

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: July 8, 1970

Appearances:

Arthur Lazarus, Jr., Attorney for Pine Ridge Sioux Tribe. Marvin J. Sonosky, Attorney for Rosebud, Standing Rock, Crow Creek, Lower Brule, and Santee, Sioux Tribes. William Howard Payne, Attorney for Cheyenne River and Fort Peck Reservation Sioux Tribes. Strasser, Spiegelberg, Fried, Frank & Kampelman, and James B. Blinkoff were on the Brief.

Craig A. Decker with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION ON SCOPE AND MEANING OF ARTICLES
11 AND 16 OF THE 1868 TREATY

Commissioner Vance delivered the opinion of the Commission.

The claim in Docket No. 74 is brought pursuant to clauses (3) and (5) of Section 2 of the Indian Claims Commission Act to recover for lands and interests ceded to the United States under the Treaty of April 29, 1868, 15 Stat. 635. On October 29, 1968, the Commission issued an order setting questions for determination, in order to define the issues which remained to be decided before the valuation of

the lands would be undertaken.^{1/}

There were four questions involving the Docket No. 74 claims, two of which (questions 2 and 3) are now before the Commission for determination. However, before considering questions 2 and 3, we must refer to question 1 since it has a relationship to this decision and to the procedure to be followed in this case. The first question related to the exterior limits of the cession made by the Sioux in Article 2 of the 1868 Treaty. The Commission directed that a determination of this question would "include all of the petitioners' aboriginal title claims to be presented in the subject case including not only the claims east of the Missouri River (concerning which hearings have already been concluded) but also any claims to lands west of the Missouri River." (Commission Order, October 29, 1968). Actually it appears that question 1 should not be limited to the cession made under Article 2 of the 1868 Treaty but should extend to

1/ In Sioux Tribe v. United States, 2 Ind. Cl. Comm. 646 (1954) the petition in Docket No. 74 was dismissed. The dismissal was affirmed by the Court of Claims in 146 F. Supp. 299 (Ct. Cl. 1956). In an order of November 5, 1958, reported later at 182 Ct. Cl. 912, however, the Court of Claims granted a motion to vacate its judgment and remanded the claim to the Commission. On April 5, 1962, the Commission consolidated the claim with several others which presented alleged overlaps and issued an order defining the issues to be tried. On August 27, 1965, 15 Ind. Cl. Comm. 577, the Commission issued a decision on title. On January 17, 1967, the Commission issued an order consolidating Docket Nos. 74 and 332-A to determine the identity of the Sioux Nation under the Ft. Laramie Treaty, 11 Stat. 749 (1851). On October 29, 1968, the Commission issued its order setting down certain questions for determination. On September 10, 1969, 21 Ind. Cl. Comm. 371, the Commission amended its title decision of 1965, redefining the Sioux boundary.

a consideration of all aboriginal title land ceded by any article of the treaty. By order of November 14, 1968, question 1 was set for argument on November 10, 1969. It was not argued at that time, however, apparently because the parties felt that a determination of the meaning of parts of Article 11 of the treaty was necessary first.

This confusion results because both Article 2 and Article 11 contain language relinquishing certain claims or rights. Article 2 relinquishes "all claims or right in and to any portion of the United States or Territories" except the reservation set aside by Article 2 and "except as hereinafter provided". Article 11 provides that the Sioux:

" . . . will relinquish all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase."

Turning now to the questions under consideration, the second question set down by the Commission in its order of October 29, 1968, related to the boundaries of the territory described in Article 11, what interests the Sioux conveyed by Article 11 and what interests they retained in such territory.

Plaintiff no longer contends that Article 11 gave the Sioux compensable rights which were later taken. In its brief at pages

35-36, plaintiff states:

"A more exact delineation of the Article 11 lands does not seem necessary, since the Court of Claims and this Commission have held petitioners' interests therein to be non-compensable. Assiniboine Tribe v. United States, 77 Ct. Cl. 347, 373-374 (1933); Makah Tribe v. United States, 7 Ind. Cl. Comm 477 (1959)."

Instead, plaintiff now relies upon the claim that prior to 1868 it acquired aboriginal title to certain lands within the general area referred to in Article 11, south and east of lands recognized as Sioux by the Fort Laramie Treaty (11 Stat. 749 (1851)). Such aboriginal title lands, the Sioux claim, were ceded by Articles 2, 11 and 15 of the 1868 Treaty. Defendant has briefed the legal questions involved, contending that no such rights could have been obtained. Plaintiff has not briefed such issues. Since this comes within the scope of the aboriginal title claims referred to in the first question set out by the Commission in its order of October 29, 1968, we will postpone until the hearing on that question a decision as to whether the Sioux had any rights in lands assigned to the Pawnee and the Cheyenne and Arapahoe by the Fort Laramie Treaty. The parties shall promptly obtain from the Clerk of the Commission a date for a hearing on all remaining aboriginal title claims referred to in question 1.

The third question set down by the Commission involved the boundaries of the territory described in Article 16 and the interest retained or acquired by the Sioux in such territory. Article 16 of the 1868

Treaty, 15 Stat. 635, provides:

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.

At issue is the nature of the rights, if any, granted to the Sioux by Article 16. Article 16 of the Sioux Treaty of 1868 can be understood only in light of the dispute then raging over the Powder River Road.

In order to provide a direct route to the mining settlements of Montana, the United States, beginning in 1865, constructed the Powder River Road, with Fort Reno, Fort Phil Kearney and Fort C. F. Smith as military posts along the route (see, Pl. Ex. 2). By this time the Sioux had driven the Crow Indians toward the headwaters of the Yellowstone River in Montana. The Sioux thus hunted along the base of the Big Horn Mountains to the valley of the Yellowstone River. The Sioux opposed emigrant travel along the Powder River Road in this area, and hostilities developed into the Powder River War of 1866-1867. In the wake of these hostilities, the Sioux Treaty of 1868 was negotiated.

In negotiating the treaty with the Sioux, the United States realized that not all Sioux were prepared to abandon hunting and become agriculturalists. Thus a reservation, described in Article 2 of the Treaty, was set aside for those who desired to abandon hunting and take up agriculture. The United States was confident that those who did not immediately take up farming would do so eventually. Thus General Sanborn told the Sioux during the negotiations:

" . . . we only ask of you to remain at peace, to settle down and commence farming into the country designated for your home when you abandon hunting, and surrender such lands as no longer afford you any game." Pl. Ex. 6, p. 96.

In order to understand the issue before the Commission, we must distinguish two separate questions facing us. First we must determine what is the nature of the rights which were granted to the Sioux under Article 16. Secondly, we must determine if rights of that nature are compensable under the Indian Claims Commission Act. The negotiators clearly thought that the Sioux had fewer rights in the hunting lands set aside under Article 16 than in the reservation set aside by Article 2. Thus General Sanborn told the Sioux during the negotiations, as to the reservation:

"We shut the whites out of a country which will be your own" (Emphasis added) Pl. Ex. 6, p. 103.

As to the hunting lands he continued:

" . . . and besides we give you the privilege of hunting wherever the game can be found." Id.

But at the same time, the Indians were seen as having rights in the hunting lands which could not be taken from them without their consent.

General Sanborn told them:

"We also agree . . . to remove all the military posts along the base of the Big Horn Mountains, and hold the country between the Black Hills and summit of this mountain as unceded Indian lands, until you cede it by treaty. *** All who wish to roam and hunt can do so whenever they please while they remain at peace and game lasts." (Emphasis added) Pl. Ex. 6, p. 96.

Thus the Sioux were given the exclusive right to hunt in the Article 16 lands. This was seen as a right given to them, but it was assumed that they would cede their hunting lands to the United States either when all the Sioux decided to become agriculturalists or when the game supply was exhausted.

The United States contends, and we agree, that Article 16 did not give the Sioux "recognized title" to Article 16 lands. But that does not mean that the Sioux have no compensable interest in the more limited rights which were granted by that article.

The hunting rights here granted by treaty would be compensable if taken in a manner which would otherwise subject the United States to liability. This principle was made clear in Menominee Tribe v. United States, 391 U.S. 404 (1968). While the majority there held that the tribe's hunting and fishing rights had not been abrogated, they made clear that such rights would be compensable if they had been taken (Id. at p. 413):

"We find it difficult to believe that Congress, without explicit statement, would subject the United States to a claim for compensation 14/ by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligation toward the Indians." 15/

14/ See n. 4, supra, /Note 4 reads: "See Shoshone Tribe v. United States, 299 U.S. 476."/

15/ Compare the hearings on the Klamath Termination bill, which took place shortly before the Menominee bills were reached, in which Senator Watkins expressed the view that perhaps the Government should "buy out" the Indians' hunting and fishing rights rather than preserve them after termination /footnotes by the Court/.

The dissenters, finding that the Menominees' hunting and fishing rights were taken, said that the Menominees were "entitled to compensation."

Id. at p. 417.

Finally we must determine the extent of the lands over which hunting rights were granted to the Sioux by Article 16 of the 1868 Treaty. We cannot agree with plaintiff's contention that the boundaries extended to the Yellowstone and Missouri Rivers on the north and east, thereby covering land which had been granted to the Crow and to the Gros Ventre, Mandan and Arikara Nations under the Treaty of Fort Laramie, 11 Stat. 749 (1851).

We think it clear that the eastern boundary of the lands described in Article 16 could not have been intended to be the Missouri River. During the negotiations, the hunting lands were described as being between the Black Hills and the Big Horn Mountains, Pl. Ex 6,

p. 96. Article 16 provided for the closing of the military posts "now established in the territory in this article named." If the Article 16 lands extended to the Missouri River, this would have obligated the United States to close bases on the west bank of the Missouri. It is clear from the record of the treaty negotiations that the United States refused to agree to close such bases. See, Pl. Ex. 6, p. 103.

The peculiar language of Article 16 which provided that the land "shall be held and considered to be unceded Indian territory" indicates that the drafters were referring to land which had already been ceded to the United States but would now be "considered" to be unceded. This described the Crow lands to which cessions were obtained by the same negotiators. It could not describe the land of the Gros Ventres, Arikaras and Mandans for which no cession had at that time been obtained.

Likewise, we do not think that the negotiators who were treating with both the Sioux and the Crow Indians during the same period of time would insert inconsistent provisions in the treaties with those tribes. Thus we do not think that the Sioux were given hunting rights in the territory which was guaranteed to the Crow for their absolute and undisturbed use by the Treaty of May 7, 1868, 15 Stat. 649.

In summary, then, the territory described by Article 16 of the Sioux treaty lay between the Black Hills and the summits of the Big Horn Mountains, in land ceded by the Crow Indians, but not within the Crow Reservation. We find the boundaries of the lands described in

Article 16 of the Sioux Treaty of 1868 to be as follows:

Beginning where the eastern boundary of Big Horn County, Wyoming intersects the northern border of Wyoming, southerly along the eastern boundaries of Big Horn and Washaki counties to the northern boundary of Natrona County, then southwesterly to the westernmost point of Cedar Ridge, then in a line southeasterly through the town of Hiland, Wyoming, to the Sioux Fort Laramie Line, then southerly and easterly along the Sioux Fort Laramie Line to the point on the North Platte River where the Line intersects the 104th meridian; then north along the 104th meridian to the point at which the 104th meridian intersects the Sioux Fort Laramie Line, then along this Line to the Little Powder River, then down the Little Powder River and the Powder River to the Yellowstone River; then up the Yellowstone River to the 107th Meridian; then south along the 107th meridian to the northern border of Wyoming, then west along the Wyoming border to the point of beginning.

The "Sioux Fort Laramie Line" referred to in the above description is the boundary set out in the Commission's order of September 10, 1969, 21 Ind. Cl. Comm. 371, 381, at 382.

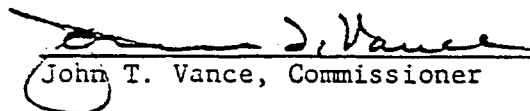
While the hunting rights which the Sioux received and retained under Article 16 are compensable, defendant is entitled to credit their 1868 value against plaintiff's recovery. Any rights received by the Sioux in lands not previously owned by them constitute consideration received under the 1868 Treaty. Any rights retained in previously owned Sioux lands would reduce the value of the lands ceded to the government, since the government would hold the area subject to these hunting rights.

Taking account of these factors, we shall proceed to value the Sioux lands west of the Missouri River at their highest and best use without deduction for hunting rights retained by the Sioux. In addition

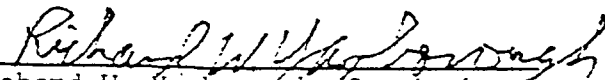
we shall not allow as consideration the value of hunting rights in formerly non-Sioux lands granted by Article 16. This will fully compensate the Sioux for the 1868 value of their hunting rights. Defendant, in its brief, assumes that the value of hunting rights was on the decrease. Def. Br., p. 45. While it seems likely that this was the case, there is insufficient evidence for us to pass upon this question at this time. Additional recovery will be allowed only if plaintiff can show that the Article 16 hunting rights were taken under circumstances which impose liability upon defendant and that when taken these hunting rights were worth more than their 1868 value.


Plaintiffs shall notify the Commission within sixty days whether or not they wish a hearing upon these issues to be set.


Concurring:


John T. Vance, Commissioner

Jerome K. Kuykendall Chairman


Richard W. Yarborough, Commissioner


Margaret H. Pierce, Commissioner


Brantley Blue, Commissioner