BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX TRIBE, ET AL., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Docket No. 74

Decided: September 10, 1969

Appearances:

Marvin J. Sonosky, Attorney of record for the Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe and Santee Sioux Tribe.

Arthur Lazarus, Jr., Attorney of record for the Pine Ridge Sioux Tribe

William Howard Payne, Attorney of record for the Cheyenne River Sioux Tribe and the Sioux Tribe of the Fort Peck Reservation, Montana

Walter A. Rochow, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

On August 27, 1965, the Commission determined that plaintiffs had recognized title to the territory described as follows in the Fort Laramie Treaty of September 16, 1851:

> 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." (11 Stat. 749)

The Commission concluded:

> ...that the proper location of the Sioux western boundary between the "Red Bute" on the south and the headwaters of Heart River on the north follows the drainage divide between the rivers flowing east into the Missouri and those flowing north into the Missouri. At the point where such line joins the line of the Gros Ventre, Mandan and Arricara Indians along the 'range of mountains known as the Black Hills' it continues to follow said line to the headwaters of the Heart River forming a contiguous boundary with said Gros Ventre, Mandan and Arricara line to that point and from there continues as a contiguous boundary with said Gros Ventre, Mandan and Arricara line to the mouth of Heart River. The Sioux Tribe of Indians, et al., v. United States, 15 Ind. Cl. Comm. 577, 597 (1965)

This determination by the Commission of the Sioux western boundary created several million acres of undefined and unrecognized land in the middle of the territory covered by the Fort Laramie Treaty.

On December 10, 1968, plaintiffs filed a "Motion to Modify Paragraph No. 2 of Order Defining Boundary entered August 27, 1965, to strike or modify findings and to admit Exhibit in Evidence." Defendant filed a response to this motion January 24, 1969, and plaintiffs replied to this response January 29, 1969.

Plaintiffs' motion requested the Commission to modify Paragraph No. 2 of the order entered August 27, 1965, so as "...to conform the western boundary of Sioux country to the language, purpose and intent

of the treaty and to provide common boundaries between the Sioux and the countries of other tribes contiguous to the Sioux" and to make appropriate changes in the Findings of Fact entered August 27, 1965, consistent with this relief. Plaintiffs' motion also requested the admission in evidence of Sioux Exhibit No. 545, a copy of an excerpt from the Arizona Miner of April 30, 1875. The motion was made on the ground that the clause in the 1851 Fort Laramie treaty calling for a boundary to run "along the range of mountains known as the Black Hills" is ambiguous and that the Commission erred as a matter of law in construing this clause. Lower Sioux Indian in Minnesota v. United States, 163 C. Cls. 329 (1963) is given by plaintiffsas authority for this view.

Defendant contends that the Commission's determination of the western boundary was correct, that the treaty description is not ambiguous, and that to change the western boundary "would be an arbitrary failure by this Commission to abide by the treaty calls." No attempt was made by defendant to explain or distinguish the Lower Sioux case.

Under the circumstances we think the Fort Laramie Treaty language "...thence along the range of mountains known as the Black Hills, to the headwaters of Heart River" is ambiguous and,therefore, must be interpreted as part of the treaty as a whole to carry out the intent of the parties to the treaty as reflected in the treaty negotiations, the treaty itself, and the subsequent treaty history. We consider the principles set forth in the Lower Sioux case referred to above as being controlling. In that case the

Court of Claims reversed the Commission in finding that certain language in the boundary descriptions of the Prairie du Chien Treaty was ambiguous. The Court then considered the treaty history and subsequent events in construing the boundary language so as to carry out the purposes of the treaty.

There are two basic reasons why we consider the above clause to be reasonably subject to more than one interpretation. First, there were several places in the general area of the Fort Laramie Treaty boundaries known at that time as the "Black Hills". In our previous decision in this case the Commission made the following comment on this very point.

> 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. The Sioux Tribe of Indians, et al v. United States, 15 Ind. Cl. Comm. 577, 604 (1965)

Plaintiffs' proposed Exhibit No. 545, an 1875 report by General Sheridan, says that

> The Black Hills country is much more extensive than that particular locality brought to the notice of the public by the recent exploration of Gen. Custer, and gets its name from the black scrubby character of the timber which grows on the sides and tops of the mountains and hills.
>
> It comprises the whole country bounded on the east by longitude 103 degrees, on the south by the Sweetwater and Laramie rivers, on the west by the Big Horn and Wind rivers, and on the north by the Yellowstone river. This is really the country of the Black Hills; for instance, Black Hills of Laramie, Black Hills of Powder river, Black Hills of Cheyenne river . . .

Thus it is apparent that the term "Black Hills" as it appears in the Fort Laramie Treaty raises a possible ambiguity on its face.

Secondly, a map (plaintiffs' Exhibit No. 514) prepared by Father De Smet, who gave expert assistance in negotiating the Fort Laramie Treaty, shows a complete boundary around the several areas of the respective tribes as well as the division lines between those tribes. These division lines are contiguous and the respective tribal areas completely fill the outside perimeter of the lands described in the Fort Laramie Treaty. In comparing this map with the treaty descriptions, it is apparent that the boundary lines on the map of the territories of the Mandan, Gros Ventre, and Arikara and the Crow which are common to the Sioux western boundary line do not follow the boundary descriptions as given in the Treaty but are a considerable distance to the east. This fact was also pointed out in the Commission's previous decision. Ibid, 15 Ind. Cl. Comm. 577, 588 (1965).

These facts strongly suggest that the description of the western boundary of the Sioux, to wit, "... thence along the range of mountains known as the Black Hills, to the headwaters of Heart River . . ." as it appears in the Fort Laramie Treaty, "... is not clear and unambiguous" and "In this posture, we believe it necessary to first review the history and purpose of the ...Treaty in an effort to determine the intent thereof." Lower Sioux Indian in Minnesota v. United States, 163 C. Cls. 329, 333 (1963).

The purpose and intent of the Fort Laramie Treaty becomes clear upon an examination of its background history. This history has been thoroughly examined both by this Commission and the Court of Claims so

the essential facts are not in dispute. Crow Tribe v. United States, 151 C. Cls. 281, 287-291 (1960), cert. denied 366 U. S. 924; see Crow Nation v. United States, 81 C. Cls. 238, 242-248 (1935); Assiniboine Indian Tribe v. United States, 77 C. Cls. 347, 370-371 (1933), cert. denied 292 U. S. 606; Fort Berthold Indians v. United States, 71 C. Cls. 308, 330-333 (1930); Cheyenne and Arapahoe Tribes v. United States, 10 Ind. Cl. Comm. 1, (1961). The essential purpose was to clearly establish the boundaries of the respective tribes so as to promote peace among these tribes, to protect the white immigrants passing through the territory and to help establish responsibility for any depredations that might be committed in a particular area. This is illustrated by the statements of Mr. D. D. Mitchell, who at this time was Superintendent of Indian Affairs.

In his annual report to the Commissioner of Indian Affairs written from St. Louis on October 13, 1849, Superintendent Mitchell wrote the following:

> ...Again, the boundaries dividing the different tribes have never been settled or defined; that is the fruitful source of many of their bloody strifes, and can only be removed by mutual concessions, sanctioned by the government of the United States. The boundaries being once established and clearly understood, each tribe could be held responsible for any depredations that might be committed within their respective territories. (Emphasis Supplied)

Two years later on September 8, 1851, the first day of the Fort Laramie Treaty negotiations, the now Treaty Commissioner Mitchell addressed the Indians as follows:

> In order that justice may be done each nation, it is proposed that your country be divided into geographical districts - - that the country and its boundaries shall be designated by such rivers, mountains and lines, as will show what country each nation claims and where they are located. In doing this it is not intended to take any of your lands away from you, or to destroy your rights to hunt, or fish, or pass over the country, as heretofore.
>
> But it will be expected that each nation will be held responsible for depredations committed within its territory, unless it can be clearly shown that the people of some other nation committed them, and then that nation will be held responsible....
>
> . . .
>
> When you have made peace between all your nations here assembled, there will be no occasion for war parties going into the country of another nation. St. Louis Republican, October 26, 1851. (Emphasis Supplied)

The language of the treaty itself corroborates this same purpose. Therein it recites that the tribes "having assembled for the purpose of establishing and confirming peaceful relations" agreed to maintain peace (Article 1) and to permit the United States to establish roads and posts "within their respective territories" (Article 2). The tribes also bound themselves to make restitution for any wrongs committed by any band or individual "on the people of the United States, whilst lawfully residing in or passing through their respective territories" (Article 4) on penalty, among other things, of being denied their annuities (Article 8). The United States bound itself to "protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States"

(Article 3), and agreed to pay certain annuities (Article 7).

The carrying out of the treaty objectives necessitated the division of the entire territory into geographical districts. The statement of Commissioner Mitchell to the Indians that "In order that justice may be done each nation, it is proposed that your country be divided into geographical districts--" reflects this intention. So also does the map (Plaintiffs' Exhibit No. 514) prepared by Father De Smet illustrating the entire territory described in the treaty as being divided among the several tribes. One of the treaty reports characterizes this map "as very important for the use of the department, as it shows the different sections of country claimed and occupied by the different tribes" (Plaintiffs' Exhibit No. 145). In its response to plaintiffs' motion defendant concedes that De Smet's map may have this meaning but argues that "The descriptions in the treaty do not bear this out." Furthermore, omitting from the effects of the treaty several million acres in the middle of this territory would tend to frustrate one of the main purposes of the treaty which was the protection of white immigrants passing through the territory. A neutral zone unassigned to any tribe would be an area of potential conflict. The possibility of such a neutral zone had been clearly contemplated. In his letter to Mitchell, under date of May 26, 1851, informing him of his selection as a treaty commissioner, the Commissioner of Indian Affairs re-emphasized the need to provide compensation to the Indians for the use of the right of way across their lands, and stated:

> It is important, if practicable, to establish for each tribe some fixed boundaries, within which they should stipulate generally to reside, and each should agree not to intrude within the limits assigned to another tribe without its consent. If in arranging such boundaries there should be a portion of country not included where it has been their habit to go periodically in pursuit of game, it should be recognized as a neutral ground where all will enjoy equal privileges and have no right to molest or interfere with one another. IV Kappler, Indian Affairs, Laws and Treaties, Senate Document 53, 70th Cong., 1st Sess., p. 1074-1075. (Emphasis Supplied)

It seems reasonable that if the parties had intended to create such a "neutral ground" it would surely have been mentioned in the treaty negotiations or in the treaty. There is no record of such an intention. In its response to plaintiffs' motion defendant sees the difficulty presented by such an unclaimed area but "...cannot explain except to say that this strip of land is not accounted for by any description in the Fort Laramie Treaty."

Subsequent cessions of the lands involved in the 1851 Treaty are also indicative of the intent of the parties. In these cessions there is no mention of a neutral territory and the United States only dealt with the Sioux for the disputed area.

In summary, we have found the treaty language with regard to the Sioux western boundary to be ambiguous and therefore requiring an examination of the treaty history to determine the intent of the parties in accord with the principles set forth in Lower Sioux Indian in Minnesota v. United States, 163 C. Cls. 329 (1963).

This examination has led us to the conclusion that the purpose of

the Fort Laramie treaty required the division among the tribes of the entire territory covered by the treaty. Our previous decision in this case which left several million acres located in the midst of this territory unassigned to any tribe must therefore be changed.

The motion of the plaintiff herein is granted and an order will be entered modifying the Findings of Fact entered August 27, 1965, appropriate and consistent with the relief requested in the motion.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner