BEFORE THE INDIAN CLAIMS COMMISSION

THE LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA, et al.,	)	
Plaintiffs,	)	
v.	)	Docket No. 363
	)	(2nd Claim, amended)
THE UNITED STATES OF AMERICA,	)	(Treaty of 1867,
	)	Agreement of 1872)
Defendant.	)	

Decided: September 25, 1975

Appearances:

Marvin J. Sonosky, Attorney for the Plaintiffs. Emerson Hopp was on the brief.

Bernard M. Sisson and John D. Sullivan, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission.

I. INTRODUCTION

This is the claim of the Sisseton and Wahpeton Bands of Mississippi Sioux Indians for additional compensation for their interest in certain lands ceded by the Agreement of September 20, 1872,[1/] for a consideration they contend was unconscionable. The lands lie in two parcels in the eastern part of the present states of North and South Dakota. The first parcel is identified in the agreement by reference to Article II of the

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1/ 2 Kappler 1057; amended by striking all after paragraph numbered "Second" by Act of February 14, 1873, c. 138, 17 Stat. 437, 456; amendments accepted by Indians May 2 and May 19, 1873 (2 Kappler 1059, 1063); agreement confirmed as amended, by Act of June 22, 1874, c. 389, 18 Stat. 146, 167.

Treaty of February 19, 1867 (15 Stat. 505), where the following description appears:

> . . . being bounded on the south and east by the treaty line of 1851 and the Red river of the North to the mouth of Goose river, on the north by the Goose river and a line running from the source thereof by the most westerly point of Devil's lake to the Chief's Bluff at the head of James river, and on the west by the James river to the mouth of Mocasin river, and thence to Kampeska lake.

We refer to this tract as "the 1867 area."

The cession, according to the agreement, extended as well to all other land in Dakota Territory to which the Sissetons and Wahpetons had title or interest; but it did not include the Lake Traverse and Devil's Lake Reservations, 2/ which were set aside in Articles 3 and 4 of the 1867 treaty.

The second parcel of land here in issue is a triangular area to the south of the 1867 area. We discuss this "southern triangle" in the immediately following part of this opinion.

The instant case was tried on the plaintiff's amended petition, which the Commission accepted by its order of December 10, 1969, 22 Ind. Cl. Comm. 231. The petition does not state whether aboriginal or recognized title is asserted to the ceded area. The defendant denied that plaintiff had either. The trial was held in October of 1970. The plaintiffs proceeded on a theory of aboriginal title. Since we think they had recognized title to the 1867 area, we are ruling on their claim of aboriginal title only in regard to the southern triangle.

2/ The area described in the 1867 treaty is identified in Charles C. Royce, Indian Land Cessions, as Areas 538 and the southern part of 445, plus the reservation areas, Nos. 496 and 497. See Royce's map of North and South Dakota (Plate II) in the 18th Annual Report of the Bureau of American Ethnology, Part II (1899).

II. THE SOUTHERN TRIANGLE

Only one witness appeared for each side at the trial. Both were experts in the ethnohistory of the Dakota people. The defendant's witness, Mr. Alan R. Woolworth, testified that Sisseton Indians exclusively used an area south and east of the Sisseton Indian Reservation extending beyond the area described in the 1867 treaty. His testimony was not contradicted, and accords with the documentary evidence in the case. The same witness had previously testified on the same matter in Yankton Sioux Tribe v. United States, Docket 332-C; and the Commission there made a finding on Sisseton use of the area. See 24 Ind. Cl. Comm. 208, 232 (1970), aff'd 205 Ct. Cl. 148 (1974).

After trial, the present plaintiffs moved to further amend their amended petition, to conform to the evidence by including the following triangular area among the lands for which they ask additional compensation:

> . . . Commencing at the mouth of Snake Creek on the James River; thence down the James River to the mouth of Timber Creek; thence east-southeasterly in a direct line to the mouth of Stray Horse Creek on the Big Sioux River; thence up the Big Sioux River to Lake Kampeska; and thence in a direct line to the place of beginning. 3/

We granted the motion on September 22, 1971, and stated that the expanded claim would be adjudicated on the existent record. See 26 Ind. Cl. Comm. 267, 269.[4/] Since the only relevant evidence in the record supports Sisseton aboriginal title, we are entering a finding to that

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3/ The triangular area is in the northern part of Royce Area 410.

4/ Defendant's motion to consolidate Docket 332-C and the present docket because of alleged overlapping claim to the triangle was denied on October 4, 1972, 29 Ind. Cl. Comm. 1.

effect and need not further discuss the southern triangle. See Indian Claims Commission, General Rules of Procedure 13 (b), (c), 25 CFR 503.13 (b), (c); Yankton Sioux Tribe v. United States, 175 Ct. Cl. 564 (1966), reversing Docket 332-A, 10 Ind. Cl. Comm. 137 (1962); Miami Tribe v. United States, 150 Ct. Cl. 725, 743-744, 281 F. 2d 202, 212-213 (1960), cert. denied 366 U.S. 924 (1961), reversing Dockets 124-A, 251, 6 Ind. Cl. Comm. 513 (1958); cf. Blackfeet and Gros Ventre Tribes v. United States, 162 Ct. Cl. 136 (1963), reversing Docket 279-A, order of October 21, 1957.

III. PLAINTIFFS HAD RECOGNIZED TITLE TO 1867 AREA

We think plaintiffs had recognized title to the remaining area at issue in this suit. The area is contiguous, along part of its eastern boundary, with the portion of the Sioux-Chippewa boundary that lies on the Red River, as set out in Article 5 of the Treaty of Prairie du Chien of August 19, 1825, 7 Stat. 272.

The purpose of the treaty was to establish peace in the Upper Mississippi region by drawing a boundary line among warring tribes, and according to its preamble "* * * thereby to remove all causes of future difficulty * * *." The Prairie du Chien line runs generally in a southeast to northwest direction to the Red River, and then north along the said river. The Chippewas were to the north and east of the line, and the Sioux to the south and west, but the precise territories they and their respective bands occupied were not defined beyond the single boundary line.

Subsequently, the Federal Government entered into various treaties of cession with the Indians involved in the Prairie du Chien Treaty by which the signatory tribes relinquished their lands on their respective sides of the line.

Interpretation of the Prairie du Chien treaty can be found in decisions concerning Indian claims arising from these cessions. These decisions hold that "It was a treaty of recognition; it defined the country of the respective Indian tribes; * * *." Lower Sioux Indian Community v. United States, 163 Ct. Cl. 329, 335 (1963), rev'g in part Docket 142 et al., 10 Ind. Cl. Comm. 137 (1962).

However, the cases have not determined that the Prairie du Chien Treaty of itself gave recognized title to specific territories. Rather they have concluded that subsequent acts of the Government, taken with the Prairie du Chien treaty, established recognized title in the Indians to specified lands.[5/] This is the same reasoning that has been applied

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5/ Minnesota Chippewa Tribe v. United States, 161 Ct. Cl. 258, 315 F. 2d 906 (1963), rev'g Docket 18-B, 8 Ind. Cl. Comm. 781 (1960); Minnesota Chippewa Tribe v. United States, Docket 18-C, 19 Ind. Cl. Comm. 514, 525 (1968); Pillager Bands v. United States, Docket 144, 19 Ind. Cl. Comm. 500, 511 (1968); Minnesota Chippewa Tribe v. United States, Docket 18-T, 19 Ind. Cl. Comm. 341, 352 (1968); Minnesota Chippewa Tribe v. United States, Docket 18-S, 19 Ind. Cl. Comm. 319, 332 (1968); Yankton Sioux Tribe v. United States, Docket 332-A, 19 Ind. Cl. Comm. 131 (1968); Sac and Fox Tribe v. United States, Docket 43, 15 Ind. Cl. Comm. 381, 411 (1965); Sisseton and Wahpeton Bands v. United States, Docket 142 et al., 10 Ind. Cl. Comm. 137, 186-87 (1962); Winnebago Tribe v. United States, Dockets 243-45, 8 Ind. Cl. Comm. 100 (1959); Iowa Tribe v. United States, Docket 153, 7 Ind. Cl. Comm. 98, 105 (1959); Sac and Fox Tribe v. United States, Docket 158, 5 Ind. Cl. Comm. 367, 438 (1957); Otoe and Missouri Tribe v. United States, Dockets 11-A, 138, 5 Ind. Cl. Comm. 316, 351 (1957). Cf. Red Lake, Pembina and White Earth Bands v. United States, Docket 18-A, et al., 6 Ind. Cl. Comm. 305 (1958).

to interpretation of the Treaty of Greeneville of August 3, 1795, 7 Stat. 49, which also was a treaty which promoted peace along the frontier by establishing boundaries with warring Indian tribes. This treaty too was held to grant recognized title although the exterior boundaries between the various tribes were not specified.[6/]

In Miami Tribe, supra, n. 6, the Court of Claims stated (146 Ct. Cl. at 442):

> If we had before us only the Treaty of Greenville and if the Indian claimants were relying on that treaty alone, it would, of course, be necessary for them to prove what part of the land covered by Article IV of the treaty and relinquished to the Indians by the United States was owned by each of the claimants. General Wayne had found it impossible in 1795 to define the boundaries enclosing the various areas used and occupied by the signatory tribes. But those boundaries were established by subsequent treaties * * *. By the time the cession of October 6, 1818, was made, the boundaries of the land owned by the Miami Indians * * * had been established by a number of previous treaties. In those treaties and in the negotiations leading up to them, as well as in the negotiations for the Treaty of October 6, 1818, the right of the Miami Indians as the permanent and recognized owners of the lands ceded in the 1818 Treaty had been unmistakably confirmed by the United States.

The same logic applies, mutatis mutandis, to the instant case.

In the treaty of 1867 between the parties, plaintiffs ceded various rights of way across the lands they claimed in Dakota Territory, as described in Article II, above. The effect of this treaty, in combination

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6/ E.g., Miami Tribe v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959), aff'g Docket 67 et al., 2 Ind. Cl. Comm. 617, 645 (1954); Saginaw Chippewa Tribe v. United States, Docket 59 et al., 30 Ind. Cl. Comm. 388 (1973); Peoria Tribe v. United States, Docket 289, 19 Ind. Cl. Comm. 107, 120-22 (1968).

with the 1825 Prairie du Chien treaty, was to define the area of Sisseton and Wahpeton recognized title.

The circumstances under which Congress confirmed the 1872 agreement further evidence recognition of plaintiffs' title. In the Act of June 7, 1872, 7/ Congress had directed the Secretary of the Interior to examine and report what title or interest the Sisseton and Wahpeton bands had in the 1867 treaty lands, and what compensation, if any, should be made for the extinguishment of such title or interest.

The Secretary appointed the Reverend Moses N. Adams, agent at Lake Traverse, Major William H. Forbes, agent at Devil's Lake, and James Smith, Jr., as a special commission to make a full investigation of the title situation, and if title was found, to negotiate with the Indians

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7/ Chapter 325, 17 Stat. 281. The following is the full text:

> CHAP. CCCXXV. -- An Act to quiet the Title to certain Lands in Dakota Territory.
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> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the Secretary of the Interior to examine and report to Congress what title or interest the Sisseton and Wahpeton bands of Sioux Indians have to any portion of the land mentioned and particularly described in the second article of the treaty made and concluded with said bands of Indians on the nineteenth day of February, eighteen hundred and sixty-seven, and afterward amended, ratified, and proclaimed on the second day of May, of the same year, or by virtue of any other law or treaty whatsoever, excepting such rights as were secured to said bands of Indians by the third and fourth articles of said treaty, as a "permanent reservation;" and whether any, and, if any, what, compensation ought, in justice and equity, to be made to said bands of Indians, respectively, for the extinguishment of whatever title they may have to said lands.

for its relinquishment. Annual Report of the Commissioner of Indian Affairs for the Year 1872 (Def. Ex. W-93) at 86. The commissioners reported on October 3, 1872, that Sisseton and Wahpeton title was good, and accompanied their report with a signed agreement of the Indians to sell for $800,000. The report quoted portions of Article II and IX 8/ of the 1867 treaty, and then stated:

> It appears to us, therefore, that the Government is estopped by the recitals, provisions, and admissions of the treaty from now claiming that the lands designated in Article II were not at the time of making said treaty Indian lands, in the actual possession and occupancy of said Sisseton and Wahpeton bands, and that it is not now at liberty to controvert or question the right of those Indians, or their claim at that time as the owners of the Indian title to all of said territory. 9/

The report of the special commission was accepted by the Commissioner of Indian Affairs and published in his Annual Report for 1872 (Def. Ex. W-93 at 86, 118-123). The Commissioner wrote (id. at 75):

> By act of July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph-line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," this corporation was authorized to construct a railroad between the points named, and it was provided in the second section of this act that "the United States shall extinguish, as rapidly

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8/ The quoted portion of Article IX (as amended by the Senate) reads as follows in pertinent part:

> . . . And it is further agreed that no person not a member of said bands, parties hereto whether white, mixed-blood, or Indian, except persons in the employ of the government or located under its authority, shall be permitted to locate upon said lands, either for hunting, trapping, or agricultural purposes.

9/ Def. Ex. W-93 at 120.

> as may be consistent with public policy and the welfare of said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill." The first tract of country through which the line of this road passes to which the Indians have claim is that lying between the Red River of the North on the east and the James River on the west. The claim of the Sisseton and Wahpeton bands of Sioux Indians to this territory is recognised by the treaty of 1867. By act of June 7, 1872, it was made the duty of the Secretary of the Interior to examine and report to Congress what title or interest the said bands of Sioux Indians have to this territory, and what compensation should be paid them therefor. The proceedings of the commission appointed in pursuance of this act, and the recommendations of the Office thereon, will be found under the appropriate titles of this report.

The Commissioner of Indian Affairs expressly recommended the confirmation by Congress of the action of the special commissioners and the enactment at its next session of "legislation necessary to perfect the purchase of the Indian claim to said land, and to appropriate one installment of the purchase money." Def. Ex. W-93 at 100.

With the Commissioner of Indian Affairs' Report before it,[10/] Congress at its next session did confirm the agreement, with an amendment immaterial to the title question, and appropriated the first installment of purchase money.[11/] In the circumstances, such action amounted to legislative enactment of the commission's interpretation of the 1867 treaty as conferring recognized title on the Sisseton and Wahpeton, whether or not originally

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10/ Cong. Globe, 42d Cong., 3d Sess. 111 (House 1872), 482 (Senate 1873).

11/ See note 1, above.

correct. Such action by Congress constituted a second recognition of Sisseton-Wahpeton title to the area here in suit.[12/]

IV. CUTHEAD SIOUX UNDER CHIEF WANATA JOIN SISSETON AND WAHPETON BANDS

During the Little Crow War, the United States forfeited the plaintiffs' reservation in Minnesota. See Act of February 16, 1863, c. 37, 12 Stat. 652. The Indians fled or were driven into Dakota Territory. In 1867, the Government put a new tribal administration in power, headed by its former chief scout, the mixed-blood Gabriel Renville, who was designated head chief of the combined Sisseton and Wahpeton bands. No such office had existed before. In this capacity, Renville signed the 1867 treaty and the 1872 agreement.

The combined bands were resettled on the two reservations, at Lake Traverse and Devil's Lake, provided by Articles 3 and 4 of the 1867 treaty. Sissetons were not segregated on one reservation and Wahpetons on the other, but members of both bands were settled on each. As separate political entities, the Sisseton Band and the Wahpeton Band had passed into history.

12/ Cf. Sisseton and Wahpeton Bands, supra, note 7, 10 Ind. Cl. Comm. at 168, where a Senate resolution of 1868 was held to constitute retroactive confirmation of title to Sioux lands, supplying a deficiency in a previous statute. See also Choctaw Nation v. United States, 119 U.S. 1, 34 (1886), United States v. Gilmore, 75 U.S. (8 Wall.) 330, 332 (1869).

The Court of Claims, in dictum, called the special commission's decision that the Government was estopped to deny Sisseton-Wahpeton title "very doubtful;" but the court went on to state that the Government by the 1867 treaty "did recognize some proprietary interests in the lands." See Sisseton and Wahpeton Indians v. United States, 58 Ct. Cl. 302, 328 (1923). The Court's attention appears not to have been called to the 1825 treaty of Prairie du Chien.

The evidence shows that a number of Sioux of the Cuthead division of the Yanktonai Tribe were also settled on the Devil's Lake Reservation. Such settlement was expressly contemplated by Article 4 of the 1867 treaty. The question of its legal effect on the present claim naturally arises.

We conclude as a matter of law that these Cutheads simply became members of the Sisseton-Wahpeton Tribe. We reach this conclusion from examination of the 1867 treaty and the 1872 agreement. The Cuthead band is not a party to the 1867 treaty. And although that compact expressly contemplated Cuthead settlement at Devil's Lake, no Cuthead signatures appear on it. When we come to the 1872 agreement, we find that the Cuthead Band is still not a party; but on both the original and the tribal consent to the Congressional amendments there appears the signatures of Wanata, described as "hereditary chief of Sissetons and Cutheads." Clearly, between 1867 and 1872, Wanata and his people had become members of the entity which contracted with the Government.

The interpretation of treaties is a question of law, not of fact.[13/] But the evidence of record is entirely compatible with our above conclusion. The autonomy of the Sisseton and Wahpeton bands was in eclipse between 1867 and 1872. A defeated people, even the power to determine their own membership had been assumed by the United States. Moreover, the transfer of allegiance of a chief and his followers from one band to another was nothing new in Sioux history. Wanata's move had a close precedent in the Wahpakootas or "Santies" who withdrew from their parent

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13/ Sioux Tribe v. United States, App. No. 13-72, 205 Ct. Cl. 148 (1974), slip op. at 5.

band in 1829 to join the Yanktons. See Yankton Sioux Tribe v. United States, Docket 332-C, 24 Ind. Cl. Comm. 208, 224-225 (1970).

The case will now proceed to trial for the purpose of determining the value of the ceded areas on the date the 1872 agreement became effective. That date was May 19, 1873, when the Indians accepted the Congressional amendment.

John T. Vance, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner