

BEFORE THE INDIAN CLAIMS COMMISSION

HANNAHVILLE INDIANS, ET AL.,)	
DOCKET NO. 29-D,)	
)	
Plaintiffs,)	
)	
HANNAHVILLE INDIANS, ET AL.,)	
DOCKET NO. 29-E,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 29-D and
)	Docket No. 29-E.
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: October 14, 1964

Appearances:

Walter H. Maloney, Attorney for
Petitioners.

Walter J. Muir, with whom was
Mr. Assistant Attorney General
Ramsey Clark, Attorneys for the
Defendant.

OPINION ON DEFENDANT'S MOTIONS TO DISMISS

Watkins, Chief Commissioner, delivered the opinion for the Commission.

The petitions in the above dockets were filed herein on March 14, 1950. In Docket No. 29-D the petitioners are asking additional compensation for certain lands that were ceded to the United States under the Treaty of July 4, 1805 (7 Stat. 87). The ceded lands are officially designated as Royce Areas 53 and 54, and they are located in north central Ohio south of and adjoining Lake Erie. In Docket No. 29-E the petitioners seek additional compensation for lands ceded to the United States under the Treaty of November 17, 1807 (7 Stat. 105). This particular area is located in southeastern Michigan and northern Ohio, and is known as Royce Area 66.

In both of these cases the petitioners are two Potawatomi Indian communities, the Hannahville Indian Community of Wilson, Michigan, and the Forest County Potawatomi Community of Crandon, Wisconsin. The four individual plaintiffs are members of these two communities. For the sake of convenience we shall at times refer to the plaintiffs collectively as either the Hannahville Indians, Hannahville group, or petitioners.

As set forth in the two petitions, the Hannahville petitioners base their right to recover under both the 1805 and 1807 treaties of cession on their allegation that, and we quote:

" . . . they are descendants and the successors in interest of the Potawatomi Indians who, and the Potawatomi Indian Nation that owned and lived upon the lands hereinafter described . . ." 1/

On July 21, 1950, the defendant answered both petitions in which, besides denying liability, it alleged that the United States did not conclude the 1805 and 1807 treaties with any so-called Potawatomi Tribe or Nation of Indians, but rather with that band of Potawatomi Indians, known as the Potawatomi Indians of the Huron.

On March 29, 1959, the defendant filed identical motions to dismiss the petitions in Docket Nos. 29-D and 29-E on grounds that the Hannahville Indians have no genuine interest in the subject matter of these lawsuits because (1) the 1805 and 1807 treaty participants were not the Potawatomi Nation as petitioners contend but rather the Potawatomi of the Huron, a separate tribal land-owning entity, and (2) the Hannahville petitioners can

1/ Par. 2(a) petitions in Docket Nos. 29-D and 29-E.

show no ancestral, legal, or other connection with the Potawatomi of the Huron or descendants thereof. Thus, says the defendant, the petitioners have no right to maintain these lawsuits on their own behalf, or in a representative capacity in behalf of the Potawatomi of the Huron, or descendants thereof. In support of its position the defendant cites the Commission's decision in the case of Prairie Band of Potawatomi Indians et al., v. United States, (Dkt. Nos. 15-J and 71-A) 4 Ind. Cl. Comm. 474, aff'd, 143 C. Cls. 131, as determinative as a matter of law of the issues with respect to what Potawatomi Indians would have an interest in any claims arising out of the 1805 and 1807 treaties of cession. The Hannahville group, as intervening petitioners were parties to the Commission's determinations in Docket Nos. 15-J and 71-A.

The petitioners on October 14, 1959 filed their opposition to the aforesaid motions to dismiss the petitions in Dockets 29-D and 29-E. On December 14, 1959, the petitioners filed a "Supplement To Opposition Heretofore Filed To Defendant's Motion To Dismiss," covering both Docket Nos. 29-D and 29-E, in which, after denying the applicability of the Commission's decisions in Docket Nos. 15-J and 71-A as controlling on the issues raised in defendant's motion to dismiss, they moved this Commission for permission to amend each of their petitions by adding as a party plaintiff, Albert Mackety, "from the Huron River group."

On January 14, 1960, the defendant responded to the above by filing of "Reply to Plaintiffs' 'Supplement To Opposition To Defendant's Motion To Dismiss,'" in which it reiterated its previous grounds for dismissing the Hannahville petitions and opposed the petitioners' motion to add Albert Mackety as a party plaintiff on grounds that, Albert Mackety is no way related to or connected with the Hannahville group, the present

petitioners, and any amendment to the Hannahville's petition that would allow Albert Mackety, an alleged Huron Potawatomi, to assert a claim on behalf of the Potawatomi of the Huron, or an identifiable group of descendants thereof, would result in the filing of a new cause of action that is barred by Section 12 of the Indian Claims Commission Act.^{2/}

Following an informal conference with the petitioners' attorney and counsel for the defendant, this Commission on March 30, 1960, ordered defendant's motion to dismiss and petitioners' motion to amend the petitions in Docket Nos. 29-D and 29-E to be set down on September 19, 1960, for a full hearing on all the issues involved. As stated in its order the Commission made it abundantly clear that this hearing would be limited to the following:

"; the sole issues to be considered at said hearing and said trial, and on which evidence may be introduced, will be whether or not the plaintiffs are entitled to amend petitions to include the name of Albert Mackety as requested, and the issue made by defendant in its motion to dismiss, which is based on defendant's contention that the plaintiffs have not the capacity to amend the pleadings or prosecute the suits."^{3/}

On January 3, 1961, following several continuances, the Commission heard full and extended argument on both motions. Both sides completed their briefing in the early part of 1962.

In 1960 the Commission had ordered Docket No. 29-D and Docket No. 29-E consolidated with several other docket numbers because of competing tribal

^{2/} C. 959 § 12, 60 Stat. 1052, "Limitation of time for presenting claims."

^{3/} Commission's "Order Setting The Motion Of Plaintiffs To Amend Petitions In The Above Dockets, And The Motions of Defendant To Dismiss Both Petitions, For Hearing and Trial."

claims to the lands ceded under the 1805 and 1807 treaties.^{4/} Trial on the merits of these consolidated dockets began on November 18, 1963, and continued through December 6, 1963, whereupon the Commission ordered the hearings recessed until June 1, 1964.

The pending motions in Docket No. 29-D and Docket No. 29-E are preliminary in the sense that they do not reach the merits of whether or not the Potawatomi treaty participants to the 1805 and 1807 treaties of cession actually owned the lands ceded thereunder as claimed by the Hannahville petitioners. The Commission could have ruled upon these motions earlier than this. However, in order to give the Hannahville petitioners maximum time and opportunity to make a full and adequate presentation in opposition to defendant's motion, we have deferred our rulings pending a trial on the merits of these several consolidated cases. Now that they have been tried, there is no real reason to delay further our decision on any of these motions.

The Prairie Band case, cited by the defendant in support of its motion to dismiss, involved Potawatomi tribal claims against the Government that arose out of the Treaty of June 5 and 17, 1846 (7 Stat. 853). Under this treaty the United States acquired by purchase from the newly formed "Potawatomi Nation" two separate reservations in Iowa and Kansas. The two Potawatomi claimants, who initiated this lawsuit, were The Prairie Band

^{4/} The Treaty of July 4, 1805, was concluded with the "sachems, chiefs, and warriors of the Wyandot, Ottawa, Chipewa, Munsee and Delaware, Shawnee and Pottawatomie nations. . ." The Treaty of November 17, 1807, was concluded with ". . . the sachems, chiefs, and warriors of Ottaway, Chippeway, Wyandotte, and Pottawatomie nations of Indians..."

of Potawatomi Indians living in Kansas in Docket No. 15-J, and The Citizens Band of Potawatomi Indians in Oklahoma, who filed its claims in Docket No. 71-A. The Commission consolidated these two dockets for trial on the merits.

The Hannahville petitioners, claiming the right to share in any prospective judgment, sought to intervene in this Prairie Band case. The principal allegation upon which they sought to intervene, and indeed, the theme that runs through all their claims before this Commission, is that the Hannahville petitioners are descendants of members of a single overall Potawatomi land-owning entity known as the "Potawatomi Tribe" or "Nation." This "Potawatomi Nation" existed during treaty times, roughly that period between 1795-1846, and according to the petitioners it was this Potawatomi Nation that the Government dealt with by treaty in acquiring all Potawatomi lands. The defendant denied the existence of any such overall Potawatomi land-owning entity, and contended that, the evidence would show clearly that the so-called Potawatomi Nation was in fact composed of separate autonomous bands, and it was from these bands through a series of treaties that the United States ultimately acquired all Potawatomi Indian lands east of the Mississippi River. We concluded that the evidence substantially supported the defendant's position. We specifically found that during the period 1795 through 1833 the Potawatomi Indians were in fact composed of separate tribes or bands, residing in different areas, and that in their various activities, including the holding and use of lands, these bands acted independently of each other.^{5/} There were five principal

^{5/} Commission's Finding 6, 4 Ind. Cl. Comm. 477.

tribes or bands with whom the Government dealt by treaty in obtaining the various land cessions. These bands were the United Nation of Chippewa, Ottawa, and Potawatomi, The Potawatomi of the Prairie and Kankakee, The Potawatomi of the Wabash, The Potawatomi of St. Joseph, and finally The Potawatomi of the Huron, or Huron band.^{6/}

The Commission further identified the Huron Band as being that group of Potawatomi Indians which concluded the 1805 and 1807 treaties, with which we are presently concerned. In the Commission's Finding 31 we said in part:

"31. Subsequent to the Greenville treaty the United States made three treaties in which various Indian tribes or bands participated and by which lands adjoining Lake Erie in northern Ohio and southeastern Michigan were ceded to the United States. In two of these treaties, made at Fort Industry, July 4, 1805, and at Detroit, November 17, 1807, the Huron band was identified as the particular band of Potawatomi Indians which was one party to the treaty and which was entitled to payment for its interest in the land cessions involved. These two treaties provided for the cession to the United States of the lands which are identified as Areas 53 and 54 on Royce's map of Ohio and as Area 66 of which part is shown on Royce's map of Ohio and part on Royce's map, Michigan 1." ^{7/}

In other findings the Commission found that "The Huron band asserted its interest exclusive of any other Potawatomi band in the payment provided for under the 1805 treaty * * *," and, that "The United States recognized the exclusive interest asserted by the Huron band to the 1805 treaty payment."^{8/} We also found that the \$400 permanent annuity provided for under the 1807 treaty was paid exclusively to the Huron band in Michigan

^{6/} Commission's Findings 9, 11; 4 Ind. Cl. Comm. 480-481.

^{7/} 4 Ind. Cl. Comm. 497

^{8/} Commission's Finding 32; 4 Ind. Cl. Comm. 497-498.

until finally commuted for the sum of \$8,000 in 1888 and distributed to the members of said band,^{9/} that the Huron band was "politically distinct from and independent of the United Nation, the Kankakee band, the Wabash band, the St. Joseph band, and Potawatomi Nation"; ^{10/} that "The Huron band never had, or claimed any interest in any lands on the west side of Lake Michigan"; ^{11/} and that the Huron band, having not participated in the 1833 and 1837 removal treaties, never went westward to the new reservations established in Iowa and Kansas, but continued to reside in Michigan.^{12/}

Albert Mackety, whom the petitioners are trying to bring into these two dockets as a party plaintiff, was an intervening petitioner in the Prairie case and the only petitioner who claimed an ancestral connection with the Huron Band of Potawatomi Indians. This Commission so entered a finding to that effect. Mr. Mackety was shown, not to be a member of the Hannahville group, but rather a member of an incorporated Indian Community in Michigan, known as the "Potawatomi Indians of Michigan and Indiana, Inc." ^{13/} The net result of the Commission's findings concerning the Huron Band clearly was that there is not, and never was, any connection, tribal or otherwise, between the Hannahville petitioners and the Huron band of Potawatomi Indians.

^{9/} Commission's Finding 33, 4 Ind. Cl. Comm. 498.

^{10/} Commission's Finding 37, 4 Ind. Cl. Comm. 501.

^{11/} Commission's Finding 38, supra.

^{12/} Commission's Findings 26, 38, 39; 4 Ind. Cl. Comm. 493, 501.

^{13/} Testimony of Albert Mackety, Docket Nos. 15-J and 71-A.

The present membership of the Hannahville petitioners is derived from a head count of the "Wisconsin Indians" conducted in 1906 by the Interior Department. This special enrollment was made for the Government by Agent Walter M. Wooster, and the compiled roll is known as the "Wooster Roll." It was Wooster's objective to enroll only those Potawatomi Indians whose ancestors were members of the Wisconsin band or tribe at the time of the 1833 Potawatomi removal treaty, and who had refused to move west across the Mississippi in compliance with the provisions of said removal treaty. The Potawatomi tribal entity that ceded Royce Area 187 in Wisconsin and Illinois under the 1833 removal treaty was the "United Nation" band, and in those years following the 1833 treaty, a great majority of the "United Nation" did in fact remove west to the Iowa reservation set aside for them. Those members, who refused to emigrate and remained at their Wisconsin sites, thereafter were known and dealt with by the Government as "Wisconsin Indians." Wooster specifically excluded in this compilation those Indians whose ancestors had removed westward, those whose ancestors were enrolled in any other tribe, those whose ancestors lived in southern Wisconsin or Michigan, and those whose ancestors were members of "Pokagon's Band." By process of elimination, the Indians actually enrolled by Agent Wooster comprised descendants of non-emigrating members of the "United Nation" previously referred to. The Commission specifically found that the membership of the Hannahville group (including the Forest County Community) consisted of the Indians on the Wooster roll or descendants thereof.^{14/}

^{14/} Commission's Findings 56, 58; 4 Ind. Cl. Comm. 509, 510.

Upon the issuance of the Commission's Findings of Fact, Opinion, and Order dismissing the intervening petition in the Prairie Band case, the Hannahville and other individual intervening petitioners promptly appealed to the Court of Claims. After extended briefing and argument on all the issues, the Court of Claims, in a comprehensive decision, affirmed the Commission's Findings of Fact, Opinion, and Order dismissing the intervenor-appellants' petition.^{15/} Ever since the Court's affirmation of this Commission's decision in the Prairie Band case, the Hannahville petitioners have repeatedly challenged its res adjudicata application on the issues raised and decided in that case. The sole exception is the Commission's ultimate determination that they had no compensable interest in the western reservation lands that were ceded under the Treaty of June 5, 1846 (9 Stat. 853). Apparently they have accepted this as being final. Apart from the ultimate issue in the Prairie Band case, the Hannahville petitioners maintain that our adjudication of the other issues raised by them was only obiter dicta.

The most significant of our so-called "obiter dicta" determinations involved the question of whether or not there existed during treaty times a single overall Potawatomi land-owning entity known as the Potawatomi Tribe or Nation. The Hannahville petitioners vigorously contended for such an entity in the Prairie Band case, as they believed that it was essential to prove this fact in order for them to intervene. We found that there was no such overall entity, but this is not the reason the

^{15/} Prairie Band of Potawatomi Indians et al., v. United States, 143 C. Cls. 131(1958), pet. for writ of certiorari denied, 359 U. S. 905.

petitioners were denied their right to intervene. We ultimately found that the ancestors of the Hannahville petitioners were members of the "United Nation" band, and that they never acquired a compensable interest in the subject matter of the Prairie Band case due to their avowed refusal to comply with the provisions of the 1833 removal treaty. Because the decision on the overall entity question was not absolutely necessary to our ultimate determination that the Hannahville Indians lacked rights of intervention in the Prairie Band lawsuit, the petitioners contend that they are at liberty to raise this same issue in other cases.^{16/} We think the Hannahville petitioners in this instance have unduly restricted the applicability of the doctrine of res adjudicata, and that they cannot now escape the consequences of an adverse decision in the Prairie Band case on the issue of the existence of an overall Potawatomi land-owning entity.

Today the Commission had occasion to act on another motion brought by these same Hannahville petitioners.^{17/} In an opinion accompanying our order denying this motion, we discussed at some length the res adjudicata applicability of our determination of the issues specifically raised by the Hannahville intervenors in the Prairie Band case. In so doing we rejected the petitioners' same argument made herein to the effect that they were bound only by the ultimate decision in the Prairie Band case and nothing more. We specifically pointed out that, where a court having

^{16/} The exact language of the Court of Claims in the Prairie Band case was, "As to the first contention, in our view of the controlling facts in this case as to membership, it is immaterial whether the Potawatomi in the East were a single tribe or many bands. Appellant's rights would be the same." 143 C. Cls. 131, 136.

^{17/} Commission's Order and Opinion of October 14, 1964 denying petitioners oral motion to admit additional evidence in Docket Nos. 29-I, 29-J, and 29-K.

jurisdiction decides several issues in a case, and where these specific determinations may not necessarily figure directly in the court's ultimate decision, the parties to the original lawsuit may nevertheless be bound by such findings when they seek to raise these same issues in a different lawsuit. To support this position we cited the Court of Claims opinion in the case of The Choctaw Nation v. United States, 133, C. Cls. 207, wherein the court in dealing with a situation somewhat comparable to that herein, upheld the defendant's plea of res adjudicata.

In the appeal in the Choctaw case, the Choctaws had brought suit before the Indian Claims Commission for certain lands west of the 100^o meridian, west longitude, and the defendant cited as res adjudicata a prior decision in the Supreme Court of the United States, 179, U. S. 494 (reversing 34 C. Cls. 17), in which the court ruled that the Choctaws did not own the lands west of the 100^o meridian. This Supreme Court case did not originate as a claim for lands west of the 100^o meridian, but rather for the lands east of the 100^o meridian. However, the Choctaw Indians had specifically raised the question of their ownership of those lands west of the 100^o meridian, and the Supreme Court, as a result, gave it detailed and careful consideration and actually decided it. In the Choctaw appeal from the suit before this Commission the Court of Claims upheld the defendant's plea of res adjudicata on the grounds that the Choctaws had their day in court on the issue of their ownership of the lands west of the 100^o meridian. The court, after noting that in the case plead in bar the Supreme Court had commented on the apparent irrelevancy of deciding Choctaw

ownership of the lands east of the 100^o meridian, went on to state the following:

However that may be, the Choctaws presented the question for decision, it received detailed and careful consideration and was, in fact decided. We think they have had their day in court on the question. We think the situation is fairly comparable to that of a prior decision which is rested on two grounds. Although the decision would probably have been the same if either one of the grounds had been lacking, yet that does not make both or either of the grounds obiter dictum. United States v. Title Insurance and Trust Company, 265 U. S. 472, 486. The situation is also comparable to that of a case in which a court considers and decides a question presented to it as one step in the logical development of its ultimate decision. It then passes on to the next question, and its decision of that question is such that the ultimate decision would have been the same if the preceding question had not been decided at all, or had been decided the other way. But the question was presented and decided and is res adjudicata. Railroad Companies v. Schutte, 103 U.S. 118, 143.^{18/}

We agree with the rule stated in the above decision, and are firmly convinced that under the circumstances surrounding the Commission's determination of the overall Potawatomi land-owning entity question raised in the Prairie Band case, the Hannahville petitioners have had their day in court on this particular issue.

It has been decided then that the Hannahville petitioners, being descended from the "United Nation" of Potawatomi Indians and not connected with the independent Huron band, have no cognizable interest in the subject matter of either the 1805 treaty or the 1807 treaty since the Commission identified the Potawatomi treaty tribal participants to have been exclusively the Huron band of Potawatomes. Accordingly we find no

^{18/} 133 C. Cls. 207, 209.

justification in allowing the Hannahville petitioners to continue to prosecute the claims in Dockets 29-D and 29-E under a theory that the Commission rejected many years ago, and from which action the petitioners on appeal were unable to convince the Court of Claims that we had made a horrible mistake. This being the case, the Commission does no injustice to the Hannahville petitioners by dismissing their petitions.

This brings us to petitioners' motion to add the name of Albert Mackety "from the Huron River group" as a party plaintiff to the petitioners in Docket Nos. 29-D and 29-E. We think the addition of Albert Mackety as a party plaintiff to these two petitions at this late date is prohibited under Section 12 of the Act; in the absence of there being a real party in interest presently capable of prosecuting the claims in the Docket 29-D and 29-E petitions. The addition of Mr. Mackety as a claimant at this date amounts to the filing of an original petition some 13 years after limitation for filing original petitions.

While our decision to deny petitioners' motion in this regard forecloses Mr. Mackety from filing any original petitions on behalf of an identifiable group of claimants, we are aware that there is evidence in the record of these cases as well as in other Potawatomi dockets that Mr. Mackety belongs to an Indian organization in Michigan known as "The Potawatomi Indians of Indiana and Michigan, Inc." Assuming for the moment that within the above organization's membership there are other individuals like Mr. Mackety, who can show ancestral connections with the Huron band of Potawatomi Indians, then it is possible that Mr. Mackety's group may be entitled to intervene upon a showing of a "common interest" in the subject matter of the pending dockets in which other Indian claimants are also seeking to recover additional compensation for the areas ceded under the

1805 and 1807 treaties.^{19/} Our suggestions along this line should not be taken as a silent guarantee or prejudgment that such intervention rights are valid, but rather as an expression of this Commission's earnest desire to assist all the interested parties in expediting these particular claims toward final judgment. Thus we feel that in this instance our procedural suggestions are appropriate and proper, although the petitioners are certainly at liberty to pursue their remedies as they see fit.^{20/}

In keeping with our views expressed herein, the Commission will enter an order denying petitioners motion to add the name of Albert Mackety as a party plaintiff to the petitions in Docket Nos. 29-D and 29-E, and granting defendant's motion dismissing both petitions.

/s/ Arthur V. Watkins
Chief Commissioner

I concur:

Wm. M. Holt
Associate Commissioner

T. Harold Scott dissents, see pages attached.
Associate Commissioner

^{19/} The Blackfeet and Gros Ventre Tribes of Indians et al., v. United States, Appeal No. 1-58, C. Cls. decided June 7, 1963.

^{20/} It has been brought to our attention that the "Potawatomi Indians of Indiana and Michigan, Inc.," is not represented at this time by an attorney of attorneys under an approved contract. We would advise that this situation be remedied as soon as possible before any counsel attempt to take any further action before this Commission on behalf of this organization or on behalf of Mr. Mackety acting in a representative capacity.

