BEFORE THE INDIAN CLAIMS COMMISSION

THE SIOUX NATION, ET AL.,	)	Docket No. 74
	)	
THE YANKTON SIOUX TRIBE OF INDIANS,	)	Docket No. 332-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: December 2, 1970

Appearances:

William Howard Payne and Marvin J. Sonosky, Attorneys for Plaintiffs in Docket 74. Arthur Lazarus, Jr. was on the brief.

Angelo A. Iadarola, Attorney for Plaintiff in Docket 332-C. Wilkinson, Cragun and Barker, John W. Cragun and Frances L. Horn were on the brief.

Walter Rochow and Craig Decker, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for the Defendant.

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

On August 27, 1965, the Commission decided that the Treaty of Fort Laramie of September 17, 1851, (11 Stat. 749, 2 Kapp. 594) recognized title to a described territory of land (hereinafter "Sioux-Laramie land") "in the 'Sioux or Dahcotah Nation' as that name was used in the treaty." Sioux Tribe v. United States, 15 Ind. Cl. Comm. 577, 601 (1965). At that time the Commission stated that it expressed

no opinion "as to what bands or groups constituted the 'Sioux or Dahcotah Nation' which was the party to the Treaty of Fort Laramie and whose title was recognized." Id. We stated that such a determination would be left to a future decision. We now make that determination.

A short review of the history of the consolidation of the dockets is necessary to a proper understanding of the issues to be determined in this opinion. By motion, filed March 22, 1965, plaintiffs in Docket No. 74 urged the Commission to render a decision on their claim based on recognized title to the Sioux-Laramie land. On April 28, 1965, plaintiff in Docket No. 332-C (then designated as Docket No. 332-A) filed a response to the motion asserting its interest in the Sioux-Laramie land and stating reasons why it was then unable to prosecute its claim. A hearing was held, April 29, 1965, at which the parties expressed their willingness for the Commission to decide whether the Treaty of Fort Laramie recognized title in the 'Sioux or Dahcotah Nation', and if so, what were the boundaries of the Sioux-Laramie land. The question of what tribes or bands constituted the Sioux Nation was to be deferred. The August, 1965, decision of the Commission followed. On December 5, 1966, plaintiff in Docket No. 332-C filed a motion to consolidate the two dockets for the purpose of determining the Sioux parties to the Treaty of Fort Laramie and their respective interests in the Sioux-Laramie land. On January 17, 1967, the Commission ordered that the two dockets be consolidated for hearing to resolve the issues set out in Docket No. 332-C plaintiff's

amended motion.

It is the contention of the Docket 332-C plaintiff, that "Sioux or Dahcotah Nation" as used in the Treaty of Fort Laramie includes only the Yankton and Teton divisions of Sioux, and that the Yanktonais division of Sioux received no interest under the treaty. Docket No. 332-C plaintiff further contends that each Sioux party to the treaty held an undivided interest in the Sioux-Laramie land, and that if division is on a tenancy in common basis the Yankton share would be 50%; if on a population basis the Yankton share would be 16.2%. The plaintiffs in Docket No. 74, on the other hand, argue that "Sioux or Dahcotah Nation" as used in the treaty includes the Yanktonais division as well as the Teton and Yankton divisions, and that there were ten Sioux tribes party to the treaty--seven tribes of the Teton division, two tribes of the Yanktonais division, and the Yankton tribe. It is their contention that each tribe held an undivided interest in the land, and that if division is on a tenancy in common basis the Yankton share would be 10% and if on a population basis the Yankton share would be 9%. Docket No. 74 plaintiffs further contend that each tribe held an undivided interest not only in the Sioux-Laramie land, but also in all land occupied by the three western Sioux divisions in 1851. Because the area of the Yankton Sioux claim east of the Missouri River (Royce Area 410; see Yankton Sioux Tribe of Indians v. United States, 22 Ind. Cl. Comm. 344 (1969)) is greater than 10% of the total Sioux land in 1851, Docket No. 74 plaintiffs argue, the Docket No. 332-C plaintiff is not entitled to any interest

in the Sioux-Laramie land.

The resolution of the conflicting positions of the two plaintiffs requires a construction of the Treaty of Fort Laramie. The language of that treaty relevant to this dispute--the words of recognition-- is found in Article 5: "The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories viz: The territory of the Sioux or Dahcotah Nation, [description of the Sioux-Laramie land] . . . ." 2 Kapp. 594. Although clear on its face, this language becomes ambiguous when it is realized that the term "Sioux" or "Sioux Nation" or "Sioux Tribe" has been used by the United States to refer to different entities at different times. Since the term "Sioux or Dahcotah Nation" is not clear or unambiguous it is necessary to review the history and purpose of the treaty in order to determine its true meaning. Citizen Band of Potawatomi Indians v. United States, 179 Ct. Cl. 473, 482, 391 F.2d 614, 619, cert. denied, 389 U.S. 1046 (1967); see Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-432 (1943). "To help us in this search, appropriate landmarks are, inter alia, the instruction to the treaty commissioners, their report to their superior, the treaty preamble, the President's message transmitting the treaty to Congress and the subsequent treatment given to the terms of the treaty by the United States and the Indians." Citizen Band of Potawatomie Indians, supra, 179 Ct. Cl. at 482-483, 391 F.2d at 619; see Lower Sioux Indian Community v. United States, 163 Ct. Cl. 329, 334 (1963).

PARTIES TO THE TREATY

An examination of the history of the Treaty of Fort Laramie clearly indicates that the Government's primary purpose in entering into negotiations at Fort Laramie was to secure safe passage along the Arkansas River and Platte River roads for white emigrants to Oregon, California, Utah and New Mexico, and that the only Sioux that were intended to be parties to the treaty were those residing south or west of the Missouri River. The earliest suggestion of the propriety of entering into a treaty with the prairie tribes is in the annual reports for 1847 of the St. Louis Superintendent of Indian Affairs and the Upper Missouri Indian Agency (Finding No. 19). In those reports a grand council of these tribes was suggested as a means to ending the intertribal Indian wars. Apparently the Office of Indian Affairs did not act upon these suggestions. It was not until 1849, when the increase of travel along the two roads west had created the risk of a major Indian uprising, that the Commissioner of Indian Affairs recommended to the Secretary of Interior that the prairie Indians be dealt with to procure from them promises of peaceful relations with the whites in exchange for an annual compensation. Commissioner Medill's letter of June 15, 1849, makes it clear that the Office of Indian Affairs was concerned with protecting travelers along the Platte and along the Arkansas and that the tribes to be treated with were those which lived along these rivers. (Finding No. 21).*/

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*/ This letter, the letter from Commissioner Brown to Agent Fitzpatrick

This intent of the Office is further indicated in Commissioner Brown's treaty instruction to Agent Fitzpatrick. (Finding No. 22). The treaty was to be with the larger and more important tribes of Fitzpatrick's agency. Agent Fitzpatrick was agent for the Upper Platte Agency which had jurisdiction of the Indian tribes living along the Arkansas River and between that river and the North Fork of the Platte River. It is doubtful that Agent Fitzpatrick's instructions authorized him to treat with the Sioux. Acting Commissioner Loughery's letter to Superintendent Mitchell of September 20, 1849, indicates that the Office of Indian Affairs actually contemplated negotiations only with the tribes dwelling in the immediate vicinity of the Santa Fe Trail. (Finding No. 23). It was Superintendent Mitchell, in conjunction with Agent Fitzpatrick, who convinced the Office that some Sioux bands should be included. In his annual report for 1849, Mitchell speaks of treaties with the "tribes inhabiting the plains, extending from the Missouri to the borders of Texas." He then attempts to justify "including the

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*/ [Continuation of footnote.] of August 6, 1849, and the letter from Acting Commissioner Loughery to Superintendent Mitchell, of September 20, 1849, have been added to the record as Commission exhibits. The first two letters were referred to by the Docket No. 74 plaintiffs in their Proposed Findings of Fact and Brief in Support Thereof, filed May 31, 1963. (Proposed Finding 6, footnote 2). However, the Commission was unable to locate these letters in the record and, considering them relevant to a determination of the intent of the Office of Indian Affairs in proposing negotiations with the plains Indians, ordered them, on its own motion, admitted into evidence. The third letter was found by the Commission to be the only document which discussed the question which tribes were to be included in the negotiations, and because of its great probative value, the Commission, on its own motion, ordered it admitted into evidence.

Sioux south of the Missouri River" in the negotiations. (Finding No. 24, emphasis added). It is evident, therefore, that when the Commissioner of Indian Affairs adopted the plans of Mitchell and Fitzpatrick for treating with the Indians of the plains, the tribes that were contemplated to be treated with were only those dwelling north of the Texas border and south of the Missouri River. The documents submitted to the Senate Committee on Indian Affairs in support of the bill to authorize these negotiations confirms this conclusion. (Finding No. 25).

It is clear that Congress in authorizing negotiations "with the wild tribes of the prairies," intended that only tribes dwelling south or west of the Missouri River were to be included. The actual authorization was included in the deficiency appropriations act for fiscal year 1851 and gives no clue as to Congressional intent. Act of February 27, 1851, 9 Stat. 570, 572. This appropriation, however, was in fulfillment of the policy ennunciated in Senate Bill 157, passed by the Senate in the previous session of Congress but not acted upon by the House of Representatives. That bill authorized negotiations with "the several tribes of Indians living and hunting south and west of the Missouri River, and north of the northern line of the State of Texas. . . ." Comm. Ex. 4 (emphasis added). */ The Congressional

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*/ The Commission, finding this bill and the accompanying Senate documents to be probative of the intent of the Congress in authorizing treaties with the plains Indians, has ordered them on its own motion, admitted into evidence as Commission exhibits.

intent to include only those Sioux bands living south of the Missouri River is further evidenced by the report written by Senator Atchison, Chairman of the Committee on Indian Affairs, which accompanied the bill. The Senator justified including the Sioux south of the Missouri with the identical language used by Superintendent Mitchell in his annual report for 1849. Comm. Ex. 5, page 2.

The preamble to a treaty may be consulted for the purpose of solving ambiguities or ascertaining the meanings of words when doubt exists. Garrison v. United States, 30 Ct. Cl. 272, 282 (1895). The preamble to the Treaty of Fort Laramie states that the treaty is between the United States "and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico . . . ." 2 Kapp. 594 (emphasis added). This description of the general areas inhabited by the tribes party to the treaty is not a mere accident of draftsmanship. It is clear that Superintendent Mitchell interpreted his instructions as limiting him to treating only with tribes residing within these boundaries. He went so far as excluding from the treaty a band of Shoshone who, although present at the treaty negotiations, did not occupy territory within the described boundaries. (Finding No. 30). Therefore, the treaty preamble is further evidence that only Sioux bands south or west of the Missouri were party to the treaty.

The Teton and Yankton divisions of Sioux occupied, to some extent, land south or west of the Missouri River. The Yanktonais division of

Sioux occupied land east or north of the Missouri. Therefore, the treaty history and the preamble indicate that of the three western Sioux divisions only the Teton and the Yankton were intended to be parties to the treaty. The Yanktonais, because they resided generally north or east of the Missouri, and because they were far removed from either of the roads which the treaty was designed to protect, were not intended to be parties to the treaty. (See Finding No. 32). This conclusion is supported by the fact that the treaty itself was signed only by chiefs of the Teton and Yankton divisions, and that the Senate amendment to the treaty was approved only by chiefs of the Teton and Yankton divisions.

The Docket No. 74 plaintiffs contend that because one of the primary purposes of the Treaty of Fort Laramie was to secure free passage for emigrants across the Indian lands, the purpose of the treaty could not have been fulfilled without including the Yanktonais, and that therefore the United States must have intended that the Yanktonais be included in the negotiations. This contention is without merit. The evidence conclusively establishes that the free passage for emigrants which the United States sought to obtain was over the Platte River and Arkansas River roads. The fact that the Yanktonais Bands may have controlled 250 miles of the Missouri River is irrelevant because this river was not one of the arteries that the treaty was intended to protect. Because the Yanktonais were far removed from either the Oregon or Santa Fe Trails the purposes of the treaty could have been fulfilled without making the Yanktonais party to the treaty.

The remaining contentions of Docket No. 74 plaintiffs with regard to the Sioux bands that were party to the treaty are equally without merit. The treaty instructions of 1849 to Agent Fitzpatrick weigh against inclusion of the Yanktonais. As already stated above, Agent Fitzpatrick was agent for the North Platte Agency. The assertion by plaintiffs in Docket No. 74 that the Yanktonais were under that agency is clearly contrary to the evidence. The only Sioux that were under the jurisdiction of the Upper Platte Agency at the time of the negotiation of the treaty were the Brule and Oglala Bands of the Teton division. The fact that Superintendent Mitchell reported that the Sioux at Fort Laramie were the "Sioux or Dahcotah of the Missouri" is of little probative value because the designation of Sioux of the Missouri had no fixed meaning and was used in his report only to indicate that the Minnesota or Sioux of the Mississippi were not parties to the treaty. It therefore does not establish that all three of the western Sioux divisions were present at Fort Laramie. The statement in the St. Louis Republican of November 23, 1851, that there were ten bands in the Sioux Nation is to be given little weight. There is no indication that the reporter was referring to seven Teton bands, two Yanktonai bands and one Yankton band. It is far more likely that he was merely referring to the number of Sioux bands or sub-bands present at the Laramie Treaty ground. The General Accounting Office reports do not establish that the United States administered the treaty as including the Yanktonais as part of the Sioux Nation. These reports are merely evidence that funds appropriated to fulfill the Treaty of Fort Laramie were dispersed

in favor of the Yanktonais. The report also lists the Poncas, Comanches, Kiowas and Apaches as recipients of funds appropriated to fulfill the provisions of the treaty, and these tribes were not parties to the treaty. Furthermore, there are several patent errors in the reports which cast doubt on their reliability as evidence. Finally, the fact that the two bands of Yanktonais were among the nine bands of Sioux dealt with by the United States in 1865 and subsequently is irrelevant to the question whether they were also party to the Treaty of Fort Laramie.

RESPECTIVE INTEREST IN THE SIOUX LARAMIE LAND

Having decided which bands constituted the "Sioux or Dahcotah Nation" in which title was recognized by the Treaty of Fort Laramie, the Commission will proceed to determine the respective interests of these bands in the Sioux-Laramie land. Both plaintiffs agree, and the Commission so holds, that each Sioux party to the Treaty of Fort Laramie held an undivided interest in the Sioux Laramie land. The plaintiffs each suggest alternative methods of fixing the extent of that interest: (1) a tenancy in common formula in which the Sioux bands would hold equal undivided interests; and (2) a population formula in which each tribe would hold an interest proportionate to its population. In rejecting the tenancy in common formula we adopt our language in Blackfeet and Gros Ventre Tribes of Indians v. United States, 18 Ind. Cl. Comm. 289, 321 (1967):

> To apply such a rule to Indian lands would lead to an unjust result in most cases. Indian rights in land are tribal in nature and not individual. If

> we tried to equate tribal rights with individual rights and thereby create an equal interest in an area among the tribes using and occupying it, we would be ignoring the basic fact of Indian use and occupancy. We would be creating a common law concept of title in an area where such concept had never grown by custom or usage. The smallest tribe would be entitled to as much as the largest one. To do this would be contrary to reason since a subsistence use of land necessarily implies a use in proportion to numbers. Where there is no evidence of intention to the contrary and no language stating what interest shall be taken, we think the proper and just manner of dividing tribal interests in a given area is by population as of the date of cession, or an average population near that date, whichever is more reasonable under the particular circumstances. Id at 321.

In this instance, we find that the most reasonable manner of dividing tribal interests is by population averages near the effective date of the Treaty of Fort Laramie. Accordingly, we hold that the Yankton Sioux held an undivided 17% share of the Sioux-Laramie land, and that the Teton Sioux held an undivided 83% share in that land. (Finding No. 35). In calculating these percentages we were faced with many population estimates. We rejected the estimates of Riggs and Denig as being unreliable. Neither of these men estimated populations for official purposes and therefore it is doubtful they placed an undue emphasis on accuracy. We rejected the population estimates published in the 1862 Annual Report of the Commissioner of Indian Affairs because it is apparent that the Yankton population was the result of an exact head count, while the figures from the Upper Platte and Upper Missouri agencies were estimates. It is likely that the agents for the Upper Platte and Upper Missouri included all of the Sioux known by them to be in their agencies. On the other hand, it

is doubtful that the Yankton agent included those Yankton who were off the reservation hunting at the time of the census. These population figures therefore give a distorted picture of the total Sioux population. Furthermore, these estimates were made a full nine years after the effective date of the treaty and are thus not reliable in establishing the respective populations at an earlier date. The three estimates upon which the Commission bases its finding were chosen because they were all made by government officials as part of their officials duties, included all the known Sioux rather than merely those present for a head count, and were made close enough in time to the effective date of the treaty to make them reliable.

One final contention of the Docket No. 74 plaintiffs needs to be discussed. This is their contention, already mentioned above, that the Yankton Sioux are not entitled to any share of the Sioux-Laramie land. The major flaw in plaintiffs' argument is the failure to differentiate between recognized title with respect to the Sioux-Laramie land, and the aboriginal title claim of the Yankton Sioux to Royce Area 410. Recognized title and aboriginal title are based on totally different legal theories. The former is based upon a grant of land by the United States to an Indian entity or an acknowledgment by the United States of the Indian right to permanently occupy land. The latter is based upon the exclusive use and occupancy of land by an Indian entity. This Commission has found that the Treaty of Fort Laramie recognized title to the Sioux-Laramie land in the "Sioux or Dahcotah Nation" as a land-holding entity. We have also found that the Yankton division of Sioux was part of that landholding entity and held an undivided 17% in the

Sioux-Laramie land. This conclusion was based upon the intent of the United States Government and was totally unrelated to whether or not the Yankton Sioux exclusively used or occupied any land. The Treaty of Fort Laramie did not involve land east or north of the Missouri River. Only the Sioux-Laramie land was recognized in the "Sioux or Dahcotah Nation". This recognition did not affect the claim of the Yankton based on aboriginal title to land east of the Missouri River. It follows that the Yankton 17% interest in the Sioux-Laramie land is separate from and in addition to any land to which the Docket No. 332-C plaintiff may prove aboriginal title.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner