

Glen A. Wilkinson, Attorney for Plaintiff in Docket 113. John A. Storman, J. Howard Storman, Frances L. Horn, and Wilkinson, Cragun & Barker were on the Briefs.

Jay H. Hoag, Attorney for Plaintiffs in Docket 246. Marvin J. Sonosky was on the Briefs.

Lawrence C. Mills, Attorney for Plaintiffs in Dockets 191, 221, and 221-A. Mills and Garrett were on the Briefs in Dockets 191 and 221.

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 in Docket 74. John S. White, Strasser, Spiegelberg, Fried, Frank and Kampelmen were on the Briefs.

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

William D. McFarlane, with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant in Dockets 113, 246, 191 and 221.

Maurice H. Cooperman, with whom was Mr. Assistant Attorney General Ramsey Clark, Attorneys for Defendant in Dockets 74 and 221-A.

OPINION OF THE COMMISSION

Commissioner Vance delivered the opinion of the Commission.

The Commission has before it two claims under Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, 1050, involving certain lands north and east of the Missouri River in North Dakota and Montana. These claims, filed in severed petitions in Dockets 350-B and 350-C, were brought by the Three Affiliated Tribes of the Fort Berthold Reservation, successor in interest to the Mandan, Hidatsa, and Arikara Tribes.

In Docket 350-C, the plaintiff seeks compensation under clause 4, section 2, for the alleged taking of some 13,000,000 acres of land lying to the north and east of the Missouri River in the present states of North Dakota and Montana. The plaintiff claims that the three tribes had aboriginal or Indian title to these lands, the approximate boundaries of which are as follows:

Beginning at the mouth of the Cannonball River; thence up the Missouri River to the mouth of Big Muddy Creek; thence up Big Muddy Creek to the boundary line between the United States and Canada; thence east to the point where said boundary line intersects the Mouse River; thence along the Mouse River in the United States to the point where said Mouse River turns north; thence to Devil's Lake; thence around and including Devil's Lake; thence to the place of beginning.

In Docket 350-B, the plaintiff seeks compensation under Clause 5, Section 2, claiming that on and prior to July 27, 1866, the three tribes owned or occupied the following lands in the present state of North Dakota:

Beginning on the Missouri River at the mouth of Snake River, about thirty miles below Ft. Berthold; thence up Snake River and in a northeast direction twenty-five miles; thence southwardly parallel to the Missouri River to a point opposite and twenty-five miles east of old Ft. Clarke; thence west to a point on the Missouri River opposite to old Ft. Clarke; thence up the Missouri River to the place of beginning.

The above tract lies wholly within the outer boundaries of the area claimed in Docket 350-C and is estimated to contain in excess of 200,000 acres. The plaintiff claims that the defendant was not fair and honorable in its dealings with the three tribes when it failed to ratify an agreement entered into on July 27, 1866 (II Kappler 1052), whereby the three tribes agreed to cede the above lands to the United States and that in violation

of their right of ownership or occupancy of this tract, the defendant has taken and disposed of a large part of these lands without the payment of compensation.

At the outset, it must be pointed out that the plaintiff has chosen not to pursue the claim set forth in Docket 350-B. The plaintiff did not introduce evidence that the three tribes were unfairly and dishonorably dealt with by the defendant when it failed to ratify the Treaty of July 27, 1866, nor did the plaintiff propose any findings of fact in support of that claim. Accordingly, since the record is devoid of any evidence that the lands claimed in Docket 350-B were in fact taken from the plaintiff in 1866, or that the United States acted unfairly and dishonorably in failing to ratify the treaty, we will dismiss the claim set forth in Docket 350-B.

Because numerous Indian tribes or bands have filed petitions with the Commission claiming either aboriginal ownership of or recognized title to much of the same area in North Dakota, several claims have been consolidated with Dockets 350-B and 350-C. Pursuant to a Commission Order of September 9, 1960, claims filed by the Turtle Mountain Band of Chippewa Indians (Docket 113), the Little Shell Band of Chippewa Indians (Docket 191), the Chippewa Cree Tribe (Docket 221), the Red Lake and Pembina Bands (Docket 246), and the Three Affiliated Tribes of the Fort Berthold Reservation were consolidated to the extent that they overlapped or were in conflict. Subsequently, by Order of April 5, 1962, the Commission directed that the plaintiff's claims herein

be consolidated with claims brought by the Sioux Nation in Docket 74 and the Chippewa Cree Tribe in Docket 221-A.

The Chippewa and Sioux cases on the issue of title have been separately heard and decided with the Commission directing that Dockets 350-B and 350-C be the subject of a separate title opinion. However, in deciding the Chippewa and Sioux cases, the Commission considered all of the evidence with respect to all of the plaintiffs in the consolidated cases, including Docket 350-C.^{1/} As a result, portions of the plaintiff's claim in Docket 350-C have been disposed of in our opinions in Turtle Mountain Band v. United States, 23 Ind. Cl. Comm. 315 (1970), and Sioux Nation v. United States, 23 Ind. Cl. Comm. 419 (1970). More specifically, in the Turtle Mountain Band case, supra, the Commission found that the northeastern portion of the area claimed by The Three Affiliated Tribes, including the area around Devil's Lake was, in fact, exclusively used and occupied for a long time by the Plains-Ojibwa. Further, in the Sioux Nation case, supra, it was found that the Teton and Yanktonai Sioux exclusively used and occupied the southeastern portion of the area claimed in Docket 350-C, including land bounded approximately as follows:

Beginning at the mouth of the Cannonball River; then up the Missouri River to the mouth of the Heart River; then northerly in a direct line to Dog Den Butte; then northeasterly in a direct line to the southeastern corner of the town of Minnewaukan, North Dakota; then southwesterly around and including Long Lake to the place of beginning.

^{1/} As already noted, the plaintiff failed to submit any evidence with respect to its claim in Docket 350-B.

The area originally claimed in Docket 350-C is shown on Defendant's Exhibit 74, Docket 113. Subsequently, the plaintiff modified its contentions, admitting that the territory allegedly occupied by the three tribes at various times from 1750 to 1860 decreased in extent as their population grew smaller because of smallpox epidemics, drought, and hostilities of neighboring tribes, especially the Sioux. Defendant contends, however, that the plaintiff has erroneously extended the northern boundary of the area finally claimed in Docket 350-C beyond its northern boundary at the Missouri as of 1803. Defendant contends that, as of 1803, United States sovereignty attached to the area in question, by virtue of the Louisiana Purchase, and that aboriginal territory cannot be enlarged after United States sovereignty attaches to an area.

We disagree. 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). Moreover, 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 cert. denied, 389 U.S. 900 (1967), that the Three Affiliated Tribes need not have exclusively used and occupied the subject lands for a long time prior to the attachment of 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 id. at 22-23, 383 F.2d at 998-999. It is sufficient that the lands were exclusively used and occupied for a long time prior to the date of taking

to turn them into domestic territory of the Three Affiliated Tribes. See Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 205-206, 315 F.2d 896, 905, 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.

At this point it should be noted that in 1851, under the terms of the Fort Laramie Treaty, certain land to the west and south of the Missouri River, in North Dakota and Montana, was recognized as the territory of the Mandan, Hidatsa, and Arikara Tribes. However, the treaty specifically provided that the Indian nations involved did not "abandon any rights or claims they may have to other lands." The area now claimed by the plaintiff in Docket 350-C lies to the north and east of the Missouri.

Defendant concedes that the three tribes may have exclusively used and occupied a narrow strip of land east of the Missouri extending from just below the mouth of the Knife River on the south to the mouth of the Little Missouri on the north. However, defendant contends that if the three tribes made any use of the eastern part of the territory claimed, beyond the immediate vicinity of the Missouri, it was only for occasional hunting activities, which alone are insufficient to support a claim of aboriginal title; that the Indians of the three tribes were village dwellers, living in fortified villages along the Missouri; that their primary means of livelihood was agriculture rather than hunting; and

