

BEFORE THE INDIAN CLAIMS COMMISSION

THE CROW TRIBE OF INDIANS,)	
)	
Petitioner,)	
)	
v.)	Docket No. 54
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: February 12, 1958

ADDITIONAL FINDINGS OF FACT

EXPLANATORY STATEMENT

By stipulation filed by the parties and approved by the Commission on March 13, 1953, the parties agreed that the initial hearing before the Commission would be limited to the issues presented by defendant's three legal defenses, i.e., (1) that the Treaty of Fort Laramie being but a treaty of amity, the petitioner, Crow Tribe, acquired no compensable estate in the lands therein described, (2) that the issues alleged in the petition are res adjudicata by virtue of the prior decision rendered by the Court of Claims in Crow Nation v. United States, 81 C. Cls. 238, and (3) that the Commission has no jurisdiction by virtue of Section 4 of the Act approved July 3, 1926, 44 Stat. 807.

A hearing was held limited to a determination of the issues raised by these legal defenses, evidence introduced, and the issues briefed. After a study of the record produced and the legal arguments of the parties the Commission made findings of fact and rendered an opinion on

the issues raised (3 Ind. Cl. Comm. 147) and concluded that the prior decision was not res adjudicata, that the bar of the provisions of Section 4 of the 1926 Act did not apply, and that the United States by the Treaty of Fort Laramie had recognized Indian title in petitioner to the lands later ceded to the United States by the Treaty of May 7, 1868 (15 Stat. 649). Thereafter, the Commission by Order of October 12, 1955, ordered a further hearing to determine all issues not previously disposed of, including the question of the consideration paid for the cession of May 7, 1868, and the value of the land as of said date, but not including the questions of offsets, if any.

Hearings having been held on the issues so defined in the Order of October 12, 1955, the Commission makes the following findings of fact which are supplemental to the findings numbered 1 to 12, inclusive, heretofore made herein:

13. The territory which the Crow Tribe ceded by the Treaty of May 7, 1868, II Kapp. 1008, 15 Stat. 649, comprised 30,530,764.8 acres, located in the present states of Montana and Wyoming. The consideration paid for said cession to the Crow Tribe by the United States amounts to \$1,644,585.49. (This amount was agreed to by both parties in their briefs.)

14. As of May 7, 1868, the area ceded by the Crows had not been opened to non-Indian settlement and was still in a relatively underdeveloped state. The character of the region was fairly well known since it had been long used by trappers and traders, explored by prospectors, and examined by official and unofficial expeditions seeking roads or trails through the area. The belief that the mineral resources, especially

gold, of the area might prove of great value resulted in demands that Indian title to the area be extinguished. The adaptability of parts of the area to grazing use was at that time recognized as was the suitability of some of the valley lands, such as those on the Yellowstone and Wind Rivers, for irrigated agricultural use.

15. (a) Although at the time of the cession in 1868 the area had not been opened to non-Indian settlement, there were a small number of miners and a few settlers within the lands, such as at Miner's Delight, a mining town near South Pass, Wyoming, in a small mining area both within and just outside of the ceded area and others adjoining the ceded area in the north at the copper lode at Copperopolis in Montana Territory. South of the ceded area in Wyoming permanent settlement of any size at all was just beginning with the advent in 1868 of the Union Pacific Railroad into Wyoming Territory. Prior to this era the only settlers had been the operators of the ranch stations who supplied the wagon trains on the transcontinental routes. Settlement in Wyoming Territory was confined to along the route of the Union Pacific as of this period for the most part and the Federal Census gave the total population as 9118 in the year 1870, and 20,595 for Montana Territory. The late 1860's also saw the beginning of the "open range" operations in Wyoming with the arrival of the Texas trail herds into the southeastern part of the territory and this "open range" system where the cattlemen made free use of the public domain was to continue through the 1880's not only in the southern part of this territory but later on the lands of the ceded area when there was an end to Indian trouble.

(b) With the discovery of gold in northern and western Montana in 1862 and 1864 settlement began in the valleys of the lands adjoining the western boundary of Crow Territory. Agriculture and ranch type stock raising developed in these valleys, such as in Gallatin Valley. As the mining boom diminished the miners either became settlers, joining those who had been supplying them, and engaged in farming or stock raising or they left the area to prospect for gold in other regions such as the Crow Territory. The cattle industry in western Montana was expanding eastward at the time of the cession and these ranch men looked with favor on the grazing lands in the northern part of the Crow Territory to their east, as did the mining and other business people who sought improved transportation to the mining regions.

16. The westward tide of immigration during the 1860's, the prospecting for and discovery of gold and other minerals on or near the lands set apart for the Indian tribes by the Treaty of Fort Laramie, September 17, 1851, 11 Stat. 749, and the construction of wagon roads across Indian country such as the Bozeman and Bridger trails through Crow Territory in 1864 and 1865 to the Montana mining communities were among the events which culminated in the so-called Sioux War of 1866-1867, and hostilities continuing to about 1877, made travel of any kind across the Crow Territory exceedingly dangerous. As of the date of the cession, Indian hostilities would have deterred any large scale settlement of the ceded area which, although Crow territory, was the hunting ground of the Sioux and other tribes over which the buffalo roamed in large herds. The ceded area was also virtually surrounded by lands held by Indians either as reservations or as hunting grounds.

17. (a) The territory ceded by the Crow Tribe on May 7, 1868, was varied in topography and resources. The eastern portion of the ceded area, extending in excess of 10,000,000 acres, consisted of prairie grasslands. In the Montana portion of the ceded area, these prairies extended westward to approximately the 109th meridian, where the topographical pattern merges into the foothills of the Crazy Mountains. The western extent of the prairie lands in Wyoming was marked by the foothills from the eastern slope of the Big Horn Mountains. West of the Big Horn Mountains was the Big Horn Basin, and to the south of this basin, separated from it by the Owl Creek Mountains, was the Wind River Basin. The floors of these large, intermountain basins were characterized by wide expanses of rolling plains, cut by eroded valleys and stream courses. The western boundary of the ceded area in Wyoming was formed by the Rocky Mountain front ranges, including the Absarokas, the Shoshones and the Wind River ranges. The western boundary of the ceded area in Montana was defined by the Yellowstone River and a line extending northward from the great bend of the Yellowstone to the headwaters of the Musselshell.

(b) The mountain ranges included within this area were steep and rugged rising to elevations from 11,000 to 13,000 feet.

(c) The principal water courses arising upon or flowing through the ceded area were the Tongue and Powder rivers, draining the eastern slopes of the Big Horn Mountains, the Big Horn River, the largest tributary of the Yellowstone, draining the Wind River and Big Horn Basins, the Clark Fork of the Yellowstone, arising east of Yellowstone National Park, the

Yellowstone River, forming one of the most fertile and productive valleys in the entire Missouri Basin drainage, and the Shields River draining a small basin in the northwestern portion of the ceded area.

(d) The soils of the eastern prairies, the foothills, and the alluvial flood plains along the main water courses were rich and fertile. Portions of the soils in the intermountain basins were deficient in organic fertility.

18. The climate of the ceded area was also diversified. The prairie lands received typically from 14 to 15 inches of precipitation, about $3/4$ of which fell during the growing season. The Big Horn and Wind River Basins were comparatively arid, with a considerable part of the basins receiving about 10 inches or less annual precipitation. The aridity of these basins limited natural forage production but was favorable for irrigated agriculture. Some of the mountains received precipitation up to 30 inches per year in the higher elevations, mostly in the form of snowfall during the winter and early spring, which could supply irrigation water to the lower basin and prairie lands.

The climate, though characteristically northern and rigorous, was favorable for most agricultural crops. Temperature ranges were considerable in some locations, but in large sheltered areas in the prairies and intermountain basins temperature ranges were comparable to those for northern Illinois and northern Iowa. Wind velocities and evaporation rates were moderate for western climates. The area was climatically well suited for stock ranching, with as long a grazing season as any area in the northwest.

19. The natural forage cover of the ceded area which was estimated, admittedly somewhat arbitrarily, fell into four principal rangeland types, with miscellaneous additional types of lesser extent and importance.

(a) The largest natural rangeland type was prairie grassland, comprising about 10,400,000 acres. This type, characterized by a highly productive combination of short and mid-grasses, provided an excellent seasonal balance for year around grazing. It was one of the best grazing areas in the west, having a capacity of 2.5 acres per animal unit month or 30 acres per cow year long.

(b) The next largest rangeland type was sagebrush grassland, comprising approximately 9,100,000 acres. This type occurred to the south and west of the Big Horn Mountains, along the west side of the Big Horn Basin in Wyoming, and in eastern Montana to the north of the Yellowstone River. The grasses associated with the sagebrush in this range type made it also a productive and good rangeland type, having an average grazing capacity of approximately 3.5 acres per animal unit month.

(c) There were approximately 4,100,000 acres of desert shrub rangeland within the ceded area, occurring mainly in the Big Horn and Wind River Basins. While shrubs and grasses suitable for grazing occurred in this type, its average grazing capacity was only about 7 acres per animal unit month.

(d) The fourth principal natural range type was made up of foothill grasslands, comprising approximately 1,600,000 acres in the ceded area. This type occurred eastward from the escarpment of the Crazy

Mountains, along the east side of the Big Horn Range, and locally along the west side of the Big Horn Basin. The type was characterized by highly productive bunch grasses with an average grazing capacity of 2 acres per animal unit month.

(e) The remaining portions of the ceded area, forming several miscellaneous natural rangeland types, were largely in the mountainous areas now included within national forests. Most of these lands were characterized by some type of timber growth, with ponderosa pine, lodgepole pine, spruce and fir predominating. Most of these areas also had a usable understory of forage, with grazing capacity varying from 2.5 acres per animal unit month to 12 acres per animal unit month.

20. By virtue of its location, topography and soils, climate, water distribution, vegetative cover, and other natural resources, the area ceded by the Crow Tribe by the Treaty of May 7, 1868, was adaptable to several economic uses, including irrigated crop farming, livestock grazing, lumber production, and mineral development.

21. As of May 7, 1868, and within the foreseeable future thereafter, the principal economic use for the most of the ceded area would have been for livestock grazing. The foothill grasslands, prairie grasslands, sagebrush grasslands, and desert shrub rangelands were substantially all adaptable to this economic use. In addition, large portions of the mountain lands now included within national forests were useful for grazing purposes.

22. The timbered areas of the lands ceded by the Crows in 1868 were generally associated with the more mountainous regions, aggregating

approximately 4,700,883 acres. These are largely the lands presently included within the national forests and the timbered area of the Shoshone Indian Reservation. Not all of these forested areas sustain commercial stands of timber. The timbered areas supported approximately 3,624,000,000 board feet of timber as of 1868. Lodgepole pine was the predominant type with Engleman spruce, Douglas fir, and ponderosa pine, occurring in substantial, but lesser quantities.

23. As of May 7, 1868, any increment to the value of the ceded area because of the known or suspected existence of mineral resources, such as gold, copper and coal deposits, and because of timber upon a part of the lands would have been speculative and nominal.

24. Sales of Small Tracts. Petitioner's proof showed 35 individual sales of 160-acre pre-emption claims during the period 1865 to 1873, in 3 counties of western Montana adjoining the Crow ceded area to the northwest; 10 early sales involving 160 acres near the ceded area on the northeast and southeast between 1872 and 1885; and 23 early sales of 160-acre claims and homestead entries within the Crow ceded area between 1875 and 1885. The small sales both within and outside of the ceded area were for the most part select locations in river valleys and sold for an average of about \$2.40 to \$2.50 per acre.

25. Railroad Sales - (a) The Northern Pacific and Union Pacific Railroads were given substantial land grants by the United States in aid of constructing their transcontinental lines. These land grants encompassed alternate sections extending for a prescribed distance on both sides of the railroad's right-of-way. In Montana the Northern

Pacific Railroad received approximately nineteen million acres of land grants while the Union Pacific received 4,600,000 acres of granted land in Wyoming. The railroads sold these lands to obtain capital to pay for the construction of their lines or to pay off indebtedness incurred during the construction of their lines. The railroads carried on vigorous sales programs, offering the land on attractive terms.

(b) The Union Pacific Railroad entered Wyoming from the east in 1867, and by 1868, had been completed to Cheyenne, some 175 miles south-east of the Crow ceded lands. In 1869 the western and eastern branches of this transcontinental line were joined at Promontory Point in Utah.

The Northern Pacific was the first railroad actually to enter the Crow ceded lands. Explorations for this northern transcontinental route had begun with Governor Stevens' expedition in 1853. Following his favorable report, the Northern Pacific Railroad was chartered and received its land grant in 1864. The route ultimately followed through the Crow territory along the Yellowstone was under active consideration prior to May 7, 1868. As of 1868, expectations in Montana were optimistic, and the extension of the Northern Pacific into Montana had been promised to precede the Union Pacific into Utah. In fact, the construction of the railroad was terminated at Bismarck, North Dakota in 1873, where progress was greatly delayed by the financial panic of 1873. As a result, the Northern Pacific did not reach the eastern Montana border until the summer of 1881. The rails had crossed the Crow area by December 1882, and on September 8, 1883 the eastern section of the railroad joined the western section in western Montana to form the transcontinental connection.

(c) From 1882, when the Northern Pacific Railway began selling lands in Montana, until 1899, the railroad made some 2,888 sales in the state of Montana involving a total of 1,992,675.13 acres, for a total consideration of \$4,222,134.42, or approximately \$2.12 per acre. Substantial portions of this total were within the Crow ceded area. Other substantial portions would have been near or adjoining the ceded area to the east and the west. Since these were the earliest sales of the Northern Pacific's land grants in Montana, they probably were made up of the choicest selections.

26. The Union Pacific Railroad, according to one source, in 1884 sold 555,890 acres of its land grant in Albany and Carbon Counties, Wyoming, to the Swan Land and Cattle Company for a reported price of \$460,990, or an average of \$.83 per acre. Other sources place the acreage at 549,423 acres. The contracts of sale are not in evidence but two of them appear in the record in Docket No. 63. One contract (Dkt. 63 - Def. Ex. 145) entered into by the Swan Company and the railroad on September 29, 1884, called for the sale of 286,473.08 acres of land in Carbon County for the sum of \$143,236.54, or at the rate of \$.50 per acre. This sales contract called for payment in ten instalments with interest. The contract was cancelled on July 29, 1899, (Dkt. 63 - Def. Ex. 146). A second contract entered into on September 29, 1884, between the Swan Cattle Company and the Union Pacific (Dkt. 63 - Def. Ex. 144) called for the sale of 179,305.48 acres of land in Albany County, for a consideration of \$89,652.74, or at the rate of \$.50 per acre, payable with interest in ten annual instalments. These two sales totaled 465,778.56 acres of land sold to the Swan Company by the Union Pacific.

27. (a) The Northern Pacific sales included seven separate transactions made with Mr. David Auchard between 1891 and 1897 involving an aggregate of 56,356 acres for a total purchase price of \$65,256.00, or an average of \$1.16 per acre. Only one of these sales involved a large tract of land, being the sale of 48,713.21 acres for \$51,500.00 or an average of about \$1.05 per acre. The sales were in the foothill grasslands of western Montana, some 45 miles north of Helena. According to petitioner's appraiser, Mr. Saunderson, the lands were comparable to, though not as valuable as, the foothill grasslands of the area ceded by the Crow Tribe in 1868.

(b) Another large sale by the Northern Pacific in western Montana involved 150,432 acres sold to the Big Blackfoot Milling Company at a price of \$316,975.02, or about \$2.10 per acre. The agreement was negotiated in the 1890's and consummated in 1901. These lands were located approximately 175 miles west of the western border of the Crow ceded lands in the Missoula and Flathead River drainages, and near the line of the railroad. The timber areas, according to petitioner's appraiser, were substantially better than the timbered portions of the Crow ceded area, but the range resources were not as good as the rangelands in the Crow timbered areas.

28. (a) Seven sales were made by the Northern Pacific Railroad to the Musselshell Cattle Company from 1886 to 1898. These sales covered a total of 23,024 acres for an aggregate consideration of \$33,269.11, or an average of \$1.45 per acre. These lands were located within the Crow ceded area, north of the Yellowstone River. According to petitioner's appraiser these

lands were prairie grasslands slightly better than the average of the prairie grasslands in the ceded area as a whole.

(b) Ten sales within the same general area were made by the Northern Pacific to the Montana Cattle Company in 1895, 1896 and 1899, covering a total of 58,102 acres for \$1.00 per acre. They were prairie grasslands lying within the ceded area, but slightly better than the average of the prairie grasslands of the ceded area taken as a whole according to petitioner's appraiser.

(c) There were several smaller sales by the Northern Pacific of foothill grasslands actually within the area ceded by the Crow Tribe. Three of these were made to the Smith Brothers Sheep Company in 1897, involving an aggregate of 14,992 acres for a total consideration of \$16,267.00, or about \$1.22 per acre. These lands were located south of the Musselshell River near the present town of Martinsdale. One additional sale involved 9,277.68 acres of foothill grasslands within the Crow ceded area which was made to Widdecomb in 1899, for the sum of \$11,597.10, or about \$1.25 per acre. All of these, according to petitioner's appraiser, were foothill grasslands within the ceded area, and typical of the foothill grasslands of the ceded area as a whole.

29. The Crow ceded area consisting of 30,530,764.8 acres had a fair market value of \$12,212,305.00 as of May 7, 1868, or at the rate of 40 cents per acre. The consideration of \$1,644,585.49 paid to the Crow Tribe under the provisions of the Treaty of May 7, 1868, for the cession of lands having a value of \$12,212,305.00 was grossly inadequate and

unconscionable. The Crow Tribe is chargeable with the sum of \$1,644,585.49, the consideration received, leaving a balance payable to petitioner of \$10,567,720, from which will be deducted the offsets, if any, to be hereinafter determined in accordance with the Rules of the Commission.

Louis J. O'Marr
Associate Commissioner

Wm. M. Holt
Associate Commissioner