BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX NATION, ET AL.,	)	
	)	
Plaintiffs,	)	Docket No. 74
	)	(1868 Treaty)
v.	)	
	)	Docket No. 74-B
THE UNITED STATES OF AMERICA,	)	(1877 Act)
	)	
Defendant.	)	

Decided: November 30, 1970

Appearances:

Arthur Lazarus, Jr., Marvin J. Sonosky and William Howard Payne, Attorneys for Plaintiffs.

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

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

The Commission is faced with two motions arising out of its Opinion and Interlocutory Order entered herein on July 8, 1970 (23 Ind. Cl. Comm. 358, 369). Plaintiffs have moved for a modification of the order so as to declare the hunting rights described in Article 11 of the Treaty of April 29, 1868 (15 Stat. 635), to be compensable rights. In their motion, plaintiffs further contend that the question of whether additional compensation is owed them for the loss of their Article 16 hunting rights is one that must be resolved in Docket No. 74-B rather than in Docket No. 74. Finally the plaintiffs move that the order be modified

"to provide that the time for appeal under the Act of September 8, 1960, 74 Stat. 829, shall not commence until all the questions defined in the order of October 29, 1968, are determined." Defendant, on the other hand, has moved that the Commission dismiss all claims of the plaintiffs based on aboriginal title to lands west of the Missouri River as to which no hearing has been held. In the alternative, defendant requests an order requiring plaintiffs to brief their aboriginal claims west of the Missouri. For the reasons set out below the Commission grants in part and denies in part plaintiffs' motion and denies defendant's motion.

In their "Memorandum Defining Scope and Meaning of Articles 11 and 16 of the 1868 Treaty," filed March 6, 1969, plaintiffs stated at page 35-36, "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." Based on this statement, the Commission, in its July 8, 1970, opinion, decided that the plaintiffs had abandoned their hunting rights claim under Article 11, and intended instead to claim the lands south of the Sioux Fort Laramie lands to be held by aboriginal title. 23 Ind. Cl. Comm. at 360-361. In so ruling, the Commission apparently misinterpreted a statement made by plaintiffs in a reply memorandum filed June 25, 1969. Although that statement was not expressed as a withdrawal of their previous concession as to the non-compensability of Article 11 hunting rights, plaintiffs now claim that it was so intended. Plaintiffs' change of position was based upon United States v. Native Village of

Unalakleet, 188 Ct. Cl. 1, 411 F.2d 1255 (1969), in which the Court of Claims, although not expressly holding such rights to be compensable, ruled that hunting rights claims brought under clause 5 of Section 2 of the Indian Claims Commission Act could not be dismissed as non-compensable as a matter of law.

We have already held that the hunting rights created in Article 16 of the treaty will be compensable if it is determined that they were taken in a manner which would otherwise subject the United States to liability. 23 Ind. Cl. Comm. at 358. We now hold that the Article 11 rights may be likewise compensable. The temporary nature of these rights, in that they were to last only so long as the buffalo herd was large enough to justify the hunt, is a factor to be considered in establishing their value; it does not affect their compensability. Likewise, any problem resulting from the possible necessity of evaluating these rights twice does not render them non-compensable.

The Article 11 rights being of a compensable nature, it is necessary to determine the extent of the lands over which the right to hunt by the Sioux was continued in Article 11. We are unable to agree with plaintiffs that the boundaries extended to the 98th meridian on the east, and to the Smokey Hill River on the south. The language of Article 11 is quite specific. The Sioux retained the right to hunt "on any lands north of North Platte, and on the Republican Fork of the Smokey Hill River." The "Republican Fork" mentioned is today designated as the Republican River. This river marks the southern boundary of Article 11 rights. With regard to the eastern boundary, it is

clear that Article 11 extended no farther east than the boundaries of the Fort Laramie lands. As stated by plaintiffs, Article 11 did not create rights since they had already been recognized by the Treaty of Fort Laramie of September 17, 1851. Therefore, with respect to Article 11 rights north of the North Platte River the eastern boundary must be the Sioux Fort Laramie Line, while with respect to Article 11 rights south of the North Platte River the eastern boundary must be the eastern border of the Cheyenne-Arapaho Fort Laramie lands. Accordingly, we find the boundaries of the lands described in Article 11 of the Treaty of 1868 to be as follows:

> Beginning where the Sioux Fort Laramie Line intersects the 43rd parallel of north latitude, southwesterly along the Sioux Fort Laramie Line to the forks of the Platte River, then southerly along the eastern boundary of the territory reserved to the Cheyenne and Arapaho by the Treaty of Fort Laramie of September 17, 1851, to a point where it crosses the Republican River (west of McCook, Nebraska), then west-southwesterly along the Republican River and its south fork to its headwaters (south of Bovina, Colorado), then west-northwesterly in a direct line to a point where the Sioux Fort Laramie Line is intersected by the 104th meridian, then northerly on said meridian to its intersection with the 43rd parallel of north latitude, then easterly on said parallel 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.

Although the Article 11 hunting rights may be compensable, defendant is entitled to credit their 1868 value against plaintiffs' recovery. Unlike Article 16, however, Article 11 did not grant new rights to the

Sioux. Therefore the value of Article 11 rights in lands not previously owned by the Sioux does not consitute consideration under the 1868 Treaty. On the other hand, as in the case of Article 16 rights, the retention of Article 11 rights by the Sioux in lands previously owned by them reduces the value of the lands ceded to the United States. It follows that in valuing the Sioux lands west of the Missouri without deduction for hunting rights, the Sioux will be receiving compensation for the 1868 value of their hunting rights only with respect to lands they previously owned. To compensate them for the Article 11 rights on land not previously owned by the Sioux, it will be necessary to allow additional recovery if these rights were worth anything when taken, and if they were taken under circumstances which impose liability upon defendant.

In summary then, additional recovery will be allowed the plaintiffs for all their Article 16 rights and their Article 11 rights within the Sioux-Laramie lands if these rights were taken under circumstances which would ordinarily impose liability upon defendant, and if the value of these rights when taken exceeded their value in 1868. For their Article 11 rights outside the Sioux-Laramie lands, however, additional recovery will be allowed the plaintiffs if the rights were taken under liability imposing circumstances, and if the rights were worth anything when taken.

The Commission agrees with the plaintiffs that the question of further recovery for Article 11 and Article 16 hunting rights must be determined in Docket 74-B. Under questions 2 and 3 set out in our

order of October 29, 1968, only the nature and extent of the rights and interests conveyed or retained in Articles 11 and 16 of the 1868 Treaty were to be determined in Docket 74. Any questions which involve the Act of February 28, 1877, the Act under which plaintiffs claim that their Article 11 and Article 16 rights were taken, were to be resolved in Docket 74-B. Questions 2 and 3 with respect to Docket 74 are now fully answered.

The Commission is unable to grant plaintiff's request with respect to setting the date from which the time for appeal shall begin to run. The provisions which control the appealability of our orders are jurisdictional in nature, and the Commission is powerless to affect them. The Indian Claims Commission Act states that "either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final as to the amount of recovery; and any such interlocutory appeal shall be taken on or before . . . three months from such interlocutory determination. . . ." 25 U.S.C. § 70s (1964).[1/] Therefore the Commission must deny paragraph (4) of plaintiffs' motion.

In its order of July 8, 1970, the Commission instructed the parties to "obtain a date for a hearing as to title to any lands, east or west of the Missouri, ceded under any part of the 1868 Treaty, which are claimed by plaintiff to have been owned aboriginally and as to which no hearing has been held." 23 Ind. Cl. Comm. 358, 369 at 370 (1970). In their motion filed July 23, 1970, plaintiffs notified the Commission

1/ See also Court of Claims Rule 171(a) Appeals from the Indian Claims Commission - Time for Appeal.

that they did not wish a hearing to try aboriginal title to any lands east or west of the Missouri River. Plaintiffs stated:

> For the record, petitioners note that their rights in land west of the Missouri either have been found to constitute recognized title under the Commission's decision of September 10, 1969, 21 Ind. Cl. Comm. 371, or are involved in construction of Articles 11 and 16 of the 1868 Treaty. East of the Missouri, petitioners already have tried the question of original Indian title to some 14 million acres and, as part of the Missouri Sioux Nation, are claiming additional territory on the basis of Yankton use and occupancy in Docket No. 332-C. (Motion for Modification of Interlocutory Order and Notice Pursuant Thereto, p. 3).

The Commission interprets this language to mean that the totality of plaintiffs' claims west of the Missouri in Docket 74 are either in the Sioux Fort Laramie lands or in hunting rights under Articles 11 and 16 of the 1868 Treaty. Moreover, in replying to Defendant's motion to dismiss, plaintiffs stated that they did not intend to pursue any additional aboriginal title claims in Docket 74. We therefore agree with plaintiffs that defendant's motion "is not directed to any real issue in this litigation." Plaintiffs have already stated for the record that they have no further aboriginal title claims in Docket 74. We therefore dismiss defendant's motion.

We Concur:

John T. Vance, Commissioner

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner