



Decided: June 4, 1957

Appearances:

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Rothschild and Louis L.  
Rochmes, Attorneys for Peti-  
tioners, Dkt. No. 253

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and Robert S. Johnson,  
Attorneys for Plaintiffs,  
Dkt. No. 15-H

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Plaintiffs, Dkt. Nos. 131 and 29-F

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Francis J. Clary and Ralph H.  
Barney, with whom was  
Mr. Assistant Attorney General  
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OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission.

The claims here presented for our determination are for additional compensation for three tracts of land ceded by two treaties later described. For convenience we will generally refer to these cessions by the tract numbers used by Royce on his Indiana map of Indian land cessions published in the 18th Annual Report of the Bureau of American Ethnology for 1896-1897.

Each of the claimants in the seven dockets shown above claimed rights to all or parts of the lands ceded; they were therefore consolidated for trial, but by an order entered January 18, 1955, the initial hearing was

limited to the question whether the tribal claimants or any of them had "recognized title" to the lands ceded by the treaties upon which the claims are thought to arise.

The treaties involved are these:

The treaty of August 21, 1805 (7 Stat. 91, 2 Kapp. 77), by which the Delaware, Pottawatomie, Miami, Eel River and Wea ceded Royce area 56, but more plainly shown on the map, Exhibit 4 in Docket 253. This treaty is generally known as the Grouseland Treaty.

The treaty of September 30, 1809, (7 Stat. 113, 2 Kapp. 101), which is generally known as the Treaty of Fort Wayne, and by which the Delaware, Potawatomi, Miami and Eel River Miami ceded Royce areas 71, 72 and 73, but more plainly shown on the map, Exhibit 4 in Docket 253.

As to area 73, by the order of January 18, 1955, said area was excluded from consideration in this proceeding and may be disposed of in another or separate hearing.

And as to area 71, as shown in said Exhibit 4, it was agreed by the petitioners in Dockets 253, 131, 314, and the defendant in each, that the Wea Tribe, at or about the time of cessions of 1805 and 1809, exclusively dominated or controlled that part of area 71 lying west of the blue line appearing in Exhibit 83 in Docket 253, and that the acreage of such part of area 71 is 549,081 acres. (Stipulation filed November 18, 1954).

#### The Parties

Each of the parties claimant, set forth in the title, made claim to all or part of the lands ceded by the 1805 and 1809 treaties. We deemed it necessary therefore to consolidate the seven cases for trial on the

question of rights or interests of the respective claimants in the lands ceded. This was done by an order dated April 21, 1953. However, since the 1953 order was made changes in the claims of some of the claimants have occurred. The present status of the several parties is as follows:

The Citizen Band of Potawatomi and the Potawatomi Nation, Docket 307, have amended their petition and eliminated all claim to lands ceded by the 1805 and 1809 treaties, so these claimants will not be further considered and will be dismissed from the consolidation.

The Kickapoo Tribe of Kansas et al., Docket 317, offered no proof, it having been stated in opening hearing before the Commission on March 7, 1955 (pp. 27-28 Transcript), that these claimants are interested only in tract 73, which has been eliminated from consideration. (See order of January 18, 1955). So they will not be further considered herein and will be dismissed from the consolidation.

The Peoria Tribe of Oklahoma for the Wea, Docket 314, at the hearing of March 7, 1955, (Transcript, p. 27) announced that no more evidence would be offered by such claimants. No brief or proposed findings have been submitted. These claimants will, therefore, be further considered in the disposition of this consolidated case in connection with the Miami claims.

The Hannahville Indian Community, et al., Docket 29-F, offered no proof herein on this claim and submitted no brief. No further consideration will be given this consolidated claim and it will be dismissed.

The Potawatomie Nation and Prairie Band of the Potawatomie Nation, Docket 15-H, offered proof and submitted findings of fact and brief on their claim.

The Miami Tribe of Oklahoma and the Miami Tribe, Docket 253, offered proof and submitted findings of fact and brief on their claim.

The Miami Indian Tribe and Miami Tribe of Indiana, Docket 131, have submitted evidence and filed proposed findings of fact and brief on their claim. These petitioners and the petitioner in Docket No. 253 represent all Miami Indians, including the Eel River Miami.

#### The Issues

It is understandable from the point of view of the claimants in the several dockets shown in the caption, that they should desire to first limit their submission to the question whether their right to the lands, which are the subject of the several claims, was recognized by the United States through Congressional action; if it was, the time-consuming, difficult and expensive task of proving Indian title would be obviated. The defendant would likewise be relieved of lengthy and expensive research on the question of Indian aboriginal rights if recognized title be proved. It was in recognition of these problems we, by the order of April 21, 1953, consolidated all the cases for trial and limited the issues to the questions of law and fact as to whether the government in its dealings with the northwest tribes signatory to the Greenville Treaty of August 3, 1795, recognized the title of the claimant Indians to tracts 56, 71 and 72, shown on the map, Exhibit 4, Dkt. 253 and Royce's Map 1 of Indiana.

A further consideration of the question of recognized title is deemed appropriate by reason of the fact that since our decision (March 24, 1954) in the Miami case, Docket 67, 2 Ind. Cls. Comm. 617, 635, involving a tract (Royce 99) in Indiana, adjoining the tracts here under consideration, there have been decisions by the Court of Claims and the Supreme Court, which the Government contends have a bearing on the question of recognized title. They are: Tee-Hit-Ton v. United States, 128 C. Cls. 82, decided April 6, 1954, which was affirmed by the Supreme Court (348 U. S. 272) on February 7, 1955, and Otoe and Missouriia v. United States, 131 C. Cls. 593.

Since it is the nature of the petitioners' interest in the land ceded by the 1805 and 1809 treaties that is the main problem presented for our determination, we proceed to examine that interest.

We discussed the general problem of tribal real property rights in Crow Tribe v. United States (1954), Docket 54, 3 Ind. Cls. Comm. 155, 157, and stated that Indian tribes held lands in two ways:

(1) By aboriginal possession, which is the primary source of Indian title, and is based upon immemorial use and occupancy. This interest is generally known as "original Indian title" or "unrecognized Indian title." This type of Indian rights in land is not involved here, for, as we have said above, we are only to decide whether the petitioners ceded by said treaties their recognized title or rights. We mention original Indian title primarily to distinguish it from the kind of tribal interest the claimants here maintain they had when they ceded their lands to defendant.

(2) The other way in which Indians held land was by "recognized title," that is, where the Indians' right to permanently occupy and use land has been confirmed or recognized by Congressional action. This kind of tribal right is variously referred to in court decisions as "treaty" or "reservation" title, "recognized" title and "acknowledged" title.

To create such an interest in Indian tribes Congressional action is necessary. This is so, for as stated in *Hynes v. Grimes*, 337 U. S. 86, 103, 93 L. Ed. 1231, 1247:

Since Congress, under the Constitution, Sec. 3 of Art. 1, has power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just. *Northwestern Bands of Shoshone Indians v. United States*, 324 U. S. 335, 339, 340, 89 L. Ed. 385, 990, 991. (*Italics added*).

And in *Sioux v. United States*, 316 U. S. 317, 326, the Supreme Court held that the disposal of public lands rests "exclusively in Congress."

Congressional recognition may be by direct legislative action or by ratifying a treaty or agreement with an Indian tribe. And, as stated in *Tee-Hit-Ton Indians v. United States*, 348 U. S. 272, 278:

There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. Citing *Hynes v. Grimes Packing Co.*, *supra*.

The petitioners in these consolidated cases do not rely upon proof of "Indian title" to sustain their position, but upon the proposition that by the Treaty of Greenville of August 3, 1795, 7 Stat. 49, between twelve Indian tribes, including the petitioners in these consolidated cases, the defendant recognized the title of these petitioners in the lands ceded

in 1805 and 1809, such lands being tracts 56, 71 and 72, all of which were within the boundaries of the lands relinquished (Art. IV) by the United States in the Greenville Treaty of 1795.

Although the provisions of the Greenville Treaty are perhaps sufficient in themselves to show the intention of the United States as to tribal rights relinquished by it, we believe the dealings of the Government through its authorized representatives show beyond doubt what was intended with respect to recognition of such rights. We are not to be understood, however, as saying that the administrative officers or representatives of the Government can "recognize" Indian title for, as shown above, only Congress can do that, but such officers could and did formulate Government policies respecting Indian land titles and when the Congress acted in pursuance thereof it is permissible, and sometimes necessary, to consider them as indicating Congressional intention in ratifying treaties negotiated by such officers. This is especially true when the instructions given the treaty commissioners and the treaty proceedings are before the Senate when considering ratification.

We glean from the mass of material offered in this case that Government officials and representatives considered the lands "relinquished" by Article 4 of the Greenville Treaty belonged to the twelve tribes as the aboriginal possessors thereof. There was a sound basis for this belief; for by the Fort Harmar Treaty of January 9, 1789, 7 Stat. 28, with the Wiandot, et al., a line was established "as a division line between the lands of the United States of America, and the lands of said nations, forever." These signatory tribes released, quitclaimed, relinquished and ceded to the

United States all their land east, south and west of said line. The east part, and the south part of said line from near Fort Lawrence (Laurens) to the portage near Loromie's store in western Ohio, are the same lines as those in the Greenville Treaty, but from Loromie's store the 1789 treaty line continued northerly, northwesterly and then northeasterly to Lake Erie and thence to the place of beginning. And as to the lands within that boundary the United States did "relinquish and quitclaim" to the signatory tribes all such lands, reserving the exclusive right to purchase the same. This treaty was proclaimed by the President on September 29, 1789, and in connection with his proclamation stated that he did so "by and with the advice and consent of the Senate." (7 Stat. 28, 32).

At the same time and place -- January 9, 1789, 7 Stat. 33, at Fort Harmar -- a treaty was consummated with the Six Nations in which a division line between those nations and the United States was also established and it was therein provided (Article 2) that the United States "confirm" and "relinquish and quit claim" to the Six Nations the lands lying east and north of the division line fixed by that treaty. This treaty seems not to have been ratified or proclaimed, although it was frequently mentioned and discussed in connection with the other treaty of Fort Harmar, referred to above, at treaty councils held with the Northwestern tribes at which the Treaty Commissioners and tribal spokesmen seemed to assume that it was operative. (See Ex. 8 of Dkt. 253 and Vol. 4, pp. 340-361 of American State Papers, and Ex. 94 of said docket, which is

an excerpt from the instructions to the Treaty Commissioners who were unsuccessful in making a treaty with the so-called Northwestern tribes in 1793).

The two Fort Harmar treaties are of consequence because they evidence a plain purpose and intent to make a division between the lands of the signatory tribes and the lands of the United States, and to consummate such separation of territory each party relinquished its rights to the lands retained by the other. Plainly, by the use of the language quoted above the United States intended to accord the tribes legal rights, that is, the rights of perpetual occupancy to use as they saw fit the lands the Government relinquished to the Indian parties by those treaties.

The Fort Harmar treaties have another important bearing on the Greenville Treaty of 1795 for, in addition to the fact that some of the same tribes that consummated the first of the Fort Harmar treaties were parties to the Greenville Treaty, and the first treaty commissioners appointed to negotiate with the Northwestern tribes -- the hostile tribes northwest of the Ohio River -- were instructed to be guided by the Fort Harmar treaties which were, according to the instructions, "regarded as having been formed on solid grounds." The commissioners were also directed to endeavor to induce the tribes to confirm the boundary established by the Fort Harmar Treaty and to offer the Indians: "The guarantee of the United States of the right of soil, to all remaining lands in that quarter, against the citizens or inhabitants of the United States." (Finding 4, and for full instructions see 4 American State Papers, 340-342). These instructions

were issued on April 26, 1793, but the commissioners were unable to negotiate a treaty and abandoned their efforts in August 1793. (4 American State Papers 359).

The Government, after the unsuccessful efforts of 1793 to negotiate with the hostile tribes of the Northwest, renewed its efforts in 1794 and on April 4, 1794, sent instructions to General Wayne (Def. Ex. 19, Dkt. 253) for his guidance in negotiating with the Indians. These instructions, insofar as they relate to land disposition, are identical to those given the commissioners in 1793 in that they emphasized the plan of dividing the territory between the United States and the Indians followed in the Harmar Treaty with the Wiandots, et al., and authorized an offer of guarantee of the right of soil to the Indian lands. These 1794 instructions remained the basis for the negotiations at the Greenville Treaty Council which began on June 16 and was concluded on August 10, 1795 (Pet. Ex. 8, Dkt. 253), for in the instructions of April 8, 1795 (Def. Ex. 15, p. 9, Dkt. 253) General Wayne was admonished: "The instructions on the subject of a treaty with the western Indians, given at the War Office on the fourth day of April, 1794, are still to be attended to, and to aid and influence your negotiations in all matters not varied by the present instructions; \* \*." Moreover, it is a fact, although proof of it is not in evidence, that President Washington submitted the above mentioned Wayne instructions and the treaty proceedings to the Senate in a communication, dated December 9, 1795, laying before that body the Greenville Treaty, in which he wrote:

I lay before you, for your consideration, a treaty of peace which has been negotiated by General Wayne, on behalf of the United States, with the late hostile tribes of Indians, northwest of the river Ohio; together with the instructions which were given to General Wayne, and the proceedings at the place of treaty." (4 American State Papers, 562).

General Wayne followed his instructions implicitly, with one exception. He was first directed to define the boundaries of the separate tribes (Def. Ex. 19, p. 6, Dkt. 253), but in the later instructions of April 8, 1795, the difficulties of such a plan were recognized and Wayne was authorized to make a single treaty for all, which he did. (See Finding 6 and Def. Ex. 15, p. 5, Dkt. 253).

Aside from the establishment of peace, the main object to be accomplished by the Greenville Treaty was the settlement of territorial rights as between the Government and the Indian tribes. This was done by the establishment of a "general boundary line between lands of the United States, and lands of said Indian tribes \* \* ." This line is described in Article III and shown in Royce's maps of Ohio and Indiana and it plainly marks the territorial division between the United States and the tribes. The Indians collectively ceded to defendant all lands they claimed lying eastwardly and southwardly of said boundary line plus some sixteen small tracts in the area relinquished by defendant, however, the small tracts are not in controversy. And the United States, in turn, relinquished its claims to lands not ceded by the Indians or specifically reserved by it.

The relinquishment by the United States is in these words (Art. IV, Finding 5(a)):

In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual; the United States relinquish their claims to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the king of Great-Britain, in the treaty of peace made between them in the year 1783. But from this relinquishment by the United States, the following tracts of land, are explicitly excepted. 1st. The tract of one hundred and fifty thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself and his warriors. 2d. The post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished. 3d. The lands at all other places in possession of the French people and other white settlers among them, of which the Indian title has been extinguished as mentioned in the 3d article; and 4th. The post of fort Massac towards the mouth of the Ohio. To which several parcels of land so excepted, the said tribes relinquish all the title and claim which they or any of them may have.

The real question in these cases is whether the above language constitutes "recognition" of tribal rights, as said term has been defined by the courts, supra, in the territory described in Article IV quoted above, embracing, according to defendant, 156,000,000 acres of land, being all the present states of Michigan, Wisconsin and Illinois, most of Indiana and parts of Ohio and Minnesota.

In arriving at the intent of the Government in the relinquishment of its claims to the lands to the Indian tribes, it is well to look at the problems confronting the new nation at this early period of its existence. The war with the northwest tribes had continued for a number of years and was a great burden on the struggling nation and the people were weary of its cost in men and material resources. Furthermore, at this particular

time we were threatened with the possibility of becoming involved in a general war with European nations. This critical situation is summed up in the following instructions to General Wayne by the Secretary of War:

This commission will require the exercise of all your talents and all your judgment. The delicacy of it ought not in the least degree to be concealed from your view. You are well aware of the extreme dislike of the great portion of the people of the United States to the war, and how gladly they would embrace the occasion of terminating it upon tolerable terms. If therefore a treaty should take place and be frustrated, thorough clear and unequivocal evidence will be required by the public that the agents of the United States had taken every precaution and used every proper exertion to produce a contrary issue. And as you are the commanding General this evidence would be more necessary on your part than it would on the part of a citizen not being a military man.

In addition to all the motives which have previously existed for finishing this war, the present state of European affairs as connected with the commerce of this country threatening to involve us in the general war require in the most forcible manner that we should if possible make peace with the Indians in order to prevent such an undue portion of our strength and wealth from being appropriated to an object of less importance than some other which may probably occur.

So peace was imperative, but not a mere cessation of hostilities. A reading of the instructions to General Wayne, as well as those to the treaty commissioners of 1793, plainly shows that a permanent peace was desired and that the Government considered a settlement of territorial rights essential to a lasting peace. Indian spokesmen at the Greenville Treaty shared this view, in fact, the discussions at that treaty council related largely to territorial interests as between the United States and the Indian tribes. As to the character of such rights the commissioner was authorized to offer the Indians: "The guarantee of the United States of the right of soil to all the remaining Indian lands in that quarter

against the citizens and inhabitants of the United States." (p. 4, Def. Ex. 19). Again, in referring to the right of the United States to purchase the Indian lands, the General was instructed: "But in describing these rights to the Indians you will impress them with the idea that we concede to them fully the right and possession of the soil as long as they desire to occupy the same, but when they choose to sell any portion of the country it must be sold only to the United States who will protect the Indians against all imposition." (p. 7, Def. Ex. 19).

Hence, when the words of relinquishment contained in Article IV of the Greenville Treaty were read in the light of the directions to the Commissioner, their import becomes clear and discloses an intent to give substance to the aboriginal right of possession of the soil until the Indians choose to sell it, that is, in perpetuity. It is true of course that the Indians, at the time of the treaty, had original Indian title -- a right of occupancy based upon immemorial possession -- to the lands relinquished by defendant, but this was a natural right that required no governmental action to create; it has been described by the Supreme Court in these words:

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial \* \*." Worcester v. Georgia, 31 L. Ed. 483, 500.

Article V of the treaty is more explicit as to the relinquishment by the United States in that it is there declared that:

The Indian tribes who have the right to those lands the lands relinquished by the Government are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States;  
\* \*.

And the defendant further promised that until the lands of the signatory tribes were sold to the United States, it would protect them "in the quiet enjoyment of their lands against" all white persons, including citizens of the United States.

It is certain therefore that in incorporating in the treaty the words of Articles IV and V, quoted above, defendant was not granting the tribes Indian title to lands in the Northwest territory, for, as before stated, those tribes then had Indian title thereto, a title which amounted to a mere right of occupancy that could be terminated by the Government at any time and without compensation; it was a right the Government would protect against third parties, but its tenure depended upon the will of the Government and the manner, method and time of extinguishment of such title was not a subject of judicial concern. Tee-Hit-Ton case, supra; Beecher v. Wehterby, 95 U. S. 517, and United States v. Santa Fe Pacific, 314 U. S. 339; 347; Buttz v. Northern Pacific, 119 U. S. 66. Manifestly, when the defendant relinquished its claims to the tribal lands in the Northwest territory and solemnly agreed that the tribes might enjoy those lands as they pleased without molestation from the United States, it was granting each of the twelve signatory tribes the right of exclusive permanent occupancy of the lands each respectively possessed until they were disposed to sell them. The tribes were thus each granted a right they did not enjoy before Greenville, but one plainly within the judicial concept of "recognized Indian title."

However, in the Greenville Treaty no division of the territories of the respective tribes was made. The Indians desired such a division and,

as has been mentioned above, General Wayne was by his first instructions (Def. Ex. 19, p. 6) urged to make separate contracts with the tribes, but these instructions were changed to permit a single treaty with all (Def. Ex. 15, p. 5) and General Wayne informed the Indians at the Greenville Council of the impropriety and impossibility of dividing the lands between the respective tribes. (Finding 6). But the failure of the treaty to specify the lands of the respective tribes does not in our opinion militate against the Government's recognition of the right of each tribe to use and occupy its lands until it was disposed to sell them to the United States. The instructions to Wayne (Def. Exs. 19, 14, Dkt. 253), his statements to the assembled Indians (Finding 6) and the statements of the Indians at the Greenville Treaty (Pet. Ex. 8, Dkt. 253) conclusively show that insofar as tribal lands were concerned the Government was dealing with each tribe independently of the others. In other words, it was understood by the Government's representatives and the Indians that each tribe had separate lands; that there was no community of interest in the lands of the Northwest territory. So the recognition accorded by the Greenville Treaty was that of each tribe. To be sure, the separate tribal lands had to be identified whenever identification became necessary and that could be done by agreements between the tribes and the United States.

While the areas occupied and used by the Miami, Wea and Eel river Indians were never defined prior to the treaties here involved, they, being parties to the Greenville Treaty, had recognized title to such lands as were occupied by them in the Northwest territory. Our problem is to

determine what the boundaries were or, more specifically, whether they were the recognized permanent occupants of the lands within the boundaries described in the 1805 and 1809 treaties. None of the petitioners rests its rights to such lands upon proof of actual occupancy, and no such proof has been offered. They rely upon those two treaties as specifically identifying the lands of such petitioners, the permanent occupancy of which was recognized by the United States in the Greenville Treaty.

The principle of recognized Indian title has been applied to cases arising from the taking of Indian lands without paying therefor and in those cases a defined area was involved and compensation was allowed. *United States v. Creek*, 295 U. S. 103; *Shoshone v. United States*, 299 U. S. 476; *United States v. Klamath*, 304 U. S. 358. But the principle of recognition establishes a right of the Indians "to hold lands permanently," as distinguished from Indian title -- permissive possession. Aside from creating a compensable interest in Indian lands, the principle relieved Indian claimants of proving actual occupancy of the area recognized. No doubt the recognition must go to particular Indian lands and if those lands can be identified as belonging to a tribal entity dealt with and are within the area which is the subject of the dealings between the Government and the Indians, they are recognized lands under the rule.

After the Greenville Treaty of Peace in 1795, conditions in the northwest became stabilized. Indiana became a territory in 1800. William Henry Harrison became its Governor and Superintendent of Indian Affairs, also sole treaty commissioner. With the actual and anticipated migration

of the whites to the northwest it became necessary to obtain relinquishments of title to Indian lands in the new Indiana Territory, but the problem confronting the Government and its representatives was to determine the occupancy of the lands to be freed of Indian occupancy.

Governor Harrison began his study of Indian territorial claims early in 1801, under instructions of the President to make efforts for the extinguishment of Indian claims upon the Ohio river below the mouth of the Kentucky river. (Finding 7). He approached the undertaking by rejecting the idea that the Greenville Treaty created a community of interests of the signatory tribes in the Northwest territory and began negotiations only with tribes claiming rights in a particular area with the result that conflicting claims were resolved by treaties in which all tribes in an area were made parties. (Pet. Ex. 21, Dkt. 253). He also adopted the policy of giving tribes without legitimate claims a part of the consideration in order to facilitate future boundary settlements.

On June 7, 1803, 7 Stat. 74, Harrison negotiated a treaty with nine of the Greenville tribal signatories, including the Miami, Eel river and Wea, by which the boundary of the Vincennes tract (reserved by Article IV of the Greenville treaty) was definitely fixed. And on August 18, 1804, 7 Stat. 81, the Governor concluded a treaty with the Delawares in which they ceded lands between the Ohio and White rivers in Indiana and included lands claimed by the Miami, Eel river and Wea groups. Whatever the merits of the Miami, Eel river and Wea territorial claims, they were acknowledged by the Delawares, the Potawatomi and defendant in the Grouseland Treaty

of August 21, 1805, 7 Stat. 91, which fixed the boundaries of the Miami, Eel river and Wea (Royce tract 56) and the boundaries of the Delaware (Royce tract 49) lands in the Ohio-White rivers area. Here then is joint action by all interested parties, including the Government, settling the boundaries of the Miami, Eel river and Wea tribes and thereby identifying the lands of the last named tribes which were recognized by the Greenville Treaty.

The Fort Wayne Treaty of September 30, 1809, 7 Stat. 113, is the other treaty involved in these cases by which the Miami and Eel river tribes, with the Delawares and Potawatomi tribes "as their allies," ceded two tracts of Indiana land (Royce 71 and 72) to defendant. By Article 5, the consent of the Wea to the cession of the tract first described in Article 1 (Royce 71) of the treaty was necessary to complete the title. This consent was obtained by a separate treaty with the Wea concluded on October 26, 1809, 7 Stat. 116. The Kickapoo were mentioned in the ninth article concerning lands (Royce 73) not here involved.

Here again all parties having or claiming an interest in said tracts 71 and 72 (described in Finding 11) joined in a cession thereof which identified by plain boundaries the lands of the Miami, Eel river and Wea, the title to which was recognized by defendant in the Greenville Treaty.

Potawatomie Nation and Prairie Band of Potawatomie Indians,  
Docket No. 15-H

The Potawatomie Nation and the Prairie Band of Potawatomies in their petition (Docket 15-H) allege they were the owners of one-third of the land (Royce 71, 72) ceded by the Fort Wayne Treaty of September 30, 1809. For

the purpose of this inquiry we shall consider the Prairie Band a part of the Potawatomi Nation.

The only proof offered by the plaintiffs in Docket No. 15-H consists of its Exhibit 1, showing annuity payments to the Potawatomi (Prairie Band) under the 1809 treaty, which were commuted in 1909, and Exhibit 2 which shows six \$500 annuity payments to "Pottawatomie Indians" under the 1809 treaty for the years 1813 through 1818.

The plaintiffs in Docket 15-H have offered no proof as to their identity or capacity to prosecute their claim; however, since plaintiffs of the same name as those appearing here have submitted to the Commission other claims and proved their capacity to prosecute them, we will assume, for the purposes of this case, that these plaintiffs are the same and entitled to assert the claim pleaded in Docket 15-H.

The Potawatomi base their claim of interest in the land ceded by the Fort Wayne Treaty upon the fact that they were a party to that treaty and that they or their bands -- the Prairie and Citizen -- received the annuity of \$500 provided for the Potawatomi by the Fort Wayne Treaty until it was commuted.

It is an undisputed fact that the Potawatomi were a party to the Fort Wayne Treaty and that an annuity was provided for and paid them for their relinquishment, but those facts cannot be accepted as conclusive proof of tribal rights in the area ceded (Tracts 71 and 72) in view of the undisputed evidence appearing in this record and the total absence of proof by the Potawatomi that they used or occupied any part of the area, although they were afforded every opportunity to do so.

It will be noticed that the Potawatomi are referred to in the treaty as an ally of the Miami and Eel river. It is perhaps true, as the Potawatomi's counsel state, that Indians could be "joint owners of property and allies at the same time." But we know of no treaty or other dealings with Indian tribes that gave the term "allies" the connotation of joint ownership. The uncommon use of the term in the Fort Wayne Treaty would indicate it was inserted advisedly and was intended to convey a meaning other than property ownership or interest. This idea is borne out by a statement made in the Treaty Journal of the Treaty of Fort Wayne (Treaty Journal, p. 15, Pet. Ex. 15 in Dkt. 253): "the Putawatomes & Deliwares would be considered as participating in the advantages of the treaty [1809] as allies of the Miamies not as having any right to the land." The Potawatomi were a part of the Indian confederacy which carried on the war against the United States prior to 1795, as were the Miami and many other of the tribes who signed the Greenville Treaty, hence, were allied with the Miami, Eel river and Weas (Pet. Ex. 21, Dkt. 253), but Harrison never considered the Potawatomi as having any valid claim to the lands ceded by the Miami in 1809, nor has any such interest been shown. Moreover, it appears (Def. Ex. 14, Dkt. 253) that it was expedient to include the Potawatomi as a party to the 1809 treaty in order to satisfy the Miami who were friendly with the Potawatomi who were then in an impoverished condition and needed assistance.

Then there is the treaty between the Potawatomi and the United States dated October 2, 1818, 7 Stat. 185, by which the Potawatomi ceded an area

of land (Royce 98) lying north of the Wabash River in the then new State of Indiana and Territory of Illinois. This treaty contains these plain provisions: "The Potawatomes also cede to the United States all their claim to the country south of the Wabash river." There can be no doubt but that these provisions quitclaimed whatever rights the Potawatomi had in the Miami, Eel river and Wea lands ceded in 1809, for all such lands lie south of the Wabash River.

Although the Potawatomi have offered no proof of ownership or interest in the lands ceded by the 1809 treaty, we have examined the evidence offered by all the other parties to this consolidated hearing but have found no evidence that would justify a finding that the Potawatomi, or its Prairie band, had any right or interest in the lands ceded by the treaty of 1809. Their petition in said Docket No. 15-H must be dismissed.

#### Defendant's Contentions and Evidence

Defendant's counsel has expended much energy and devoted much space in its brief to the meaning and effect of recognized title and seems to reach the conclusion that unless a fee title was created by the Greenville Treaty there was no "recognized title" in the lands ceded by the 1805 and 1809 treaties. The effect of the concept of "recognized title" is to change the status of the Indians' natural rights to the soil (original Indian title) and to confirm their rights to the exclusive permanent use and occupancy of a particular territory. It is not necessary that they be vested with a fee simple title, and no such title was created by the Greenville Treaty, nor is any such title claimed by any of the petitioners.

As we have said before, the Greenville Treaty gave each of the named tribes the right of the use and occupancy of its lands in the Northwest territory (described in Article IV) until they were disposed to sell them to the United States. Such use and occupancy was not to apply to all the lands in said territory, but, as explicitly declared in Article V, only to "the Indian tribes who have the right to those lands \* \*." This language, especially when considered in connection with General Wayne's statement (Finding 6) that it was impossible to divide the lands as between the signatory tribes, signifies that it was only the lands that the respective tribes had a right to in the Northwest territory that were relinquished by defendant. It must be remembered that the General was dealing with groups of hostile Indians whose territorial rights were unknown and could not be ascertained, so he fixed over-all boundaries within which the signatory tribes would be protected as to the separate lands each had a right to. Such arrangement would not seem to change or affect the aboriginal rights of nonsignatory tribes within the Northwest territory, but that is a question to be settled when needed for its determination arises.

Defendant offered much evidence (see Appendix to its brief) relating to the British colonial policy respecting Indians during its sovereignty of the American colonies but we have found none of it that changes the conclusions we have reached above. The Treaty of Peace of 1783 between Great Britain and the United States was an unqualified relinquishment of all British territorial rights to the lands in the United States

east of the Mississippi River. No provision designed to protect Indian property rights appears in the treaty, so it is difficult to see how British policy in regard to such rights has any relevancy to the question we are considering here. We are not controlled in any degree by the colonial policy of Great Britain as to Indian property interests. The concept of "recognized Indian title" is the creature of our own laws and policies and apparently had no counterpart in British policy. On the other hand, we note from the opinion in *St. Catherine's Milling and Lumber Co. v. Ontario* (Def. Ex. 11; Eng. L.R. 14 App. Case 46): "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden." This conforms to our laws respecting original Indian title, about which there is and can be no dispute. The main thesis of the defendant's argument seems to be that since the Indians had nothing but an "usufructuary right, dependent upon the good will of the Sovereign," such right cannot by sovereign action be changed to one of permanent tenure. We cannot accept such a contention. Congress may recognize even a fee simple title in the Indians (*Hynes v. Grimes*, supra) and it could, as it did by the Greenville Treaty, create a right of permanent occupancy which would not seem to be contrary to British policy even if we were governed by it, which we are not.

We conclude, therefore, from a consideration of the evidence in this record, and that we have judicially noticed:

1. That defendant by the Treaty of Greenville recognized the rights of the Miami, Eel River and Wea tribes to the lands identified and described

in the Grouseland Treaty of August 21, 1805 (Finding 9) and the Fort Wayne Treaty of September 30, 1809 (Finding 11), and that the petitioners in Dockets Nos 253, 131, 314 are authorized to prosecute the claims for such lands.

2. That the petition in Docket No. 15-H, and the petition in Docket No. 29-F, to the extent that each asserts a claim based on the treaty of 1809, shall be dismissed.

3. That Dockets Nos. 307 and 317 shall be removed from their consolidation with the other cases herein and shall not be prejudiced by such consolidation.

It will be so ordered.

Louis J. O'Marr  
Associate Commissioner

We concur:

Edgar E. Witt  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner