

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.<sup>1/</sup>

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

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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.









