

BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE OF INDIANS, ET AL.,)	Docket No. 74
)	
THREE AFFILIATED TRIBES OF THE)	Docket Nos. 350-B and
FORT BERTHOLD RESERVATION,)	350-C
)	
THE YANKTON SIOUX TRIBE OF INDIANS,)	Docket No. 332-A
)	
THE CHIPPEWA CREE TRIBE OF INDIANS,)	Docket No. 221-A
)	
Plaintiffs,)	
)	
v.)	
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: August 27, 1965

Appearances:

William Howard Payne, on behalf of the
Cheyenne River Sioux of South Dakota
and Fort Peck Sioux of Montana (Dkt. No. 74)

John White, on behalf of the Rosebud, Standing
Rock, Crow Creek, Lower Brule, and Santee
Sioux Tribes (Dkt. No. 74)

Arthur Lazarus, Jr., on behalf of the
Pine Ridge Sioux Tribe (Dkt. No. 74)

Jonathan C. Eaton, on behalf of the Three
Affiliated Tribes of the Fort Berthold
Reservation (Dkt. Nos. 350-B and 350-C)

Jerry C. Strauss, on behalf of the Yankton
Sioux Tribe of Indians (Dkt. No. 332-A)

Louis L. Rochmes, on behalf of the Chippewa
Cree Tribe of Indians (Dkt. No. 221-A)

Attorneys for Plaintiffs

M. H. Cooperman, with whom was associated
Mr. Assistant Attorney General Edwin L. Weisl, Jr.

Attorneys for Defendant

OPINION OF THE COMMISSION

PER CURIAM:

This matter comes before the Commission upon a motion filed by petitioners in Docket No. 74 requesting a preliminary determination of certain questions for the purpose of expediting the handling of the case. Answers were filed and the matter was argued before the Commission and there was agreement by defendant as well as the other interested parties that such preliminary determination be made.

There was no hearing directed specifically to the matters to be determined and consequently no specific evidence or proposed findings upon those matters were presented by the parties. The determination of the questions will be based upon evidence of record in the principal case.

The matter of the recognition of title in the Sioux Tribe by the Fort Laramie Treaty is not a difficult problem since it has been answered by this Commission and the Court of Claims with regard to other Indians who were parties to the Fort Laramie Treaty, although not with regard to the Sioux Tribe who were also parties to that Treaty.

In the initial hearing before this Commission in The Crow Tribe of Indians v. The United States, Docket No. 54, 3 Ind. Cl. Comm. 147, it was determined after a review of the evidence and prior decisions of the Court of Claims and Supreme Court that the Treaty of Fort Laramie was a treaty of recognition. That holding was limited, of course, to the Crow Tribe, which was the party in interest in that case. This was affirmed by the Court of Claims in 151 C. Cls. 281.

The evidence and prior decisions of the Court of Claims and the Supreme Court upon which the Crow case, supra, was based would be the same evidence and decisions upon which a determination with regard to recognition of Sioux title would be based. For this reason it seems unnecessary to go into the matter a second time and the Commission is of the opinion and so holds that the Fort Laramie Treaty constituted a recognition of title to the area described therein in the "Sioux or Dahcotah Nation" as that name was used in the treaty. The Commission expresses no opinion at this time as to what bands or groups constituted the "Sioux or Dahcotah Nation" which was the party to the Treaty of Fort Laramie and whose title was recognized. Such determination will be left to a future decision.

The problem of the western boundary of the area so recognized presents a much more complicated situation. The evidence upon which to base a decision as to the proper location of that portion of the western boundary which is under dispute is not extensive. It consists of reports and maps of the country in question by three or four of the earlier explorers, the instructions to the men who negotiated the treaty, reports of government officials, and the unofficial report of the Secretary to the Treaty Commissioners as printed in his newspaper.

Petitioners contend that the Fort Laramie Treaty description of the Sioux western boundary was intended to follow the Crow Tribe's line along the Powder River. On the other hand, defendant argues that the term "Black Hills" as found in the treaty description of the Sioux western line referred to the present-day Black Hills of South Dakota, or alternatively

to the drainage divide between the streams flowing east into the Missouri River and those flowing north into the Missouri.

The purpose of the Fort Laramie Treaty with regard to boundaries is very clear from the instructions issued prior to the council. It is evident from the statements of Commissioner Mitchell to the council that an effort would be made to adequately define the bounds of the participating tribes. It is also evident from the report of A. B. Chambers, Secretary to the Commission, that the Indians themselves agreed upon the respective boundaries after spending the day of September 12, 1851 in considering them. From the same source it is reported that the Treaty Commission had the benefit of the assistance of Father De Smet and James Bridger, both of whom were thoroughly familiar with the country involved. In addition to these two men there were a number of interpreters, trappers, and traders, some of whom had been in the country for 30 years, as well as the more intelligent Indians of each tribe who should have been entirely familiar with their own country and probably with that of neighboring tribes.

In his unofficial reports Chambers mentions only one disagreement. This concerned the line between the Sioux and the Cheyenne and Arrapahoe on the south along the North Platte River and also the right of the Sioux to hunt as far west as the Sweetwater River. This apparently was settled when Commissioner Mitchell convinced the Sioux that the boundary would not prohibit their hunting in their usual areas so long as they remained at peace.

On September 17, 1851, the treaty was signed. Among the descriptions of the various tribal areas it will be noted that there are several contiguous lines. Based upon the descriptions as given in the treaty there are two of these contiguous lines which affect the Sioux area. One of these is the southeasterly border of the Gros Ventre, Mandan, and Arrickara and the other is the northern border of the Cheyenne and Arrapahoe which runs along the North Platte River. In both of these cases the treaty descriptions clearly indicate a common boundary.

The common line between the Sioux and Cheyenne and Arrapahoe as called for in the description was a large portion of the North Platte River up to the "Red Bute."

The common calls between the Sioux and the Gros Ventre, Mandan and Arrickara were "thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning."

There is no common call between the Sioux and Crow. These two descriptions are as follows:

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills to the headwaters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning. (emphasis supplied)

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to

the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head-waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth. (emphasis supplied)

It will be noted that the only calls which appear to be similar are actually going in different directions. The call in the Sioux description which starts at "Red Bute" refers to the "range of mountains known as the Black Hills" and continues from the "Red Bute," "to the head-waters of Heart River." The headwaters of Heart River lie in a northeasterly direction from "Red Bute."

The call in the Crow description which leaves from the source of Powder River reads "thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River." Not only is there a difference in the language which refers to the "main range of the Black Hills and Wind River Mountain," instead of the "range of mountains known as the Black Hills," but the Crow call is in a westerly and northwesterly direction to the headwaters of the Yellowstone River. In addition the calls do not have a common starting point since the Crow call leaves from the source of Powder River while the Sioux call leaves from the "Red Bute."

The reports and maps of Fremont, De Smet, Sage, and Chittenden clearly indicate that the term "Black Hills" was applied to a number of mountains and ranges to the west of the Black Hills of South Dakota and Wyoming as we know them today. This fact alone though is not of too much assistance in determining the location on the ground of the line described by the Treaty Commissioners as the Sioux western boundary.

The map drawn by Father De Smet and presented to Commissioner Mitchell is not too clear either. Judging from the location and number of streams shown on the map it looks as though De Smet placed the common Crow-Sioux boundary along the drainage divide east of Powder River rather than on the Powder River as called for by the Crow description in the treaty. While the Crow-Sioux line drawn by De Smet follows the line of what he has labeled "Black Hills", it appears to be far enough east to pass through the present-day Black Hills of South Dakota. This, too, is somewhat confusing because his map seems to be inaccurate to approximately one degree of longitude, which at that latitude is some forty-five to fifty miles.

The Fremont map is excellent for what it shows but it does not contribute greatly to the solution of the problem of the location of the disputed line. It does help establish that the term "Black Hills" had a much broader application at the time of the treaty and that the Sioux apparently ranged over near the Sweetwater River.

The fact that the Sioux ranged that far is not too helpful because they also ranged south of the North Platte River and yet their Fort Laramie southern boundary was the North Platte. The Fort Laramie Treaty boundaries were not set with the intention of confining the Indians within them and consequently the range of the Indians proves little about the proper location of the boundary lines.

As stated in the treaty the tribes did not "abandon or prejudice any rights or claims they may have to other lands; and further, that

they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described."

The Sage map supposedly drew upon the Fremont map for much of its material. The Sage map appears to be in more nearly correct relation to longitude and latitude than the De Smet map. This is true at least with regard to the location of what is now known as the Black Hills of South Dakota. Although the Heart River is not labeled on the Sage map there is shown a river whose relationship with the Little Missouri River on the Sage map and on present-day maps would seem to indicate that it was intended to be the Heart River. Its headwaters are shown on the Sage map as being close to the north end of the mountains labeled "Black Hills." This would tend to confirm the logic of the description of Sioux territory when it called for following the "Black Hills" to the headwaters of Heart River. Also the location of the "Black Hills" on the map as drawn by Sage shows the reasonableness of the call from "Red Bute", thence along the range of mountains known as the Black Hills.

The inherent difficulty involved in attempting to establish the Sioux western boundary between "Red Bute" and the headwaters of Heart River is underscored by the treatment given the problem by Royce in his compilation of land cessions. On pages 786 and 787 of the Eighteenth Annual Report of the Bureau of American Ethnology, Royce has listed the Fort Laramie Treaty. Under the heading "Historical data and remarks" he inserted the following statement: "The tract herein described included only a portion of what was subsequently recognized as Sioux territory."

Under the heading "Designation of cession on map" there are no numbers showing subsequent cessions by the Sioux. There are numbers of subsequent cessions for the other Fort Laramie Treaty tribes. Since the Fort Laramie Treaty was not a treaty of cession the cession numbers of other tribal areas necessarily referred to subsequent treaties.

The fact that the Fort Laramie Treaty was not a treaty of cession brings forth another facet of the problem. The petitioners' composite map, Exhibit No. 522, is a map of cessions as shown by Royce in his B.A.E. report. These cessions have no direct relationship to the titles recognized in the various tribes under the Fort Laramie Treaty. Royce acknowledged this fact when he stated that the tract described in the Fort Laramie Treaty as being Sioux territory was only a portion of the area subsequently recognized as belonging to the Sioux. It is true that certain of the areas described in the Fort Laramie Treaty as belonging to participating tribes were later ceded under those same descriptions. For instance, the Crow Tribe cession of May 7, 1868 (15 Stat. 649) is described by Royce on page 848 of the B.A.E. report as being the same description as that of the Fort Laramie Treaty. Royce shows this cession as No. 517, Montana 1, Wyoming 1, less the reserve which was retained by the Crow.

The Sioux treaty of April 29, 1868 (15 Stat. 635) set up the Great Sioux Reservation and relinquished all rights to lands outside that reservation and made certain other agreements which will be discussed hereafter. Royce, on page 849 of the B.A.E. report, states the following:

"This cession comprises that portion of the Sioux territory assigned them by Fort Laramie treaty of 1851 within the present limits of South Dakota not included in the reservation described in the second article of this treaty of Apr. 29, 1868." This is designated as Cession 516, Dakota 1.

Then, with reference to the provision of the 1868 treaty which said that the country north of the North Platte River and east of the summit of the Big Horn Mountains should be considered unceded Indian territory, Royce indicates that "a portion of this tract was ceded by agreement with the Sioux of June 23, 1875, and the remainder by agreement of Sept. 26, 1876." He then lists Cessions 584, 597, Nebraska 1, Dakota 1, Wyoming 1, Montana 1.

The June 23, 1875 Agreement affected land in Nebraska which is Cession 584 and not important for the purpose of this problem.

The Agreement of September 26, 1876 is the one which ceded the remainder of the country described in Article 16 of the Treaty of April 29, 1868, and is the cession listed by Royce as 597, Dakota 1, Nebraska 1, Wyoming 1, Montana 1.

Article 16 of the 1868 Treaty reads as follows:

The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux Nation, the military posts now established in the territory in this article named shall be abandoned, and

that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

Article 1 of the Act of February 28, 1877 (19 Stat. 254), which is the Act affirming the Agreement of September 26, 1876, provides among other matters, "* * * and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and Article 16 of said treaty (the 1868 treaty) is hereby abrogated."

It is obvious that the Act of February 28, 1877 had reference to the unceded Indian territory as created under the Treaty of April 29, 1868, and that this unceded Indian territory is a part of what was shown by Royce as extending to the Powder River in his Cession 597 listed under the 1877 Act. It does not indicate that the Sioux title was recognized as extending to the Powder River under the 1851 Fort Laramie Treaty.

This seems to be clearly indicated by the instructions issued the Commission appointed to begin the negotiations of 1875 which culminated in the Act of 1877. These instructions were quoted in the Sioux case decided by the Court of Claims on jurisdictional grounds in 1942 and which was based upon these same treaties and agreements of 1851, 1868 and 1877. (See 97 C. Cls. 613, 636) The following are paragraphs from those instructions as issued by the Commissioner of Indian Affairs:

* * *

By reference to the treaty of 1868, made with these Indians, sections 2 and 16, copy of which is herewith inclosed, you will be informed as to the nature and extent of the respective claims of the Sioux to these tracts of country. That portion of the Black Hills country which

lies within the boundaries of Dakota is, without dispute, a part of their permanent reservation. The country mentioned in Wyoming, as described in the sixteenth section of the treaty, above referred to, is a portion of "unceded territory." To this the Indians have no claim except for hunting purposes and the exclusion of other people.

By reference to a map of this country, inclosed herewith, you will observe that the cession of the Black Hills, and the relinquishment of the Big Horn country leaves a considerable tract between these two cessions still within the claim of the Indians, as defined in the sixth (sixteenth) section. This region, especially along the Powder River, is known as the Sioux hunting ground for buffalo, and is intended still to be preserved to them for that purpose, a passage to it being left open on the north of the North Fork of the Cheyenne, as well as on the south of the South Fork.

* * *

By quoting the above paragraphs the Commission does not intend to express an opinion as to either subsequent recognition of Sioux title or exclusive use and occupancy of an area by the Sioux. The paragraphs are quoted for the purpose of showing that it was the understanding of the Commissioner of Indian Affairs that the treaty being dealt with was that of 1868 and not the 1851 Fort Laramie Treaty from which it is contended recognition of Sioux title up to the Powder River arose.

In the light of the description of Sioux territory, as written at the Fort Laramie Treaty Council, the maps of the territory, particularly the De Smet map; the subsequent history of agreements and cessions by the Sioux Indians, and the questionable treatment of the Sioux areas by Royce in the Report of the Bureau of American Ethnology, it seems

abundantly clear that the boundary of the Sioux territory did not extend to Powder River under the Fort Laramie Treaty description and that there was left between the Sioux and Crow tribes an area of land to which title was not recognized in either tribe. Parenthetically, while Royce is the undoubted authority on his subject, he is nevertheless subject to rebuttal and his unsubstantiated opinion as to matters of recognition cannot be given any weight as evidence by the Commission.

While it may be considered speculation there nevertheless appears to be a basis for the separation of the Sioux and Crow tribes in the speech of Black Hawk, one of the Sioux at the treaty council. That speech indicates quite clearly that warfare between these two tribes and their allies was common. It will be remembered that suppression of warfare was one of the basic reasons for the Fort Laramie Treaty. Under these circumstances it would be reasonable to separate these two tribes.

Such a separation was made practical under the conditions of the treaty. It was made clear by Commissioner Mitchell that each tribe would be held responsible for depredations committed within the limits of its territory as assigned at the treaty council unless it could be shown that another tribe was guilty. This responsibility would have been more easily enforced with a buffer zone between the two major warring tribes. It was also made clear that the drawing of boundaries would not interrupt the peaceful use of such country as the tribes had been in the habit of doing theretofore.

That these conditions lent themselves to the drawing of boundaries which did not comport with a prior use is emphasized by the protest and final acceptance by Black Hawk of the North Platte River as the boundary between the Sioux and Cheyenne and Arrapahoe and also by the clear implication that there was an acceptance of a western line which fell short of the claimed Sioux hunting area along the Sweetwater River. As reported by Mr. Chambers, Commissioner Mitchell finally convinced Black Hawk that the fixing of boundaries did not limit them to that area so long as they remained peaceful.

The Commission then is convinced that it would be improper to distort the descriptions of the Fort Laramie Treaty boundaries by placing the Sioux western boundary at the Powder River on the basis that such description justified it. Had the Fort Laramie Treaty Commissioners wanted to draw a description that included a common boundary along the Powder River between the Sioux and the Crow they certainly would have had no difficulty in doing so. The people present at the Fort Laramie Treaty Council were probably more familiar with the country being described than any other group of people who could have been assembled. It is almost inconceivable that an error or lack of knowledge could have caused the discrepancy which resulted in non-contiguous boundary lines between the Sioux and Crow Indians.

On this basis the Commission obviously cannot agree with petitioners' contention that the Fort Laramie Treaty description of Sioux territory extended to the Powder River.

Defendant's contention that the line runs either through the Black Hills of South Dakota or along the drainage divide between the streams flowing east into the Missouri and those flowing north into the Missouri appears to be more tenable.

The drainage divide line seems logical in that it follows a reasonably straight northeasterly course and connects with and follows the Gros Ventre, Mandan, Arrikara line without too much variation in its course.

The maps of Sage and De Smet lend substance to the other line through the Black Hills of South Dakota as contended for by the defendant. Both of these maps show the "Black Hills" running easterly from near "Red Butte" and turning north to run along in the close vicinity of where modern maps place the Black Hills of South Dakota. This line would run in a northeasterly direction through the Black Hills of South Dakota and make a reasonable connection with the headwaters of Heart River.

The line drawn by De Smet would appear to be following this general pattern. However, as mentioned earlier, the joint Sioux-Crow line shown by De Smet on his map seems to place the Crow Tribe's lands farther east than called for by the Fort Laramie Treaty description.

After a careful review of the available evidence including a painstaking search of the maps it is the opinion of the Commission that the line running along the drainage divide is the most reasonable one under the evidence and, because of its position with regard to

the other lines on the southern and northern ends, seems to fit with more exactness than either the Powder River line or the line through the Black Hills of South Dakota. Either of these latter two lines creates a strained contour to the Sioux boundary and does not comport with the more or less uniform boundaries otherwise drawn by the Treaty Commissioners not only on the Sioux description but on the others as well.

The Commission is aware, as noted above, that the placement of the disputed segment of the Sioux western line along the drainage divide will leave a section of country between the Sioux on the east and the Crow Tribe on the west which was unrecognized territory under the Fort Laramie Treaty. However, the Commission cannot hold that the treaty created recognized title where the description as drawn by the parties does not cover the territory.

As stated in the Crow case, supra, at page 291, the purpose of the Fort Laramie Treaty was to establish the boundaries of the lands of the tribes and that these boundaries were recognized as much by the United States for purposes of determining the Indians' rights thereto as they were by the Indians for accepting responsibility therefor. This being so, then the Commission cannot go outside the confines of the boundary, as the evidence in our view establishes that boundary, and find that the treaty confers recognition on the basis that defendant may have meant to recognize such territory in the Sioux Nation. As stated before, had the Treaty Commissioners meant to extend the boundary to the Powder River they could easily

have done so, and since they didn't it is now impossible for this Commission to re-draw the description in order to accomplish that purpose.

As pointed out on page 284 of the Crow case, supra, the reason for showing recognition of title is for the purpose of establishing a compensable interest in the land without proving exclusive use and occupancy. The lack of recognition will, of course, not preclude the possibility of showing a compensable interest through exclusive use and occupancy of the unrecognized portion.

Although petitioners have based their claim to the lands west of the Missouri River on recognition of title under the Fort Laramie Treaty, the Commission will, upon proper request, hear evidence from petitioners and defendant with regard to exclusive use and occupancy by the Sioux Nation of the excluded area to the west of the drainage divide line as established herein.

The Commission reserves at this time its opinion on all other questions which are involved in future proceedings in this matter.

An order to the above effect will be entered.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner