BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS OF THE LOWER BRULE RESERVATION, SOUTH DAKOTA, Plaintiffs,	)	
v.	)	Docket No. 78
UNITED STATES OF AMERICA, Defendant.	)	

Decided: April 26, 1956

Appearances:

Ralph H. Case,
Attorney for Plaintiffs

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

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The claim here presented is for the value of a strip of land 5164 feet wide (north and south) and 41.887 miles long, lying immediately south of the south line of the Lower Brule Reservation as that line was established by Edwin H. Van Antwerp, a United States Deputy Surveyor, in 1890, and as it has been located since that time.

By the Act of March 2, 1889, 25 Stat. 888, which was accepted and agreed to by the different bands of the Sioux Nation, including the

Lower Brule, parts of the Great Reservation of the Sioux Nation was divided among the several bands of the nation. The south boundary line of the reserve set apart for the Brule, is described in the act as running from where the western line of Presho County intersects the forty-fourth degree of latitude; "thence on said forty-fourth degree of latitude to western boundary of township number seventy-two; * *." This south line, 41.887 miles long, was located by the 1890 survey 5164 feet north of the true location of the 44th parallel and thus excluded from the Brule the land between those lines, and it is the value of this land the Court of Claims has decided the Brule are entitled to recover. (125 C. Cls. 439). This excluded land was actually a part of the Lower Brule Reservation but was considered by both the Government and the Indians as part of the lands of the Great Reservation of the Sioux, as established by the Treaty of April 29, 1868, which were ceded by the Act of March 2, 1889, 25 Stat. 888. It was not until the General Accounting Office report of April, 1932 (Plaintiffs' Ex. 1 and Defendant's Ex. 26) that the error in locating the 44th parallel was discovered. (105 C. Cls. 725, 809). The excluded lands had long before, and on February 10, 1900, passed to defendant as part of the ceded lands.

Acreage of Excluded Tract

The plaintiffs contend that there are 34,664.62 acres in the tract excluded from the Brule Reservation by the 1890 survey and bases its claim on the findings and opinion of the Court of Claims in the case, Sioux Tribe v. United States, No. C-531 (18-24), 105 C. Cls. 725, which it has pleaded in its petition herein, and a report of the General

Accounting Office set forth in plaintiffs' Ex. 1. The findings and opinion of the Court of Claims are in evidence herein as Defendant's Ex. No. 22, and the finding relied upon is No. 37, p. 20, of that exhibit, in which it is stated that there were 34,664.62 acres in the excluded area. This acreage appears to have been taken from the General Accounting Office report, part of which is in evidence as Plaintiffs' Ex. 1 and Defendant's Ex. 26, and pages 412-414 of Volume I of that report which was offered in the Sioux case No. 531-C (18-24), supra.

An examination of the Sioux case (Def. Ex. 22) shows that the case involved the consideration of the claims of seven different Sioux groups on reservations created out of the Great Reservation of the Sioux Nation by the Act of March 2, 1889, 25 Stat. 888. Of the seven cases there involved, all, except the Lower Brule which is C-531 (22), were set up in the original petition, but the Brule claim was not filed until after the time limit under the jurisdictional act had expired (see pp. 77-78, Def. Ex. 22, 105 C. Cls. 725, 809) and the court decided with respect to the Brule claim (pp. 77-78, Def. Ex. 22, 105 C. Cls. 725, 809):

> The amended petition was filed more than five years after approval of the jurisdictional act. We are therefore without jurisdiction of this claim by the Lower Brule Indians. It may be stated, however, that as a matter of fact it does not appear that any portion of the 34,664.62 acres, or any of the money received therefrom has been taken or misappropriated by defendant to its own use.

So, neither the findings above referred to nor the decision are res judicata.

Since the above decision and the preparation of the G.A.O. Report in the former case, the Coast and Geodetic Survey has determined that the southern boundary of the reservation, as determined and monumented in 1890,

is 44° 00' 51" and that the true location of the 44th parallel is 5164 feet south of the southern boundary and that the excluded area extended between the longitude of the eastern limit of 99° 31' 31" and the longitude of the western limit of 100° 21' 57", a distance of 41.887 miles. (Def. Ex. 29). So, the excluded area was 5164 feet by 41.887 miles. The Coast and Geodetic Survey computed this area as containing 26,218 acres, "based upon a standard section of 640 acres." There is a difference between this computation and that of the Bureau of Land Management as will be hereafter discussed.

For the purposes of this case, the Bureau of Land Management has prepared data for determining the acreage of the excluded strip.

Defendant's Exhibit 28 is a tabulation of all land disposals within the strip and they aggregate 26,235.56 acres, but it will be noticed that the description of each disposal and the acreage thereof is in accordance with the plats of the survey thereof approved March 4, 1891. (Def. Exs. 31-37). These disposals, therefore, include lands lying south of the 44th parallel as it is located by the Coast and Geodetic Survey in the North half of Sections 7 to 12, inclusive, of Townships 106 North of Ranges 73 to 79 West of the 5th P.M. This is shown by defendant's Exhibits 31 to 37, inclusive. In these exhibits, the Bureau has shown the location of the 44th parallel with respect to the half section lines and has computed the acreage of the "fractional sections north of this [44th] parallel of latitude." (Letters of November 25, 1953, and January 21, 1954, Def. Ex. 27). The total acreage lying between the monumented south reservation line and the location of the 44th parallel, as determined by the United States

Coast and Geodetic Survey, is 25,968.24 acres, as shown by the plats. This is the correct acreage of the area of the land erroneously excluded from the Brule Reservation by the 1890 survey and for which the plaintiffs are entitled to recover, since it is only the lands lying north of the 44th parallel and south of the monumented south line of the reservation that were excluded.

Valuation Date

The parties are not agreed as to the date upon which the value of the excluded lands should be determined. The plaintiffs insist that the lands should be valued as of February 10, 1900, while the defendant contends they should be valued as of February 10, 1890.

The Act of March 2, 1889, 25 Stat. 888, set aside a portion of the Great Reservation of the Sioux Nation to seven groups of that nation and created a separate reservation for each. The reservation for the Lower Brule is described in Section 5 of that act. All the lands of the Great Reservation outside the several reservations set aside for the separate groups were restored to the public domain (except certain parts not material to this case) by Section 21 of that act and were to be disposed of by defendant for the benefit of the Sioux Nation.

The lands ceded to defendant by the Act of March 2, 1889, aggregated about 9,500,000 acres which included the 25,968.24 acres of lands excluded from the Brule. Since the error in excluding these lands was not discovered until the General Accounting Office report was made in 1932 (see 105 C. Cls. 729, 809), the defendant treated the excluded lands as

part of the public domain and began disposing of them as early as 1892 and continued to do so until 1911, when the last entry was made. (Def. Ex. 28).

Section 21 of the Act of March 2, 1889, provides:

> That all the lands in the Great Sioux Reservation outside of the separate reservations herein described are hereby restored to the public domain * * [with certain exceptions not pertinent here].

The section then provides for the sale of the ceded Sioux lands to settlers at specified prices for the first ten years, that is, from February 10, 1890, when the act became effective, to February 10, 1900, for the benefit of the Indians.

As stated above, the Government contends that by the first part of Section 21, quoted above, all the lands outside the reserved parts were "restored to the public domain" and since that part of the act became operative on February 10, 1890, there was a change in status of the excluded land as of that date.

There is much merit in the Government's argument, if the quoted clause is considered alone, but an examination of Section 21 shows that by its provisions the Government first undertook for a period of ten years the disposition of the excluded lands to actual settlers under the provisions of the homestead laws at prices ranging from $1.25 per acre for the first three years, $.75 per acre for the next two years, and fifty cents per acre for the remaining five years. During this ten-year period the defendant was plainly acting for the Indians and was obligated by said provisions to dispose of the excluded land in the manner and for the prices fixed. To carry out such contract it was necessary that there be an extinguishment of Indian title to such of

the lands as might be disposed of to settlers during the ten-year period. This was accomplished by the provisions which restored the lands to the public domain.

Were the provisions of the section above referred to the only ones contained in section twenty-one, we would have no difficulty in holding that Indian title to the excluded lands, undisposed of on February 10, 1900, passed to the United States on February 10, 1890. But, as respects the purchase of the lands by defendant, which were not sold on February 10, 1900, Section 21 provides: "That all lands herein opened for settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre * * and said lands shall thereafter be part of the public domain of the United States, to be disposed of under the homestead laws of the United States and the provisions of this act; * *." Here are special and separate provisions relating solely to the acquisition of the unsold lands by defendant. These provisions expressly require the Government to take, accept and pay for the unsold lands remaining on February 10, 1900, and there follows the provision that "said lands shall thereafter be part of the public domain of the United States." Obviously, this language must be given precedence over the general provisions of the first sentence of Section 21 and interpreted to intend that the Indian title to the lands acquired by the Government passed on February 11, 1900, and not on February 10, 1890.

Value of Excluded Lands

The value of the excluded lands is fixed by defendant's appraisers at 67 cents, and by plaintiffs' appraisers at upwards of $8.00 per acre as of February 10, 1900. It is obviously impossible to reconcile the figures of the two sets of valuers used by the respective parties.

The parties have not deemed it necessary to offer in evidence the mass of available evidence having an important bearing on the question of value of the Brule lands in controversy, so we have been compelled to extend our investigation beyond the meager evidence contained in the record before us.

In the former case (Def. Ex. 22, being Court of Claims C-531, 105 C. Cls. 725) there was presented a comprehensive report of the land disposals of the Great Sioux Reservation under the Act of March 2, 1889. Only part of this report (Pet. Ex. 1 and Def. Ex. 26) was offered here, but that report shows that of the 9,508,419 acres opened for settlement under the 1889 act (Vol. I, G.A.O. Report of April 12, 1932, pp. 405-8) only 1,044,727 acres of the Sioux lands had been entered between February 10, 1890 and February 10, 1900, and that figure included 135,826 acres of confirmed Indian allotments outside the reserved areas. And on February 10, 1900, there remained in the ceded area 7,261,592 acres of unappropriated land (Vol. I, G.A.O. Report, pp. 410-411) outside the excluded Brule lands, which could have been acquired by any settler at the nominal price of fifty cents per acre between 1895 and 1900. That report further shows at page 410 that between February 10, 1890 and February 9, 1893, 410,835 acres were entered at $1.25 per acre; during

the next two years, 238,564 acres were entered at $0.75 per acre, and during the last five years only 259,501 acres were entered at fifty cents per acre. So, deducting the confirmed Indian allotments, only about 900,000 acres of opened Sioux lands were appropriated by settlers. And, as the undisputed evidence shows, only 1851 acres of the excluded Brule lands were entered during the ten-year period.

The only logical conclusion that can be reached from this record is that the Brule lands had small market value on February 10, 1900, and that the values placed upon them by the plaintiffs' experts are fanciful. Moreover, it is hardly likely the Government would have opened this, as well as other ceded Indian land, for settlement without payment, as it did by the Act of May 17, 1900, 31 Stat. 179, had there been a demand therefor after 1895, even at the nominal price of fifty cents per acre.

On the record in this case and the evidence outside the record, which we have referred to above, we believe the Brule excluded lands did not exceed in value seventy-five cents per acre on February 11, 1900, or sixty-five cents per acre on February 10, 1890. We conclude, therefore, that the plaintiffs are entitled to an award for 25,968.24 acres of land at seventy-five cents per acre, or the sum of $19,476.18.

The plaintiffs contend that no part of the excluded lands were paid for by the Government, also in their brief they agree that there were erroneously added to the Lower Brule Reservation on the west side 3763.55 acres (being tracts 167 and 168 of Pltfs. Ex. 2 herein - Exhibit A in the former case), which need not be compensated for, that is, they

have deducted that acreage from the amount they are claiming compensation for.

As to payments which may be due from the Government, they will be determined when we consider offsets.

And as to the deducted acreage, 3763.55 acres, the defendant has not yet made claim therefor, except as a part of the 32,644 acres included in the triangular area (Def. Ex. 20) which we, in effect, denied in this case by our former decision. See also Court of Claims opinion, 125 C. Cls. 439, 443-4. There seems to be little doubt but that the tracts 167 and 168 are outside the western boundary of the Lower Brule Reservation as fixed by Section 5 of the March 2, 1889 act, and that such lands were erroneously included as part of the reserve; however, whether such included lands may properly be considered as an offset or counterclaim will have to await our determination of the offsets, next to be disposed of at a hearing thereon.

Louis J. O'Marr
Associate Commissioner

I concur:

Wm. M. Holt
Associate Commissioner