BEFORE THE INDIAN CLAIMS COMMISSION

THE MIAMI TRIBE OF OKLAHOMA, also known as THE MIAMI TRIBE, and HARLEY T. PALMER, FRANK C. POOLER and DAVID LEONARD, as representatives of THE MIAMI TRIBE and all of the members thereof,	)	
Petitioners,	)	Docket No. 67 (Consolidated) and Docket Nos. 124, 314 and 337
v.	)	consolidated therewith
THE UNITED STATES OF AMERICA,	)	INTERVENORS - Docket Nos. 15-D, 29-B, 89,
Defendant.	)	311 and 315

Decided: March 26, 1954

Appearances:

Edward P. Morse, with whom were Edwin A. Rothschild and Louis L. Rochmes, Attorneys for Petitioners in Docket No. 67.

Francis J. Clary, with whom was Mr. Assistant Attorney General Perry W. Morton, Attorneys for Defendant.

OPINION OF THE COMMISSION

Witt, chief Commissioner, delivered the opinion of the Commission

The Miami Tribe of Oklahoma, also known as the Miami Tribe, petitioners in Docket No. 67, seek to recover from the defendant additional compensation for lands ceded by the Miami Nation to the United States by treaty of October 6, 1818 (7 Stat. 189) the said lands which are designated on Royce's Map of Indiana as Area 99 and consists of approximately 7,036,000 acres in

Indiana and Ohio.

By reason of overlapping and conflicting claims asserted by petitioner in other docket numbers, the Commission by order dated January 5, 1953, consolidated Docket No. 124 which was being asserted on behalf of the Miami Tribe by Miamis of Indiana with Docket No. 67; and by the same order consolidated with Docket No. 67 for the limited purpose of determining the title of the Wea and Delaware Indians, if any, to any part of Area 99, Docket 314 asserting claims on behalf of the Weas and Docket 337 asserting claims on behalf of the Delawares. Thereafter, by reason of claims being asserted which might be construed as conflicting with claims asserted by claimants in Docket Nos. 67, 124, 314 and 337, by order of the Commission dated March 2, 1953, leave was gran to the petitioners in Dockets Nos. 15-D, 29-B and 311 (Potawatomi); and in Docket 89 by the Six Nations, and in Docket 315 by the Kickapoos to intervene in Docket No. 67 (consolidated) for the limited purpose of asserting on behalf of the respective petitioners in said docket numbers any and all claims of any right, title or interest in or to Area 99 or any part thereof. Said order provided that the failure of any of said petitioners to file a motion for leave to intervene on or before March 24, 1953, should constitute and be deemed to be a disclaimer of such petitioners so failing to file within said time of any claim of right, title or interest in or to Area 99 or any part thereof.

Petitions of intervention were filed by all of said petitioners so granted the right to do so except petitioners in Docket No. 29-B. Said petitions of intervention so filed disclaimed an interest in Area 99

or agreed that their rights should be determined upon the evidence introduced by other parties.

On March 31, 1953 the Commission made an order and set said consolidated and intervening causes for final hearing as to limited issues for April 21, 1953 and thereafter on April 21, 1953, an order was made with reference to the issues to be submitted and upon which evidence was to be introduced, said order being agreed upon by all parties, reading as follows:

> This cause coming on to be heard pursuant to order heretofore entered herein on March 31, 1953, and it appearing to the Commission that said order should be modified as hereinafter provided, and the parties having agreed in open hearing on this 21st day of April, 1953, to such modification, it is hereby ordered:
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> A. Notwithstanding the provisions of said order of March 31, 1953, the issues to be submitted to the Commission for its preliminary determination and special findings shall be the following:
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> 1. Indian title to Area 99 (being the land ceded by the Miami Tribe or Nation pursuant to treaty of October 6, 1818 (7 Stat. 189) to the extent that such title was recognized by the United States as existing in any Indian tribes or nations at or about the date of such cession.
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> 2. The right of the Miami Tribe of Oklahoma and the individual petitioners named in Docket No. 67, or any of them, to institute and maintain a claim under the Indian Claims Commission Act arising out of and in connection with said cession of the Miami Tribe or Nation.
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> B. Submission of the aforesaid issues shall not prejudice:
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> 1. The right of any of the parties, including the intervenors and the defendant, to present further evidence and to request findings on the issue of Indian title to Area 99, but only to the extent, if any, that it may be determined that Indian title to Area 11 was not recognized by the United States.
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> 2. The right of the petitioners in Docket No. 124 to present evidence in support of their right to institute and maintain

a claim under the Indian Claims Commission Act arising out of and in connection with said cession by the Miami Tribe or Nation.

C. All parties, including the intervenors and the defendant, shall be permitted to file proposed findings of fact and briefs on the two issues set forth in Paragraph A of this order, as provided in the rules of procedure of this Commission.

Evidence was thereafter concluded on the two issues thus submitted to the Commission, to-wit:

1. Indian title to Area 99 to the extent that such title was recognized by the United States as existing in any Indian tribe or nation at or about the date of the cessions of October 6, 1818;

2. The right of the Miami Tribe of Oklahoma and the individual petitioners named in Docket No. 67 by any of them to insist and maintain a claim under the Indian Claims Commission Act arising out of and in connection with the cession made by the treaty of October 6, 1818.

It should be noted that said order of the Commission of April 21, 195 provided that the submission of the issue of recognized title only did not prejudice any party from a subsequent submission of evidence on the issue of Indian title to Area 99 or any part of which whose Indian title thereto had not been found to have been so recognized by the United States; nor was the submission of such limited issues to affect the rights of petitioners in Docket No. 124 whose right to insist and maintain a claim under the Indian Claims Commission Act arising out of and in connection with said cession of October 6, 1818, was not to be determined by said submission.

In the brief filed herein by the defendant the issue as to the right of petitioners in Docket No. 67 to bring the action is eliminated by statement that it no longer controverts the same; therefore, one sole issue is presented for determination and decision, which is this:

What tribe or tribes of Indians had Indian title, recognized or acknowledged by the United States in Area 99 (Royce's Map of Indiana) on the 6th day of October, 1818? (Def. Brief, pp. 3, 9, 40).

Petitioners in Dockets 67, 124, 314 and 337 assert that they held, recognized, or acknowledged Indian title to said Area 99 by reason (among others) of the treaty of August 21, 1805 (7 Stat. 91), the treaty of September 30, 1809 (7 Stat. 113), the supplemental treaty of September 30, 1809 (7 Stat. 115); and by reason of various writings and reports of W. Henry Harrison, Treaty Commissioner in 1805 and 1809, and a letter written by Lewis Cass (Pet. Ex. 35) one of the Treaty Commissioners, to the Secretary of War on October 23, 1826.

It is the contention of the defendant that the language of Article 4 of the treaty of 1805 upon which petitioners rely for recognition of title was intended solely as an assurance that the Miamis, the Eel Rivers and Weas would be considered as one nation and no dealings would be had with any one tribe as to whatever lands they held in common without the consent of each tribe. The fact that the land involved is not definitely described but is referred to as "the country on the Wabash and its waters above the Vincennes tract" and covers such a vast unsurveyed and indefinite area is urged to convince that title thereto in the Indians was not intended to be recognized.

Statements made by Governor Harrison upon which petitioners rely are construed by the defendant to only have the purpose of assuring that the tribes would be recognized as joint owners of whatever lands they might own in common and were not intended as evidencing any recognition of said ownership.

Recognition of Indian title may be formally expressed in a treaty; it may be derived from the necessary implications of a treaty; it may be found in a statute; it may appear in pronouncements and conduct of responsible government officials.

Lengthy discussions of whether or not a treaty provision constituted a recognition of Indian ownership is found in the decisions of Fort Berthold Indians v. United States, 71 C. Cls. 308, and Assiniboine Indian Tribe v. United States, 77 C. Cls. 347. These cases involve the construction of the Treaty of Fort Laramie of September 17, 1851 (11 Stat. 749). It was contended by the Government that "the territorial provisions (of the treaty) were simply mutual recognition by the Indians of their claims to territory and its segregation by them, without positive governmental recognition or verification of the same." The treaty involved a vast domain--that claimed by the Fort Berthold Indians embracing close to 13 million acres and that by the Assiniboines approximately 6½ million acres. The treaty was held in each case to acknowledge Indian title in the claimant Indians. No appeal was taken in the Fort Berthold case; certiorari was denied by the Supreme Court in the Assiniboine case. Without going into the facts involved in these decisions, we think they support the contention of petitioners herein that the language of the treaty and the acts and statements of government officials at the time and thereafter evidence a recognition that the Miami, Eel and Wea tribes were the owners of the land involved at the time of the treaty.

As stated in the Republic of China case, 30 F. 2d, 278, 279, "Recognition is not necessarily expressed; it may be implied * * *."

The language of the treaty relied upon by the petitioners as constituting a recognition of the ownership of same by petitioners is found in Article 4 of the treaty of August 21, 1805 (7 Stat. 91), which article reads as follows:

> ART. IV. As the tribes which are now called the Miamis, Eel River, and Weas, were formerly and still consider themselves as one nation, and as they have determined that neither of these tribes shall dispose of any part of the country which they hold in common; in order to quiet their minds on that head, the United States do hereby engage to consider them as joint owners of all the country on the Wabash and its waters, above the Vincennes tract, and which has not been ceded to the United States, by this or any former treaty; and they do farther engage that they will not purchase any part of the said country, without the consent of each of said tribes, Provided always, That nothing in this section contained, shall in any manner weaken or destroy any claim which the Kickapoos, who are not represented in this treaty may have to the country they now occupy on the Vermillion river.

The defendant contends that the area, to-wit: "the country on the Wabash and its waters, above the Vincennes tract" was "too vast, indefinite and unsurveyed" to warrant the contention that Indian title thereto was intended to be recognized.

In the treaty of Prairie du Chien, August 19, 1825 (7 Stat. 272) boundaries were fixed among a number of tribes, among them the Menominies, although the representatives of the Menominies were "not sufficiently acquainted with their proper boundaries to settle the same indefinitely." However, in Beecher v. Weatherby, 95 U. S. 517, the Supreme Court referred to the "land thus recognized as belonging to the Menominee tribe." In Minnesota v. Hitchcock, 185 U. S. 373, in discussing the situation wherein a reservation was held to have been created, the court said with reference to the language involved as follows: "Now, in order to create a reservation,

it is not necessary that there should be a formal cession or a formal act setting apart a particular tract." In Spaulding v. Chandler, 160 U. S. 394, a treaty reserving to a tribe an undefined "place of encampment * * * convenient to the fishing ground" was held to have been sufficiently definite when coupled with proof of the land actually occupied to create a reservation.

That the territory involved had been long prior to the treaty of 1818 regarded as Miami territory is evidenced by the fact that Little Turtle, the Miami Chief, during the negotiations resulting in the Greenville Treaty of 1795, referred to this land in Indiana and Ohio as "country which has been enjoyed by my forefathers since time immemorial." He also described the boundaries of a large tract of land, including all of Indiana, much of Ohio and part of Illinois as "the boundaries of the Miami Nation."

By the Greenville Treaty of August 3, 1795 (7 Stat. 49) the Miami Tribe and other tribes ceded lands in Ohio and southern and eastern Indiana and these cessions were confirmed by the Fort Wayne Treaty of June 7, 1803 (7 Stat. 74), by the treaty of September 30, 1809 (7 Stat. 113) and the Grouseland Treaty of August 21, 1805, and finally by the treaty of October 6, 1818. Finally by the treaty of October 23, 1826 (7 Stat. 300), the Miami Tribe ceded all its lands north of the Wabash River.

These several treaties are cited to confirm our viewpoint that when the language of Article 4 which says that the United States considered the tribes therein named "as joint owners of the country on the Wabash