BEFORE THE INDIAN CLAIMS COMMISSION

JAMES STRONG, et al., as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS,	)	Docket No. 13-E
RED LAKE BAND, et al.,	)	Docket No. 18-L
THE DELAWARE TRIBE OF INDIANS,	)	Docket No. 27-E
HANNAHVILLE INDIAN COMMUNITY, et al.,	)	Docket No. 29-D
THE SIX NATIONS, et al.,	)	Docket No. 89
THE OTTAWA TRIBE, and GUY JENNISON, et al., as representatives of THE OTTAWA TRIBE,	)	Docket No. 133-A
LAWRENCE ZANE, et al., ex rel., WYANDOT TRIBE, et al.,	)	Docket No. 139
ABSENTEE DELAWARE TRIBE OF OKLAHOMA, DELAWARE NATION, ex rel., W. E. EXENDINE and MYRTLE HOLDER,	)	Docket No. 202
THE OTTAWA TRIBE, and GUY JENNISON, et al., as representatives of THE OTTAWA TRIBE,	)	Docket No. 302
THE SENECA-CAYUGA TRIBE OF OKLAHOMA, and PETER BUCK, et al., members and representatives of members thereof,	)	Docket No. 341-C
Plaintiffs,	)	
POTAWATOMI INDIANS OF INDIANA AND MICHIGAN, INC.	)	Docket No. 29-D
Intervenor,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: April 4, 1973

Appearances:
Robert C. Bell, Jr., Attorney for
Plaintiffs and Intervenor in Docket 29-D.

Rodney J. Edwards, Attorney for
Plaintiffs in Dockets 18-L and 139.

James R. Fitzharris, Attorney for
Plaintiffs in Docket 13-E.

Allan Hull, Attorney for Plaintiffs
in Dockets 133-A and 302.

Paul G. Reilly, Attorney for
Plaintiffs in Dockets 89 and 341-C.

Louis L. Rochmes, Attorney for
Plaintiffs in Dockets 27-E and 202.

James E. Clubb, with whom was Mr.
Assistant Attorney General Kent
Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Blue, Commissioner, delivered the opinion of the Commission.

As a preface to this opinion I wish to point out that I concurred in the dissenting opinion of Chairman Kuykendall in the Commission's decision that the Potawatomi Indians constituted one political entity during the period 1795 to 1833. See Citizen Band v. United States, Dockets 71, et al., 27 Ind. Cl. Comm. 187 (1972). Specifically as regards the Treaty of Fort Industry, July 4, 1805, 7 Stat. 87, Chairman Kuykendall stated that, in his opinion, the Huron Potawatomi Band was the political entity with which the United States treated at Fort Industry (27 Ind. Cl. Comm. at 397-99). While I continue personally to adhere to the views expressed in Chairman Kuykendall's dissent, the conclusions I have reached in the following opinion reflect the position of the Commission with respect to the political structure of the Potawatomi Indians in 1805, as has been determined by a majority of the Commission in the case aforementioned.

This consolidated proceeding involves the determination of title claims by the various plaintiffs to the areas identified as Areas 53 and 54 on Royce's Map of Ohio in Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897. Representatives of several Indian tribes relinquished their interests in these areas at the Treaty of Fort Industry, July 4, 1805, 7 Stat. 87.

Royce Areas 53 and 54 encompass the north-central portion of the present State of Ohio, from Lake Erie on the north to the United States-Indian boundary established at the Treaty of Greeneville, August 3, 1795, 7 Stat. 49, on the south, and from the Cuyahoga and Tuscarawas Rivers on the east to Sandusky Bay, and south therefrom, on the west. Royce Area 53, the portion of this territory north of 41° north latitude, was a part of the Connecticut Western Reserve. It remained under the political jurisdiction of Connecticut until 1800, when Connecticut granted to the United States the right of political jurisdiction, reserving, however, to herself and her grantees the right to the soil. In 1792, the Connecticut legislature had granted 500,000 acres at the western end of Royce Area 53 to those of her citizens who had suffered by the depredations of the British during the Revolutionary War. Under this grant a company was chartered under the laws of Ohio, and the tract became known as "Sufferers' Land". Connecticut had also granted the area between Sufferers' Land and the Cuyahoga River to the Connecticut land company in 1795 and 1796.

The Dockets captioned above were consolidated by the Commission's order of November 4, 1960, for purposes of trying the issue of title to these areas.

The Potawatomi Indians of Indiana and Michigan, Inc., have been permitted to intervene by the Commission's order of March 28, 1972, 27 Ind. Cl. Comm. 325, 326.

The Greeneville Treaty Line began at a point where Cleveland, Ohio, is now located, ran south about 70 miles, then almost due west across central Ohio to a point midway on the Ohio-Indiana border near Fort Recovery, and then south-southwest in Indiana to the Ohio River. Under Article IV of the treaty, the United States relinquished, with certain enclaves excepted, claims to all the Indian lands west and north of the Greeneville Treaty Line and, under Article V, conferred upon the Indians participating at the treaty the right permanently to occupy the lands on the Indian side of the Greeneville Treaty Line. Among the enclaves was the six mile square area in the north-western corner of Royce Area 53 identified by a dotted black line on Royce's Map of Ohio. The 1795 Greeneville Treaty did not, however, establish boundaries among the tribes within their lands.

Among those Indians signing the 1795 Greeneville Treaty were representatives of the Wyandot, Delaware, Shawnee and Potawatomi Tribes, and representatives of those bands of Ottawa and Chippewa Indians known, respectively, as the Ottawas of the Maumee, Blanchard's Fork,

AuGlaize and Roche de Boeuf, and the Chippewas of the Saginaw. See Citizen Band v. United States, Dockets 71, et al., 27 Ind. Cl. Comm. 187, 323 (1972); Saginaw Chippewa Indian Tribe v. United States, Dockets 57, et al., 22 Ind. Cl. Comm. 504, 522 (1970); and Ottawa Tribe v. United States, Dockets 40-B, et al., 2 Ind. Cl. Comm. 461, 466 (1953). The Indian identified as "Reyntueco, (of the Six Nations, living at Sandusky,)" signed the treaty as a representative of the Delawares.

Royce Areas 53 and 54, which were on the Indian side of the Greeneville Treaty Line (the Line comprised the eastern boundary of Royce Area 53 and the eastern and southern boundaries of Royce Area 54), were relinquished by representatives of the "Wyandot, Ottawa, Chipawa, Munsee and Delaware, Shawanee, and Pottawatima nations" at the Treaty of Fort Industry, July 4, 1805, 7 Stat. 87. The land companies which had been the recipients of grants by Connecticut to the area comprising Royce Area 53 desired to extinguish Indian title and claims to this area. Therefore they requested that the United States conduct a treaty with the Indians who claimed rights therein. Charles Jouett, who was appointed United States Commissioner to hold the treaty, was also instructed to gain, if possible, the cession of Royce Area 54, south of Royce Area 53 and north of the Greeneville Treaty Line.

The treaty signed at Fort Industry included relinquishment by the Indians of their claims to both Royce Areas 53 and 54.[1/] Royce Area 54 was relinquished to the United States for a consideration of $825.00 payable annually "forever" to the "Wyandot, Munsee and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots". This $825.00 annuity, according to Jouett, represented the legal interest on $13,750.00. The Indians quitclaimed Royce Area 53 to the land companies for a total consideration, paid by the land companies, of $18,916.67.[2/] Of this amount, $4000.00 was paid immediately to the "Ottawa and Chipawa nations, and such of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighbourhood thereof", and the two land companies "secured to the President of the United States in trust for" these same Indians, the sum of $12,000.00, payable to them in six annual instalments of $2,000.00 each. The two land companies further secured to the President in trust for the "Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots", an annuity of $175.00. The treaty recites in Article V that the proportions of the payments to "the Ottawa and Chipawa nations, and such

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1/ The six mile square enclave at the northwestern corner of Royce Area 53 had been ceded at the 1795 Greeneville Treaty. Docket 13-G, et al., consolidated, involves claims to the areas ceded at the 1795 Greeneville Treaty. Title to this enclave is not at issue here.

2/ A separate treaty between the United States, acting as agent for the land companies, and the same Indians, was concluded the same day and incorporated by reference in the Fort Industry Treaty. See Def. Ex. A-252; American State Papers, Indian Affairs, Vol. 1, at 696.

of the Pottawatima nation as reside on the river Huron of lake Erie, and in the neighbourhood thereof" had been "agreed on and concluded by the whole of said nation in their general council," and Article IV states that the annuity payments to "the Wyandot, Munsee, and Delaware nations, and those of the Shawanee and Seneca nations who reside with the Wyandots" would be "divided between said nations, from time to time, in such proportions as said nations, with the approbation of the President, shall agree," 7 Stat. at 88 .

The 1805 Fort Industry Treaty was signed by representatives of the Delaware, Shawnee, Wyandot and Potawatomi Tribes. The Commission has previously held that those Ottawas who signed the Fort Industry Treaty were the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf. See Ottawa Tribe v. United States, supra. All of the above were parties to the 1795 Greeneville Treaty. Furthermore, we believe that those bands of Chippewas who participated at Greeneville in 1795 were also participants at the Fort Industry Treaty. We rest this conclusion upon the fact that the references in the Fort Industry Treaty to the 1795 Greeneville Treaty indicate that the United States knew it was dealing with the same parties.

The legal effects stemming from the 1795 Greeneville Treaty have often been spelled out by the Court of Claims and this Commission. In the case of Peoria Tribe v. United States, Docket 289, 19 Ind. Cl. Comm. 107, 120-21 (1968), the Commission described those effects as follows:

*** Under Article III of the Greenville Treaty
*** a common boundary was strategically negotiated.

> To give the new line real meaning the Indians relinquished all tribal claims to those lands situated generally east and south of the Greenville line, while the United States, with [a] few exceptions ***, relinquished all claims they might have to the Indian tribal lands situated west and north of the 1795 Greenville line.
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> By this relinquishment the United States guaranteed to the Indian tribes negotiating the 1795 Greenville Treaty, more than mere temporary or permissive use and possession of the lands upon which they then were living. As the Comission concluded on a prior occasion, this "relinquishment" was indeed recognition by the United States that permanent ownership of these lands shall be in the occupying tribes. Thus these Indians were accorded legal rights to their homelands, the deprivation of which through governmental action would command just compensation. ***
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> *** The integral follow-up treaties, that is, the post 1795 treaties of cession negotiated with the Greenville Treaty Indians, not only defined with particularity the intertribal boundaries, but also confirmed the previously recognized title. ***

The Court of Claims has held in Sac and Fox Tribe v. United States, 161 Ct. Cl. 189 (1963), cert. denied, 375 U.S. 921 (1963) (aff'g Docket 83, 7 Ind. Cl. Comm. 675 (1959)), that only tribes signatory to the 1795 Greeneville Treaty were accorded rights thereunder.

The defendant has argued that recognition of title to Royce Area 53 by the United States at Greeneville in 1795 was not possible since the lands comprising Royce Area 53 were not then public lands. This argument is without merit because we have previously held that the United States may be liable in a recognized title claim for its own act of purporting to grant title by treaty to lands it did not own. See Kiowa, Commanche and Apache Tribe v. United States, Docket 257, 26 Ind. Cl.

Comm. 101, 117-18 (1971); Seneca Nation v. United States, Dockets 342-B, et al., 20 Ind. Cl. Comm. 177, 181 (1968). The latter case also held that subsequent disposition by the Indians of such lands was under the protection of the Trade and Intercourse Act of 1790, 1 Stat. 137, and that under the Indian Claims Commission Act, 60 Stat. 1049, the United States may be held responsible in damages where the Indians failed to receive a conscionable consideration from private parties for the subsequent disposition of such lands. 20 Ind. Cl. Comm. at 181-82. See also Cayuga Nation v. United States, Docket 343, 28 Ind. Cl. Comm. 237 (1972); Oneida Nation v. United States, Docket 300-A, 25 Ind. Cl. Comm. 281 (1971).

Based upon what we have said above, we conclude that those tribes and bands of Indians who participated at the 1795 Treaty of Greeneville and who were then using and occupying Royce Areas 53 and 54 were, by virtue of said treaty, together with the "follow-up" 3/ treaty of July 4, 1805, granted recognized title to these areas. By executing and ratifying the 1805 Fort Industry Treaty the United States determined and confirmed the boundaries and ownership of the lands previously relinquished to said Indians under the 1795 Greeneville Treaty. Thus it follows that those tribes and groups of Indians who had participated at the 1795 Greeneville Treaty and who were then using and occupying Royce Areas 53 and 54 held recognized title to these areas as of July 4, 1805: namely, the Delaware Tribe, represented in these proceedings by the plaintiffs in Dockets 27-E and 202; the Wyandot Tribe represented in these proceedings by the plaintiffs in Docket 139;

3/ See Sac and Fox Tribe v. United States, supra, at 194.

the Potawatomi Tribe, represented in these proceedings by the plaintiffs and intervenor in Docket 29-D; the bands of Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, represented in these proceedings by the plaintiffs in Dockets 133-A and 302; and the bands of Chippewa of the Saginaw, represented in these proceedings by the plaintiffs in Docket 13-E. The Mingoes, represented in these proceedings by the plaintiffs in Docket 341-C, were not signatories to the 1795 Greeneville Treaty and therefore derived no benefits therefrom. Furthermore, non-exclusive use and occupancy of portions of Royce Areas 53 and 54 prior to 1805 by these Mingoes forecloses any claim based upon aboriginal ownership of any portions of these areas. That Mingo use and occupancy of portions of Royce Areas 53 and 54 was non-exclusive is established by the evidence herein and admitted by the plaintiff Seneca-Cayuga Tribe. The Shawnee Indians, while signatories to the 1795 Greeneville Treaty, were not using and occupying Royce Areas 53 and 54. Therefore, in the absence of any Shawnee identification with Royce Areas 53 and 54, we conclude that the Shawnee Indians did not gain recognized title to any of these areas at the 1795 Greeneville Treaty.[4/] The claims of the Red Lake Band, et al., in Docket 18-L, and The Six Nations, et al., in Docket 89, are not supported by any evidence.

4/ Latter-day representatives of the aboriginal Shawnee Tribe apparently acknowledge this fact, as evidenced by their failure to file claims involving these Royce areas. The Shawnees who signed the Fort Industry Treaty were presumably those who were residing with the Wyandots. See Article IV, Treaty of Fort Industry, July 4, 1805, 7 Stat. 87, 88, and Article XIII, Treaty of September 29, 1817, 7 Stat. 160, 165.

The final question to be resolved in this stage of these proceedings is the proportion or part of the territory comprising Royce Areas 53 and 54 to which each of the above-specified entities was accorded recognized title. Different methods have been utilized in various cases before this Commission and the Court of Claims to apportion interests in areas where recognized title was granted to more than one Indian entity, and the object, of course, has always been the same -- to achieve the most just and equitable result on the evidence available. Population figures were used in Sioux Nation v. United States, Dockets 74, et al., 24 Ind. Cl. Comm. 147, 157-59 (1970). Analysis of use and occupancy of the recognized title area may also be used where such evidence is available and reliable. See Otoe and Missouria Tribe v. United States, Dockets 11-A, et al., 5 Ind. Cl. Comm. 316, 349-50, 365-66 (1957). A third method was that employed in Kickapoo Tribe v. United States, Dockets 317, et al., 10 Ind. Cl. Comm. 279 (1962), aff'd, 174 Ct. Cl. 550 (1966), where, in the absence of evidence of discrete regions of predominant use and occupancy, undivided fractional interests were awarded. In Red Lake, Pembina and White Earth Bands v. United States, 164 Ct. Cl. 389 (1964) (rev'g Docket 18-A, 6 Ind. Cl. Comm. 247 (1958), 9 Ind. Cl. Comm. 315 (1961) and 9 Ind. Cl. Comm. 457 (1961)), interests in an aboriginal title area were divided in the same proportions as was the treaty consideration, but the consideration was based upon population of the bands at the time.

Apportionment of the relative interests among those Indian entities found to own a particular area is always a difficult process. The Commission

has wide discretion with regard to the alternative methods available to reach the most equitable result. See Kickapoo Tribe v. United States, supra, at 555.

The language of the treaty should be analyzed first to determine whether it contains a statement of relative interests in the lands. In a particular treaty, the language of the cession itself or the division of consideration may reflect the division of such interests. The treaty, however, may not define relative interests in the lands ceded, or may contain ambiguities (as, for instance, obvious inconsistencies between the language of cession and the division of consideration), or other evidence may indicate that reliance upon the treaty language is inappropriate. In such instances, evidence of use and occupancy of the lands and evidence of the population of the various Indian groups using and occupying the lands may provide the best evidence upon which to make a division of interests. All of these factors have been utilized in varying degrees, depending upon their reliability in specific instances, in the cases cited above. Where the evidence is inconclusive, or where, as in Kickapoo, supra, there is no evidence, equal undivided interests may be awarded.

In this case, the language of the 1805 Fort Industry Treaty does not provide us with any specific information as to the relative interests of the Indian groups who ceded Royce Areas 53 and 54. The overall language of the treaty, including the near-equal division of the consideration, does, however, indicate that all the signatory Indians ceded whatever interests they had in all of these lands taken as a whole and that

those present at the treaty did not regard the Indian interests in Royce Areas 53 and 54 as substantially disproportionate.

The other evidence in this case does not contradict the conclusions gathered from the treaty itself. A great deal of documentary evidence has been filed in these proceedings, and extensive reports have been submitted by expert witnesses for the various parties herein, relating to Indian use and occupancy of Royce Areas 53 and 54. This evidence does not support either a geographical division of the ceded areas based on predominant use and occupancy or an unequal apportionment of fractional interests in the whole. The evidence of use and occupancy indicates that the tribes and groups whose title to Royce Areas 53 and 54 was recognized at the 1795 Greeneville Treaty, as confirmed and determined by the 1805 Fort Industry Treaty, were, at the time of these treaties, using and occupying these areas jointly without clearcut tribal boundaries and that no particular group or groups predominated. We believe the expert testimony supports these conclusions.[5/]

Estimates of Indian populations in the 18th century of large areas such as involved in this case are generally unreliable when they are available at all. We do have population estimates by contemporary observers of some Indian locations within these lands but there is no way to determine with any degree of accuracy the total populations of

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5/ See Pl. Ex. 160, Docket 139, Tanner, The Location of Indian Tribes in Southeastern Michigan and Northern Ohio, 1700-1817, at 42; Testimony of Robert F. Bauman, June 18, 1964, Transcript, at 3382-3438; Def. Ex. A-322, Docket 13-E, Wheeler-Voegelin, Ethnohistorical Report, Royce Areas 53-54, at 198-202, 221-24.

the various Indian groups within Royce Areas 53 and 54 during the relevant period.

Based upon all the considerations set forth above, we believe that the best manner of division of interests in this proceeding is that utilized in the Kickapoo case, supra; i.e., equal undivided fractional interests in the recognized title areas.

We have pointed out in our findings of fact that, while the consideration under the Fort Industry Treaty was apportioned separately to all the tribes for the relinquishment of Royce Area 53 and to only certain of the tribes for the relinquishment of Royce Area 54, the language of the treaty clearly indicates that it was all the signatory tribes who were relinquishing their interests in both tracts. Therefore, the transaction was, in substance, a cession by each signatory Indian entity of its interests in both Royce Areas 53 and 54 in return for a near-equal fractional share of the total consideration. With respect to this issue, Commissioner Jouett's contemporaneous interpretation of the treaty supports our analysis (finding of fact No. 7, infra) and none of the parties have viewed the treaty otherwise.

We therefore conclude that, as of July 4, 1805, the effective date of the Fort Industry Treaty, the Delaware, Wyandot and Potawatomi Tribes, and the bands of Ottawa Indians and Chippewa Indians known, respectively, as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, and the Chippewas of the Saginaw, each had recognized

title to an undivided one-fifth interest in Royce Areas 53 and 54, excluding the six mile square enclave in northwestern Royce Area 53 which had been previously ceded to the United States at the 1795 Greeneville Treaty.

This case may now proceed to a determination of the acreage of the ceded lands, the fair market value thereof as of July 4, 1805, the consideration given for the cessions, and all other matters bearing upon the question of defendant's liability to the separate plaintiffs and intervenor.

Brantley Blue
Brantley Blue, Commissioner

We concur:

John T. Vance, Commissioner

Richard W. Yarborough, Commissioner

Margaret H. Pierce, Commissioner

Kuykendall, Chairman, concurring in part and dissenting in part.

I concur in the conclusions expressed in the foregoing opinion and the accompanying findings of fact except the conclusion that the Potawatomi Tribe possessed an undivided one-fifth interest in the subject Royce areas. My opinion is that the Huron Potawatomi Band, as a distinct political entity, acquired recognized title to an undivided one-fifth interest in Royce Areas 53 and 54 at the 1795 Greeneville Treaty and that said band, alone among the Potawatomis, relinquished its interests in these areas at the 1805 Fort Industry Treaty. See my dissenting opinion in Citizen Band v. United States, Dockets 71, et al., 27 Ind. Cl. Comm. 187, 397-99 (1972).

Jerome K. Kuykendall, Chairman