

BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: August 26, 1970

Appearances: Marvin J. Sonosky, Attorney for the Rosebud, Standing Rock, Crow Creek, Lower Brule, and Santee Sioux Tribes.

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

William Howard Payne, Attorney for the Cheyenne River and Fort Peck Sioux Tribes.

John S. White, Strasser, Spiegelberg, Fried, Frank and Kampelman were on the briefs.

Jonathan C. Eaton, Jr., Attorney for The Three Affiliated Tribes of the Fort Berthold Reservation.

Lawrence C. Mills, Attorney for the Chippewa-Cree Tribe of the Rocky Boy's Reservation.

Maurice H. Cooperman, with whom was Mr. Assistant Attorney General Ramsey Clark, Attorneys for Defendant.

Walter A. Rochow, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant in Dockets 350-B and 350-C.

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

The Commission has before it claims under clauses 3, 4 and 5 of Section 2 of the Indian Claims Commission Act as to certain lands east of the Missouri River in North and South Dakota. Docket 74 is a claim by the Sioux Nation brought by several present day Sioux Tribes. The portion of the claim here at issue involves a claim on behalf of the Yanktonai and Teton Sioux to aboriginal title to a tract of land largely between the James and Missouri Rivers. Docket 221-A is a claim by the Chippewa Cree Tribe of the Rocky Boy's Reservation for almost the identical area. The Chippewa Cree Tribe, however, has now conceded that it has no interest in these lands. (See Transcript, Hearing of April 1, 1970, Dockets 191 and 221-B, at page 3). We thus dismiss the portion of the claim in Docket 221-A relating to lands in North and South Dakota east and south of mouth of the Little Knife River. The Three Affiliated Tribes of the Fort Berthold Reservation, successors to the Mandan, Arikara and Hidatsa Tribes, claim aboriginal title to an area which in part overlaps a portion of the lands claimed in Docket 74. A portion of the claim in Docket 350-C has been disposed of in our opinion in Turtle Mountain Band v. United States, 23 Ind. Cl. Comm. 315 (1970).

In order to deal with the legal objections raised by defendant, it will be useful to review the labyrinthine history of the claim in Docket 74. The original petition was filed on August 15, 1950. On April 5, 1954, plaintiffs' petition was dismissed (2 Ind. Cl. Comm.

64b). On November 7, 1956, the Court of Claims affirmed the Commission's dismissal in an opinion which is reported only at 146 F. Supp. 229. Following this, the plaintiffs sought out new attorneys who argued to the Court of Claims that the claim had not been adequately presented to the Commission by previous counsel. On November 5, 1957, in an order, later reported at 182 Ct. Cl. 912, the Court of Claims remanded the case to the Commission for a determination as to

"(1) whether the claimant Indian tribes are entitled on the basis of statements made in support of the above motions to have the proof in this case reopened, and (2) if so, to receive the additional proof sought to be offered and on the basis thereof, together with the record already made, reconsider its prior decision in this matter."

On November 19, 1958, the Commission ordered the case reopened to receive additional proof. On November 4, 1960, the Commission granted plaintiffs' motion to amend the original petition in Docket 74. In January 1961, defendant filed in the Court of Claims a petition for writ of mandamus or other extraordinary relief, alleging that the Commission's order of November 4, 1960, violated the Court's mandate upon remand of the case. Defendant argued that the inclusion in the amended petitions of a claim to aboriginal title to lands east of the Missouri River constituted a new cause of action, the filing of which was not timely under Section 12, 25 U.S.C. §70k, of the Indian Claims Commission Act. The defendant's petition was denied by the Court on February 6, 1961 (later reported at 182 Ct. Cl. 912).

Defendant now renews the objection raised in 1961 in the Court of

Claims, namely that the entire Sioux claim to aboriginal ownership east of the Missouri River is barred by the limitation of Section 12 of the Indian Claims Commission Act. We feel that the Court intended to and did rule on the merits of the same timeliness issue in denying defendant's mandamus petition in 1961. It is almost inconceivable that the Court of Claims, well aware of the expense and effort necessary to prepare an aboriginal title claim, would have sent back for hearing a case which it felt was legally barred.

Defendant contends that while the Sioux exclusively used and occupied much of the subject lands, they did not do so either from time immemorial or for a long time prior to United States sovereignty over the area. As we have recently pointed out, exclusive use and occupancy "for a long time" by a tribe is sufficient to give aboriginal title. Turtle Mountain Band v. United States, 23 Ind. Cl. Comm. 315, 323-324 (1970).

Likewise it is clear since the Court of Claims opinion in Sac and Fox Tribe v. United States, 179 Ct. Cl. 8, 383 F.2d 991 (1967), cert. denied 389 U.S. 900 (1967), that the Sioux need not have exclusively used and occupied the subject lands for a long time prior to United States sovereignty over the area involved. The boundaries of a tribe's aboriginal holdings were not frozen as of the date of United States sovereignty. See, Sac and Fox Tribe, *id.* at 22-23, 383 F.2d at 998-999. It is sufficient that the lands were exclusively used and occupied for a long enough time prior to the treaty of cession to turn them into

domestic territory of the Sioux. See Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 205-206, 315 F.2d 896, 905 (1963), cert. denied 375 U.S. 921 (1963). That a "long time" ran during the period of United States sovereignty over the area involved rather than during the period of French or Spanish sovereignty is irrelevant insofar as the perfecting of Indian title is concerned.

We have examined the evidence relating to Sioux use and occupancy in our findings of fact. By 1795, Truteau's accounts indicate that the Tetons occupied the southern portion of the area claimed. By 1806, Alexander Henry had described the northern frontier of the Sioux as reaching the ridge adjoining Dog Den Butte. Along the Missouri River, exclusive Sioux occupancy moved northward as the Mandan, Hidatsa and Arikara left some of their village sites. By the 1830's, exclusive Sioux use and occupancy had reached the point opposite the mouth of the Heart River.

The Fort Berthold plaintiffs contend that they retained aboriginal title to parts of the subject tract which the Sioux came to exclusively use and occupy as their own domestic territory. The Fort Berthold plaintiffs maintain that the aboriginal title of the Mandan, Hidatsa and Arikara tribes could have been lost only by an unreserved surrender of their claims. We cannot agree. We have recently rejected this same contention in Turtle Mountain Band v. United States, 23 Ind. Cl. Comm. 315, 323-324 (1970). Sioux ascendancy in these areas formerly occupied by the Mandan, Hidatsa and Arikara gave the Sioux aboriginal title by reason of exclusive Sioux use and occupancy for a long time. See,

Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 205-206, 315 F.2d 896, 905 (1963), cert. denied 375 U.S. 921 (1963).

By the Treaty of April 29, 1868, 15 Stat. 635, which was proclaimed on February 24, 1869, the subject lands of the Tetons and Yanktonais were ceded to the United States.

We therefore hold that the Teton and Yanktonai Sioux, by reason of exclusive use and occupancy for a long time prior to 1869, had aboriginal title to lands east of the Missouri River bounded as follows:\*

- (1) Beginning at a point in the middle of the Missouri River opposite the mouth of the Heart River (in North Dakota), northerly in a direct line to the westernmost point on the limit of Bismarck, North Dakota;
- (2) then northerly in a direct line to Dog Den Butte;
- (3) then northeasterly in a direct line to the southeastern corner of the town of Minnewaukan, North Dakota;
- (4) then southwesterly in a direct line to the point at which the James River crosses the western limit of the town of Manfred, North Dakota;
- (5) then westerly and southerly down the James River to its junction with Moccasin Creek (north of Stratford, South Dakota);
- (6) then southeasterly in a direct line to the northernmost point of Lake Kampensa (on the south side of Highway 20);
- (7) then westerly in a direct line to the mouth of Snake

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\* These boundaries are contiguous to the following: a) On the northeast, the area found to have been owned by plaintiffs in Turtle Mountain Band et al., v. United States, 23 Ind. Cl. Comm. 315 (1970); b) on the east, Royce Area 538; c) on the south, Royce Area 410, as modified by our opinion in Yankton Sioux Tribe v. United States, 22 Ind. Cl. Comm. 344 (1969).

Creek on the James River (south of Ashton, South Dakota);

(8) then westerly up the South Fork of Snake Creek to its source (south of Seneca, South Dakota);

(9) then in a direct line south-southwesterly to the western tip of Rice Lake, which is the source of North Medicine Creek (also called the northern branch of East Medicine Knoll Creek);

(10) then southwesterly down North Medicine Creek and Medicine Knoll Creek to the junction of Medicine Knoll Creek with the Missouri River;

(11) then northerly up the middle of the Missouri River to the point of beginning.

(All of the above-described locations are as depicted on the latest editions of the U. S. Geological Survey maps, Western United States 1:250,000 series.)

The valuation date for these lands is February 24, 1869, the date of the proclamation of the 1868 Treaty.

The Teton and Yanktonai Sioux did not have aboriginal title to any other land east of the Missouri River in North Dakota within the boundaries set forth in Sioux plaintiff's proposed Findings of Fact No. 4, filed May 31, 1963. There is still pending in Docket 332-C the question of Teton and Yanktonai interest in Royce Area 410 as defined in our opinion in Yankton Sioux Tribe v. United States, 22 Ind. Cl. Comm. 344 (1969). Thus our present opinion in no way determines title or lack thereof to the area in South Dakota between the north and south branches of East Medicine Knoll Creek which was claimed in the present case and which we held in Yankton Sioux Tribe, supra, to within Royce Area 410.

Defendant raises several other issues which may be disposed of without lengthy discussion. Defendant contends that the aboriginal

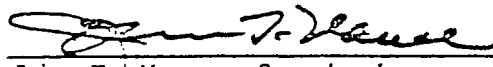
title claim is foreclosed by "rule against splitting an indivisible demand and suing for a fragment after having sued and recovered for other parts of the entirety". Def. Br., p. 92. Such technical rules of pleading have never been a part of this Commission's practice. Our rules of procedure specifically require that "all pleadings shall be construed as to do substantial justice." Rule 7(c). See also Lower Sioux Indian Community v. United States, 22 Ind. Cl. Comm. 226 (1969). Defendant's objection is without merit.

Defendant's contention that the Commission has no jurisdiction over aboriginal occupancy claims is equally without merit. The Commission's jurisdiction over such claims was clearly established by Otoe and Missouri Tribes v. United States, 131 Ct. Cl. 593, 131 F Supp. 265 (1955), cert. denied 350 U.S. 848 (1955). Likewise the contention that Indians could not obtain aboriginal title in formerly French and Spanish lands within the Louisiana Purchase is clearly unsupportable. Aboriginal title to lands within the Louisiana Purchase has been found in Sac and Fox Tribe v. United States, 179 Ct. Cl. 8, 383 F.2d 991 (1967), cert. denied 389 U.S. 900 (1967).

Docket 74 will proceed to a determination of the remaining title issues (see our opinion of July 8, 1970, 23 Ind. Cl. Comm. 358), and to the question of consideration, value and other issues remaining to be decided. Docket 350-B and 350-C will be the subject of a separate title opinion and will proceed separately from Docket 74. In Docket 221-A, plaintiffs have conceded that they have no interest in "the lands in North Dakota south of the Ten Cent Treaty lands", Transcript of hearing on Dockets 191 and 221-B, April 1, 1970, p. 3,

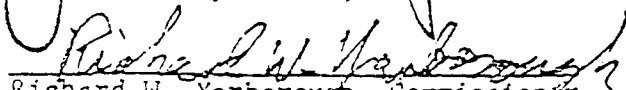


and we have dismissed this portion of their claim. It is not clear whether they also concede that they have no interest in the area north of the Missouri River between the Little Knife River and the Montana border. Plaintiffs in Docket 221-A shall notify the Commission within thirty days whether they intend to pursue this portion of the claim in Docket 221-A.

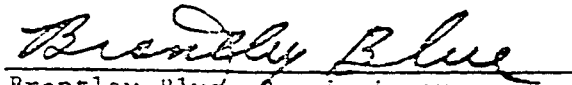
  
John T. Vance, Commissioner

We Concur:

  
Jerome K. Kuykendall, Chairman

  
Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

  
Brantley Blue, Commissioner