BEFORE THE INDIAN CLAIMS COMMISSION

MINNESOTA CHIPPEWA TRIBE, ET AL.,	)	
	)	
Petitioners,	)	
	)	
v.	)	Docket No. 18-S
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: August 13, 1968

Appearances:
Jay H. Hoag, with whom was
Marvin J. Sonosky,
Attorneys for Plaintiffs.

Howard G. Campbell, with whom was
Mr. Assistant Attorney General Clyde O. Martz,
Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Chairman, delivered the opinion of the Commission.

This case is now before the Commission on petitioners' motion for summary judgment by which they seek a determination that the "Chippewa Indians of the Mississippi and Lake Superior, or other Chippewa bands included as parties plaintiff, or some combination of the same" were the owners by "recognized title" of the lands which were ceded to the United States by the Treaty of October 4, 1842 (7 Stat. 591). The petitioners assert that the United States recognized title in the Chippewas by the Prairie du Chien Treaty of August 19, 1825 (7 Stat. 272), and the subsequent course of dealings and series of treaties between the United States and the Chippewas. The lands involved in the 1842 cession are referred to as Royce Area 261.

Petitioners contend that by the decisions of the Supreme Court, the Court of Claims, and this Commission, it is settled law that the Treaty of Prairie du Chien is a treaty of recognition. Therefore, the Chippewas, who were parties to the treaty, held recognized title to a vast territory which included all of Royce Area 261. However, as counsel for the petitioners recognizes, no decision has yet been rendered which holds that the Prairie du Chien Treaty recognized title in any Chippewa Indians. While this question has been argued in other Chippewa claims the only decisions have been that the Prairie du Chien Treaty did not grant recognized title in the Chippewa Indians. Minnesota Chippewa Tribe v. United States (Docket 18-B), 8 Ind. Cl. Comm. 781, reversed in part, modified in part, 161 C. Cls. 258 (1963),[2/] Minnesota Chippewa Tribe v. United States (Docket 18-U), 14 Ind. Cl. Comm. 360 (1964).

Petitioners have cited six Commission decisions as holding that the Prairie du Chien Treaty was a "treaty of recognition". One of those cited decisions was Red Lake and Pembina Bands v. United States (Dockets 18-A, 113, 191), 6 Ind. Cl. Comm. 247. The Commission did not hold that the Chippewas

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2/ The Commission's decision on the title phase of this case was based on aboriginal Indian title and a determination that Congress had not granted recognized title to the petitioners. The Court of Claims reversed the Commission, holding that the United States had recognized the Chippewa's title to the two segments of land which had been excluded in the Commission's decision. The Court did not base the recognition on the Prairie du Chien Treaty but looked to later Congressional action, particularly the 1842 and 1854 Treaties, to conclude that the Chippewas had recognized title. Since this case will be more carefully considered later in this opinion, we need not belabor it at this point.

had recognized title to the lands there in issue. The title determination was based on exclusive use and occupation for a long time, i.e., aboriginal Indian title. It is true that the decision makes many references to "recognition". We believe this was, in most instances, an unfortunate selection of words. In that decision the Commission relied to a considerable extent on the Article 5 Prairie du Chien Treaty line as a "recognized boundary" which separated Chippewa and Sioux territory. The Commission did not intend to indicate a determination of Congressional granting or recognizing of land title. The statements in that decision such as government officials "repeatedly recognized petitioner bands as the owners of Indian title" were ill advised. In considering questions of title in Indian cases use of the word "recognize" should more properly be limited to its restricted meaning as a word of art in the term "recognized title".

Recognized title is the granting to the Indians by Congress of a permanent right of occupancy in lands. The vesting in Congress of the sole power to dispose of the lands of the United States is found in §3 of Article 4 of the Constitution. Hynes v. Grimes Packing Co., 337 U.S. 86, 103-104. It is well established that the only source of recognized title is Congress. When Congress has acted to grant or recognize title to land in a particular tribe, that tribe thereafter possesses a right to permanently hold such lands. The precise nature of the right or title thus granted or recognized depends on the wording and intent of Congress. Congress may even recognize a title equal to fee simple. But whatever the precise title may be, it is clear that recognized title confers a legal interest in the lands involved. As

tne Supreme Court has stated, "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". Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-279. Recognized title was defined by the Court of Claims in Sac and Fox Tribe of Indians of Oklahoma, et al., v. United States, 161 C. Cls. 189, 192-193 (1963) cert. den. 375 U.S. 921:

> " ....Congress, acting through a treaty or statute, must be the source of such recognition, and it must grant legal rights of permanent occupancy within a sufficiently defined territory. Mere executive'recognition' is insufficient, as is a simple acknowledgment that Indians physically lived in a certain region. There must be an intention to accord or recognize a legal interest in the land."

In considering recognized title and its requisites, it is proper to observe that it is in no way dependent on "Indian title". Indian title, also variously referred to as original or aboriginal title or aboriginal Indian title, is a mere permissive right to land use and occupation which Indian tribes acquired through exclusive use and occupation of lands for a long time. While language such as "recognized Indian title" or even "recognized original Indian title" has at times appeared in decisions on Indian claims, this cannot be interpreted as indicating any necessity of Indian use and occupancy of land to support recognized title. There need be no actual use or occupation or even the presence of Indians in an area to sustain recognized title. The lands to which an Indian tribe has been granted recognized title may be all or part of the lands formerly held by

them under mere aboriginal title or may be lands which they never previously occupied. The Miami Tribe of Oklahoma, et al., v. United States, 146 C. Cls. 421, 445.

We turn now to a consideration of petitioners' argument that the Prairie du Chien Treaty was a treaty of recognition. Petitioners have placed great reliance on the Minnesota Chippewa case in pressing their argument.

The Minnesota Chippewa case was tried before the Commission alternatively on both aboriginal Indian title and recognized title. The Commission held that title had not been recognized in the petitioning Minnesota Chippewas but that the Indians had proven aboriginal Indian title to a substantial portion of the claimed area. There were two areas, however, which were excluded from the area found to have been "owned" by the petitioners, and those two excluded segments were the subject of the appeal. The Court of Claims reversed the Commission, holding that the Indians did have recognized title to the excluded segments.

In that case the Indians made a vigorous argument that the 1825 Treaty at Prairie du Chien recognized title in the Chippewas. In their brief before the Court of Claims they argued that "the purpose and circumstances leading to the 1825 Prairie du Chien Treaty disclose the intent to recognize territorial limits"; "the 1825 Treaty negotiations confirm the intent to recognize title"; and finally "the language of the 1825 Treaty establishes recognition". The Court of Claims noted that "appellants urge strongly that the 1825 Treaty, in itself, constituted recognition of the Chippewas' claim to

ownership of all land to the north of the line ..." (161 C. Cls. 258, 262).

But the Court of Claims clearly did not find, as had been argued, that the Prairie du Chien Treaty recognized title in the petitioners. The Court "passed" the issue and proceeded to consider later Congressional action. Of special importance in that case was the Treaty of October 4, 1842 (7 Stat. 591), which is the same treaty by which the petitioners herein ceded Royce Area 261. The Court quoted all of Article V of the Treaty, italicizing the phrases "... the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas, party to this treaty;" and "all the unceded lands belonging to the aforesaid Indians, are hereafter to be held in common..." (161 C. Cls. 258, 264).

The Court found the Treaty of September 30, 1854 (10 Stat. 1109) "perhaps even more enlightening". That treaty "effected a division of the Chippewa country" between the Chippewas of the Mississippi and the Chippewas of Lake Superior.

In the dissent in the case, 3/ Chief Judge Jones wrote that the primary reason for the determination of recognized title was found in Article V of the 1842 Treaty. He stated "... the part of the majority opinion which reverses the Commission as to the two segments rests almost altogether on the provisions of Article V of that Treaty and some other scattered comment." (161 C. Cls. 258, 272)

3/ Both Chief Judge Jones and Judge Whitaker dissented from the determination that there was recognized title.

However, the Prairie du Chien Treaty has been held to have granted recognized title in other Indians. Otoe and Missouria Tribe of Indians et al, v. United States, 5 Ind. Cl. Comm. 316; Sac and Fox Indians of Oklahoma, et al., v. United States, 5 Ind. Cl. Comm. 367; The Iowa Tribes, et al., v. United States, 7 Ind. Cl. Comm. 98; Winnebago Tribe v. United States, 8 Ind. Cl. Comm. 78.

But the most significant decision was that in Lower Sioux Indian Community in Minnesota, et al., v. The United States, 10 Ind. Cl. Comm. 137, reversed 163 C. Cl. 329. The Lower Sioux case was the second time the Court of Claims had occasion to consider the 1825 Prairie du Chien Treaty. In that case, which was decided eight months after the Minnesota Chippewa case, the Court used clear and unmistakable language in declaring the 1825 Prairie du Chien Treaty to be one of recognition. The Court stated:

> "We can find nothing in the historical background of the treaty [1825 Prairie du Chien] that suggests other than that the intent of the United States, and that of the various Indian tribes assembled, was to carve the entire territory so as to give each tribe title to the lands claimed. It was a treaty of recognition; it defined the country of the respective Indian tribes; it was not a treaty of cession." (163 C. Cls. 329, 335)

In the Commission's decision in the Lower Sioux case it was found:

> ".... that the 1825 Prairie du Chien treaty was a treaty of recognition, and that it accorded to the treaty participants permanent rights of occupancy to the landed areas belonging to them and located within the fixed treaty lines...." (10 Ind. Cl. Comm. 137, 153)

In view of the previous decisions that the Prairie du Chien Treaty was one of recognition, and especially the Lower Sioux decision by the Court of Claims in that regard, we can see no valid reason for saying that the treaty

did not recognize Chippewa title. As petitioners' counsel has argued there must be either plain language in the treaty or clear legislative intent to except the Chippewas from the overall recognition of title. We find no such language and no such intent.

The Commission was concerned, in earlier Chippewa cases, with the fact that, with respect to the Chippewas, the 1825 Prairie du Chien Treaty drew an open-ended boundary extending from a point in Wisconsin northwestward across Minnesota to the Red River. The line defined a southern boundary for the Chippewas but left the north, east, and west limits undefined. But this failure to completely circumscribe the territory was no impediment to a determination of recognized title in the Lower Sioux case. In that case the entire western boundary was undefined in the Prairie du Chien Treaty.

In the subject case petitioners contend that the bounds of the recognized Chippewa country are bounded by the Canadian international line on the north; on the east by the 1827 Butte des Morts Treaty line which terminated in Lake Michigan; on the south by the Article 5 and Article 6 Prairie du Chien boundaries; and on the west the Article 5 line which terminated at the Red River fixed the boundary from that point up to the mouth of the Goose River on the North Dakota side. From the Goose River to the Canadian border and west into North Dakota has already been found to have been Chippewa country, occupied by Pembina Chippewas. Red Lake, Pembina Bands, et al., v. United States, 6 Ind. Cl. Comm. 247. The Commission is satisfied that these are the bounds of recognized title in the Chippewas as established by the 1825 Prairie du Chien Treaty and the supplementary treaties in 1826 and 1827.

And in the subject case we also note the significance of the Treaty of October 4, 1842. While this is the treaty of cession by which the claimed Royce Area 261 was ceded to the United States, it does nevertheless contain the Article V language relied on by the Court of Claims in finding that there was a recognition of title in the Minnesota Chippewa case.

We have therefore concluded that petitioners' motion for summary judgment should be granted. By Congressional action the United States granted recognized title to the Chippewa Indians of the Mississippi and Lake Superior to all of the claimed lands (Royce Area 261). The lands were ceded by the Chippewa Indians of the Mississippi and Lake Superior to the United States by the Treaty of October 4, 1842, which was proclaimed on March 28, 1843.

Having ruled favorably on petitioners' title claim to Royce Area 261, we shall reserve further judgment until proof has been offered as to the consideration paid for the cession, the acreage involved, and the fair market value of the area as of March 28, 1843.

John T. Vance, Chairman

Concurring:

Jerome K. Kuykendall, Commissioner

Richard W. Yarborough, Commissioner