public domain.

32 Stat. 744, I Kapp. 799-800 (2d ed. 1904). [133]

133 The Joint Resolution also provided that:

Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled, "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," (the General Allotment Act) and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

The significance of this statute in this case is discussed at 1152-1153, infra.

The provision, supra, dealing with establishment of a grazing reserve was repealed by the Act of Mar. 3, 1903, 32 Stat. 982, 997-998, III Kapp. 18 (1913), LD 91.

[139]** The funding needed to execute the amended 1902 Act was not immediately forthcoming. A year later, in the Indian Appropriations Act of March 3, 1903, ch. 994, 32 Stat. 982, 997-998, III Kapp. 17-18 (1913), LD 91, Congress provided funds to do surveying and to carry out the 1902 Act. The 1903 Act further provided

> That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the Act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, cannot be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said Act ...

[*1117] 32 Stat., at 997-998 (emphasis added). [134] The time for opening the unallotted lands was extended to October 1, 1904. Id.

> 134 The Act also limited the grazing lands provided for in the 1902 Joint Resolution to 250,000 acres, to be located south of the Strawberry River. Id., 32 Stat. at 998. By an amendment offered by Senator Kearns of Utah, the Act opened mineral lands on the former Uncompahgre Reservation to entry. Senator Kearns commented,
>
> It has always been a pet scheme of mine to throw open these reservations, for I was convinced that the Indians were not making proper use of the land. And then again, I was opposed to such a large tract of land being practically unoccupied. You know a great deal of the best land in the state is embraced in these reservations, and we cannot well afford to keep out settlers.
>
> Deseret Semi-Weekly News, Mar. 30, 1903, JX 157, at 1; see also, id., Feb. 5, 1903, JX 156, at 5.

[140]** By letter of April 29, 1903, JX 133, 160, the acting Commissioner of Indian Affairs delivered formal instructions for allotting the Uintah Reservation to U. S. Indian Inspector James McLaughlin. See Instructions to J. McLaughlin, Esq., JX 133, 159. McLaughlin was instructed to meet in council with the Ute bands "and endeavor to obtain their consent to the allotment of lands." Id., at 5. [135] He met with the Uintah and White River Utes at the Uintah and Ouray Agency from May 18 through May 23, 1903. McLaughlin was in the peculiar position of one who was delegated to negotiate Indian consent to a chain of events that would occur regardless of the outcome of the negotiations. Accordingly, he argued to the Utes that they had no choice but to agree:

> 135 Of course, Indian consent was no longer necessary under the 1903 Act. On January 5, 1903, the Supreme Court announced its decision in Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903). Lone Wolf, "the Indians' Dred Scott decision," Sioux Nation of Indians v. United States, 220 Ct. Cl. 442, 601 F.2d 1157, 1173 (Ct.Cl.1979) (J. Nichols, concurring), held that Congress could allot and open an Indian reservation without tribal consent. In the 1903 Act and subsequent legislation Congress relied on Lone Wolf to act unilaterally in dealing with reservation lands. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 593 & n. 13, 595-599 & nn. 17, 19-20, 97 S. Ct. 1361, 1366 & n. 13, 1367-1369, 51 L. Ed. 2d 660 (1977).

[141]** INSPECTOR McLAUGHLIN: * * *

My friends, you want to get rid of this idea that you have the say whether your reservation can be opened or not. You are simply to say whether or not you will accept allotments. The survey for your reservation is already advertised for. The work will commence in a few months. After the survey is completed, allotments will be made.... This is the condition, my friends, and it is your duty to accept it gracefully because the law of the great council (Congress) has said so....

Minutes of councils with the Uintah and White River Ute Indians, JX 162, at 34 (1903). [136] The council reached immediate impasse, the Indians wholly opposed to the allotment and opening of the reservation and McLaughlin adamantly refusing to discuss the question. The Indians responded to McLaughlin's stubbornness with reciprocal obstinance, even humor:

> 136 Inspector McLaughlin's approach to the Utes was reminiscent of the Athenian's approach to the Melians recounted by Thucydides in his History of the Peloponnesian War (ca. 416 b.c.):
>
> ATHENIANS : Then we on our side will use no fine phrases saying, for example that we have a right to our empire because we defeated the Persians, ... a great mass of words that nobody would believe.... Instead we recommend that you should try to get what it is possible for you to get, taking into consideration what we both really do think; since you know as well as we do that when these matters are discussed by

> practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.
>
> Thucydides, The Peloponnesian War, 401-402 (Penguin ed. 1954). As the City of Melos was besieged and captured by the Athenians, so the Uintah Reservation was allotted and opened by the Government against its residents' wishes.

[142]** QUINN: * * *

Where did you find the key to this reservation to open it? That's the reason I don't understand even if you do say it is provided for. I don't believe it. You say you are here, and that you have this paper as your authority.

[*1118] If they find the key to this reservation, to open it we will give it to you. You come and throw it on the table and say, "Here, I have the key to this reservation. Throw it down here so I can see it. When you throw your key to the reservation out here, I will believe you.

INSPECTOR McLAUGHLIN: * * *

I feel, my friends that I have done my duty in this matter. I have explained it so clearly that you cannot fail to understand it fully, but it is very difficult to convince persons who do not want to be convinced....

Id., JX 162, at 66, 71.

Inspector McLaughlin reported to the Secretary of the Interior on May 30, 1903 that of 280 adult male Uintah and White River Utes, he was able to secure the signatures upon the assent to the allotment statute of only 82 of the Indians:

> I deemed it proper to transmit the same, but with the explanation that the signers were as much opposed to the opening **[**143]** of the reservation without consulting the Indians as the non-signers were, but they thus expressed their acceptance of the law to show their good will and readiness to comply with the wishes of the Government.

Letter from Insp. McLaughlin to the Secretary of the Interior of May 30, 1903, JX 165, at 5 (emphasis added), reprinted in H.Doc.No.33, 58th Cong., 1st Sess., LD 92, at 3-7 (1903). According to McLaughlin, the Indians were "unanimously opposed to the opening of their reservation under the provisions of the Act," id., at 8.

> Those of the Indians who signed the acceptance of the Act, did so, as heretofore stated, to show their good will, and many others would doubtless have signed had there been anything to be gained by their doing so. They fully understood that they were to have land allotted to them whether they consented to the Act or not, and having nothing to lose by refusing to assent to the provisions of the Act they declined to sign and thus became a party to that which was distasteful to them. ...

Id., JX 165, at 9.

Indian consent to the opening of the Uintah Reservation was wholly lacking in 1903, and never subsequently appeared. While several exhibits **[**144]** make reference to the "ceded" lands of the Uintah Reservation, these references are erroneous. [137] No cession of Uintah Reservation lands after 1888 was agreed to by even a simple majority of the Utes. Nor was cession language used in any of the relevant legislation affecting the Uintah Reservation. The absence of those "disestablishment factors" [138] distinguishes at least in part the circumstances found in DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 97 S. Ct. 1361, 51 L. Ed. 2d 660 (1977). Such an agreement of cession had been concluded by the Sioux and ratified by Congress in DeCoteau and had been agreed to by a majority of the Sioux and enacted in unilaterally amended form in Rosebud ; both of those acts contained express language of cession. To the extent that Indian consent and express language of cession in DeCoteau and Rosebud aided the Court "in determining that congressional intent was to terminate the Reservation," [139] that aid is wholly absent here.

137 E. g., Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, LD 139 (refers only to 1902 Act); Act of Mar. 3, 1911, 36 Stat. 1058, 1074, LD 141; H.Rep.No.70, 77th Cong., 1st Sess., LD 179, at 3 (1941); 74 Cong.Rec. 3408 (Jan. 28, 1931), LD 166 (remarks of Rep. Leavitt) (Reprinted document refers to nonexistent 1905 agreement. Cf. Rept. of the Comm. of Ind. Aff., 1906, JX 334, at 78); Letter from the Comm., Gen. Land Off. to the Comm. of Ind. Aff. of Sept. 28, 1922, JX 403 ("ceded Uintah lands").

[145]**

138 Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 599 n. 13, 97 S. Ct. 1361, 1369, 51 L. Ed. 2d 660 (1977).

139 Id., at 598 n. 13.

The discussions in council did move Inspector McLaughlin to suggest amendments to the opening legislation to provide for creation of Indian timber and coal reserves **[*1119]** for use by the Utes following allotment. See also Letter from Comm. of Ind. Aff. to the Secretary of the Interior of July 18, 1903, JX 167 (transmitting McLaughlin's recommendations); Letter from the Secretary of the Interior to the Comm. of Ind. Aff. of Aug. 25, 1903, JX 172 (recommendations should be transmitted to next session of Congress). On November 23, 1903, Interior submitted an amendment to the Indian Appropriations bill for 1904 embodying McLaughlin's recommendations. S.Doc.No.159, 56th Cong., 3d Sess., LD 101, at 3 (1905).

Though the timber and coal reserves proposal did not pass, Interior succeeded in securing congressional approval of an additional extension of the time for opening the reservation to March 3, 1905. Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-208, **[**146]** III Kapp. 35, 53 (1913), LD 94. In July the Secretary authorized the Uintah agent to proceed with allotting lands at Uintah to the Uncompahgres, and in November, expanded that authority to include allotments for the Uintah and White River Utes. S.Doc.No.159, LD 101, supra, at 3. [140] Problems confronting the agent and the Office of Indian Affairs ranged from surveying matters, [141] to problems with mines and prospectors, [142] selection of the Indian grazing reserve [143] and protection of water rights for the Indian allottees. [144] Federal **[*1120]** troops were requested to aid Acting Agent Hall in patrolling the Uintah Reservation and expelling "sooners," prospectors and other unauthorized trespassers. Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of March 1, 1905, JX 226; e.g., Letter from Secretary of Interior to the Comm. of Ind. Aff. of June 6, 1905, JX 272. While authority was granted to the Uintah Railway Co. to enter the reservation to survey a right-of-way to be secured under the Act of Mar. 2, 1899, [145] entry by other non-Indians was generally prohibited. The agent restricted travel upon roads passing through the reservation, with the approval of **[**147]** the Commissioner of Indian Affairs. [146]

140 See Letter from Acting Comm. of Ind. Aff. to Rep. Murdock of July 26, 1904, JX 189; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Aug. 27, 1904, JX 193; Letter from Acting Agent Hall to Comm. of Ind. Aff. of Oct. 17, 1904, JX 199. The agent soon requested additional time, pointing out that the opening date of Mar. 10, 1905 required allotment to be completed in "the most extreme" weather. Letter from Acting Agent Hall to Comm. of Ind. Aff. of Dec. 14, 1904, JX 207. By letter of the same date, Hall requested that tracts of land be set aside for timber, coal, school grounds and other agency purposes. Id., JX 208. Ten days later the Acting Commissioner informed Hall that a proposal for an extension until Oct. 1, 1905 had been submitted to Congress. Letter of Dec. 24, 1904, JX 209.

141 Letter from U.S. Surveyor-General for Utah to the Comm., Gen. Land Office of July 28, 1903, JX 169; Letter from Acting Comm., Gen. Land Office to Comm. of Ind. Aff. of Aug. 4, 1903, JX 171; Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 30, 1904, JX 181; Letter from the Acting Director, U.S.G.S. to the Secretary of the Interior of May 9, 1904, JX 182; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Aug. 15, 1904, JX 191; id., Aug. 27, 1904, JX 194; Rept. of the Comm., Gen. Land Office, 1904, JX 196, at 1374. Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 31, 1905, JX 243; S.Doc.No.159, 58th Cong., 3d Sess., LD 101 (1905).

[148]**

142 See Letter from Acting Comm. of Ind. Aff. to Messrs. Chrystie, Brightman & Douglass of July 28, 1904, JX 190; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 19, 1904, JX 202; Letter from Secretary of the Interior to Raven Mining Co. of Dec. 14, 1904, JX 206; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 15, 1905, JX 233.

143 See Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 17, 1904, JX 201; Letter from the Secretary of the Interior to the Comm. of Ind. Aff. of Dec. 13, 1904, JX 205; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of May 13, 1905, JX 264; see also Petition to the Secretary of the Interior of Oct. 22, 1904, JX 203 (lands south of Strawberry River are rich in minerals; should not be reserved for Indian grazing).

144 Between 1899 and 1902, Cyrus Cates Babb was assigned to make a hydrological survey of the Uintah Reservation for the U.S. Geological Survey. In his report, Babb recommended that steps be taken to protect the Indians' rights to the water, a supply which would fall

short of the demand if the reservation was opened. H.Doc.No.671, 57th Cong., 1st Sess., LD 86 (1902). Babb recommended that an Indian irrigation system be implemented quickly. Id. Water rights protection became a significant concern in the administration of the reservation. See Letter from the Director, U.S.G.S. to the Secretary of the Interior of May 15, 1903, JX 161; Letter from the Acting Secretary of the Interior to the Comm. of Ind. Aff. of May 21, 1903, JX 163 (no rights for taking water off of reservation should be granted); Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of July 27, 1903, JX 168; Letter from Director, U.S.G.S. to the Secretary of the Interior of May 9, 1904, JX 182; Letter from the Acting Comm., Gen. Land Off. to the Comm. of Ind. Aff. of June 6, 1904, JX 183; id., June 27, 1904, JX 184; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 17, 1904, JX 200; id., Jan. 23, 1905, JX 217; id., Mar. 29, 1905, JX 241; id., Apr. 7, 1905, JX 246; id., Apr. 11, 1905, JX 248; Letter from Citizens' Committee to the Secretary of the Interior of Mar. 30, 1905, JX 242; Letter from Sen. Smoot to the Secretary of the Interior of Apr. 18, 1905, JX 251; Letter from Ass't. Atty. Gen. to the Secretary of the Interior of May 11, 1905, JX 262; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of May 11, 1905, JX 263; Letter from the Secretary of the Interior to the Comm. of Ind. Aff. of May 16, 1905, JX 268; Letter to Acting Agent Hall from Comm. of Ind. Aff. of May 17, 1905, JX 269. The agency officials were particularly concerned with the impact of state water law on Ute water rights. See Letter from Agency Engineer to the Secretary of the Interior of Apr. 24, 1905, JX 252; id., May 4, 1905, JX 259; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Apr. 27, 1905, JX 254; Letter from the Director, U.S.G.S. to the Secretary of the Interior of May 2, 1905, JX 258; Letter from State Engineer to Agency Engineer of May 15, 1905, JX 266; Letter from Agency Engineer to State Engineer of May 23, 1905, JX 270; Letter to Agency Engineer from State Engineer of June 8, 1905, JX 273; Letter from Agency Engineer to the Secretary of the Interior of June 15, 1905, JX 275; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Oct. 27, 1905, JX 325; id., Nov. 17, 1905, JX 327; Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Oct. 13, 1906, JX 335. In a letter from Acting Agent Hall to the Comm. of Ind. Aff. of July 5, 1905, JX 279, it was recommended that additional lands be reserved along the streams in order to control access to the streams by non-Indian users. Such lands were so reserved. Letter from Acting Comm. of Ind. Aff. to Acting Agent Hall of Aug. 5, 1905, JX 304; Presidential Proclamation of Aug. 3, 1905, 34 Stat., pt. 3, 3141, LD 112; id. of Aug. 14, 1905, 34 Stat., pt. 3, 3143 LD 114.

[149]**

145 Ch. 374, 30 Stat. 990, I Kapp. 102-104 (2d ed. 1904); Letter from the Acting Comm. of Ind. Aff. to the Secretary of the Interior of Mar. 9, 1905, JX 231.

146 See Letter from Acting Comm. of Ind. Aff. to the Secretary of the Interior of June 23, 1905, JX 277. The Secretary of the Interior himself disapproved a proposal for a new state road from Vernal to Park City and Ogden, Utah on the ground that its construction "would be detrimental to the interests of the reservation, ...". Letter from the Secretary of the Interior to the Comm. of Ind. Aff. of Mar. 18, 1905, JX 234; Application to the Secretary of the Interior, Nov. 21, 1904, JX 234; Letter from Acting Agent Hall to the Comm. of Ind. Aff. of Feb. 2, 1905, JX 234.

Meanwhile, Congress was inquiring of the Secretary as to the progress being made towards opening. S.Res., 39 Cong.Rec. 1863 (Feb. 4, 1905). The Secretary submitted a report and documents indicating that more time was needed to complete the allotment process. S.Doc.No.159, 58th Cong., 2d Sess., LD 101 (1905). Senator Smoot further had introduced bills dealing with the **[**150]** opening of the Uintah Reservation. S. 6867 provided in part:

> That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, shall be disposed of under the general provisions of the homestead and townsite laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied or entered by persons entitled to make entry thereof; ...

S. 6867, 58th Cong., 3d Sess., LD 97, at 1-2. S. 6868 provided for reservation of Uintah timber lands for inclusion in the Uinta Forest Reserve. The described lands were to be "maintained as a national forest reservation," to be "subject to all the general laws, rules, and regulations now and hereafter in force for national forest reserves," and were to be "free from any claims of the Uintah and White River tribes of the Ute Indians except for rights and privileges specifically reserved to them in this Act; ..." LD 98, at 6. The bill provided for creation of Indian timber and coal reserves within the Uintah Forest Reserve to be administered under forest reserve regulations. **[**151]** The **[*1121]** third bill, S. 6869, LD 99, consented to suit in the Court of Claims by the Utes on questions arising under the first two bills.

Though not enacted themselves, the provisions of S. 6867 and 6868 were substantially included in the Indian Appropriations Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105 (see Appendix A for text). In pertinent part the 1905 Act provided:

> That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of **[**152]** under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: ....
>
> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm **[**153]** such rights to water thereon as have already accrued: Provided, That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.

33 Stat., at 1069-1070 (emphasis added).

Additional provisions of the Act repealed the requirement that the Indian grazing lands be located south of the Strawberry River, protected the homestead rights of veterans, provided that unentered lands were subject to limited sale five years hence and readopted the 1902 Act's distribution of proceeds from entry into the lands. While preserving the mineral rights on the Uintah Reservation created by the 1902 Act's lease conversion provisions, [147] the 1905 Act materially **[*1122]** altered the operative statutory language governing the opening of the Uintah Reservation to non-Indian entry and settlement.

147 Special provision was made for settling the mining claims of the major mineral operators on the Reservation, the Florence and Raven Mining Companies:

> That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two; and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each of said claims: Provided further, That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: And provided further, That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right to ingress and egress to and from their respective properties over and through said reservation.
>
> The press, particularly The Denver Post, had earlier styled the favored treatment of the mining companies as the foundation of "a gigantic land steal," id., Jan. 16, 1905, JX 212. See also Deseret Semi-Weekly News, Jan. 19, 1905, JX 213, at 1; id., Jan. 23, 1905, JX 215, at 5. Congress apparently was not dissuaded.

[154]** Without much question, opening of the Uintah Reservation under the original terms of the 1902 Act [148] would have accomplished the termination of the reservation; the unallotted lands were to be "restored to the public domain" language precisely suited to disestablishment under Seymour v. Superintendent, 368 U.S. 351, 354-356, 82 S. Ct. 424,

426-427, 7 L. Ed. 2d 346 (1962), and Mattz v. Arnett, 412 U.S. 481, 504 n. 22, 93 S. Ct. 2245, 2257, 37 L. Ed. 2d 92 (1975). The impact of the 1902 Act on the Uintah Reservation's boundaries was clear at least in the mind of Rep. Sutherland of Utah:

148 The reference herein to the "1902 Act" includes the relevant portions of the Act of May 27, 1902, 32 Stat. 245, LD 82, as amended by the Joint Resolution of June 19, 1902, 32 Stat. 744, LD 85.

Mr. Chairman, at the last session of Congress (1902) we provided for opening the Uintah Indian Reservation. This bill makes an appropriation of a large part of the $ 175,000 mentioned in the preceding paragraph for this purpose. **[**155]** This is appropriated for making surveys for allotments and such other surveys as may be necessary to carry that out into operation. If the Uintah reservation is opened, ... this appropriation of $ 6,000 for reestablishing the boundary lines of the reservation is entirely useless. The boundary lines have been in their present condition for many years, and if by any mischance the reservation should not be opened it will not hurt to let it wait for another year; and if the reservation is opened it is simply an appropriation of $ 6,000 without any useful purpose whatever. I think it should be stricken from this bill.

The reservation will be simply restored to the public domain....

36 Cong.Rec. 1388 (Jan. 28, 1903), LD 90 (emphasis added).

The Tribe argues to the contrary, relying heavily upon the repeated references to the "opening" of the reservation as mitigating the plain meaning of the 1902 Act; a reservation that is "opened", so the argument goes, is not abolished, disestablished, diminished, or terminated. Plaintiff's Post-Trial Brief at 65-80.

There is no question that the Uintah Reservation was "opened" to non-Indian entry and settlement. All of the reservations **[**156]** examined in Rosebud, DeCoteau, Mattz, Seymour, and United States v. Celestine, 215 U.S. 278, 30 S. Ct. 93, 54 L. Ed. 195 (1909), and in the numerous cases decided by the Courts of Appeals, were "opened" to non-Indian entry and settlement. Some of those reservations have been disestablished or diminished; others have not. The fact of opening merely leads to the next step in the inquiry. It is the substantive manner of opening that has been decisive in this **[*1123]** line of cases and it is the manner of opening that is decisive here.

The manner of opening under the terms of the 1902 Act, restoration of unallotted lands to the public domain, by definition would have ended the reservation status of those lands. The 1903 and 1904 Acts speak of "opening" the Uintah Reservation under the 1902 Act rather than "terminating" it or "abolishing" it, but the operative 1902 public domain language remained in force. The Uintah Reservation, however, was not opened under the 1902 restoration language. [149] It was opened under the 1905 Act, which provides expressly that "the manner of opening such lands for settlement and entry, and for disposing of the same" shall be that the unallotted lands, **[**157]** excepting national forest [149A] and mineral lands, "shall be disposed of under the general provisions of the homestead and townsite laws of the United States" not all the land laws of the United States, as at Uncompahgre in 1897: only the homestead and townsite laws.

149 As a practical matter, the effort to disestablish the Uintah Reservation under the 1902 Act failed of its purpose as similar legislative proposals abolishing the Klamath River Reservation had failed of enactment in Mattz. The 1905 Act herein reflects as much a retreat from the intent to terminate the affected reservation as the 1892 Act in Mattz.

149A As to the status of the national forest lands, see 1135-1141, infra.

In this respect the 1905 Act closely resembles the 1906 legislation that opened but did not disestablish the Colville Reservation in Seymour, [150] and the 1892 Act that opened but did not disestablish the Klamath River Reservation in Mattz. [151] In fact, the defendants cite no disestablishment case holding limited **[**158]** entry under the mineral,

homestead and townsite laws to be statutory language "precisely suited to disestablishment," Rosebud Sioux Tribe v. Kneip, 430 U.S. at 597, 97 S. Ct. at 1368. [152] To the contrary, Indian reservations opened under such provisions have consistently been held to remain in existence. United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977) (surplus lands on Standing Rock Reservation disposed of "under the general provisions of the homestead and townsite laws of the United States," mineral lands to be reserved for late disposition. Act of Feb. 14, 1913, ch. 54, 37 Stat. 675, III Kapp. 555-558); United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated as moot, 446 U.S. 980, 100 S. Ct. 2959, 64 L. Ed. 2d 836 (1980) (surplus land on the Cheyenne River Reservation disposed of "under the general provision of the homestead and town site laws of the United States," school sections and coal lands to be reserved. Act of May 29, 1908, ch. 218, 35 Stat. 460, III Kapp. 373-377 (1913)) United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973) cited with approval in Mattz, supra, 412 U.S. 481, 505 n.23, 93 S. Ct. 2245, 2258, 37 L. Ed. 2d 92 (1973) (same); **[**159]** City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972) (surplus lands of the Fort Berthold **[*1124]** Reservation disposed of under "the provisions of the homestead, mineral and townsite laws of the United States," tribal forest lands and state school lands reserved. Act of June 1, 1910, §§ 8, 9, ch. 264, 36 Stat. 455, III Kapp. 462-466 (1913)). [153]

150 The Act of Mar. 22, 1906, § 3, ch. 1126, 34 Stat. 80 III Kapp. 163-165 (1913) provides that the unallotted lands of the Colville Reservation shall be classified by the Secretary as irrigable, grazing, timber, mineral, or arid lands and, except for the mineral lands which are to be entered under the general mining laws, "such surplus lands shall be open to settlement and entry under the provisions of the homestead laws ..." as well as to selection for townsite purposes under § 11 of the Act. Seymour found no intent to disestablish the opened reservation. 368 U.S. at 356, 82 S. Ct. at 427.

151 The Act of June 17, 1892, ch. 120, 27 Stat. 52, I Kapp. 439 (2d ed. 1904), provides that the unallotted lands of the Klamath River Reservation are "declared to be subject to settlement, entry, and purchase under the laws of the United States granting homestead rights and authorizing the sale of mineral, stone, and timber lands ..." The provisions of the 1892 Act, the Court said in Mattz, "do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation." Id., 412 U.S. at 497, 93 S. Ct. at 2254.

[160]**

152 While the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254 III Kapp. 71, 74 (1913), construed by the Supreme Court in Rosebud, used homestead and townsite language, the Court cited express language of cession also found in that act as the "language precisely suited to disestablishment." The Supreme Court has never treated such limited provisions, standing alone, as express language of termination.

153 Interior Solicitor Mitchell Melich reached the same conclusion regarding Fort Berthold in a memorandum of March 13, 1970 which reversed an earlier Departmental position. M-36802 in 2 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 2009-2013 (1979).

At least one court has concluded that specification of the townsite laws in the opening legislative justifies an inference of continued reservation status:

(If) the opened land was still a part of the Reservation, the townsite laws would not be applicable, and an express statement by Congress was required to make them applicable. It may reasonably be inferred that in including this provision, Congress recognized that the townsite laws would not otherwise have been applicable.

Confederated Salish and Kootenai Tribes v. Namen, Civ. No. 2343 (D.Mont., dec. Sept. 20, 1979) at 21.

[161]** The Presidential Proclamation of July 14, 1905, 34 Stat. pt. 3, 3119, III Kapp. 605-608 (1913), LD 108, [154] opening the Uintah Reservation to non-Indian settlement parallels the terms of the 1905 Act:

154 See Appendix A, infra, for complete text.

* * * I, Theodore Roosevelt, President of the United States of America, by virtue of the power in me vested by said Acts of Congress, do hereby declare and make known that all the unallotted lands in said reservation, excepting such as have at that time been reserved for military, forestry and other purposes and such mineral lands as may have been disposed of under existing laws, will on and after the 28th day of August, 1905, in the manner hereinafter prescribed, and not

otherwise, be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws of the United States; ...

Id., LD 108, 34 Stat., pt. 3, at 3120, III Kapp. at 606 (emphasis added). [155] Related proclamations issued in 1905 refer to provisions **[**162]** of the 1905 Act as authority, not the 1902 Act. [156]

155 This proclamation was amended on August 2, 1905 to expand the number of applications drawn at random on the first two opening days. 34 Stat., pt. 3, 3140, III Kapp. 610 (1913) LD 111.

156 Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602-605 (1913), LD 107 (Uintah forest reserve lands); id., of Aug. 3, 1905, 34 Stat. pt. 3, 3141, III Kapp. 610-612 (1913), LD 112 (reservoir and agricultural lands); id., of Aug. 14, 1905, 34 Stat. pt. 3, 3143, III Kapp. 612-613 (1913), LD 113 (additional townsites); id. of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 613-614 (1913) LD 114 (reservoir lands). See Appendix A, infra, for the text of the proclamations.

Meanwhile, the Indian agency officials who formed an allotting commission had proceeded to complete the allotment distribution among the Uintah and White River Utes and other preparations for the opening pursuant to the 1905 Act and the proclamations issued under it. **[**163]** [157] A schedule of allotments **[*1125]** was submitted by the Commission to the Commissioner of Indian Affairs on June 23, 1905. Letter from Ute Allot. Comm. to Comm. of Ind. Aff. of June 23, 1905, JX 278. The schedule was duly approved by the Secretary of the Interior on July 18, 1905. Letter from the Acting Secretary of the Interior to the Comm. of Ind. Aff. of July 18, 1905, JX 292. The reservation was to be opened pursuant to the "Rosebud Regulations," a random selection, controlled entry procedure applied the year before in the opening of the Rosebud Reservation in South Dakota. [158] See Deseret Evening News, July 8, 1905, JX 282, at p. 5; Deseret Semi-Weekly News, Mar. 20, 1905, JX 236 at 2; 39 Cong.Rec. 1183-1184 (Jan. 21, 1905), LD 103 (remarks of Rep. Sherman); note 169, infra.

157 The commission consisted of Acting Agent Hall, Agency Engineer W. H. Code, and Mr. Chas. Carter, a prominent local citizen. Rept. of the Comm. of Ind. Aff., 1905, JX 323, at 146. Some problems facing the commission were reported by the Chief Engineer for the Agency, W. H. Code:

In company with Captain Hall I have spent a considerable time in examining the desirable lands of the reservation, and find the situation somewhat disappointing, as will many prospective settlers who now regard this as a land of milk and honey. The very best tracts of irrigable lands are located on the tops of high plateaus from two to four hundred feet higher than the adjoining river valleys. Water could only be placed on these plateaus at great expense, owing to the many miles of steep sidehill work, flumes, tunnels, etc., which it would be necessary to construct before water could reach the desired areas. The river valleys and lower benches near the streams upon which the Indians desire to be located, are interspersed with areas and ridges of rocky soil which would discourage any New England farmer. Much of the bench land joining the Uintah River on the west is practically a huge bed of boulders mixed with a small percentage of sand and clay and covered with a few inches of loam. On the valley lands immediately joining the streams, alkali is found in patches, and, in fact, the latter appears soon after irrigation begins even on the higher benches. Of course there are many tracts of very fair land, but it will not be easy to make the selections of good land in the limited time at our command.

Letter from Agency Engineer to the Secretary of the Interior of May 4, 1905, JX 259.

[164]**

158 Counsel for the defendant counties asserts that use of the Rosebud Regulations is "particularly significant" to the boundary issue considered here. Counties' Post-Trial Brief at 46 n. 56. That procedurally the government provided for opening the reservation to less than a wholesale land rush indicates little about the substantive operation of the 1905 Act. See pages 1127-1133, infra.

While the press was reporting that the Indians were content with the ongoing process of allotment and opening of the Uintah Reservation, e.g., Deseret Semi-Weekly News, Apr. 13, 1905, JX 250, at 5, all was not well. A Ute delegation had traveled to Washington in March, communicating their strong opposition to the forthcoming events. See Deseret Evening News, Mar. 18, 1905, JX 235, at 2; id., Mar. 22, 1905, JX 237, at 2. As spring turned to summer, rumors of a possible armed uprising by the Utes circulated and were investigated and disproved by federal officials. [159]

159 See Letters from Acting Comm. of Ind. Aff. to the Secretary of the Interior of May 5, 1905, etc., JX 260 (6 documents). An agent of the American Asphaltum & Rubber Co. reported that the White River Utes were "purchasing astonishing quantities of rifles and ammunition" and also "indulging in war dances," with the intent "to clean out all the white men in sight." Id., JX 260, at 1. Lt. Col. F. West, Inspector General for the Army's Southwestern Division, reported that though the White River Utes were talking of moving back to Colorado, the merchants in Vernal and elsewhere "claim that the sales to the Indians (of weapons) are not as large this year as they were last year." There would be no "uprising." Id., JX 260. See also Letter from Acting Agent Hall to the Comm. of Ind. Aff. of May 13, 1905, JX 265 (agent taking precautions to avoid incidents upon opening).

[165]** By a series of proclamations issued by President Roosevelt, Uintah Reservation lands were withdrawn for incorporation in the Uintah Forest Reserve, [160] set aside for reservoir purposes [161] and designated as townsites. [162] Interior officials additionally designated reservation lands for various purposes relating to the Indians, exempting those lands from homestead entry. [163] Of the reservation area of over two million acres, 1,010,000 acres were added to the Uintah Forest Reserve, 2,100 acres designated in townsites, 60,160 acres set aside for reclamation and reservoir purposes, 2,140 acres entered as mining claims, and 1,004,285 were opened to homestead entry. 282,460 acres were reserved for various purposes as "unallotted tribal lands." Rept. of the Comm. of Ind. Aff., 1905, JX 323, at 501.

160 Presidential Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602-605, LD 107.

161 Presidential Proclamation of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 613-614, LD 114, modifying id. of Aug. 3, 1905, 34 Stat., pt. 3, 3141, III Kapp. 610-612, LD 112.

162 Presidential Proclamation of July 31, 1905, 34 Stat., pt. 3, 3139, III Kapp. 609, LD 110, id. of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 612-613, LD 113.

[166]**

163 See Rept. of the Comm. of Ind. Aff., 1905, JX 328, at 1893:

The (Indian) grazing land, approximating but not exceeding 250,000 acres, for the most part lies along the boundary of the forest reserve in townships 1 and 2 north, ranges 1 to 9 inclusive, west, and also along the White Rock River. Small tracts have been reserved for timber, coal, burial grounds, school sites, and similar purposes necessary in aid of the civilization and uplifting of these people.

[*1126] Even with the restraints applied under the Rosebud Regulations, the opening of the reservation on August 28, 1905 triggered its own land rush. Hundreds of people made homestead entries on the Uintah lands, far more than could be provided with good lands. Much of the intended farmland was at best marginal, as barren as Brigham Young's survey team had found it in 1860.

> The new settlers were almost immediately in trouble. By 1912 enough of them were so poverty stricken they went to Senator Reed Smoot asking for an act of Congress to place a moratorium on land payment.

O'Neil, The Reluctant Suzerainty: "The Uintah **[**167]** and Ouray Reservation," 39 Utah Historical Quarterly 129, 140 (Spring 1971), JX 478. A number of Utes felt wholly alienated by the situation. Over 400 Utes, mainly White Rivers led by Red Cap, left the Uintah Reservation in 1906 on an exodus to the Sioux Reservations of the Dakotas, hoping to enter into an alliance with the Indians there. No such alliance came to be. "After two years of dislocation, and poverty, the wandering Utes returned to Utah no better off than when they left. The only reason they refrained from fighting was the lack of any hope of success." Id., JX 478, at 141 (footnote omitted). The "Absentee Utes" returned to the Uintah Reservation in 1908. See O'Neil, "An Anguished Odyssey: The Flight of the Utes, 1906-08," 36 Utah Historical Quarterly 315 (Fall 1968), JX 472; Rept. of the Comm. of Ind. Aff., 1906, JX 334 at 78-79; id., 1907, JX 337, at 121-127; id., 1908, JX 342 at 120-123.

In his annual report for 1905, the Commissioner of Indian Affairs observed:

> The future of these Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate. The circumstances are such that delay **[**168]** or hesitation will be fatal because all rights to waters in Utah are based on the priority of use. It is believed that an appropriation of not less than $ 500,000 for irrigation for the Utes should be asked for at the next session of Congress....

JX 328, at 1893.

Irrigation and water rights protection was a matter of constant concern to the Uintah and Ouray Agency. [164] The Commissioner's recommendation was realized in 1906 through the creation of the Uintah Irrigation Project. See Act of June 21, 1906, ch. 3504, 34 Stat. 325, 375-376, LD 127. [165]

164 See e.g., Letter from the Acting Comm. of Ind. Aff. of Oct. 13, 1906, JX 335; Letter from Acting Comm. of Ind. Aff. to Supt. of Irrig., Uintah & Ouray Agency of Sept. 26, 1907, JX 336; Letter from Ass't. Secretary of the Interior to Comm. of Ind. Aff. of Nov. 8, 1907, JX 338; Letter from Chief Clerk, Off. of Ind. Aff. to Supt. of Irrig., Uintah & Ouray Agency of Nov. 11, 1907, JX 339; Letter from the Comm. of Ind. Aff. to the Secretary of the Treasury of Dec. 19, 1908, JX 341; Letter from Comm. of Ind. Aff. to the Secretary of the Interior of Feb. 3, 1911, JX 345; Letter from Ass't. Comm. to Engineer, Uintah Irrig. Proj. of June 7, 1913, JX 361; Rept. of the Secretary of the Interior, 1915, JX 369, at 54-55; Letter from the Ass't. Atty. Gen. to the Secretary of the Interior of Apr. 26, 1916, JX 377.

In July, 1916, the United States Attorney filed United States v. Dry Gulch Irrigation Co., No. 4418 in this Court to enjoin interference by white homesteaders with the federal canals and rights-of-way in the Uintah Irrigation Project. Complaint, No. 4418, JX 379. See Rept. of the Comm. of Ind. Aff., 1916, JX 381, at 46; Letter from Ass't. Secretary to Supt. of Irrig. of Feb. 23, 1917, JX 383; Rept. of the Comm. of Ind. Aff., 1917, JX 387, at 36 (U.S. Dist. Ct. issued restraining order, appt'd. commissioner); see also, H.Doc.No.1250, 63d Cong., 3d Sess., LD 149 (1914); O'Neil & Mackay, "A History of Uintah-Ouray Ute Lands," JX 483, at 34-35 (1977).

[169]**

165 O'Neil & Mackay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 34 (1977):

> The project eventually covered 80,000 acres, most of the allotted lands, and contained 22 canal systems which diverted water from most of the streams in the Uintah Basin. A program was initiated to level, clear, plow, and fence the Indian allotments to get them into cultivation. Tribal funds were used for this purpose. By 1908 over $ 330,000 had been spent on the irrigation project; less than $ 7,000 had been paid to Indian laborers. Under the Act of April 30, 1908, authority was granted the Secretary of the Interior to lease any irrigable allotment with the consent of the allottee. At the same time the Ute people were permitted to sell allotments as soon as they were ready for farming. Out of 80,000 acres within the irrigation project, about 25,000 acres were sold to non-Utes.

[*1127] Under one of the Presidential Proclamations issued under the 1905 Act, approximately 56,000 acres in the Strawberry Valley had been reserved for use in Indian irrigation projects. [166] However, the land was already under **[**170]** study by the U. S. Reclamation Service for a major reservoir project, a project the plans for which were approved by the Secretary of the Interior in 1905. The Reclamation Service offered to purchase the reserved Ute lands at $ 1.25 per acre. The offer was refused. Ann. Rept. of the U. S. Reclamation Service, 1909-10, at 268-269. In 1910, Congress appropriated the lands by statute:

166 Proclamation of Aug. 14, 1905, 34 Stat., pt. 3, 3143, III Kapp. 613-614, LD 114.

> (T)he Secretary of the Interior is hereby authorized to pay from the reclamation fund for the benefit of the Uintah Indians the sum of one dollar and twenty-five cents per acre for the lands in the former Uintah Indian Reservation, in the State of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, ... All right, title and interest of the Indians in the said lands are hereby extinguished, and the title management and control thereof shall **[**171]** pass to the owners of the lands irrigated from said project whenever the management and operation of the irrigation works shall so pass under the terms of the Reclamation Act.

Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, III Kapp. 429, 445, LD 139 (emphasis added). See also S.Rep.No.214, 61st Cong., 2d Sess., LD 138 (1910). By 1910, the statutory framework governing the opening of the Uintah

Reservation had been established. What was the legal impact of these statutes upon the territorial boundaries of the Uintah Reservation?

As discussed above, nothing in the operative language of the Act of March 3, 1905, 33 Stat. 1048, 1069, LD 105, expressly terminated the reservation status of the unallotted Uintah lands not withdrawn for forest reserve or reclamation purposes. [167] The applicable Presidential Proclamations track the language of the 1905 Act. No agreement for the cession of the unallotted lands was ever concluded, and the relevant statutes include no cession language. Cf. Rosebud Sioux Tribe v. Kneip, supra.

167 The status of the national forest and Strawberry Reservoir lands is determined infra, at 1135-1142.

[172]** To find the disestablishment of the Uintah Indian Reservation that the defendants assert, the record herein must satisfy the requirement that "(a) congressional determination to terminate (an Indian reservation) must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," Rosebud, supra, 430 U.S. at 586, 97 S. Ct. at 1362, quoting Mattz, supra, 412 U.S. at 505, 93 S. Ct. at 2258. Such intent was not expressed on the face of the 1905 Act; this Court will now look to the legislative history and circumstances surrounding the opening of the Uintah Reservation in search of congressional intent.

The legislative history of the Act of Mar. 3, 1905, 33 Stat. 1048, commences with the introduction of the Indian Appropriations bill for 1905-1906, H.R.17474, in the House. See H.Rep.No.3472, 58th Cong., 3d Sess. (1905). Language had been included in the bill to change the existing law on the opening of the Uintah Reservation:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah, as provided by the acts of May 27, 1902 and March 3, 1903, and April 21, 1904, be, and the same is hereby, extended to **[**173]** October 1, 1905 : Provided, That so much of said land as will be under the provisions of said acts restored to the public domain shall be open to settlement and entry by proclamation **[*1128]** of the President of the United States, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied and entered by persons intending to make entry thereon; ...

39 Cong.Rec. 1180 (Jan. 21, 1905), LD 103 (emphasis added). Amendments were offered on the floor of the House to modify the proposed language. One offered by Representative Sherman and passed by the House added to the date extension the following language: "unless the President shall determine that the same may be opened at an earlier date." Id. Representative Howell of Utah offered substitute language which read in part as follows:

> That the time for opening the unallotted lands to public entry on the Uintah Reservation in Utah having been fixed as the 10th day of March, 1905, it is hereby provided that so much of said lands as will be under the provisions of said acts restored to the public domain shall be open to settlement and entry by proclamation of the President of the United States, **[**174]** which proclamation shall prescribe the manner in which these lands may be settled upon, occupied and entered by persons intending to make entry thereon; ... and further provided, That for one year immediately following the restoration of said lands to the public domain said lands shall be subject to entry only under the homestead, townsite and mineral laws of the United States.

39 Cong.Rec. 1180 (Jan. 21, 1905), LD 103, supra (emphasis added). While Rep. Howell objected to any further extension of time because it would involve "the loss of practically one year to the settlers and home makers," he advocated the change in the manner of disposing of the lands restored to the public domain:

> In this connection there is another matter of great importance and one which should receive the earnest attention of Congress. In the pending bill these lands, when restored to the public domain, are subject to entry under the general land laws of the United States, coupled with such rules and regulations as the President may prescribe. In my humble judgment there should be some provision such as is embodied in my amendment, limiting the lands in the reservation to entry under the homestead, **[**175]** townsite and mining laws alone for one year from the date of opening.
>
> With the full development of the resources of this portion of the State of Utah will come also a capacity for supporting a numerous and thrifty population. Congress should see to it that until such time as those lands easy of access, reclamation and irrigation are settled by actual home makers the provisions of the homestead law alone shall prevail....

39 Cong.Rec. 1182 (Jan. 21, 1905), LD 103 (remarks of Rep. Howell). Rep. Sherman opposed the Howell substitute, defending the need for an extension for the date of opening. [168] The bill was amended to read "September 1" instead of

"October 1," and the substitute was rejected. 39 Cong.Rec. 1185, LD 103, supra. Rep. Howell then reasserted the last clause of the substitute as a separate amendment:

> 168 During the debate, Rep. Howell inquired,
>
> Mr. HOWELL of Utah. I would like to ask the chairman of the Committee on Indian Affairs what the reasons are that occur to his mind that would injure the Indians to have these lands, for the first year, at least, preserved for actual homebuilders rather than to be entered under the present land laws and the timber and stone act, etc? I see no reason why it should injure the Indians.
>
> Mr. SHERMAN. I do not see any reason myself, so far as that is concerned....
>
> 39 Cong.Rec. 1183, LD 103, supra.

[176]** "And further provided, That for one year immediately following the restoration of said lands to the public domain, said and shall be subject to entry only under the homestead, townsite and mining laws of the United States."

Mr. SHERMAN. We have already provided in this amendment that they shall be opened under the regulations prescribed by the President, under a proclamation in which he can cover everything. **[*1129]** [169] I think we ought not to adopt that amendment.

> 169 The "regulations prescribed by the President" Rep. Sherman refers to were likely the Rosebud Regulations:
>
> Mr. SHERMAN. This amendment under consideration proposes to open them under a proclamation by the President, which shall lay down rules and regulations for their opening, the idea being to have such rules and regulations as were prescribed, for instance, in the Rosebud Reservation opening and have been used as the rules and regulations in the opening up of the Indian lands for the last two or three years, and which have proved to be not only beneficial to the Indians, but of advantage to the would-be settlers.
>
> 39 Cong.Rec. 1183 (Jan. 21, 1905) LD 103, supra; see also Letter from the Secretary of the Interior to the President of Nov. 25, 1904, reprinted in 39 Cong.Rec. 1184, LD 103, supra (remarks of Rep. Sherman).

[177]**

Mr. HOWELL of Utah. It seems to me that the amendment is of great importance for the reason that it limits the choicest lands on that reservation to entry and location by actual home seekers and home builders, and restricts those who might desire to acquire title to land there under any other of the land laws of the United States at least for one year after the opening of the reservation....

39 Cong.Rec. 1186 (Jan. 21, 1905), LD 103 supra. The amendment was rejected.

Two weeks later, Senator Smoot of Utah introduced two bills, S. 6867 and S. 6868. S. 6867 provided:

> That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the manner of opening such lands for settlement and entry, and for disposing of the same shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, shall be disposed of under the general provisions of the homestead and townsite laws of the United States; and shall be opened to settlement and entry by proclamation of the President, **[**178]** which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; ...

S. 6867, 58th Cong., 3d Sess., LD 97 at 1-2 (emphasis added). S. 6868 provided for the withdrawal of specifically described timber lands as an addition to the Uintah forest reserve. S. 6868, 58th Cong., 3d Sess., LD 98.

In hearings held a few days later by a subcommittee of the Senate Committee on Indian Affairs, the inclusion of S. 6867 in the Indian Appropriations bill for the next year was discussed by Chairman Stewart, Senators Kearns and Smoot of Utah, and Senator Teller of Colorado:

> The CHAIRMAN. Suppose we do not put anything in with regard to extending the time there and leave that for the conference; strike it all out.
>
> Senator SMOOT. Senator Kearns had the matter under consideration, and if he is satisfied with the bill I would like to have it go in.
>
> Senator KEARNS. I would prefer not to load up the bill. I would like to cut out all the House amendments. If Mr. Newell recommends the withdrawal of the reservoir site I would consent to that, but I would like to see the reservation opened at **[**179]** the date set in the last act in March. If that is impossible, then leave it to the President.
>
> Senator SMOOT. That is what my bill says, to leave it to the President, with this added, that there shall be no lands settled there except under the homestead and townsite entry.
>
> Senator TELLER. I want that in, myself.
>
> Senator SMOOT. That is all there is to this bill.
>
> Senator TELLER. I have a memorandum to put that in.
>
> The CHAIRMAN. Then we can not settle it this morning. I think we will have to strike that out.
>
> **[*1130]** Senator TELLER. I think Senator Smoot and Senator Kearns and Mr. Pinchot can get up something.
>
> Senator SMOOT. The only difference between Senator Kearns and me on this whole proposition is this, that this bill that I ask be inserted in the appropriation bill says it shall be left to the President to open it that he shall issue a proclamation: but it adds further, Mr. Chairman, that no land shall be located there except under the homestead and town-site laws.
>
> Senator TELLER. We want that provision in about the homestead or town-site entries. I am not going to agree to any entry of that land except **[**180]** under the homestead and town-site entries.
>
> Senator SMOOT. That is exactly what my bill is, and leaving the President to issue the proclamation.
>
> Senator TELLER. I am not going to consent to any speculators getting public land if I can held it.
>
> Senator KEARNS. Will the committee go into the matter of reserving that forest reservation? Could we not safely leave that with the Department?
>
> Senator TELLER. I do not believe we ought to go into that, but, as this is an Indian reservation, we should authorize the President to reserve what he thinks is proper, or, more properly speaking, the Secretary of the Interior.

"Indian Appropriation Bill, 1906," Hearings, Subcomm. of the Sen. Comm. of Ind. Aff., 58th Cong., 3d Sess., LD 100, at 29-30 (1905) (emphasis added).

Following the hearings, the Secretary of the Interior reported to the Senate on the progress being made in preparing to open the Uintah Reservation, see S.Doc.No.159, 58th Cong., 3d Sess., LD 101 (1905), and the Committee on Indian Affairs reported out the Indian Appropriations bill. S.Rep.No.4240, 58th Cong., 3d Sess., LD 102 (1905).

The Committee had agreed to Commissioner Leupp's recommendation **[**181]** that the time for opening be extended to September 1, 1905, unless the President determines an earlier date to be appropriate. Id. at 14. In a letter reprinted by the Committee the Commissioner advised that

> As the manner of opening Indian reservations to entry and settlement after the lands are restored to the public domain is a matter that comes within the jurisdiction of the General Land Office, it is suggested that the bill be referred to that office.

Id., LD 102, at 14. The Commissioner's reading of the bill apparently saw the Senate provisions as supplementing the restoration to be accomplished under the 1902 Act, as did the Howell substitute that failed in the House, rather than as amending or repealing its opening provisions. The Commissioner of the General Land Office took a different view.

> Attention is called to the fact that under act of May 27, 1902 (32 Stat. 263), these lands were to be simply "restored to the public domain," and could, consequently, under that statute be appropriated under any of the public-land laws, while the pending bill provides that they "shall be disposed of under the general provisions of the homestead and town-site laws of the United **[**182]** States."
>
> Possibly doubt may arise in determining whether the proposed bill will repeal the act of May 27, 1902, in so far as that act would permit entries under other than the homestead and town-site laws, and for the purpose of removing any possible doubt on this subject I would suggest that the word "only" be inserted between the words "of" and "under" ...

Id., LD 102, at 15 (emphasis added). [170] Though "only" was not added by the Committee **[*1131]** to the Senate version, the subsequent legislative history of the 1905 Act tacitly acknowledges the observation by the Land Office Commissioner that the 1905 Act repealed the public domain language of the 1902 Act. References to the Uintah Reservation being restored to the public domain all but vanish from the legislative material. It was clear to Congress that the reservation was to be "opened" under the homestead and town-site laws.

170 The Commissioner further commented that

"The provisions of this bill prescribing the manner in which the lands are to be opened are similar to the provisions under which the Rosebud Indian Reservation, in South Dakota, and the Devil's Lake Indian Reservation, in North Dakota, were opened during the past year."

Id., LD 102. These comments should not be read too broadly. While it is true that both Rosebud and Devil's Lake were opened under the homestead and townsite laws, with school sections reserved to the states, both of those acts included express language ceding the unallotted lands. See Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, III Kapp. 71-75 (Rosebud); Act of Apr. 27, 1904, ch. 1620, 33 Stat. 319, III Kapp. 83-87 (Devil's Lake). The 1905 Ute Act did not. The bill was indeed similar, but certainly was not the same.

[183]** The Indian Appropriations Bill, H.R. 17474, was without debate amended on the floor to substitute the modified versions of S. 6867 and S. 6868. 39 Cong.Rec. 3522 (Feb. 27, 1905), LD 103, supra. [171]

171 The Senate versions are identical to this legislation as enacted.

The House objected to the multiple amendments made by the Senate and the bill was referred to a conference committee. 39 Cong.Rec. 3751, LD 103, supra. Senators Stewart, McComber and DuBois and Representatives Sherman, Curtis and Stephens were appointed to the committee, 39 Cong.Rec., LD 103, at 3751, 3792. The conference report struck the House version, substituting the Senate language, 39 Cong.Rec., LD 103, at 3919, and this version was enacted as the Act of March 3, 1905, Stat. 1048, 1069, LD 105. The legislative history of the 1905 Act parallels that of the 1892 Act construed in Mattz v. Arnett, 412 U.S. 481, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973). As in Mattz, a House effort that could have disestablished the Uintah Reservation failed **[**184]** to accomplish its objective, for the Senate bill's language was substituted for that of the House. The Senate version, like the Act in Mattz, allowed entry of the opened reservation only under the homestead and other specified laws. Compare Mattz v. Arnett, supra, 412 U.S. at 501-504, 93 S. Ct. at 2256-2257. Here, as the Supreme Court pointed out in Mattz, "Congress was fully aware of the means by which termination could be effected." Id., at 504, 93 S. Ct. at 2257. But clear termination language was not employed in the 1905 Act. Indeed, it was purposefully rejected.

Senator Henry M. Teller, a primary advocate of the Senate language, had long opposed the allotment of Indian lands and wholesale opening of Indian reservations to white settlement under the allotment bills, charging that such legislation was in the interests of non-Indian land speculators. See 11 Cong.Rec. 783 (Jan. 20, 1881) (remarks of Sen. Teller) id. at 780-781, 934-935; D. Otis, The Dawes Act and the Allotment of Indian Lands 12, 18, 44, 46, 50 (Prucha ed. 1973). [172] During the Senate debate on the Indian Appropriations bill in 1905, Senator Teller vehemently attacked the allotment program:

172 Senator Teller, for example, commented on an earlier allotment bill:

This is a bill that, in my judgment, ought to be entitled "A bill to despoil the Indians of their lands and to make them vagabonds on the face of the earth," because, in my view, that is the result of this kind of legislation....

Id. 11 Cong.Rec. at 934.

[185]** Mr. TELLER. * * * I have the satisfaction, Mr. President, when I look over the present condition of Indian affairs in this country to remember that I have never voted for the allotment of an acre of Indian land; and I think upon

all occasions, when reasonable opportunity presented itself, and sometimes when it was not reasonable, I have protested against such action....

39 Cong.Rec. 3515 (Feb. 27, 1905), LD 103. The 1905 Act reflects more the conservative approach expressed by Senator Teller, who insisted on the homestead and townsite language in committee, than the wholesale opening advocated earlier by, for example, Rep. Sutherland of Utah. Cf. Sen.Doc.No.212, 57th Cong., 1st Sess., LD 68, at 111-120 (1902) (remarks of Rep. Sutherland). [173]

> 173 Commissioner of Indian Affairs Francis Leupp expressed a similarly critical viewpoint on the subject of "opening" legislation, particularly the opening of the Uintah Reservation:
>
> There are two general methods of making allotments....
>
> The Uintah Reservation, in Utah, furnishes an example of the rushing and haphazard method. The allotments there had to be made very hastily, because the act directing the opening of the reservation did not allow a reasonable time. It was impossible to survey the lands before the opening, much less before the allotments were made, ...
>
> Not uncommonly nowadays reservations are opened by special act of Congress, and in almost every instance, as I have pointed out elsewhere, the primary object seems to be to hasten the date when the surplus unallotted lands can be taken by the homeseeker. This is not unnatural, in view of all the circumstances, but it is unwise nevertheless. Too little thought is given to the condition of the Indians to be allotted, and, incidentally to this, not enough regard is paid to the ultimate welfare of the whites who will try to acquire homes on the coveted lands or of those who will ultimately succeed to a large part of the allotments....

[186]** **[*1132]** Nothing in the legislative history of the 1905 Act approaches a clear expression of congressional intent to disestablish the Uintah Reservation, particularly under the Senate language. Cf. Rosebud Sioux Tribe v. Kneip, supra. The "public domain" language of the 1902 Act and the 1905 House proposals was deliberately rejected in favor of the more limited homestead and town site language.

The distinction between the 1905 Uintah legislation and contemporaneous legislation that expressly disestablished other reservations seems to be discerned in executive documents reporting on the opening of those reservations. For example, the Secretary of the Interior comments,

> The opening to settlement and entry under the homestead law of the Rosebud Indian lands in South Dakota and of the Devil's Lake lands in North Dakota, ..., respectively, was successfully accomplished, and the entry of the lands in said reservations is still in progress. Equally successful was the opening to settlement and entry under the homestead laws on August 28, 1905, of the unreserved and unallotted land of the Uintah Indian Reservation in Utah under the act of March 3, 1905 (33 Stat.L., 1069).

Report **[**187]** of the Secretary of the Interior, 1905, JX 328, at 1495 (emphasis added). Both the Rosebud and Devil's Lake "lands" were governed by express language of cession, while the opening at Uintah was of a "reservation." Similarly a report by the Assistant U. S. Attorney General for Public Lands draws a distinction between the opening of Rosebud and Devil's Lake and the opening of Uintah: while opened lands at Rosebud and Devil's Lake are said to be "restored to the public domain," Uintah lands are said "to be disposed of under the provisions of the Act of March 3, 1905 ...," and to be "opened to homestead entry." See id., JX 328, at 1501-1502.

Simple logic commands the conclusion that an opening of a reservation to entry under two specified statutes is, by definition, not a restoration to the status of "public lands" or public domain: "The words "public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." Newhall v. Sanger, 92 U.S. 761, 763, 23 L. Ed. 769 (1875).

The opening of the Uncompahgre Reservation to entry under all the land laws of the United States was tantamount to a restoration to public domain status; **[**188]** opening of the unallotted lands of Uintah Reservation under only two of those laws was not. [173A] Reservation lands remain such until expressly withdrawn from that status by Congress. United States v. Celestine, 215 U.S. 278, 285, 30 S. Ct. 93, 94, 54 L. Ed. 195 (1909); Rosebud Sioux Tribe v. Kneip, supra.

173A When Congress desire that other of the public land laws apply to the Uintah lands it expressly legislated to that effect. See e.g., Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, III Kapp. 429, 445, LD 139 (Carey Act, 28 Stat. 442, as amended, 29 Stat. 434, extended to Uintah desert lands).

The defendant State and counties assert that congressional intent to disestablish the unallotted Uintah lands is proven through reflection in subsequent references in legislative **[*1133]** materials to the "former" Uintah Reservation, the "late" Uintah Reservation, etc. The briefs offer an impressive catalog of citations to past-tense references. See State of Utah Post-Trial Brief at 42-43; Defendant Counties' **[**189]** Post-Trial Brief at 100-101. A careful analysis of those items discloses a common source, a source not necessarily representative of past or present congressional intent. Senator (formerly Representative) George Sutherland introduced three bills between 1906 and 1910 dealing within the Uintah Reservation lands. Each of the bills includes a reference to the "former" Uintah Indian Reservation in the title. Congressional committee reports and references to the bills on the floor of either house track the language of the bill titles in making shorthand descriptions of the bills or their purposes. S. 3935, 59th Cong., 1st Sess., a bill "to authorize Indians on the former Uintah Reservation to cut and sell cedar and pine timber for posts and fuel," was reported in S.Rep.No.823, 59th Cong., 1st Sess., LD 122 (1906). The report itself includes references to the Uintah Reservation in the present tense ("Very little of this class of timber is to be found upon other parts of the reservation available to the settlers," "land of the Uintah Indian Reservation," "Indians of the Uintah Indian Reservation"). S. 6375, 59th Cong., 1st Sess., a bill "granting lands within the former Uintah Indian Reservation" **[**190]** to the Episcopal Church was reported from committee in S.Rep.No.4263, 59th Cong., 1st Sess., LD 126 (1906). References in the committee report to the "former" reservation are descriptions identifying the bill by tracking its operative language. The same is true of the House Committee report, see H.Rep.No.5010, 59th Cong., 1st Sess., LD 128 (1906) and of discussion of the bill on the Senate and House floor. See 40 Cong.Rec. 8306 (remarks of Sen. Sutherland), 9386 (remarks of Rep. Howell). The bill passed both houses without debate and was enacted in the form proposed by Sen. Sutherland. Act of June 29, 1906, ch. 3599, 34 Stat. 611, LD 129. S. 5926, 61st Cong., 2d Sess., a bill "to make available certain lands on the former Uintah Indian Reservation under the reclamation act," was reported from committee in S.Rep.No.219, 61st Cong., 2d Sess., LD 138 (1910). The past-tense references in the report merely recite the bill's language. They do not reflect an informal congressional evaluation of the effect of the 1905 Act. The language of the bill was carried on to the final version of the bill, which became law. Act of Apr. 4, 1910, ch. 140, 36 Stat. 269, 285, LD 139.

On the floor of the **[**191]** Senate on March 8, 1906, Senator Sutherland offered an amendment to the Indian appropriations bill for that year which dealt with canals and ditches on grazing lands upon the "former" Uintah Reservation. 40 Cong.Rec. 3500 (Mar. 8, 1905), LD 123. The bulk of the past-tense legislative references, in fact, arise from the activities of Senator Sutherland. He and his relatively anti-Indian views had not yet joined the Senate in the session that enacted the 1905 language. What is most revealing, however, is the fact that following his departure from the Senate in 1917, references to the "former" Uintah Reservation fade from the legislative materials. Commencing with the Indian Appropriations Act of 1921, Act of Mar. 3, 1921, ch. 119, 41 Stat. 1225, IV Kapp. 282, 312, LD 157, reference is made to the "Uintah and Ouray Reservation," and made consistently in the present tense. See e.g., Act of Mar. 4, 1929, ch. 705, 45 Stat. 1562, 1584, V Kapp. 92, 111, LD 164 (reference to "the State Experimental Farm, ... within the Uintah and Ouray Indian Reservation."); Act of Apr. 22, 1932, ch. 125, 47 Stat. 91, 111, V Kapp. 257, 274, LD 170 (same); H.Rep.No.2399, 74th Cong., 2d Sess., LD 174 (1936) ("These **[**192]** lands join the Uintah and Ouray Reservation ..."); Act of Aug. 9, 1937, ch. 570, 50 Stat. 564, 573, LD 177 ("Indians of the Uintah and Ouray Reservation"); H.Rep.No.370, 77th Cong., 1st Sess., LD 179, at 3 (1941) ("The Uintah and Ouray Indian Reservation ..."); S.Rep.No.243, 77th Cong., 1st Sess., LD 180 (1941) (same); H.Rep.No.143, 78th Cong., 1st Sess., LD 181 (1943) ("add certain public lands to the Uintah and Ouray Reservation"); S.Rep.No.1188, 78th Cong., 2d Sess., LD 182 (1944) **[*1134]** (same); S.Rep.No.749, 80th Cong., 1st Sess., LD 184 (1947) ("the exterior boundary of the Uintah and Ouray Reservation"); 94 Cong.Rec. 84, 1943, 1960 (1948), LD 185 (same); H.Rep.No.1372, 80th Cong., 2d Sess., LD 186 (1948) (same); Act of Mar. 11, 1948, ch. 108, 62 Stat. 72, LD 187 (same); Act of Mar. 16, 1950, ch. 59, 64 Stat. 19, LD 188 ("Uintah and Ouray Reservation"); S.Rep.No.602, 82nd Cong., 1st Sess., LD 189 (1951) (same); Act of Aug. 21, 1951, P.L. 82-120, 65 Stat. 193, LD 190 (same); H.Rep.No.2503, 82d Cong., 2d Sess., LD 192 (1952) (same); S.Rep.No.1632, 83d Cong., 2d Sess., LD 193 (1954) (same); 100 Cong.Rec. 9720-9725, 13124 (1954), LD 194 (same);

Act of Aug. 27, 1954, P.L. 83-671, **[**193]** 68 Stat. 868, LD 197 (same); S.Rep.No.841, 84th Cong., 1st Sess., LD 195 (1955) ("exterior boundaries of the Uintah and Ouray Reservation"); H.Rep.No.1479, 84th Cong., 1st Sess., LD 196 (1955) (same); Act of Sept. 18, 1970, P.L. 91-403, 84 Stat. 843, LD 209 ("Uintah and Ouray Reservation").

The legislative documents also disclose a few references to the Uintah Indian Reservation in the present tense. See e.g., H.Doc.No.892, 62d Cong., 2d Sess., LD 146 (1912) ("Conditions on Uintah Indian Reservation, Utah"); [174] 53 Cong.Rec. 7863 (May 12, 1916), LD 152 ("the opening to settlement of the Uintah Indian Reservation"); [175] Act of Aug. 1, 1914, ch. 222, 38 Stat. 582, 604, LD 148 ("of the bridge at Myton, on the Uintah Indian Reservation, Utah"); 53 Cong.Rec. 7863 (May 12, 1916), LD 152 (remarks of Rep. Howell); S.Doc.No.414, 66th Cong., 3d Sess., LD 156 (1921) ("leasing of irrigable Indian land on the Uintah Reservation, Utah"); Act of Mar. 4, 1931, ch. 522, 46 Stat. 1552, 1567, LD 168 ("Irrigation system, Uintah Reservation, Utah"); Act of Feb. 2, 1932, ch. 12, 47 Stat. 15, 22, LD 169 (same); Act of June 19, 1934, ch. 648, 48 Stat. 1021, 1033, LD 173 (same); 74 Cong.Rec. 3406 (Jan. **[**194]** 28, 1931) LD 166 ("the opening of the Uintah Indian Reservation").

174 That report also includes references to "the former Uintah Indian Reservation" and an erroneous reference to Uintah Reservation lands having been "restored to the public domain." Id. at 2. That reference, repeated verbatim in H.Doc.No.1250, 63d Cong., 2d Sess., LD 149, at 2 (1914) comprises the only legislative reference to the Uintah lands having been so restored under the 1905 Act.

175 A memorial from the Utah Legislature reprinted id., refers to lands "formerly within the boundaries of the Uintah Reservation" but is referring to the Indian grazing lands reserved under the 1905 Act by definition, Indian reservation lands.

The proposals of Senator Sutherland were not the only source of past-tense references; three bills offered by Senator Smoot of Utah included past-tense descriptions as did the discussion surrounding them. [176] Debates on the bills prove palpably ambiguous; comments by Senator Smoot, Representative Howell, and **[**195]** others include present as well as past-tense references. [177] See 40 Cong.Rec. 1064, LD 116, (remarks of Sen. Smoot); id., at 1332 (remarks of Rep. Howell); S.Rep.No.139, 59th Cong., 1st Sess., LD 117 (1906); 40 Cong.Rec. 3553 (1906), LD 131 (remarks of Rep. Howell); S.Rep.No.893, 62d Cong., 2d Sess., LD 142 (1912); H.Rep.No.443, 62d Cong., 2d Sess., LD 143 (1912); 48 Cong.Rec. 9101-9102, 9107, (July 15, 1912) LD 144 (remarks of Rep. Howell, e.g., "The Uintah Indian Reservation is an arid region....") Other references in the legislative documents include both present and former designations. See e.g., Act of Apr. 30, 1908, ch. 153, 35 **[*1135]** Stat. 70, 95, LD 135; Act of Mar. 3, 1911, ch. 210, 36 Stat. 1058, 1071, LD 141 (both "ceded" and current references).

176 See S. 321, 59th Cong., 1st Sess., ("lands which were heretofore a part of the Uintah Indian Reservation"); S.Rep.No.139, 59th Cong., 1st Sess., LD 117 (1906) (same); 40 Cong.Rec. 144, 1064, 1465 (1906), LD 116; S. 3016, 66th Cong., 2d Sess., ("Unsold lands formerly included in the Uintah Indian Reservation"); H.Rep.No.901, 66th Cong., 2d Sess., LD 154 (1920); Act of May 14, 1920, ch. 187, 41 Stat. 599, LD 155. S. 6934, 62d Cong., 2d Sess. (lands "formerly a part of the Uintah Indian Reservation"); S.Rep.No.893, 62d Cong., 2d Sess., LD 142 (1912); Act of July 20, 1912, ch. 244, 37 Stat. 196, LD 145.

[196]**

177 House Report No. 291, 59th Cong., 1st Sess., LD 119 (1906) includes both past and present-tense references to the Uintah Reservation alongside past-tense references to lands within the Rosebud and Devil's Lake reservations.

This history of past-tense and present-tense references highlights the importance of the oft-repeated warning by the Supreme Court that "(T)he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Philadelphia National Bank, 374 U.S. 321, 348-349, 83 S. Ct. 1715, 1733, 10 L. Ed. 2d 915 (1963), quoting United States v. Price, 361 U.S. 304, 313, 80 S. Ct. 326, 331, 4 L. Ed. 2d 334 (1960); see United States v. Southwestern Cable Co., 392 U.S. 157, 170, 88 S. Ct. 1994, 2001, 20 L. Ed. 2d 1001 (1968); Rainwater v. United States, 356 U.S. 590, 593, 78 S. Ct. 946, 949, 2 L. Ed. 2d 996 (1958); United States v. United Mine Workers, 330 U.S. 258, 282, 67 S. Ct. 677, 690, 91 L. Ed. 884 (1947); cf. United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 590, 77 S. Ct. 872, 875, 1 L. Ed. 2d 1057 (1957). In Mattz **[**197]** v. Arnett, supra, the Supreme Court found similar

past-tense references "to have been a natural, convenient, and shorthand way of identifying the land subject to allotment" under the applicable legislation. Id., 412 U.S. 498, 93 S. Ct. at 2254. In Seymour v. Superintendent, supra, the Court regarded "former" references in some legislation against the backdrop of a record of more recent, present-tense references as evidencing "some congressional confusion." Id., 368 U.S. at 356-357 & nn. 12, 13, 82 S. Ct. at 427. In City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972), the United States Court of Appeals for the Eighth Circuit found "inconsistent and confusing" present and past-tense references to the Fort Berthold Reservation to have little weight:

> By 1916, however, inconsistencies began to creep into the legislation and the reservation was sometimes referred to as the "former" Fort Berthold Reservation. However these later statutes are not always consistent, even within themselves. Thus we can find no clear intent by Congress to diminish the Fort Berthold Reservation from these later statutes.

Id., 454 F.2d at 125-126 (emphasis added & footnote omitted); see **[**198]** id., at 126 & nn. 9, 10.

Likewise, this Court can discern no clear legislative intent to disestablish the unallotted lands of the Uintah Indian Reservation evidenced by past-tense, "former" references. Not only are the references grossly inconsistent when considered together, they arise from a specific source, the Utah delegation, ca. 1906, and they virtually cease after the retirement of Senator Sutherland from the Senate in 1917, and furthermore, are merely passing references in text, not deliberate expressions of informal conclusions about congressional intent in 1905. Compare United States v. E. I. duPont de Nemours & Co., 353 U.S. 586, 590-593, 77 S. Ct. 872, 875-877, 1 L. Ed. 2d 1057 (1957). The citations here lack the consistency of the past-tense references to the "old" Uncompahgre Reservation that permeate the historical record. Nor do they have the clarity of remarks such as those made by Representative Bell of California in 1905 concerning the Round Valley Reservation:

> Mr. BELL of California. Mr. Chairman, I offer the following amendment.
>
> The CLERK read as follows:
>
> Add a new paragraph, after line 25, page 24, to read as follows:
>
> "For fencing **[**199]** division-line between relinquished and diminished portions of the Round Valley Indian Reservation, Cal., $ 2,500."
>
> Mr. SHERMAN. I desire to hear some explanation of the amendment of the gentleman from California.
>
> Mr. BELL of California. I intend to make an explanation. I would state, Mr. Chairman, that a few years ago, by act of Congress, a portion of the Round Valley Indian Reservation was relinquished and was placed upon the market for sale. Only a few of the lands were sold, and here recently a few weeks ago we passed an act through the House authorizing the Secretary of the Interior to resurvey and reappraise the relinquished portions and offer them for public sale. The proceeds of this sale are to go to the **[*1136]** Indians of the Round Valley Indian Reservation, so that when we appropriate this money $ 2,500 for the purpose of fencing the division line between the reservation as it now is and the portion that has been relinquished, that will pass to private ownership, this money will be returned to the Treasury from the sale of these outside lands.

39 Cong.Rec. 1149 (Jan. 20, 1905), LD 103 (emphasis added). The "relinquished" Round Valley lands were **[**200]** disestablished from that reservation, see Russ v. Wilkins, 624 F.2d 914, 921-926 (9th Cir. 1980); such language in reference to the "opened" Uintah Reservation lands is notably absent.

This Court has little trouble reconciling the continuing reservation status of opened lands on the "former" Uintah Reservation for another reason: by the Act of March 3, 1905, Congress expressly provided for the withdrawal of timber lands from the Uintah Reservation for inclusion in the Uintah Forest Reserve. 1,010,000 acres were set aside nearly half of the reservation. Rosebud Sioux Tribe v. Kneip and the related case law is not enlightening on the impact on Indian reservation boundaries of the withdrawal of lands for national forest purposes. [178] The express language, legislative history and surrounding circumstances of the Act of Mar. 3, 1905, 33 Stat. 1048, 1069, however, justify the conclusion of this Court that the Uintah Indian Reservation was diminished by the withdrawal of timber lands for national forest purposes.

178 Counsel for the defendants and for amicus Paradox Production Corp. make repeated reference to United States v. Pueblo of San Ildefonso, 206 Ct. Cl. 649, 513 F.2d 1383 (Ct.Cl.1975) United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976), and to Uintah and White River Bands of Ute Indians v. United States, 139 Ct.Cl. 1 (1957) and id., 152 F. Supp. 953 (Ct.Cl.1957), as being dispositive of the reservation status of the national forest lands. In its reply brief, the Tribe correctly points out that

(T)his citation is totally irrelevant to the issues in this case, since even the extinguishment of statutorily recognized titles (which is of greater legal magnitude than aboriginal title), as by the granting of land to homesteaders, does not terminate Indian Reservation status.

Id., at 25. [HN10] It is fundamental that extinguishment of Indian title to lands within a reservation by itself does not withdraw those lands from a reservation. See Seymour v. Superintendent, 368 U.S. 351, 357-358, 82 S. Ct. 424, 427-428, 7 L. Ed. 2d 346 (1962); United States v. Celestine, 215 U.S. 278, 285, 30 S. Ct. 93, 94, 54 L. Ed. 195 (1909); 18 U.S.C. § 1151(a) (1976); see also Ellis v. Page, 351 F.2d 250, 252 (10th Cir. 1965); Hilderbrand v. United States, 287 F.2d 886 (10th Cir. 1961), affirming United States v. Hilderbrand, 190 F. Supp. 283, 286-287 (D.Kan.1960). Indian title is not at issue here; territorial boundaries are, and are determined by separate rules and principles.

[201]** [HN11]

The 1905 Act itself provides as follows:

> That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, ... such portion of the lands within the Uintah Indian Reservation as he considers necessary; ...

33 Stat., LD 105, at 1070 (emphasis added). By proclamation [179] President Theodore Roosevelt withdrew 1,010,000 acres from the reservation for this purpose, pursuant to his authority under the 1905 Act and the more general Act of March 3, 1891, § 24, ch. 561, 26 Stat. 1095, 1103, LD 25. That section empowered the President to

179 Proclamation of July 14, 1905, 34 Stat., pt. 3, 3116, III Kapp. 602-605, LD 107.

set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public **[**202]** reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. (Emphasis added.)

The original Senate version of the 1905 Act's forest provisions, S. 6868, [180] proposed by Senator Smoot, had included additional language directing that the forest lands be set aside be "free from any claims of the **[*1137]** Uintah and White River tribes of the Ute Indians except for rights and privileges specifically reserved to them in this Act; ..." Id., LD 98, at 6. [181] That language, which would have been conclusive of the diminishment issue, was deleted in committee, as was much of the lengthy proposal. It seems clear from the committee hearings that the Senators perceived an obvious conflict between the withdrawal of the timber lands as a national forest and their continued reservation for Indian purposes:

180 58th Cong., 3d Sess., LD 98.

181 Section 8 of the bill provided for establishment of an Indian timber and coal reserve. Section 9 protected Indian grazing rights in the forest lands that overlapped into the designated Indian grazing reserve. Section 11 provided that proceeds from forest activities above actual expenses would be used for the Utes' benefit. The final version of the Act retained a modified clause governing the proceeds from timber sales. See 33 Stat., at 1070.

[203]** Senator TELLER. Why do we have to do anything about that forest reserve? Can not the President do it?

> Senator SMOOT. This authorizes the President to do it.

> Senator TELLER. Has he not the authority to do so?
>
> Senator SMOOT. It is Indian Land, and he can not do it.
>
> The CHAIRMAN. You could say in three lines that the President shall have the same right to declare a forest reserve there as he would have if there were no Indian reservation.
>
> Senator DUBOIS. You can go into any forest reserve now and locate a mining claim.
>
> Senator SMOOT. Yes, sir; anyone can.
>
> The CHAIRMAN. Then it seems to me that if you will just authorize the President to make the reserve and leave it entirely to him, notwithstanding it is an Indian reservation, that would be sufficient.
>
> Senator SMOOT. And say nothing as to the Indians' rights?
>
> The CHAIRMAN. Nothing at all.
>
> Senator TELLER. What have you said about the Indians' rights?
>
> Senator SMOOT. As to the sale of timber; all sales of timber shall go to the credit of the Indians.
>
> Senator TELLER. Do you want to sell any timber?
>
> Senator SMOOT. Yes; * **[**204]** * *
>
> Senator TELLER. Can you not do that now under the general law?
>
> Mr. (Gifford) PINCHOT. No, sir.
>
> Senator TELLER. You can on public lands.
>
> Mr. PINCHOT. The trouble is that these are treated as Indian land.
>
> Senator TELLER. Can you not say in this bill in a general way that the President shall set aside this land and let it go at that?
>
> Senator DUBOIS. Do not put anything in that is covered by existing law. Do not re-enact, but simply say
>
> Senator TELLER. That the present law shall apply to this case. Then, if you have to put in something about payments to the Indians for timber, put that in.

"Indian Appropriations Bill, 1906," Hearings, Sub Comm. of the Sen. Comm. on Indian Affairs, 58th Cong., 3d Sess., LD 100, at 26, 28-29 (emphasis added). In earlier discussion on the House floor, Representative Howell of Utah had commented:

> The northern part of this reservation is of great altitude and is densely wooded; it is in this part that all water courses draining the reservation find their source. This particular portion will not be thrown open to entry, but is to be set aside as a forest reserve and will later be **[**205]** incorporated with the present Uintah Forest Reserve.

39 Cong.Rec. 1180 (Jan. 2, 1905), LD 103 (emphasis added). The Senate amendments, enacted as law, provided for that incorporation.

[HN12] While it is true that Congress may disestablish or diminish an Indian reservation by restoring the lands to the public **[*1138]** domain, it is also true that Congress may diminish an Indian reservation by withdrawing and reserving the lands for an inconsistent purpose. Cf. United States v. Wounded Knee, 596 F.2d 790, 792-796 (8th Cir. 1979). The status and purposes of national forest lands are distinct from the status and purposes of Indian reservations, or federal reservations for other purposes. The Act of March 3, 1891, supra, defines national forests as public reservations. National forests have from before 1905 until now been governed by laws, regulations and an administrative structure separate from those governing Indian affairs intended to serve specific, narrow purposes. [182] A month prior to the enactment of the 1905 Ute Act, Congress had substituted the Secretary of Agriculture for the Secretary of the Interior in the administration of the national forests, transferring those powers **[**206]** to a different Executive department. Act of Feb. 1, 1905, ch. 288, 33 Stat. 628. Clearly the lands included in the Uintah Forest Reserve would be administered wholly apart from the lands remaining a part of the Uintah Indian Reservation. The Act expressly provides that the

Uintah forest lands would be "subject to the laws, rules, and regulations governing forest reserves," not the laws, rules and regulations governing "Indian country", or Indian reservations.

182 See e.g., United States v. New Mexico, 438 U.S. 696, 705-718, 98 S. Ct. 3012, 3016-3023, 57 L. Ed. 2d 1052 (1978); 16 U.S.C. §§ 471 et seq.

This dissonance between national forest and Indian reservation status is highlighted by subsequent actions taken by Congress in dealing with the Uintah lands. In 1915, a move arose to attach the Indian grazing lands reserved from entry at Uintah to the Ashley National Forest Reserve and place them thereby under the control of the Forest Service. See 53 Cong.Rec. 7863-7865, LD 152 (May 12, 1916). Both the Indians **[**207]** and officials in the Interior Department opposed the plan. See Letter from Ute Indians to Agent Kneale of Jan. 10, 1916, JX 374 (Indian protests); Letter from Agency Supt. to the Comm. of Ind. Aff. of Jan. 31, 1916, JX 375; Letter from the Comm. of Ind. Aff. to Sen. Meyers, Chmn., Comm. on Publ. Lands, of Apr. 15, 1916, JX 376. In a letter to Rep. Howell dated February 28, 1916, Commissioner of Indian Affairs Cato Sells wrote:

> The proposed action would place the tribal grazing reserve entirely under the control and management of the Forest Service, whose primary concern is the conservation of the forests of the United States rather than the welfare of the Indians.
>
> Based on official reports, the land is apparently not such as would properly be included within a national forest reserve. The entire grazing reserve is absolutely essential for Indian stock and that of white lessees. This service, rather than the forest service, is responsible for the proper and efficient management of Indian affairs. The Indian Service is now engaged in an aggressive campaign to save the water rights on this reservation, the success of which, so necessary to the future industrial welfare and **[**208]** progress of the Indians, depends upon its undisputed control of all contributory factors, including the tribal grazing reserve.
>
> For these reasons, it is my opinion that the proposal necessarily involves such elements of danger to the welfare and program of the Indians, which must at all times be my primary concern, that I cannot consistently give it my approval.

reprinted in 53 Cong.Rec., 7864-7865, supra, LD 152. The effort subsequently failed, see O'Neil and MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 35 (1977), was revived briefly in the 1920's and failed again. See Letter from Senator William King to the Secretary of the Interior of July 18, 1922, JX 402; Letter from Agency Supt. to the Comm. of Ind. Aff. of Jan. 23, 1924, JX 405; Letter from Wm. Wash to the Comm. of Ind. Aff. of Jan. 23, 1924, JX 406; Letter from the Comm. of Ind. Aff. to **[*1139]** Wm. Wash of Feb. 9, 1924, JX 407; Letter from the Acting Comm., Gen. Land Off. to E. Mooseman of July 27, 1927, JX 413; Letter from Chief Clerk to Agency Supt. of Aug. 4, 1927, JX 414.

Over the years, it became apparent that the Utes were not receiving the benefits of the proceeds of the activities **[**209]** (timber sales, etc.) in the national forest as provided for by the 1905 Act. When a bill, S. 615, 71st Congress, 2d Sess., in 1930, was introduced to consent to a suit for the proceeds by the Uintah, Uncompahgre and White River Utes in the United States Court of Claims, the Senate Committee on Indian Affairs reported out a substitute measure that provided for the direct payment of $ 1,262,500 in satisfaction of the Utes' claims. S.Rep.No.725, 71st Cong., 2d Sess., LD 165 (1930). The Committee also reported the recommendation of Secretary of the Interior Roy L. Wilbur, joined by a subcommittee, that the forest lands be returned to the Utes in lieu of monetary compensation. [183] House debates on the measure reflect the understanding of the members that the lands were held in a national forest reservation rather than an Indian reservation:

183 In a letter to Indian Committee Chairman Frazier dated Apr. 10, 1930, Secretary Wilbur wrote:

> MY DEAR MR. CHAIRMAN: Further reference is made to your request for report on Senate bill 615, which would authorize the Uintah Uncompahgre and White River Bands of Ute Indians to bring suit in the Court of Claims. One of the principal claims to be filed under this bill would be for payment to the Indians for 1,010,000 acres of their reservation lands in Utah which were withdrawn from entry and sale and included within the Uintah National Forest.

I have to inform you that the Director of the Bureau of the Budget reports that Senate bill 615 would not be in accord with the financial program of the President, but that legislation which would restore these lands to Indian ownership and place them in an Indian forest reserve would be in accord with his financial program.

Reprinted in S.Rep.No.725, LD 165, supra, at 3 (emphasis added).

[210]** Mr. LEAVITT. * * * There has been a proposal that the national forest area be given back to the Indians and made an Indian forest instead of the government paying for it.

That is an entirely impractical proposition. The area has been, since the proclamation by President Roosevelt, a national forest, and there have grown up in connection with it certain uses on the part of the people living in that section. It would be entirely out of the question to uproot all of these conditions. The only thing to do is to pay the Indians as is proposed in this bill.

Those of us on the committee who come from the kind of country which is being considered here know that the return to the Indians of a national forest area, after it has been a national forest since the administration of President Roosevelt, would be an impractical proposition....

Mr. STAFFORD. Will the gentleman inform the House as to whether there is any such character of reserve as an Indian forest reserve referred to by the Secretary?

Mr. LEAVITT. Yes; one was established by the present Congress out in the Yakima country in the State of Washington. The Yakima Indians own a considerable area **[**211]** of rough land, the greatest value of which is for forest and grazing purposes. I myself introduced a bill which had the approval of those Indians, of Representative SUMMERS of Washington, and of the department, to set that area aside as an Indian forest. From it the returns secured will go into the tribal fund, and with regard to grazing and other uses the Indians shall have preference. [184]

184 A search of volumes III V of Kappler's Indian Affairs: Laws and Treaties reveals no special legislative reference to a Yakima "Indian Forest Reserve." Such reserves, to say the least, appear to be rare.

Mr. STAFFORD. That is the only instance in the government where we have established a distinct Indian forest reserve?

[*1140] Mr. LEAVITT. That is true....

Mr. GREENWOOD. And during that period that the government has held this (Uintah) land as a forest reservation has there been any valuable timber cut off the reserve by the government?

I can understand that an Indian forest **[**212]** reserve might be made where the value of the timber cut could accrue to the Indians, but if during these years the timber had been cut off by the government, then to turn it back to an Indian reserve would not be just.

Mr. LEAVITT. It has been handled according to proper forestry practice, and it probably has as much timber value now as it ever had....

Mr. GREENWOOD. And the committee after hearing all of these facts, in view of the fact that the government held it for some 25 years, deem it better to go through with the original contract than to turn it back to an Indian reservation.

Mr. LEAVITT. Oh, it is much better to pay for it.

74 Cong.Rec. 3409-3410 (Jan. 28, 1931), LD 166 (emphasis added). The payment option was favored, and enacted into law. See Act of Feb. 13, 1931, ch. 124, 46 Stat. 1092, LD 167. [185] That the national forest lands are not a continuing part of the Uintah and Ouray Reservation is further confirmed by congressional action taken twenty-five years later. The 1931 Act had settled much of the Utes' claim arising from the taking of the national forest lands. A claim for more than 36,000 acres of coal lands included within the **[**213]** forest withdrawals remained uncompensated. [186] This time it seemed more expedient to return the subsurface mineral estate to the Utes than to incur the burden of an "expensive and detailed appraisal of mineral and oil and gas resources" in measuring damages. H.Rep.No.2171, 84th Cong., 2d Sess., LD 200, at 3 (1956). The proposal was also favored from an administrative standpoint:

185 Congress appropriated $ 1,217,221.25, which was deposited in the U.S. Treasury to the credit of the plaintiff Tribe. H.Rep.No. 2171, 84th Cong., 2d Sess., LD 200, at 3 (1956).

186 By special jurisdictional act, Congress consented to suit by the Ute bands on their remaining claims in the Court of Claims. See Act of June 28, 1938, ch. 776, 52 Stat. 1209, V Kapp. 619-621. Uintah and White River Bands of Ute Indians v. United States, 139 Ct.Cl. 1, 152 F. Supp. 953 (1957), concluded that litigation.

The Department of Agriculture desires to retain the administration and control of the surface of the land in order to protect **[**214]** the national forest and the important watersheds. The bill would restore to the Indians the mineral and oil and gas resources and retain in the United States the ownership and control of the surface rights which would be administered under the supervision of the Secretary of Agriculture.

Id. The legislative materials refer to the 36,000 acres of national forest mineral lands as being "formerly a part of the Uintah Indian Reservation." Id., at 2, 4, 6. At the same time, the House Committee makes reference to the "Uintah and Ouray Reservation" in the present tense. Id., at 4, 7. The Senate Committee indicates that the "Uintah and Ouray Reservation" is the current designation for the "former" Uintah Indian Reservation, which was diminished by the 1,010,000 acres of national forest withdrawals. See S.Rep.No.2372, 84th Cong., 2d Sess., LD 201 (1956). The Act of July 14, 1956, Pub.L.84-717, 70 Stat. 546, restores the mineral estate beneath the 36,000 acres to tribal ownership and vests the resources in the United States "in trust for the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah" with no reference to the "former" Uintah Reservation.

Besides the legislative materials, **[**215]** the administrative exhibits evidence the implicit understanding that the forest lands were withdrawn from the Uintah and Ouray **[*1141]** Reservation. [187] Had they remained a part of the reservation would not the Interior Department rather than the Department of Agriculture have been charged with supervision of the timber lands? The trust responsibility of the federal government for management of the Indian forest reserves is primarily administered through Interior and the Bureau of Indian Affairs. [187A] See 1 American Indian Policy Review Commission, Final Report 325-328 (comm. print 1977); F. Cohen, Handbook of Federal Indian Law 312-316 (1942); and e.g., 25 U.S.C. § 466; cf. United States v. Mitchell, 445 U.S. 535, 100 S. Ct. 1349, 63 L. Ed. 2d 607 (1980). The Uintah forest lands included in the designated national forest reserves are not administered in that fashion, [188] a fact buttressing this Court's conclusion that the Uintah Indian Reservation was expressly diminished to the extent of the withdrawal of the national forest lands. [189] See Map, Appendix B, infra.

187 See, e.g., 53 I.D. 128 (June 14, 1930) JX 421 (Uintah Indian Reservation was reduced by the withdrawal of the forest lands); Letter from Sp. Agent Early to Comm. of Ind. Aff. of June 1, 1912, JX 356; Letter from Asst. Comm. of Ind. Aff. to Forester, U.S. Forest Service of July 12, 1912, JX 357; Letter from the Asst. Secretary of Agriculture to the Secretary of the Interior of Dec. 19, 1963, JX 467; Letter from Area Director, Bureau of Ind. Aff. to Agency Supt. of Jan. 10, 1964, JX 467; Letter from Asst. Secretary of the Interior to the Secretary of Agriculture of June 24, 1964, JX 468; Memorandum, Solicitor to Comm. of Ind. Aff. of Nov. 18, 1964, JX 469; Letter from the Secretary of the Interior to the Secretary of Agriculture of Aug. 2, 1966, JX 471.

[216]**

187A Of course, the actions of the U.S. Forest Service in its dealings with Indians are also subject to being "judged by the most exacting fiduciary standards," Seminole Nation v. United States, 316 U.S. 286, 297, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480 (1942), of the federal trust responsibility to Indians. As the United States Court of Appeals for the Ninth Circuit observed in Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), "It is fairly clear that any federal government action is subject to the United States' fiduciary responsibilities toward the Indian tribes. Seminole Nation v. United States, 316 U.S. 286, 297 (, 62 S. Ct. 1049, 1054, 86 L. Ed. 1480) ..." Id., at 711 (emphasis in original). Accord, Eric v. Secretary of the U.S. Dep't. of HUD, 464 F. Supp. 44 (D.Alas.1978); see also American Indian Religious Freedom Act, 42 U.S.C. § 1996; H.Rep.No.1308, 95th Cong., 2d Sess. (1978).

188 See also 16 U.S.C. § 480 (1976) (jurisdiction over national forests).

189 It comes as no surprise that a 2,000,000 acre reservation that has been reduced by half its area might have been referred to as the "former" Uintah Reservation. The consistent pattern of present-tense references to the Uintah and Ouray Reservation since 1921 justifies drawing an inference that the remaining lands retain their reservation status.

[217]** The withdrawal of the 56,000 acres of the Ute lands by Presidential proclamation for the purpose of the Strawberry Reservoir Project ultimately led to the disestablishment of such lands from the Uintah and Ouray Reservation. Under the terms of the 1905 Act and the proclamation, the setting aside of the Strawberry acreage was arguably for Indian purposes, consistent with continuing reservation status. However, by language in the Act of April 4, 1910, ch. 140, 36 Stat. 269, 285, III Kapp. 429, 445, LD 139, discussed supra at page 1127, Congress provided that "All right, title and interest of the Indians in the same lands are hereby extinguished, and the title management and control thereof shall pass to the owners of the lands irrigated from said project" as provided under the terms of the Reclamation Act. Id. (emphasis added). Though arguably the legislative history indicates that the reservoir lands remained a part of the Uintah Indian Reservation until operated upon by the 1910 legislation, see S.Rep.No.219, 61st Cong., 2d Sess., LD 138 (1910) (e.g., "lands on the former Uintah Reservation"), the transfer of all management and control of the lands to private parties, compounded with **[**218]** the express extinguishment of the Indians' interest, is inconsistent with continuing Indian reservation status. But see United States v. Wounded Knee, 596 F.2d 790, 794-796 (8th Cir. 1980), [190] cert. denied 442 U.S. 921, 99 S. Ct. 2847, 61 L. Ed. 2d 289.

190 Cf. "Oil and Gas Leases on the Strawberry Valley Reclamation Project," M-36051 (Supp.) (Nov. 1, 1951), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 1558-1559 (1979); "Reservation Boundaries Regulation of Hunting and Fishing Colville and Spokane Reservations," (June 3, 1974), id., at 2062-2071; "Jurisdiction of Flathead Tribal Council to Regulate Hunting on ... Reservoir Sites," M-34739 (Jan. 3, 1947), id., at 1429-1431.

[*1142] With the diminishment of the Uintah Indian Reservation by the withdrawal of the national forest and reclamation lands, it is not surprising that the administrative materials include references to the "former" Uintah Indian Reservation as well as to the present-tense **[**219]** Uintah or Uintah and Ouray Reservation. [191] More significant, however, is executive departmental action taken in regards to the Uintah lands because of their apparent reservation status. A number of administrative reports on reservation land management recognize the continuing reservation status of at least the trust lands, which of course the federal government was duty-bound as the Indians' trustee to manage to the benefit of the Indians. See e.g., Report on Grazing Lands on the Reservation, Nov., 1931, JX 424; Ann. Report of the Uintah and Ouray Agency, 1931, JX 425; Id., 1932, JX 427. Indian Service forestry officials recommended in 1931 that the Office of Indian Affairs actively see to the management of the "ceded, unappropriated lands within the boundary of the former Uintah Reservation." Letter from J. P. Kinney to the Comm. of Ind. Aff. of Sept. 22, 1931, JX 423, at 2. When the Indian Office reassumed such a posture in 1937 white ranchers protested. See O'Neil & MacKay, "A History of the Uintah-Ouray Ute Lands," JX 483, at 35-36 (1977). In a court test of the asserted federal authority, the United States Court of Appeals for the Tenth Circuit held that the Utes retained a **[**220]** beneficial interest in the unallotted and unentered lands sufficient to justify the Indian Bureau's proprietary management of the lands, issuance of use permits, etc. Hanson v. United States, 153 F.2d 162, 163 (10th Cir. 1946); see Ash Sheep Co. v. United States, 252 U.S. 159, 166, 40 S. Ct. 241, 242, 64 L. Ed. 507 (1920). [192]

191 E. g., Letter from Comm. of Ind. Aff. to Secretary of the Interior of Feb. 9, 1915, JX 366 ("the former Uintah Indian reservation"); Report of the Secretary of the Interior, 1915, JX 369 at 54 ("the Uintah and Ouray Indian Reservation"); Letter from Supt. Wright to Regional Forester of Jan. 24, 1929, JX 444 ("the Uintah Reservation"); Letter from Asst. Comm. of Ind. Aff. to Dir., Div. of Grazing of Aug. 8, 1939, JX 447 ("the Uintah Reservation"); Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 19, 1941, JX 450 ("the Uintah and Ouray Reservation").

Like similar references discussed by the Court in DeCoteau v. District County Court, 420 U.S. at 442 n.27, 95 S. Ct. at 1091, "the authors of these documents appear to have put no particular significance on their choice of a label."

[221]**

192 It is worthwhile to note that the issues raised in the Hanson litigation deal with retained proprietary interests in the unallotted lands rather than with the jurisdictional boundary issues raised in this case. Cf. Rosebud Sioux Tribe v. Kneip, supra, 430 U.S. at 601 nn. 23-24, 97 S. Ct. at 1370. However, if the 1905 Act had operated to restore the land to the public domain, events may have taken a different course. Cf. F. Cohen, Handbook of Federal Indian Law 334-336 (1942); Hanson, supra.

At various times, pursuant mainly to the provisions of the Indian Reorganization Act of 1934, Act of June 18, 1934, ch. 576, 48 Stat. 984, V Kapp. 378, 25 U.S.C. §§ 461 et seq., LD 172, the Secretary of the Interior has restored to tribal ownership much of the unallotted acreage within the Uintah and Ouray Reservation that remained unentered. On August 25, 1945, Secretary of the Interior, Harold L. Ickes, issued an Order of Restoration upon the recommendation of Commissioner of Indian Affairs John Collier, [193] which reads as follows:

193 Letter from the Comm. of Ind. Aff. to the Secretary of the Interior of June 19, 1941, JX 450. While Collier's letter recommends restoration of "all the undisposed-of opened lands lying within the former boundaries of the Uintah and Ouray Indian Reservation," he cites as authority Section 3 of the Indian Reorganization Act, which authorizes the Secretary to restore to tribal ownership "the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale or any other form of disposal ... See also S.Rep.No.1080, 73d Cong., 2d Sess. (1934). Later in the letter, Collier refers to the lands as the surplus opened lands of the Uintah and Ouray Indian Reservation not "ceded", "former" or some similar designation.

It is important to remember that the restoration of lands was mainly a proprietary rather than jurisdictional transaction. As to the jurisdictional boundaries question, the Collier letter is, at best, ambiguous.

[222]** **[*1143]** WHEREAS, pursuant to the provisions of the Act of May 27, 1902 (32 Stat. 263), as amended, the unallotted lands of the Uintah and Ouray Indian Reservation in the State of Utah, were made subject to disposal under the laws of the United States applying to public lands, and

WHEREAS, there are now remaining undisposed-of within said area approximately 217,000 acres of unallotted lands, which need closer administrative control in the interest of better conservation practices, and

WHEREAS, by relinquishment and cancellation of homestead entries within this area a limited additional acreage of land of similar character may later be included within this class of undisposed-of opened land, and

WHEREAS, the Tribal Council, the Superintendent of the Uintah and Ouray Agency, and the Commission of Indian Affairs have recommended restoration to tribal ownership of such undisposed-of surplus unallotted lands in the said reservation;

NOW, THEREFORE, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 18, 1934 (48 Stat. 984), I hereby find that the restoration to tribal ownership of all lands **[**223]** which are now or may hereafter be classified as undisposed-of opened lands of the Uintah and Ouray Reservation will be in the public interest, and the said lands are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah, and are added to and made a part of the existing reservation, subject to any valid existing rights.

10 Fed.Reg. 12409, LD 183 (emphasis added).

While the Order itself is somewhat ambiguous as to whether the lands restored were thought to be within the political boundaries of the reservation, related departmental documents indicate that Interior deliberately distinguished between the "opened" lands within the continuing boundaries of existing Indian reservations and "ceded" lands purchased by the United States and no longer within such boundaries; opened lands could be withdrawn from entry and restored to tribal ownership, while "ceded" lands could not. See Instructions, Restoration of Lands Formerly Indians to Tribal Ownership, 54 I.D. 559, 560, JX 431 (1934). [194] While a subsequent opinion by the Solicitor seems to add ambiguity by holding that the Utes "ceded" lands in Colorado, though **[**224]** not within an existing reservation, could be restored under Section 3 of the Indian Reorganization Act, see 56 I.D. 330, JX 442 (1938), they were perceived as an exception to the general rule. Instructions, JX 431, supra, at 562.

194 Id. : This brings us up to the period of about 1890, at which time there was adopted the plan of opening to entry, sale, etc., the lands of reservations that were not needed for allotment, the Government taking over the lands only as trustee for the Indians. Under this plan the Indians were to be credited with the proceeds only as the lands were sold, the United States not to be bound to purchase any portion of the lands so opened. Undisposed of lands of this class remain the property of the Indians until disposed of as provided by law (Ash Sheep Company v. United States, 252 U.S. 159 (, 40 S. Ct. 241, 64 L. Ed. 507)). Such lands are usually referred to as surplus lands of Indian reservations opened to public entry, and undoubtedly comprise the class of lands from which restorations of tribal ownership are to be made under the said Section 3, if in the public interest. It can safely be said that it would not be to the interest of the public to restore to the Indians all undisposed of public lands that at one time were in Indian ownership but afterwards became the property of the United States by outright cessions from the Indian owners, because, as stated above, such action would mean the withdrawal in many States of all lands now available for entry as public domain. Such action undoubtedly would raise strong opposition in the various localities affected and have an undesirable bearing on the new Indian legislation.

Though the Supreme Court in Rosebud indicated that this document offered "no clear view" on the boundary question, 430 U.S. at 604 n.27, 97 S. Ct. at 1372, it does shed some light on the issue.

[225]** **[*1144]** A number of other parcels of land within the reservation were restored to trust status by subsequent orders. See Public Land Order No. 2713, 18 Fed.Reg. 426 (Jan. 20, 1953); Public Land Order No. 1310, 21 Fed.Reg. 5015, LD 202 (July 6, 1956); Public Land Order No. 2002, 24 Fed.Reg. 8175, LD 207, (Oct. 8, 1959); Public Land Order No. 2269, 26 Fed.Reg. 1718, LD 208 (Feb. 28, 1961).

The conclusion that the lands restored to tribal ownership were within the existing boundaries of an Indian reservation is buttressed by a formal opinion by the Solicitor for the Department of the Interior construing the scope of the 1945 Secretarial Order. The Solicitor concluded that the order had restored to tribal ownership the mineral estate underlying fee-patented lands as well as the whole of the unallotted and unappropriated lands of the reservation:

The order restores "all lands which are now or may hereafter be classified as undisposed-of opened lands" of the reservation. The minerals in place are a part of the land. The fact that a lesser estate, the surface, has been carved out of the land and disposed of does not make that which is left, the mineral estate, any the less "lands." **[**226]** British-American Oil Producing Co. v. Board of Equalization of Montana et al., 299 U.S. 159 (, 57 S. Ct. 132, 81 L. Ed. 95) (1936).

One of the purposes of the order was to insure closer administrative control of the tribe's property in the interest of better conservation practices. As pointed out above, the beneficial title to the minerals has always been in the Indians. Certainly the Indians' mineral estate can be administered more effectively if the whole estate the minerals underlying the patented lands can be administered as a unit rather than by having the minerals underlying the patented lands administered under one set of laws and regulations and the minerals underlying the unpatented lands administered under another set of laws and regulations.

The order should be construed in such a manner as will result in the accomplishment of its broad purpose. That was to restore to tribal ownership all lands, or interest in lands, to which the superior rights of third parties had not attached.

Therefore, as previously indicated, it is my opinion that the minerals underlying the patented lands within the Uintah and Ouray Indian Reservation were restored to tribal **[**227]** ownership by the order of August 25, 1945.

59 I.D. 393, 396 (1947), II Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs, 1917-1974, at 1434, 1435-1436 (1979), JX 454 (emphasis added). The Solicitor reached a similar conclusion as to certain lands within the town of Myton, Utah, "Restoration of Land to Tribal Ownership Under Indian Reorganization Act," M-34912 (Apr. 11, 1947), II Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs, 1917-1974, at 1450-1451 (1979), and applied a similar analysis to mineral rights underlying certain reclamation withdrawals within the reservation boundaries. "Restoration to Tribal Ownership of Lands Included in a Reclamation Withdrawal," M-36142 (Oct. 29, 1952) in id., at 1589-1591. While the statutory references in the 1945 Order itself may be ambiguous, see Russ v. Wilkins, 624 F.2d 914, 925 (9th Cir. 1980), [195] the contemporaneous construction of the Order by the Solicitor tends strongly to support this Court's inferences and conclusions. See Mattz v. Arnett, 412 U.S. 481, 505, 93 S. Ct. 2245, 2258, 37 L. Ed. 2d 92 (1973).

195 The Order refers both to section 3 of the Indian Reorganization Act, which authorizes restoration of unsold, opened lands, and § 7, which authorizes the addition of new lands to existing reservations. 25 U.S.C. §§ 463, 467. Further the Commission of Indian Affairs recommended restoration of the lands citing section 3 as authority without reference to section 7, JX 450, supra. Counsel for the defendant counties erroneously asserts that the restoration was made under section 7 without mention of section 3. Counties' Post-Trial Brief at 91. Counsel's related arguments are, therefore, properly disregarded.

[228]** The "jurisdictional history" of the Uintah and Ouray Reservation is less than clear or consistent. Plaintiff offers evidence of the **[*1145]** exercise of federal and tribal criminal jurisdiction over the reservation since 1921; see plaintiff's Exs. 2-15; the defendants offer a similar collection of state prosecutions beginning in 1915 and ending in 1967. See defendants' Ex. DU-9 through DU-33. The annual reports of the Uintah and Ouray Agency range in reference from an acknowledgment of state jurisdiction over the reservation to the assertion of exclusive federal jurisdiction. [196] Other historical exhibits run either direction. [197]

196 Annual Rept. of the Uintah and Ouray Agency, 1910, JX 344 (state jurisdiction); id., 1911, JX 354 (state, federal jurisdiction); id., 1915, JX 368 (jurisdiction somewhat confused); id., 1916, JX 380 (state jurisdiction); id., 1917, JX 386 (state jurisdiction); id., 1918, JX 393 (state jurisdiction); id., 1919, JX 396 (state laws inapplicable to Indian activities on restricted lands); id., 1920, JX 397 (cooperation between agency, county officials); id., 1921, JX 399 (same); id., 1927, JX 415 (federal, state and county jurisdiction; establishment of Indian court recommended); id., 1928, JX 417 (Indian court advocated; federal jurisdiction); id., 1929, JX 420 (Indian court recommended; federal, state laws apply); id., 1930, JX 422 (Indian court recommended; state not interested in offenses within reservation; federal jurisdiction applies to all serious crimes).

[229]**

197 See e.g., Opinion of Asst. Utah Atty. Gen. of Aug. 14, 1975, JX 478 (no county jurisdiction); Uintah Basin Standard, Nov. 18, 1965, JX 470 (Roosevelt, Utah within "Indian Country"); Letter from Dist. Supt., Indian Field Service to the Comm. of Ind. Aff. of Aug. 5, 1926, JX 412 (opened Uintah Reservation governed by state law). It should be remembered that during this entire period the definitions of jurisdiction in "Indian Country" did not remain static. See pages 1081-1085, supra.

The defendant State of Utah places heavy reliance upon the history of regulation of hunting and fishing on the reservation as "jurisdictional history" probative of their views on the boundary question in general, that the Uintah and Ouray Reservation is confined to the Ute trust lands. See State of Utah Post-Trial Brief at 47-53, A80-A96; trial transcript at 115-133, 153-154, 175-176, 164-166, 216-218, 238-246, 258-265; Ex. I-5 I-15.

The history of hunting and fishing jurisdiction in "Indian country" is unique and anomalous, a hybrid mixture of Indian jurisdictional and proprietary interests. See United States **[**230]** v. Minnesota, 466 F. Supp. 1382, 1385 (D.Minn.1979), affirmed, Red Lake Band of Chippewa Indians v. State of Minnesota, 614 F.2d 1161 (8th Cir. 1980) (per curiam), cert. denied, 449 U.S. 905, 101 S. Ct. 279, 66 L. Ed. 2d 136; Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 724 (10th Cir. 1980), vacated, 450 U.S. 1036, 101 S. Ct. 1752, 68 L. Ed. 2d 234; F. Cohen, Handbook of Federal Indian Law 285-286 (1942); "Jurisdiction Hunting and Fishing on the Wind River Reservation," M-31480 (Feb. 12, 1943), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1185, 1186-1194 (1977). Indian-owned, or trust lands rather than "reservation" lands have often served as the fulcrum in the balance struck between jurisdictions regarding hunting and fishing. Interior Solicitor Mitchell Melich wrote in an opinion on jurisdiction over hunting on the Uintah and Ouray Indian Reservation that it is "well settled that state game laws do not apply to Indians on trust lands within the Indian reservation." M-36813 (Mar. 29, 1971), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 2030, 2031 (1979) (citations omitted). **[**231]** Further, [HN13] 18 U.S.C. § 1165 provides:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon or for the removal of game, paltries, or fish therefrom shall be fined.... (Emphasis added.)

See also H.Rep.No.2593, 85th Cong., 2d Sess. (1958); H.Rep.No.625, 86th Cong., 1st Sess. (1959); S.Rep.No. 1686, 86th Cong., 2d Sess. Cf. United States v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976).

[*1146] Finally, in Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 1254-1259, 67 L. Ed. 2d 493 (1981), the Supreme Court expressly held [HN14] tribal jurisdiction over hunting and fishing to be confined to Indian-owned and "trust" lands.

The unique controversies surrounding the territorial extent of tribal control of hunting and fishing now settled by the rule of Montana v. United States is independent of reservation disestablishment in the **[**232]** Rosebud sense and does not, therefore, advance this Court's inquiry in any ultimate way. [198]

198 See also, Letter from Asst. Comm. of Ind. Aff. to Agency Supt. of Dec. 26, 1924, JX 408 (w/attachments); Letter from Asst. Secretary of the Interior to Sen. Smoot of Feb. 6, 1926, JX 409; Letter from the Comm. of Ind. Aff. to Agency Supt. of May 29, 1926, JX 410; id., of July 28, 1926, JX 411; memorandum to the Solicitor of Dec. 8, 1927, JX 416. The state also relies heavily upon the presence of various signs which indicate that one is "entering", "leaving" or "on Indian land" or "the Uintah and Ouray Reservation." See State of Utah Post-Trial Brief at 44-45.

The general sense of the trial testimony indicates that more often than not the signs were understood to mark the boundary of "Indian land" in a proprietary sense, see e.g., Trial Transcript at 137, 155-157, 159-160, 169-170, 176-177, 275-276, 304 so as to put persons on notice, for example, that further ingress on the land might be an unlawful trespass. See Trial Transcript at 276, 299-301, 304; 18 U.S.C. § 1165. Of course, that purpose is defeated if signs are posted at political rather than proprietary boundary lines.

Very little documentary and testimonial evidence was offered as to the specific purposes and understandings underpinning the posting of the signs which indicated more than proprietary motivations. Cf. Trial Transcript at 160-173.

[233]** The older judicial decisions cited by the parties as well carry reduced precedential value, as the United States Court of Appeals for the Tenth Circuit held in Ute Indian Tribe v. State Tax Comm. of Utah, 574 F.2d 1007, 1009 (10th Cir. 1978) that the issue of the boundaries of the Uintah and Ouray Reservation is "a matter which required the proof of facts and the application of law." The trial court in that case was reversed because the Court of Appeals was "unable from the record to find any evidence or basis for the determination by the trial court as to the boundaries of the reservation or what might constitute trust lands." Id.

Likewise, this Court is unable to discern any substantial evidentiary basis for the statements as to reservation status made in the judicial opinions cited by the parties. [199] The demanding analysis mandated by Rosebud Sioux Tribe v. Kneip and related cases cannot be circumvented by reliance upon cursory or presumptive statements in cases litigating other questions. See Appawora v. Brough, 431 U.S. 901, 97 S. Ct. 1690, 52 L. Ed. 2d 384 (1977), vacating and remanding, 553 P.2d 934 (Utah 1976).

199 See United States v. Fitzgerald, 201 F. 295, 296 (10th Cir. 1912); United States v. Boss, 160 F. 132, 133 (D.Utah 1906); Whiterocks Irrigation Co. v. Mooseman, 45 Utah 79, 82, 141 P. 459, 460 (1914); Sowards v. Meagher, 37 Utah 212, 216-217, 108 P. 1112, 1114 (1910); contra, State v. Roedl, 107 Utah 538, 543, 155 P.2d 741, 743 (1945).

The summary "judicial notice" approach to the boundary issue found in these cases was apparently disapproved by the United States Supreme Court in Brough v. Appawora, 553 P.2d 934 (Utah 1976), which it vacated and remanded "for consideration in light of Rosebud Sioux Tribe v. Kneip ..." 431 U.S. 901, 97 S. Ct. 1690, 52 L. Ed. 2d 384 (1977). That case is now here by removal. See Brough v. Appawora, 431 U.S. 901, 97 S. Ct. 1690, 52 L. Ed. 2d 384 (1977).

[234]** One thing is certain: the jurisdictional history of the Uintah and Ouray Reservation is not one of "unquestioned" exercise of state authority. Cf. Counties' Post-Trial Brief at 68. The record evidences substantial jurisdictional contradictions and confusion, which are now to be resolved by the judgment of this Court.

Other factors not decisive standing alone, when taken together with the record and analysis set forth above, lend support to the conclusion that the Uintah and Ouray Reservation survives, diminished by the national forest and Strawberry Project withdrawals. For example, the immunity of the reservation to selection of state school and indemnity lands [200]

justifies an inference **[*1147]** that the reservation was not disestablished and its "surplus" acreage "restored to the public domain." While the state asserts alternative reasons for the apparent immunity in an attempt to diminish its probative value herein as a "disestablishment factor," [201] the fact is that school sections have not been selected and the Interior Department early on took the position that they could not be selected. [201A] The Utah Enabling Act, Act of July 16, 1894, ch. 138, 28 Stat. 107, 109, **[**235]** LD 34, provided that school or indemnity sections could not be selected upon Indian reservation lands "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." Id., § 6. The Uintah lands have never been so restored, and remain in continuing reservation status. The disestablishment factor of school lands selection within the "opened" area, which supported an opposite conclusion in Rosebud Sioux Tribe v. Kneip, supra, is simply lacking here.

200 State school land selections have never been made within the boundaries of the Uintah Indian Reservation. See Trial Transcript at 241 (testimony of Donald Prince). None were ever asked for. Id. at 247. See also Andrus v. Utah, 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980).

201 See State of Utah Post-Trial Brief at 60-62; Trial Transcript at 241-247; Transcript of Final Arguments at 61-62.

201A On April 27, 1905, the Governor of Utah received a communication from Commissioner W. A. Richards of the General Land Office informing him that the State of Utah was not entitled to select sections 2, 16, 32 and 36 in the townships on the reservation because of the status of the lands. While the state consequently could select "in lieu" lands to compensate for those sections, the indemnity selection could not be made within the opened unallotted lands of the Uintah Reservation:

It follows also that no disposition of the lands can be made that will impair the interests of the Indians, these lands are not subject to selection by the state as indemnity, but must be disposed of in the manner and for the purpose designated by Congress.

Letter of Comm. W. A. Richards, quoted in Deseret Semi-Weekly News, Apr. 27, 1905, JX 255, at 5; Salt Lake Herald, Apr. 27, 1905, JX 256, at 8.

Commissioner Richards' Opinion was affirmed by the Secretary of the Interior in Instructions issued June 13, 1905, to the Commissioner:

The second question presented affects the rights of the State under its grant in support of common schools. In regard to the grant in place, which grant was made by the act of July 16, 1894 (28 Stat., 107), of sections numbered 2, 16, 32 and 36 in each township in said State, it is the opinion of this Department that not only technical rules of statutory construction but also the general scope of legislation bearing upon the disposal to be made of the unallotted portion of this reservation, and the policy of the United States in respect to public schools and also to Indians, call for the denial of any claim on the part of the State to any portion of its school grant in place within the limits of this reservation. Further, that the reasons controlling the decision just arrived at prevent the recognition of any claimed right on the part of the State to select indemnity from the surplus lands of this reservation in further satisfaction of its school grant, prior to the opening thereof, under the provisions of the act of March 2, 1895 (28 Stat., 876, 899), or at all. See Minnesota v. Hitchcock (185 U.S. 373, 46 L. Ed. 954, 22 S. Ct. 650). The Department concurs also in your recommendations covering these matters.

33 I.D. 610, 611, JX 274.

The denial of indemnity selections within the opened Uintah lands is consistent with [HN15] 43 U.S.C. § 851, which provides that "such selections may not be made within the boundaries of said reservation: ...," if the reservation continues to exist. [HN16]

Section 851 also provides

That nothing in this section contained shall prevent any state from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein.

No such extinguishment and restoration has taken place at Uintah. In contrast, state selections have been made within the restored Uncompahgre lands. See Trial Transcript at 240-241, 244; Exhibit I-17; see also Andrus v. Utah, 446 U.S. 500, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980).

[236]** Press coverage of the opening of the Uintah Indian Reservation also reflects the continued reservation status of the opened lands. Multiple references are made to "homesteads on the reservation," e.g., Deseret Evening News, July 29, 1905, JX 301, at 1, Deseret Semi-Weekly News, Sept. 14, 1905, JX 321, at 3; id., Aug. 31, 1905, JX 318, at 3; id., Aug. 28, 1905, JX 316, at 6; id., Aug. 17, 1905, JX 312, at 1; "home-getting on the reservation," e.g., Deseret Semi-Weekly News, Aug. 14, 1905, JX 307, **[*1148]** at 5; id., Aug. 7, 1905, JX 305, at 1; "filing for lands on the

reservation," e.g., Deseret Semi-Weekly News, Sept. 4, 1905, JX 319, at 5; id., Aug. 24, 1905, JX 314, at 2; id., Sept. 7, 1905, JX 320, at 2 ("lands on the reservation"); and other on-reservation matters, e.g., Deseret Evening News, July 7, 1905, JX 280, at 1 (townsites set aside "within the reservation"); Deseret Semi-Weekly News, Oct. 30, 1905, JX 326, at 1 (Ft. Duchesne townsite "in Uintah Indian Reservation"); id., Sept. 21, 1905, JX 322 at 3 (80-acre farm "in the Uintah Reservation, Utah," awarded to daughter of Jim Bridger); id., Sept. 14, 1905, JX 321, at 3 ("settlers of the reservation," "settlers on the **[**237]** reservation"); id., Aug. 28, 1905, JX 317, at 6 (townsite "in Uintah Reservation"); id., Aug. 14, 1905, JX 306, at 2 (newspaper editor will "go on the reservation" to start paper); id., July 27, 1905, JX 298, at 1 (rights in streams "of the Uintah Reservation"); id., July 20, 1905, JX 294, at 3 ("unallotted land in the Uintah Reservation"); Deseret Evening News, July 19, 1905, JX 293, at 1 ("filing on water of the Uintah Reservation"); id., July 18, 1905, JX 290 ("all eyes now on the reservation"); Salt Lake Herald, July 17, 1905, JX 289 at 3 (farming lands "on the Uintah Reservation"); id., July 11, 1905, JX 286, at 1 (old soldiers' colony "on Uintah Reservation"). A well-read public was surely aware that homesteads were being made available upon an Indian reservation not on lands once possessed by Indians now dispossessed, and merely a part of the unreserved public domain.

Another factor is the reference in the 1948 Act adding the Hill Creek Extension to the Uintah and Ouray Reservation. Act of Mar. 11, 1948, ch. 108, 62 Stat. 72, VI Kapp. 375, LD 187. By that legislation, Congress "extended" the "exterior boundary" of the Uintah and Ouray Reservation to include the Hill Creek lands. **[**238]** How could Congress extend a boundary that did not exist?

While this Court disagrees with the United States as amicus to the extent that the Government asserts that the original boundary of the Uintah Valley Reservation remains undiminished, it is significant that the United States, the Indians' trustee, has asserted that the reservation was not disestablished by Congress under the criteria expressed in Rosebud and related cases. The United States' views have carried some weight in other disestablishment cases. See e.g., Seymour v. Superintendent, 368 U.S. 351, 357, 82 S. Ct. 424, 427, 7 L. Ed. 2d 346 (1962). They are afforded significance herein as well.

Some categories of evidence presented at trial have proven less than illuminating. For example, a map exhibit can be found in the record to stand for any of several propositions that one could make regarding the boundary issues. The maps themselves shine little light on the intent of their makers vis-a-vis the specific issue now before this Court. Their probative value is, therefore, weaker than that of other exhibits and testimony.

What can be generalized from the maps is that for many years the former Uncompahgre Reservation has **[**239]** not been thought to deserve map notation, while at the same time, some version of the Uintah or Uintah and Ouray Reservation has been regularly indicated. This Court's conclusions on the boundary issues find approximate reflection, for example, in the U.S. Geological Survey Maps, see Exhibit I-1A (map; 1959 ed.); P.Ex. 1 (map, 1976 ed.), and in the Bureau of Indian Affairs' "Indian Land Areas" Map, JX Map 21 (1971). See also, Ex. I-3 (BLM Map, 1974 ed). Other Maps such as Ex. I-1B, (BLM Map, 1977 ed.), and Ex. I-4A (BLM Map, 1967 ed.), do not indicate those boundaries because they are maps of proprietary tenure, not legal jurisdiction. Some maps are so poorly reproduced that they are valueless, e.g., JX Map 20; some are useless because their definitive color distinctions have been lost in photo-copying, e.g., JX Maps 1, 9, 11 and 13.

Considerable testimony as well was elicited at trial on the availability of federal services to Indians "on or near" the Uintah and Ouray Reservation, and on the alleged "reputation" in the community as to boundaries **[*1149]** of the reservation. Since eligibility of Indians for Federal services is not strictly reservation boundary-dependent, see Morton **[**240]** v. Ruiz, 415 U.S. 199, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1973), testimony on that subject is at best ambiguous on reservation boundary issues.

The reputation evidence is also afforded less weight than other evidence in the record. While, as counsel for the counties points out, such reputation evidence is generally admissible in federal court under Rule 803(20), [202] its reliability in these specific circumstances is suspect.

202 Rule 803(20) of the Federal Rules of Evidence provides this exception to the Hearsay Rule (see Rule 802, F.R.Ev.):

> Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

While a long-standing reputation may serve as important evidence of the status of a boundary of immediate personal importance, e.g., a private property line among neighbors, or of **[**241]** more universal importance, such as a national or state boundary, reputation in a non-Indian community as to Indian boundaries, rights, etc., is indeed a treacherous ground for decision. As the Advisory Committee Notes to the Federal Rules of Evidence, Rule 803(20), point out:

> [HN17] Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusions if any has been found, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, ...

[HN18] To have significant probative value, the matter in question "must be one of general interest, so that it can accurately be said that there is a high probability that the matter underwent general scrutiny as the community reputation was formed." McCormick on Evidence § 324, at 750 (2d ed. 1972) (footnote omitted). Wigmore states this "general interest" requirement even more emphatically:

> [HN19] (T)he facts for which such an opinion or reputation can be taken as trustworthy must ... be such facts as have been of interest to all members of the **[**242]** community as such, and therefore have been so likely to receive general and intelligent discussion and examination by competent persons, so that the community's received opinion on the subject cannot be supposed to have reached the condition of definite decision until the matter had gone, in public belief, beyond the stage of controversy and had become settled with fair finality.

5 Wigmore on Evidence § 1598, at 564-565 (Chadbourn rev. 1974) (emphasis in original); see also id., §§ 1583-1597.

Applying the theoretical underpinnings of Rule 803(20) to the record herein, the reputation in the non-Indian community as to Ute boundaries, arising before this controversy, seems as much based upon the proprietary nature of "Indian lands" as anything else, e.g., Trial Transcript 175-180, diminishing its trustworthiness on the jurisdictional question. Tribal jurisdiction was not an issue before the commencement of this controversy simply because it was not asserted over non-Indians before then to any great extent. Thus tribal jurisdiction was not a topic "likely to have been inquired about" by the non-Indian community; counsel for the State himself asserts that something as significant **[**243]** to Indians as the organization of the tribe under a constitution in 1937 was an event that "didn't get any publicity or attention" in the local non-Indian communities, nor did it "attract the attention of the State." Transcript of Final Arguments at 37 (argument of Mr. Dewsnup).

Furthermore, the evidence of reputation among that segment of the community that is the most likely to inquire about tribal jurisdiction, i. e., the Indians, is largely absent from the record herein. Trial testimony **[*1150]** indicates that discussion of such subjects between Indians and non-Indians was extremely limited. E. g., Trial Transcript at 175 (testimony of Gordon Harmston. [202A] The Federal courts have eschewed the use of boundary by acquiescence, mutual reliance, or estoppel in cases involving the determination of Indian reservation boundaries, see Sekaquaptewa v. MacDonald, 626 F.2d 113, 117-118 (9th Cir. 1980), and with good reason. Federal Indian law is a field of unique texture and complexity and, recalling that the primary focus of the inquiry herein is congressional intent, Rosebud Sioux Tribe v. Kneip, supra, the reputation evidence found in the record here is of less than material importance. **[**244]** [202B]

202A Trial Transcript at 175:

> Q Did you have occasion to talk about boundary questions with any of those people?
>
> A Indians are rather non-communicative, and unless you ask direct questions, you do not get an answer. So I don't ever recall discussing that with anyone of Indian extraction.

It must also be observed that with unfortunate consistency, the assertion of Indian tribal rights and powers to their lawful extent puts Indians at odds with their non-Indian neighbors. E. g., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S.

658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979). Non-Indians in an Indian reservation setting are often far from being dispassionate observers of historical events. Cf. United States v. Kagama, 118 U.S. 375, 384, 6 S. Ct. 1109, 1114, 30 L. Ed. 228 (1886).

202B The offer of a local cafe's dinner table placenta, JX 485, as indirect corroboration of a specific congressional intent to disestablish the Uintah Indian Reservation presses the admissibility of the joint exhibits to the limits of Rule 401 of the Federal Rules of Evidence.

[245]** Finally, this Court has reached the conclusions on the reservation status of the Uintah lands based upon the overall sense of the historical record concerning the Uintah Reservation in contrast to the treatment of the old Uncompahgre Reservation over the same period. To say that both reservations were disestablished by Congress would require this Court to ignore the marked distinctions, contrasts, and inconsistencies that characterize the respective approaches to each reservation. The overall tone of the evidentiary record harmonizes with a finding that the Uintah and Ouray Reservation continues in Indian reservation status, diminished only by the national forest and Strawberry Project withdrawals.

X. THE GENERAL ALLOTMENT ACT

Both plaintiff and defendants in this case assert that the legislation dealing with the Uintah and Uncompahgre Reservations should be construed in light of the provisions of the Dawes Act, or General Allotment Act of 1887, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388, I Kapp. 33 (2d ed. 1904), LD 13. See Plaintiff's Post-Trial Brief at 19-22 ff; Defendant Counties' Post-Trial Brief at 6-18; Transcript of Final Arguments at 63-81. Plaintiff argues that the general **[**246]** operation of the General Allotment Act was to allot and open the Indian reservations while continuing the reservation status of the lands. Defendant Counties assert that the general operation of the Act was the opposite, to reduce the territorial boundaries of reservations following allotment through the restoration of the "surplus" unallotted lands to the public domain. Each party would resolve ambiguities in the legislative materials in its own favor by infusing the specific language at issue with its chosen interpretation of the operative effect of the General Allotment Act. This Court has reviewed the general descriptions of allotment policy expressed in a number of the exhibits. [203] Further, this Court has **[*1151]** looked to treatises and scholarly works dealing with the allotment program in search of such a generalized effect of the General Allotment Act on reservation boundaries. See D. S. Otis, The Dawes Act and the Allotment of Indian Lands (Prucha ed. 1973); F. Cohen, Handbook of Federal Indian Law 334-336, 206 ff (1942); S. L. Tyler, A History of Indian Policy 95-124 (1973); W. Washburn, The Indian in America 233-249 (1975); F. Prucha, ed., Americanizing the American **[**247]** Indians (1973); D. Getches, et al., Cases and Materials on Federal Indian Law (1979); M. Price, Law and the American Indian (1973); 1 American Indian Policy Review Commission, Final Report 61-69 (comm. print 1977); F. Prucha, ed., Documents of United States Indian Policy 153-214 (1975); I, II W. Washburn, ed., The American Indian and the United States: A Documentary History 282-904 (1973).

203 See generally, Ann. Rept. of the Comm. of Ind. Aff., 1880, JX 4 at xvii; Rept. of the Secretary of the Interior, 1885, JX 9, at 24-28; Proceedings of the Third Ann. Lake Mohonk Conference (Oct. 1885), JX 11, at 34-59; Rept. of the Secretary of the Interior, 1886, JX 13, at 3-4; Ann. Rept. of the Comm. of Ind. Aff., 1887, JX 16, at iv-xiv; Rept. of the Secretary of the Interior, 1888, JX 17, at xxviii-xxxiii; Rept. of the Comm. of Ind. Aff., 1890, JX 18, at 3-4; Rept. of the Secretary of the Interior, 1890, JX 19, xxiii-xxiv; id., 1891, JX 22, at vi; id., 1892, JX 28 at vii-viii, xxxii-xxxiii; id., 1894, JX 34, at iv; Rept. of the Comm. of Ind. Aff., 1891, at 4-9, 26, 44-47; id., 1892, JX 27, at 5, 74; id., 1893, JX 31, at 30; id., 1905, JX 328, at 1784-1793; id., 1906, JX 334, at 80-85; 26 Cong.Rec. 6233-6252, 7683-7708, 8251-8253, 8263-8271 (1894), LD 32.

[248]** No doubt the General Allotment Act was understood as a method for ultimately ending the Indian reservation system. President Theodore Roosevelt colorfully described the General Allotment Act as "a mighty pulverizing engine to break up the tribal mass." [204] As Secretary of the Interior Carl Shurz explained in 1880:

204 President's First Annual Message to Congress, Dec. 3, 1901, reprinted in 35 Cong.Rec. 81, 90, LD 64 (1902).

(Allotment) will eventually open to settlement by white men the large tracts of land now belonging to the reservations, but not used by the Indians. It will thus put relations between the Indians and their white neighbors in the western country upon a new basis, by gradually doing away with the system of large reservations, which has so frequently provoked those encroachments which in the past have led to so much cruel injustice and so many disastrous collisions.

Rept. of the Secretary of the Interior, 1880, H.Exec.Doc.No.1, pt. 5, 46th Cong., 3d Sess. at 3 (emphasis added). **[**249]** The processes of the General Allotment Act were indeed understood to be gradual. [205] The annual report of the influential Board of Indian Commissioners commented:

> 205 Consider the colloquy with Professor James B. Thayer of the Harvard Law School as to the effect of the General Allotment Act:
>
> Q "When would the reservation cease to be a reservation?"
>
> A (Thayer) "It would cease to be a reservation when the tribe ceases to be."
>
> Proceedings of the Fifth Ann. Lake Mohonk Conference (Sept. 1887), JX 15, at 84.

This bill, which became a law on the 8th of February, 1887, is a great step in advance in our Indian policy, and the day when it was approved by the President may be called the Indian emancipation day.

> It is plainly the ultimate purpose of the bill to abrogate the Indian tribal organization, to abolish the reservation system and to place the Indians on an equal footing with other citizens of the country.
>
> We do not look for the immediate accomplishment of all this. The law is only **[**250]** the seed, whose germination and growth will be a slow process, and we must wait patiently for its mature fruit.

Ann. Rept. of the Board of Indian Commissioners, 1888, quoted in Tyler, A History of Indian Policy 95-96 (1973) (emphasis added). As the Supreme Court explains in Mattz v. Arnett, 412 U.S. 481, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973), "Under the 1887 Act, ..., the President was not required to open reservation land for allotment; he merely had the discretion to do so. In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotment." Id., 412 U.S. at 497, 93 S. Ct. at 2254 (footnote omitted). In fact, Congress enacted 108 separate pieces of legislation directing the allotment of specific reservations. See 2 American Indian Policy Review **[*1152]** Commission, Task Force No. 9, Report on Federal Indian Law Consolidation, Revision and Codification 235-246 (comm. print 1976). The manner of opening the "surplus" unallotted lands of the reservations to white settlement under those acts was hardly uniform or consistent. Some of the acts provided **[**251]** for the outright cession of the unallotted lands; [206] some provided for a cession in trust; [207] some provided that the unallotted lands would be "restored to the public domain" [208] or to status as "public lands;" [209] other acts simply provided that the unallotted lands would be opened for settlement; [210] and still other of the acts mandated allotment without opening the reservations at all. [211] Reviewing this significant body of legislation as a whole, no single, specific pattern emerges. Not even the exhaustive study of allotment prepared by Dr. D. S. Otis offers a universal rule of construction of those statutes based upon the operation of the General Allotment Act. [212] Instead, the courts must look to the particular terms of statute or statutes affecting the reservation lands under consideration, the legislative history of the statutes and the unique historical circumstances surrounding them.

> 206 See e.g., Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1022, 1026, 1032, 1035, 1039, I Kapp. 407-437 (6 cession agreements ratified); Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 326, I Kapp. 520, 536-541; Act of June 6, 1900, ch. 813, 31 Stat. 672, I Kapp. 704; Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1078, III Kapp. 124, 155-156; Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352, III Kapp. 87.

[252]**

> 207 See e.g., Act of Mar. 2, 1889, ch. 405, 25 Stat. 888, I Kapp. 328 (ceded lands "restored to the public domain"); Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254, III Kapp. 71; Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016, III Kapp. 117.

208 See e.g., Act of July 1, 1892, ch. 140, 27 Stat. 62, I Kapp. 441; Act of Feb. 20, 1895, ch. 113, 28 Stat. 677, I Kapp. 555; Act of May 29, 1908, ch. 216, 35 Stat. 444, 457, III Kapp. 356, 370.

209 See e.g., Act of Feb. 13, 1891, art. V, ch. 165, 26 Stat. 749, I Kapp. 389.

210 E. g., Act of June 17, 1892, ch. 120, 27 Stat. 52, I Kapp. 439; Act of May 29, 1908, ch. 217, 35 Stat. 458, III Kapp. 371; Act of Dec. 21, 1904, ch. 22, 33 Stat. 595, III Kapp. 110; Act of Feb. 14, 1913, ch. 54, 37 Stat. 675, III Kapp. 555.

211 E. g., Act of Mar. 2, 1889, ch. 422, 25 Stat. 1013, I Kapp. 344; Act of Jan. 12, 1891, ch. 65, 26 Stat. 712, I Kapp. 383; Act of Mar. 2, 1895, ch. 188, 28 Stat. 876, 907, I Kapp. 559, 566-567; Act of Feb. 11, 1901, ch. 350, 31 Stat. 766, I Kapp. 713; Act of Mar. 3, 1911, ch. 210, 36 Stat. 1058, 1063, III Kapp. 487, 492-493.

212 See D. Otis, The Dawes Act and the Allotment of Indian Lands (Prucha ed. 1973), originally printed as a "History of the Allotment Policy," in "Readjustment of Indian Affairs," Hearings, House Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 9, at 428-489 (1934). This work is cited with approval in Mattz v. Arnett, 412 U.S. 481, 496 n.18, 93 S. Ct. 2245, 2253, 37 L. Ed. 2d 92 (1973).

[253]** This Court has no problem with the proposition that the Uintah Indian Reservation was allotted pursuant to the general principles of the General Allotment Act as applied by the 1902-1905 Ute legislation. Congress expressly provided for that, and the Court of Appeals for this Circuit has found that to be the case. See Joint Resolution of June 19, 1902, Res. No. 31, 32 Stat. 744 I Kapp. 799, 800 (2d ed. 1904), LD 85, and page 1116 n. 133, supra; United States v. Gray, 201 F. 291, 292 (8th Cir. 1912). Even if this Court adopts the approach of courts in other cases and construes the Ute legislation in pari materia with the General Allotment Act, [213] the operation of the 1887 Act is no interpretative talisman compelling this Court to reach one result as opposed to any other.

213 See United States v. Jackson, 280 U.S. 183, 196, 50 S. Ct. 143, 147, 74 L. Ed. 361 (1930); Stevens v. Commissioner of Internal Revenue, 452 F.2d 741, 746 (9th Cir. 1971); Kirkwood v. Arenas, 243 F.2d 863, 866 (9th Cir. 1957); cf. DeCoteau v. District County Court, 420 U.S. 425, 432, 95 S. Ct. 1082, 1087, 43 L. Ed. 2d 300 (1975); Mattz v. Arnett, 412 U.S. 481, 496, 93 S. Ct. 2245, 2253, 37 L. Ed. 2d 92 (1973).

[254] XI. SUMMARY and CONCLUSION**

In deciding the issues presented in this case, the Court has undertaken a fairly meticulous review of the legal and historical materials concerning the status of the Uintah and Ouray Reservation as it has evolved **[*1153]** over the past 120 years. [214] As the Supreme Court has long recognized:

214 While this Court has consistently advocated the value of brevity in legal writing, I also recognize that in any given case one must cut the cloth to fit the pattern. The above-entitled action offers a pattern that is unusual in its extent and complex detail.

(W)e are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, "courts, in construing a statute may with propriety recur to the history of the times when it was passed." United States v. Union Pacific R. Co., 91 U.S. 72, 79, (23 L. Ed. 224).

Great Northern Ry. Co. v. United States, 315 U.S. 262, 273, **[**255]** 62 S. Ct. 529, 533, 86 L. Ed. 836 (1942); see also Winona and St. Peter R. Co. v. Barney, 113 U.S. 618, 625, 5 S. Ct. 606, 609, 28 L. Ed. 1109 (1885); Smith v. Townsend, 148 U.S. 490, 494, 495, 13 S. Ct. 634, 635, 37 L. Ed. 533 (1893); United States v. Denver & Rio Grande Ry. Co., 150 U.S. 1, 14, 14 S. Ct. 11, 15, 37 L. Ed. 975 (1893); supra, notes 18-20 and accompanying text. This is particularly true where legislation affecting Indians is concerned. See Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665-669, 99 S. Ct. 2529, 2536-2538, 61 L. Ed. 2d 153 (1979); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206, 98 S. Ct. 1011, 1019, 55 L. Ed. 2d 209 (1978); Mohegan Tribe v. State of Connecticut, 638 F.2d 612, 621-623 (2d Cir. 1980). At the same time the limitations inhering in the use of the historical materials remain apparent; this Court is called upon to

determine the present meaning of statutes under circumstances not imagined by their draftsmen. Members of Congress in 1905 firmly believed that the "Indian Problem" would dissipate in a short time:

> I believe that if we follow the policy which has been inaugurated within the last ten or twelve years, and which the members of **[**256]** the Committee on Indian Affairs in the House and in the Senate have supported, within a generation there will be no Indian problem, no Indian question of any magnitude.

39 Cong.Rec. 1139 (Jan. 20, 1905) (remarks of Rep. Lacey), LD 103. Of course, that has not been the course of events resulting from the allotment program. See e.g., S. L. Tyler, A History of Indian Policy (1973); 1 American Indian Policy Review Commission, Final Report (comm. print 1977); E. Kickingbird and K. Ducheneaux, One Hundred Million Acres (1973); F. Cohen, Handbook of Federal Indian Law (1942). The allotment program was probably one of the best-intentioned grievous errors in the history of American policy-making. By the 1920's, the mistake had become obvious to observers, e.g., L. Meriam, ed., The Problem of Indian Administration (1928), and Congress expressly abandoned allotment as a policy in 1934. See Act of June 18, 1934, § 1, ch. 576, 48 Stat. 984, LD 172, codified at 25 U.S.C. § 461 (1976); F. Cohen, Handbook of Federal Indian Law 83-88 (1942). Allotment as a policy remains abandoned, but its voluminous legacy of legislation survives, awaiting interpretation by the courts based upon the intent **[**257]** of congressmen long since gone. In subsequent administrative documents the Court is asked to perceive fine shadings of meaning as to what was or was not an Indian reservation at a time when the executive officials were themselves uncertain. See "Judicial and Departmental Construction of the Words "Indian Reservation' " (Dec. 29, 1945), II Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, at 1378-1379 (1979).

Even conceding the theoretical limitations of the evidentiary record, important findings can be extracted and sound conclusions can be rationally arrived at. Four of these conclusions are: (1) That the original boundaries of the Uncompahgre Reservation as established by Executive Order in 1882 have been disestablished by Congress and no longer exist, Act of June 7, 1897, 30 Stat. 62, 87; (2) That the original boundaries of the Uintah Valley Indian Reservation have been diminished by Congress through the withdrawal of the Gilsonite Strip in 1888 by agreement with the Utes, through the withdrawal of 1,010,000 acres **[*1154]** of timber land and their inclusion in the contiguous national forest reservations pursuant to the Act of **[**258]** Mar. 3, 1905, 33 Stat. 1048, and through the withdrawal of nearly 56,000 acres of land for the Strawberry reclamation project by the Act of April 4, 1910, 36 Stat. 269, 285; (3) Save as thus expressly diminished, the lands of the Uintah Valley Indian Reservation retain continuing status as lands within the boundaries of an Indian reservation, and are "Indian Country" as a matter of federal law, see 18 U.S.C. § 1151(a) (1976); and (4) That the reservation boundaries of the former Uintah Valley Reservation, now the Uintah and Ouray Indian Reservation, have been extended by Congress to include the lands known as the Hill Creek Extension pursuant to the Act of Mar. 11, 1948, 62 Stat. 72.

The map annexed to this opinion as Appendix B and thereby made a part hereof generally outlines the boundary described by these four conclusions. [215]

> 215 If the parties hereto so desire, a stipulated legal description of the boundary determined herein, expressed in metes and bounds, may be submitted for approval by this Court.

[259]** Standing on its own, each separate conclusion finds solid support in the record in this case. Taken together they effectively summarize the preponderant sense of the evidence on the boundary issues. This Court's findings and conclusions on the present territorial extent of the Uintah and Ouray Indian Reservation have strength beyond that afforded by the clear preponderance of the evidence; they are fortified "by that "eminently sound and vital canon'," Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7, 96 S. Ct. 1793, 1796, 48 L. Ed. 2d 274 (1976), that [HN20] "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' Alaska Pacific Fisheries v. United States, 248 U.S. 78, 84, 39 S. Ct. 40, 63 L. Ed. 138 (1918). Bryan v. Itasca County, Minn., 426 U.S. 373, 392, 96 S. Ct. 2102, 2112, 48 L. Ed. 2d 710 (1976); accord,

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586, 97 S. Ct. 1361, 1362, 51 L. Ed. 2d 660 (1977): (In determining (congressional) intent, we are cautioned to follow "the general rule that "(doubtful) expressions are to be resolved in favor of the weak and defenseless people **[**260]** who are the wards of the nation, dependent upon its protection and good faith.' " McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174, 93 S. Ct. 1257, 1263, 36 L. Ed. 2d 129 (1973), quoting Carpenter v. Shaw, 280 U.S. 363, 367, 50 S. Ct. 121, 122, 74 L. Ed. 478 (1930); ...); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666, 99 S. Ct. 2529, 2537, 61 L. Ed. 2d 153 (1979); Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 484, 99 S. Ct. 740, 753, 58 L. Ed. 2d 740 (1979); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173-175 & n.13, 93 S. Ct. 1257, 1262-1263, 36 L. Ed. 2d 129 (1973); Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 n.2, 88 S. Ct. 1705, 1707, 20 L. Ed. 2d 697 (1968); Squire v. Capoeman, 351 U.S. 1, 6-7, 76 S. Ct. 611, 614-615, 100 L. Ed. 883 (1956); United States v. Santa Fe Pac. R. Co., 314 U.S. 339, 353-354, 62 S. Ct. 248, 255, 86 L. Ed. 260 (1941); Choate v. Trapp, 224 U.S. 665, 675, 32 S. Ct. 565, 569, 56 L. Ed. 941 (1912); Choctaw Nation v. United States, 119 U.S. 1, 28, 7 S. Ct. 75, 90, 30 L. Ed. 306 (1886); The Kansas Indians, 72 U.S. (5 Wall.) 737, 760, 18 L. Ed. 667 (1866); Worcester v. Georgia, 31 **[**261]** U.S. (6 Pet.) 515, 582, 8 L. Ed. 483 (1832) (J. McLean, concurring).

Federal Indian law applies a second relevant canon of construction forbidding any assumption "that Congress would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction." United States v. Long Elk, 565 F.2d 1032, 1039 (8th Cir. 1977). The strong policies against "checkerboard" jurisdiction are described by Justice Douglas in his dissenting opinion in DeCoteau v. District County Court, 420 U.S. 425, 95 S. Ct. 1082, 43 L. Ed. 2d 300 (1975). [216] The Supreme Court has indicated that such an impractical **[*1155]** result is not to be imputed to Congress without specific language to that effect. See Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 478, 96 S. Ct. 1634, 1643, 48 L. Ed. 2d 96 (1976); Seymour v. Superintendent, 368 U.S. 351, 358, 82 S. Ct. 424, 428, 7 L. Ed. 2d 346 (1962); United States v. Long Elk, supra, 565 F.2d at 1039 & n.12. [217] No such specific language, or clear intent to that effect, is found here.

216 See note 46, supra.

[262]**

217 As the map exhibits demonstrate, disestablishment of the Uintah reservation would indeed result in checkerboard jurisdiction in the Uintah basin. This contrasts with the settlement pattern in Rosebud, which left the reservation "compact and in a square tract." 430 U.S., at 595, 97 S. Ct. at 1367. Congress rejected a bill introduced by Senator Rawlins in 1901 that would have resulted in a similar pattern at Uintah. See 1112-1114 & note 128, supra.

Instead it is readily apparent that the opening of the Uintah Reservation under the 1905 Act, like the opening in Mattz v. Arnett, 412 U.S. 481, 93 S. Ct. 2245, 37 L. Ed. 2d 92 (1973), was "completely consistent with continued reservation status." Id., at 497, 93 S. Ct. at 2254. As in Seymour v. Superintendent, 368 U.S. 351, 82 S. Ct. 424, 7 L. Ed. 2d 346 (1962), "the Act did no more than open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards." Id. at 356, 82 S. Ct. at 427. Someone who regularly **[**263]** read the Deseret Evening News in 1905 would know that. It is equally apparent to this Court.

[HN21] "(W)hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." United States v. Celestine, 215 U.S. 278, 285, 30 S. Ct. 93, 94, 54 L. Ed. 195 (1909). Mattz, supra, 412 U.S. at 504-505, 93 S. Ct. at 2257-2258. [217A] The "face of the legislation" its "legislative history" and the "surrounding circumstances" as evidenced by the record in this case wholly lack the clear expression of congressional intent to disestablish the diminished Uintah reservation under the principles of Rosebud Sioux Tribe v. Kneip, supra. The "hard evidence" necessary to overcome the construction of ambiguities in favor of the Indians, United States v. Long Elk, supra, is simply not there.

217A This remains true today. Congress may still determine or modify the boundaries of the Uintah and Ouray Reservation by appropriate legislation.

Declaratory relief **[**264]** on the boundary questions is, therefore, granted in favor of the plaintiff Ute Indian Tribe as to the lands within the Uintah and Ouray Reservation as defined above. Declaratory relief is granted in favor of the defendants as to the national forest, Strawberry project, 1888 "gilsonite strip" lands, and the lands of the 1882 Uncompahgre Reservation not included within the 1948 Hill Creek Extension. [218]

218 To the extent that the Tribe's complaint seeks declaratory relief affirming the validity of the Ute Law and Order Code in all of its specific provisions, an advisory opinion is asked for and is hereby denied. The validity of given sections of the Ute Code, or any statutory code, are best evaluated in case-by-case litigation. Tribal jurisdiction within the reservation boundaries as a general concept, however, is expressly affirmed.

The Tribe's prayer for injunctive relief, however, is another matter. The Tribe's allegations of immediate, irreparable harm not remediable at law, a necessary foundation of **[**265]** federal injunctive relief, are nearly six years old. No hard evidence of an immediate threat of irreparable injury to the Tribe at the hands of the defendants appears in the present record. Nor should evidence of such a grave threat arise.

Two of the jurisdictional issues most important to the parties, tribal criminal jurisdiction over non-Indians and tribal regulation of non-Indian hunting and fishing off of tribal lands, have already been resolved by the United States Supreme Court. In Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978), the Court held that the Indian tribes do not have inherent power to try and punish non-Indians for criminal offenses. In Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981), **[*1156]** the Court restricted tribal control of hunting and fishing to Indian-owned and Indian trust lands.

Of course, an expansive reservoir of sovereign tribal authority remains intact. See United States v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). The scope of tribal civil jurisdiction over non-Indians **[**266]** within Indian country was expressed in Montana v. United States, supra, by Justice Stewart:

> To be sure, [HN22] Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Williams v. Lee, 358 U.S. 217, 223 (79 S. Ct. 269, 272, 3 L. Ed. 2d 251); Morris v. Hitchcock, 194 U.S. 384 (24 S. Ct. 712, 48 L. Ed. 1030); Buster v. Wright, 135 F. 947, 950 (CA8); see Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, (100 S. Ct. 2069, 65 L. Ed. 2d 10). [HN23] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court, 424 U.S. 382, 386 (96 S. Ct. 943, 946, 47 L. Ed. 2d 106); Williams v. Lee, 358 U.S. **[**267]** 217, 220 (79 S. Ct. 269, 270, 3 L. Ed. 2d 251); Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129 (26 S. Ct. 197, 200-201, 50 L. Ed. 398); Thomas v. Gay, 169 U.S. 264, 273 (18 S. Ct. 340, 343, 42 L. Ed. 740).

-- - U.S., at -- , 101 S. Ct., at 1258. See also Collins, "Implied Limitations on the Territorial Jurisdiction of Indian Tribes," 54 Wash.L.Rev. 479 (1970). The Supreme Court has expressly confirmed the power of Indian tribes to tax non-Indians entering the reservation to engage in economic activity, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-154, 100 S. Ct. 2069, 2080-2081, 65 L. Ed. 2d 10 (1980); see also Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980) (en banc), cert. granted, 449 U.S. 820, 101 S. Ct. 71, 66 L. Ed. 2d 21, as well as to regulate at least some forms of activity on fee lands. United States v. Mazurie, 419 U.S. 544, 95 S. Ct. 710, 42 L. Ed. 2d 706 (1975). See also Indian Child Welfare Act, 25 U.S.C. §§ 1901 et seq. [219]

219 As Justice Stewart commented in United States v. Montana, supra, "this Court has held that the Indian tribes retain rights to river waters necessary to make their reservations livable, Arizona v. California, 373 U.S. 546, 599 (83 S. Ct. 1468, 1497, 10 L. Ed. 2d 542)." Id., -- -

U.S., at -- n.15, 101 S. Ct., at 1258. This apparently includes the power to control the use of that water. See Colville Confederated Tribes v. Walton, 460 F. Supp. 1320, 1332 (E.D.Wash.1978) affirmed in part, reversed in part and remanded, 647 F.2d 42 (9th Cir. 1981); 46 Fed.Reg. 944 (Jan. 5, 1981).

[268]** The determination herein of the territorial extent of the Uintah and Ouray Indian Reservation bears important implications for the allocation of jurisdiction among federal, tribal, state and local authorities in the Uintah basin. See e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980); Central Machinery Co. v. Arizona State Tax Comm., 448 U.S. 160, 100 S. Ct. 2592, 65 L. Ed. 2d 684 (1980); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973); Williams v. Lee, 358 U.S. 217, 219-220, 79 S. Ct. 269, 270, 3 L. Ed. 2d 251 (1958). [219A] Far from engendering **[*1157]** "absolute chaos and disastrous consequences" [220] this Court's determination of the boundaries of the Uintah and Ouray Indian Reservation should simplify the administration of the law by resolving the nagging disputes that have marked the "jurisdictional history" of that area for years. The evolving principles of federal Indian law and jurisdiction, while not quite a clockwork free of internal frictions, [221] offer **[**269]** the guidance needed to settle in an orderly fashion future jurisdictional disputes that may arise.

219A Of course, criminal cases arising upon the reservation among non-Indians remain within the exclusive jurisdiction of the State, United States v. McBratney, 104 U.S. 621, 26 L. Ed. 869 (1881), New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S. Ct. 307, 90 L. Ed. 261 (1946), as do civil matters not involving Indians or Indian interests. Cf, Utah & Northern Ry. v. Fisher, 116 U.S. 28, 31, 6 S. Ct. 246, 247, 29 L. Ed. 542 (1885); Langford v. Monteith, 102 U.S. 145, 26 L. Ed. 53 (1880); Ute Law and Order Code § 1-2-5 (1975). Nothing in this Court's judgment herein relates in any way to land titles or proprietary interests in lands. Compare Oneida Indian Nation v. County of Oneida, N. Y., 414 U.S. 661, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974); "Symposium on Indian Law: The Eastern Land Claims," 31 Maine L.Rev. 5-211 (1979). The issues herein involve legal jurisdiction, not ownership.

220 Letter from Ass't. Utah Atty. Gen. R. Dewsnup to the Court, June 25, 1980, at 3.

221 See R. Barsh and J. Henderson, The Road: Indian Tribes and Political Liberty (1980).

[270]** The denial of injunctive relief at this point is, however, a denial without prejudice. If circumstances shall arise that justify invoking the exercise of this Court's equitable powers, this Court stands ready to exercise such continuing jurisdiction upon the making of an appropriate record, and to enter such orders as are necessary in order to effectuate its judgment, or as needed in aid of its jurisdiction. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 692-696 & nn. 32, 36, 99 S. Ct. 3055, 3078-3080, 61 L. Ed. 2d 823 (1979); United States v. Michigan, 508 F. Supp. 480 (W.D.Mich.1980). The defendants are reminded that a refusal of their officers to recognize legitimate tribal judicial and governmental authority on the reservation is at least to some extent state interference with tribal sovereignty. [HN24] "While it is clear that tribal reservation sovereignty is not congruent with state sovereignty, such sovereignty as the tribes do possess is entitled to recognition and respect both by state and federal governments." Davis v. Muellar, 643 F.2d 521, 525-526 & nn. 8-9 (8th Cir. 1981). [222]

222 As the United States Court of Appeals for the Eighth Circuit notes in Davis v. Muellar, supra, "the trust responsibility of the Federal Government includes protecting tribal sovereignty." Id. at 525.

[271]** With confidence that the effectuation of this Court's judgment will be approached by all parties with a spirit of open-minded cooperation, this Court hereby ORDERS that this Opinion serve as findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure, and that judgment be entered consistent with these findings and conclusions, pursuant to Rule 58, Federal Rules of Civil Procedure.

2 of 3 DOCUMENTS

UINTAH UTE INDIANS OF UTAH, Plaintiff, v. THE UNITED STATES, Defendant.

No. 92-427L

UNITED STATES COURT OF FEDERAL CLAIMS

28 Fed. Cl. 768; 1993 U.S. Claims LEXIS 107

August 6, 1993, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Under the Treaty with the Utah, Dec. 30, 1849, art. IV, 9 Stat. 984 (1849 treaty), plaintiff Indian tribe filed suit against defendant federal government, asserting aboriginal title in certain lands. The federal government defended with an alternative motion seeking either dismissal or summary judgment.

OVERVIEW: The Indian tribe asserted that it had aboriginal title to land in Utah to which the federal government asserted sole ownership. The federal government's dispositive motion raised four issues regarding 1) whether the Indian tribe was a party to the 1849 treaty; 2) whether the Indian tribe had aboriginal title in the lands at issue; 3) whether the Indian tribe properly pled a breach of trust; and 4) whether collateral estoppel barred the Indian tribe's claim. The court granted summary judgment to the federal government. The court held that an earlier ruling of the Indian Claims Commission collaterally estopped the Indian tribe's successful prosecution of its claim in the current litigation. The court also concluded that the Indian tribe did not possess aboriginal title to the lands claimed because that title had not previously been recognized, and there was no evidence of the Indian tribe's actual and continuous use of the lands claimed. The Indian tribe's breach of trust claim failed because the 1849 treaty did not create a trust relationship, and the court had no jurisdiction over claims that Congress breached a trust relationship.

OUTCOME: The court granted the federal government's motion for summary judgment.

CORE TERMS: treaty, aboriginal, band, tribe, valleys, territory, reservation, occupied, trust relationship, occupancy, mountain, extinguish, ancestors, extinguishment, breach of trust, military, settlers, issue preclusion, property right, designate, cause of action, unrecognized, disputed, summary judgment, establishment, sub-group, northern, outpost, occupy, congressional act

LexisNexis(R) Headnotes

Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
[HN1] In the Treaty with the Utah, Dec. 30, 1849, art. IV, 9 Stat. 984, the Utah Indians submitted to the jurisdiction, power, and authority of the United States. The parties agreed to cease hostilities and to exchange prisoners and any stolen property. The treaty did not place property as such under the government's guardianship, but it alluded to a relationship of protection and guardianship between the parties.

Governments > Local Governments > Boundaries
Governments > Native Americans > Authority & Jurisdiction
[HN2] The Treaty with the Utah, Dec. 30, 1849, art. IV, 9 Stat. 984, provided that the contracting parties agree that the laws now in force, and such others as may be passed, regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the government of the United States, shall be as binding and obligatory upon the said Utahs as if said laws were enacted for their sole benefit and protection. And that said laws may be duly executed, and for all other useful purposes, the territory now occupied by the Utahs is hereby annexed to New Mexico as now organized or as it may be organized or until the government of the United States shall otherwise order.

Governments > Native Americans > Authority & Jurisdiction
[HN3] The Treaty with the Utah, Dec. 30, 1849, art. VI, 9 Stat. 985, stipulated that, to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

Governments > Native Americans > Authority & Jurisdiction
[HN4] Under the Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 985, the Utahs agreed that the aforesaid government shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits. As consideration for the Utahs' agreement, the government grants "donations, presents, and implements" and promises to "adopt such other liberal and humane measures," as it deems appropriate. Treaty with the Utah, Dec. 30, 1849, art. VIII, 9 Stat. 985.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN5] Issue preclusion, or collateral estoppel, and the related doctrine of res judicata mandate that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties. In particular, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving and party to the prior litigation. As a theoretical matter, issue preclusion frees the court and the parties from the onerous task of relitigating issues already decided.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Res Judicata
[HN6] Res judicata and its offspring, collateral estoppel, are not statutory defenses; they are defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court finally decides an issue, a litigant cannot demand that it be decided again. Even if the court disagrees with the factual findings or legal rulings, those findings or rulings remain binding, provided that the test for applying issue preclusion is met.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN7] For issue preclusion to apply, the court must answer four questions in the affirmative: are the issues to be decided identical in the two suits?; are these issues raised and actually litigated in the initial action?; is the court's determination of those issues necessary and essential to the previous judgment?; is the party to be precluded fully represented in the prior action? Thus, issue preclusion does not require identity of causes of action.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN8] The second prong of the issue preclusion test requires the court to examine whether the parties dispute an issue and whether the trier of fact resolves it.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN9] The determination of the issues in the prior action must be necessary and essential to the initial decision. The requirement that a finding be "necessary" to a judgment does not mean that the finding must be so crucial that, without it, the judgment could not stand. Rather, the purpose of the requirement is to prevent the incidental or collateral determination of a non-essential issue from precluding reconsideration of that issue in later litigation.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel
Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN10] The fourth prong of issue preclusion requires the court to analyze whether plaintiff is fully represented in the earlier litigation.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Collateral Estoppel
[HN11] Exceptions exist to invocation of issue preclusion when special circumstances merit or when facts or legal principles significantly change since the prior judgment. These exceptions apply, however, only when unrelated subject matter arises in subsequent cases between the same parties involving similar issues.

Governments > Courts > Courts of Claims
Governments > Federal Government > Executive Offices
Governments > Native Americans > Authority & Jurisdiction
[HN12] 28 U.S.C.S. § 1505 provides, inter alia, that the Court of Federal Claims has jurisdiction over Indian claims whenever such claim is one arising under the Constitution, laws or treaties of the United States, or executive orders of the President. Thus, an Indian tribe must demonstrate that the Constitution, a law, or a treaty can be interpreted to mandate compensation for the court to have jurisdiction.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Motions to Dismiss
[HN13] In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court normally accepts as true the nonmovant's undisputed allegations of fact and construes them in a light most favorable to plaintiff. However, when there exist disputed facts relating to the court's jurisdiction, the court may consider evidence outside the pleadings to resolve the dispute. The nonmoving party bears the burden of proving subject matter jurisdiction.

Estate, Gift & Trust Law > Trusts > General Overview
Governments > Courts > Judicial Precedents
International Law > Treaty Interpretation > General Overview
[HN14] Precedents dictate a liberal reading of Indian treaties.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Opposition > General Overview
Civil Procedure > Summary Judgment > Standards > Appropriateness
[HN15] Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. U.S. Ct. Cl. R. 56(c). The moving party has the burden of establishing the absence of disputed genuine issues of material fact and its entitlement to judgment as a matter of law. In the capacity of opposing defendant's motion, plaintiff has the burden of providing sufficient evidence to show that a genuine issue of material fact indeed exists. In resolving defendant's motion, the court cannot weigh the evidence and determine the truth of the matter on summary judgment. Any evidence presented by the nonmovant is to be believed and all justifiable

inferences are to be drawn in its favor. Summary judgment pursuant to Rule 56 properly can intercede and prevent trial if the movant can demonstrate that trial would be useless in that more evidence than is already available in connection with its motion could not reasonably be expected to change the result.

Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN16] The rights of the original inhabitants are, in no instance, entirely disregarded; but are necessarily, to a considerable extent, impaired. They are admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, are necessarily diminished, and their power to dispose of the soil at their own will, too. Aboriginal title is also called "the right of use and occupancy," "original title," and "Indians title." Aboriginal title does not grant the Indian a property right. Rather, aboriginal title provides a given tribe with rights as against all except the sovereign. The sovereign will protect the Indians' right of occupancy against intrusion by third parties but which right of occupancy may be terminated and such lands filly disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN17] Establishing aboriginal title requires proof of actual, exclusive, and continuous use and occupancy "for a long time" prior to the loss of the land. A court treats aboriginal title as a factual question. A tribe must prove exclusive possession of a parcel, that is, that it uses and occupies the land to the exclusion of other Indian groups. Therefore, mixed use of a given parcel precludes the establishment of any aboriginal title, unless the tribes occupy a defined area in joint and amicable possession. To establish "use and occupancy," a tribe usually provides evidence regarding its way of life, habits, customs, and usages of the land. "A long time" is defined as long enough that the Indians make the area into domestic territory. Plaintiff also must establish that the government recognizes its alleged aboriginal lands to recover compensation for a taking.

Governments > Native Americans > General Overview
Real Property Law > Estates > Present Estates > Fee Simple Estates
Real Property Law > Inverse Condemnation > General Overview
[HN18] Although the Indian right of occupancy is considered as sacred as the fee-simple of the whites, without recognized or acknowledged title, an Indian tribe cannot recover compensation for a Fifth Amendment taking. Aboriginal title does not create a compensable property right. Because aboriginal title constitutes mere possession not specifically recognized as ownership by Congress, the Government may terminate an Indian tribe's unrecognized right of occupancy without compensating the tribe for the land. The Indian Claims Commission (Commission) cases represent a significant departure from this rule because the Commission's enabling jurisdiction grants it the power to hear cases in which the tribe indicts the government's "fair and honorable dealings." Indian Claims Commission Act, 25 U.S.C.S. § 70a (omitted 1978). As a result, the Commission could find a taking when a given plaintiff could only demonstrate unrecognized aboriginal title. The Court of Federal Claims operates under different, less permissive constraints.

Civil Procedure > Justiciability > Political Questions > General Overview
Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN19] Without a property right, no compensation is due under the Fifth Amendment. The existence of a property right does not depend on the justiciability of plaintiff's claim. Courts abstain from ruling on the manner, method, and time of extinguishment of Indian title because those issues remain the exclusive province of the legislative branch. That these issues become justiciable after 1977 does not transform unrecognized Indian title into a compensable property right.

Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN20] Recognition of Indian title may take various forms, but such recognition must manifest a definite intention to accord legal rights. In other words, Congress must affirmatively intend to grant the right to occupy and use the land permanently.

Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN21] Statements by government officials regarding Indian title cannot form the basis for a finding of recognized title.

Governments > Native Americans > Property Rights
[HN22] The treaty states that the Utah tribe occupies some land; however, the boundaries and location of that territory are not defined. Treaty with the Utah, Dec. 30, 1849, art. IV, 9 Stat. 984. Moreover, the treaty indicates that, whatever lands the tribe may occupy at the time, the boundaries of that territory in 1849 are not determined. In pertinent part the treaty provides that the aforesaid government shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries. And the said Utahs, further, bind themselves not to depart from their accustomed homes or localities unless specifically permitted by an agent of the aforesaid government; and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits, and they now deliberately and considerately, pledge to confine themselves strictly to the limits which may be assigned them. Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 985.

Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN23] The 1849 Treaty with the Utah does not recognize title because the boundaries of aboriginal lands are to be settled in the future. Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 985. By its terms the treaty does not designate, settle, adjust, define, or assign limits or boundaries to plaintiff; it leaves such matters to the future. Consequently, the treaty cannot be said to recognize Indian title.

Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN24] When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find indications of such purpose. Congressional intent to recognize Indian title must be definite.

Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN25] The Government can extinguish aboriginal title in various ways. Generally, the failure of an Indian tribe to satisfy any of the elements of aboriginal possession will defeat an aboriginal title claim. In particular, a tribe must demonstrate actual and continuous possession up until the date of the alleged taking. Therefore, the sovereign's exercise of complete dominion adverse to the Indian right of occupancy defeats a claim to aboriginal title.

Governments > Native Americans > Property Rights
Governments > Public Lands > General Overview
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN26] When an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land; and the United States cannot be required to pay therefor on the same basis as if it were a

recognized treaty reservation. Various actions that end actual, exclusive, and continuous use of the land by the Indians can extinguish aboriginal title. However, extinguishment of Indian title cannot be lightly implied in view of the avowed solicitude of the federal government for the welfare of its Indian wards.

Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
Real Property Law > Title Quality > Adverse Claim Actions > Quiet Title Actions
[HN27] Even if Indians continue to occupy some portions of a fort's land, a military base destroys the exclusivity prong of the aboriginal title test. That the Government establishes a military outpost is even more inconsistent with Indian title than occupation by white settlers.

Governments > Fiduciary Responsibilities
Governments > Native Americans > Property Rights
International Law > Treaty Interpretation > General Overview
[HN28] A court can infer the existence of a trust relationship from the nature of the transaction or activity at issue. A trust relationship does not depend for its existence on express language in a treaty or statute. However, a court may look to language contained in the treaty under which the claim is brought to ascertain whether there exists (1) a legal relationship wherein the United States is in fact and law a trustee, fiduciary or guardian, or (2) a general relationship without any of such attributes or obligations, but which is described in the same terms by the courts. A trust relationship exists only with respect to tribal lands.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Governments > Courts > Courts of Claims
Real Property Law > Trusts > Holding Trusts
[HN29] The United States Court of Federal Claims has no jurisdiction to entertain nonconstitutional claims that Congress breaches a trust relationship.

Constitutional Law > Relations Among Governments > New States & Federal Territory
Governments > Native Americans > Property Rights
Real Property Law > Title Quality > Aboriginal & Recognized Title
[HN30] Congress cannot destroy existing property rights acquired under a statute or agreement with the government.

COUNSEL: [1]** Kent A. Higgins, Idaho Falls, Idaho, for plaintiff.

Glen R. Goodsell, Washington, D.C., with whom was Acting Assistant Attorney General Myles E. Flint, for defendant. William Robert McConkie, Office of the Solicitor, Department of the Interior, of counsel.

JUDGES: Nettesheim

OPINION BY: CHRISTINE COOK NETTESHEIM

OPINION

[*771] ***OPINION***

NETTESHEIM, Judge.

This case is before the court after argument on defendant's motion to dismiss or, in the alternative, for summary judgment. Four overriding issues are presented: first, whether plaintiff, an Indian tribe, was party to an 1849 treaty upon which it now sues; second, whether, in any event, plaintiff has aboriginal title to the land at issue; third, whether

plaintiff pleads a breach of trust; and fourth, whether plaintiff is collaterally estopped from litigating these issues by reason of prior litigation before the Indian Claims Commission.

FACTS

Except as noted, the facts are uncontroverted. The Uintah Ute Indians of Utah [1] ("plaintiff") are a Native American tribe currently residing, for the most part, on the Uintah and Ouray Reservation in Utah. The Uintah Band is a federally-recognized tribe organized under the Indian Reorganization Act of June **[**2]** 18, 1934, ch. 576, 48 Stat. 984, codified at 25 U.S.C. §§ 461-492 (1988). The White River (formerly Yampa/Grand River) and Uncompahgre (formerly Tabeguache) Ute bands also reside on the reservation.

1 The parties dispute the exact identity and location of plaintiff's band. Indeed, the multiple bands of Ute Indians confuse the analysis. Plaintiff tribe calls itself the Uintah Utes and the Ute Band.

I. FORT DOUGLAS

In July 1862 the Government erected a military outpost, Camp Douglas, in the Utah Territory. On October 26, 1862, the Government renamed the camp Fort Douglas. On September 3, 1867, President Andrew Johnson reserved the land as a military post. The Fort was subsequently enlarged in 1887 and 1890. Fort Douglas is located on the east side of the Salt Lake Valley at the mouth of the Red Butte Canyon in the Wasatch Mountains. The fort lies two miles east of Salt Lake City. This land is the focal point of the case at bar. Plaintiff alleges that its ancestors "were the original **[**3]** inhabitants upon the land . . . now known as Fort Douglas, and exclusively used and occupied that land in accordance with their lifestyle, habits, customs, and usage." Plf's Compl. filed June 25, 1992, P 5. Plaintiff further alleges that in 1852 "the territorial governor of the State of Utah [2] and [an] Indian agent" acknowledged unspecified "Indian" title to the land encompassed in Fort Douglas. ***Id.*** P 6. Plaintiff contends that the **Weber Utes,** with whom the tribe asserts continuity of **[*772]** identity, continued to live in and around Salt Lake City until 1872, when they left subsequent to the signing of the Spanish Fork Treaty.

2 Utah was not a state in 1852.

Beginning in 1895 Congress began to deed away portions of the Fort Douglas Reservation to the University of Utah. On November 5, 1990, the United States abandoned its use of 48 acres of Fort Douglas. On November 19, 1991, the Government quitclaimed the property to the University. Plaintiff argues that, without remuneration to the Uintah Band of Utes, this conveyance **[**4]** violated the Government's trust responsibilities to the tribe. Plaintiff claims "economic" damages for breach of trust in excess of $ 10,000.00 and asks for attorneys' fees and costs, as well.

II. GENERAL HISTORICAL BACKGROUND

1. ***Aboriginal settlement of the Salt Lake Valley***

Indians inhabited the area in and around what is now Fort Douglas as early as 1805 when Lewis & Clark encountered an Indian who spoke of the inhabitants in and around the Great Salt Lake. [3] Other explorers recorded contacts with Indians in the Salt Lake Valley in 1825, 1842, and 1844. In 1847 Mormon settlers arrived in Utah. Many early Mormon settlers noted encounters with Indians in and around Red Butte Canyon, near and on Fort Douglas' present site. These early settlers called the Indians "Utes" or "Shoshone." Plaintiff alleges that Indians later known as Uintahs inhabited the Salt Lake area under various names, such as **Weber Utes** (also known as Cumumbah) or Gosiute. Eventually these sub-tribal groups were all classified as the Uintah Band. In 1850 Congress created the Utah Territory which included part of what became the Colorado Territory.

3 Defendant also initially disputed the very existence of any Indians within the subject area. In its reply brief, defendant apparently concedes that some non-Uintah Utes inhabited the Salt Lake Valley.

[5]** **2. *The Mormons, the Federal Government, and the Uintah Utes***

During the initial white settlement of the area, tension existed between Mormon leaders and the Government over Indian policy. The Government distrusted the Mormons' relationship with the Indians and vice-versa. Each side believed the other incited the Indians. Consequently, the Uintah Band endured a haphazard and often injurious Indian policy during the 1849-1865 period. (For example, the Utah Indian Agency received less federal funding than other agencies.)

Plaintiff alleges that the Mormon territorial government recognized Indian ownership of the lands within the Utah Territory. In particular, plaintiff points to acts passed in 1852 and 1855 that acknowledge Indian title to land in the territory. However, these acts do not specify a particular band of Indians, nor do they designate specific boundaries of aboriginal land. As a result of anti-Mormon sentiment in the East, the Government formulated an express policy against extinguishing Indian title in the Utah Territory. In this manner the Government placed the title of Mormon settlers in doubt. [4] Plaintiff contends that the Government or its agents provided insufficient **[**6]** appropriations for land acquisition and gave specific orders not to extinguish Indian title to the Utah Indians Agency. In *Northwestern Bands of Shoshone Indians v. United States,* 95 Ct. Cl. 642 (1942), the Court of Claims documented the extinguishment issue with respect to a treaty between the Shoshone Indian Tribe and the Government. The court quoted a letter from the Commissioner of Indian Affairs to a committee formed to negotiate treaties with the Shoshone Indians:

> "It is not expected that the treaty will be negotiated with a view to the extinguishment **[*773]** of the Indian title to the land, but it is believed that . . . you will be enabled to procure from them such articles of agreement as will render the routes indicated secure for travel and free from molestation; also a definite acknowledgement as well of the boundaries of the entire country which they claim, as of the limits within which they will confine themselves. . . .

Id. at 651 (quoting a Letter from the Commissioner of Indian Affairs to Superintendent James Doty, Luther Mann, and former Superintendent Henry Martin dated July 22, 1862). Plaintiff contends **[**7]** that this letter reveals the Government's intention not to extinguish Indian title in negotiating treaties with all Utah Indians, at least in the Salt Lake Valley.

4 Although plaintiff takes the position that Congress excluded the Utah Territory from the Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (1862), and Mormon settlers received no federally recognized legal title to lands that they occupied, the Act does not so provide. It appears that the Government did not designate a land district in Utah until 1868. Claim filing began in 1869.

3. *Treaties with the Utah Indians*[5]

5 Utah Indians" refers to any and all Indians resident in Utah during this time period. The court also uses this term when no specific tribal name is ascribed to a group of Indians.

On December 30, 1849, plaintiff's alleged ancestors and the Government entered into **[**8]** a peace treaty at Abiquin, in what later became the State of New Mexico ("the 1849 treaty"). [6] Because this treaty forms the basis for the court's jurisdiction, a close examination of all its provisions is warranted. [HN1] In the treaty the Utah Indians submitted to the jurisdiction, power, and authority of the United States. The parties agreed to cease hostilities and to exchange prisoners and any stolen property. The treaty did not place property as such under the Government's guardianship, but it alluded to a relationship of protection and guardianship between the parties. [HN2] The treaty further provided:

> The contracting parties agree that the laws now in force, and such others as may be passed, regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the Government of the United States, shall be as binding and obligatory upon the said Utahs as if said laws had been enacted for their sole benefit and protection. And that said laws may be duly executed, and for all other useful purposes, the territory now occupied by the Utahs is hereby annexed to New Mexico as now organized or as it may be organized **[**9]** or until the Government of the United States shall otherwise order.

Treaty with the Utah, Dec. 30, 1849, art. IV, 9 Stat. 984. The parties agreed to allow free passage to American citizens and others through the Indians' lands. [HN3] The treaty stipulated:

> In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the Government of the United States will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said Government may designate.

Treaty with the Utah, Dec. 30, 1849, art. VI, 9 Stat. 985. [HN4] The Utahs agreed

> that the aforesaid Government shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries . . . and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits. . . .

Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 985. As consideration for the Utahs' agreement, the Government granted "donations, presents, and implements" and promised to "adopt such other liberal and humane measures," as it deemed appropriate. Treaty with the Utah, Dec. **[**10]** 30, 1849, art. VIII, 9 Stat. 985. On September 9, 1850, the Senate ratified the treaty. Plaintiff alleges continuity of identity with **[*774]** the Indian signatories to this treaty. At this point in history, plaintiff alleges, the Government made no distinction between the Utes in Utah or the Utes in Colorado and New Mexico. Consequently, plaintiff urges that this treaty applies equally to all Utes.

> 6 Defendant challenges whether plaintiff tribe descends from the same Utes who signed the 1849 treaty. In particular, defendant contends that the 1849 treaty involved the Colorado and New Mexico Utes. According to defendant, the Uintah Utes have no historical connection with these Colorado and New Mexico Ute bands. Therefore, defendant maintains, plaintiff cannot rely on the 1849 treaty for jurisdiction. The treaty document itself refers only to the "Utahs" as signatories. It does not mention band names such as Uintah or even Ute. The treaty by its terms does not specify which band of Utes agreed to its terms.

In 1861 President **[**11]** Abraham Lincoln issued an executive order creating the Uintah Reservation. Exec. Order of Oct. 3, 1861 (1 Kappler 900). Congress did not immediately ratify the order. [7] Plaintiff alleges that the Government desired a buffer zone between the Mormons in Utah and the eastern half of the United States. Moreover, the Government worried that Indian proximity to the overland routes to the West Coast imperiled the safety of settlers, miners, and the mails. The Army constructed Fort Douglas to protect these overland routes. Despite the executive order, however, the Government made no immediate effort to relocate the Uintahs.

> 7 It is unclear whether ratification of such an order was required. However, in 1864 Congress ratified the order, thus consenting to the creation of the Uintah Reservation. Act of May 5, 1864, ch. 77, 13 Stat. 63 (1864).

In 1863 the Government entered into two agreements with the Utahs. The first, an oral agreement finalized on July 7, 1863, was concluded with Chief Little Soldier and the Weber (or Cumumbah) **[**12]** Indians near Salt Lake City. According to a written summary of this oral peace agreement, the **Weber Utes** agreed to cease depredations against the white man. They further agreed to remain encamped near the Great Salt Lake until allowed to venture to their hunting grounds. At a later meeting, James Doty, the Superintendent of Indian Affairs met with other unspecified Ute bands. These bands also agreed to make peace in return for presents and provisions.

On October 12, 1863, Superintendent Doty entered into the Treaty of Tuilla Valley (also known as the Shoshonee-Goship Treaty). Shoshonee-Goship Treaty, Oct. 12, 1863, 13 Stat. 681. Plaintiff alleges that the Cumumbah were among the Indians who signed this treaty of amity and peace. Because plaintiff contends that the Cumumbah

constituted part of the Uintah Band, plaintiff views itself as a party to this treaty. However, the treaty document only specifies the Shoshonee-Goship Band of Indians. This treaty specified the following area as Shoshonee territory: "On the north by the middle of the Great Desert; on the west by Steptoe Valley; on the south by Tooedoe or Green Mountains; and on the east by Great Salt Lake, Tuilla, and Rush Valleys." **[**13]** Shoshonee-Goship Treaty, Oct. 12, 1863, art. V, 13 Stat. 682. Plaintiff alleges that these boundaries encompass the area now occupied by Fort Douglas. The Shoshonee-Goship agreed to keep travel routes unobstructed. They also consented to the construction of military posts along the westward emigrant routes. The Senate ratified the treaty in 1864.

According to plaintiff, the peace treaties entered into with plaintiff tribe did not provide for extinguishment of aboriginal title to land. The issue of who owned land in the Utah Territory therefore remained unsettled. The discovery of valuable minerals in the mountains and the resultant influx of miners further encroached upon the Indians already driven from the lowlands. Settlers in the area began to complain that the Utes had not moved with dispatch to their reservation. In 1864 the Governor of Utah, Amos Reed, asked the Government to negotiate treaties to extinguish Indian title to the land. In February 1865 Congress passed a law authorizing the President to enter into treaties with Indians in the Utah Territory that would extinguish Indian title. An Act, To Extinguish the Indian Title to lands in the Territory of Utah Suitable for **[**14]** Agricultural and Mineral Purposes, ch. 45, 13 Stat. 432 (1865). The Act also provided for the establishment of reservations as far as practicable from areas of white settlement. Plaintiff takes the position that this was the first congressional act to extinguish Indian title in the Salt Lake Valley. Plaintiff also urges that the Act mandated that extinguishment could only be accomplished by treaty.

[*775] In June 1865, pursuant to the congressional legislation, ex-Governor Brigham Young and the Utah Superintendent, O.H. Irish, negotiated a treaty with the Utes. On June 8, 1865, they signed the Treaty with the Utes, Yampah Ute, Pah-vant, Sanpete Ute, Tim-p-nogs, and Cumumbah Bands of the Utah Indians (also known as the Spanish Fork Treaty). In the Spanish Fork Treaty, the signatory Indians agreed to cede their claims to land title in Utah and to move to the Uintah Reservation in exchange for an annual subsistence payments. On October 30, 1865, the Weber (Cumumbah) Utes signed a treaty incorporating the terms of the Spanish Fork Treaty. From 1865-1866 most of the Utes were removed to the reservation. In March 1866 President Johnson submitted the treaty to Congress for ratification. Three years **[**15]** later, on March 11, 1869, Congress rejected the Spanish Fork Treaty.

III. THE INDIAN CLAIMS COMMISSION'S FINDINGS

The Uintah Ute Band previously brought suit against the United States for a taking of aboriginal land. In ***Uintah Ute Indians v. United States,*** $ Ind. Cl. Comm. 1 (1957), the Uintah Band sued for compensation under the fifth amendment to the U.S. Constitution and the Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946), codified at 25 U.S.C. §§ 70-70n, 70o-70v-3 (1976) (omitted 1978), § 70w (repealed 1949). The Indian Claims Commission ("the Commission") made extensive findings and issued an opinion in plaintiff's favor. [8] The Commission's findings and discussion differ from the position advanced by the same plaintiff in the instant litigation. Because the parties, subject matter, and legal issues before the Commission mirror those in the instant litigation, the court will closely canvass the Commission's opinion.

8 In a related case, the Commission also decided a dispute involving the Uintah and Ouray Reservation itself. ***Uintah Ute Indians v. United States,*** 5 Ind. Cl. Comm. 47 (1957).

[16]** The procedural aspects of the case before the Commission reveal important details for this case. First, the original petition filed with the Commission included the Yampah, Cumumbah, and **Weber Ute** Bands. Plaintiff amended the petition to omit these bands and add the Seuvarit Band. 5 Ind. Cl. Comm. at 20-21. Thus, plaintiff did not allege continuity of identity with the **Weber Utes,** and the Commission did not discuss that band. Plaintiff alleged descent from the Uintah, Timpanoag, Pahvant, Sampitch, and Seuvarit Bands. The Commission listed, *inter alia,* seven issues for decision:

1) What area did plaintiff's ancestors occupy?

2) Did plaintiff hold aboriginal or Indian title to this area?

3) Is plaintiff tribe descended from those who aboriginally held the land?

4) Did plaintiff's ancestors divest themselves of any interest in the subject lands?

5) Is plaintiff estopped to assert its alleged claims by administrative ruling, prior litigation, or its conduct in accepting a share of the proceeds of various treaties and agreements?

6) What are the boundaries of lands occupied by plaintiff's ancestors?

7) What was the date of taking?

Id. at 21. **[**17]** In the course of the opinion, the Commission resolved all but the last issue, which it reserved for a later hearing.

1. *Aboriginal location and ethnic composition of the Uintah Band*

The Commission began by noting that the Uintah Band reside on the Uintah and Ouray Reservation with two other unrelated Ute Bands: the White River (formerly Yampa and Grand River) and Uncompahgre (formerly Tabeguache) Bands. 5 Ind. Cl. Comm. at 2. (In fact, the related litigation involved the settlement of these bands on the Uintah Reservation. ***See supra*** note 8.)

The primary issue involved determining the extent of plaintiff's aboriginal lands. Plaintiff proposed a large aboriginal area covering central and eastern Utah, as well as the entire Uintah and Ouray Reservation. **[*776]** 5 Ind. Cl. Comm. at 22. It does not appear that plaintiff claimed aboriginal title to Salt Lake City. Plaintiff's amended petition to the Commission described the claimed northern boundary, as follows: "thence east from the Butterfield Peaks *along the summit of the mountain range separating the drainage area of the Utah and Great Salt Lakes* to the summit of the **[**18]** Uintah Mountains. . . ." ***Id.*** at 22 (emphasis added). For its part, defendant denied aboriginal occupancy of the Uintah Valley. Defendant, however, admitted Uintah occupancy of central Utah to the west of the Wasatch Mountains. ***Id.*** at 23. The Commission agreed with all but the plaintiff's claimed eastern boundary, where the Seuvarits resided, and a portion of the southern boundary. In particular, the Commission noted that the areas around Utah and Sevier Lake in central Utah were "unquestionably Ute." ***Id.*** at 25. Notably, the Commission stated:

> The northern boundary of the Uintah Utes, starting at the northwest corner of the Uintah Valley Reservation, is formed by a part of the Uintah Mountains. The boundary on the north . . . starts at the northwestern corner of the reservation and follows the crest of the Uintah Mountains to the south of the town of Oakley and continues to the Butterfield Peaks in the Oquirrh Mountains. As it proceeds southwesterly, the country opens up into valleys and there is no natural barrier. *However, the location of the Shoshoni to the east of the Great* **[**19]** *Salt Lake and around present Salt Lake City as opposed to the location of the Ute to the south around Utah Lake and Provo seems to indicate a sufficiently definite boundary to justify the division line being placed where it is.*

Id. at 43-44 (emphasis added). [9] The northern boundary of Uintah aboriginal lands was also described as running through the mountains which separate the Salt Lake and Utah Valleys. ***Id.*** at 6-7. Thus, the Commission found aboriginal title to an area largely to the west of the Wasatch and south of the Great Salt Lake. ***Id.*** at 2, 23-27.

9 The Commission parenthetically noted that aboriginal lands delineated in its findings were well within the limits of lands described in the Spanish Fork Treaty. 5 Ind. Cl. Comm. at 12-13.

2. *The Colorado and Utah Utes*

The second major dispute concerned whether the Uintahs were parties to treaties entered into with the Colorado Utes. These treaties provided for cession **[**20]** of aboriginal title and therefore would have defeated plaintiff's claims of a taking. The Commission found that in aboriginal times the Utah Utes included the following five groups: the Uintahs, located in the Uintah Valley; the Timpanoags located around Utah Lake; the Pahvants, located around Sevier Lake and

Corn Creek; the Sampitches, located in San Pete County; and the Seuvarits, roaming in the area to the east of the Wasatch Mountains. 5 Ind. Cl. Comm. at 2. These groups ultimately merged under the common name of Uintah Utes. The Commission did not include the Weber or Cumumbah Utes in this amalgamation. Moreover, the Commission found that "on all four sides of their original lands . . . [plaintiff tribe was] bounded by Indian peoples of a different language, or culture, or both." ***Id.*** at 4. The Shoshone inhabited the area west and north of plaintiff's lands. ***Id.*** at 5. This would encompass Salt Lake City. The Southern Paiutes occupied the area to the south while the Colorado Utes lived to the east, largely in the State of Colorado.

Some confusion existed regarding treaties entered into **[**21]** by the Colorado Utes because the documents listed the Uinta (the omission of the "h" is intentional) Utes as signatories. [10] 5 Ind. Cl. Comm. at 33. On this basis defendant argued before the Commission that the Uintah Utes of Utah had signed away their rights to aboriginal lands pursuant to these treaties. Plaintiff rejoined that the Uintah Band of Indians residing in Utah had no connection whatever with the Colorado Uintah Indians. ***Id.*** at **[*777]** 33. The Commission found that plaintiff tribe constituted "a separate and distinct group from the Indians of Colorado who came to be known as the Grand River, Yampah, and Uintah Bands, and eventually as the White River Utes." ***Id.*** The Commission's opinion aptly chronicled this confusing ethnic history:

> 10 Further confusion resulted from the 1880 forced removal of the Colorado White River Ute Band to the Uintah and Ouray Reservation. 5 Ind. Cl. Comm. at 37-40.

> There is naturally **[**22]** some confusion between these Indians because they were all Utes and prior to the coming of the white men there was no reason for them to avoid contact and also they were probably common victims of raids by the Shoshonies to the north. In other words, there was a common plane of interest upon which they undoubtedly met. However, with the establishment of Utah Territory in 1850, and Colorado in 1861, there came a definite division between the two groups as a result of the establishment of two superintendencies for the two groups of Indians. *We do not mean to say that there was not a separation prior to that time but rather that such separation became a matter of record through the reports of the respective superintendencies.*

5 Ind. Cl. Comm. at 33-34 (emphasis added).

Consequently, the Utah Uintah Band constituted a separate band from those Utes in Colorado and, one would presume, elsewhere. In fact, the Commission later went so far as to state that "the Uintahs of Utah have always been separate from" the White River, Southern, and Uncompahgre Utes. ***Id.*** at 42. Therefore, the Commission determined that the Uintah Utes **[**23]** did not sign the Treaty of March 2, 1868, 15 Stat. 619 (1868), in which various bands of Colorado Utes [11] ceded title to the United States. ***Id.*** at 33. [12] The Commission accordingly held that the Uintah Utes had aboriginal title to a defined area that they had not ceded. Moreover, the Commission concluded that the Government failed to pay compensation for land taken within the aboriginal lands. ***Id.*** at 40, 46. Therefore, the Commission held the Government liable for the taking of the aboriginal lands described. The Commission left the extent of the taking and damages for a later hearing.

> 11 These bands included the Tabeguache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands from Colorado.

> 12 In fact, the Commission's detailed research revealed that some Utah Utes were present during the treaty signing, but the Commission concluded that those Utah Utes could not bind their brethren in Utah. 5 Ind. Cl. Comm. at 36.

[24] DISCUSSION**

The parties present three issues that must be decided: first, whether the Uintah Band of Ute Indians is related to the Utah Indians who signed the 1849 treaty upon which plaintiff now sues; second, whether the Uintah Band had unextinguished and/or recognized aboriginal title to the land ceded by the Government to the University of Utah; and third, whether plaintiff can maintain the instant action as a breach of trust suit. Before examining these issues, the court

will address a dispositive issue that was mentioned in defendant's briefs and was discussed extensively during oral argument.

I. ISSUE PRECLUSION AND THE INDIAN CLAIMS COMMISSION

[HN5] Issue preclusion, or collateral estoppel, and the related doctrine of *res judicata* mandate that "a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties . . . . ***Montana v. United States,*** 440 U.S. 147, 153, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979) (quoting ***Southern Pac. R.R. v. United States,*** 168 U.S. 1, 48-49, 42 L. Ed. 355, 18 S. Ct. 18 (1897)). In particular, "once an issue is actually and necessarily **[**25]** determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving & party to the prior litigation. . . ." ***Montana,*** 440 U.S. at 153 (citing, *inter alia,* ***Parklane Hosiery Co. v. Shore,*** 439 U.S. 322, 326, n.5, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979)); ***see also Mother's Restaurant, Inc. v. Mama's Pizza, Inc.,*** 723 F.2d 1566, 1569 **[*778]** (Fed. Cir. 1983). As a theoretical matter, issue preclusion frees the court and the parties from the onerous task of relitigating issues already decided. As the Court of Claims noted:

> [HN6] *Res judicata* and its offspring, collateral estoppel, are not statutory defenses; they are defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again.

Warthen v. United States, 157 Ct. Cl. 798, 800 (1962). **[**26]** Even if the court disagrees with the factual findings or legal rulings, those findings or rulings remain binding, provided that the test for applying issue preclusion is met. ***See United States v. Moser,*** 266 U.S. 236, 242, 69 L. Ed. 262, 45 S. Ct. 66 (1924) (erroneous view or erroneous application of law does not vitiate application of collateral estoppel).

In order [HN7] for issue preclusion to apply, the court must answer four questions in the affirmative: Are the issues to be decided identical in the two suits? Were these issues raised and actually litigated in the initial action? Was the court's determination of those issues necessary and essential to the previous judgment? Was the party to be precluded fully represented in the prior action? ***Mothers Restaurant,*** 723 F.2d at 1569. Thus, issue preclusion does not require identity of causes of action. The court will consider these questions serially.

1. *Identity of issues*

The court begins by examining the issues presented to the factfinders. Before the Commission, the parties disputed, and the Commission decided, the following issues: 1) What were the areas that plaintiff's ancestors aboriginally **[**27]** occupied? 2) Were plaintiff's ancestors legally capable of holding such title? 3) Did plaintiff tribe descend from its alleged ancestors? 4) Did the ancestors divest themselves of aboriginal title? 5) Was plaintiff estopped in this suit by previous litigation? 6) What were the boundaries of plaintiff's aboriginal land? ***Uintah Ute Indians v. United States,*** 5 Ind. Cl. Comm. 1, 21 (1957). In the instant case, issues before the court include the following: 1) Did plaintiff's ancestors sign the 1849 Treaty with the Utahs? 2) Did plaintiff aboriginally occupy the land encompassed within Fort Douglas? 3) Has plaintiff divested itself of title to that land? 4) Was plaintiff's title extinguished? The court concludes the Commission's resolution of issues 1 and 6 precludes litigation before the Court of Federal Claims of the composition of the band and the areas and boundaries of plaintiff's aboriginally occupied lands.

a. *Aboriginal title*

The Commission made detailed findings with respect to plaintiff's aboriginal lands. In finding number 3, the Commission stated:

> 3. That at the time plaintiff's were deprived of their lands by defendant they were in **[**28]** the exclusive use and occupancy of lands lying within the following boundaries:

> Commencing at the northwest corner of the Uintah and Ouray reservation in the Uintah Mountains and running thence along the crest of said mountains through Clayton, Sunset and Lone Peaks and across Jordan Narrows, where Jordan River cuts through the mountains separating Salt Lake and Utah Lake valleys; thence along the crest of such mountains to Butterfield Peaks; thence along the crest of the Oquirrah Mountains to a point thereon due east of the town of Lofgreen . . . .

5 Ind. Cl. Comm. at 2. In fact, the northern aboriginal boundary found by the Commission was consistent with plaintiff's contentions at the time.

The described aboriginal land does not include the Salt Lake Valley and therefore does not include the land conveyed by the Government to the University of Utah. In this case plaintiff asks the court to designate **[*779]** the Salt Lake Valley as Uintah aboriginal land. The tribe thereby seeks to redefine and expand its aboriginal lands. For example, plaintiff presents documentary and anthropological reports showing **Weber Ute** occupancy of the Salt Lake Valley. Plaintiff classifies **[**29]** the **Weber Utes** as having merged into the Uintah Band. [13] In effect, plaintiff argues that the court should revisit the aboriginal boundaries established by the Commission in 1957 because the Weber or Cumumbah Utes constitute a sub-group amalgamated into the Uintah Band, along with other sub-groups, such as the Pahvants. Plaintiff further contends that the **Weber Utes** aboriginally occupied the Salt Lake Valley and Fort Douglas. In this manner plaintiff obtains aboriginal title to more than the Commission found in 1957. Plaintiff puts forth considerable effort to present the court with historical evidence to achieve a supplementation of a finding made by the Commission over 25 years ago.

> 13 Plaintiff's historical data also indicate that the **Weber Utes** may more properly be classified as Shoshone or mixed Shoshone-Ute. In any event, plaintiff maintains that they integrated into the Uintah Band.

Plaintiff acknowledges that in the 1950's the tribe argued for a northern boundary that did not include the Salt Lake Valley, **[**30]** but ascribes this position to counsel's concomitant representation of the Shoshone. According to Carl S. Hawkins, a law professor at Brigham Young University, then an associate in plaintiff's counsel's former law firm, the Utes' northern boundary (the court assumes that the affiant refers to the Uintah Band) contained a "region of intermixture" of Utes and Shoshone. Affidavit of Carl S. Hawkins, dated July 7, 1993, P 6. Mr. Hawkins avers: "If we attempted to define an exact boundary between the Shoshones and the Utes, the partners felt it would clutter the Northwestern Shoshone claim with an unnecessary distraction from the issues and delay resolution of that claim." ***Id.*** **P 7**. Mr. Hawkins indicates that ethnological evidence linked the Salt Lake Valley with both tribes. Due to a perceived conflict of interest, plaintiff's former counsel decided not to argue for the inclusion of the Salt Lake Valley within plaintiff's aboriginal lands. Mr. Hawkins avers that plaintiff's former counsel therefore drew the Uintah's northern boundary between Utah Valley and the Salt Lake Valley.

While Mr. Hawkins' affidavit does raise troubling questions regarding his **[**31]** firm's representation of the Uintah Band, [14] it does not affect the identity of issues in the case before the Commission and the case at bar. At this stage in the analysis, the question is not whether a Uintah Band did inhabit Salt Lake Valley, but whether the issues in the two cases are identical. The Hawkins affidavit supports a conclusion that the issue of the scope of Uintah aboriginal lands was present in both the Commission proceeding and the instant case.

> 14 The court observes that former counsel's representation of two Indian tribes which had claims to the same land raised a potentially disqualifying conflict of interest issue. Even if the Uintah Band consented to such representation, the court finds it difficult to understand why the Band would consent to a reduction in its aboriginal lands. How Mr. Hawkins' firm procured the **Weber Utes'** consent to withdraw as a plaintiff is also mystifying. Apparently neither the Commission nor the parties raised these concerns, and plaintiff is bound by the decades-old tactical decisions of its former counsel.

[32]** b. *Sub-groups included within the Uintah Band*

In order to draw aboriginal boundaries, the Commission had to determine which sub-group bands merged into the Uintah Band. Before the Commission plaintiff withdrew the **Weber Utes** as a plaintiff; therefore, the Commission found that the Uintah Ute Band contained the following sub-groups: Uintahs, Timpanoags, Pahvants, Sampitches, and Seuvarits. 5 Ind. Cl. Comm. at 2-3. The Commission did more than merely accept plaintiff's representations. The Commission also separately found that "to the west and north of the original habitat of the plaintiffs lived various bands of Shoshone Indians. . . ." ***Id.*** at 5. Moreover, as previously noted, the Commission opined that the Shoshone inhabited the region around the Great Salt **[*780]** Lake and present Salt Lake City, whereas the Utes resided around Provo and Utah Lake. ***Id.*** at 44. In the instant case, plaintiff, on the basis of historical and documentary evidence, asks the court to include the **Weber Utes** within the Uintah Band as part of the court's analysis of plaintiff's aboriginal lands. Thus, the composition **[**33]** of the Uintah Band is also an identical issue before the Commission and the court.

2. ***Issues raised and litigated***

[HN8] The second prong of the issue preclusion test requires the court to examine whether the parties disputed an issue and whether the trier of fact resolved it. ***Mother's Restaurant,*** 723 F.2d at 1570. For the most part, the Commission's findings and opinion do not indicate the areas of disagreement between the parties. Indeed, defendant admitted the occupancy of the areas west of the Wasatch occupied by the Timpanoag, Pahvant, and Sampitch Utes. 5 Ind. Cl. Comm. at 23. Defendant did dispute whether plaintiff tribe occupied the areas east of the Wasatch. ***Id.*** Defendant also disputed whether plaintiff occupied the Uintah Valley. ***Id.*** at 26-27. Resolution of these disputes necessarily involved identifying the sub-groups that comprised plaintiff band. The Commission resolved both of these disputes in connection with its overall determination of the aboriginal area. Thus, defendant disputed plaintiff's aboriginal boundaries and the Commission resolved these disputes. The parties **[**34]** did not stipulate to any issues, which indicates that defendant required plaintiff to present evidence and thereby to litigate the issues.

3. ***Necessary and essential to the prior judgment***

[HN9] The determination of the issues in the prior action must have been necessary and essential to the Commission's decision. ***Mother's Restaurant,*** 723 F.2d at 1571 (citing cases). As the Federal Circuit stated:

> The requirement that a finding be 'necessary' to a judgment does not mean that the finding must be so crucial that, without it, the judgment could not stand. Rather, the purpose of the requirement is to prevent the incidental or collateral determination of a non-essential issue from precluding reconsideration of that issue in later litigation.

Id. (citations omitted). The Commission's delineation of plaintiff's aboriginal boundaries and its determination of which groups comprised the Uintah Band formed crucial underpinnings of the Commission's opinion. In order to adjudicate plaintiff's takings claim, the Commission faced the *sine qua non* of determining the boundaries of the band's aboriginal lands, if any. Moreover, this inquiry depended **[**35]** on which groups comprised the Uintah Band. If the Webers formed a constituent part of the Uintah Band, then additional aboriginal lands would come into play. Neither the defining of plaintiff's aboriginal lands nor the enumeration of which groups formed the Uintah Band can be considered incidental, collateral, or non-essential to the Commission's decision.

4. ***Full representation***

[HN10] The fourth prong of issue preclusion requires the court to analyze whether plaintiff tribe was fully represented in the Commission case. Though it appears that plaintiff's former counsel ill-served at least his **Weber Ute** clients, the court notes that plaintiff prevailed in the Commission case in which a large portion of Utah was included within the tribe's aboriginal lands. The court cannot conclude that plaintiff was not fully represented in the Commission case.

5. ***Special circumstances/change in controlling facts or legal principles***

[HN11] Exceptions exist to invocation of issue preclusion when special circumstances merit or when facts or legal principles have significantly changed since the prior judgment. These exceptions apply, however, only when unrelated subject matter arises in subsequent cases between **[**36]** the same parties involving similar issues. ***Montana,*** 440 U.S. at 162.

The court is satisfied that the Commission acted as a court of competent jurisdiction. In particular, the Commission's enabling statute provided that the Commission **[*781]** could adjudicate "claims arising from a taking by the United States." Indian Claims Commission Act, ch. 959, § 2(4), 60 Stat. 1050, codified at 25 U.S.C. § 70a (1976) (omitted 1978). The Commission's judgments had the effect of a final judgment of the Court of Claims and, upon payment to the plaintiff tribe, constituted a full discharge of all matters in controversy. § 22(a), 60 Stat. 1055, codified at 25 U.S.C. § 70u. Furthermore, the Act provided that "[a] final determination against a claimant made and reported in accordance with . . . [the] Act shall forever bar any further claim or demand against the United States arising out of the matter in controversy." § 22(b), 60 Stat. 1055, codified at 25 U.S.C. § 70u.

The court recognizes that plaintiff's present cause of action allegedly matured in 1991 and therefore **[**37]** could not have been brought prior to 1951, the expiration date for claims presented to the Commission. Issue preclusion does not bar future claims, but it does bar relitigating issues, even if they are presented later as wholly new theories or causes of action. The doctrine of issue preclusion thus forecloses plaintiff from relitigating the same issues that it could, or should, have framed more broadly when the issues concerning the lands aboriginally occupied by plaintiff's ancestors and the boundaries of those lands were litigated fully and decided over 35 years ago. The court concludes that the Commission finally decided the issues of aboriginal title and the constituent sub-groups included within the Uintah Band. Plaintiff is precluded from arguing that it retained aboriginal title to the subject land of Fort Douglas and from alleging that the **Weber Utes** form a constituent part of the Uintah Band. Consequently, plaintiff cannot maintain the present action for a breach of trust or a constitutional taking of a right to trust protection as to the subject land.

II. JURISDICTION

Because it is not dispositive, jurisdiction, the *force majeure* of all legal defenses, does not receive **[**38]** priority treatment in this opinion. The resolution of this issue involves [HN12] 28 U.S.C. § 1505 (1988), which provides, *inter alia,* that the Court of Federal Claims has jurisdiction over Indian claims "whenever such claim is one arising under the Constitution, laws or treaties of the United States, or executive orders of the President . . . ." Thus, an Indian tribe must demonstrate that the Constitution, a law, or a treaty can be interpreted to mandate compensation in order for the court to have jurisdiction. ***United States v. Mitchell,*** 463 U.S. 206, 216-18, 226, 77 L. Ed. 2d 580, 103 S. Ct. 2961 (1983) (commonly referred to as ***"Mitchell II").***

1. *Were plaintiff's ancestors parties to the 1849 treaty?*

Plaintiff alleges that the tribe is "treaty heirs of the 'Treaty with the Utah, 1849'. . . entered into . . . between defendant . . . and certain bands of Indians, including the ancestors of plaintiff . . . ." Compl. filed June 25, 1992, P 1. Defendant moves to dismiss for lack of subject matter jurisdiction, arguing that plaintiff cannot base its cause of action on a treaty, as required by 28 U.S.C. §§ 1491 **[**39]** (a)(1), 1505.

Defendant's version of these century-old historical events recounts that the 1849 Treaty with the Utahs included Utes from New Mexico and Colorado, not Utah. The Utah Utes and Colorado/New Mexico Utes lived separate existences, and the Government treated with each group individually. Defendant points to several provisions in the 1849 treaty. Acknowledging that the treaty does not actually describe the land occupied by the Utah Indians, defendant notes that the parties signed the treaty in Abiquin, New Mexico Territory, and that the treaty provided for the annexation to the New Mexico Territory of all the Utah Indian lands. This, defendant asserts, shows that the Government treated with, and extinguished the territorial claims of, Indians who occupied lands in or near New Mexico. In addition, defendant points to the unratified Spanish Fork Treaty with the Uintah Utes, which also provided for the extinguishment of aboriginal

title. According to defendant, this treaty manifests **[*782]** the Government's separate view of the Utah and Colorado/New Mexico Indians.

Plaintiff responds with a veritable plethora of historical evidence. Plaintiff points to the Commission's determination **[**40]** that the Colorado and Utah Utes existed separately and independently of each other. Plaintiff maintains that until at least 1850, when Congress created the Utah Territory, the Government considered all Utahs, wherever residing, as Utahs. After that point, or as late as 1861 when Congress created the Colorado Territory out of the Utah Territory, the Government treated the two groups separately. Hence, an 1849 treaty with "Utahs" perforce includes all Utahs within the United States. Plaintiff cites the Commission's historical account of the Utah and Colorado Utes as separate entities only after 1850 or 1861. Plaintiff also points to contemporaneous accounts describing the negotiator's view that "Utahs" comprised all the Utah Indians in the United States at the time of the treaty.

[HN13] In ruling on a motion to dismiss for lack of subject matter jurisdiction, the court normally accepts as true the nonmovant's undisputed allegations of fact and construes them in a light most favorable to plaintiff. ***Scheuer v. Rhodes,*** 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1984); ***Reynolds v. Army & Air Force Exch. Serv.,*** 846 F.2d 746, 747 (Fed. Cir. 1988). However, **[**41]** when there exist disputed facts relating to the court's jurisdiction, the court may consider evidence outside the pleadings in order to resolve the dispute. ***Rocovich v. United States,*** 933 F.2d 991, 994 (Fed. Cir. 1991); ***Indium Corp. v. Semi-Alloys, Inc.,*** 781 F.2d 879, 884 (Fed. Cir. 1985), ***cert. denied,*** 479 U.S. 820, 93 L. Ed. 2d 37, 107 S. Ct. 84 (1986); ***Reynolds,*** 846 F.2d at 747. The nonmoving party bears the burden of proving subject matter jurisdiction. ***Rocovich,*** 933 F.2d at 993; ***Reynolds,*** 846 F.2d at 748. Plaintiff has put forward sufficient facts to warrant trial on the issue of subject matter jurisdiction were the matter to proceed further.

This case presents the court with the first treaty entered into with any Ute band. This much, at least, is certain. Each party presents seemingly legitimate historical evidence. On the one hand, defendant argues deductively that the parties signed the treaty in present-day New Mexico. The treaty provided for cession of all Indian lands to the New Mexico Territory. **[**42]** Therefore, the treaty must apply only to those Utes residing in New Mexico. Plaintiff, which bears the burden, sets forth the thoughts of the Government's negotiator, Commissioner of Indian Affairs James S. Calhoun, who indicates that he thought that he treated with all Utahs. Plaintiff also cites the Bureau of American Ethnology and an historical account of the Utes to similar effect.

The court deems plaintiff's authorities sufficient, in the present posture of the case, to survive defendant's jurisdictional motion. Mindful that it is not beyond doubt that plaintiff can prove no set of facts which would entitle it to relief, ***Hamlet v. United States,*** 873 F.2d 1414, 1416 (Fed. Cir. 1989), the court concludes that plaintiff has met its burden. While defendant's deductive argument has merit, the court cannot ignore plaintiff's well-researched history indicating that the Government did not separately deal with the Utah and Colorado Utes until at least 1850, one year after the treaty at issue. The court does not intimate that plaintiff presents a conclusive history; nonetheless, the history presented satisfies the court that it is at least possible that **[**43]** plaintiff could have proved a set of facts entitling the tribe to pursue relief in the Court of Federal Claims. [15]

15 Plaintiff contends that the treaty creates a trust relationship violated by the Government when it conveyed land to the University of Utah. Because the [HN14] precedents dictate a liberal reading of Indian treaties, ***Choate v. Trapp,*** 224 U.S. 665, 675, 56 L. Ed. 941, 32 S. Ct. 565 (1912), the court does not insist on a strict interpretation of the 1849 treaty. The court does not read the 1849 treaty to mandate compensation if a party breaches the treaty. ***Cf. Mitchell,*** 463 U.S. at 218 (stating that "a court must inquire whether the source of substantive law [in this case, the 1849 treaty] can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained. . . ."). The 1849 treaty is a peace treaty; it does not provide for annual payments, a reservation, or specify rights or obligations.

[*783] III. THE PARTIES' CONTENTIONS ON THE MERITS

[44]** [HN15] Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RCFC 56(c). Defendant, as the moving party, has the burden of establishing the absence of disputed genuine issues of material fact and its entitlement to judgment as a matter of law. ***Celotex Corp. v. Catrett,*** 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In the capacity of opposing

defendant's motion, plaintiff has the burden of providing sufficient evidence to show that a genuine issue of material fact indeed exists. ***Id.,*** at 322, 324.

In resolving defendant's motion, the court cannot weigh the evidence and determine the truth of the matter on summary judgment. ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 249, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Any evidence presented by the nonmovant is to be believed and all justifiable inferences are to be drawn in its favor. ***Id.*** at 255. Summary judgment pursuant to RCFC 56 properly can intercede and prevent trial if the movant can demonstrate that trial would be useless in that more evidence **[**45]** than is already available in connection with its motion could not reasonably be expected to change the result. ***Pure Gold, Inc. v. Syntex (U.S.A.), Inc.,*** 739 F.2d 624, 626 (Fed. Cir. 1984).

Defendant essentially asks for summary judgment on the basis that plaintiff's theories of relief, measured against all the evidentiary materials submitted by the parties, do not state claims upon which relief can be granted. The facts in dispute between the parties are not dispositive. The inquiry on this motion for summary judgment is whether, affording plaintiff the presumptively favorable view of the facts to which it is entitled, defendant has discharged its burden of showing that it is entitled to judgment as a matter of law.

At oral argument plaintiff presented a novel and ingenious theory of recovery not completely addressed in its briefs. Plaintiff sues for an alleged breach of trust that occurred when the Government deeded certain land to the University of Utah. However, during argument, plaintiff moved to amend its complaint to allege a taking without just compensation under the fifth amendment to the U.S. Constitution. Plaintiff's argument may be summarized, **[**46]** as follows: As part of its breach of trust action, plaintiff argues that the 1849 treaty recognized Indian title and provided for the permissive occupation by the Government of certain Indian lands on which to build agencies and military outposts. These outposts, plaintiff argues, provided benefits to both settlers and Indians by keeping the peace. Plaintiff posits that the 1849 treaty created a trust relationship between the Government and the Uintahs as to those lands. Plaintiff urges that the treaty also vested in plaintiff a right to that trust protection. In other words, when the Government's permissive use ceased, the land would revert to the Indians. The congressional authorization for and subsequent 1991 conveyance of land from the Government to the University of Utah breached this trust. In this fashion plaintiff seeks to avoid the issue preclusion bar on ripeness grounds, arguing that plaintiff could not have presented this cause of action to the Commission because, until 1991, the Government dutifully held the subject land in trust for plaintiff. Plaintiff would plead that the 1991 authorization and conveyance unconstitutionally took plaintiff's right to trust protection.

[47]** Defendant rejoins that ***Menominee Tribe v. United States,*** 221 Ct. Cl. 506, 607 F.2d 1335 (1979) (en banc), ***cert. denied,*** 445 U.S. 950, 63 L. Ed. 2d 786, 100 S. Ct. 1599 (1980), forecloses plaintiff's new theory and thus renders amendment futile. ***Mitsui Foods, Inc. v. United States,*** 867 F.2d 1401, 1403-04 (Fed. Cir. 1989) (holding that futility of amendment constitutes a valid reason for denying leave to amend). ***Menominee*** held that the Court of Claims lacked jurisdiction over a non-constitutional claim that a congressional act breached a trust relationship to an Indian tribe. 221 Ct. Cl. at 511-18, 607 F.2d at 1338-43.

[*784] Plaintiff responds in two ways. First, plaintiff distinguishes ***Menominee*** by asserting that the 1991 authorizing legislation does not conflict with the 1849 treaty, because the subject congressional act does not explicitly extinguish plaintiff's right of occupancy. Second, plaintiff posits that it would plead a constitutional claim, *i.e* a taking. [16] Still, the gravamen of plaintiff's proposed claim is that the Government breached **[**48]** its trust by enacting legislation that had the effect of taking plaintiff's land. Defendant rebuts the constitutional claim by citing ***Tee-Hit-Ton Indians v. United States,*** 348 U.S. 272, 99 L. Ed. 314, 75 S. Ct. 313 (1955), and ***Inupiat Community v. United States,*** 230 Ct. Cl. 647, 680 F.2d 122, ***cert. denied,*** 459 U.S. 969, 74 L. Ed. 2d 281, 103 S. Ct. 299 (1982), for the proposition that no taking occurs when the Government exercises its sovereign prerogative to extinguish unrecognized Indian title. Plaintiff puts forward ***Choate v. Trapp,*** 224 U.S. 665, 678, 56 L. Ed. 941, 32 S. Ct. 565 (1912), which held that Congress could not unilaterally abrogate a vested property right. Plaintiff also points to 1865 legislation authorizing the Government to negotiate treaties to extinguish title. According to plaintiff, congressional authorization therefore could not have the effect of extinguishing Indian title.

16 At argument plaintiff styled the proposed amended claim as a "taking of a right to trust protection."

[49] IV. ABORIGINAL TITLE**

Aboriginal title denotes an interest that an Indian tribe possesses in land based solely on rights acquired by the Indians as original inhabitants of the land and not upon a statute, treaty, or grant by the sovereign. As early noted by the Supreme Court, the first settlers on the North American continent established relations with the Native Americans where whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

> [HN16] the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to

Johnson and Graham's Lessee v. M'Intosh, 21 U.S. 543, 574, 5 L. Ed. 681 (1823). Aboriginal title has also been called "the right of use and occupancy" "original title," and "Indians **[**50]** title." *Sac & Fox Tribe v. United States,* 179 Ct. Cl. 8, 20-21, 383 F.2d 991, 997, ***cert. denied,*** 389 U.S. 900, 19 L. Ed. 2d 217, 88 S. Ct. 220 (1967). Aboriginal title does not grant the Indian a property right. ***Tee-Hit-Ton Indians,*** 348 U.S. at 279. Rather, aboriginal title provides a given tribe with rights as against all except the sovereign. **Id.** The Supreme Court held in ***Tee-Hit-Ton Indians*** that the sovereign will protect the Indians' right of occupancy "against intrusion by third parties but which right of occupancy may be terminated and such lands filly disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." ***Id.***

[HN17] Establishing aboriginal title requires proof "'of actual, exclusive and continuous use and occupancy 'for a long time' prior to the loss of the land.'" ***United States v. Pueblo of San Ildefonso,*** 206 Ct. Cl. 649, 669, 513 F.2d 1383, 1394 (1975) (quoting ***Confederated Tribes of the Warm Springs Reservation v. United States,*** 177 Ct. Cl. 184, 194 (1966)); **[**51]** ***see United States v. Santa Fe Pac. R.R.,*** 314 U.S. 339, 345, 86 L. Ed. 260, 62 S. Ct. 248 (1941) (describing aboriginal possession as "definable territory occupied exclusively by the . . . [Indians]"). A court treats aboriginal title as a factual question. ***Id.*** A tribe must prove exclusive possession of a parcel *i.e.*, "'that it used and occupied the land to the exclusion of other Indian groups.'" ***Strong v.*** **[*785]** ***United States,*** 207 Ct. Cl. 254, 261, 518 F.2d 556, 561 (quoting ***Pueblo of San Ildefonso,*** 206 Ct. Cl. at 669, 513 F.2d at 1394), ***cert. denied,*** 423 U.S. 1015, 46 L. Ed. 2d 386, 96 S. Ct. 448 (1975). Therefore, mixed use of a given parcel "precludes the establishment of any aboriginal title," ***Strong,*** 207 Ct. Cl. at 260, 518 F.2d at 561, unless the tribes occupy a defined area in joint and amicable possession. ***Confederated Tribes,*** 177 Ct. Cl. at 194. To establish "use and occupancy," a tribe usually provides evidence regarding its way of life, habits, customs, and usages of the land. **[**52]** ***Mitchel v. United States,*** 34 U.S. 711, 746, 9 L. Ed. 283 (1835); ***Sac & Fox Tribe,*** 179 Ct. Cl. at 21-22, 383 F.2d at 998. "A long time" has been defined as long enough that the Indians have made the area into domestic territory. ***Confederated Tribes,*** 177 Ct. Cl. at 194. [17]

17 At least one case intimated that 20 years' use and occupancy satisfied the "long time" requirement. ***Sac & Fox Tribe,*** 179 Ct. Cl. at 23, 383 F.2d at 999.

Plaintiff also must establish that the Government recognized its alleged aboriginal lands in order to recover compensation for a taking. ***Tee-Hit-Ton Indians,*** 348 U.S. at 284-85. Plaintiff maintained that compensation for the taking of aboriginal lands does not depend on recognition of such lands via treaty, congressional act, or otherwise. [18] Plaintiff is incorrect. [HN18] Although in 1835 the Supreme Court **[**53]** stated that the Indian "right of occupancy is considered as sacred as the fee-simple of the whites," ***Mitchel,*** 34 U.S. at 746 , without recognized or acknowledged title, an Indian tribe cannot recover compensation for a fifth amendment taking. ***Tee-Hit-Ton Indians*** emphasized that aboriginal title does not create a compensable property right. 348 U.S. at 279. Because aboriginal title constitutes "mere

possession not specifically recognized as ownership by Congress," the Government may terminate an Indian tribe's unrecognized right of occupancy without compensating the tribe for the land. ***Id.*** at 279, 284-85. [19]

18 The court recognizes that plaintiff pleads a taking of a right of trust protection. The court first addresses the general issue of takings in the context of Indian property rights. In a subsequent section, the court discusses plaintiff's novel arguments regarding the taking of a right of trust protection. This approach allows the court to consider both the parties' arguments in their briefs and those made orally before the court.

[54]**

19 The Indian Claims Commission cases represent a significant departure from this rule because the Commission's enabling jurisdiction granted it the power to hear cases in which the tribe indicted the Government's "fair and honorable dealings." Indian Claims Commission Act, ch. 959, § 2(5), 60 Stat. 1050, codified at 25 U.S.C. § 70a (1976) (omitted 1978). As a result, the Commission could find a taking when a given plaintiff could only demonstrate unrecognized aboriginal title. The Court of Federal Claims operates under different, less permissive constraints.

Plaintiff responds that the manner in which the Government extinguishes Indian title no longer is considered to raise political, non-justiciable questions. Plaintiff points out that ***Delaware Tribal Business Committee v. Weeks,*** 430 U.S. 73, 83-85, 51 L. Ed. 2d 173, 97 S. Ct. 911 (1977), and ***Littlewolf v. Lujan,*** 278 U.S. App. D.C. 270, 877 F.2d 1058, 1064 (D.C. Cir. 1989), ***cert. denied,*** 493 U.S. 1043, 107 L. Ed. 2d 832, 110 S. Ct. 837 (1990), overruled the political question doctrine in Indian **[**55]** cases. Therefore, plaintiff insists that the court can hear its taking claim, even if it only rests on unrecognized aboriginal title.

Although plaintiff correctly states that ***Littlewolf*** and ***Weeks*** represent the demise of the political question doctrine in these cases, this court's ruling that unrecognized aboriginal title vests no compensable property right does not rest on an application of the political question doctrine. Instead, the law is that [HN19] without a property right, no compensation is due under the fifth amendment. The existence of a property right does not depend on the justiciability of plaintiff's claim. Courts have abstained from ruling on the manner, method, and time of extinguishment of Indian title because those issues remained the exclusive province of the legislative branch. That these issues became justiciable after 1977 **[*786]** did not transform unrecognized Indian title into a compensable property right.

1. ***Does the 1849 treaty recognize plaintiff's alleged aboriginal title?***

In order for plaintiff to proceed with its takings claim, were its claim not otherwise barred, plaintiff must demonstrate that the 1849 treaty or some other congressional act recognized **[**56]** its alleged aboriginal title. [HN20] Recognition of Indian title may take various forms, but such recognition must manifest a definite intention to accord legal rights. ***Tee-Hit-Ton Indians,*** 348 U.S. at 278-79; ***Strong,*** 207 Ct. Cl. at 265, 518 F.2d at 563; ***Miami Tribe v. United States,*** 146 Ct. Cl. 421, 439-46, 175 F. Supp. 926, 936-40 (1959). In other words, "Congress must affirmatively intend to grant the right to occupy and use the land permanently." ***Sac & Fox Tribe v. United States,*** 161 Ct. Cl. 189, 197, 315 F.2d 896, 900, ***cert. denied,*** 375 U.S. 921, 11 L. Ed. 2d 165, 84 S. Ct. 266 (1963). [20] The court must determine whether the 1849 treaty, or some other clear congressional act, recognized plaintiff's aboriginal title to the area of Fort Douglas deeded to the University of Utah in 1991.

20 follows from these propositions that [HN21] statements by government officials regarding Indian title cannot form the basis for a finding of recognized title. While Mr. Calhoun's statements following the 1849 treaty are sufficient to create a genuine issue as to which Indians were parties to the treaty, these statements cannot create recognized title absent congressional action.

[57]** Plaintiff argues that the 1849 treaty recognized plaintiff's title to the subject lands. An examination of the treaty reveals no such acknowledgement. [HN22] The treaty does state that the Utah tribe occupies some land; however, the boundaries and location of that territory are not defined. Treaty with the Utah, Dec. 30, 1849, art. IV, 9 Stat. 984. Moreover, the treaty indicates that, whatever lands the tribe may have occupied at the time, the boundaries of that territory in 1849 had not been determined. In pertinent part the treaty provides that

the aforesaid Government shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries . . . . And the said Utahs, further, bind themselves not to depart from their accustomed homes or localities unless specifically permitted by an agent of the aforesaid Government; and so soon as their boundaries are distinctly defined, the said Utahs are further bound to confine themselves to said limits . . . and they now deliberately and considerately, pledge . . . to confine themselves strictly to the limits which may be assigned them . . . .

Treaty with the Utah, Dec. 30, 1849, art. VII, 9 Stat. 985. [HN23] Article VII of the **[**58]** 1849 treaty does not recognize title because the boundaries of aboriginal lands were to be settled in the future. By its terms the treaty does not designate, settle, adjust, define, or assign limits or boundaries to plaintiff; it leaves such matters to the future. Consequently, the treaty cannot be said to recognize Indian title.

By the same token, the court cannot accept the contention that, by failing to designate boundaries, the treaty recognizes title to whatever lands plaintiff occupied in December 1849. [HN24] "When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find indications of such purpose." ***Hynes v. Grimes Packing Co.,*** 337 U.S. 86, 104, 93 L. Ed. 1231, 69 S. Ct. 968 (1949) (footnote omitted). Congressional intent to recognize Indian title must be definite. ***Tee-Hit-Ton Indians,*** 348 U.S. at 278-79. For example, in ***Miami Tribe,*** where the Treaty of Greenville referred to the Government's "relinquishment" of claims to certain lands and where the Government granted the tribe lands "as long as they please," the court held that such language constituted a clear indication **[**59]** of the Government's intent to recognize title. 146 Ct. Cl. at 429-30, 440-41, 175 F. Supp. at 930-31, 937; ***cf. Strong,*** 207 Ct. Cl. at 265-66, 518 F.2d at 563-64 (holding that even a guarantee of "territorial rights" constitutes only a declaration of intention to respect Indian title as against third parties). In this case Congress **[*787]** did not accord legal rights to the Utah Indians. The ratified treaty allowed the Indians permissive occupation and reserved a final settlement sometime in the future.

2. *Was plaintiff's aboriginal title extinguished?*

Since aboriginal title may form the basis for a fifth amendment takings claim, assuming that it is recognized, the court will address whether plaintiff has a valid claim to aboriginal title. For the purposes of this discussion, the court also assumes that the Weber or Cumumbah Utes formed a constituent part of the Uintah Band and that they occupied the subject area.

[HN25] The Government can extinguish aboriginal title in various ways. Generally, the failure of an Indian tribe to satisfy any of the elements of aboriginal possession will defeat an **[**60]** aboriginal title claim. In particular, a tribe must demonstrate actual and continuous possession up until the date of the alleged taking. Therefore, the sovereign's exercise of complete dominion adverse to the Indian right of occupancy defeats a claim to aboriginal title. ***Quapaw Tribe v. United States,*** 128 Ct. Cl. 45, 49, 120 F. Supp. 283, 286 (1954), ***overruled on other grounds, United States v. Kiowa,*** 143 Ct. Cl. 545, 166 F. Supp. 939 (1958), ***cert. denied,*** 359 U.S. 934, 3 L. Ed. 2d 636, 79 S. Ct. 650 (1959).

> [HN26] When an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land; and the United States cannot be required to pay therefor on the same basis as if it were a recognized treaty reservation.

128 Ct. Cl. at 49, 120 F. Supp. at 286 **[**61]** (citations omitted). Various actions that end actual, exclusive, and continuous use of the land by the Indians can extinguish aboriginal title. ***Pueblo of San Ildefonso,*** 206 Ct. Cl. at 661, 513 F.2d at 1390. However, extinguishment of Indian title "cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." ***Santa Fe,*** 314 U.S. at 354.

Contrary to plaintiff's contention, the 1865 Act regarding extinguishment, ch. 45, 13 Stat. 432, does not mandate that the Government extinguish Indian title only by treaty. The Act specifies that if the President enters into treaties with Indians in the Utah territory, such treaties shall provide for extinguishment of Indian title. Other methods of extinguishment would still be effective, the statute notwithstanding.

The undisputed facts reveal that plaintiff has not been in possession of the subject lands since 1872, if not before. Plaintiff, in effect, concedes that it has not actually, exclusively, and continuously occupied the subject land up to 1991, the alleged taking date. Plaintiff may have held the **[**62]** requisite occupancy until 1872 at the latest. (It would seem that 1872 is a more appropriate taking date.) Be that as it may, plaintiff seems to argue that the Government acted as an Indian proxy until 1991, thus obviating the bar of the statute of limitations. Without actual and continuous Indian use, however, the court cannot find aboriginal possession. In fact, the mere establishment of the fort in 1862, its official inauguration in 1867, and its expansions in 1887 and 1890, alone or in concert, would constitute dominion adverse to Indian title. [HN27] Even if Indians continued to occupy some portions of the Fort's land (which plaintiff has not alleged), a military base destroys the exclusivity prong of the aboriginal title test. [21] That the Government **[*788]** established a military outpost is even more inconsistent with Indian title than occupation by white settlers. *See United States v. Gemmill,* 535 F.2d 1145, 1148 (9th Cir.) (holding that forced expulsion of Indians followed by Government use of land extinguishes Indian title), ***cert. denied,*** 429 U.S. 982 (1976); ***Pueblo of San Ildefonso,*** 206 Ct. Cl. at 661, 513 F.2d at 1390 **[**63]** (holding the impact of white settlement a factor in extinguishment of Indian title). In these circumstances the court concludes that the creation, occupation, and Indian departure from the lands encompassed in Fort Douglas extinguished any aboriginal title to the subject land.

21 Plaintiff presented evidence to the court of substantial mixed-tribal use of the subject area, namely by Shoshone and **Weber Utes.** This would impact plaintiff's allegation of exclusive use. While the court does not have the benefit of a complete record in this regard, the evidence suggests that plaintiff would face a serious obstacle in proving joint and amicable use of the Salt Lake Valley area by the two groups. Even if the bands lived in joint and amicable possession, the court would also inquire into the composition of the **Weber Utes,** since they are variously described as Ute, mixed-blood, and Shoshone.

V. TRUST PROTECTION AND THE 1849 TREATY

Plaintiff argues that the 1849 treaty created a trust relationship between plaintiff and the **[**64]** Government as to any military outposts constructed on plaintiff's aboriginal lands and that the Government breached this trust (and took plaintiff's right to trust protection) when it conveyed the subject land to the University of Utah. As previously explained, the undisputed evidence presented by the parties in connection with defendant's dispositive motion does not support a finding that plaintiff had aboriginal title after 1862 at the earliest and 1867 at the latest. [22] Moreover, assuming that plaintiff had aboriginal title, that title was never recognized. Here, however, plaintiff subtly blends aspects of aboriginal title and constitutional takings analysis with accepted breach of trust doctrine into a novel cause of action.

22 The evidence discloses that plaintiff had not left the area by the later of these dates, but the establishment of Fort Douglas defeats a claim to exclusivity. Alternatively, plaintiff would claim that aboriginal title had been achieved by the earlier date, but the establishment of Fort Douglas would have extinguished it.

[65]** 1. *Treaty Interpretation: Does it create a trust relationship?*

As a threshold proposition, plaintiff argues that the 1849 treaty vested a property right in plaintiff such that the Government would hold the Fort Douglas land in trust until the Government ceased using the land. The court carefully has examined this issue and concludes that the 1849 treaty created no such trust relationship as to the land encompassed within Fort Douglas.

[HN28] A court can infer the existence of a trust relationship from the nature of the transaction or activity at issue. ***Navajo Tribe v. United States,*** 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980). A trust relationship does not depend for its existence on express language in a treaty or statute. *Id.* However, a court may look to

> language contained in the treaty . . . under which the claim is brought to ascertain whether there exists, (1) a legal relationship wherein the United States is in fact and law a trustee, fiduciary or guardian, or (2) a general relationship without any of such attributes or obligations, but which is described in the same terms by the courts. . . .

Sac & Fox Tribe, 179 Ct. Cl. at 27, 383 F.2d at 1001. **[**66]** A trust relationship exists only with respect to tribal lands. ***Navajo Tribe,*** 224 Ct. Cl. at 183, 624 F.2d at 987; ***Sac & Fox Tribe,*** 179 Ct. Cl. at 27, 383 F.2d at 1001.

Notwithstanding these decisions, plaintiff relies on the 1849 treaty to create a trust relationship, pointing to no other facts showing such a relationship as to the specific lands at issue. However, as discussed ***supra*** at pp. 25-27, the 1849 treaty does not designate aboriginal lands. Rather, the treaty reserves for a future date the final delineation of boundaries. Whether or not the Government and plaintiff ever entered into a general trust relationship, the lands at issue could not have constituted part of that trust, because the Government never recognized or described Fort Douglas as aboriginal land. The 1849 treaty itself only generally refers to a guardian relationship between the Government and the Utahs. ***See*** Treaty with the Utahs, **[*789]** Dec. 30, 1849, art. IV, 9 Stat. 484. The treaty contains no obligations with respect to property. The article providing for the creation of military outposts does not **[**67]** refer to Indian lands, nor does it provide that the land occupied by such outposts would be held in trust for plaintiff. Art. VI, 9 Stat. 985. It would seem that the absence of provisions establishing obligations as to defining property emanated from the fact that the parties agreed to postpone boundary determinations. Once the Government established boundaries, a trust relationship could exist as to plaintiff's aboriginal land. The Government never did so until it created plaintiff's reservation in 1864. The record does not admit of a finding that the 1849 treaty created a trust relationship or trust protection as to the land conveyed by the Government to the University in 1991. [23]

> 23 No other evidence in the record before the court demonstrates, or raises a genuine issue concerning, the existence of a trust relationship involving the Fort Douglas property. When the Government designated boundaries, it did not include Fort Douglas within plaintiff's lands. In 1864 the Government did not include the land within the Uintah Reservation, and in a June 17, 1867 request to confirm the land as a military reservation, the land was referred to as "public domain." Even in the 1849-1861 period, plaintiff has provided insufficient evidence of a trust relationship as to the subject land. In 1867 Congress denominated the land "public lands." Gen. Order No. 27 (Army H.Q., Asst. Gen. Office Mar. 30, 1887).

[68]** **2.** ***Taking of a right of trust protection and/or breach of trust relationship***

Even if the court were to find a trust relationship as to the Fort Douglas land, plaintiff's cause of action cannot overcome the jurisdictional bar put in place by the Court of Claims. In ***Menominee*** the Court of Claims held that [HN29] it had no jurisdiction to entertain nonconstitutional claims that Congress breached a trust relationship. 221 Ct. Cl. at 510-18, 607 F.2d at 1338-43. Plaintiff's breach of trust action cannot survive because it does not derive from a constitutional violation. To the extent that plaintiff alleges that the conveyance, not the congressional authorization, breached a trust relationship, the result remains the same: The congressional authorization provided the essential impetus for the deeding of the land to the University.

Plaintiff's constitutional gloss on the breach of trust claim does not withstand close scrutiny. As discussed above, plaintiff cannot claim a taking of unrecognized aboriginal title. This has several implications. First, it undermines plaintiff's cause of action for a constitutional taking, because plaintiff's aboriginal **[**69]** title, if any, has never been recognized. Second, it renders inapposite ***Choate,*** 224 U.S. at 665, because plaintiff has no vested property interest in unrecognized aboriginal title. ***Choate*** stands for the proposition that [HN30] Congress cannot destroy existing property rights acquired under a statute or agreement with the Government. 224 U.S. at 678. Here, the 1849 treaty did not accord plaintiff any rights as to the land encompassed in Fort Douglas because it did not recognize or denote aboriginal title in any fashion whatsoever.

Plaintiff moved orally to amend its complaint to allege a taking. Because the court finds plaintiff cannot allege a taking, an amendment at this time would be futile. ***Mitsui Foods,*** 867 F.2d at 1403-04. Accordingly, the court denies plaintiff's motion' to amend.

CONCLUSION

Accordingly, based on the foregoing, defendant's motion for summary judgment is granted because plaintiff is precluded by the doctrine of collateral estoppel from relitigating issues decided by the Indian Claims Commission. Alternatively, defendant is entitled to a grant of summary judgment **[**70]** because plaintiff's breach of trust and takings theories are not actionable. [24] The Clerk of the Court shall dismiss the complaint.

24 Defendant did not move pursuant to RCFC 12(b)(4) due to reliance on extra-pleading materials; its summary judgment arguments are directed to deficiencies in plaintiff's theories of relief.

[*790] IT IS SO ORDERED.

No costs.

Christine Cook Nettesheim, Judge

521 F. Supp. 1072, *; 1981 U.S. Dist. LEXIS 9948, **

28 Fed. Cl. 768, *; 1993 U.S. Claims LEXIS 107, **

139 Ct. Cl. 1, *; 1957 U.S. Ct. Cl. LEXIS 89, **;
152 F. Supp. 953, ***

3 of 3 DOCUMENTS

THE UINTAH AND WHITE RIVER BANDS OF UTE INDIANS v. THE UNITED STATES

No. 47569

United States Court of Claims

139 Ct. Cl. 1; 1957 U.S. Ct. Cl. LEXIS 89; 152 F. Supp. 953

June 5, 1957. Defendant's motion for amendment of the judgment denied October 9, 1957

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff Indian bands sought just compensation for land that was part of their reservation. Defendant government incorporated the former reservation land into a national forest. The government filed a motion to amend the judgment of the commissioner of the United States Court of Claims, which found that the value of the land was $ 1.25 per acre.

OVERVIEW: Initially, the court determined that it had jurisdiction of the controversy pursuant to the special Ute Jurisdictional Act. Next, the court found that the Indian bands had title to the reservation when the government returned it to the public domain. The court upheld the commissioner's finding that the land was valued at $ 1.25 per acre when it was returned to the public domain. The court deferred to the commissioner's finding in part because of the sharp disagreement between the parties' experts. The government made a payment to compensate the Indian bands for the land. The court thought that the government was not entitled to credit for a portion of the payment because it was made to another Indian band, which was living on the reservation but did not have title to any land. The court decided that the government received credit for payment made to the Indian bands that were the plaintiffs in this suit. The payment was applied so that the principal was reduced to the extent that the payment was sufficient to cover accrued interest. The court found that the Indian bands were entitled to interest on the remaining principal from the time that the reservation land was taken.

OUTCOME: The court affirmed the judgment that determined the value of the reservation land, which the government took from the Indian bands' reservation and incorporated into a national forest. The court remanded the case to the commissioner for further proceedings with respect to the government's entitlement to any other offsets.

CORE TERMS: indians, uintah, acre, per acre, reservation, utah, grazing, river, railroad, mountain, forest, timber, animal unit, band, carrying capacity, arm, elevation, appraisal, livestock, tract, forage, secretary, valley, mile, comparable, covering, interior, allotment, deed, purchaser

LexisNexis(R) Headnotes

Governments > Courts > Courts of Claims
Governments > Native Americans > Authority & Jurisdiction

[HN1] By section 1 of special Ute Jurisdictional Act of June 28, 1938, 52 Stat. 1209 (1938), the United States Court of Claims is authorized to hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constituent band thereof, may have against the United States, including, claims arising under or growing out of any treaty or agreement of the United States, law of Congress, executive order, or by reason of any land taken from them, without compensation.

Governments > Courts > Courts of Claims
Governments > Native Americans > Authority & Jurisdiction
[HN2] Section 1 of special Ute Jurisdictional Act of June 28, 1938, 52 Stat. 1209 (1938), gives the United States Court of Claims jurisdiction to decide plaintiffs' claims arising by reason of any lands taken from them without compensation. Section 5 of the Jurisdictional Act provides that payments made by the United States upon or in satisfaction of any claim sued on under the Act should not operate as an estoppel, but only as a setoff against the claim.

Governments > Native Americans > Authority & Jurisdiction
[HN3] Land must be valued as of the date that it was taken.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Governments > Native Americans > Property Rights
[HN4] In the case of an expropriation of lands owned by Indian Tribes, interest from the time of the taking must be included as a part of just compensation, in order to satisfy the Fifth Amendment.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings
Governments > Native Americans > Authority & Jurisdiction
Governments > Native Americans > Property Rights
[HN5] Section 6 of special Ute Jurisdictional Act of June 28, 1938, 52 Stat. 1209 (1938), provides that if a court finds that plaintiffs' lands had been taken without compensation, a court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands.

Governments > Federal Government > Property
[HN6] A debtor may effectively direct the application of his payment. If he makes a payment stipulating that it shall be applied to principal, it would seem that the creditor would have no right to retain the payment and apply it to interest. If the interest is overdue, he may collect it by suit, but he can not do it by self-help, by using for a purpose which he prefers, money which is put into his hands for another purpose.

SYLLABUS

[1]** *On the Proofs*

Indian claim; just compensation. -- Plaintiffs' suit is for the recovery of the value of 973,777 acres of land taken from them by the Government in 1905. The Government recognized the claim by making a payment in 1931, of $777,754.37. It is *held* that plaintiffs are entitled to recover, and a valuation of $1.25 per acre is placed on the land as of the time of taking. The 1931 payment is credited partly to the value of the land taken and partly to the damages for delay in payment, leaving a total of $879,067.17 still owing to plaintiffs. This sum is to bear interest as a part of just compensation from 1905 to 1934 at 5 percent per annum, and from 1934 on at 4 percent.

Same; historical background. -- The lands in question, taken by the Government for a national forest, had long been recognized as belonging to the plaintiff bands. As early as 1861 the President by Executive Order set aside for the use and occupancy of the Indians the land which later became known as the Uintah Indian Reservation. The Act of May 5, 1864, 13 Stat. 63, provided for the settlement of the territory by the Indians and numerous other acts and treaties followed. The White **[**2]** River Utes were moved into the area in 1881, coming from Colorado. Evidence of plaintiffs' title is found in the Act of May 24, 1888, under which payments were made to plaintiff bands by the

Government upon relinquishment of a part of the reservation. All of the legislative history of the reservation and the acts of the Executive in interpreting the statutes clearly show that plaintiffs were recognized as the rightful owners of the reservation.

Same; jurisdiction. -- The court acquired jurisdiction of the instant claim under the Act of February 13, 1931, 46 Stat. 1092. This act provided that any payment made by the Government should not act as an estoppel but only as a setoff against the claim.

Same; valuation of land. -- The task of placing a value on the land as of 50 years ago was one of great difficulty. Many factors were taken into consideration, including the influence of the railroads and climate conditions. Although both parties produced competent witnesses there was disagreement as to many conditions entering into the determination of fair value.

COUNSEL: *Mr. Carl S. Hawkins* for plaintiffs. *Messrs. Ernest L. Wilkinson* and *F. M. Goodwin,* and *Wilkinson,* **[**3]** *Cragun, Barker & Hawkins* were on the briefs.

Mr. Floyd L. France, with whom was *Mr. Assistant Attorney General Perry W. Morton,* for the defendant.

OPINION BY: MADDEN

OPINION

[*2] **[***954]** MADDEN, *Judge,* delivered the opinion of the court:

This is a suit against the United States by the Uintah and White River Bands of Ute Indians. They assert, and the Government denies, that this court has jurisdiction of the case under the special Ute Jurisdictional Act of June 28, 1938, as amended. [1] [HN1] By section 1 of that Act this court is authorized to "hear, determine, and render final judgment on all legal and equitable claims of whatsoever nature which the Ute Indians or any tribe or band or any constituent band thereof, may have against the United States, including, * * * claims arising under or growing out of any treaty or agreement of the United States, law of Congress, executive order, or by reason of any land taken from them, without compensation."

1 The Ute Jurisdictional Act of June 28, 1938, c. 776 (52 Stat. 1209), as amended by the Act of July 15, 1941, c. 299 (55 Stat. 593); June 22, 1943 (57 Stat. 160); June 11, 1946, c. 378 (60 Stat. 255); and Sections 1, 2, 11, and 25 of the Act of August 13, 1946, c. 959 (60 Stat. 1049).

[4]** The plaintiffs claim just compensation for 973,777 acres of the former Uintah Indian Reservation in Utah, taken by **[*3]** the United States on July 14, 1905, by incorporation into the Uintah National Forest. The questions now ready for decision are whether the plaintiffs were the owners of the land at the time in question; if they were, what was the value of the land at the time it was taken; and are they entitled to interest on that value.

THE PLAINTIFF'S TITLE

By an Executive Order of October 3, 1861, 1 Kappler 900, President Lincoln approved a recommendation of the Secretary of the Interior that "the Uintah Valley, in the Territory of Utah, be set apart and reserved for the use and occupancy of Indian Tribes". The lands involved in this case lie within the area described in the Executive Order.

The Act of May 5, 1864, 13 Stat. 63, authorized and required the Superintendent of Indian Affairs to bring together and settle in the Uintah Valley as many of the Indians of Utah Territory as might be found practicable. It said that the Uintah Valley

is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said **[**5]** territory as may be induced to inhabit the same.

Pursuant to an Act of February 23, 1865, 13 Stat. 432, a treaty was negotiated with numerous Indian tribes in Utah providing for their surrender of all their rights in land in that territory which was suitable for agricultural and mineral purposes, but reserving to the Indians for their exclusive use and occupation "the entire valley of the Uintah River within Utah Territory".

Although the treaty just described was never ratified, various individual Indians and groups of Utah indians, from time to time after 1865, moved into the Uintah Valley. An Indian Agency was established **[***955]** there, the area became known as the Uintah Indian Reservation, and the Indians so migrating into the reservation, as well as those already there before the reservation was established, and their descendants, became and have since been known as the Uintah Indians or Uintah Ute Indians, one of the plaintiffs herein.

In 1868 a treaty was made with seven bands of Ute Indians, **[*4]** sometimes thereafter known as "The Confederated Bands of Ute Indians". This treaty was later duly ratified.It set apart a large reservation, wholly within the **[**6]** Territory of Colorado, for the Indians named in the treaty and for such other friendly Indians as they might be willing to admit among them. The Indians relinquished all claims and rights to land not included within the reservation.

In an agreement embodied in the Act of June 15, 1880, 21 Stat. 199, with the Confederated Bands of Ute Indians in Colorado, the Indians ceded the then remaining portions of their Colorado reservation and the various bands agreed to settle in other places designated in the agreement. Of interest in this case were the provisions that the White River Utes agreed to remove to the Uintah Reservation in Utah and the Uncompahgre Utes agreed to remove to an area on the Grand River, in Colorado, or to other lands in that vicinity and in Utah. The White River Utes them moved to the Uintah Reservation in Utah, and their descendants have continued to live on that reservation. This band and the Uintah band are the plaintiffs in this case. The Uncompahgre Utes were settled upon a reservation in Utah which was not within the area of the Uintah Reservation.

Thus far, on the question of title, we have the 1864 Act setting apart the Uintah Reservation

for the **[**7]** permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory (Utah) as may be induced to inhabit the same.

We have Indians who were already in the area and others of different Utah bands moving into the area and settling there, apparently losing their identity and becoming known as "Uintah Ute" Indians. It could well be urged that these Indians, having fulfilled the conditions of the statute, became the grantees, or at least "recognizees" under the statute. It is as if one made a deed "to the first of my grandsons who shall reach the age of 25".

The Indian Claims Commission, on February 21, 1957, in the case of *The Uintah Ute Indians of Utah* v. *United States,* Docket No. 45, held that the United States is liable to the Uintah Ute Indians for the undivided share of the **[*5]** reservation which the United States turned over to the White River Utes pursuant to the 1880 statute.

The Act of May 24, 1888, 25 Stat. 157, provided that a designated portion of the Uintah Valley Reservation should be restored to the public domain and sold if three-fourths of the adult male Indians residing on the reservation consented. The statute **[**8]** provided:

That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the United States and held or added to any trust funds of said tribes now there.

In the administration of this Act, the consent of the Uintah and the White River Indians was obtained, the lands were sold, and the receipts were credited to these two bands of Indians. In 1902, Congress appropriated $10,000 more to these Indians for other lands detached from the reservation pursuant to the 1888 statute.

Bills were introduced in Congress in 1893 proposing that the Uncompahgre Indians be allotted lands in the Uintah Reservation. The Secretary of the Interior and the Commissioner of Indians Affairs, being asked to comment on the bills, opposed the bills on the ground that the Indians residing on the Uintah Reservation owned the land, and that it should not be taken from them except by negotiation and purchase. The bills were not passed.

[*956]** In finding 14 we recite administrative actions taken in 1892, 1897, and 1898 on the express assumption that the Uintah and White River Utes owned he land in the Uintah Reservation. Pursuant to statutes cited **[**9]** in our findings 15, 16, and 17, some Uncompahgre Indians were given allotments in severalty in the Uintah Reservation, and the Uintah and White River Utes were paid $60,064.48 for the lands so allotted.

By the Act of May 27, 1902, 32 Stat. 245, 263, the Secretary of the Interior was directed, if a majority of the adult male Indians of the Uintah and White River bands consented, to make individual allotments to the Indians and then restore all of the unallotted lands of the Uintah Reservation to the public domain, to be sold under the homestead law for $1.25 an acre, the proceeds to be used for the benefit of said **[*6]** Indians. The allotments were made, and sales of the lands restored to the public domain ultimately produced proceeds of $1,184,996.33 which were placed in an account headed "Proceeds of Unitah and White River Ute Lands".

Our finding 19 shows that later in 1902, and before the allotments had been made and the unallotted lands restored to the public domain, Congress directed the Secretary of the Interior to set apart for the Indians a common grazing area in the reservation. The statute seems to have reduced the allotments of the Uncompahgre Indians, but gave **[**10]** them rights in the common grazing area.

By the Act of March 3, 1905, 33 Stat. 1048, 1069-70, Congress, among other things, authorized the president to set apart and reserve, as an addition to the Uintah Forest Reserve, such portions of the lands within the Uintah Indian Reservation as he considered necessary. The President, on July 14, 1905, 34 Stat. (Part 3) 3116, set aside 1,010,000 acres of land under this authority. This land was, of course, a part of the land which, under the Act of May 27, 1902, was to have been restored to the public domain, sold, and the proceeds used for the benefit of the Uintah and White River Indians. No provision was made for paying the Indians for the 1,010,000 acres of land, and they are now suing for its value.

In this opinion we have abbreviated the history of the dealings of Congress and the Executive with these Indians in relation to this land. A much fuller history appears in our findings. It plainly appears from it, we think, that Congress in its statutes, and the Executive in interpreting those statutes, repeatedly recognized the plaintiff bands as the owners of the Uintah Reservation. They were the ones whose consent had to be obtained, **[**11]** when transactions relating to the land were contemplated. They were the ones to whom the money was to be paid and was paid, when reservation land was disposed of to third persons.

Between 1924 and 1929 several unsuccessful attempts were made to obtain passage of special jurisdictional acts to permit the plaintiff bands to sue in this court for the taking of the 1,010,000 acres of land. In 1930 a bill was introduced providing for a direct payment for the lands, at the rate of **[*7]** $1.25 per acre. In this bill, for the first time, the Uncompahgre Band of Utes was included with the Uintah and White River Bands. The committee report and material inserted in the Congressional Record discussed only the title of the Uintah and White River Bands. There is no explanation or mention of a reason for including the Uncompahgre in the bill.

The bill was enacted on February 13, 1931, 46 Stat. 1092, and provided for the direct payment of $1,217,221.25 for 973,777 acres of land, which was at the rate of $1.25 per acre. The bill said that the payment was to be in full satisfaction of all claims of the Indians in relation to the 973,777 acres of land. The remainder of the land, 36,223 **[**12]** acres, was said to be coal land, and action on it was reserved. The appropriated money was distributed per capita to the three bands of Indians, the Uncompahgre receiving $439,466.88 of it. The coal lands **[***957]** are the subject of another suit now pending in this court.

THE JURISDICTIONAL ACT

[HN2] The jurisdictional act, cited *supra,* gives the court jurisdiction to decide the plaintiffs' claims arising "by reason of any lands taken from them without compensation." The Government points to the payment made under the 1931 Act and says that these lands were not taken without compensation. We have no doubt that the Jurisdictional Act was intended to include these claims. The pertinent committee reports say so in express words. House Rept. No. 1028, 75th Cong., 1st sess., on HR 3162, pp. 2-3; Senate Rept. No. 1219, 75th Cong., 1st Sess., pp. 2-3. And section 5 of the

Jurisdictional Act itself provides that payments made by the United States upon or in satisfaction of any claim sued on under the Act should not operate as an estoppel, but only as a setoff against the claim. Our conclusion is that the court has jurisdiction of the claim.

THE VALUE OF THE LAND

[HN3] The land was **[**13]** taken in 1905, and must be valued as of that date. The valuation of an area of land such as the one here involved, as of today, would be a task of great difficulty, **[*8]** and the figure arrived at would be, at best, an approximation, reached by weighing a large number of elements of greater or lesser significance, and giving each the weight which it was thought to merit. In the instant case, the relevant events and elements are those of fifty years ago. Highly competent experts were presented by the parties. But they disagreed as to whether 1905 was an unusually dry season, or on the other extreme, was a year of record-breaking rainfall; whether the edible plant growth was more abundant in 1905 than now, because it had been overgrazed during World War I, or the management of the Forest Service had so improved it that it is better now than it ever was; whether in 1905, small tracts of this kind of land brought higher prices per acre than large ones, or *vice versa.* Thus there was disagreement, even as to relevant historical facts. There was disagreement as to conclusions to be drawn even from undisputed historical facts, such as the prices at which the railroads in the area **[**14]** sold their alternate sections of land. Did they sell them cheap in order to settle the country and get in cash to retire their bonds, or did they hold out for about the market price? There was disagreement as to how far from the area in question land transactions might take place, and still be helpful in arriving at the market value of these lands. Many lay witnesses were presented by the plaintiffs, old residents who recollected, more or less accurately, events and transactions of the time in question.

Commissioner Hogenson of this court presided over the lengthy trial and has made an able and obviously careful report. He had a better opportunity than we have to acquire a realistic understanding of the problem of the value of these lands as of 1905, and we think his conclusion is substantially right. We therefore find, as he did, that the value was $1.25 per acre.

THE PAYMENT TO THE UNCOMPAHGRES

As we have seen, the 1931 Act required the payment of a share of the money granted by that act to the Uncompahgre Indians, and $439,466.88 of the money was paid to them. They had no title or interest in the Uintah Reservation except in the allotments which were brought for them **[**15]** from the plaintiffs, and in the common grazing area. They had, **[*9]** therefore, no interest in the 973,777 acres of the land placed in the Forest Reserve, for which the 1931 payment was made. The United States is entitled to no credit for the $439,466.88 which was paid to the Uncompahgre Indians. It is entitled to credit for the $777,754.37 which was paid to the plaintiffs.

INTEREST

The parties disagree as to whether our judgment should include interest upon the sum which we find to be the 1905 value of the land in question. As **[***958]** we have said, the plaintiffs were the owners of the land in question, with a title repeatedly recognized by Acts of Congress, and by Executive actions taken pursuant to statutes. The United States, pursuant to an Act of Congress, took possession and ownership of the land for itself, for its Forest Reserve. No plainer case of an expropriation could be stated. In that respect the case is like *United States* v. *Creek Nation,* 295 U.S. 103, and *Shoshone Tribe of Indians* v. *United States,* 299 U.S. 476. It was held in those cases that [HN4] in the case of an expropriation of lands owned by Indian Tribes, interest from the time of **[**16]** the taking must be included as a part of just compensation, in order to satisfy the Fifth Amendment. The decision in *United States* v. *alcea Band of Tillamooks,* 341 U.S. 48, was based on the Court's conclusion that no taking such as is contemplated by the Fifth Amendment occurred in that case.

If the plaintiffs were not, as we think they are, entitled to interest as a constitutional right, we think are, entitled be entitled to interest under the provisions of the Jurisdictional Act.If Congress did not intend that the measure of recovery constitutionally required in expropriation cases should be applied, there was no reason for its express statement in [HN5] section 6 that, if it found that the plaintiffs' lands had been taken without compensation,

the court shall render judgment in favor of said Indians, and shall award to them, as for a taking under the power of eminent domain, compensation for all such lands * * *.

An interesting question arises as to the effect of the payment of the $777,754.37 by the United States to the plaintiffs in 1931 on the computation of interest. If it is applied to **[*10]** reduce the principal, it would follow that no interest on that part **[**17]** of the principal would accrue after 1931. If it is applied on the interest accrued up to 1931, it is not enough to pay that interest, and would leave all of the principal continuing to draw interest since 1931.

The plaintiffs say that a payment not large enough to pay both interest and principal is to be applied first to interest, citing *Story* v. *Livingston,* 13 Pet. (38 U.S.) 359,371. The Government says that this is the rule unless the debtor, when he makes his payment, stipulates that it is to be applied to principal. the authorities cited by the Government seem to relate not to the question of principal and interest, but to situations where the debtor owes the creditor more than one debt, and stipulates that his payment should, for example, be applied to a secured debt, when the creditor would prefer to apply it to an unsecured debt.

However, although there seems to be no precedent, we think that the general rule should be that [HN6] the debtor may effectively direct the application of his payment. If he makes a payment stipulating that it shall be applied to principal, it would seem that the creditor would have no right to retain the payment and apply it to interest. If **[**18]** the interest is overdue, he may collect it by suit, but he can't do it by self-help, by using for a purpose which he prefers, money which is put into his hands for another purpose.

If the intention of the debtor were controlling in the instant case, we have no doubt about the intention of Congress in 1931. It said that its payment was to be in full satisfaction of all claims relating to the land, and it fixed a price of $1.25 per acre for the land. It was thinking of principal, not interest.

The plaintiffs urge that the Jurisdictional Act has directed us how to apply the 1931 payment by saying, in section 5

No payment or payments which have been made by the United States upon or in satisfaction of any claim or claims in any suit brought hereunder * * * shall apply as an estoppel against any suit brought hereunder, but there **[***959]** shall be set off against any recovery * * * any payment made * * *.

[*11] The plaintiffs say that this language directs us to compute their recovery as if no payment had been made in 1931, and then set off the 1931 payment against the result of that computation. This is a fair argument, and we are by no means certain that it is not **[**19]** correct. we conclude, however, that it was not meant by Congress as a specific direction as to how the computation should be made, but only as an assurance that the claims were not to be barred completely by a prior payment purportedly made in full satisfaction. We think Congress left to the Court the details of the computation, and expected us to make it in the same way that such a computation would be made in private litigation.

We do not adopt the proposal of either litigant. As to the Government's contention as to the application of the 1931 payment, we think that in the instant situation the intention of the debtor is not controlling. The "debt" is not an obligation incurred by agreement, but one imposed by the law of the Constitution. Our duty, we think, is to apply the 1931 payment in such a way as to most nearly approach the Constitutional objective of compensation for the value at the time of taking, plus compensation, in the form of interest, for delay in paying for the value at the time of taking.

When the $777,754.37 was paid to the plaintiffs in 1931, 26 years of interest at 5% had accrued upon the 1905 value of the land.The $777,754.37 was, therefore, sufficient **[**20]** to pay principal (100%) plus accrued interest (130) upon only $338,154.08 of the principal ($777,754.37/2.30=$338,154.08). We think it should be so applied. That means that as to that much of the principal, the payment was in full, and no further interest accrued. As to the balance of the principal, $879,067.17, no payment has ever been made, and that sum draws interest from 1905 to the date of payment.

We realize, of course, that such a formula, attempted to be patterned to fit a situation as unusual as the instant one where the Constitutional obligation has remained unfulfilled for more than fifty years, has rather rough edges. But it seems fairer to us than those proposed by the parties.

The plaintiffs are entitled to recover $879,067.17, with interest thereon, as a part of just compensation at 5% from **[*12]** July 14, 1905 to July 14, 1934, and at 4% from the latter date to the date of payment. [2] The question of the remaining offsets, if any, has not been determined, and the case will be remanded to the commissioner for further proceedings on that matter under Rule 38(c).

2 See *Alcea Band of Tillamooks* v. *United States,* 115 C. Cls. 463; *Rogue River Tribe of Indians* v. *United States,* 116 C. Cls. 454, *cert. den.* 341 U.S. 902.

[21]** It is so ordered.

LARAMORE, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

FINDINGS OF FACT

The court, having considered the evidence, the briefs and argument of counsel, and the report of Commissioner Roald A. Hogenson, makes the following findings of fact:

1. Plaintiffs, the Uintah and White River Bands of Ute Indians, who timely filed this suit pursuant to a statute conferring special jurisdiction upon this court (Act of June 28, 1938, 52 Stat. 1209, as amended), are two bands of Ute Indians, which, together with the Uncompaghre Band of Ute Indians, constitute the Ute Indian Tribe of the Uintah and Ouray Reservation, a corporation formed under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984. The members of plaintiff bands in general reside on the uintah and Ouray Reservation, State of Utah, as do some of the Uncompaghre Band.

In pre-white times, Indians who have since come to be known as Utes, Southern paiutes, and Shoshones lived within the territory now included in the State of Utah.

2. By Executive Order of October 3, 1861, 1 Kappler 900, the President approved a recommendation of the Secretary of the Interior **[**22]** that "the Uintah Valley, in the Territory of Utah, be set apart and reserved for the use and occupancy of Indian tribes." In the absence of an authorized survey, the area "reserved to the united States and set apart as an Indian reservation" was described as "the entire valley of the Uintah River within Utah Territory, extending on both sides of said river to the crest of the first range of contiguous mountains on each side."

[*13] The lands involved in this case are within the area so described.

3. By act of May 5, 1864, 13 Stat. 63, it was provided:

* * * That the superintendent of Indian affairs for the territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uintah valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same.

4. By an act of February 23, 1865, 13 Stat. 432, "* * * to extinguish the Indian Title to Lands in the Territory of Utah suitable for agricultural and mineral Purposes.", the President was **[**23]** authorized and directed to enter into treaties with the various tribes of Indians of Utah Territory, providing for the surrender of their possessory right to all such lands, except such part as might be set apart for reservations. Pursuant to this act, treaties were negotiated with the "Pieede or Pah-Ute" Indians on September 18, 1865, the "**Weber Ute**" on October 30, 1865, 5 Kappler 698, and various groups of "Utah" Indians on June 8, 9, and 10, 1865, 5 Kappler 695. None of the said treaties was ever ratified.

5. The Indian parties to the treaty negotiated on June 8, 9, and 10, 1865, commonly referred to as the Spanish Fork Treaty, were designated therein as the "* * * Utah, Yampah Ute, Pah-Vant, Sampete Ute, Tim-p-nogs and Cum-nm-bah Bands of the Utah Indians occupying the lands within Utah Territory, * * *." The said treaty provided for the cession by

said Indians of "all their possessory right of occupancy" to an area described therein, reserving a designated part thereof for their exclusive use and occupation as follows:

Art. II. There is however reserved for the exclusive use and occupation of the said tribes the following tract of lands; viz "the entire valley of the Uintah **[**24]** River within Utah Territory extending on both sides of said river to the crest of the first range of contiguous mountains on each side" which said tract shall be, so far as is necessary, surveyed and marked out, set aside and reserved for their exclusive use and occupaton nor shall any white person, unless he be in the employ of the **[*14]** Indian authorities, be permitted to reside upon the same, without permission of the said tribe, and of the Superintendent of Indian Affairs or United States Indian Agent. It is however understood that should the President of the United States hereafter see fit to place upon the reservation, any other friendly tribe or bands of Indians of Utah Territory, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

Art. III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, provided the means are furnished them by the United States to enable them to do so -- In the meantime it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied **[**25]** if with the permission of the owner.

6. From time to time after 1865, various individuals and groups of Indians residing in Utah Territory, other than those who were in Uintah Valley at the time, moved into the area described in the Executive Order of October 3, 1861, and the unratified Spanish Fork Treaty of 1865, and set apart by the act of May 5, 1864, *supra.* An Indian agency was established known as the Uintah Valley Agency, and the area became known as the Uintah Indian Reservation or the Uintah Valley Reservation. A substantial number of the said Indians, so located on the reservation, and their descendants have continued to live upon the reservation, have received individual allotments thereon pursuant to the act of May 27, 1902, as amended, and are now all known as Uintah or Uintah Ute Indians.

7. On March 2, 1868, a treaty was concluded (and subsequently ratified and proclaimed, 15 stat. 619) between the United States and Indian parties designated therein as "the Tabequache, Muache, Capote, Weeminuche, Yampa, Grand River, and Uintah Bands of Utes," sometimes referred to thereafter as the "Confederated Bands of Ute Indians." Article II of the said treaty set apart **[**26]** a large reservation, wholly within the Territory of Colorado, for the use and occupation of the Indians therein named, and for such other friendly Indians as they might be willing to admit among **[*15]** them. By Article III the Indians, parties thereto, relinquished all claims and rights in and to any other territory not included within the reservation. Article IV provided for the establishment of two agencies upon the reservation, "one for the Grand River, Yampa, and Uintah bands, on White River, and the other for the Tabequache, Muache, Weeminuche, and Capote Bands on the Rio de Los Pinos * * *." The said agencies were established and Indians associated with the White River Agency in northwest Colorado came in time to be known as White River Utes or the White River Band of Ute Indians.

8. By an agreement approved by the act of June 15, 1880, 21 Stat. 199, with the "Confederated Bands of Ute Indians in Colorado," it was provided that the Indians would cede the then remaining portions of the Ute reservation in Colorado. The agreement provided for stated considerations to the Indians and that reservations be established for them as follows:

The Southern Utes agree to remove **[**27]** to and settle upon the unoccupied agricultural lands on the La Plata River, in Colorado; and if there should not be a sufficiency of such lands on the La Plata River and in its vicinity in Colorado, then upon such other unoccupied agricultural lands as may be found on the La Plata River or in its vicinity in New Mexico.

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.

The White River Utes agree to remove to and settle upon agricultural lands on the Uintah Reservation in Utah.

9. Pursuant to the Agreement and Act of June 15, 1880, *supra,* the White River Utes were removed to the Uintah Reservation beginning about November 1881. Pursuant to the same act and subsequent legislation they were given

individual allotments on the Uintah Reservation. In general, the White River Ute Indians so removed to the reservation, and their descendents have continued to live upon the reservation.

[*16] 10. **[**28]** Pursuant to section 2 of the act of June 15, 1880, *supra,* a commission reported that it had examined the land on the Grand River near the mouth of the Gunnison, and had found insufficient suitable land for the Uncompahgre Utes. A tract of land in the valleys of the White and Green Rivers in Utah (south and east of the uintah Reservation) was selected by the commission and approved by the Secretary of the Interior for the settlement of the Uncompahgre Utes, who removed thereto by October 1881. The Uncompahgre Reservation in Utah was established by Executive Order of January 5, 1882, 1 Kappler 901.

11. The act of May 24, 1888, 25 Stat. 157, provided that a designated portion of the Uintah Valley Indian Reservation should be restored to the public domain and sold upon ratification by three-fourths of the adult-male Indians residing on the reservation. The act provided further:

* * * That all moneys arising from the sales of this land shall belong to said Indians and be paid into the Treasury of the United States and held or added to any trust funds of said tribes now there.

Pursuant to this act, the required consent of the Uintah and White River Bands of Ute Indians was **[**29]** obtained, and the lands were sold by the united States and receipts therefrom in the amount of $22,417.93 were credited to the benefit of the Uintah and White River Bands of Ute Indians. Pursuant to the act of May 27, 1902, 32 Stat. 245, 263, as amended by the Joint Resolution of June 19, 1902, 32 Stat. 744, an additional $10,000 was appropriated and paid to the Uintah and White River Utes to cover claims for lands detached from the reservation pursuant to the act of May 24, 1888, *supra.*

12. On September 12, 1893, Mr. Rawlins of Utah introduced and there was referred to the House Committee on Indian affairs, H. Res. 45, 53d Congress, 1st session. This proposed joint resolution would have authorized and directed the Secretary of the Interior to release from the Uintah and Uncompahgre Indian Reservations in Utah and to restore to the public domain such portion or portions of either or both reservations "as are in his judgment desirable to be so released, having due regard to the interests of the **[*17]** several Indian tribes hitherto occupying the same and to all rights secured to such Indians by any treaties or statutes." By section 2 of the resolution it was provided:

[30]** That in case it shall appear to the Secretary of the Interior that any tribe or band of Indians have any title or proprietary interest in any body of land in their said reservations which should, in the judgment of the said Secretary, be restored to the public domain, it shall be lawful for the Secretary to appoint and send out a commission for the purpose of treating with such Indians for the purchase of such title or interest; and the result of such negotiations shall be communicated to Congress.

On December 7, 1893, Mr. Rawlins introduced H.R. 4511, 53d Congress, 2d session, which proposed to authorize and direct the Secretary of the Interior, through a commission, to make allotments to the indians upon the Uintah and Uncompahgre Indian Reservations, and provided for disposition of the unallotted lands. H.R. 4511 provided, in section 9 thereof:

That said Commissioners may adjust and settle any claims of the Indians against the United States, make adequate and just compensation to them for the relinquishment of any rights or claims which they may have in any lands within said Reservations, such payments to and provisions for the Indians to be out of the proceeds of the sale **[**31]** of the lands as hereinbefore provided; * * *

H. Res. 45, and H.R. 4511 were referred by Congress to the Secretary of the Interior and the Commissioner of Indian Affairs for reports. These officials reported to Congress their opposition to the enactment of the legislation in its present form, stating as grounds, *inter alia,* that the Indians residing upon the Uintah Reservation had title to their lands which should not be extinguished except after negotiation and purchase, and with the consent of the Indians.

Neither H. Res. 45 nor H.R. 4511 was enacted. However, Congress enacted the act of August 15, 1894, 28 Stat. 286, 337, which directed the appointment by the President of a commission (1) to make allotments in severalty to the

Uncompahgre Indians within the reservation referred to in **[*18]** finding 10, with a provision that the Uncompahgres would be required to pay $1.25 per acre for the lands so allotted, from the proceeds of the sale of their Colorado lands under the 1880 Agreement and Act; and (2) to "negotiate and treat with the Indians properly residing upon the Uintah Indian Reservation, in the Territory of Utah, for the relinquishment to the United States of **[**32]** the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians, * * *"

13. The commission authorized by the act of August 15, 1894, *supra,* was appointed, but on January 8, 1895, reported that it had encountered difficulty in explaining to the Uncompahgres why they would be required to pay $1.25 per acre for their allotments, whereas the Indians on the Uintah Reservation would not be required to pay for their allotments. As a consequence, no allotments or agreements for cession of unallotted lands were made.

14. Section 3 of the act of February 28, 1891, 26 Stat. 794, authorized the leasing of Indian lands "where [such] lands are occupied by Indians who have bought and paid for the same, * * *." On May 6, 1892, the Secretary of Interior ruled that lands of the Uintah Reservation were occupied by Indians who had "bought and paid for the same" within the meaning of the act. The validity of a lease upon Uintah Reservation lands made pursuant to this authority was upheld by the Supreme Court of Utah, 45 Pac. 348, against an attack that Uintah Reservation lands had not been "bought and paid for" by the Indians. On November **[**33]** 17, 1897, Assistant Attorney General Van Devanter issued an opinion to the Secretary of the Interior on the subject, in which he undertook a review of the various acts of Congress and executive and administrative action with respect to the tenure of the Uintah and White River Indians on the Uintah Indian Reservation. He held that the uintah Reservation lands came within the purview of the act, stating:

It is clear that the Indians on this reservation gave up what were to them valuable rights for the purpose of securing a place for permanent homes, and some of the White River Utes relinquished rights to land in Colorado which had been guaranteed them by treaty stipulation. It would seem thus, that they may very **[*19]** justly be considered as Indians who are occupying lands which they "have bought and paid for" within the purview of said act of 1891. The fact that this has heretofore been held by the supreme court of Utah, the State within which the lands are situated, is a persuasive argument in favor of the same conclusion by this Department. Again the fact that the holding of this Department has always been in favor of such ownership in these Indians tends strongly in favor **[**34]** of that conclusion now.

In 1898 the Secretary approved a lease expressly reciting that the Uintah Reservation lands had been "bought and paid for" by the Uintah and White River Ute tribes, and thereafter other leases were negotiated and approved.

15. The Indian Appropriation Act of June 10, 1896, 29 Stat. 321, 341-342, authorized the Secretary of the Interior to appoint a commission to negotiate with various Indians located on reservations in Montana and nearby states, and "with the Indians residing upon the Uintah Reservation in the State of Utah," for the surrender of any portion of their respective reservations. The commission appointed pursuant to this act was directed by the Secretary of the Interior to negotiate with the Uintah and White River Bands of Ute Indians for cession of lands on their reservation to the United States for the allotment of the same in severalty to the Uncompahgre Utes.

The commission, on January 8, 1898, negotiated an agreement with the Uintah and White River Ute Indians, whereby the Indians consented to "cede, sell, and relinquish to the United States," for the use of Uncompahgre allotments, "all right, title, and interest which they may have **[**35]** to the lands necessary for such purposes * * *." The agreement provided for payment to the Uintah and White River Utes at the rate of $1.25 per acre for the lands so ceded. This agreement was reported to Congress on January 21, 1898, Senate Document No. 80, 55th Congress, 2d session, but was never ratified.

16. The act of January 7, 1897, 30 Stat. 62, 87, directed the Secretary of the Interior to allot in severalty to the Uncompahgre Ute Indians on the Uncompahgre reservation, lands in the Uncompahgre reservation or the Uintah reservation **[*20]** or elsewhere in the State of Utah, and provided for the disposition of unallotted lands on the Uncompahgre reservation under the public land laws. Pursuant to this act and the act of June 4, 1898, 30 Stat. 429 (see finding 17) and the Joint Resolution of June 19, 1902, 32 Stat. 744, amending the act of May 27, 1902, 32 Stat. 245, 263, (see findings 18 and 19) Uncompahgre Indians were given allotments in severalty upon the Uncompahgre and Uintah reservations, including ultimately 63,915.51 acres in allotments on the Uintah reservation by 1905, and the

unallotted portions of the Uncompahgre reservation were opened for disposition under **[**36]** the public land laws. By the act of May 27, 1902, as amended by the joint resolution of June 19, 1902, the United States appropriated and paid to the Uintah and White River Utes $60,064.48, which had been received from the Uncompahgres for allotments on the Uintah reservation.

17. The act of June 4, 1898, 30 Stat. 429, directed and authorized the President to appoint a commission to make allotments in severalty with the consent of the Indians properly residing on the Uintah Indian reservation, "to the said Indians, and to such of the Uncompahgre Indians as may not be able to obtain allotments within the Uncompahgre Indian Reservation," and also provided:

Sec. 2. That said commission shall also obtain, by the consent of a majority of the adult male Indians properly residing upon and having an interest in the said Uintah Indian Reservation, the cession to the United States of all the lands within said reservation not allotted or needed for allotment as aforesaid. The agreement for such cession shall be reported by said commission and become operative when ratified by Act of Congress; and thereupon such ceded lands shall be held in trust by the United States for the purpose of **[**37]** sale to citizens thereof: *Provided,* That the United States shall pay no sum or amount whatever for said lands so ceded. Said lands shall be sold in such manner and in such quantities and for such prices as may be determined by Congress: *Provided,* That the amounts so received shall, in the aggregate be sufficient to pay said Indians in full the amount agreed upon for said lands. All sums received from the sale of said lands shall be placed in the Treasury of the United States for said Indians, and shall be **[*21]** exclusively devoted to the use and benefit of the Indians having interests in the lands so ceded.

18. The act of May 27, 1902, 32 Stat. 245, 263, provided for individual allotments and disposition of unallotted lands on the Uintah Reservation, as follows:

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, to be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments **[**38]** to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore, issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the **[**39]** proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a **[*22]** majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four **[**40]** dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

Pursuant to this act, and amendments thereto, more fully set out hereafter, allotments in severalty, aggregating 39,349.84 acres by 1905, were made to the Uintah and White River Indians, and surplus lands (with the exception of forest reserve and reclamation withdrawals and certain mineral entries) were restored to the public domain, and opened for disposition under the public land laws for the benefit of the Indians.

Substantial amounts of these surplus lands were sold, and $1,184,996.33 in proceeds from such sales was set up for the benefit of the Indians under an account headed "Proceeds of Uintah and White River Ute Lands." By Order of the Secretary of the Interior, August 25, 1945, 10 F.R. 12409, all undisposed-of opened lands of the former Uintah Reservation were "restored to tribal ownership for the use and benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah * * *."

19. **[**41]** The joint resolution of June 19, 1902, 32 Stat. 744, supplemented and modified the act of May 27, 1902, *supra.* The resolution provided:

In addition to the allotments in severalty to the Uintah and White River Utes of the Uintah Indian Reservation in the State of Utah, the Secretary of the Interior shall, before any of said lands are opened to disposition under any public land law, select and set apart for the use in common of the Indians of that reservation such **[*23]** an amount of nonirrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of livestock.

All allotments hereafter made to Uncompahgre Indians of lands in said Uintah Indian Reservation shall be confined to agricultural land which can be irrigated, and shall be on the basis of eighty acres to each head of a family and forty acres to each other Indian, and no more. The grazing land selected and set apart as aforesaid in the Uintah Indian Reservation for the use in common of the Indians of that reservation shall be equally open to the use of all Uncompahgre Indians receiving allotments in said reservation of the reduced area here named.

[42]** The resolution also provided that the $70,064.48 previously appropriated by the act of May 27, 1902, *supra,* in satisfaction of claims of the Uintah and White River Tribes of Ute Indians, as set forth in the act, should be paid without awaiting the action of the Indians upon the program of allotments and disposition of unalloted and unreserved lands proposed by the act.

20. The act of March 3, 1903, 32 Stat. 982, 997-8, provided:

* * * That the Secretary of the Interior shall forthwith send an inspector to obtain the consent of the Uintah and White River Ute Indians to an allotment of their lands as directed by the Act of May twenty-seventh, nineteen hundred and two, and if their consent, as therein provided, can not be obtained by June first, nineteen hundred and three, then the Secretary of the Interior shall cause to be allotted to each of said Uintah and White River Ute Indians the quantity and character of land named and described in said Act * * *

21. The act of March 3, 1905, 33 Stat. 1048, 1069-1070, extended the time for opening the Uintah Indian Reservation, provided generally for the disposition of unreserved and unalloted lands under the general provisions **[**43]** of the home-stead and town-site laws, the proceeds to be used for the benefit of the Indians, made other changes in the provisions of the 1902 Act for the disposal of unalloted lands, and provided for reservation of forest lands and reservoir sites prior to opening, as follows:

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart **[*24]** and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules and regulations governing forest reserves, and subject to the mineral rights granted by the Act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the Act opening **[**44]** the reservation.

22. Pursuant to the authority granted by the act of March 3, 1905, *supra,* approximately 1,010,000 acres of land within the Uintah Indian Reservation (more fully described hereafter) were added to and made a part of the Uintah Forest Reserve, by Proclamation of the President on July 14, 1905, 34 Stat. Pt. III 3116. Quantities of timber were sold from time to time from such lands prior to 1920, and, pursuant to the act of March 3, 1905, *supra,* $63,024.83 in proceeds therefrom was transferred to accounts for the benefit of the Indians, as follows: $62,724.83 to an account "Proceeds of Uintah and White River Ute Lands," and $300 to an account "Indian Moneys Proceeds of Labor, Uintah and Ouray Indians."

23. Pursuant to the authority granted by the act of March 3, 1905, *supra,* approximately 93,000 acres of land in the Uintah Indian Reservation were reserved for "reservoir site necessary to conserve the water supply for the Indians, or for general agricultural development," by proclamation of the President on August 3, 1905, 34 Stat. Pt. III 3141. By proclamation of August 14, 1905, this reservation was modified by excluding certain lands, thereby reducing **[**45]** the number of acres to approximately 60,160. By orders of May 13, 1907, and November 11, 1909, 56,868.51 acres of the 60,160 acres theretofore reserved by the above proclamations, were withdrawn, by the Secretary of the Interior pursuant to **[*25]** Section 3 of the Reclamation Act of June 17, 1902, 32 Stat. 388, for irrigation works for the Strawberry Valley project.

24. By the act of April 4, 1910, 36 Stat. 269, 285, Congress extinguished "All right, title and interest of the Indians" in the "lands in the former Uintah Indian Reservation in the state of Utah, which were set apart by the President for reservoir and other purposes under the provisions of the Act approved March third, nineteen hundred and five, * * * and which were by the Secretary of the Interior withdrawn for irrigation works under the provisions of the Reclamation Act of June seventeenth, nineteen hundred and two, in connection with the reservoir for the Strawberry Valley project." The area embraced within the above description constitutes 56,868.51 acres, and is the subject of the claim for just compensation in case No. 47570 of this court. The same act appropriated $1.25 per acre for the lands thus taken **[**46]** to be paid from the reclamation fund "for the benefit of the Uintah Indians," subject to the same disposition as the proceeds of sales of lands in the former Uintah Indian Reservation, and payable in five annual instalments. Pursuant to this act, $71,085.65 was paid into the Treasury under the fund "Proceeds of Uintah and White River Lands," in five equal instalments of $14,217.13 on February 21, 1912, October 28, 1912, June 27, 1913, September 22, 1914, and February 25, 1915, respectively. Under date of October 18, 1948, the Acting Commissioner of Indian Affairs, in response to a call of this Court, reported that rentals or income from these lands were collected between August 3, 1905, and April 4, 1910, and were paid or credited to plaintiffs, as follows: January, 1908, $10,408; September, 1908, $8,728; September, 1910, $9,945.88. By intradepartmental letter dated August 21, 1911, the Assistant Director of the Reclamation Service stated that these rentals were paid to the Indian Service for the Indians because title was in the Indians until the act of April 4, 1910, when title passed to the Reclamation Service, and thereafter rentals were considered revenue belonging to the Reclamation **[**47]** fund.

25. Between 1924 and 1929 several unsuccessful attempts were made to obtain passage of special jurisdictional legislation **[*26]** to permit the Uintah and White River Bands of Ute Indians to bring suit in the Court of Claims for compensation for the 1,010,000 acres taken from the Uintah Reservation for the Uintah National Forest, pursuant to the Executive Order of July 14, 1905, *supra.* The first attempt was with the introduction of S. 3080, in 68th Congress, 1st session, a bill "for the relief of the Uintah and White River Tribes of Ute Indians of Utah" which proposed to confer "jurisdiction upon the Court of Claims to hear and determine the rights of said Indians under an agreement ceding lands embraced in their reservation to the United States and under acts of Congress relating thereto." In reporting favorably upon the bill, the Senate Committee on Indian Affairs stated that the Uintah and White River Bands "held title jointly and in common" to the Uintah Reservation. Following a general description of the 1,010,000 acres of forest land taken in 1905, the Committee concluded that "The Government having taken these lands (which it was, under the agreement and the **[**48]** law, required to sell for the benefit of the Indians) for a forest reservation, it is, of course, responsible to the Indians for the value of the lands so taken." S. 3080 passed the Senate and later the House with an amendment, but Congress adjourned before conferees could act.

In 1926 a bill of like import, S. 1924, was introduced in the 69th Congress, and passed the Senate. The House Committee on Indian Affairs reported favorably on the bill, stating that since 1881 the Uintah and White River Bands "held title jointly and in common" to the Uintah Reservation, and that "By subsequent acts of Congress the use and occupancy of the lands by these Indians were repeatedly recognized and confirmed." The House, however, did not take final action upon the bill.

In 1928 S. 2482 was introduced and passed in the Senate for the relief of these Indians, reported by the House Committee on Indian Affairs, but withdrawn from further consideration when it came up in the House. H.R. 16985, introduced in the 70th Congress in 1929, passed both the House and Senate but received a pocket veto.

[*27] 26. These unsuccessful attempts to enact special jurisdictional legislation finally culminated **[**49]** in 1930 in the introduction of S. 615, 71st Congress, 2d Session, which provided for direct payment to the Uintah, White River, and Uncompahgre Bands of Ute Indians, at the rate of $1.25 an acre, for the lands which were taken pursuant to the Executive Order of July 14, 1905, *supra.* This was the first legislative reference to the Uncompahgre Band of Ute Indians with respect to this claim. The report of the House Committee on Indian Affairs took cognizance of the hearings and reports in connection with the earlier attempts to get special jurisdictional legislation for the Uintah and White River Bands of Ute Indians and concluded that title to the Uintah Reservation since 1881 had been held "jointly and in common" by the Uintah and White River Bands. The Committee reported that "Their title to the land has never been challenged and has been repeatedly recognized by treaty, congressional acts, and court decisions."

When the bill came before the House on the Consent Calendar, a question was raised with respect to the Indians' title. Consequently, the bill was passed over without prejudice. When the bill was brought up for consideration against, there was inserted into the Record **[**50]** a lengthy and documented "Deraignment of Title of Uintah, White River Utes, to Their Lands and In Support of S. 615 -- Statements of Charles J. Kappler, Esquire, Attorney, Washington, D.C.," after which it was observed that there was no "well-founded question" as to the title of these Indians, and the bill passed the House. There was no mention of the Uncompahgre Utes as having any interest in the lands, nor any explanation for their inclusion in the payment under the bill.

27. S. 615 was enacted into law on February 13, 1931, 46 Stat. 1092, providing for direct payment for 973,777 acres of the 1,010,000 acres of land taken for the Uintah National Forest on July 14, 1905, in the following terms:

* * * That there is hereby authorized to be appropriated the sum of $1,217,221.25 for payment at the rate of $1.25 per acre, to the Uintah, White River, and Uncompahgre bands of Ute Indians in the State of Utah for nine hundred and seventy-three thousand seven **[*28]** hundred and seventy-seven acres of land belonging to such Indians being a part of the one million and ten thousand acres of land withdrawn from entry and sale by an Executive Order dated July 14, 1905, and included within **[**51]** the Uintah National Forest. Such sum shall be in full satisfaction of all claims of said Indians against the United States with respect to such lands and shall, when appropriated, be apportioned by the Secretary of the Interior among the said bands of Indians in such amounts as in his opinion the interests of said bands require: *Provided,* That as to the balance of said one million and ten thousand acres, amounting to thirty-six thousand two hundred and twenty-three acres, which has heretofore been classified as coal lands, the Secretary of the Interior shall proceed with all convenient speed to ascertain the value thereof and report his findings with respect thereto to the Congress not later than six months after the approval of this Act for such action as to the Congress shall seem appropriate. The amounts so apportioned, less the amount of the attorneys' fees determined as provided in Section 2, shall be credited to such bands on the books of the Treasury Department, shall bear interest at the rate of 4 per centum per annum and shall be disposed of in the same manner as now or hereafter provided by law for the disposition of other funds belonging to said Indians.

28. Pursuant **[**52]** to the act of February 13, 1931, $1,217,221.25 was set up on the books of the United States Treasury under the heading "Payment to Uintah, White River, and Uncompahgre Ute Indians of Utah for Lands." After payment of attorneys' fees, $1,162,221.25 of said amount was transferred to the "Uintah, White River and Uncompahgre Ute 4% Fund, Utah." $1,146,319.50 of said funds was distributed *per capita* to the Uintah, White River, and

Uncompahgre Bands of Ute Indians in the years 1935, 1936, and 1938. The Uncompahgre Indians received the benefit of $439,466.88 of the $1,217,221.25 appropriated pursuant to the Act of February 13, 1931, *supra.*

29. The area of land for which plaintiffs seek just compensation in this action consists of 973,777 of the 1,010,000 acres of the former Uintah Indian Reservation in Utan which were placed by defendant in the Uintah National Forest on July 14, 1905. The balance of 36,223 acres which was separately classified as coal lands and for which no payment was **[*29]** made by the act of February 13, 1931, is the subject of a separate action, No. 47568. The legal description of the 973,777 acres, sometimes hereinafter called "subject lands" or "subject **[**53]** area", is contained in paragraph 25 of the stipulation between the parties, filed January 4, 1954, which paragraph is included in this finding as if fully set forth.

The subject lands are now within and administered as parts of the Uintah and Ashley National Forests in Utah. The national forest boundaries within the subject lands have changed from time to time so that in years past the subject area has been part of the Uintah, Ashley, and Wasatch National Forests in Utah.

30. The Uintah Indian Reservation as created by the Executive Order of October 3, 1861, and the act of May 5, 1864, included the entire drainage of the Duchesne (then Uintah) River system. The original reservation was the major part of the Uintah Basin which extends eastward beyond the Indian reservation and includes the towns of Jensen and Vernal, the latter being about 12 miles east of the east boundary of the reservation.

The original Indian reservation was surrounded on the north, west and south by mountains, the crest of which was the reservation boundary. It was these mountain lands lying at higher elevations than the balance of the reservation, and being roughly in the form of a horseshoe open at **[**54]** the east end, which were added to the Uintah Forest Reserve by the Proclamation of July 14, 1905. The interior boundary of the horseshoe-shaped area coincides with present boundaries of the Uintah and Ashley National Forests. The westernmost part of the subject lands is about 45 airline miles east of Salt Lake City, Utah. The lands extend eastward about 70 miles to a point about 45 miles west of the Utah-Colorado State line. The north arm extends northward to within about 12 airline-miles of the Wyoming State line. The area between the north and south arms is about 35 miles in width. The north arm is about 20 miles wide and the south arm about 10 miles wide at their widest points. The western part is irregular in shape, varying in width from less than one mile to about 15 miles.

[*30] Generally speaking, the western part of the subject lands lies within the present boundaries of Wasatch County with a very small area in Utah County, and the north and south arms lie within the present boundaries of Duchesne County, with the extreme east end of the north arm being in Uintah County.

31. The elevation of subject lands ranges from about 7,000 feet at the inside boundary, **[**55]** which follows section and township lines rather than topography, to the crest of mountains which exceed 13,000 feet at the highest peaks. About 90 percent of subject lands lie at elevations above 8,000 feet.

The north arm extends about 40 miles along the south slope of the Uintah Mountains, an east-west range of the Rocky Mountains. The upper reaches of the north arm are rocky barren ridges and peaks (some exceeding 13,000 feet) rising abruptly from large glaciated basins located high in the Uintah Mountains. These basins have a shallow soil with a grass cover and some meadows. They drain into canyons which are steep and rugged in their upper areas and thereafter widen into areas extensively covered with good forage. The principal streams originating in the high basin areas and flowing southerly through the various canyons are, from east to west, the Whiterocks River, the Uintah River, the Yellowstone River, Lake Fork River, Rock Creek and the north fork of the Duchesne River, all of which are tributaries of the Duchesne River. Ridges extending southerly from the crest of the Uintah Mountains and separating the various canyons are high and barren or inacessible at their summits **[**56]** in the upper and middle areas of the north arm, with coniferous forests predominant on their slopes. In the lower parts are areas of aspen woodlands, sagebrush, mountain browse, grassland, and coniferous timber.

The western part of the subject lands is characterized by a succession of valleys on the east side of the Wasatch Mountains, with the elevation rising to a maximum of about 10,000 feet. The slopes are covered with forage desirable for the grazing of livestock, with extensive areas of aspen woodland having excellent undercover and with some

coniferous forest, mountain browse and sagebrush areas. There is very little barren or inaccessible land. This part of subject **[*31]** lands extends roughly from the north fork of the Duchesne River westerly, southerly, and then easterly into lands south of the Strawberry Reservoir withdrawal. Both the Strawberry Reservoir and coal-lands, withdrawals impinge upon this part of the subject lands, with the Strawberry withdrawal enclosed by subject lands on its north, west and south sides, and with one area of the coal lands completely surrounded by subject lands and the other adjacent to the east. The west fork of the Duchesne River **[**57]** fed by mountain streams runs through the northern part of this area of the subject lands. Numerous mountain streams throughout the other parts of this western area form the headwaters of Red Creek, Currant Creek and the Strawberry River, which rise on subject lands, flow through the coal lands and Strawberry site and into lower levels of the Uintah Basin, and in conjunction empty into the Duchesne River.

The south arm, considerably smaller in area and dimensions than the north arm, constitutes mountainous lands sloping northerly from a maximum elevation of 10,000 feet. In its principal canyons from west to east flow Willow Creek, Timber Creek, sources of Avintaquin Creek, and towards the eastern end, intermittent streams in Indian, Sowers and Antelope canyons, all part of the drainage system of the Uintah Basin. The south arm has areas of grassland, sagebrush, aspen woodlands, pinon-juniper, mountain brush, coniferous forest, and some wasteland.

32. Average precipitation on subject lands ranges from a low of 10 to 16 inches per year on the lower portions to from 25 to 40 inches per year on the higher elevations. The year 1905 was marked by better than average precipitation. **[**58]** The bulk of the precipitation falls in the form of snow between the months of October and May. Temperature extremes range from 40 degrees below to 95 degrees above zero Fahrenheit. For the greatest proportion of subject lands, the growing season extends from May 15 to September 15, with slightly longer growing season at the lowest elevations and considerably shorter above the timber line and in the highest elevations. Precipitation in the Uintah Basin, as in most western grazing areas, increases in relation to altitude, **[*32]** and a more abundant and desirable forage is generally found on the vast grazeable areas of the subject lands than is found on the lower elevations of the Uintah Basin.

33. The mountain streams distributed throughout subject lands provide year around flow, except for a few intermittent streams in the eastern portion of the south arm. Sufficient seeps exist in this latter area to permit summer grazing, but fullest utilization of this relatively small portion of subject lands is in spring and fall grazing, with all the rest well watered for summer grazing.

34. The soil is typical of mountain areas. The high peaks and ridges of the Uintah Mountains **[**59]** are largely sharp quartzite rocks, which are so hard they have withstood weathering. There is no evidence of a soil being formed. The high alpine basins have a very shallow soil. On the Uintah foothills the soil is of glacial origin, thickly dotted with rocks and boulders. At the lower elevations, and particularly on the west end and south arm, the soil is sandy or gravelly loam with some clay, the soil being deeper in the valleys and on the less steep slopes. Shale is found in the eastern portion of the south arm.

35. There was no land classification report on the subject area in 1905 or for about ten years thereafter. The earliest comprehensive classification reports were made by the United States Forest Service about 1915. Those reports show the following with respect to acreages of lands with various types of forage cover:

Cover type	Area in acres	Percentage
Grassland (including meadows and forbs)	74,493	7.65
Sagebrush	29,213	3.07
Mountain browse	107,015	10.88
Coniferous timber	331,084	33.98
Inaccessible or barren	155,804	15.86
Aspen and other woodland	276,168	28.00
	973,777	99.44

The difference between the total of **[**60]** the percentages and 100 percent reflects minor mathematical adjustments in rounding off figures and a negligible area of water surface acres and alienated land in the 1915 reports.

[*33] 36. The broad classification set forth in the preceding finding is not in accord with modern classification techniques. In accordance with present day practices, the subject lands are described as follows:

Grassland, type No. 1, on subject lands is characterized by open areas, free of trees or browse, on which the growth is principally mountain grasses or grasslike plants. Much of the grasslands is in the high alpine basins of the Uintah Mountains where the growing season is short.

Meadow lands, type No. 2, in the subject area are found principally in the vicinity of high mountain lakes, and along the flat areas adjacent to rivers. This cover differs from the grassland because of the abundance of moisture and the resulting differences in density and quality of forage. These wet lands are avoided by sheep but preferred by cattle.

Perennial weeds or forbs, type No. 3, in subject area are characterized by all types of high altitude weeds or forbs, growing in relatively open areas not **[**61]** dominated by shrub or tree growth. This type results from an encroachment of weeds into grasslands that have been overgrazed, although many of the invading weeds continue to supply palatable forage to livestock.

Type No. 4, or sagebrush lands, is one of the most common types found below the alpine zone in subject area. Sagebrush tends to replace other forage plants that die out from over use. He sagebrush plant itself is not highly palatable, but much good grazing is found in the area classified as sagebrush lands in subject area because of the good understory of grasses and weeds.

Type No. 5, mountain-browse lands on subject area, is characterized by palatable woody forage plants such as scrub oak, serviceberry, mountain mahogany, choke cherry, etc., generally growing on slopes. Some grasses and forbs are present in this type. Mountain browse lands usually support good grazing, unless slopes are too steep or rocky, providing better forage for sheep than for cattle.

Type No. 6, coniferous timber land, is characterized by the predominance of evergreen trees, other than pinon-juniper varieties. Englemann spruce and lodgepole pine, with some western ponderosa or yellow pine, **[**62]** make up the **[*34]** coniferous cover on subject lands. Some of the coniferous timber areas support a usable understory of grasses and weeds, but others are so dense that no grazeable cover grows thereon.

Where timber of poor merchantable quality, as occurs in some places of subject lands, is so dense as to preclude grazing use, it may be classified in type No. 7, as inaccessible land, along with other types of land which support some forage but on slopes so steep or rocky as to make it unsuitable for grazing.

Type No. 8, barren lands, in the subject area consists of barren, high, rocky crags and peaks, generally above the timber line. Nearly all of the lands of this type in subject area are found in the north arm along the peaks and high ridges of the Uintah Mountains, and extending in places down into canyon gorges and walls.

There is relatively little type No. 9, or pinon-juniper land, in subject area because this type usually prevails at elevations below 7,000 feet. It is characterized by stands of ever-green trees of pinon and juniper variety, usually in shallow rocky soils. Some portions of this type do support a usable understory of dry land grass types, and occasionally **[**63]** some browse or sage. The principal pinon-juniper areas of subject lands are located in the east end of the south arm.

Type No. 10, broadleaf tree lands, in subject area is characterized by large stands of aspen or aspen and narrow leaf cottonwood, usually found where the soil is rather deep and of a loamy character. This type generally supports a very good understory of grass and browse and offers some of the best grazing resources on subject lands. It is usually located in areas accessible to livestock, and extensive areas of this type are to be found in the western part in the drainages of the west fork of the Duchesne River, Red Creek, Current Creek, and the Strawberry River, and also substantial areas in the southern parts of the north arm.

37. Some changes in the nature and quality of the cover upon subject lands have occurred in the years since 1905. Sagebrush, rabbit brush, and forbs have invaded areas previously occupied by grassland, and the quality of the forage has somewhat deteriorated. The timber has matured, but **[*35]** very slowly. With the exception of these changes in forage, physical conditions on subject lands have remained relatively stable.

38. **[**64]** Portions of the subject lands had been used by non-Indians for sheep and cattle grazing since about 1880. In the 1880's prior to any official leasing to non-Indians, thousands of cattle were grazed by white owners from Strawberry Valley at the western end of the original Uintah Reservation to Green River, which runs in a southerly direction some miles east of this reservation. Shortly thereafter thousands of sheep were trespassed upon the high summer ranges at the western end of the reservation. In 1893, the first official leases were executed, permitting cattle grazing over the western end of the reservation, including large portions of subject lands. Sheep trespassing continued extensively, so that the trespass use during some years actually exceeded the grazing use under the cattle leases. In 1900, the western end of the reservation, constituting approximately 800,000 acres, including large areas of subject lands, was divided into three ranges and leased to non-Indian livestock operators for the grazing of sheep and cattle, and in 1901, another area of approximately 80,000 acres lying to the east of the other three ranges was leased. Grazing use under these leases continued **[**65]** until July 14, 1905, and beyond. This earlier grazing use of subject lands tended to center in the better grazing lands in the western end of subject area from the north fork of the Duchesne around to the Avintaquin drainage. Some grazeable portions of subject land were still relatively unused as of 1905.

39. The condition of the range over subject lands as a whole in 1905 was good. Forage growth was better in quantity and quality than at the present time. Overgrazing was slight and highly localized.

In the years after 1905, and especially during World War I, the range on subject area deteriorated under extensive grazing. Beginning in the 1920's, the Forest Service interposed a policy, which has continued to the present, of progressively reducing the number of livestock permitted to graze in the area, and reducing the grazing season. The average grazing season of the area as a whole is presently **[*36]** from about mid-June through late September. However, in or about 1905, the average grazing season extended from early May to October, with some fall and spring grazing. The present grazing use of the subject area is substantially below its grazing use in and around 1905.

[66]** 40. Under modern range management practices, the grazing resources of subject area are measured in terms of carrying capacity, or ability to support livestock for a given length of time, expressed in terms of acres required per animal unit month of grazing. A prospective purchaser in 1905, would not have estimated grazing resources of the subject area in terms of acres per animal unit month, but would have attempted to make some inventory of the available forage resources in terms of the number of livestock which could be grazed upon the range. Such an estimate by a well-informed purchaser in 1905 would have shown grazing resources equivalent to 181,000 animal unit months of grazing, expressed in modern terminology, or an acreage requirement of approximately 5.43 acres per animal unit month of grazing. An animal unit month is the amount of forage required to feed an average adult cow or horse, or five adult sheep for one month.

41. Coniferous timber, other than the pinon-juniper type, makes up the merchantable timber resources on subject lands. The conifers occur in four major types; lodgepole pine, Engleman spruce, ponderosa or western yellow pine, and Douglas fir. The **[**67]** aspen growth occurring over extensive areas of subject lands has no commercial timber value.

Lodgepole pine comprises the largest area and percent of merchantable timber on the subject lands. It predominates in the northeast sections of subject area, in the Ashley National Forest. The Engleman spruce type often occurs interspersed with the lodgepole pine, but also grows in substantial pure stands in more favorable moisture situations, such as the north slopes of the small creeks at higher elevations and at the head of the upper basins. The yellow pine, which is the most valuable commercial timber, occurs in open and irregular stands in the Yellowstone, Dry Fork, and Uintah River areas, generally along the lower borders of the subject area. The Douglas fir type occurs most frequently **[*37]** in the lower areas about the Strawberry Reservoir site, and along the southern arm of subject lands.

42. As of July 14, 1905, there were from 1,200,000 to 1,500,000, thousand-board-feet of timber on subject area, to which Forest Service officials, in 1915 and 1916, attributed a total value of $1,218,625. These value estimates, apparently based upon an attempt to estimate the intrinsic **[**68]** value of the timber, are not a reliable indicia of the market value of the timber lands in 1905, but do indicate that there was substantial timber on subject lands of merchantable quality.

Timber resources in forest areas on the west slopes of the Wasatch Mountains, west of the subject lands, had been heavily exploited in the years prior to 1905. These forest areas were accessible to the populated areas between Salt Lake City and Provo, Utah, as well as settlements on the west slopes of the Wasatch Mountains. The timber resources of the subject lands, being within the original Uintah Indian Reservation, had never been offered for sale, and there was little local demand and inadequate transportation facilities for commercial lumbering operations. Prior to July 14, 1905, the pending opening of large areas of the lower lands of the reservation for settlement, combined with the expected construction of a railroad through the Uintah Basin, created an expectancy of a demand for the virgin timber resources of the subject lands, and lumbering men were giving consideration to the commencement of lumbering operations.

The Forest Service received the average sum of $4,988 annually during **[**69]** the years 1906 through 1910 on sales of timber from subject lands, and, in addition, permitted free use to settlers of the Uintah Valley of timber averaging in value about $2,000 per year in the early years of the Forest Service Administration. Without rail facilities, substantial commercial operations failed to develop, and timber cutting was largely limited to local demand, but as late as 1915, construction of rail facilities and timber development were still expected.

43. The first permanent non-Indian settlements in Utah commenced with the arrival of the Mormon pioneers on July 24, 1847, on the site of Salt Lake City. From this center **[*38]** of activity and growth, the Mormon settlers soon established principal communities in the areas of Ogden, Salt Lake City and Provo, located in relatively extensive and level valley areas extending north and south at the foot of the western slopes of the Wasatch Mountains. The Territory of Utah was organized in 1850. Grazing activities from the population centers reached into the west slopes of the mountains adjacent to the western part of the subject lands as early as 1859. Wasatch County, adjoining subject lands to the west, was **[**70]** organized in 1862. To the east of the original Uintah Reservation, permanent settlements at Jensen and Vernal were founded prior to 1880, and Uintah County was organized in 1880.

Prior to July 14, 1905, the Uintah Indian Reservation had not been opened to settlement of any kind by non-Indians. The only white population in the reservation consisted of Indian Service personnel, grazing lessees, soldiers stationed at Forst Duchesne and, possibly, mineral lessees. On July 14, 1905, it was known that the unallotted and unreserved lands within the Uintah Indian Reservation were to be opened to settlement under the public land laws the following month. It was anticipated that this would bring in an additional population.

44. In the years immediately preceding and following July 14, 1905, the area environing subject lands was undergoing a period of population increase. Between the years 1890 and 1900, Wasatch and Uintah Counties, adjoining subject lands to the west and east, increased in population respectively from 3,595 to 4,736 and from 2,762 to 6,458. Between 1900 and 1910, Wasatch County increased further from 4,736 to 8,920, and Uintah County from 6,458 to 7,050.

The population **[**71]** of Utah increased from 276,749 in 1900 to 373,351 in 1910, with approximately 35 percent of the total population in the valleys from Ogden to Salt Lake City to Provo, approximately 45 to 70 miles west of the western part of subject lands.

45. In 1905, transportation in the original Uintah Indian Reservation was limited to wagon roads which provided access to nearly all parts of Uintah valley below 7,500-foot elevation.Only two wagon roads crossed the subject lands, **[*39]** one through the western part to Heber, Utah, about 14 miles west of subject lands, and the other through the south arm to Price, Utah, about 18 airline miles south of the south arm of subject lands. This latter road was used to transport supplies for the Indian Service. Both of the roads through subject lands were often impassable in winter because of snow. The existing roads were adequate for grazing use of subject lands, but were not adequate for commercial lumbering operations.

46. There were no railroads into or through the subject lands or the Uintah basin in 1905. The main line of the Denver and Rio Grande Railroad from Denver to Ogden had been completed in 1883, affording shipping points about **[**72]** 4 to 6 miles south of the south arm of subject lands. In 1899, a branch line of this railroad was extended to Heber, 14 miles west of the western part of subject lands. The north arm remained rather remote from rail facilities. Although this railroad was adequate for the shipping of livestock grazed upon subject lands; it was inadequate for commercial lumbering operations.

47. Construction of a railroad through the Uintah Valley was expected in 1905. The projected line of the Denver and Salt Lake Railroad, from Denver to Salt Lake City, *via* the Uintah Basin, commenced construction in 1902, and was scheduled for completion by 1912. While actual construction of this line, because of financial difficulties, terminated at Kremling, Colorado, in 1906, and ultimately at Craig, Colorado, in 1913, planned construction through the Uintah Basin was fully expected for many years after 1905. Anticipating this scheduled construction, the Uintah Railroad had been constructed in the years 1904 and 1905 from Mack, Colorado, to Watson, Utah, 60 miles east of subject land, with the original intention of connecting the Denver and Salt Lake Railroad, being built from Denvery, with the Denver **[**73]** and Rio Grande Railroad at a terminus in the Uintah Valley. These prospects of railroad construction exerted a favorable influence on economic conditions in the area environing subject lands in 1905.

48. July 14, 1905, was in a period of favorable economic trends, both national and local. Real estate values and interest **[*40]** rates were high. Price levels for commodities were generally steady and rising slowly. Livestock population was near peak levels. Per-head values for cattle were temporarily depressed, but demand was steady and prices for slaughtered steer products were increasing. Sheep values per-head and for slaughtered products were increasing.

Between the years 1900 and 1910 the number of farms in Wasatch County practically doubled, while increasing by about 20 percent in Uintah County, which included at that time all of the farm land in the Uintah basin. Over the same period the number of irrigated acres more than doubled in both counties, and value of farm lands increased several fold.

49. In 1905 summer grazing lands were in demand in Utah, and especially in and about the area of subject lands. Abundant winter grazing lands were available, with summer **[**74]** ranges relatively scarce. Some Utah livestock operators who operated in the general area of subject lands had been required by lack of availability of sufficient summer grazing lands to move their livestock operations into nearby states.

50. The subject lands, particularly in the Uintah Mountains, had been thoroughly prospected for minerals prior to 1905. In 1905 there were no known mineral deposits which added a separate value to the subject lands and no separate mineral value has been claimed by the plaintiff.

51. As of July 14, 1905, subject lands, or portions thereof, were potentially adaptable to several economic uses, including livestock grazing timber cropping, water shed protection, water storage, water power and recreational use. The highest and best use of subject lands was as a summer grazing pasture for sheep and cattle. The timber resources could have been exploited without detracting from grazing use, but demand for this timber in 1905 was slight, and the timber resources would have added value to subject lands in relation to the extent that the expected coming of the railroad would cause prospective purchasers to forecast a future demand. There was not sufficient **[**75]** demand for the water development and recreational resources of subject area, as such, to have had a measurable effect on the market value of subject lands in **[*41]** 1905, but the presence of such resources would have had a generally favorable influence on prospective purchasers.

Both parties accepted market value as of July 14, 1905, as the standard for valuation of subject lands. The evidence adduced by both parties, in determining market value, took into consideration the physical characteristics of the land and the uses to which it was adaptable in 1905. Both parties agreed that market value was best evidenced by market data -- *i.e.,* the price paid for comparable lands, similarly situated, at or near the date of valuation.

52. The principal appraisal witnesses in this case were Watson A. Bowes, called by plaintiffs, and Werner Kiepe, called by defendant. Each prepared an elaborate appraisal report, plaintiffs' exhibit 41, being the Bowes report, and

defendant's exhibit 1, being the Kiepe report. In addition, the plaintiffs adduced the testimony of Dean Mahaffey and Dr. Franklin S. Harris as to their opinions of the value of subject lands.

The ultimate opinions **[**76]** of these witnesses as to the market value of the 973,777 acres of subject lands as of July 14, 1905, were from the lowest to the highest as follows:

Kiepe, $730,000, or about $0.75 per acre;

Bowes, $1,305,000, or about $1.34 per acre;

Mahaffey, $1,704,000, or about $1.75 per acre; and

Harris, $2,011,389, or $2.065 per acre.

53. Mr. Bowes, a member of the real estate firme of A. G. Bowes & Son, Denver, Colorado, was a professional real estate appraiser with 23 years' experience, having entered that field with the above-named firm upon his graduation from Washington and Lee University in 1931 with a Bachelor of Science degree in business administration. In 1933 and 1934 he successfully completed two courses in real estate appraisal offered by the Denver Board of Realtors, and in 1940 graduated from such a course at Tulane University. He is presently in charge of the appraisal section of his firm, and has had a varied experience in all phases of real estate business.

He has been a member and officer of various city, state, and national professional associations, serving as president of the Denver Realty Board in 1934, president of the Denver **[*42]** Board of Realtors **[**77]** in 1951, president of the Colorado Association of Real Estate Boards in 1947, director of the National Association of Real Estate Boards for three years and a member of the executive committee thereof, first member from Colorado of the American Institute of Real Estate Appraisers in 1940, and national president of the latter organization in 1953, after having served three years as a member of its board of governors and two years as chairman of its education committee.

From 1941 to 1948 he taught courses at the University of Denver in real estate appraising and real estate principles and practices. He also lectured on real estate appraising at Boston University in 1947, at Washington University of St. Louis in 1949, and at Indiana University in 1952, in courses sponsored by the American Institute of Real Estate Appraisers.

Mr. Bowes' experience included appraisal services performed for several national life insurance companies, a number of state and national banks, and savings and loan associations of Denver, for oil companies, railroads, and others.

His real estate appraisal experience also includes services for several departments and agencies of the United States, and various **[**78]** Colorado and Denver governmental agencies.

Mr. Bowes had extensive experience with western grazing lands and ranches. He personally owned two farms and was a partner in a third in Colorado, has served as a consultant on the acquisition or disposition of large ranches in Colorado and Wyoming, and also as consultant of the Colorado State Board of Land Commissions with respect to its policies in leasing or disposing of state lands, a great majority of which were grazing lands.

Among the most important appraisals done by Mr. Bowes involving large areas of western ranch and grazing lands were the Colorado Big Thompson Diversion project involving large areas of mountain grazing land on the western slope of the Rocky Mountains in Colorado, one million acres of land in Arizona for an air gunnery range, the Los Alamos Ranch School in New Mexico, 200,000 acres of land near Albuquerque, New Mexico, acquired for bombing range purposes, **[*43]** 857,000 acres of farm land and livestock grazing land in southeastern Kansas, several prisoner-of-war sites in New Mexico and Colorado, a large portion of the land now comprising Camp Carson at Colorado Springs, Colorado, and the appraisal of approximately **[**79]** four and one-half million acres of grazing land in western Colorado in connection with a suit in this court, No. 45585, *Confederated Bands of Ute Indians* v. *The United States.*

The appraisal of the lands in western Colorado for the Ute Indians was made by Mr. Bowes in 1946 and 1947 for a valuation as of a date in 1938; and the appraisal of the extensive areas of southeastern Kansas was made in 1952 for a valuation as of 1865. Mr. Bowes has also made several appraisals for private clients in tax cases before the Internal

Revenue Service, in which it was necessary at a recent date to establish the market value of property as of March 15, 1913.

Mr. Bowes has previously qualified to testify as an expert appraiser before this Court, the United States District Courts for New Mexico and Colorado, several state District Courts of Colorado, and before the Indian Claims Commission. His previous appraisal experience has been in Colorado, New Mexico, Arizona, Montana, Wyoming, Oklahoma, Florida, Virginia, and the Province of British Columbia.

54. The purpose of Mr. Bowes' appraisal was to arrive at an opinion of the market value of subject lands as of July 14, 1905. Mr. Bowes **[**80]** understood "market value" to be "* * * the highest price, fairly determined in terms of money, which could be commanded for the property by a seller who is willing and able but not obliged to sell and is well informed as to the rights and benefits inherent in or attributable to the property, from a buyer who is willing and able but not obliged to buy and is also well informed as to the rights and benefits inherent in or attributable to the property if the property is exposed to sale in the open market for a reasonable length of time." In arriving at his opinion he used two approaches, accepted and recognized as standard approaches by the appraisal profession. The first approach was the comparative or market data approach, which assumes that the market value of the property under appraisement **[*44]** tends to be set by the price at which similar properties have been sold. It was considered by him to be the most reliable approach to market value. The second approach was the income or productivity approach, which assumes that the market value of land tends to be set by the amount of rental income that it is capable of producing. This approach requires the collection of data on **[**81]** the actual and potential rentals from subject area, analysis of the relationship between the rentals and market price for comparable areas and types of land, and the capitalization of the rental received by the property under appraisement by the gross rental multiple thus derived. Because it did not reflect all the aspects of ownership, the productivity approach in this instance was used primarily as a check on the market data approach.

55. In order to familiarize himself with all of the pertinent characteristics of the subject lands, Mr. Bowes and other technical and professional assistants under his direction made an elaborate analysis of the physical characteristics, economic characteristics, and the economic uses of the subject lands and the environing vicinity, based upon physical inspection and upon extensive documentary research, endeavoring to ascertain the conditions existing as of 1905.

56. After obtaining the correct legal description of the property and plotting it on various maps, Mr. Bowes made a preliminary survey of the property in April of 1952, including a field trip to the property, a preliminary inspection of the areas in which comparable sales data might **[**82]** be obtainable, contacts with county recorders' offices and title companies to ascertain the availability of comparable sales data in the area environing subject lands as of 1905, and an investigation of the availability of maps, reports, and historic and economic data. This preliminary survey and investigation required approximately 12 days. Mr. Bowes then formulated a plan for the appraisal of subject area to be conducted by him or by other employees under his supervision.

57. Mr. Bowes, or his associates under his supervision, collected extensive data relative to the historical background of the subject area, the economics of the period, the population **[*45]** trends and statistics of the area at the date of appraisal, information relative to railroads and other transportation facilities, and information with respect to agricultural prices. He also assembled extensive documents bearing specifically upon the physical characteristics of subject lands, including maps obtained from the Forest Service and the Soil Conservation Service showing the types of cover on subject lands and adjoining private lands, aerial mosaics and U.S.G.S. maps showing general contour and topography, **[**83]** reports of Forest Service and other government agencies describing subject lands, the timber, grazing, and water resources found thereon, and the income received from rentals of the subject lands.

58. Following assembly of the pertinent documentary data, an inspection of the subject lands was undertaken by Mr. Bowes, and Mr. Dean Mahaffey under Mr. Bowes' supervision. Mr. Bowes personally spent several days in the field traversing substantially all of the areas of subject lands which could be reached by a four-wheel-drive vehicle. Mr. Mahaffey, a qualified and experienced range inspector and land classification expert, under Mr. Bowes' supervision, spent additional time covering the inaccessible portions of subject lands on foot and by horseback, and reported his findings to Mr. Bowes. Mr. Bowes' physical inspection of the subject area was complemented by two air views of the

subject area, involving approximately 8 hours of flying time spent in viewing the entire subject area at low altitudes with maps and surface field inspection notes in hand as guides.

59. To better familiarize himself with conditions prevailing in the subject lands in 1905, Mr. Bowes conducted interviews **[**84]** with 25 to 30 persons who had lived in the area or operated livestock on subject lands, or were engaged in business operations in subject area at that time, discussing with such persons the physical characteristics of subject lands, their carrying capacity as of 1905, and general economic conditions prevailing at about that time.

60. The data and information produced by field inspection of the lands, by documentary research, and by interviews with persons acquainted with the subject area in 1905 were then classified, organized, and analyzed by Mr. Bowes with **[*46]** the assistance of Mr. Mahaffey and Mr. David L. Montonna, and prepared for presentation and report in the way of narrative report, charts, tables, and maps. The investigation, research, analysis, and preparation of the appraisal report involved 421 man-days of work.

61. Mr. Bowes' knowledge of the physical characteristics, economic environment, and economic use of the subject lands as of 1905 was substantially in accord with the preceding findings of fact covering such subject matters.

62. Mr. Bowes and his associates under his supervision made an extensive investigation of purchases and sales of summer grazing **[**85]** lands located within the Uintah Basin, in areas surrounding and adjacent to the subject area, and elsewhere in the states of Utah, Colorado, and New Mexico, limiting the transactions generally to those occurring in the period between 1895 and 1915.

They obtained from county recorders, from abstract and title companies, and from interviews with individuals, information involving some 1,000 transactions appearing to them to be free market sales of comparable grazing lands. These transactions were analyzed and screened with the object of eliminating obvious family transactions and other transactions where the consideration was not mentioned in the deed and could not be otherwise verified by interviews with persons involved, or where the consideration may have been affected by abnormal factors. The lands involved in the remaining transactions were inspected to eliminate cultivated and irrigated lands, lands with extensive improvements, and lands not generally comparable in terms of covertype, economic use, economic environment, elevation, and precipitation. The remaining areas were then mapped and inspected for cover type classification, based upon personal inspection and upon official **[**86]** type maps by the Forest Service, the Grazing Service, the Bureau of Land Management, and the Soil Conservation Service. After all eliminations, there remained 442 transactions which Mr. Bowes considered to be sufficiently comparable to give a reliable indication of value. Wherever possible, parties or persons otherwise having knowledge of the transactions were interviewed to confirm **[*47]** the data derived by the investigation process. Because of the early date of many of these transactions, confirmation could not be obtained from parties to a substantial number of the transactions, but all of the 442 transactions selected by Mr. Bowes for comparison and analysis were either confirmed in some manner to his satisfaction, or were adequately recorded in the deed in such a manner and under such circumstances to satisfy Mr. Bowes as to the reliability of the data contained therein.

63. In order to relate the varying physical and economic characteristics of these transactions more precisely to valuation of subject lands as of 1905, Mr. Bowes classified these 442 transactions into three groups, as follows: (1) 12 private sales involving large tracts of mountain grazing land, located **[**87]** in Utah and New Mexico at varying distances from the subject area; (2) 210 private transactions involving sales of small areas of grazing lands in six counties adjacent to or bordering subject area; and (3) 220 private transactions involving sales of small areas of mountain grazing lands, elsewhere in Utah and in western Colorado.

64. Included among the 442 private sales considered by Mr. Bowes were 12 sales involving relatively large areas of land, ranging from 6,252 to 99,289 acres. Because of their size, their plottage value for grazing use, and their inclusion of all types of cover found upon subject lands, Mr. Bowes considered these sales as giving the most reliable indication to the 1905 market value of subject lands.

65. Included among the 12 large sales known to Mr. Bowes were nine sales concerning which plaintiffs adduced testimony of witnesses in verification of the nature and amount of property involved and consideration paid. These nine sales are described in this finding.

One transaction, verified by the testimony of a stockholder of the grantee company, who was the person in direct charge of grazing operations on the lands before and after the sale, involved **[**88]** 17,199 acres of land sold in 1911 for $137,500, located adjacent to the La Sal National Forest in San Juan County, Utah, about 114 airline-miles from the south arm of subject lands. The land ranges in elevation from **[*48]** 8,000 to 10,000 feet and has precipitation of from 25 to 35 inches per year. The area is rolling in character with some steep portions, with relatively less steep and inaccessible areas than subject lands. Two creeks running through the area supply water comparable to the well watered areas of subject lands. Cover-types on this area are comparable to cover-types found in subject area, including aspen with interspersed areas of grassland, mountain browse, and coniferous timber. The land is generally comparable to the better portions of subject lands and had a carrying capacity of about two acres per animal unit month based upon actual experience in 1905. Some fencing, one sheep corral, and a summer cabin were on the land at the time of purchase, reasonably valued at about $9,500, leaving an average price for the unimproved land of $7.44 per acre.

Six of the large sales are located within a large Spanish land-grant area known as the Tierra Amarilla in Rio **[**89]** Arriba County, New Mexico, and are adjacent to or near the Carson National Forest. These sales are located adjacent to or near the northern boundary of New Mexico from 105 to 140 miles east of the southeastern corner of Utah, averaging in distance about 294 airline-miles from the south arm of subject lands. Arlington Land Company was the grantor in each transaction. The confirming witness for each transaction was and had been an agent for the grantor since 1916, after the transactions in question, was thoroughly familiar with the nature and extent of the lands involved, but with respect to considerations paid, stated that the policy of the grantor company was to recite correctly the considerations in its deeds involving parts of the Tierra Amarilla grant because of the fact that there existed an overall trust on the entire grant which would have to be released in part as consideration was paid on the sale of a part thereof. Each deed on these six transactions is in evidence, limited by the offer of the plaintiffs "not as independent evidence of the consideration recited therein." Mr. Bowes' sources of information for the considerations were the deeds and an interview with the confirming **[**90]** witness. The acreages, dates, and purchase price of these sales were as follows: **[*49]**

Date of sale	Acreage	Consider-ation	Average price per acre
1912	17,352.80	$36,451.00	$2.10
1912	19,421.00	40,658.00	2.09
1913	32,070.00	59,329.00	1.85
1913	6,252.00	13,352.00	2.14
1913	6,031.00	12,967.50	2.15
1913	7,680.00	16,128.00	2.10

All of these lands were unimproved and were purchased for grazing purposes. They were summer grazing lands with a grazing season comparable to subject lands, ranging in elevation from 7,500 to 10,000 feet and receiving annual precipitation of from 20 to 35 inches. The cover on these lands was comparable to the cover found in areas of subject land, being characterized by sagebrush, aspen, coniferous timber with grasslands interspersed, and some meadow land. There were within these sales areas of waste timber, barren outcroppings of rock, and steep, rocky, and inaccessible canyons, comparable to some of the waste areas found in the north arm of subject lands. Some stands of commercial timber more valuable than the timber resources on subject lands were found on these New Mexico sales at **[**91]** the time of the transaction, but in all such instances the timber rights were reserved to the grantor. Each tract either was crossed by or was in close proximity to a railroad. The grazing capacity of these lands was between five and six acres per animal unit month.

Two of the nine large sales involved the same tract of land, 15,020 acres located approximately 10 miles northeast of Las Vegas, New Mexico, and 414 airline-miles from the south arm of subject lands, sol in 1905 and resold in 1907. The two deeds are in evidence on plaintiff's conditional offer as not being independent evidence as to the considerations recited therein. The 1905 deed recited that Alphonso Hart, the grantee, was an attorney who had rendered legal services for the town of Las Vegas in perfecting its title to a Spanish grant which included the land conveyed, and had made claim for a fee of $40,000. This deed further recited that the conveyance was made in recognition of the "validity and justness" of the claim. The conditions of this 1905 sale **[*50]** were confirmed in the testimony of Albert T. Rogers, who acted as attorney for Mr. Hart to collect his claimed fee. He testified that the pertinent **[**92]** tract was conveyed in full settlement of the $40,000 claim. The 1907 deed, received in evidence upon the same conditional offer of plaintiffs, was a conveyance of the same lands by Mr. Hart to one Morley, with the consideration recited therein as $10. Mr. Bowes testified that the actual consideration was $45,060, which amount was substantially confirmed by Mr. Rogers in that he had been consulted by Mr. Hart concerning the transaction and advised by Mr. Hart and the grantee and his attorney that $45,000 was the consideration. The land was used for grazing and there were no improvements on it at the time of these transactions, although the land was of such nature that Morley subdivided the tract a year or two after his purchase, and some dry farming projects were established thereon. The tract ranges in elevation from 6,700 to 7,000 feet with annual precipitation of about 13 to 17 inches. It had a carrying capacity of three acres per animal unit month. The cover was primarily sagebrush and grassland, with the higher elevations carrying a sparse cover of pinonjuniper. The terrain was relatively level, but gently sloping in the areas covered with brush and pinon-juniper. The 1905 **[**93]** and 1907 sales prices of $40,000 and $45,060 averaged respectively $2.66 and $3.00 per acre.

66. In addition to the nine large sales, concerning which confirming witnesses were called by plaintiffs, Mr. Bowes had knowledge of three additional large sales of unimproved mountain grazing land in Colorado and New Mexico, which he took into consideration in formulating his opinion. The first of these was a transaction between the Costilla Estates Development Company and the Adams Cattle Company which, according to Bowes, involved the sale of 68,000 acres of unimproved mountain grazing land in Taos County, New Mexico, in the year 1911, for a price of $170,000, or an average of $2.50 per acre. The land involved, located adjacent to the north boundary of New Mexico about 175 miles east of the southeast corner of Utah, and about 366 airline-miles from the north arm of subject lands, was summer grazing land in the Sangre de Cristo Mountains, ranging in elevation **[*51]** from 8,000 to 12,800 feet, and receiving from 20 to 40 inches of precipitation annually. It had a combination of almost every cover type found upon subject lands, with the higher elevations containing steep and rocky **[**94]** river canyons. The carrying capacity was three acres per animal unit month.

The second was a transaction in 1909 between Valles Land Company and the Redondo Development Company, which Mr. Bowes' investigation disclosed involved the sale of 99,289 acres of unimproved mountain grazing land in Sandoval and Rio Arriba Counties in New Mexico, located 40 to 45 miles north of Albuquerque and about 342 airline-miles from the south arm of subject lands, for a consideration of $297,512, or an average of $3 per acre. The land was excellent summer grazing range, located at elevations from 8,200 to 11,250 feet, with precipitation of about 30 to 40 inches per year. It was characterized by grass, meadow, sage, browse, and coniferous timber, and had an estimated carrying capacity of two acres per animal unit month, being exceptionally good grazing land.

The third of these transactions was in 1907 between the San Luis Valley Land and Mining Company and Lipencott, which, according to Bowes, involved the sale of 99,289 acres of mountain grazing land in the San Luis Valley, located in south central Colorado about 294 airline-miles from the north arm of subject lands, for a total consideration of **[**95]** $550,000, including $75,000 worth of improvements, leaving $475,000 for the unimproved land, or $4.78 per acre. The land varied sharply in elevation, rising from a valley floor at 8,000 feet to the top of the Sangre de Cristo range at about 14,000 feet. Much of the land in the higher elevation was steep and rocky. Some of it was entirely unsuitable for grazing. It had grass, sage, browse, coniferous timber, and some pinon-juniper and aspen cover, with an estimated carrying capacity of three and one-half acres per animal unit month.

67. The 12 large sales testified to by Mr. Bowes as a basis for his opinion involved some 402,623.8 acres of land for a total consideration of $1,334,457.50, or an average of $3.31 per acre. The nine sales in this category, concerning which

confirming witnesses testified, involved a total area of 136,045.8 **[*52]** acres, for a total consideration of $391,945.50, or an average of $2.88 per acre.

For the purpose of relating the price paid for each one of the 12 large tracts to the value of the subject lands, three adjustments were made by Mr. Bowes. The first adjustment concerned the date of each sale in relation to the valuation year, 1905. **[**96]** In this connection, Mr. Bowes relied upon statistics derived from publications of the United States Department of Commerce providing national economic indices for each of the years 1890 through 1915, covering general price index of commodities, farm products, cattle per head, sheep per head, horses per head, steers per cwt., and lambs per cwt. Considering that a combination of all these indices was important with respect to the valuation of subject lands, he computed the average of these indices for each of the years covered. Each price index and the average of all indices for each year were adjusted so that the year 1905 was represented by the figure 100. Using the related average of all indices for the year of each sale, as compared with the average of all indices for 1905, Mr. Bowes employed a time adjustment factor with respect to the per acre price of each sale. For example, the first above-mentioned of the 12 large sales (see finding 65) took place in the year 1911. The average of all indices for the year 1911 was computed by Mr. Bowes at 125, as compared with the base year of 1905 at 100. The time factor used on this sale was 80 percent and the $7.44 price per acre on **[**97]** that sale was thus reduced to $5.95. Each of the 12 sales was adjusted accordingly, except the 1905 sale, and the time factor adjustments ranged from 72 percent to 86 percent.

The second adjustment made by Mr. Bowes was for the purpose of further relating the per acre price on each of the 12 large sales on the basis of the relative size of the tract compared to the 973,777 acres of subject lands. Mr. Bowes conceded that a tract as large as subject lands would be more difficult to sell than tracts the size of the 12 large sales. With respect to the same one of the 12 large sales used as an example on the first adjustment, the readjusted price of $5.95 was reduced by a size factor of 90 percent to $5.36. Each of the 12 large sales was adjusted by a size factor of **[*53]** 90 percent, except the three set forth in finding 66 on which the size factor adjustment was 95 percent.

The third adjustment made by Mr. Bowes concerned relative carrying capacity. The carrying capacity of the example tract was two acres per animal unit month, as stated in finding 65, whereas the carrying capacity of subject lands was 5.43 acres per animal unit month, and 2,715 times as much of the subject **[**98]** land was required to carry one animal unit month as was required of the example tract. Consequently, the carrying capacity of subject lands was 36.8 percent of that of the example tract. The re-adjusted price of $5.36 on the example tract was further adjusted by this carrying capacity factor of 36.8 percent to the sum of $1.97 as applicable to the subject lands. The six Tierra Amarilla tracts were considered by Mr. Bowes to be equivalent in carrying capacity to the subject lands and no carrying capacity factor was applied to them. One other of the large tracts was adjusted by a carrying capacity factor of 36.8 percent, three were adjusted to 55.2 percent, and one to 64.5 percent.

Based on these analyses, Mr. Bowes arrived at an indicated value of $1.43 per acre, on the average, for subject lands in 1905, which indication was not expressed as an independent opinion of value but was correlated with value indications from all other sources in arriving at a final conclusion of value.By eliminating the sale with the highest price per acre and also the one with the lowest price per acre, Mr. Bowes by the same method arrived at a value indication of $1.38 per acre for subject lands. **[**99]** Mr. Bowes' adjustments on the nine large sales, concerning which confirming witnesses testified, result in an average 1905 value indication for subject lands in the sum of $1.42 per acre.

68. Included among the 442 private transactions which Mr. Bowes took into consideration in arriving at his final opinion of value, were 210 private transactions involving sales of areas of grazing land in five counties bordering the subject area which sales were referred to by Bowes as his "small sales close." According to Mr. Bowes' information, these transactions involved a total of 114,290 acres, in 210 sales, for a total consideration of $331,114 (after deductions **[*54]** for improvements, where present), or an average consideration of $2.90 per acre. The sales took place between the years 1882 and 1915, with the exception of two in 1916 and one in 1917. In location they ranged from immediately adjacent to portions of subject lands to a distance of 30 miles from subject area. The data considered by Mr. Bowes included 109 sales in Wasatch County, 19 prior to 1906, and 90 in the years 1906 through 1915, involving 50,309 acres for a total consideration of $156,678, or an average of $3.11 **[**100]** per acre; 61 transactions in Duchesne County, all

in the years 1910 through 1915, involving a total of 48,078 acres, for a total consideration of $101,531, or an average of $2.11 per acre; 10 transactions in Uintah County, all in the years 1907 through 1917, involving a total of 3,939 acres for a total consideration of $15,510, or an average of $3.94 per acre; and 30 transactions in Carbon and Sanpete Counties, 11 prior to 1906 and 19 in the years 1906 through 1916, involving 11,964 acres for a total consideration of $57,395, or an average of $4.80 per acre. The average size of all sales in this category, as taken into consideration by Mr. Bowes, was 544 acres.

69. The lands involved in these 210 private sales close to subject lands, considered by Mr. Bowes, were distributed in northeastern Utah, varying in elevations from 6,000 to 10,000 feet. All kinds of cover found upon subject lands were also found upon these 210 private sales, except that the private lands did not involve comparable stands of lodgepole pine and had few barren and inaccessible areas. Subject lands were higher and had generally more precipitation and better water resources than the land involved in this category. **[**101]** Large areas of subject lands produced better forage and had better grazing resources, but considered as a whole, Mr. Bowes estimated that the private lands had a substantially higher average carrying capacity because of the inclusion of relatively less barren and inaccessible land.

In his analysis of the transactions in this category, Mr. Bowes concluded that no adjustment was warranted for the differences in size, on the basis of his opinion that the lack of assemblage value in the small private sales was sufficient to offset any dimunition of value attributable to the wholesale **[*55]** size of subject area. In Bowes' opinion no adjustment for time factor was warranted, inasmuch as his analysis of the sales prior to 1906 in this category showed a slightly higher average than the sales after that date. Of the 210 transactions, 30 occurred before 1906. To adjust for the greater accessibility and higher average carrying capacity of the private lands, Bowes applied the $2.90 average from the private lands to the 486,889 acres of subject lands best suited for grazing, which included 74,493 acres of grassland, 29,213 acres of sagebrush, 107,015 acres of mountain browse, and 276,168 **[**102]** acres of aspen and other woodland, as enumerated in finding 35. Mr. Bowes then added 50 cents per acre as an allowance for the 331,084 acres of coniferous timber land, and attributed no value to the 155,804 acres of barren and inaccessible land. The resulting value indication was $1.62 per acre. After Mr. Bowes' appraisal report had been completed and submitted, Mr. Bowes discovered inaccuracies in some 13 of the 210 transactions, either contained in the information provided by an abstract company, or as revealed in the testimony of confirming witnesses. Correction of these inaccuracies resulted in a mathematical difference of one cent per acre in this indication of value, and Mr. Bowes testified that this change did not alter his final opinion of the value of subject lands.

Based upon Bowes' estimate of an average carrying capacity of 3.3 acres per animal unit month, purchasers of these private lands paid an average of $9.81 per animal unit month of carrying capacity in their lands. Application of this date to the 181,000 animal unit months available on subject land gave Bowes an alternative indication of $1.80 per acre for the 1905 market value of subject lands. These indications **[**103]** were not used by Mr. Bowes as independent conclusions of value, but were correlated with indications derived from other sources of data in arriving at his final opinion of value.

70. Testimony of confirming witnesses was adduced by plaintiffs concerning 68 private sales, nearly all of which were included within Mr. Bowes' 210 private sales close to subject lands. Of the 68 such transactions, six are eliminated from this finding because the testimony was uncertain as to the consideration paid, leaving 62 sales, 44 of which were **[*56]** in Wasatch County, 14 in Duchesne County, 3 in Uintah County, and 1 in Sanpete County. The 62 sales aggregated 43,270.44 acres, or an average of 698 acres per sale, for a total consideration of $121,547.16, or an average of $2.81 per acre.

Concerning the 44 sales in Wasatch County, 8 of which are supported by deeds in evidence, these transactions occurred: 3 in 1900; 5 in 1905; 2 in 1907; 3 in 1910; 4 in 1911; 10 in 1912; 5 in 1913; 2 in 1914; and 10 in 1915. The total acreage was 24,877.15, or an average of 565 acres per sale, for a total consideration of $75,540.86, or an average of $3.04 per acre.

Concerning the 14 sales in Duchesne County, **[**104]** 6 of which are supported by deeds in evidence, these transactions occurred during the years 1911 through 1915. The total acreage was 17,453.29, or an average of 1,247 acres per sale, for a total consideration of $42,866.30, or $2.46 per acre.

Concerning the three sales in Uintah County, all are supported by deeds in evidence and occurred during the years 1908, 1915, and 1917. The total acreage was 780, or an average of 260 acres per sale, for a total consideration of $2,500, or $3.21 per acre.

The one sale in Sanpete County occurred in 1906, there being a supporting deed in evidence, and the acreage was 160 for a consideration of $640, or $4 per acre.

About two-thirds of the total acreage and most of the 44 sales in Wasatch County were located within the former Uintah Indian Reservation, in the areas adjacent to the eastern edges of the western part of subject lands, east of the Strawberry Valley withdrawal, and are closely comparable to the areas of subject lands which they adjoin, except that being at lower elevations they are less steep, receive less precipitation, have more sagebrush and pinon-juniper and less grassland and aspen woodland. The major streams arising in **[**105]** the western part of subject lands flow through this area. None of these private sales contains steep, rocky and inaccessible areas not stands of thick coniferous timber. The remaining one-third of the total acreage of the 44 sales is located west of the divide marking the boundary of the western part of subject lands, and within a maximum distance of ten miles therefrom. These lands involved in the **[*57]** sales on the western slope are comparable to the best lands of subject area, having aspen woods and grasslands with good water distribution.

The 14 sales in Duchesne County are entirely within the original Uintah Indian Reservation, and were in the same general area and in some instances involved the same land purchased originally at the Uintah auction sales, hereinafter mentioned in these findings. They were at lower elevations than subject lands, without any substantial amount of steep and rocky areas and with less precipitation, having a carrying capacity less than the better areas of subject lands, but more than the average of the entire subject area.

The lands involved in the three sales in Uintah County are located 25 to 30 miles east of the north arm of subject **[**106]** lands, adjoining the eastern boundary of the Ashley National Forest. Lower in elevation, receiving less precipitation, predominantly covered by sagebrush and browse, these lands have less carrying capacity than the better areas but more than the average of subject lands.

The lands involved in the one sale in Sanpete County have a cover of aspen, grass and mountain browse, and are located adjacent to the Manti National Forest about 25 miles southwest of the south arm of subject lands.

71. Included among the 442 private sales known to Mr. Bowes and taken into consideration by him in arriving at his opinion of value, were 220 private transactions involving sales of relatively small areas of mountain grazing land in nine counties in Utah and western Colorado, considerably removed from subject lands. Mr. Bowes' investigation disclosed 25 transactions in Routt County, Colorado, located 125 airline-miles east of the north arm of subject lands, involving 4,957 acres for a total consideration of $24,426, or an average of $4.93 per acre; eight transactions in Sevier County, Utah, located about 72 airline-miles southwest of the south arm of subject lands, involving 11,731 acres for a total **[**107]** consideration of $64,926, or an average of $5.53 per acre; 61 transactions in Mesa County, Colorado, located about 110 airline-miles southeast of the south arm of subject lands, involving 10,312 acres for a total consideration of $27,155, or an average of $2.63 per acre; 90 transactions in **[*58]** the vicinity of the Uncompahgre Plateau in Montrose, Ouray, and San Miguel Counties, Colorado, located an average of about 174 airline-miles southeast of the south arm of subject lands, involving 19,084 acres for a total consideration of $71,062, or an average of $3.72 per acre; 30 transactions in Rio Blanco County, Colorado, located about 114 airline-miles east of the north arm of subject lands, involving 4,846 acres for a total consideration of $13,327 or $2.75 per acre; 5 transactions in Moffat County, Colorado, located about 50 airline-miles east of the north arm of subject lands, involving 920 acres for a total consideration of $2,700, or an average of $2.93 per acre; and one sale in Grand County, Utah, located about 48 airline-miles southeast of the south arm of subject lands, involving 5,492 acres for a total consideration of $23,560, or

an average of $4.29 per acre. The total **[**108]** acre-age of all sales as considered by Mr. Bowes in this category was 57,342, which sold for a total consideration of $227,156 (after allowances for improvements where applicable), or an average per-acre price of $3.96. The average size of all sales in this category was 261 acres. The sales took place between the years 1890 and 1915, with 29 prior to 1900, 83 during the years 1900 through 1906, and 108 after 1906. The average price for all sales prior to 1900 was $3.38 per acre; during the years 1900 through 1906, $2.99 per acre; and after 1906, $4.44 per acre.

72. The 220 private sales, substantially distant from subject lands, considered by Mr. Bowes, were located generally in areas bordering upon or near to national forests at elevations between 7,000 and 10,000 feet. The lands involved in these transactions, taken as a whole, were comparable in cover-type, forage, and topography, to large areas of subject lands and were characterized by grass, sagebrush, mountain browse, aspen and coniferous timber. However, the lands in the private sales had substantially less barren and inaccessible areas than the subject lands. The average carrying capacity of these private lands, largely **[**109]** because of their greater selectivity and accessibility, was estimated by Mr. Bowes as 3.09 acres per animal unit month.

Mr. Bowes concluded that the 486,889 acres of subject lands which were classified as grassland, sagebrush land, **[*59]** mountain browse land and aspen land (see finding 35) were very similar to the lands involved in the 220 sales. However, he considered and concluded that the general economic environment with respect to population, road and rail development and other factors, was better with respect to this category of sales than as pertained to the subject lands.Accordingly, he reduced the $3.96 average price per acre of the 220 tracts by 20 percent to the sum of $3.17 to reflect a value of $1,543,438 for the 486,889 acres of the subject lands. He then added the sum of $165,542 representing value attributable at $0.50 per acre to the 331,084 acres of coniferous timber land on the subject lands. The resulting value indication for the subject lands was $1,708,980 or $1.75 per acre. In this analysis he attributed no value to the 155,804 acres of subject lands classified as barren or inaccessible.

Mr. Bowes' judgment was that the carrying capacity of the lands **[**110]** in this category varied on the basis of the average for each of the counties from 2.5 to 4 acres per animal unit month with the total area of 57,342 acres having a total carrying capacity of 18,580 animal unit months. The total consideration paid in the sum of $227,156 indicated that a price of $12.22 was paid for each animal unit month of grazing, indicating that subject lands on the basis of a carrying capacity of 5.43 acres per animal unit month are only 57 percent as good for grazing purposes as the lands in this category of sales. Applying this 57 percent factor to the sum of $3.17 per acre (the price of the sales in this category adjusted downward by 20 percent to reflect the difference in economic environment) he concluded that an average per acre price for the entire subject lands was indicated in the sum of $1.80 per acre, or a total of $1,752,798.

These indications of value were not expressed by Mr. Bowes as independent conclusions of value, but were correlated with value indications derived from other sources of data in arriving at his final opinion of value.

73. Testimony of confirming witnesses was adduced by plaintiffs concerning 29 private sales, all included **[**111]** within Mr. Bowes' 220 small private sales distant from subject lands. Of the 29 such transactions, two were eliminated from this finding because the testimony was uncertain as **[*60]** to the consideration paid, leaving 27 sales, eight of which were in Sevier County, Utah; eight in Montrose County, Colorado; ten in Mesa County, Colorado; and one in Rio Blanco County, Colorado.

The 27 sales aggregated 12,469.33 acres, or an average of 462 acres per sale, for a total consideration of $63,514.56, or an average of $5.09 per acre. Eliminating the large sale among the Sevier County transactions, hereinafter mentioned, the remaining 26 sales aggregated 6,069.33 acres, or 233 acres per sale, for a total consideration of $19,514.56, or an average of $3.21 per acre.

Concerning the eight sales in Sevier County, Utah, one of which was supported by a deed in evidence, these sales occurred: one in 1907, and seven in 1913. The total acreage was 8,473.33, or an average of 1,059 acres per sale, for a total consideration of $52,294.56, or an average of $6.17 per acre. One large sale in this group consisted of 6,400 acres sold for $44,000 in 1907, or an average of $6.88 per acre. The other **[**112]** seven sales in 1913 totaled 2,073.33 acres, or 296 acres per sale, for a total consideration of $8,294.56, or an average of $4 per acre.

Concerning the eight sales in Montrose County, Colorado, all of which are supported by deeds in evidence, these transactions occurred: four in 1903, two in 1904, and two in 1905. The total acreage was 2,120, or an average of 265 acres per sale, for a total consideration of $5,570, or an average of $2.63 per acre.

Concerning the 10 sales in Mesa County, Colorado, nine of which are supported by deeds in evidence, these transactions occurred: one in 1905, one in 1907, five in 1912, and three in 1913. The total acreage was 1,716, or an average of 172 acres per sale, for a total consideration of $5,150, or an average of $3 per acre.

Concerning the one sale in Rio Blanco County, Colorado, this transaction occurred in 1898, is supported by a deed in evidence, concerned 160 acres for a consideration of $500, or $3.13 per acre.

74. As a further basis for his final opinion of value, Mr. Bowes took into consideration the sales to private individuals by the Utah State Board of Land Commissioners of lands **[*61]** owned by the State of Utah, as set **[**113]** forth in the records of proceedings and annual reports of the State Board. From the annual reports for 1900 (1901 not being available) and 1902 through 1915, pertinent excerpts from which are in evidence as plaintiffs' exhibits 163 through 176, Mr. Bowes derived the following table concerning the sales of State lands to private individuals:

Year	Acres	Price	Average
1900	284,191	$400,211	$1.41
1901	[1]	[1]	[1]
1902	364,157	548,727	1.51
1903	240,690	346,559	1.44
1904	207,672	315,520	1.52
1905	43,011	75,747	1.76
1906	50,957	140,520	2.76
1907	222,094	448,893	2.02
1908	264,490	614,632	2.32
1909	236,811	585,080	2.47
1910	376,874	960,756	2.55
1911	163,415	453,261	2.77
1912	105,989	359,644	3.39
1913	130,191	297,386	2.28
1914	141,392	485,010	3.43
1915	54,876	159,415	2.90
Total	2,886,810	6,191,361	2.14

1 Records not available.

These lands were distributed throughout the State of Utah. Because they could be selected **[**114]** by purchasers, Mr. Bowes concluded that they constituted some of the best State lands available. He made an investigation of such sales in Wasatch, Duchesne, Carbon, Sanpete, Emery and Uintah Counties, all of which are adjacent or close to one of the major portions of subject lands, and plotted many of them on cover-type maps, and found that most of the areas so plotted had the same cover as found on subject lands. He concluded generally from his study and research that nearly all state lands in Utah suitable for dry-farming or irrigated farms had been transferred to private ownership prior to 1900.

The sales for 1900 through 1905 aggregated 1,139,721 acres for a total consideration of $1,686,764, or $1.48 per acre. Mr. Bowes concluded from his study that the State lands sold between 1900 and 1905 were inferior in forage and

precipitation to subject lands, had a small portion of irrigable or dry-farming lands, but relatively little barren or **[*62]** inaccessible areas. It was his conclusion that the average quality of these State lands sold in 1900 and 1902 through 1905 was about equal to the average quality of subject lands, provided that the 155,804 acres of rocky and rough **[**115]** lands in subject areas were eliminated. He then applied the $1.48 per acre (being the average paid for state lands from 1900 to 1905) to 817,973 acres of subject lands, indicating a value of $1,210,600 for all of subject lands, or $1.24 per acre, which was not expressed as an independent conclusion of value, but was correlated with value indications derived from all other sources in arriving at a final opinion of value.

75. Upon the admission of the State of Utah into the Union in 1896, the State received from the United States land grants totaling about 7.5 million acres. Some of the grants were of lands in place but in others the State was entitled to select lands from the public domain to satisfy unfulfilled allocations.

The lands of the State of Utah were administered by the State Board of Land Commissioners (now the State Land Board) under laws of the State of Utah. Lands were offered at public auction and any lands remining unsold could be offered at private sale. The private sales were far more numerous and much greater in acreage covered. Prospective purchasers could select tracts of public domain and apply for the State to take them in satisfaction of unfulfilled **[**116]** allocations. In this manner the purchasers had the selection of the finest grazing lands either in State ownership or remaining a part of the public domain.

No more than 160 acres of State land could be sold to any one individual, except that an individual could obtain a maximum of 320 acres of arid lands or four sections of grazing land. The applicant was required to make a deposit of $0.25 per acre, the balance being payable in 10 equal annual installments. Sometime prior to 1905, it appears that a minimum price of $1.50 per acre had been fixed by the State Board of Land Commissioners applicable to all lands disposed of by them. In 1905, the Board raised the price for selections from the public domain in satisfaction of unfulfilled allocations to $2.50 per acre, but the minimum price for other State lands was not then changed. Although the **[*63]** specific date is not shown by the evidence, the minimum price for all lands was increased by 1910 to $2.50 per acre. Some few sales continued to be mae at a lower price.

Sales of State lands declined from 1,102 certificates of sale issued in 1903 covering 240,690 acres at an average price of $1.44 per acre; to 869 certificates **[**117]** in 1904 covering 207,672 acres at an average price of $1.52 per acre; and to 174 certificates in 1905 covering 43,011 acres at an average price of $1.76 per acre. In its annual report covering 1905 the State Board of Land Commissioners stated as follows:

The year was characterized by a falling off in selections of lands in satisfaction of the grants to the State. The fact is due largely, if not entirely, to the withdrawal by the Secretary of the Interior of vast tracts as temporary forest reserves. These withdrawals were made prior to 1904, and while only a part of the land has been designated as permanent reserves, so far as private entries and selections by the State are concerned, the land is not a part of the public domain. The temporary and permanent reserves embrace much of the better part of the grazing lands of the State, including as they do, for the most part, the Wasatch range of mountains and incidental valleys and mesas. The applications for the purchase of lands by citizens are largely for grazing tracts, as very little agricultural land, easily and cheaply susceptible to irrigation, remains unoccupied in this State. While these so-called forest reserves maintain **[**118]** their present proportions, the State selections will necessarily be confined chiefly to lands brought into market by the extension of the public surveys. The Board has also increased the minimum price of lands selected to $2.50 per acre, and upon an application to select and purchase being received, it is at once referred to a member of the Board for investigation and reports as to the character and value of the lands applied for. There have been 33,211.14 acres applied for since this order was passed, and no application has been withdrawn on account of said raise, which will mean a gain to the State of $33,211.14, and ultimately of half a million dollars.

Sales of State lands were not classified according to the type of land involved. The 1900 report stated that buyers were mostly cattle-raisers, and sheep-growers. The 1904 report stated that new Government surveys of public lands, covering **[*64]** some state lands, were generally of mountain lands valuable only for grazing. The reports for 1900, and 1902 through 1915, show that 889,735 acres of State lands sold during those years in six counties adjacent to subject

lands, that is, Wasatch, Summit, Uintah, Utah, Carbon **[**119]** and Sanpete Counties, for $1,753,698 or an average of $1.97 per acre.

According to the records of the State Board of Land Commissioners relating to cancellation of outstanding sales certificates, delinquencies in installment payments resulted in cancellations reaching a high mark of 267 in 1904, with a decline to 148 in 1905, and thereafter further declines in later years.

From 1896 through 1912 the State Board of Land Commissioners sold 2,964,962 acres of State lands for $6,170,611, or an average of $2.08 per acre, and by the end of 1915, additional lands bringing the totals to 3,291,421 acres for $7,112,422, for an overall average of $2.16 per acre. In the years 1896 through 1904, 1,501,320 acres of State lands sold for $2,553,574, or an average of $1.70 per acre.

76. As a further basis for his final opinion of value, Mr. Bowes took into consideration the Uintah auction sales of 1910 and 1912.

The Uintah auction sales were made in accordance with the terms of the act of May 3, 1905, which amended the act of May 27, 1902. Pursuant to these acts, the unallotted and unreserved lands of the former Uintah Indian Reservation were opened to homesteaders for five years beginning **[**120]** August 28, 1905, the price being $1.25 an acre. It was further provided that all such lands not taken up within five years after the opening of the reservation should be sold for cash under rules to be prescribed by the Secretary of the Interior, no one person being allowed to purchase more than 640 acres of the reservation lands. Pursuant to this authority, substantial areas of unallotted, unreserved lands in the former Uintah Indian Reservation were sold at public auction in the years 1910 and 1912. These sales have been referred to as the "Uintah auction sales."

The Uintah auction sales had been advertised and were well attended. Generally, the lands were offered in tracts of 320 acres each. Sales were for cash.Some purchasers were **[*65]** able to acquire more than 640 acres by buying through members of their families or other agents.

The subject lands formed the rim of the basin within which the Uintah auction sales lands were located. The auction sales lands were enclosed on the west and south by the subject lands, but there was an Indian grazing reserve between these lands and the north arm. To the west and south, some of the auction sales lands joined the subject **[**121]** lands.They were in the same economic environment except that the auction sales were held five and seven years after the reservation had been opened to white settlement and at a time when prices had advanced materially.

Five years after the Uintah reservation had been opened to settlement, the 1910 sale was held at which 183,420 acres were sold for a total consideration of $250,503, or an average of $1.37 per acre. Prices ranged from a set minimum of $0.50 to $4.50 per acre. At the second auction sale held in 1912, 136,441 acres sold for a total consideration of $206,662, or an average of $1.51 per acre. Prices on this sale ranged from the set minimum of $0.50 to $7.80 per acre.

At both these auction sales, 319,861 acres of land were sold for a total consideration of $457,165, or an average of $1.43 per acre. None of these lands contained stands of coniferous timber or large areas of rocky, rough land unsuitable for grazing, such as found within the subject lands. Mr. Bowes considered the general improvement in the economy between the years 1905 and the years 1910 and 1912, but concluded that better quality and higher rainfall of all the subject lands except that portion unsuitable **[**122]** for grazing, offset the improvement in general price level experienced during this period. Consequently he applied the average price of $1.43 per acre to the 486,889 acres of subject lands having covers of grass, safebrush, mountain browse, and aspen and other woodland, for an indicated value of $696,251 for that portion of subject lands. He then applied a value of $0.50 per acre to 331,084 acres of coniferous timberland of the subject area for $165,542, resulting in a total indication of value of subject lands in the sum of $861,793, or $0.885 per acre. This computation allowed no ascribed **[*66]** value for the 155,804 acres of inaccessible or barren areas of the subject lands.

Mr. Bowes concluded from his study and investigations that the carrying capacity of the lands sold at the 1910 and 1912 auctions was approximately 3.5 acres per animal unit month, and that the entire subject lands at 5.43 acres per animal unit month were only 64 percent as good in terms of grazing capacity. He applied this percentage to the $1.43 per acre

price of the auctioned lands for an indication of value of $0.92 per acre for subject lands on a basis of relative carrying capacity.

In Mr. Bowes' **[**123]** opinion, the value indicated for subject lands by the Uintah auction sales was from $0.885 to $0.92 per acre, or from $861,793 to $895,875.

77. The Uintah auction sales lands were unimproved and generally at lower elevations than the subject lands. They received less precipitation but had a longer growing season. The cover types were mainly sagebrush and pinon-juniper, with relatively little of the more valuable types, aspen woodland, grassland and meadow, found extensively on subject lands. Their terrain was much more level, and there were no substantial areas of coniferous timber, or barren or inaccessible lands. Water distribution for grazing purposes was in general better on subject lands, although several major streams originating in subject area flowed through the auction lands. The grazing capacity of the auction lands was less than the better areas but more than the general average of the subject lands.

78. As a further basis for his final opinion of value, Mr. Bowes took into consideration certain land sales by the Union Pacific Railroad to private individuals, which lands were located in Summit County, Utah. The source of his information was all Union Pacific **[**124]** deeds dated and recorded in that county in 1909, none of which was offered in evidence by plaintiffs. From his study of Union Pacific sales, he concluded that 1909 was the year when the greatest volume of such sales had occurred.These 1909 transactions, according to Bowes' knowledge, involving 98,202.63 acres of land which sold for a total price of $74,890.14, or an average of $0.76 per acre.

[*67] Summit County is adjacent on he north to Wasatch and Duchesne Counties, and the area of Union Pacific sales in this county is separated from the northwest areas of subject lands by a forest reserve area varying in width from 7 to 15 miles. The western part of this area extends to within a few miles of Salt Lake City and Ogden, Utah, and the Union Pacific main line exists and has existed through the northern part of this area for many years prior to 1905. Elevations vary from about 5,000 to 10,000 feet. There are some areas that are steep, but generally the Summit County terrain in the areas involving Union Pacific sales is rolling, as compared to the higher elevations of the north arm of subject lands, and there are no large areas of barren or inaccessible lands. Precipitation **[**125]** on this area is comparable to the average of subject lands, with less than that obtaining in the highest elevations, but more than on the south arm of subject lands. The cover is primarily mountain browse and sagebrush with some aspen and other broadleaf woodlands at the higher elevations. There is some coniferous timber. The carrying capacity in 1905 was from 5 to 6 acres per animal unit month. The Union Pacific lands were alternate sections in each township, being the odd-numbered sections lying in checkerboard fashion in relationship to each other. All mineral and coal rights were reserved in the deeds by the Union Pacific Railroad Company.

Mr. Bowes concluded that the subject land had a higher per acre value as of 1905 than was indicated by the sales recorded in the 1909 Union Pacific deeds, for three reasons, as follows: (1) The Union Pacific lands are located at lower elevations and receive less annual precipitation than subject lands; (2) subject lands have an assemblage or plottage value because of their contiguity that is a value increment not present with respect to the Union Pacific sales; and (3) the rights being appraised on subject lands include all rights, surface **[**126]** and subsurface. He stated that his investigation showed that these railroad sales and sales made by other railroads at or near the year 1905, indicate that railroads were attempting to create good public relations with livestock operators by selling or leasing lands to them at bargain prices, and that railroads, in many instances, were badly in **[*68]** need of funds to pay for railroad construction recently completed or in progress. He also observed that the Union Pacific sold and would sell its lands in no less than complete sections, and he concluded that there was no selectivity in such sales. For the foregoing reasons, Mr. Bowes concluded that the value of subject land would be from 20 to 25 percent higher than the value indicated by the sales recorded in the 1909 railroad deeds in Summit County, and that the value indicated for subject lands was from $0.91 to $0.95 per acre, or from $886,137 to $925,000.

79. The following table is a summary showing all of the categories of sales considered by Mr. Bowes and the values indicated to him for subject lands:

				Lowest	Highest	Aver-

				value	value	age
			Price	indi-	indi-	value
	Acres	Sales price	per	cated	cated	indi-
			acre	for	for	cated
				subject	subject	for
						subject
Large sales	402,623.8	$1,334,457.50	$3.31	$1.38	$1.43	$1.41
Small sales, close	114,290	331,114	2.90	1.62	1.80	1.71
Small sales						
distant	57,342	227,156	3.96	1.75	1.80	1.77
Utah State land						
sales	2,886,810	6,191,361	2.14			1.24
Uintah Auction						
sales	319,861	457,165	1.43	.885	.92	.90
Union Pacific						
R.R. sales	98,202.63	74,890.14	.76	.91	.95	.93
	3,879,129.43	8,616,143.64	2.22	1.31	1.38	1.33

[127]** Mr. Bowes concluded that the large sales category was the most reliable because he believed the data therefrom was best confirmed, and because the large tracts were most comparable to subject lands in elevation and precipitation and in having all types of subject lands thereon. The small sales close were considered important by him because he considered that they had the same economic and locational factors, with the weakness being that the sales were small in size and further, that difficulty was encountered in attributing correct amounts to be deducted from prices for improvements existing on the land at the time of sale. He considered the small sales removed from subject lands to be important because they enlarged the base of comparable sales and because they were purchased by the same type of buyers who would be interested in subject area, with this category having the same weaknesses as the small sales close and the further difficulty **[*69]** of being remote from subject lands.He concluded that the Utah State land sales showed a great demand for lands in Utah at the date of valuation, and were further important in that it was certain that no improvements existed on **[**128]** them, with the depressing factor being limitation of the size of tracts that could be sold. He believed that the Utah State land sales were more indicative of the value of subject lands than the small sales distant but not as important as the small sales close. He considered the Union Pacific sales important because of certainty as to lack of improvements, but least reliable because they included surface rights only, and did not reflect the full fee value in the prices paid, and because it was difficult to ascertain the exact motive of the seller. He recognized the Uintah auction sales as reliable from the standpoints of proximity to subject lands and lack of improvements, but questioned whether the sales were conducted for the full benefit of the Indians to obtain maximum prices possible.

The average of all value indications reached by Mr. Bowes was $1.33 per acre, as shown above in the table in this finding. After according a reliability rating of 95 to the value indication of $1.41 per acre on the large tracts, 85 to the $1.71 indication on the small sales close, 75 to small sales distant, 80 to Utah State land sales, 70 to Union Pacific Railroad sales, and 80 to Uintah auction **[**129]** sales, Mr. Bowes reached an indication of value of $1.34 per acre for subject lands, or $1,304,861, which he rounded to $1,305,000 for his final opinion as to the market value of the 973,777 acres of subject lands on July 14, 1905, after giving consideration to productivity of such lands and the rental-income indication of value.

80. As a still further basis for his opinion of value, Mr. Bowes gave consideration to the productivity of subject lands and the rental-income indication of value derived therefrom.

The actual income producing potential of subject lands had been demonstrated by July 14, 1905, and consequently would have influenced the market value of the lands as of that date. As set forth in finding 38, large tracts in the

western end of the former Uintah Indian Reservation had been **[*70]** leased to non-Indian livestock operators from time to time over the period from 1893 until 1905. After 1901, the area under these leases exceeded 800,000 acres. Substantial acreas of subject lands were under these leases, including, at one time, all of the subject area west of the east fork of the Lake Fork and around to Indian Canyon. Portions of subject lands in the northeastern **[**130]** and southeastern areas were not included in any of these leases, but included were substantial areas of land in the former Indian Reservation below the forest area. The rentals received varied from slightly over one cent per acre per season to a high of almost nine cents per acre per season. Rentals were rising and competition for the leases was spirited in the later years approaching 1905, as a consequence of which, a prospective purchaser of subject area in 1905 could have expected grazing rental income somewhat in excess of the actual rentals received up to that time. During approximately the same period, from 1896 to 1904, the State of Utah was receiving an average of approximately 5.36 cents per acre per year for the rental of state owned lands, largely grazing lands. Giving full consideration to all of these facts, a prospective purchaser of subject area in 1905 would reasonably have expected to have derived annual grazing rentals from subject property in an amount equivalent to 3 to 4 cents per acre, on the average.

Mr. Bowes concluded from his study of the leases involving the subject lands that 3 cents per acre per year was a reasonable rental value of subject lands **[**131]** as of July 14, 1905. He next considered that between the years 1896 and 1904 the State of Utah rented some 524,626 acres of State lands at 5.36 cents per acre per year. He determined that these State lands were appraised by the State of Utah at $1.48 per acre or a total of $778,000. He noted that the appraised value of these State lands was approximately 28 times the annual rental received. He then applied this gross rental multiple of 28 to the 3 cents per acre per year rental value of subject lands to arrive at an indication of value for the subject lands of 84 cents per acre for grazing purposes only.

During the years 1906 through 1910, the Forest Service sold timber from the subject lands for which an average sum per year of $4,988 was paid. Mr. Bowes estimated from a **[*71]** record in evidence as to the years 1914 and 1915 that the Forest Service permitted free use of timber in the years 1906 through 1910 at an annual average of $2,184. He then added the value of the free use timber to the price received on timber sales for an annual average for sales of timber in the amount of $7,172. He then multiplied the sum of $7,172 by the gross rental multiple of 28 to indicate **[**132]** an additional value of $200,816 for subject lands on account of receipts from timber, or 20.5 cents per acre.

He then added the timber value of 20.5 cents per acre to the grazing value of 84 cents per acre for a total indication of value for subject lands of $1.04 per acre or $1,012,728. Considering that all elements of market value were not necessarily reflected in the capitalization of rental income, Mr. Bowes used this approach largely as a method of testing conclusions from analyses of comparable sales, and concluded that the resulting value indication represented only a minimum value for grazing and timber uses alone.

As an alternative productivity approach, which Mr. Bowes believed tended to reflect all value elements, he computed the average price paid in the Uitah auction sales in 1910 and 1912 to be $7.43 per animal unit month. He then applied this sum of $7.43 to the 181,000 animal unit months of grazing available on subject area. The resulting indication for the market value of subject lands was $1.38 per acre.

81. Mr. Dean Mahaffey, presently an appraiser for the Federal Land Bank of Wichita, who had been Mr. Bowes' principal assistant and consultant in the appraisal **[**133]** of subject lands, testified as to his own opinion of the value of the subject lands, based upon his independent analysis of the facts and data known to him both independently and as a result of his work with Mr. Bowes in this case.

Mr. Mahaffey was born and lived almost his entire life in western Colorado. He grew up on a livestock ranch where sheep ranching was the principal occupation of his family, and has since been continuously in contact with the ranching business in his family.

Mr. Mahaffey attended Mesa College in Grand Junction, Colorado, for one year, and graduated in 1931 with a Bachelor of Science degree from the Colorado Agricultural and **[*72]** Mining College at Fort Collins, Colorado. Later he took a year of post graduate work in range management at the latter institution. He took a short post-graduate course in real

estate appraising at Mesa College several years later. For a year and one half he was an instructor in agriculture at Mesa College in Grand Junction, Colorado.

Mr. Mahaffey had been employed by several United States government agencies on matters relative to range management, including the United States Forest Service, the Soil Conservation **[**134]** Service, and the Grazing Service. In the Soil Conservation Service he made range surveys and was given various assignments as a technical foreman in range management. He continued to make extensive range surveys of western lands after his transfer to the Grazing Service. During this latter employment, covering about three years, he conducted range surveys, classifying lands and making carrying capacity estimates, over approximately 5 1/2 million acres in northwestern Colorado, doing both the field work and the mapping and compilation of the data derived therefrom. He was acquainted with and participated in the work of the government inter-agency committee to standardize range survey procedures.

Mr. Mahaffey had been a licensed real estate salesman and real estate broker since 1948, and had been in the real estate business for himself for a period. In the course of this real estate business he dealt in farm, ranch, and range lands in western Colorado. He had been a ranch and farm livestock inspector for the United States Bank at Grand Junction, Colorado, in which capacity it was his duty to report upon the condition of many ranching operations for purposes of mortgages and loans. **[**135]** In the course of these duties he became acquainted with the market values of range lands in western Colorado. Mr. Mahaffey assisted in the appraisal of approximately 4 1/2 million acres of range land in Western Colorado in connection with the case before this Court entitled *The Confederated Bands of Ute Indians* v. *United States,* No. 45585. He was engaged in this project for approximately 18 months, largely devoted to range inspection, land classification, and preparing maps and mosaics **[*73]** showing cover-types. He also assisted in the appraisal of approximately 270,000 acres of range land on the Sioux Reservation on the Missouri River. Since completing his work, in connection with the appraisal of the subject lands in the instant case, Mr. Mahaffey has been employed as a land appraiser for the Federal Land Bank of Wichita. In that capacity it is his responsibility to appraise the land of applicants for loans. While the land is appraised on the basis of expected production over a period of years, in the course of Mr. Mahaffey's duties he is required to take into consideration and to ascertain market value, to determine what the land has sold for in the last ten **[**136]** years, and to give his opinion as to what it would sell for presently.

Mr. Mahaffey participated with Mr. Bowes throughout most of the entire appraisal process as described in these findings and was familiar with substantially all of the facts and data taken into consideration by Mr. Bowes in formulating his opinion. Mr. Mahaffey participated in preliminary inspection of the lands to ascertain the nature of the problem. He did much of the work in collection of materials and documents pertinent to the appraisal problem, including Forest Service records, maps, mosaics, and land classification materials. He participated in a detailed surface inspection of the subject area, including coverage of all accessible areas by four-wheel-drive vehicle, and two aerial inspection trips. In addition Mr. Mahaffey spent many days on foot and horseback covering the more inaccessible portions of subject lands. In the course of this surface inspection Mr. Mahaffey participated in the analysis and confirmation of the land classification data and the carrying capacity estimate. Mr. Mahaffey personally conducted interviews with many elderly persons who had been upon the subject area in 1905 and read **[**137]** historical accounts to familiarize himself with conditions prevailing in 1905. He did much of the basic work in searching out, screening, and selecting comparable sales data in all of the categories included in the Bowes report. Under Mr. Bowes' supervision he did the surface land classification and mapping for many of these comparable sales areas.

[*74] 82. Mr. Mahaffey was of the opinion that the market value of the subject lands as of July 14, 1905, was $1,704,000, or an average of $1.75 per acre.

83. Dr. Franklin S. Harris, of Salt Lake City, Utah, testified in behalf of plaintiffs as to his opinion of the market value of subject lands.

Dr. Harris was reared on a cattle ranch in Mexico. He attended the Juarez Stake Academy in Mexico; received a Bachelor of Science degree from the Brigham Young University in Utah in 1907, and a Ph. D. from Cornell University in 1911. He also attended the Utah State Agricultural College and the University of Paris.

Dr. Harris began his professional career as an instructor in science at the Juarez Stake Academy in Mexico. Thereafter he was an assistant in agricultural chemistry at the Brigham Young University; assistant chemist **[**138]** at the Utah Agricultural Experiment Station; assistant in soil technology and instructor in that subject at Cornell University. In 1911 he became a professor of Agronomy at the Utah State Agricultural College and agronomist at the Utah Agricultural Experiment Station. In 1912 he became director of the School of Engineering at the Utah State Agricultural College and later the Director of the Agricultural Experiment Station for the State of Utah. In 1921 he become president of the Brigham Young University, which position he held until 1945 when he became president of the Utah State Agricultural College. He was author of six books, five of them on agriculture, and a member of over thirty scientific societies.

Dr. Harris has served on several international assignments in the development of agriculture in various parts of the world, and in 1950 was appointed chairman of the United States mission which established the first "Point 4" program of this country in Iran. In 1940, he had been retained to supervise the organization of a forest service for the country of Iran, and range management was one of the items developed in this program.

As vice president of the Farmers and Merchants **[**139]** Bank at Provo, Utah, he has had experience in considering loan **[*75]** applications, including livestock operations and grazing lands. He has been president of the Rural Rehabilitation Corporation of Utah, a Federal lending agency, in which capacity he supervised the business involved in loaning two million dollars to Utah farmers. In connection with family interests, he has had close association with the purchase and sale of grazing lands.

Dr. Harris had been employed to appraise approximately four and one-half million acres of grazing land in western Colorado, just east of the subject area, in connection with a case in this court entitled *The Confederated Bands of Ute Indians* v. *The United States,* No. 45585. He qualified as an expert appraiser and testified as to his opinion of the value of the land in that case.

Dr. Harris first became acquainted with the subject lands in 1904, when he was a member of the original survey party surveying a good deal of the subject area along its western and southern reaches. Since that time he has made recurring visits to the Uintah Basin, including several excursions into the subject area itself. He had occasion to go over portions **[**140]** of the subject lands in connection with the relocation of some elaterite mining claims. As director of the Utah Agricultural Experiment Station, he made frequent visits to the Uintah Basin in connection with a soil survey conducted jointly by the Experiment Station and the United States government.

Since being retained in this case, Dr. Harris made an automobile trip into and through the subject lands as far as and wherever existing roads would permit, and supplemented this survey by an inspection of the surface of subject lands from an airplane.

In addition to his personal acquaintance with subject lands, Dr. Harris familiarized himself with the specific sales data on comparable sales and information concerning subject lands involved in the Bowes report and the testimony and exhibits in evidence in this case.

84. Dr. Harris was of the opinion that the market value of the 973,777 acres of subject lands as of July 14, 1905, was $2,011,389, or $2.065 per acre.

[*76] Dr. Harris gave his opinion as to the relative values of the various types of land in subject area according to cover-type classifications, as follows:

	Value per acre	Acreage	Value
Grassland	$2.00	74,493	$148,986.00
Sagebrush	2.50	29,213	73,032.50
Browse	2.50	107,015	267,537.50
Timber	2.00	331,084	662,168.00

Unsuitable for grazing	.20	155,804	31,161.00
Aspens	3.00	276,168	828,504.00
		973,777	2,011,389.00

[141]** 85. Mr. Werner Kiepe, a resident of Salt Lake City since 1907, testified in behalf of the defendant as to his opinion of the market value of subject lands.

Mr. Kiepe received a Bachelor of Science degree from the University of Utah in 1926, majoring in economics, thereafter taking a number of postgraduate courses in statistics and economics. He completed courses in real estate appraising given jointly by the American Institute of Real Estate Appraisers and the University of Chicago in 1935. Mr. Kiepe had conducted courses in appraisals for the local chapter of American Bankers, for the Salt Lake Real Estate Board and for the Salt Lake City Board of Education, and had lectured at the University of Utah on economics and real estate.

Since 1937 he has been an active member of the American Institute of Real Estate Appraisers, and in 1951 he was president of the Rocky Mountain Chapter of that organization. He was a member and had been president of the Utah Chapter of the Society of Residential Appraisers and was a member of the Utah State Realty Association.

Mr. Kiepe was employed in 1926 as secretary of the Salt Lake Real Estate Board. He has been making appraisals independently **[**142]** of that Board since 1928 although he continued as an official until 1942 when he was president. In 1937 he took a position with the Union Bank and Trust Company in which position he made appraisals for the company but also extended his private appraisal practice.In 1942 he was granted leave to engage in appraisal work for the Army Engineers, where he was employed as Chief Reviewing **[*77]** Appraiser of the Rocky Mountain Division of the United States Engineers and later as Chief Reviewing Appraiser for the Salt Lake Office of that organization. This included the making and reviewing of appraisals of real estate in the States of Utah, Nevada, Colorado, Idaho and part of Montana. In 1943 Mr. Kiepe formed his present partnership.His principal clients included a number of large insurance companies, banks, oil companies, state, county and city municipal governments, and agencies of the United States.

Mr. Kiepe had made no prior appraisals in the Uintah basin but his firm had handled properties in that area which had been offered for sale. His appraisal experience, particularly with the Army Engineers, had covered large areas of both summer and winter range land in the State of **[**143]** Utah. This included those acquired for Army installations in Salt Lake County, in and around Park City in Summit County, and one appraisal covering an area in the Wasatch range approximately 25 miles long by 15 or 20 miles in width. Other appraisals made and reviewed by him included tracts of many thousands of acres each of range lands in the State of Utah.

Mr. Kiepe has previously qualified as a valuation expert in the courts of the State of Utah and several of the U.S. District Courts. He has made several appraisals for private clients in tax cases before the Internal Revenue Service in which it was necessary at a recent date to establish the market value of property as of March 15, 1913.

86. In his appraisal of the subject lands, Mr. Kiepe used the market data or comparable sales approach, and also the capitalization approach. The location and extent of subject lands were correctly determined by Mr. Kiepe, and his appraisal covers the 973,777 acres described in these findings. He assumed for the purpose of his appraisal that the subject lands would be sold in one unit and that the purchaser would receive a fee simple title free from any adverse claims.

Before doing field **[**144]** inspection work, Mr. Kiepe employed a number of professional men in various fields to assist him in obtaining as complete data as possible concerning conditions at the date of the appraisal. He employed two historians to do historical research, a geologist, an expert in **[*78]** range management, a forestry expert and an engineer acquainted with water matters in the Uintah basin. Mr. Kiepe, with the assistance of these experts, did research in the libraries of the States of Utah, Wyoming, and Colorado, and at Berkeley, California, as well as in state and federal

offices having records pertaining to the subject lands. Information was assembled disclosing conditions on the subject area in 1905 and maps and other descriptive data to aid in field research were collected.

Prior to undertaking this appraisal, Mr. Kiepe had knowledge of the subject lands and their environment derived from his long residence and professional experience in the State of Utah, trips into the subject lands for recreational purposes, and from the small amount of real estate business carried on in the basin by his firm.

Upon completion of his preliminary research, Mr. Kiepe made an inspection of the subject **[**145]** area. This was done in the summer months since much of the area is inaccessible during the late fall, winter and early spring. Commencing in July 1952, he spent a week examining the subject lands with Dr. Lawrence A. Stoddart, in a four-wheel drive vehicle. In many instances, they saw the range before the stock had grazed over it. This was followed by a trip with a soil expert. Mr. Kiepe spent ten days on the subject area with Professor J. Whitney Floyd, his forestry adviser, giving special attention to the forested areas. During this time they took horseback trips into the inaccessible areas along the Uintah range on the north arm. The inspections with Professor Floyd were chiefly after the stock had grazed the area, and thus Mr. Kiepe had examined the range both before and after it was grazed. Mr. Kiepe made additional trips into the subject lands and interviewed many of the old-time residents who had lived or grazed stock in the vicinity in earlier years.

87. The defendant offered the testimony of Dr. Lawrence A. Stoddart to establish the condition of the forage on the subject lands in 1905 as compared to 1951, and to establish the grazing capacity of the range in 1905. **[**146]** He was head of the Department of Range Management of Utah State Agricultural College and was ecologist with the Utah State Experiment **[*79]** Station. He had been so employed since 1935, with the exception of one year. He has made studies of competition for forage between wildlife and domestic livestock. For several years Dr. Stoddart had charge of the analysis of range lands by counties over the entire State. In connection with this work a study was made of the entire Uintah basin, including all of Wasatch, Duchesne and Uintah Counties, by the Experiment Station of the Utah State Agricultural College in cooperation with agencies of the Departments of Agriculture and Interior. Dr. Stoddart had supervised and directed extensive range surveys in Wasatch and Duchesne Counties. The results of the range surveys were published in map form and a report of the survey was published in a pamphlet entitled "Range Conditions in the Uintah Basin."

Dr. Stoddart was employed by Mr. Kiepe to furnish him advice on range conditions and grazing capacity of the subject lands in 1905. During the summer of 1952, Dr. Stoddart spent a full week on the subject area with Mr. Kiepe, making an examination **[**147]** of range conditions.

Dr. Stoddart also examined various historical reports and concluded that they were conflicting and difficult to interpret. He further concluded from his study that Forest Service supervision of grazing on the subject lands had resulted in improvements in the range and that conditions in 1905 were not as good as they were in 1951.

Dr. Stoddart reviewed the data and original maps of the Uintah basin survey made under his supervision about 1935, which were in his office, but not offered in evidence in this case. He perimetered each range type within the subject area and after analyzing the data concluded that the subject lands had a carrying capacity of 133,700 animal unit months, having taken into consideration forage consumption by deer. Dr. Stoddart did not consider this figure reliable.

The actual stocking of the range on subject lands in 1951, as shown by Forest Service records, was 83,661 animal unit months, exclusive of wild life. This actual use was only 79.8 percent of the use permitted by the Forest Service.

Dr. Stoddart testified that statistics showing forage consumption on the subject lands by wildlife in 1905 were not available, but that **[**148]** it was probable that wildlife had increased **[*80]** substantially by 1951. He estimated that forage consumption by wildlife, which would otherwise have been available for domestic livestock, amounted to 20,450 animal unit months. By adding this figure to the 83,661 animal unit months of actual use by domestic livestock, Dr. Stoddart concluded that 104,111 animal unit months of forage were actually consumed on the subject lands in 1951.

Dr. Stoddart considered that livestock operators would probably stock the range heavier than professional range people. The technical concept of proper range use was considerably different in 1905 than in 1951. The grazing by domestic

livestock in 1951 was lower than the preceding years, due to Forest Service conservatism which became the established policy, commencing in 1920 after excessive use of subject lands in World War I. The Forest Service had the further policy that national forests should serve recreational and watershed purposes as well as grazing. Taking all of these factors into consideration, Dr. Stoddart concluded that in 1905 a prospective purchaser of the subject lands considered to be well informed under then existing conditions **[**149]** would have felt that the subject lands had a higher grazing capacity than the actual forage consumption experienced in 1951.

Dr. Stoddart allowed a 20 percent increase on the figure of 104,111 animal unit months, and concluded that the grazing capacity in 1905 as measured by modern range management methods and 1951 figures as to stocking, was 124,933 animal unit months. Mr. Kiepe reviewed the consideration and study of Dr. Stoddart and arrived at the same conclusion, finding that subject lands had a carrying capacity in 1905 of 125,000 animal unit months, or 7.79 acres per animal unit month. For comparable sales purposes, Mr. Kiepe dropped the fraction and used a carrying capacity of seven acres per animal unit month.

88. Mr. Kiepe considered comparable sales data the most reliable indication of market value of the subject lands on July 14, 1905. In selecting comparable sales, he considered that similarity of use and similarity in size were important factors; he considered that sales made nearest the time of the appraisal were preferable to those made at more remote **[*81]** times; and he considered that sales of lands nearby the subject property which would reflect local **[**150]** conditions were preferable to sales of lands farther removed.

Mr. Kiepe obtained compilations of land sales made at about the time of the subject appraisal which were recorded in Uintah, Duchesne, Wasatch and Summit Counties, Utah; Uinta and Sweetwater Counties in Wyoming; and Moffat County in Colorado. Efforts were then made to confirm the private sales by contacting the parties to them. He concluded that satisfactory confirmation of private sales made about 1905 could not be obtained because the parties had removed from the area, were deceased, or because their recollection was not clear due to old age and the length of time which had elapsed. He further concluded that the private sales did not furnish information on the value of the subject lands as of July 14, 1905, as reliable as other categories of sales.

Mr. Kiepe found six groups of sales which he considered offered reliable evidence of the market value of the subject lands as of the evaluation date: (1) Uintah auction sales; (2) sales of State lands by the State Land Board; (3) sales by the Union Pacific Railroad in Summit County, Utah; (4) sales by the Union Pacific Railroad in Morgan County, Utah; (5) sales by the **[**151]** Union Pacific Railroad in Uinta County, Wyoming; (6) sales by the Central Pacific Railroad in Box Elder County, Utah.

89. As a result of his study and consideration of the Uintah auction sales of 1910 and 1912, Mr. Kiepe was informed as to the general facts concerning these sales as related in finding 76.

A special study of that part of the Uintah auction sales lands lying in Ranges 5, 6, 7, 8, 9, and 10 West, being roughly those lands lying west of the Town of Duchesne, was made by Mr. Kiepe based upon the records of the Bureau of Land Management. It comprised the western end of the reservation lands inside the subject lands. The eastern portion of the reservation was omitted from this study because many of the lands there were considered by Mr. Kiepe to be suitable for agriculture and irrigation and were less comparable to the subject lands.

[*82] Mr. Kiepe concluded that the lands in this special study area had a grazing capacity of 6 acres per animal unit month.

Approximately 53 percent of the 183,420 acres of land sold at the 1910 sale were in Mr. Kiepe's special study area. An analysis of the sales in the special study area, based upon the Bureau of Land Management **[**152]** records, disclosed that of the 390,829.04 acres in this area offered for sale in 1910, 467 sales were made covering a total of 96,559.37 acres for a total consideration of $139,971.45 or an average price per acre of $1.45.

Approximately 80 percent of the 136,441 acres of land sold at the 1912 Uintah auction sale was in this special study area. Of the 164,806.31 acres in this area offered for sale in 1912, 509 sales were made covering a total of 132,878.24 acres for a total consideration of $244,652.47 or an average price per acre of $1.84.

Three adjustments were made by Mr. Kiepe to the average prices of $1.45 per acre for the 1910 sales, and $1.84 per acre for the 1912 sales in his special study area.

The first adjustment concerned the element of the difference in time from the valuation year of 1905.From publications of the United States departments concerning national price indices, Mr. Kiepe compiled a table showing the general price index and also indices for prices of farm products, cattle per head, sheep per head, beef per cwt., and lamb per cwt. for each year 1895 through 1914, and for each year computed an average of all such indices, adjusted with the year 1900 at **[**153]** a base of 100. He then converted this average of all indices for each year into a 3-year moving average. For example, for the moving average for 1905, he took the average of the average indices for 1904, 1905, and 1906, and the moving average for each year ws computed in the same manner. The moving averages for the years 1910 and 1912 were respectively 122.6 and 130.9, with the moving average for 1905 at 101.8. Stating that he used the pertinent moving averages, Mr. Kiepe reduced the 1910 price per acre of $1.45 by 27 percent, and the 1912 price of $1.84 per acre, by 37 percent.

The second adjustment pertained to sizes of the tracts sold at the 1910 and 1912 auctions as contrasted with the entire **[*83]** area of subject lands. He considered that competition for such a large tract would be less and that the market price would be less per acre than on the small tracts. Accordingly, he reduced the 1910 per acre price of $1.45, and the 1912 per acre price of $1.84, each by 5 percent.

The third adjustment concerned relative carrying capacities, based on his conclusions of 7 acres per animal unit month for subject lands, and 6 acres per animal unit month for the 1910 lands, **[**154]** and 5.5 acres for the 1912 lands sold in his special study area. Mr. Kiepe allowed for this purpose a 14 percent adjustment on the 1910 price, and a 13 percent adjustment on the 1912 price.

Accordingly, Mr. Kiepe reduced the 1910 price of $1.45 by 46 percent, the total of adjustments, to reach a 1905 price for the subject lands of $0.78 per acre. He reduced the 1912 price of $1.84 by 55 percent, the total of adjustments, to reach a 1905 price for subject lands of $0.83 per acre.

90. From his research and study, Mr. Kiepe was informed as to the sales of Utah State lands by the State Board of Land Commissioners substantially in accordance with the facts related in finding 75.

Because the reports of the State Board did not classify sales as to types of land sold, Mr. Kiepe did not consider sales over the entire State sufficiently reliable as comparable sales data, and he selected a special study area comprising townships 1 and 2 north, range 7 east, in Summit County, with which he was familiar. These two townships are approximately 12 miles northwest of the north western extremes of subject lands and lie in the upper drainages of the Weber River and Chalk Creek. The State lands **[**155]** were located in alternate sections, as the odd-numbered sections lying in checkerboard fashion belonged to the Union Pacific Railroad Company.

The special study area of the State land sales consists of unimproved lands on the north slope of the western end of the Uintah mountains and east of the Wasatch range. The north slopes in this area are not as rugged as the south slopes in the north arm of subject lands. They are not so directly exposed to the sun and hold moisture better. As a result, they provide a better type of forage than the north arm, but **[*84]** not as good as the western portion of subject lands. Elevations range from about 6,500 feet along the creeks to about 10,000 feet. The forage types are comparable with the forage on the better lands in the subject area with sage brush, browse, aspen, and a negligible amount of coniferous timber.The entire area can be grazed.

Mr. Kiepe concluded that because substantial quantities of State lands remained unsold statewide in 1905, and because purchasers could select lands in areas as small as 160 acres, with some few selections covering as little as 40 acres within any one section, it would follow that the lands which **[**156]** had been sold were the choice parcels. Considering the high selectivity enjoyed by the purchaser and the quality of the forage, Mr. Kiepe decided that these special study State lands in Summit County had a carrying capacity of 4 acres per animal unit month.

In the special study area, 27 sales had been made during the years 1900 through 1904 covering 10,592 acres, for a total consideration of $15,738 or $1.49 per acre No sales were made in the area in 1905 or 1906. The certificates of sale are in evidence and show the consideration and the dates on which each of the ten deferred payments was due, including both principal and interest.

Two adjustments were made by Mr. Kiepe to correlate these State land sales to the value of subject lands as of July 14, 1905. Mr. Kiepe made a downward adjustment of 41 percent for quality of the range based upon his judgment as to the difference in carrying capacity. A further downward adjustment of 10 percent was made because of the advantage that he considered the State lands had due to the payments being deferred over a period of 10 years, which he believed would have increased the number of potential buyers and the competition for the lands. **[**157]** The adjustments downward total 51 percent which Mr. Kiepe applied to the existing State Board's minimum price of $1.50, which corresponded with the average per acre price of the lands sold during the years 1900 through 1904 in his special study area of Summit County. He concluded that based solely upon the State land sales in the special area, **[*85]** a value of approximately $0.74 per acre was indicated for the subject lands in 1905.

91. Mr. Kiepe considered four classes of sales by railroads of the lands granted to them by the United States to aid in the construction of their roads. The Union Pacific Railroad and the Central Pacific Railroad each received grants of the odd-numbered sections for 20 miles on each side of its right-of-way. These railroads thus had millions of acres of lands which they could sell to raise capital.

Mr. Kiepe's investigation of the circumstances under which the railroad sales were made included examination of the railroad records and interviews with officials of the Central Pacific Railroad (now the Southern Pacific) in San Francisco, California, and of the Union Pacific in Omaha, Nebraska. He found that each had entered upon a very active **[**158]** real estate sales campaign to dispose of its lands to raise capital. He concluded that through years of experience in selling large areas of western lands of all types, the railroads were unusually well qualified as well-informed sellers, and that these railroads followed a consistent policy of stating the true and complete consideration in their deeds of conveyance.

The railroad sales considered by Mr. Kiepe were of unimproved grazing lands located in alternate sections lying in checkerboard fashion in Utah in Summit, Morgan, and Box Elder Counties, and in Wyoming in Uinta County. The deeds covering these sales are in evidence. Sales were made at the approximate time of and for several years preceding the date of valuation of subject lands. The Union Pacific deeds show that the sales were made on terms, the purchaser paying 10 percent down and the balance over a period of 10 years, with interest at the rate of 6 percent per annum, with all coal and other minerals within or underlying the lands reserved to the Union Pacific Railroad Company. The Union Pacific deeds were not executed until all deferred payments were made, but each deed showed the date of the original sales contract. **[**159]** Mr. Kiepe concluded from his investigation that neither of the railroads offered purchasers a choice of small tracts but required the purchaser to take all land owned by the railroad within a given section and **[*86]** sometimes grouped the sections in a larger package to assure disposal of less desirable tracts.

92. Mr. Marcellus Palmer was employed by Mr. Kiepe and testified for the defendant with respect to the comparability of the railroad sales in the four counties. Mr. Palmer was a professional range management consultant. He was reared on livestock ranches and spent his boyhood on a ranch in the railroad area in Box Elder County. He also spent six years on a ranch in Idaho. He continued on livestock ranches until he was 25 years of age, when he entered the School of Forestry of Utah State Agricultural College, receiving a Bachelor of Science degree in 1940, with his major study in range management.

Mr. Palmer spent the 1939 summer season with the Department of Agriculture, making range analyses in Box Elder County. This work took him on to all the major livestock ranches and several of the smaller ones in the county for the purpose of making forage analyses to be **[**160]** used in advising the stockmen on ranch operations and conservation practices. After graduation in 1940, Mr. Palmer returned to the Department of Agriculture and had charge of the range analyses work in the five counties in northern Utah doing the same type of work as in the 1939 season. In October 1942, Mr. Palmer was moved to the State headquarters office of the same agency and with another technician had

charge of the range conservation program for the entire State of Utah. He worked directly with the livestock men making range analyses which were the basis for range improvements. He remained in this position until October 1946, and during this time became further acquainted with all the railroad sales lands through the range examinations made by him.

In October 1946, Mr. Palmer left the Department of Agriculture and entered into private practice as a range management consultant, a rather new profession. He furnishes technical assistance and advice to landowners and livestock operators concerning the carrying capacity of their ranches, changes in operations which would return a greater profit, and conservation and range management practices. He is a licensed real estate broker **[**161]** in the State of Utah, and furnishes advice and assistance in obtaining and retaining range permits **[*87]** on federal lands. Some of his principal clients are among the largest livestock operators in the State of Utah. His practice covers the State of Utah and all adjoining states, except Arizona. Mr. Palmer is secretary and adviser for five livestock associations and a member of the American Society of Range Management. Since 1948 he had been resident land agent for the Southern Pacific Railroad, assisting it in disposing of the residue of its lands.

Mr. Palmer has many clients in the area covered by the Union Pacific and Central Pacific sales. He has also had considerable experience in the Uintah basin. Some of his clients have Forest Service permits covering portions of the subject lands and he has been over the subject lands except the high areas of the Uintah mountains.

Mr. Palmer prepared the maps in evidence which show the State sales in Summit County, the Union Pacific Railroad sales in Summit and Morgan Counties, Utah, and Uinta County, Wyoming, and the Central Pacific Railroad sales in Box Elder County, Utah.

93. Mr. Kiepe's information with respect to the **[**162]** Union Pacific sales land located in Summit County, Utah, was substantially in accord with the facts set forth in the second paragraph of finding 78, except that he considered the soils to be deeper and the forage to be better on the Summit County lands than on the average of subject lands, and that moisture retention was also better on these north slopes. He concluded that these Union Pacific sales lands in Summit County had a carrying capacity of 6 acres per animal unit month. He accorded a higher carrying capacity to his special study area of sales of State lands, located in this same county, because of what he considered to be higher selectivity enjoyed by purchasers of State lands.

94. On the basis of the deeds in evidence, Mr. Kiepe analyzed 124 sales made by the Union Pacific Railroad in Summit County during the years 1895 to 1907. He divided the sales into groups of one section or less and of one section or more. There were 16 sales of less than one section covering 4,906.47 acres for a total consideration of $7,489.29, or an average of $1.53 per acre. There were 108 sales of one section or more covering 262,220.77 acres for a total consideration **[*88]** of $232,508.73 **[**163]** or an average of 89 cents per acre. For his correlation with the subject lands, Mr. Kiepe used only the sales of one section or more. Mr. Kiepe concluded that the division between large and small tracts demonstrates that sales of small tracts compel substantially higher prices. Experienced livestock men testified in this case that they would have paid more per acre for a large area of contiguous sections of range land than for smaller pieces which had to be assembled in a usable unit. The evidence tends to demonstrate that the smaller sales of railroad lands in Summit County had a greater price per acre because of peculiar locational factors.

Two adjustments were made by Mr. Kiepe to relate the $0.89 average price per acre on the 108 sales of one section or more, to the value of subject lands as of July 14, 1905. The first adjustment by 10 percent was made because the railroad lands could be bought on a time payment plan extending over 10 years, whereas it was assumed that subject lands would be sold for cash. The second adjustment by 13 percent was made on the basis of Mr. Kiepe's conclusion that subject lands had a carrying capacity of 7 acres per animal unit month as compared **[**164]** with six for these sales. Mr. Kiepe applied a total downward adjustment of 23 percent to the price of $0.89 for an indication of value on subject lands of $0.69 per acre in 1905.

95. The Union Pacific Railroad sales in Morgan County lie northwest of Summit County, the nearest being about 35 miles northwest of the northwestern portion of subject lands. The lands surround the Town of Morgan, which is on the

Union Pacific Railroad and was an established community in 1905. The economic development of Morgan County in 1905 was considerably ahead of the subject area.

The Morgan County lands are on the east slope of the Wasatch Mountains and are cut by the Weber River canyon, part of which has a south slope. The Union Pacific Railroad travels through this canyon.There are some steep areas along the canyon which are inaccessible. North and eastward higher elevations are found which provide desirable summer grazing. Elevations extend to about 10,000 feet.

The lower area on the south slope has an annual type of **[*89]** vegetation, largely cheet grass.There is some sage brush and higher up there is mountain browse and aspen with grasses and forbs. Precipitation is less than on **[**165]** the subject lands.

Mr. Kiepe was of the opinion that the Morgan County lands were very comparable in grazing capacity to the subject lands and that their carrying capacity was seven acres per animal unit month. Mr. Palmer, defendant's professional range management consultant, had been acquainted with the land since 1942 through his work with the Department of Agriculture and through services performed for the livestock operators. He had discussed the condition of the range with people acquainted with its use prior to that time and had observed the effect on the range of 70 years of livestock grazing. He was of the opinion that the Morgan County lands, particularly on the lower slopes, had deteriorated somewhat and that the grazing capacity on the lower slopes was less than in 1905. The capacity on the higher slopes remained about the same. In his opinion the carrying capacity was of 6 acres per animal unit month in 1952 and 5 1/2 acres per animal unit month in 1905. The evidence establishes a carrying capacity of from 6 to 7 acres per animal unit month in 1905, and Mr. Kiepe used seven acres in making his correlation.

96. On the basis of the deeds in evidence, Mr. Kiepe **[**166]** analyzed 64 Union Pacific Railroad sales in Morgan County made between 1895 and 1908. Seven of these sales included lands in both Morgan County and Summit County and to that extent Mr. Kiepe considered the same sales twice. He divided the sales into groups of sales covering less than one section and covering one section or more each. There were 16 sales of less than one section covering 6,273.14 acres for a total consideration of $9,165.19 or an average of $1.46 per acre, and 48 sales of one section or more each covering 197,742.97 acres for a total consideration of $151,184.79 or an average of $0.76 per acre. For his correlation of these sales with the subject lands, Mr. Kiepe used only the sales of one section or more.

Mr. Kiepe considered that only one adjustment, which concerned the time payment plan, was required to relate **[*90]** the average price of $0.76 per acre on the Union Pacific sales of one section or more in Morgan County, utah, to the value of subject lands as of July 14, 1905. Accordingly, he reduced the $0.76 price per acre by 10 percent to indicate a value of $0.68 per acre for the subject lands as of 1905.

97. The Union Pacific Railroad sales in Uinta **[**167]** County, Wyoming, are directly north of the north arm of the subject lands, at the closest point, a distance of about 15 miles. Uinta County is located in the southwest corner of the State of Wyoming across the state border from Summit County.

The Union Pacific Railroad sales in Uinta County, Wyoming, were essentially the same as the Uinta Development Company lands, hereinafter mentioned in finding 99. They were located mostly on a plateau area at elevations between about 5,500 to 6,000 feet, with some limited areas adjacent to the Utah line reaching elevations between 6,000 and 8,000 feet. Precipitation on these lands averaged 8 to 11 inches per year, considerably less than on subject lands, and water distribution was so limited that they were suitable in the main only for winter grazing, with light snowfall usually experienced. Some spring and fall grazing occurred on the fringes adjacent to the Utah line. The lands were characterized by the forage of semi-arid lands, with large areas of sagebrush and sparse feed for livestock. The carrying capacity of these lands was considerably less than the average of subject lands. However purchasers expected to obtain the free use of **[**168]** intervening even sections of the public domain, but were required to find summer grazing lands elsewhere.

Mr. Kiepe characterized this Wyoming area as "a little less mountainous" with a "rolling" terrain with "streams which rise in the Uintah Mountains" flowing through "this particular county wending their way up to the Bear River and the

Green River." He described the south area of the county as "grassland," with "many of its areas" having some "very excellent ranches." He further stated that farther north, these lands were "definitely more winter range," with the southernmost extremities used for summer range. His information on precipitation was that this area experienced **[*91]** 10 to 15 inches per year, and he stated that it was watered by streams which flow the year around.

Mr. Palmer had been acquainted with the Uinta County, Wyoming, lands since 1942, and had talked with livestock men who had used the lands for a period of years. In his opinion there had been a slight deterioration of the available forage since 1905, particularly adjacent to the ranches, and that this had resulted in a drop in carrying capacity for these lands from 6 1/2 acres per animal unit month **[**169]** in 1905 to 8 acres in 1952. Mr. Kiepe ws of the opinion that in 1905 the lands had a carrying capacity of less than 8 acres per animal unit month but that this was a reasonable figure because of the additional forage the purchasers expected to obtain from the adjoining public domain. The Uinta Development Company lands in Uinta and two adjoining counties are now being grazed at the rate of only slightly more than 8 acres per animal unit month, whereas the 1907 actual use was about 10.67 acres per animal unit month.

98. On the basis of the deeds in evidence, Mr. Kiepe analyzed 58 Union Pacific Railroad sales in Uinta County, Wyoming. He divided the sales into groups of sales covering less than one section and covering one section or more each. There were 17 sales of less than one section covering 4,722.27 acres for a total consideration of $6,438.50, or an average of $1.36 per acre, and 41 sales of one section or more covering 105,699.28 acres for a total consideration of $77,640.37 or an average price of 73 cents per acre. For his correlation of these sales to the subject lands Mr. Kiepe used only sales of one section or more.

Two adjustments were made by Mr. Kiepe to relate **[**170]** the $0.73 average price per acre on the 41 sales of one section or more, to the value of subject lands as of July 14, 1905. The first adjustment by 10 percent concerned the time payment plan. The second adjustment by 14 percent was made in favor of the subject lands on the basis of Mr. Kiepe's conclusions that subject lands had a carrying capacity of 7 acres per animal unit month as compared with 8 for these sales. Mr. Kiepe applied a net adjustment upward of 4 percent to the $0.73 average price per acre for an indication of value of $0.76 per acre on subject lands in 1905.

[*92] 99. The testimony of one of the incorporators and principal owners of the Uinta Development Company was adduced by plaintiffs concerning the purchase by that company of large acreages of Uinta County, Wyoming, lands from the original purchasers from the Union Pacific Railroad Company. Between 1908 and 1910, these original purchasers assigned their Union Pacific sales contracts to Uinta Development Company to permit consolidation of their land holdings for a more advantageous use of the land. Purchase contracts covering approximately 400,000 acres were thus sold and assigned to that company, with **[**171]** the purchase price ranging from $0.90 to $1.25 per acre.

100. The Central Pacific Railroad sales in Box Elder County, Utah, lie at their nearest point about 100 miles northwest of the northwest boundaries of subject lands. West of these lands are the Raft River Mountains, located in the northwest part of the county. In these mountains is located the Minidoka National Forest. South of these mountains and west of the railroad sales area is located a saline desert. East of the railroad sales area, the Bear River valley extends in a north and south direction, and in this valley are located irrigated farm areas situated about the towns of Brigham City, Bear River City, and Corinne, which were established some years prior to 1905. This railroad sales area extends from the Great Salt Lake on the south, to the Idaho State line on the north. The sales considered by Mr. Kiepe do not involve the irrigated farmlands on the east, the Raft River Mountains and saline deserts on the west, and the saline lands on the north shores of the Great Salt Lake.

The average annual precipitation in this area for the years 1898 through 1932, according to a record of the United States Department of **[**172]** Agriculture in evidence, was 10 to 15 inches for areas along the eastern and northern portions of this sales area, and 5 to 10 inches in the central, southern and southwestern portions. The terrain is gently rolling mountains with extensive areas of relatively level valleys.The elevation at Great Salt Lake is about 4,200 feet and at Tremonton, Utah, on the eastern fringe of this area, at 4,322 feet, with elevations rising to the north and northwest. **[*93]** Generally, the elevations are substantially below any other sales reported in these findings.

This area was and is primarily used for winter grazing, with some spring, summer and fall grazing in limited areas, and with dry farming having been developed to some extent in the eastern portion in the years subsequent to 1905. These lands were unimproved grazing lands at the time of the sales involved in Mr. Kiepe's analysis. The cover type was grasses with areas of sagebrush, and with the southwest portion having a salt desert shrub and little grass.

These lands comprised the odd-numbered sections, with the even-numbered sections being public domain, an undefined amount of which had been transferred into private ownership **[**173]** prior to the railroad sales. Mr. Kiepe concluded that very few transfers into private ownership had been made from the public domain because this was not a homestead area and livestock men could not have "wedged" their way into this area. The Central Pacific was not successful in selling all its lands in Box Elder county, and Mr. Palmer since 1948 has been the resident land agent of the successor railroad company to assist in disposing of the residue.

Mr. Palmer discussed the condition of the lands in 1905 with people who had used them at that time. His opinion was that the lands involved in the Central Pacific sales had a carrying capacity in 1905 of 6 acres per animal unit month. Mr. Kiepe accorded these lands a lower carrying capacity than Mr. Palmer, 8 acres per animal unit month. Mr. Kiepe made an allowance because of his conclusion that the purchasers of the railroad lands obtained free grazing upon a large part of the intervening sections. Consequently, he increased the forage available to purchasers to 4 1/2 acres per animal unit month.

101. On the basis of the deeds in evidence, Mr. Kiepe analyzed 48 Central Pacific Railroad sales in Box Elder County for the period **[**174]** 1895 to 1906. He first divided the sales into groups of sales covering less than one section and covering one section or more each. There were 26 sales of less than one section covering 4,974.37 acres for a total consideration of $14,418.85, or an average of $2.90 per acre, and 22 sales of one section or more covering 373,094.65 acres for a consideration **[*94]** of $294,512.37 or an average of $0.79 per acre. A large number of the sales of one section or more were made to one purchaser, George Crocker in 1895. In order to make what he considered to be a finer adjustment, Mr. Kiepe analyzed separately the Crocker sales and the sales between 1900 and 1904.

102. Among the 48 sales, there were ten sales by the Central Pacific Railroad Company in Box Elder County between 1900 and 1904, covering 12,087.54 acres for a consideration of $17,235.62 or an average price of $1.43 per acre. Mr. Kiepe made a downward adjustment of 10 percent because of the time payment plan, and a downward adjustment of 40 percent due to his conclusion as to the difference in quality of the lands. The total downward adjustment of 50 percent was applied to the average price of $1.43 per acre, and Mr. Kiepe **[**175]** thereby arrived at an indication of value for the subject lands as of July 14, 1905, of $0.72 per acre.

103. The Central Pacific Railroad made a number of sales in Box Elder County to George Crocker from 1895 to 1911. The purchaser was a brother of one of the five owners and developers of the railroad. From conversations with managers of Crocker's estate, Mr. Kiepe concluded that this relationship did not affect the considerations on the sales.

According to Mr. Kiepe's analysis, Crocker purchased in these transactions 344,177.71 acres for a total consideration of $273,994.90, or an average of $0.79 per acre, with most of the lands being purchased in 1895. Mr. Kiepe concluded that these Crocker lands approximated the subject lands in carrying capacity at the time of sale, and that the sales were made for cash. He further believed that Crocker grazed lands in this area almost twice the size of his privately acquired lands because the checkerboard pattern of his acquisitions gave him control of the intervening sections. Since most of Crocker's purchases were made in 1895, Mr. Kiepe made an upward adjustment on the basis of his relative price indices of 18 percent, and a downward **[**176]** adjustment of 27 percent on the basis of his judgment that the use of the intervening sections, together with his acquired lands, would afford Crocker more forage than was available on subject lands. The total net downward adjustment of 9 percent **[*95]** was applied by Mr. Kiepe to the average price of these railroad lands of $0.79 per acre, for an indication of value of $0.72 per acre for subject lands.

104. The following table is a summary of the sales data relied upon by Mr. Kiepe to arrive at value indications for subject lands:

				Value

	Acres	Sales price	Price per acre	Indicated for Subject
1910 Uintah auction sales	96,559.37	$139,971.45	$1.45	$0.78
1912 Uintah auction sales	132,878.24	244,652.47	1.84	.83
State land sales, two townships	10,592	15,738	1.50	.74
Union Pacific sales, Summit	262,220.77	232,508.73	.89	.69
Union Pacific sales, Morgan	197,742.97	151,184.79	.76	.68
Union Pacific sales, Wyoming	105,699.28	77,640.37	.73	.76
Central Pacific sales, Box Elder	12,087.54	17,235.62	1.43	.72
Central Pacific sales, Crocker	344,177.71	273,994.90	.79	.72
	1,161,957.88	1,152,926.33	.99	.74

[177]** Mr. Kiepe recognized that the range of his value indications was from $0.68 to $0.83 per acre, and that the average of all such indications was $0.74 per acre. It was his final opinion that subject lands had a value of $730,332,75, or $0.75 per acre as of July 14, 1905, after giving consideration to his capitalization approach to value.

105. Mr. Kiepe also made an analysis of the worth of the subject property from the capitalization approach. In doing this, he considered taxes, costs of the supervision of the investment and the rate of return the investor would expect on his investment in the property.

Mr. Kiepe considered that the subject lands were in a frontier area where public improvements such as roads, bridges and schools would be needed, and that it could be expected that taxes would be as high as the population could bear. Mr. Kiepe investigated taxing practices in the State of Utah about 1905 and concluded that a tax rate of about 2 percent of the capitalized value of the property could be expected.

For supervision of the property, such as collecting and disbursing moneys, payments to real estate brokers for finding tenants, costs of advertising and record **[**178]** keeping, etc., Mr. Kiepe estimated an expense at the rate of one-half of 1 percent of the capitalized value of the property.

[*96] Mr. Kiepe further considered that a reasonable rate of return on a real estate investment is made up of four factors, which are quite generally accepted in real estate appraising: (1) safe rate, (2) risk rate, (3) liquidity of investment, and (4) freedom from management. From his investigation Mr. Kiepe concluded that mortgage and long-term loans commanded 8 percent interest in 1905, and considered that an investor would expect a larger return if he owned the property and assumed all costs and risk.

His information was that the prevailing rate on safe investments in 1905 was about 4 percent. On the basis that the subject property would involve greater risks than some other types of investments, such risks being drought, short grazing seasons, storms, forest fires, livestock disease, failure of the livestock market and livestock prices, etc., and further that such risks would have to be considered by any owner of the subject lands, Mr. Kiepe concluded that the owner of subject lands would have to bear a risk, for which not less than 2 percent **[**179]** should be added to the capitalization rate.

Liquidity of investment concerns the speed with which the owner could get money if he needed it through disposal of the property. Mr. Kiepe considered that the subject property would be difficult to sell, and that a considerable amount of time would be required for an owner to liquidate his investment and recover the fair value of the lands. Mr. Kiepe ascribed 2 percent to the capitalization rate for lack of liquidity in the investment.

It was contemplated by Mr. Kiepe that the actual management of the property (as distinguished from supervision of the property) would require special knowledge, time and expense. For this lack of freedom from management, Mr. Kiepe included 1.5 percent in the capitalization rate.

The total of the items included in the capitalization rate as computed by Mr. Kiepe thus amounted to 12 percent, being comprised of 2 percent for taxes, one-half of one percent for supervision, 4 percent for a safe rate of return, 2 percent for risk, 2 percent for liquidity of investment, and 1.5 percent for management.

After consideration of the leases involving subject lands during the years 1900 to 1905, Mr. Kiepe concluded **[**180]** that the **[*97]** actual rentals received were too low and that he should use the maximum rental of $0.04 per acre that could be expected by a purchaser of subject lands in 1905. He applied this rental rate to the 973,777 acres of subject lands to arrive at an annual rental income of $38,951, which he reduced to the sum of $38,500. Mr. Kiepe recognized an additional source of income from the subject lands to be from timber sales. From his investigation he reported that sales of timber from the subject lands during the period 1905 to 1920 averaged $3,756 per year, which sum Mr. Kiepe added to his figure for annual rental income for a total annual income of $42,256.

Mr. Kiepe consulted several other sources of information to determine whether this total annual income figure of $42,256 was reasonable. He analyzed leases made by the Utah State Board of Land Commissioners shown in the annual reports of that Board. He also examined leasing systems applied to grazing lands owned by the State of Wyoming, the State of Texas and the Northern Pacific Railroad. The information so obtained was not correlated to the value of the subject lands but was used to confirm the appraisers' knowledge **[**181]** and conclusions as to the reasonable income which a prospective purchaser could expect from these lands.

Mr. Kiepe concluded that an annual income of $42,256 capitalized at 12 percent indicates a value for subject lands from a capitalization approach of $352,133. Mr. Kiepe did not consider this approach as reliable as the market data or comparable sales approach.

106. The market value of the 973,777 acres of subject lands as of July 14, 1905, was $1,217,221.25, or an average of $1.25 per acre.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover $879,067.17, with interest thereon as part of just compensation at 5% from July 14, 1905 to July 14, 1934, and at 4% from the latter date to date of payment, less remaining offsets, if any, as determined in further proceedings pursuant to Rule 38 (c), and judgement is entered to that effect.

[*98] In this case and in Nos. 47568, 47570, 47571 and 47572, consolidated therewith, the following order was entered on January 24, 1958:

ORDER

These cases come before the court on the joint motion of plaintiffs **[**182]** and defendant for entry of consolidated judgment pursuant to the formal stipulation of the parties filed January 20, 1958, signed on behalf to plaintiffs by their attorney of record and on behalf of defendant by Assistant Attorney General Perry W. Morton. By the stipulation, the parties agreed to the entry of a consolidated judgment in the five above-entitled cases in favor of plaintiffs and against defendant in the sum of $3,250,000 in full settlement of all claims of plaintiffs set forth in their petitions in these five cases, as well as all claims arising out of the subject matter of these cases which could have been asserted therein,

reserving only those matters expressly stated in said stipulation, and itemizing the offsets and credits which are not to be allowed to the defendant in any other cases or proceedings.

Now, THEREFORE, IT IS ORDERED this twenty-fourth day of January, 1958, that a consolidated judgment in the above-entitled cases be and the same is entered in favor of the plaintiffs and against the defendant in the sum of three million two hundred fifty thousand dollars ($3,250,000).

By the Court.

MARVIN JONES, *Chief Judge.*