BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: March 1, 1972

Appearances:

Arthur Lazarus, Jr., William Howard Payne, and Marvin J. Sonosky, Attorneys for Plaintiffs in Docket No. 74.

Angelo A. Iadarola and Frances L. Horn, Attorneys for Plaintiff in Docket No. 332-C.

Craig 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 has before it a motion for rehearing, filed by the plaintiffs in Docket No. 74, arising out of its decisions entered in consolidated Docket Nos. 74 and 332-C on December 2, 1970, 24 Ind. Cl. Comm. 147, and January 6, 1971, 24 Ind. Cl. Comm. 364, and in Docket No. 332-C (Docket No. 74 intervenors) on December 14, 1970, 24 Ind. Cl. Comm. 208. The motion is in two parts. In the first part it is

alleged that

> The Commission erred in granting the Yankton Tribe a 17% undivided interest in the Sioux Fort Laramie country based solely upon population and without regard to the intent of Congress and the subsistence use of the land.

The second part of the motion alleges that

> The Commission erred in failing to re-establish the northwestern boundary of Royce Area 410 along the South Branch of East Medicine Knoll Creek, and in failing to find that the Teton and Yanktonais Sioux had aboriginal title to the area so excluded from the Yankton claim.

For the reasons stated below the Commission concludes that the motion for rehearing must be denied.

I

In our decision of December 2, 1970, we determined that the "Sioux or Dahcotah Nation," as that term was used in the Treaty of Fort Laramie of September 17, 1851, 11 Stat. 749, included the Teton and Yankton divisions of Sioux; and that each of these divisions had an undivided interest in the Sioux Fort Laramie land, with the Teton interest amounting to 83% and the Yankton interest amounting to 17%. The motion for rehearing challenges this conclusion on several grounds. Initially, Docket No. 74 plaintiffs argue that Congress intended to recognize title to the Fort Laramie area only in those Indians who lived permanently within the area. It is their contention that because the permanent villages of the Yanktons were outside the Fort Laramie area the Yanktons received no interest in the Fort Laramie land. The Commission is unable to agree with this contention. There is no evidence in the record to support the conclusion

that Congress intended only those tribes with permanent villages within the area to participate in the Fort Laramie Treaty. It is clear that the Yanktons, who hunted extensively within the Sioux Fort Laramie area, were one of the tribes living and hunting south and west of the Missouri River and were thus intended to be party to the treaty.

The Docket No. 74 plaintiffs also contend that the subsequent actions of the parties to the treaty indicate that the Yanktons did not receive an interest in the Fort Laramie land. Specifically, they assert that had the Yanktons received an interest in the Fort Laramie land that interest would have been acquired by the United States under the Treaty of April 19, 1858, 11 Stat. 743, and that in 1866 when the United States erected three forts along the Bozeman Trail it would have been exercising its property rights in the area. The motion further argues that the fact that the United States admitted that it had no right to erect these forts indicates that it obtained no proprietary rights in the Fort Laramie land under the 1858 treaty, and that therefore the Yanktons did not have any interest in the Fort Laramie lands. This assertion is without merit. The 1858 treaty did not pass any proprietary rights in the Sioux Laramie land to the United States. It merely extinguished the Yankton interest in that area. Therefore, the fact that the United States may have had no legal right to build the three forts does not support the position that the Yanktons had no interest

in the Sioux Laramie land.[1/]

The Docket No. 74 plaintiffs further contend that the Commission should follow the procedure it previously used in Miami Tribe v. United States, Dockets 253, et al., 5 Ind. Cl. Comm. 180 (1957), to ascertain the respective interests of the Tetons and the Yanktons in the Sioux Laramie land. In Miami we resolved the issue of respective boundaries of tribes within a large recognized title area by examining subsequent treaties between the tribes and the United States which involved disposition of described tracts of land. This method, however, is not applicable to the present situation because the Sioux Fort Laramie land, by name or by description, was never the subject matter of a treaty subsequent to the 1851 Fort Laramie Treaty. The 1858 Yankton treaty did not specifically mention this land. Neither was it mentioned or described in the Treaty of April 29, 1868, between the various Sioux bands and the United States, 15 Stat. 635. The several treaties entered into in 1865 were treaties of peace and friendship which did not involve land at all. An examination of subsequent treaties, therefore, does not assist the Commission in determining the rights of the Tetons and Yanktons in the Sioux Laramie lands.

1/ Even if Docket No. 74 plaintiffs' theory were correct it would not support their conclusion because none of the three forts constructed by the United States to protect the Bozeman Trail were within the Sioux Fort Laramie area. Fort Reno, Fort Phil Kearny, and Fort C. F. Smith were all west of the Powder River which was the western boundary of the Sioux Fort Laramie Territory. See Pl. Exs. 517 and 519, Docket No. 74.

The Docket No. 74 plaintiffs finally contend that it was error for the Commission to apportion the Fort Laramie land between the Tetons and Yanktons on the basis of the total populations of the tribes. It is their position that in calculating the respective interests of the tribes in the Laramie land only those members of each tribe who actually lived on or used the land should be counted. We are unable to agree with such a contention. Docket No. 74 plaintiffs argue that their position is supported by Blackfeet and Gros Ventres Tribes of Indians v. United States, Docket 279-A, 18 Ind. Cl. Comm. 289 (1967). In that case the Commission rejected a tenancy-in-common basis for allocation of tribal interests in a recognized title area in favor of a population basis. We stated that

> . . . a subsistence use of land necessarily implies a use in proportion to numbers. Where there is no evidence to the contrary and no language stating what interest shall be taken, we think that 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.)

The motion urges that the presence of the words "subsistence use of the land" in the quoted language indicates that only those members of each tribe who actually used the land were to be included in population figures. Docket No. 74 plaintiffs seek to read too much into our language in Blackfeet. In using the words "subsistence use" we did not intend to imply that an Indian had to be physically present on the subject land in order to gain an interest in the land. Clearly a tribe can derive subsistence from land without each of its members being on the land 100% of the time. Furthermore, it is possible that a tribe the bulk of which

lives outside an area may derive a greater proportion of its subsistence from within the area than does a tribe all of whose members live within the area.[2/] In short, in establishing the formula in Blackfeet we did not intend to create a hybrid form of title in which a tribe would have to prove that it used the land in order to get an interest in a recognized title area. Rather, our Blackfeet formula was intended to reflect the principle that when Congress grants recognized title in an area to more than one tribe each member of each tribe receives an equal right to use that land. Thus the interest of each tribe in the land is proportionate to its total population.[3/]

II

It appears to the Commission that the relief requested in the second

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2/ In the present case, for example, it is possible that, because of the scarcity of game in Royce Area 410, and because the Teton bands hunted to a great extent south of the North Platte River and west of the Powder River, the Yanktons may have obtained a greater proportion of their subsistence from the Sioux Laramie lands than did the Tetons.

3/ At the oral argument of the motion for rehearing, the Docket No. 74 plaintiffs argued that if the total populations of the two tribes were to be the basis for apportioning interests then the total landholdings of each tribe should be divided on such basis. In other words, Docket No. 74 plaintiffs asserted that the acreage of Royce Area 410 should be added to that of the Sioux Laramie land and the total acreage should be divided on the basis of population. Under such a formula the Yanktons would receive title to all of Royce Area 410 and to slightly more than 1% of the Laramie lands. This proposal ignores the difference between recognized and aboriginal title. As we have explained twice before in these consolidated dockets, the basis for these two types of title are unrelated. The interest that the Yanktons had in the Laramie lands was independent of their aboriginal title to Royce Area 410. Thus in calculating respective interests in the Sioux Laramie land the Commission must ignore Royce Area 410. For the Commission to follow the suggestion of the Docket No. 74 plaintiffs it would be necessary to disregard a legal precedent of many years standing.

part of the motion for rehearing is substantially identical to that requested in the motion for rehearing which the Commission denied in its decision of January 6, 1971. Rule 33 of the Commission's General Rules of Procedure, 25 C.F.R. §503.33 (1968), states that "[a]fter the Commission has announced its decision upon such motion [for rehearing] no other motion for rehearing shall be filed by the same party unless by leave of the Commission." The present motion does not state sufficient reason why the Commission should grant such leave. The evidence referred to in the motion fails to establish that the Teton and Yanktonais Sioux used and occupied the disputed area between the forks of Medicine Knoll Creek to the exclusion of the Yankton Tribe, proof of which fact is necessary to a finding of aboriginal title.

An order shall be entered denying Docket No. 74 plaintiffs' motion for rehearing.

John T. Vance, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner

Yarborough, Commissioner, concurring

I concur in the result as to the first point only because I do not believe the Docket 74 plaintiffs (Teton Sioux) have carried their burden of showing that a substantially different or more accurate determination of the relative interests of the two tribes could be arrived at should rehearing be granted.

However, the Docket 74 plaintiffs are correct in insisting that in the determination of the relative interests of the tribes in the Fort Laramie lands only those members of each tribe who actually used or occupied the land should be counted.

This Treaty was not a grant of new lands, but a recognition by the United States of pre-existing use and occupancy by the tribes. Whatever the element of granting in it (as opposed to acknowledgement), it was to tribes as their occupancy interests would appear, not per capita or by a named fraction to each tribe. The relative use and occupancy of the area by each tribe depends on their subsistence patterns,[1/] which here depends on their numbers using the land in question. For this equation to be accurate, all the land used by all the Indians in question must be used in the calculation, as the Docket 74 plaintiffs suggest. The language of the Blackfeet case, supra, is correct in showing the dependence of population figure calculations

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1/ Here the subsistence patterns are similar and we do not have the difficulty that would be presented by comparing tribes with greatly different land use patterns.

on the underlying facts of use and occupancy. That case should not be considered to be limited by the majority opinion.

Approving the theoretical basis of the Docket 74 plaintiffs' contentions does not lead me to endorse a rehearing. It has not been shown that evidence exists that would allow the Commission to make any reasonably accurate determination of actual use and occupancy of the Fort Laramie lands by the two tribes, or any determination of all the lands used and occupied by the Teton Sioux (including those outside the Fort Laramie area) to compare to all the Yankton Sioux lands. Despite the conceptual difficulties, the population figures appear to be the best evidence available.

Richard W. Yarborough

Richard W. Yarborough, Commissioner