

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: August 25, 1977

Appearances:

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

Charles A. Hobbs, John M. Facciola, Attorneys
for Plaintiffs in Docket No. 332-C. Angelo
A. Iadarola, and Wilkinson, Cragun and Barker,
are on the brief.

Craig Decker, with whom was Assistant Attorney
General Peter Taft, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner delivered the opinion of the Commission.

This matter is now before the Commission on remand from the Court of Claims. The court was reviewing, among others, our decision of December 2, 1970, 24 Ind. Cl. Comm. 147. In that decision, this Commission determined that the term "Sioux or Dahcotah Nation" as that name was used in the Fort Laramie Treaty of 1851 referred only to those bands of Indians comprising the Teton and Yankton sub-tribes, effectively excluding the Yanktonais. The Commission further concluded that the Teton

Sioux possessed an undivided 83% interest in the Sioux-Fort Laramie territory and that the Yankton Sioux possessed a 17% interest in that same land. This conclusion was based on our determination that the respective interests of the two sub-tribes should be calculated on the basis of the total populations of each.

In its decision, 205 Ct. Cl. 148, the Court of Claims affirmed our determinations that only the Tetons and Yanktons were included within the term "Sioux or Dahcotah Nation", and that the populations of the two groups constituted 83% and 17% respectively of the whole. However, the court determined that it was the intent of Congress to recognize title in those Sioux Indians who actually were using the land. The court remanded the case to the Commission in order for us to determine from the evidence, if possible, the actual number of Tetons and Yanktons using the "Fort Laramie land" and to apportion the award accordingly.

Responding to the dictates of the court's remand, our duty is to apportion the land on the basis of the numbers of Tetons and Yanktons using it. However, if we are unable to do so, after having given the parties a reasonable opportunity to produce sufficient evidence, the previous apportionment made by this Commission in its order of December 2, 1970, will be applied.

One final aspect of the opinion of the Court of Claims relates to the frequent use of the term "Fort Laramie land". Technically, though the "Fort Laramie land" encompassed lands other than the area reserved to the Sioux, the Court of Claims implied that we are to examine use and occupancy only of the Sioux tract. However, it is the belief

of the Commission that the proper method would have been to examine the evidence of use and occupancy of the entire lands affected by the Fort Laramie Treaty.

We believe that the actual intention of Congress was to negotiate with those Sioux using and occupying lands within the overall treaty area, regardless whether they used and occupied lands within the tract reserved to the Sioux. Nowhere in the record does the history and purpose of the treaty suggest that those Sioux using and occupying the concerned tract were the only ones to be negotiated with.

The Court of Claims remanded the case in order for this Commission to determine the number of Tetons and Yanktons actually using and occupying the "Fort Laramie land". However, the intention of the remand clearly regarded the "Fort Laramie Land" as the Sioux-Fort Laramie land. Both parties presented evidence without contesting this facet of the case. We examined the evidence bearing in mind both interpretations and found, in this instance, the results to be the same.

CONTENTIONS OF THE RESPECTIVE PARTIES

The Teton Sioux plaintiffs (Docket No. 74) presented evidence to support a "corner-area theory". Based upon this theory and the evidence presented, it is their contention that the Yanktons used only a small portion of the Sioux-Fort Laramie lands, comprising approximately 4% of the entire area. The Teton Sioux further contend that the Yankton use and occupancy in this area occurred in association with Brule use and occupancy and in country where a portion of the Two Kettle band resided. This factor, they contend, resulted in the Yanktons possessing no more

than a 2-1/2 percent ownership interest in the Sioux-Fort Laramie lands. Moreover, the Docket 74 plaintiffs assert that the Yankton group which held that interest eventually merged into the Brule and is thus represented in these proceedings by the Teton plaintiffs and not the Yankton plaintiffs. They therefore conclude that the Yanktons possess no present ownership interests in the Sioux-Fort Laramie lands. In addition to the evidence presented concerning the Yanktons, the Tetons presented voluminous evidence to support their contention of full Teton use and occupancy of the Sioux-Fort Laramie area.

The Yankton Sioux (Docket No. 332-C) plaintiffs' equally voluminous evidence attempts to support a finding that the entire Yankton Sioux sub-tribe used and occupied lands within the Sioux-Fort Laramie area. In response to the Teton's corner area theory, the Yanktons contend that their use and occupancy occurred in areas well beyond the area where the Tetons would have confined the Yankton activities. The Yanktons further dispute the corner area theory by arguing that the Court of Claims' decision dealt with population and not geographical use.

Besides presenting evidence of Yankton use and occupancy within the Sioux-Fort Laramie lands, the Yankton Sioux presented additional evidence establishing Teton activities outside of the Sioux-Fort Laramie area allegedly reducing their number actually using and occupying the subject area.

In conclusion, the Yankton plaintiffs' assert that the evidence is not sufficient to determine the number of Yankton who were or were not using and occupying the Sioux-Fort Laramie area. Moreover, they contend

that the substantial number of Tetons not using the area at the time of the treaty also can not be estimated. It is the Yankton's position that the evidence is insufficient to enable the Commission to determine the numbers of each respective sub-tribe actually using and occupying the Sioux-Fort Laramie lands. Hence, the Yanktons' contention would ultimately require the imposition of the Commission's earlier method, to wit:

83% Teton and 17% Yankton.

PERIOD OF YEARS EXAMINED FOR EVIDENCE OF USE AND OCCUPANCY

At the trial on remand, both parties presented evidence of use and occupancy occurring as far back as the late 1700's and early 1800's. However, other than possibly disclosing lifestyle and migratory patterns decades prior to the Fort Laramie treaty, such reports cannot help us in determining the respective use of the Sioux-Fort Laramie lands by the Tetons and Yanktons at the time of the Fort Laramie Treaty.

We are concerned primarily with the years immediately preceding and following 1851. However, to get a complete picture of the land use patterns during these years, it is necessary to look at evidence covering a broader period of time. We conclude that a scrutiny of the years from 1838 to 1858 should provide sufficient evidence for us to determine, if such determination is possible, the relative numbers of Tetons and Yanktons actually using and occupying the Fort Laramie lands.

1838-1843

During this period the general ranges of the Yankton sub-tribe and the Teton bands ^{1/} were as follows: The Yanktons ranged from the Vermillion

^{1/} The Teton sub-tribe was composed of the following bands: Oglala, Brule, Minneconjou, Hunkpapa, Sans Arc, Two Kettle, and Blackfeet.

River to the Missouri River at Fort Pierre, along the Missouri southward, using lands on both sides of the river. The Oglalas could be found in an area including the Black Hills of South Dakota, stretching southerly to lands lying between the forks of the Platte River. The Brules ranged primarily on the headwaters of the White River and Niobrara River reaching down these rivers towards their mouth, using lands on both sides of the rivers. The Minneconjous ranged along the Cheyenne River. The Hunkpapas, Sans Arcs, Two Kettle, and Blackfoot Sioux were found along the Moreau, the Grand, the Cannonball, and the Heart Rivers.

This period evidenced the expansion of the Oglalas along with some Brules into lands south of the Sioux-Fort Laramie lands. Where earlier these lands were places of occasional visits, they were now common grounds for their activities. Nonetheless, the Oglalas did not entirely abandon areas within the Sioux-Fort Laramie lands. They continued to use and occupy lands within the southwestern portion of the subject area.

Issue arose at the trial regarding John Fremont's sighting of Sioux (and Cheyenne) on the Snake River. The Yanktons contended that this sighting placed these Sioux on the Snake River that flows through Idaho. If so, then these Sioux would have been far outside of the Sioux-Fort Laramie area. However, the Tetons asserted the existence of a Snake Creek east of the Missouri to demonstrate the uncertainty as to where these Sioux actually were. The Commission, in examining maps from this period, discovered that a tributary of the Niobrara River was also called "Snake River". It was located in the southern portion of the Sioux-Fort Laramie lands, not too distant from the Cheyenne-Arapaho land as it was

later delineated by the Fort Laramie Treaty. This discovery did not entail our finding Fremont's sighting as having occurred within the area. Rather, this discovery only increased our doubt as to where the incident actually occurred. The particular band involved was not disclosed.

Stephen Riggs' distinction, in his 1840 report, between the areas in which the Sioux bands "lived" and the areas in which they "hunted" was quite pertinent to our examination. Although a band might be described as "living" within a certain area, its hunting activities over a broader area would, of course, constitute use and occupancy of the larger territory. Thus Rigg's observation that the Yanktons hunted mostly west of the Missouri, although he described them as "living" east of the river, meant that the Yanktons were using and occupying land on both sides of the Missouri.^{2/} Riggs further noted that the women and children accompanied the men on the buffalo hunts. Therefore, if the band's hunting area was within the Sioux-Fort Laramie area, all the members of that band, whether Teton or Yankton, must be considered to have been using and occupying the area.

Rufus Sage observed that the Indians' dependence upon the chase for subsistence resulted in their being continually on the move in search of game. This transiency meant that Indians sighted in a particular area might well be on the move again within a short time. However, the numerous sightings of Oglalas, for example, tend to localize their activities in the areas where sighted.

^{2/} It is not clear from Riggs' description whether the hunting territory of the Yankton west of the Missouri was inside or outside Sioux-Fort Laramie lands.

1844-1849

The winter of 1844-45 was a harsh and bitter one for the Sioux of the Missouri. Those Indians normally found along the Missouri River and its tributaries were compelled eastward towards the James River in their attempt to avoid starvation. The report of trader Martin McLeod that there were no Teton or Yankton west of the Missouri River implied that it was not unusual for members of these two sub-tribes to be situated at that time of the year on the western side of the Missouri River.

The 1844-49 period revealed the Oglala Band conducting extensive activities in areas south of the North Fork of the Platte River and outside of the Sioux-Fort Laramie area. At times, Brules were spotted with them. Many sightings in this area referred to the Indians as only "Sioux". Since the Yanktons were not known to venture into this area, the "Sioux" sighted were presumably Tetons. However, the particular band could have been one of several or a collection of Indians from a couple of the bands, such as Oglalas and Brules.

One of the major issues of controversy between the two parties concerned the reports of Father DeSmet. Primarily, controversy surrounded his 1848 sighting of Yanktons and Santees on the headwaters of the White and Niobrara Rivers. If these Indians were in the area of what we now know to be the headwaters of these rivers, they would be outside the Docket 74 plaintiffs' proposed corner area. However, the Docket 74 plaintiffs countered DeSmet's report with the contention that DeSmet did not know where the headwaters of the two rivers were located. The Tetons contended that DeSmet believed that the South Fork of the White River was

the main branch of the White River and that the Keya Paha River was the main branch of the Niobrara River. If so, then the sighting of the Yanktons on the headwaters of these two streams would have left them within the so-called corner area.

DeSmet's indication two years earlier (1846) that the "Badlands" gave rise to the Bad River, the White River, and the Niobrara River, coupled with the location of the "Badlands" on several maps of that period, disclosed that, although DeSmet may not have known exactly where the White and Niobrara Rivers actually took their rise, he did believe that their headwaters were considerably to the west of the South Fork of the White River, in an area near the present Badlands National Monument. Hence, DeSmet encountered the Yanktons west of the Docket 74 plaintiffs' proposed corner area.

DeSmet's 1848 sighting of Yanktons and Santees allegedly deep into Sioux-Fort Laramie lands, although a matter of controversy between the parties, is not crucial to our decision. His sighting was the only one in the record between 1838 and 1858 placing Yanktons that deep into the Sioux-Fort Laramie lands. The location within the Sioux-Fort Laramie lands where these Indians were sighted, however, is not as important to our decision as the fact that they were in the treaty area.

Evidence of activities of the other bands either inside or outside of the Sioux-Fort Laramie area was minimal. War parties would, for example, result in the warriors of the various bands venturing into areas outside of the concerned area. Most of the sightings during this period involved only those Sioux located along the Platte River emigrant roads. Hence,

there was a scarcity of reports on the Yanktons, the Blackfeet Sioux, the Hunkpapas, the Two Kettles, the Minneconjous, and the Sans Arcs.

1850-1854

During this period, the Yanktons were reported only occasionally within the Sioux-Fort Laramie area. Generally, their activities were confined to a small portion of the treaty area around the vicinity of Fort Lookout. Although Agent Vaughan's report placed Yanktons along both sides of the Missouri River, without disclosing the extent of their activities west of the Missouri, we conclude, from all the evidence, that the area within the Sioux-Fort Laramie lands used by the Yanktons did not extend far from the river. Most of the Yankton activities were conducted between the Missouri and James River.

Evidence in the record indicates that an Oglala Indian asserted at the Fort Laramie treaty council that his band hunted well south of the Sioux-Fort Laramie lands. We find that his statement only referred to where his band "hunted" not to areas where they were considered to "live". Part of the Oglala country was inside of the Sioux-Fort Laramie lands while their hunting territory was predominately outside of the area. Hence, the Oglalas used and occupied areas where they were deemed to "live" and where they were deemed to "hunt". Hunting took up most of the months of the year, but after the hunt was concluded the Sioux resided in areas they regarded as "their country."

Tetons (such as the Minneconjous reported rambling around the "Platte country") sighted in the vicinity of the Platte River could have utilized

lands both inside and outside of the area. The Upper Platte Agency included lands both inside and outside of the Sioux-Fort Laramie area.

In 1854, the United States Army sought information regarding the various bands of the Fort Laramie area in an attempt to determine who was responsible for the attack which resulted in the death of Lt. John Grattan and his men. General Winship in late 1854 discussed the various bands of Sioux who habitually resided south of the Missouri River. His report did not include the Yanktons. A similar report was made by Colonel William Hoffman. Hoffman's report also omitted mention of the Yanktons. The omission of the Yanktons from both of these reports most likely can be attributed to the fact that the Yanktons were known to have had no participation in "Grattan's massacre." It was recognized that several bands of Tetons were the ones responsible.

The various Indian agents' reports, plus those from United States Army sources, revealed that the Hunkpapas, Blackfeet, Sans Arcs, and Two Kettles were almost entirely within the Sioux-Fort Laramie area from 1850 to 1854. The Minneconjous, from all relevant reports, also appear to have spent much of that period within the subject area.^{3/} The report of Minneconjous rambling around the Platte country for two years did not provide enough information for our determining the extent of their activities outside of the area.

^{3/} The incident involving the Minneconjou and the cow, resulting in the death of Lt. Grattan and his men, did not reveal any substantial group of Minneconjous in the area. In fact, one of the reports discussing the massacre mentioned that the offender, the killer of the cow, was a stranger from another band of Sioux.

The evidence did reveal Brule movement through areas both inside and outside of the Sioux-Fort Laramie lands during this period. Though most of the reports placed their activities inside the area, it is clear that they used lands outside of the area, particularly when traveling with groups of Oglalas.^{4/}

The Oglalas, during this period, appeared to spend more time outside of the area than inside. The lands between the forks of the Platte River and further south were frequent regions of Oglala activities. However, it is equally clear that the Oglalas continued to conduct activities inside the Sioux-Fort Laramie lands, primarily along the North Fork of the Platte River, and in the extreme southwestern corner of the Sioux-Fort Laramie area.

In summary, this period showed substantial amounts of the area being both used and occupied by the Tetons. The portion of the area used and occupied by the Yanktons involved only a small portion of land along the Missouri River, between Fort Lookout and Fort Pierre. It is impossible to determine from the evidence how deep into the subject area the Yankton activity extended.

1855-1858

Evidence during this period continued to indicate areas outside of the Sioux-Fort Laramie lands which were used by the Oglalas for hunting. Some reports, such as that of General Scott even placed the entire Oglala country outside of the area. (See finding No. 50, infra).

^{4/} At times, groups of Tetons were composed of members from several bands. The village in which Lt. Grattan met his demise was an example of such a situation.

Agent Twiss' directive placing the peaceful Brules and Oglalas south of the North Fork of the Platte River disrupted the customary movements of these two bands. They were not free to roam in areas where they might ordinarily be. In fact, some Oglalas actually had to leave areas within the Sioux-Fort Laramie lands in order to abide by Twiss' directive.

A substantial number of war parties were sighted throughout this period. The evidence was not sufficiently detailed for us to discover, for example, whether two sightings of war parties were of two separate groups of Indians or the same group being reported twice. Furthermore, the evidence did not disclose the duration of the war party's activities, and often times failed to disclose how many warriors were from each band. Additionally, these sightings did not reveal where the warriors had left their old men, women, and children.^{5/}

During this period buffalo and other forms of game were diminishing from areas along the Missouri River. Hence, many of the reports of agents, as well as those of the military and traders in the area, disclosed that the various bands of Tetons, though still using and occupying lands within the Sioux-Fort Laramie area, had moved west from the Missouri River. These bands had not totally abandoned the areas along the Missouri but frequented those areas less often.

As to the Yanktons, F. V. Hayden disclosed in 1855 that when supplied with an abundance of meat they would reside in the White River valley,

5/ The operation of War parties in many of the areas was not a new phenomena. Denig who spent approximately 20 years in the Fort Union area noted that the Hunkpapas had war parties extending into Assiniboine country. Yankton Sioux Exhibit: 55-1. .

an area inside the Sioux-Fort Laramie lands. However, their location in this area was conditioned upon their having an abundance of meat. This condition, the evidence revealed, was not always satisfied.

The letter to Colonel Cooper (finding 58, infra), which described the Big Sioux River area as a favorite winter rendezvous of the Yanktons, Poncas, and Santees, referred only to the Yankton-Santee band known to inhabit the area. This band was far less nomadic than the other Yanktons and needed a far smaller area in which to conduct its activities.

Lt. Warren's 1855 observation of the summer and winter season for the Sioux corroborated other reports describing a larger summer range than winter range. Lt. Warren's comment that in the wintertime the Sioux fixed their lodges in the woods along the banks of lakes and streams affirmed the observation made by Agent Drips 10 years earlier. Neither Warren nor Drips suggested that the Indians' winter habitat was necessarily a part of the land they used and occupied during the summer.

The various geographical reports of the Sioux locations placed the Yanktons outside the Sioux-Fort Laramie lands. These reports either dealt with the "location" or the "country" of the groups identified. These two terms were not necessarily interchangeable. Since the Indians were free to roam in lands of other Sioux bands, the term "locations" might include areas not included in the term "country". As stated earlier, there was no disagreement as to where the Yankton country was located. It was east of the Missouri River, outside of the Sioux-Fort Laramie

lands. The evidence during this period reveals that the Yanktons had become less nomadic than in previous years, and were starting to lead a life based upon the cultivation of the soil, rather than a life dependent upon the chase. Their reliance upon the hunt had been diminished and consequently their use of lands within the Sioux-Fort Laramie area was diminished. Their lifestyle had changed considerably from that lifestyle existing at the time of the Fort Laramie Treaty Council. Accordingly, this period (1855-58) was not as probative as the other periods in our determination of the probable number of Tetons and Yanktons actually using the Sioux-Fort Laramie lands at the time of the 1851 treaty.

ANALYSIS

Upon examination of all the pertinent evidence it has become quite clear that we are confronted with a multitude of difficulties in attempting to determine the number of Yanktons and Tetons actually using and occupying the Sioux-Fort Laramie lands.

First, many of the sightings by travelers, missionaries, members of the army, government agents, traders, steamboat captains, etc., were momentary sightings. The Sioux lived a nomadic life. Indians on a hunt could travel close to 50 miles a day. Any sighting of Indians outside the Sioux-Fort Laramie area did not necessarily mean that the next day or two they would still be outside of the area. Similarly, a sighting of Indians inside the area would not necessitate a finding of continued presence there either.

Second, rarely was a sighting of an entire band. Most often, a sighting was of groups within the band or groups from several bands. To draw a conclusion that the remainder of the band was also in that area would be improper and clearly unsupported by the evidence. In fact, most sightings completely failed to mention numbers of either Indians or lodges situated within a village.

Third, unless sightings by different sources within the similar time period included a thorough description of the group, we were unable to determine whether such sightings were of the same group or of different groups. Clearly, when the object of the examination is to determine the number of Indians actually using and occupying the Sioux-Fort Laramie lands, it is necessary to know whether two sightings were of the same or of different groups.

Fourth, sightings of Indians near the Sioux-Fort Laramie borders, coupled with evidence of these Indians "being out on a buffalo hunt", were not sufficiently detailed to enable us to determine whether the buffalo being hunted were inside or outside of the Sioux-Fort Laramie lands..

Fifth, numerous sightings and map designations of "Sioux" outside the Sioux-Fort Laramie lands only referred to them as that, failing to mention which sub-tribe or band was being referred to. Again, the Commission's responsibility on this remand is to determine the numbers of Yanktons and Tetons actually using the Sioux-Fort Laramie lands. Sightings of simply "Sioux" prevent our determining the band to which these "Sioux" belonged.

Sixth, sightings of war parties failed to indicate where the remainder of the band was located. The evidence reveals that war parties were composed of only the warriors, which represented approximately 25% of the entire band. The old men, women, and children remained behind, situated in areas where their safety would be insured. Hence, the location of approximately 75% of the band was not accounted for in these sightings. Furthermore, the war party did not dwell in lands for a significant period of time. Finally, we felt that war parties were not representative of the nature of activities which would constitute use and occupancy of land. Therefore, only slight weight, if any, was given to such sightings.

Seventh, there were numerous sightings of Indian villages near Fort Lookout, Fort Pierre, and Fort Laramie. There was no evidence, however, that these were permanent villages. These locations were centers of trade and designated places for the Indians to receive government supplies and provisions, thus making it likely that they would be sighted there. Such sightings were relevant to place the respective Indians in the general proximity of these areas. All three of these locations were on the borders of the Sioux-Fort Laramie lands. Hence, the Indians gathering there could have come from areas outside of the Sioux-Fort Laramie area as well as from within.^{6/}

^{6/} Although the parties contested the location of Fort Lookout at the trial, we do not place great importance on its actual location. Though we found Fort Lookout situated west of the Missouri River, it was accessible from across the river. Even if it had been east of the Missouri River, Indians living on the opposite side of the river could have frequented the fort. Moreover, "the Fort Lookout area" was regarded as encompassing lands on both sides of the Missouri River.

Eighth, from various reports throughout the period (Drips, Thwaites, Warren, and Hayden), the evidence revealed greater Indian movement during the summer season than the winter season. The Sioux, both Yanktons and Tetons, were dispersed over a larger area in the summertime. Often a group of Indians would be composed of members of several bands. During winter the Indians would wander over a greatly reduced area and tend to establish villages for a longer period of time. The winter season would afford the best opportunity of finding the Yanktons and Tetons in well-defined areas. Unfortunately, since the westward travelers had to cross the country before winter set in, almost all of the emigrants' reports were made during the late spring or the summertime. The winter locations were not well documented, although the evidence did reveal that the Yanktons and Brules would be generally situated on the White River and other tributaries of the Missouri River.

The difficulty with the above situation is that the summer season was not representative of the rest of the year and thus a series of summer sightings could not be applied to establish a year-round residency pattern in the sighted area.

Ninth, several geographically descriptive reports as to Teton or Yankton locations described lands that were prefaced by the term "country". It was conceded by both parties that the Yankton country was east of the Missouri River. This accounts for the placements on various maps of "Yankton" east of the Missouri River. However, it was the contention of the Yankton Sioux plaintiffs that they also roamed or ranged in portions

of the Sioux-Fort Laramie lands. Reports describing the "Yankton country" did not include areas within the Sioux-Fort Laramie lands. However, certain reports describing the range, hunting ground, or occupied areas of the Yanktons did include lands within the crucial area (e.g. Riggs, Vaughan).

The difficulty arises in determining whether a report (different than a sighting) distinguishes between a group's "country" and its "range". A report may place the group's country in one area without considering where else this group may roam. For example, Lt. Warren in one of his reports noted that the Oglalas "lived" between the forks of the Platte, (Finding 56, infra.) However, it was well known at the time that the Oglalas ranged over a much larger area, using and occupying lands other than that lying between the forks of the Platte. Hence, some reports excluded a group from lands within the Sioux-Fort Laramie area though evidence of their presence there was well recognized. How a report was characterized could well determine whether a group was in or out of the area.

Tenth, some sightings alluded to Yankton or Teton activities at locations west of the Missouri River. Not all areas west of the Missouri were within the Sioux-Fort Laramie lands. An example of this situation would be a sighting of Tetons or Yanktons on the Niobrara River, without further clarification. This river runs both inside and outside of the Sioux-Fort Laramie area. Only if the sighting clearly revealed where the Indians were are we able to determine whether they were inside or outside of the Sioux-Fort Laramie lands.

Eleventh, in several of the reports or sightings of the various sub-tribes and bands, the term "Black Hills" was given. Today the Black

Hills designated on maps is an area in western South Dakota and north-east Wyoming entirely within the Sioux-Fort Laramie lands. However, during the period in question the mountain range known today as the Laramie Mountains was also referred to as the "Black Hills". Maps executed during this time bear this fact out. The Laramie Mountains lie outside of the Sioux-Fort Laramie lands. Fortunately, some sightings were descriptive enough for us to determine which "Black Hills" was intended. Yet, other times the report was not definitive as to which "Black Hills" the Indians frequented.

CONCLUSION

In Yankton Sioux v. United States, 97 Ct. Cl. 56, 61 (1942), the Court of Claims found that "both before and after the Treaty of 1858 members of plaintiff's [Yankton] band hunted and roamed in the Sioux lands, as recognized by the treaty of 1851." In the present case the court stated that there was substantial evidence in the record to support this finding. Having examined the evidence in this case, it is clear that such activities existed around the time of the 1851 treaty as well. However, the evidence does not disclose the proportion of Yanktons using the subject area.

There was far more evidence in the record relating to Teton activities than to Yankton activities. The primary reason for this is that the westward route most emigrants traveled was through lands inhabited by Oglalas and Brules and other Teton bands, but not by Yanktons.

Nonetheless, the record clearly reveals that the Yanktons did conduct a significant amount of their activities in areas between Fort Lookout and Fort Pierre, on both sides of the Missouri River. Though their coverage of the Sioux-Fort Laramie lands was far less extensive than the Tetons, the Yanktons did use and occupy lands within the subject area. Likewise, the Tetons were also using and occupying the area, though large numbers of Oglalas along with a substantial number of Brules were residing in areas outside of the Sioux-Fort Laramie lands. What number of Indians this involved is unknown.

Cognizant of the Court of Claims decision, we are examining the evidence to determine the number of Tetons and Yanktons actually using and occupying the Sioux-Fort Laramie lands. The evidence reveals that the number of Tetons using the area was far greater than the Yanktons. However, we are unable to discover what approximate number of each sub-tribe this represents. Clearly, from the evidence we cannot determine whether all or simply a portion of the Yanktons or Tetons were involved in the use and occupancy activities.


The geographic or corner area theory propounded by the Docket 74 plaintiffs is unacceptable. It does not conform to the mandate of the Court of Claims. The Court of Claims held that the proper basis for allocating the interests between the two parties would be to determine the percentage of the total population of each of the claimants which actually used and occupied the Sioux-Fort Laramie lands.

Adhering to the Court of Claims remand, we are looking for numbers of Indians actually using and occupying the pertinent area. The apportionment

is to be resolved by evidence of use and occupancy, not by evidence of the extent of the treaty area being used and occupied. How large or small an area this might entail is irrelevant to the court's mandate.

In addition, the evidence does not support the existence of a Brule-Yankton merger that would diminish the number of Yanktons using and occupying the Sioux-Fort Laramie lands.

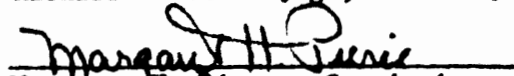
The Yankton home-country was east of the Missouri River and maps designated Yankton country as being outside of the Sioux-Fort Laramie lands. However, the Yanktons did use and occupy lands within the Sioux-Fort Laramie area. The evidence is insufficient for us to determine how many Yanktons, used and occupied lands within the Sioux-Fort Laramie area. Similar difficulty exists for the Oglala and Brule bands. Accordingly, since we are unable to determine the number of Tetons and Yanktons actually using and occupying the Sioux-Fort Laramie lands, under the remand order of the Court of Claims we are compelled to adopt that apportionment previously made by this Commission in our order of December 2, 1970.


 John T. Vance, Commissioner

We concur:


 Jerome K. Kuykendall, Chairman


 Richard W. Yarborough, Commissioner


 Margaret H. Pierce, Commissioner


 Brantley Blue, Commissioner