

BEFORE THE INDIAN CLAIMS COMMISSION

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| JAMES STRONG, <u>et al.</u> , as the representatives and on behalf of all members by blood of the CHIPPEWA TRIBE OF INDIANS, |) | Docket No. 13-G |
| |) | |
| THE POTTAWATOMIE TRIBE OF INDIANS, THE PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS, <u>et al.</u> , |) | Docket No. 15-E |
| |) | |
| RED LAKE BAND, <u>et al.</u> , |) | Docket No. 18-M |
| |) | |
| THE DELAWARE TRIBE OF INDIANS, |) | Docket No. 27-B |
| |) | |
| HANNAHVILLE INDIAN COMMUNITY, <u>et al.</u> , |) | Docket No. 29-C |
| |) | |
| ROBERT DOMINIC, <u>et al.</u> , on behalf of THE OTTAWA TRIBE OF INDIANS, |) | Docket No. 40-F |
| |) | |
| SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 64 |
| |) | |
| THE SIX NATIONS, <u>et al.</u> , |) | Docket No. 89 |
| |) | |
| LAWRENCE ZANE, <u>et al.</u> , <u>ex rel.</u> WYANDOT TRIBE, <u>et al.</u> , |) | Docket No. 120 |
| |) | |
| IRA SYLVESTER GODFROY, <u>et al.</u> , <u>ex rel.</u> THE MIAMI INDIAN TRIBE, |) | Docket No. 130 |
| |) | |
| MIAMI TRIBE OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 252 |
| |) | |
| EASTERN SHAWNEE TRIBE OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 335 |
| |) | |
| ABSENTEE DELAWARE TRIBE OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 338 |
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| EASTERN SHAWNEE TRIBE OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 338 |
| |) | |
| CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 338 |
| |) | |
| THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 338 |

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| THE KICKAPOO TRIBE OF OKLAHOMA, THE |) | Docket No. 338 |
| KICKAPOO TRIBE OF KANSAS, <u>et al.</u> , |) | |
| |) | |
| THE OTTAWA TRIBE OF OKLAHOMA, <u>et al.</u> , |) | Docket No. 338 |
| |) | |
| Plaintiffs, |) | |
| |) | |
| v. |) | |
| |) | |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |

Decided: August 9, 1973

Appearances:

Robert C. Bell, Jr., Attorney
for Plaintiffs in Docket 29-C.

Rodney J. Edwards, Attorney
for Plaintiffs in Dockets 18-M
and 120.

James R. Fitzharris, Attorney for
Plaintiffs in Dockets 13-G, 40-F,
and 64.

Allan Hull, Attorney for the Ottawa
and Kickapoo Plaintiffs in Docket 338.

Robert S. Johnson, Attorney for
Plaintiffs in Docket 15-E.

Jack Joseph, Attorney for Plaintiffs
in Docket 335, and for the Peoria and
Shawnee Plaintiffs in Docket 338.

David L. Kiley, Attorney for Plaintiffs
in Docket 130. Albert C. Harker was on
the brief.

Paul G. Reilly, Attorney for Plaintiffs
in Docket 89.

Louis L. Rochmes, Attorney for Plaintiff
in Docket 27-B, and for the Delaware and
Potawatomi Plaintiffs in Docket 338.

Edwin A. Rothschild, Attorney for
Plaintiffs in Docket 252.

Joseph S. Davies, Jr., with whom
was Mr. Assistant Attorney General
Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This consolidated proceeding involves the determination of title claims by the various plaintiffs to the area identified as Area 11 on Royce's Map of Ohio in Part II of the 18th Annual Report of the Bureau of American Ethnology, 1896-1897, as well as title claims to several smaller areas north and west of Royce Area 11, all of which were relinquished to the United States by the tribes signatory to the Treaty of Greeneville of August 3, 1795, 7 Stat. 49, and by the Six Nations who were signatories to the treaties of October 22, 1784, 7 Stat. 15, at Fort Stanwix; January 9, 1789, 7 Stat. 33, at Fort Harmar; and November 11, 1794, 7 Stat. 44, at Canandaigua.

Petitions were consolidated in the above-captioned proceedings by the Commission's order of January 22, 1954. In the same order, pursuant to a stipulation and agreement of the parties, it was also ordered that in subsequent proceedings herein, the plaintiffs in Docket 89, the Six Nations, et al., would be deemed to have no compensable interest in any lands involved in these proceedings lying west of a line in western Ohio following the north to south courses of the Maumee,

AuGlaize and Great Miami Rivers, and that all of the remaining plaintiffs herein (except the Absentee Delaware plaintiffs in Docket 338 and the plaintiff in Docket 27-B, The Delaware Tribe of Indians) would be deemed to have no right, title or interest in any lands involved in these proceedings lying east of a line starting at the easternmost point of the city of Cleveland and proceeding in a southerly direction to the village of Peninsula, Ohio, on the Cuyahoga River, and thence southerly along the Cuyahoga River and around the western and southern boundaries of Akron to Lakemore, Ohio, and thence in a straight line southeasterly to the Ohio-West Virginia border at or about Wellsburg, West Virginia. By the terms of the order, the Delaware plaintiffs in Dockets 27-B and 338 were deemed to have no such right, title or interest in a less extensive area in northeastern Ohio roughly bounded by the Cuyahoga River on the west and the Cuyahoga and Mahoning Rivers on the south, plus a separate smaller area surrounding Steubenville in Jefferson County, Ohio, on the Ohio River boundary between Ohio and West Virginia.

Royce Area 11 encompasses approximately two-thirds of the present State of Ohio and a small contiguous portion of southeastern Indiana. The other areas relinquished by the Indians at Greeneville in 1795, the sixteen enclaves described in the second paragraph of Article III, and the four areas (described in Article IV) which were excepted from the Government's general relinquishment of claims to territory north and west of the Greeneville Treaty Line, as well as the rights of

passage relinquished by the Indians in the last paragraph of Article III of the treaty, are described individually in the findings of fact which follow this opinion.

Except in the case of the Chippewa plaintiffs in Docket 13-G, the defendant has acknowledged the rights of the various plaintiffs herein to bring these claims before the Commission. The defendant contends that these Chippewa plaintiffs cannot be deemed to have established any right to recover in a suit under the Indian Claims Commission Act (60 Stat. 1049) because there was no such landowning entity as the "Chippewa Nation" or "Chippewa Tribe." In our finding of fact No. 1(a) we have described the procedural history of the claim which has evolved into Docket 13-G. We have pointed out therein that this Commission has previously held, in Red Lake Band v. United States, Dockets 18-E, et al., 7 Ind. Cl. Comm. 576, 579, 607 (1959), that the Chippewas were separate bands, and that we have also previously held, in Saginaw Chippewa Indian Tribe v. United States, Docket 57, 22 Ind. Cl. Comm. 502, 522 (1970), that Chippewas of the Saginaw participated in the 1795 Greeneville Treaty and were entitled to and received the benefits accorded the participating Indians to that treaty. In light of the prior history of Docket 13-G and the cited previous holdings of this Commission, we are of the opinion that the plaintiffs in Docket 13-G may properly bring this claim on behalf of and as representatives of the descendants of those Chippewas who were parties to the 1795 Greeneville Treaty. To deny them that

right at this point in these proceedings would not, in light of the procedural history of Docket 13-G, be proper, for to do so would deprive the descendants of those Chippewas who participated at the 1795 Greeneville Treaty of the rights which accrued to their ancestors at that treaty.

This proceeding presents several issues of law and matters of fact for the Commission's adjudication. Underlying the legal issues present is the complicated history of 18th century Ohio and the remainder of the Northwest Territory out of which these claims have grown. In an attempt to provide a full development of these historical events, the Commission has, in the following findings of fact, described in considerable detail the history of Royce Area 11, and the other areas at issue here, up to the 1795 Greeneville Treaty. These findings of fact chronicle the unique state of affairs which existed within Royce Area 11 from the advent of European involvement in Ohio in the late 17th century through the triumph and consolidation of American control during the last decade of the 18th century. During this entire period of 100 years the Indians may properly be termed to have been unwitting pawns in a battle of vast imperialistic proportions. Out of these events, it is necessary to separate and evaluate the roles of the various Indian tribes in the history of the areas at issue here and to determine the rights, if any, of these tribes.

At the beginning of the 18th century all of Ohio was essentially unoccupied and had been so for 50 years past. Up to about 1655 a

tribe of Indians known as the Eries had occupied a large portion of the area south of Lake Erie in Ohio. At the latter date the Iroquois Confederacy, based in upper New York State, conquered the Eries and destroyed this tribe as a viable political entity. Over the next several years the Iroquois defeated other tribes who lived along the Ohio River in southern Ohio. As a result, by the late 17th century Royce Area 11 was totally unoccupied.

The Iroquois, although conquerors of the tribes who had occupied Ohio, never occupied the area but did use it sporadically for hunting and passage on the way south and west on raids. The Iroquois hunted more extensively north of Lakes Erie and Ontario on the Ontario Peninsula, which had formerly been occupied by Huron (Wyandot) Indians and other tribes. During the 17th century, the Iroquois had pushed these Huron and other Indians westward to northern Michigan and the western shores of Lake Michigan.

Towards the end of the 17th century, the French interests in Canada and the English interests along the eastern coast of the present United States began to polarize. Each nation had its Indian allies, and in between them was a vast unoccupied area, including Ohio with its rich trade potential. The French, by 1700, had begun supporting the enemies of the Iroquois and, with French arms, the Iroquois threat was neutralized. In 1701 at Quebec, the Iroquois came to terms with the

French and their Indian allies. The Iroquois continued to hunt on the Ontario Peninsula (a crucial fact because had they been forced from Ontario they would inevitably have turned for hunting to Ohio), but they pledged neutrality as between the French and English, and agreed no longer to harass the western Indians. In that same year, Cadillac established the post of Detroit and, within a few years, several Indian tribes from north and west of Detroit had joined the French and settled there. Meanwhile on the English side of Ohio, the eastern Indians (Shawnees and Delawares) in Pennsylvania and Virginia, were slowly being pushed westward and closer to Ohio as white settlers began to occupy more and more land. Thus, by the early 18th century, the stage was set for the vacuum in Ohio to be filled.

There are no records of Indian settlements within Ohio during the early 18th century, but we do know that Indians from Detroit (among them Wyandots, Chippewas, Ottawas, Potawatomies and Miamis) used Ohio to hunt, and crossed Ohio to raid other tribes south of the Ohio River. Likewise, eastern Indians--Iroquois from New York and northwestern Pennsylvania, and Delawares and Shawnees from Pennsylvania and Virginia--began to enter Ohio for hunting and other purposes.

The French coveted Ohio for fur to trade and the same was true for the English. The English, however, were in the meantime continuously expanding their areas of settlement west from the Atlantic coast. This

created pressure upon the eastern Indians in Pennsylvania and Virginia, causing them to move westward. This phenomenon did not take place to any appreciable extent in reaction to French activities, although the French did encourage the western Indians to expand their hunting eastward into Ohio, and also encouraged the westward movement of the eastern tribes, both for trade purposes and to increase French influence among them.

The result of these European influences was that beginning in the 1730's and continuously thereafter various tribes from both east and west of Ohio moved into and settled in Ohio. The Shawnees moved in the late 1730's to central ^{1/} Royce Area 11 where they settled at the mouth of the Scioto River. In the 1740's groups of Senecas and other Iroquois Indians moved into northeastern Ohio just across the Cuyahoga River from Royce Area 11. ^{2/} They were joined shortly thereafter by Indians of several other tribes, including Delawares and Chippewas. Close by, and within Royce Area 11, a group of Ottawas established a settlement at about the same time. In the 1740's Delaware Indians began in significant numbers to move into Ohio from Pennsylvania, where they established settlements on the Muskingum River and along the Scioto River. At the same time additional Shawnees (along with some Senecas) migrated to Lower Shawnee Town at the mouth of the Scioto. In the late 1740's two groups of Miami Indians, trying to establish contacts with the English, moved eastward

^{1/} To facilitate analysis of Indian use and occupancy of Royce Area 11, we have divided it into four separate geographical segments, hereinafter referred to as the "northeastern", "southeastern", "central" and "western" portions of Royce Area 11. The boundaries of these respective regions are described in notes 1, 3, 6 and 7 of the accompanying findings of fact.

^{2/} Those Iroquois Indians who settled in Ohio became generally known as "Mingoes". See findings of fact, n. 5.

from the main Miami settlement at present-day Fort Wayne and settled in western Royce Area 11, where they remained until the early 1750's when, under pressure from the French, they withdrew westward.

The areas settled by the various tribes in the 1740's set the geographical pattern for subsequent Indian use and occupancy within Royce Area 11 for the remainder of the 18th century. Northeastern Royce Area 11 became the scene of intermittent occupation by various tribes lasting until the 1795 Greeneville Treaty. This area was easily accessible from both east and west and offered excellent winter hunting. The eastern Indians, particularly the Iroquois from New York and Delawares from Pennsylvania could easily cross into northeastern Ohio. The western tribes used Lake Erie to come across from Detroit. There was extensive hunting and some temporary settlement in northeastern Ohio throughout the 18th century but no tribe was either able or inclined to occupy this region continuously.

Below this region, in southeastern Royce Area 11, the Delaware Indians, beginning in the 1740's, used and occupied a large area centered along the Muskingum River. The Delawares remained here for approximately 40 years, before fleeing from the Americans in the 1780's. Other tribes, however, also occupied this area sporadically, including Wyandots, Ottawas, Shawnees, and, along the Ohio River, Mingoos.

In central Royce Area 11, the Shawnees were predominant. They had several settlements along the Scioto River beginning in the late 1730's and continuing up to approximately 1780. The evidence also establishes the presence of Delaware Indians in this region, particularly

during the early years. Around 1780, the Shawnees capitulated to white military pressure and fled westward to the Great Miami and Mad Rivers in western Royce Area 11. They remained there until the late 1780's, when they moved north above Royce Area 11 in Ohio and west into Indiana.

Prior to the Shawnee move westward about 1780, the western portion of Royce Area 11 had not been permanently used for Indian settlements since the early 1750's, when the Miamis were forced by the French to evacuate their towns there. In the interim between these dates, western Royce Area 11 had been a common hunting ground for several tribes, including the Miamis, Shawnees, Wyandots and Cherokees.

From the time of the original Indian migrations into Ohio in the 1730's and 1740's until the French and Indian War, the Indians had been relatively free to live and hunt where they wished without undue interference from the Europeans. This was so because both the French and English were interested in maintaining alliances with the Indians and attempted not to abuse unnecessarily their often fragile relationships with the Indians. In addition, Ohio was vast enough to accommodate both Indians and whites without much interference between them. There was friction and warfare, such as Nicholas' conspiracy against the French and the French sponsored attack on La Demoiselle's Miami village, but this was sporadic.

With the expulsion of the French at the end of the French and Indian War, the Indians ceased to be the balance of power between opposing European interests. Instead, they became the adversary of the British

because they stood in the way of British land aspirations in Ohio. The British, by withholding gifts and ammunition, were quick to antagonize the Indians, who, for the most part, had sided with the French in the French and Indian War. The Indians just as quickly appraised the British intentions, and in 1763 they revolted, in a concerted effort led by the Ottawa chief, Pontiac, all across the northwest from Fort Pitt to Detroit. Although there was peace during the few years after Pontiac's uprising, the Indians remained wary of British intentions with respect to the lands the Indians were using and occupying in western Pennsylvania and Ohio.

In the face of another threatened uprising, the British and Indians treated at Fort Stanwix in New York in 1768. At this council, the Six Nations of New York and smaller groups of Mingoes, Delawares and Shawnees executed a treaty which established the Ohio River below Fort Pitt as the Indian-white boundary. This treaty was not greeted well by the Ohio Indians, primarily because the Six Nations of New York had taken the lead in negotiating and had made sure that most of their lands in New York were on the Indian side of the boundary. The Ohio Indians thought that the Six Nations of New York were giving away all lands in Pennsylvania and Virginia which were still freely used by numbers of Delawares, Shawnees and Mingoes.

Indian dissatisfaction with the Fort Stanwix Treaty led to a succession of Indian raids against the white settlements in Pennsylvania and Virginia. As a result, in 1774, the first of a succession of white military expeditions into Ohio took place (historically referred to as

"Lord Dunmore's War"). Lord Dunmore's expedition was directed against the Shawnees on the Scioto River. While militarily inconclusive, this expedition did destroy several Indian villages and awakened the Indians to the perils the white colonists to the east might bring.

When the American Revolution broke out soon after, the Indians overwhelmingly sided with the British, believing (correctly) that the Americans were after their lands, and (incorrectly) that the British would stand by them. As the tide of the Revolution turned in favor of the colonists, the Americans on several occasions marched into Ohio attacking the Shawnees in western Royce Area 11 and the Delawares on the Muskingum River.

By the late 1780's, after American victory in the Revolution, the Indians, under periodic military pressure and seeing the beginnings of American migration into Ohio, performed what would best be termed a tactical retreat. They moved their settlements west and north, continuing to use Royce Area 11 only to hunt and to raid the Americans. This exodus from Royce Area 11 was anything but voluntary. They fought the Americans at every turn, inflicting serious losses in several battles, until, at the Battle of Fallen Timbers (when crucial British assistance failed to materialize), they were vanquished by General Anthony Wayne. Shortly thereafter, at the Treaty of Greeneville, they agreed to relinquish Royce Area 11.

Politically, the history of Royce Area 11 is equally complex. European claims to this area predate claims by all Indians except the Iroquois. French claims dated to LaSalle's annexation of the entire

Ohio Valley for France in 1682. English claims derived through the Iroquois, whom the English considered subjects of the British Crown. The English claim was based upon the fact that the Iroquois had conquered the Eries and thereby gained ownership of Ohio by right of conquest. The English, in 1701 and 1726, had the Iroquois execute the "beaver deeds." In these deeds the Iroquois claimed the western lands by right of conquest and deeded to the English a vast territory west of New York measuring approximately 800 miles east to west by 400 miles north to south, reserving to themselves the right to remove beaver from these lands.

At the council proceedings at Greeneville in 1795, certain of the tribes present made claims to large portions of Royce Area 11. The Miami chief, Little Turtle, asserted Miami ownership of an immense tract including significant parts of the present states of Ohio, Indiana, Illinois and Michigan. An Ottawa chief, claiming to speak on behalf of the "Three Fires" (the Ottawas, Chippewas and Potawatomis), claimed on behalf of these tribes the lands which had been ceded by the western tribes at Fort Harmar, which area was larger than that ceded at Greeneville.

There were also several Indian claims to portions of Royce Area 11 which antedated Greeneville. As early as 1751 and continuing until the 1780's, the Wyandots were acknowledged among certain of the Ohio Indians (particularly the Delawares) to have been the original owners

of a large portion of northeastern and southeastern Royce Area 11. By the time of Greeneville, however, the Wyandots had apparently disavowed any claim to the land, for it was the Wyandot chief, Tarke, who at Greeneville was urging upon the Americans that the lands the Indians were ceding there were owned in common by all. We further have record of the intertribal council held in 1750 at Lower Shawnee Town where a council of Ohio Indians consisting of Shawnees, Wyandots, Delawares and Mingoes agreed among themselves that all of Ohio east of the Great Miami River belonged to the Delawares, Shawnees and Mingoes, and that the Wyandots were free to hunt there; that the lands west of the Great Miami River were the property of a confederacy comprised of Miamis, Piankeshaws, Weas, Kickapoos and Mascoutens; and that the lands along Lake Erie west of Niagara and north to Michilimackinac belonged to the Ottawas, Potawatomis and Wyandots.

After the accession of American sovereignty there were further claims to territory within Royce Area 11 by the states of Connecticut and Virginia. Both these states claimed sovereignty to portions of Royce Area 11 by virtue of their colonial charters from the British Crown. Virginia relinquished its claim in 1784, attaching several conditions to its relinquishment, all of which were accepted by the Continental Congress. These conditions included guarantees that certain portions of the lands claimed by Virginia which had been previously set aside by the Virginia legislature as bounty lands for its militia be reserved for the uses

promised by the Virginia legislature. Connecticut relinquished part of its claim to lands in the northwest in 1786. The remainder of Connecticut's claim, which constituted what it known as the "Western Reserve", was retained by the state until 1800. The Western Reserve included more than half of northeastern Royce Area 11.

Further complicating the political question of ownership of the territory comprising Royce Area 11 were the several treaties which preceded the 1795 Treaty of Greeneville, dating back to the 1768 Treaty at Fort Stanwix. Beginning with that treaty, and including the treaties at Pittsburgh in 1775, 1776 and 1778, at Fort Stanwix in 1784, at Forts McIntosh, Finney, and Harmar, and at Canandaigua, the territory ceded for the last time at Greeneville in 1795 had been treated for several times before under varying circumstances and theories of ownership.

Thus, when the representatives of the several tribes negotiated with General Anthony Wayne at Greeneville in 1795, and agreed to cede to the United States the territory identified as Royce Area 11, a century of political and anthropological turmoil lay behind them. It is not surprising then that the events preceding the 1795 Greeneville Treaty have given rise in these proceedings before the Commission to a variety of claims, based upon a number of legal theories, and to a multitude of defenses to these claims.

Several of the plaintiffs herein have urged that the aboriginal entities which they represent possessed recognized title to Royce Area 11 and the surrounding enclaves. Various arguments have been put forward by these plaintiffs in support of this proposition. The Chippewa plaintiffs in Docket 13-G, the Shawnee plaintiffs in Docket 64 and the Wyandot plaintiffs in Docket 120 argue that title to these areas was recognized in their respective aboriginal predecessors by the Treaty of Fort Stanwix, November 5, 1768, which grant was subsequently acknowledged by the Commissioners of the Virginia Colony at the Treaty of Pittsburgh, October 9, 1775; the Treaty of January 21, 1785, at Fort McIntosh; the Northwest Ordinance of 1787 (Act of July 13, 1787; reenacted August 7, 1789, 1 Stat. 50); the Treaty of January 9, 1789, 7 Stat. 28, at Fort Harmar; and the negotiations and reports of the treaty commissioners with respect to the said treaties in the consummation of the 1795 Treaty of Greeneville.

The Hannahville plaintiffs in Docket 29-C argue that the existence and validity, at the time of the 1783 Treaty of Paris, of the Ohio River boundary between white and Indian territory was accepted by the Indians and the United States; that Royce Area 11 was part of the Northwest Territory and subject to the Northwest Ordinance which declared that the Indian lands could not be taken without Indian consent or in a just war; and that the 1768 Fort Stanwix Treaty and the 1775 Treaty at Pittsburgh and the other preGreeneville treaties are of the same force and effect as the 1795 Treaty of Greeneville. In support of this proposition they cite the holding

of Chief Justice John Marshall in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that the Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, adopted and sanctioned the treaties with the Indian tribes previous to the Constitution.

The Delawares claim recognized title by virtue of the Treaty of September 17, 1778, 7 Stat. 13.

Finally, the Miami plaintiffs in Docket 130 and the Prairie Band of Potawatomi plaintiffs in Docket 15-E urge that

. . . the treaty itself, the conduct of United States representatives before and at the time of the treaty, the acts of government officials dealing with the Indians, and the Indians' actions too, all readily reveal that in 1795, at the Treaty of Greeneville, the United States acknowledged that the title to the lands in Ohio and eastern Indiana within Royce Area 11 was vested in the signatory Indian tribes. [See Brief in Docket 130, Miami Indians of Indiana, at 55.]

The standards for determining recognized or reservation title have been set forth in numerous decisions of this Commission, the Court of Claims and the Supreme Court. In the case of Miami Tribe v. United States, 146 Ct. Cl. 421, 175 F. Supp. 926 (1959) (aff'g in part, remanding in part Dockets 67, et al., 5 Ind. Cl. Comm. 444 (1957)), the Court of Claims summarized these standards as follows:

Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as 'treaty title', 'reservation title', 'recognized title' and 'acknowledged title.' As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently

land and that right may be established in a variety of ways. Tee-Hit-Ton v. United States, 348 U.S. 272; Hynes v. Grimes Packing Co., 337 U.S. 86; Minnesota v. Hitchcock, 185 U.S. 373. [146 Ct. Cl. at 439]

The various plaintiffs' arguments that their aboriginal ancestors possessed recognized title to the areas ceded at Greeneville in 1795 do not persuade us. Even assuming arguendo that recognized title was possible through treaties and statutes prior to the adoption of the Constitution, it is still essential for a finding of recognized title that such recognition be based upon an intent to grant permanent rights of occupancy and not mere permissive occupation.

In the case of the Northwest Territory (including Royce Area 11), it may be said initially that, beginning at least as early as the end of the American Revolution, the intent of the United States Government was unequivocally the opposite of what is required to establish recognized title. The official policy of the United States from this time until the 1795 Treaty of Greeneville was to evict the Indians from Royce Area 11. This is evidenced by the position, adopted beginning with the 1784 Treaty of Fort Stanwix, and reiterated at the Treaties of Forts McIntosh and Finney by the United States commissioners, that the Indians had lost whatever rights they might have had in Ohio by siding with the British during the Revolution. Further evidence of this intention is the enactment of the Northwest Ordinance of 1787 permitting organized settlement and civil government west of the Ohio River.

Beginning with the Fort Harmar treaties in 1789 and continuing

through the Treaty of Greeneville in 1795 United States policy changed to one of negotiating for the purchase of the lands west of the Ohio River from the Indians. This policy was not based upon the notion that the Indians had received any prior permanent rights to occupy these lands, but rather on the realization that the Indians were claiming aboriginal rights to these lands, and would continue to fight for these claimed rights unless the United States could persuade them to relinquish their claims for value.

It is therefore clear that whatever claims of recognized title there are before us must have arisen out of the Treaty at Fort Stanwix with the British in 1768, and those aforementioned treaties entered into at Pittsburgh in 1775, 1776 and 1778. These treaties, however, were clearly not treaties of recognition with respect to lands within Royce Area 11. The 1768 Fort Stanwix Treaty was negotiated to ward off the threat of an Indian uprising. It was negotiated almost exclusively by the Six Nations of New York, and signed only by them. Only token representatives of the Ohio tribes were present at this treaty, and the Ohio Indians, as the evidence shows, never accepted the boundary drawn at this treaty. What records there are regarding the treaties at Pittsburgh in 1775 and 1776 reveal that these were intended by the Americans to neutralize the Indians during the imminent war. The 1778 treaty with the Delawares was intended to enlist the Delawares on the American side. The territorial guarantee was intended to offset British propaganda circulating among the Indians that the Americans wanted their

lands. The treaty refers to Delaware "*** territorial rights *** as *** bounded by former treaties," but there were no such treaties. Finally, most of the Delawares represented at this treaty later sided with the British, thereby, under the treaty's terms, abrogating their rights thereunder. We find no intent to recognize permanent rights of occupancy of Ohio in any of these treaties.

Furthermore, the acceptance of the cession of Royce Area 11 at Greeneville in 1795 cannot be considered recognition of title in the Indians to the area ceded. See Confederated Tribes of the Warm Springs Reservation v. United States, Docket 198, 12 Ind. Cl. Comm. 664, 714-17 (1963), aff'd in part, rev'd in part, 177 Ct. Cl. 184, 194 (1966); Quapaw Tribe v. United States, Docket 14, 1 Ind. Cl. Comm. 469, 485-86 (1951), rev'd on other grounds, 128 Ct. Cl. 45 (1954). Thus we conclude that at the time of the 1795 Greeneville Treaty, the Indians did not possess recognized title to the lands west of the Ohio River.

We turn now to the question of whether the predecessors of any of the plaintiffs in these proceedings possessed aboriginal title to any or all of Royce Area 11, which title was ceded to the United States at the 1795 Treaty of Greeneville, and at the Treaty of Canandaigua and preceding treaties with the Six Nations of New York. As an incident to this question, we shall first discuss the allegations of several of the plaintiffs that the various tribes (or certain of them) who inhabited Ohio during the 18th century comprised a confederated landowning entity.

This theory of confederated ownership is attractive to several of the plaintiffs for differing reasons. In the case of certain Indians, such as the aboriginal Potawatomi tribe, whose incursions into Royce Area 11 were relatively infrequent, the record herein does not support a claim based upon actual and exclusive use and occupancy. For these Indians, this theory of a confederated landowning entity would result in the determination of an interest in the overall ownership of Royce Area 11 with all the other tribes signatory to the Greeneville Treaty without the necessity of proving actual and exclusive use and occupancy of any portion of Royce Area 11. This argument is based upon the historical evidence of cooperation among the tribes within Royce Area 11 during the 18th century, and upon the 1795 Treaty of Greeneville itself, which granted consideration to all the signatory tribes in specific amounts and did not differentiate on the basis of individual tribal ownership of portions of the ceded territory. Several of the other plaintiffs, such as the Delawares and Shawnees, each of whom the evidence has established to have been permanent occupants of portions of Royce Area 11, have urged the same kind of confederated land ownership theory. This is so because, although these tribes were present in substantial numbers over large portions of Royce Area 11 during the 18th century, the burden of proving exclusive use and occupancy of any territory they claim is exceedingly difficult.

All of the experts who testified for the various parties in these proceedings are in basic agreement that no particular tribe ever exclusively used and occupied any large portions of Royce Area 11. The two experts for the plaintiffs, Dr. Helen Hornbeck Tanner and Mrs. Gay Ramabhushanam, were able at best to delineate areas of predominance by various tribes, but both acknowledged the uninterrupted mingling of the various tribes in their settlements and in their hunting areas during the entire period here under consideration.

The truth of the matter, as established by the evidence before the Commission, is that Ohio was, at the time Indian migration began, an immense open territory which was sufficiently large to accommodate all those Indians who settled or hunted there. At the beginning of the period of migration (about 1740) no tribe had acknowledged rights to any particular portion,^{3/} and this fact, coupled with the fact that the white man was the common enemy, resulted in a considerable amount of cooperation among the Indians there. When these Indians agreed among themselves to divide their interests in Ohio, as, for instance, the evidence indicates they did at the intertribal council at the mouth of the Scioto River in 1750, they were not taking any matured interests from one tribe and granting to another. Rather, they were attempting to divide a pie big enough for all, and thus there was no reason for contentiousness among them.

^{3/} The Ohio Indians repudiated the political sovereignty claims of the Six Nations of New York as soon as they were sufficiently strong to do so.

Within this framework, it may be seen that Indian settlements and hunting areas prior to 1775 were very often in a state of flux primarily because the Indians themselves so chose. They moved around so much because they knew that there were other desirable territories to utilize, and that, in so doing, they were not invading the established domain of other tribes or groups. After 1775, the situation changed. They moved then under pressure from the whites, and it was at this point that the more familiar Indian-white struggles developed.

Prior to 1775, theories of confederacy must, therefore, be based primarily upon the absence of conflict among the Indians, together with certain instances of concerted action, as in the 1747 conspiracy led by the Wyandot chief, Nicholas, and Pontiac's uprising in 1763. After 1775 concerted action by the Indians developed considerably, but was motivated defensively for the protection of the interests of each tribe or group of Indians, whose interests at these times coincided. There is little else in the record to support the theories of confederated land ownership other than the absence of friction among the Indians and the cooperative defense described above. The fact that several tribes signed the treaty at Greeneville in 1795 does not support this theory, for the treaty was one of peace as well as of cession, and Wayne sought the agreement of as many tribes as possible.

At the 1795 Greeneville Treaty proceedings only Tarke, the Wyandot chief, espoused such a theory, and his reasons may well have been politically motivated to further the interests of the Wyandots, the extent of whose presence within Royce Area 11 was questionable. At Greeneville, Tarke

also sought apportionment by Wayne of lands on the Indian side of the Greeneville Treaty line to prevent disputes among the Indians (and, incidentally, to establish an uncontested zone for the Wyandots). Furthermore, it should be noted that the Wyandots were among the first to seek peace after Fallen Timbers, a fact that Wayne acknowledged at the Greeneville Treaty proceedings.

The claim at the Greeneville proceedings by Massas that the Ottawas, Chippewas and Potawatomis (the "Three Fires") as one entity owned a large portion of Ohio is likewise not supportable. While there was a close relationship among these Indians in their dealings in Ohio and elsewhere, there is little evidence to support the theory that these Indians ever considered themselves a confederated landowning entity. The Court of Claims and this Commission have held in the past that both the Chippewas and the Ottawas were composed of separate, autonomous bands until well into the 19th century. See Mole Lake Band v. United States, 126 Ct. Cl. 596, 598 (1953); Red Lake Band v. United States, Docket 18-E, 7 Ind. Cl. Comm. 576, 579, 607 (1959); Ottawa Tribe v. United States, Dockets 40-B, et al., 2 Ind. Cl. Comm. 461, 463-64 (1953). Also, in the case of Miami Tribe v. United States, Dockets 131, et al., 5 Ind. Cl. Comm. 180, 214 (1957), this Commission held that, with respect to lands on the Indian side of the Greeneville Treaty Line,

. . . it was understood by the Government's representatives and the Indians [at Greeneville] that each tribe had separate land, that there was no community of interest in the

lands of the Northwest territory. So the recognition accorded by the Greenville Treaty [to lands on the Indian side of the Greenville Treaty Line] was that of each tribe.

We fail to see how it is possible to reach the opposite conclusion with respect to the manner of land holding by the Indians on the other side of the Greenville Treaty Line.

Accordingly, we hold that no part of these lands were owned by the tribes signatory to the 1795 Greenville Treaty as a confederated land-owning entity. See Iowa Tribe v. United States, 195 Ct. Cl. 365, 370 (1971) (aff'g, Docket 135, 22 Ind. Cl. Comm. 232 (1969)).

A further issue which must be considered before turning to the claims of aboriginal title of the respective tribal claimants is that of the political status of those Indians known as "Mingoes," who were occupying various portions of Royce Area 11 during the period here under consideration. These Mingoes were Indians of the Six Nations of New York, particularly Senecas (the westernmost of the Six Nations), who had migrated to Ohio and were located in scattered groups throughout Royce Area 11, sometimes in separate villages, often living in the villages of other tribes.

The claim in Docket 89 was brought on behalf of the Six Nations, the Seneca Nation, the Oneida Nation, the Seneca-Cayuga Tribe of Oklahoma, the Oneida Nation of New York, the Oneida Tribe of Wisconsin and the Tuscarora Nation. The Seneca-Cayuga Tribe of Oklahoma constitutes the descendants of those Mingoes who were living in Ohio in the 18th century. After leaving Royce Area 11, the Mingoes lived near the Wyandots

on the Sandusky River in northern Ohio, where they became known as the "Senecas of Sandusky". The last Indian signer of the Greeneville Treaty was Reyntueco, who was identified as "of the Six Nations, living at Sandusky." About 1800 these Senecas of Sandusky were joined by a portion of the Cayugas who had sold their lands in New York. One group of these Senecas of Sandusky lived with the Shawnees in Ohio but maintained its own identity. After 1831 both bands sold their lands in Ohio and moved to Kansas, and later, in 1867, to Oklahoma where the bands reunited. The plaintiff Seneca-Cayuga Tribe of Oklahoma has not, in these proceedings, alleged the independence of the Mingoes from the Six Nations of New York during the period under consideration here, nor has it asserted that the Mingoes alone aboriginally owned any of the lands in issue here. The defendant, however, has asserted that during the 18th century these Mingoes became independent bands or groups of Indians, no longer affiliated with or responsible to the Six Nations' Onondaga Council. Thus, the defendant concludes that any claims by the descendants of the Six Nations of New York to lands in Ohio cannot rest upon use and occupancy by these Mingoes.

The question is an important one because at the Treaty of Canandaigua in 1794, 7 Stat. 44, the Six Nations of New York relinquished claims to territory west of New York (including the area comprising Royce Area 11).^{4/}

^{4/} The Six Nations had also relinquished their western claims in prior treaties with the United States--at Fort Stanwix in 1784, 7 Stat. 15, and at Fort Harmar in January 1789, 7 Stat. 33. The 1794 Canandaigua Treaty was, however, the definitive cession of the Six Nations' Ohio claims. The 1784 Fort Stanwix Treaty was based upon the theory that the Indians had forfeited any rights to lands by siding with the British during the American revolution. The 1789 Fort Harmar Treaty was a confirmation of the 1784 Fort Stanwix Treaty boundaries but its finality was clouded by the Senate's refusal to ratify it after the Constitution went into effect on March 4, 1789.

Thus, if the Mingoes were at this time politically a part of the Six Nations of New York, the claims of the latter may rest upon use and occupancy by Six Nations Indians. If however, during the relevant period, these Mingoes were separate bands and groups, independent of the Six Nations of New York, the Six Nations' claim to aboriginal title of portions of Ohio will not stand, since the evidence herein is insufficient to support their claim of Indian title. In addition, any claims by the Six Nations based upon conquest of Ohio tribes in the 17th century have been historically repudiated.

Based upon the record in these proceedings, we believe that by the time of the 1794 Canandaigua Treaty, the Mingoes in Ohio were small independent bands, no longer politically subservient to the Six Nations of New York. To begin with, the record establishes that the majority of those Iroquois Indians living in Ohio during the 18th century were residing in villages of other tribes, particularly the Delawares and Shawnees, and often intermarried there. The Mingoes did not exclusively use and occupy any portions of Royce Area 11.

Secondly, and more important, beginning shortly before 1750, the Mingoes themselves were asserting their independence of the Six Nations of New York. In 1747, Mingoes visiting Philadelphia indicated their intentions of kindling their own council fire and, by 1750, the Mingo chief, Broken Kettle, was speaking in the name of the Ohio Council. Also, in 1750, we have reports of Mingoes acting independently at the general council at the mouth of the Scioto. The Mingoes, along with most of the other Ohio Indians, sided with the French in the French and Indian War despite the urgings of the Onondaga Council.

At Fort Stanwix in 1768, the Six Nations of New York ignored claims by Mingoes and other Ohio Indians and acted to protect their own lands in New York. The result was that the Ohio Indians raided regularly into Pennsylvania and Virginia thereafter, again against the wishes of the Onondaga Council. From 1770 until Greeneville in 1795, the references to the Mingoes in Ohio indicate that they acted on their own in harmony with the other Ohio tribes while the Six Nations Council at Onondaga stayed out of affairs in Ohio. The fact that the Americans considered the Ohio Indians, including the Mingoes, independent of the Six Nations of New York is indicated by the refusal of the commissioners at the Fort Stanwix Treaty in 1784 to entertain the assertions of the Six Nations that they were empowered to speak for the Ohio Indians.

The only conclusion which can be reached from an analysis of the activities of these Mingoes in Ohio during the 18th century is that they constituted independent bands who often acted in concert with the other Ohio Indians. Their actions do not support the conclusion that they remained politically affiliated with the Six Nations of New York.

We turn now to a consideration of the use and occupancy of Royce Area 11 during the 18th century. We have divided this large area into four separate regions for the purpose of facilitating our analysis. Each region will be discussed separately hereinafter.

We are unable to find that the predecessors of any of the tribal claimants herein possessed aboriginal title to any portion of northeastern Royce Area 11 at any time up to and including 1795. From the time that

the first Indian settlements appeared in and around northeastern Royce Area 11 in the early 1740's this region was the scene of a mixed population of Indians. Those Indians who, during the fifty years preceding 1795, used and occupied northeastern Royce Area 11 included, at one time or another, practically all of the claimants in these proceedings with the exception of certain of the western tribes; namely Kickapoos, Kaskaskias, Weas and Piankeshaws. Beginning with the Seneca migration to the west bank of the Cuyahoga River in 1742, there are references to Delawares, Chippewas, Ottawas, Wyandots, Potawatomis and Mingoes who, at various times prior to 1795, hunted or had settlements within this region. Even Dr. Tanner who testified as an expert for several of the plaintiffs, including the Chippewas and Wyandots, is at best able to postulate mixed occupancy of northeastern Royce Area 11 by Chippewas, Ottawas, Wyandots, Delawares and Mingoes during the entire period.

The predominant characteristic of this region during the entire period under consideration was that of transient use and occupancy by the several tribes of Indians, or bands or groups of them, described above. This conclusion is amply supported in the record here by the numerous instances where Indians of these tribes were observed doing their winter hunting within this region, and by the many short-lived villages which are referred to by the experts. The fact that transient use and occupancy was the characteristic of this region is attributable to its location. It was easily accessible from both New York and Pennsylvania on the east and from the post of Detroit on the west. The pattern of use and occupancy

of northeastern Royce Area 11 clearly showed common use and occupancy by many tribes. There was no actual and exclusive use and occupancy by any particular tribe.

In southeastern Royce Area 11 we are presented with a substantially different situation. From the commencement of Indian settlement of Royce Area 11 in the 1740's, the portion of southeastern Royce Area 11 along the upper Muskingum River and its tributaries, particularly the Walhonding River, was a center of Delaware activity. (This region is today the area comprising the counties of Coshockton and Muskingum, Ohio.) The first recorded Delaware settlement of this area was in 1743 with the founding of White Woman's Town on the Muskingum River near the mouth of the Walhonding River. Thereafter Delaware migration continued extensively into this area. At the height of Delaware presence here, shortly before the beginning of the American Revolution, there were known to be at least seven Delaware settlements clustered around the upper Muskingum River and its tributaries. The Delawares remained in numbers here until forced to evacuate in the early 1780's due to the pressure of American military forces.

Over the period of Delaware use and occupancy of this area from 1743 to 1781, there were other Indians present to a limited extent. There was, for a short period of time around 1750, a Wyandot town called Conchaké located near the present-day city of Coshockton. This town was settled by Nicholas' band of Wyandots, but was abandoned when the Wyandots returned to the Sandusky Bay area north of Royce Area 11 in the

early 1750's. From 1759 to 1774 there was a Shawnee village located on the upper Muskingum River. After 1774 these Shawnees moved to western Royce Area 11 with the rest of the Shawnees. Around 1770, Moravian Christian Indians established settlements, with the consent of the Delawares and the concurrence of the Wyandots, along the Tuscarawas River in present-day southern Tuscarawas County, a little to the east of the Delaware settlements. These Moravian Indians remained until the general exodus from the area in 1781.

Unlike the upper Muskingum River portion of southeastern Royce Area 11, the large expanse of territory along and inland from the Ohio River as far south as the mouth of the Hocking River was sparsely populated and was primarily the scene of hunting expeditions by different tribes of Indians. This area was the natural outlet for Six Nation Indians migrating westward as well as a popular hunting area for other Indians of the Six Nations who would return to New York. There is little documentation of this area, but we do have references to hunting by Iroquois and Delaware along the Ohio, and to a mixed village of Mingoes and Delawares at Cross Creek (near present-day Steubenville) on the Ohio River which was abandoned in the early 1770's.

Thus in considering the issue of aboriginal use and occupancy of southeastern Royce Area 11, we find that near the Ohio River there was mixed use and occupancy.

We do have evidence, however, which establishes Delaware use and occupancy in the region of the upper Muskingum and its tributaries during

the period from 1742 to 1781. Delaware presence in this area during this time was overwhelmingly predominant and lasted for a long time. Those incidents of use and occupancy by other Indians we view as permissive or as so sporadic as not to be inconsistent with Delaware use and occupancy.

When the Delawares evacuated their villages on the upper Muskingum in 1781 they did not abandon their rights to this area but, rather, were forced to leave by American military pressure. The subsequent participation by the Delawares in the warfare in Ohio against the American forces disproves any claim of voluntary abandonment or that they relinquished in any way their claims to this area before the 1795 cession at Greeneville. See Northern Paiute Nation v. United States, Docket 87, 7 Ind. Cl. Comm. 322, 419 (1959).

Based upon the evidence in this record, we conclude that as of the date of the 1795 Treaty of Greeneville, the Delaware Indians possessed aboriginal title to that portion of Royce Area 11 included within the present-day counties of Tuscarawas, Coshockton and Muskingum in Ohio. Any expansion of these boundaries cannot be supported by the evidence herein.

In the central region of Royce Area 11, Shawnees established a settlement at the mouth of the Scioto on the Ohio River in the late 1730's. During its existence this settlement remained predominantly a Shawnee town, but it was also occupied by Mingoes. In the years that followed, Shawnee use and occupancy of this area expanded northward, culminating in 1758 with the voluntary abandonment of the settlement at

the mouth of the Scioto and the movement of their main settlement to the Pickaway Plains area on the middle Scioto River near present-day Circleville. By the time of Lord Dunmore's expedition against the Shawnees in 1774, there were several Shawnee settlements existing along the middle Scioto. However by the late 1770's, the Shawnees had fled westward where they established settlements on the Great Miami River.

Other tribes occupied and used various portions of central Royce Area 11 during the 18th century. There were a few Delaware settlements along the middle Scioto during the late 1740's and early 1750's, but shortly thereafter it appears that the Delawares voluntarily abandoned all of these except a village on the upper Hocking River. We also know that there were Mingo living in many of the Shawnee settlements and that there was a Mingo town, under the chief Pluggy, on the headwaters of the Scioto from 1775 through the early 1780's. Hunting by several tribes also took place throughout the period under consideration in its northern and southern portions where there were few settlements. The evidence indicates that the southern portion (near the Ohio River) was a region of mixed use by hunters of various tribes. In the extreme northern portion, there are reports of extensive hunting by Wyandots who lived north of Royce Area 11, but other tribes hunted there as well.

The Shawnees continuously used and occupied this area from the late 1730's until they were forced to abandon these lands in the late 1770's.

Large portions of central region, however, were common hunting grounds. This was true of the entire southern third of this region bordering on the Ohio River. The same was true of the northern quarter of this region. Until they were forced out in the late 1770's, the Shawnees had established Indian title to the area bounded on the north by an east-west line running along the 40th degree north latitude and on the south by a straight line running from the city of Athens in Athens County west to the town of Highland in northern Highland County, and bounded on the east and west by the lines described in note 6 of the findings of fact as the east and west boundaries of **central Royce Area 11**. The presence of Mingoes and Delawares within this territory was permissive. Furthermore, we conclude that evacuation by the Shawnees of this region was the direct result of American military pressure and was, therefore, not voluntary. The Shawnees, as evidenced by their involvement in the warfare in Ohio throughout the period up to the Battle of Fallen Timbers, did not relinquish their claims to this region until the Treaty of Greeneville in 1795.

The United States has claimed that the portion of central Royce Area 11 west of the Scioto River, being part of the Virginia Military District, never became public domain and, therefore, that the United States cannot be held liable with respect thereto. Virginia's claims west of the Ohio River were relinquished to the Confederation in 1784, subject to several conditions, one of which was that the lands between the Scioto

and the Little Miami Rivers should be reserved for Virginia troops, as had previously been promised by the Virginia legislature. Up to the time in 1784 when Virginia relinquished its claims in the Northwest Territory, Virginia owned the Virginia Military District and possessed the exclusive right of preemption over the existing Indian rights of occupancy thereto. With the relinquishment, title to the soil passed to the United States, as did the exclusive right of preemption. The reservation did not affect the passing of title or the right of preemption. The titles of both Virginia and the United States were subject to Indian rights of occupancy, which were not relinquished until the 1795 Treaty of Greeneville, when the Indians relinquished their rights to the United States. Under these circumstances, the United States could be liable to the Indians with respect to lands located within the Virginia Military District. See Johnson & Graham's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 586 (1823). See also Lipan Apache Tribe v. United States, 180 Ct. Cl. 487, 498 (1967) (rev'g Docket 22-C, 15 Ind. Cl. Comm. 532 (1965)).

Western Royce Area 11 presents, again, a problem somewhat different from those of the other regions described above. Groups of Miamis settled at two places within this region in the late 1740's, but they evacuated after a French-led Ottawa attack in 1752. Miamis are known to have hunted here through the years up to the 1795 Greeneville Treaty, but throughout the 18th century the main area of Miami use and occupancy was northwest of Royce Area 11, centering around present-day Fort Wayne.

Shawnees are also known to have hunted extensively in western Royce Area 11. Furthermore, the Shawnees, beginning in 1773, moved their settlements west from the Pickaway Plains, and in the early 1780's there are reports indicating the existence of as many as sixteen Shawnee villages on the upper Great Miami River and its tributary, the Mad River. In the area nearer the Ohio River, just as in the other similarly situated regions of Royce Area 11, there was mixed hunting.

The Miami plaintiffs contend that despite the absence of evidence we should find by inference that the aboriginal Miami Tribe owned the territory comprising western Royce Area 11 by virtue of exclusive use and occupancy. Indian title is, however, a question of fact and, absent evidence, we are unable so to find. See Quapaw Tribe v. United States, 1 Ind. Cl. Comm. 469, 481-83 (1951), rev'd on other grounds, 128 Ct. Cl. 45 (1954). The period of use and occupancy by the Shawnees of western Royce Area 11 was not sufficiently long to establish aboriginal title.

We next turn to a consideration of the remaining areas ceded to the United States at the 1795 Greenville Treaty; namely, the sixteen enclaves described in the second paragraph of Article III, the rights of passage over the five routes described in the last paragraph of Article III, and the separate tracts described in the first paragraph of Article IV, which were excepted from the general relinquishment made

by the United States of lands north and west of the Greeneville Treaty line.^{5/}

Our findings of fact set forth the history of each of these areas and our conclusions regarding evidence of Indian use and occupancy and aboriginal title thereof. With regard to Royce Areas 12, 13 and 14 in Ohio, and the portions of the first and second described passages running between these areas, all of which are located close to the Greeneville Treaty Line, we have found nothing in the record to warrant treating these areas as other than appendages to nearby portions of Royce Area 11. These areas, as with said portions of Royce Area 11, were not aboriginally owned by any tribe at the time of the 1795 Greeneville Treaty. Furthermore, nothing in the record herein supports a finding of aboriginal title to Royce Area 15 in Ohio in any tribe.

Royce Areas 16 and 17, and that portion of the fifth described passage running from Royce Area 16 to the Wabash River, are located within the general region of Miami use and occupancy during the 18th century. The evidence supports the conclusion that these areas were aboriginally owned by the Miami Tribe by virtue of their continuous and exclusive use and occupancy from the beginning of the 18th century until the time of the 1795 Greeneville Treaty. Abandonment of these areas shortly before the

^{5/} We have entered no findings relating to the lands described in the third clause of the first paragraph of Article IV as follows:

- 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.

These lands are impossible to define. They are not at issue in these proceedings.

Greeneville Treaty in 1795 was accomplished under the threat of American military presence and was not a relinquishment of the Miami claims.

See Northern Paiute Nation v. United States, supra. The area discussed in our finding of fact No. 22, infra, described in the 1795 Greeneville Treaty as located ". . . at the Ouatonon or Old Wea towns on the Wabash river", is located within the area the Commission has previously held was within the aboriginal area of the Wea Nation which, at the time of the 1795 Treaty of Greeneville, was a part of the Miami Tribe. See Miami Tribe v. United States, Docket 67, 2 Ind. Cl. Comm. 617, 629 (1954), aff'd in part, rev'd in part, 146 Ct. Cl. 421 (1959). This area was subsequently returned to the Indians and most of it was later receded as part of Royce Area 99, for which the Wea Nation has already been compensated. See Peoria Tribe v. United States, Docket 314, 9 Ind. Cl. Comm. 274 (1961). The small portion north of the Wabash River is included in the claim of the Peoria Tribe on behalf of the Wea Nation for Royce Area 98 in Docket 314-A before the Commission. See Pottawatomie Tribe v. United States, Dockets 15-D, et al., 30 Ind. Cl. Comm. 42 (1973).

Bands of Ottawas (known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf) moved into Royce Areas 18 and 19 in Ohio immediately after Pontiac's unsuccessful uprising against the British in 1763. The evidence establishes that this region was used and occupied continuously by these Ottawas from 1763 until well into the 19th century. The evidence supports our finding that, in 1795, these bands of Ottawas possessed aboriginal title to these areas.

The unsurveyed area around Fort Sandusky on Lake Erie and Royce Area 20 had been used and occupied by the Wyandots for a long time prior

to the 1795 Treaty of Greeneville. The evidence establishes that the Wyandots first moved into these areas from Detroit in the late 1730's and remained there, almost continuously, until the time of the 1795 Greeneville Treaty. On the basis of the evidence, we have found that the Wyandot Tribe possessed aboriginal title to these areas in 1795. The fact that the area of Fort Sandusky was within Connecticut's Western Reserve does not affect the fact that the Wyandots held aboriginal title to this area, which they ceded to the United States in 1795. See Lipan Apache Tribe v. United States, supra.

With regard to the Detroit area, the evidence shows that the only Indians residing in 1795 within the area ceded at the Greeneville Treaty were the Wyandots who had two settlements there, at present Wyandotte and Gibraltar, Michigan, which they had occupied since 1777, the year following the accession of United States sovereignty. See Red Lake Band v. United States, supra, at 580. Most of the Detroit area was, by 1795, occupied by white settlers. The evidence demonstrates that the other tribes who formerly had settlements at Detroit voluntarily abandoned them well before 1795. The Wyandots, on the other hand, had apparently abandoned the Detroit cession area in the early 1740's for the Ontario side of the Detroit River, and had not returned until 1777. Use and occupancy of the two villages beginning after the accession of United States sovereignty, plus the fact that these Indians were there for only the

relatively short period of eighteen years before the 1795 Greeneville Treaty, do not support a claim of aboriginal title against the United States.

The history of the areas located at the Straits of Mackinac (Royce Areas 21, 22 and 23, Michigan) which were ceded at Greeneville in 1795, establishes that in 1795 they were areas of common use and occupancy by autonomous bands of Chippewas and Ottawas represented in these proceedings by the plaintiffs in Dockets 18-M and 40-F. These plaintiffs have acknowledged such use in their Joint Brief and Requested Findings (Requested Finding 5). Such common use and occupancy precludes a finding of aboriginal title. See Iowa Tribe v. United States, Docket 135, 22 Ind. Cl. Comm. 232, 279 (1969), aff'd, 195 Ct. Cl. 365 (1971).

Chicago (Royce Area 24, Illinois) and that portion of the fourth described passage running from Chicago to the Illinois River we have found to have been aboriginally owned in 1795 by the Potawatomi Tribe; the same is true of those portions of the areas ceded at the 1795 Greeneville Treaty located on the north and west banks of the Illinois River. The areas on the south and east banks of the Illinois River ceded at Greeneville in 1795 we have found to have been aboriginally owned by the Kickapoo Tribe. We believe that our findings of fact Nos. 28 and 29, infra, support these conclusions.

There are two legal considerations worthy of discussion in connection with our finding that none of the claimants here have established that their predecessors possessed aboriginal title to any portion of Royce Area 25 (Clark's Grant) at the time of the 1795 Greeneville Treaty. The first is the defendant's contention that the United States cannot

be held liable for these lands because, under the condition in Virginia's 1784 deed of cession of claims in Ohio setting these lands aside as bounty lands for Clark's regiment, they passed directly to individuals and were never a part of the public domain. On these same grounds, the defendant asserts that no tribes could have possessed aboriginal title to any of Clark's Grant in 1795. We do not agree with these arguments for the same reasons we have set forth earlier in this opinion in our discussion of the Virginia Military District. Dictum, cited by the defendant, of the Supreme Court of Judicature of Indiana in the case of Henthorn v. Doe, on the Demise of Shepherd, Corydon, May Term, 1822 (Def. Ex. S-33, Docket 13-G, et al.) we find inapposite. This case involved rights to land as between white grantees and did not discuss the possibility of the existence of aboriginal title.^{6/}

^{6/} We believe that a more accurate analysis of intrawhite claims to lands within Clark's Grant is set forth in the opinion of Chief Justice Marshall in the case of Hughes v. Trustees of the Town of Clarksville, 31 U.S. (6 Pet.) 369, 379 (1832), in the following language:

The plaintiff in error contends that as the State of Virginia had conveyed all her territory north-west of the River Ohio to the United States before any legal title was vested in the commissioners or trustees appointed by the Act of 1783, the title at law was vested in the United States, and could pass only from them. That the reservation in favor of Clark's regiment is not an exception of so much land from the deed of cession; but a stipulation that Congress shall comply with the promise made by Virginia to that regiment. Consequently, that the plaintiffs in ejectment had no legal title

Had the court been required to expound these laws immediately after the deed of cession was executed, it is probable that the construction made by the plaintiff in error would have been adopted. But the opposite construction has prevailed, and all the titles depend on it. It is too late to controvert.

The second and controlling consideration involves the determination of what tribes, if any, may have used and occupied the lands encompassing Clark's Grant for a long time prior to the 1795 Greeneville Treaty. The plaintiffs base their claims on certain prior Commission determinations in other cases involving lands adjacent to Royce Area 25. The plaintiffs cite the Commission's prior determination, in Peoria Tribe of Indians v. United States, Docket 289, 19 Ind. Cl. Comm. 107, 117 (1968), that by virtue of the 1795 Greeneville Treaty (together with certain follow-up treaties) the United States recognized the joint title of the Delaware and Piankeshaw Indians to Royce Area 49, which adjoins Royce Area 25 on the southwest. Plaintiffs also cite the Commission's prior determinations in Miami Tribe v. United States, Dockets 67 et al., 2 Ind. Cl. Comm. 617, 629-31 (1954), aff'd in part, rev'd in part, 146 Ct. Cl. 421 (1959), and Miami Tribe v. United States, Dockets 253 et al., 5 Ind. Cl. Comm. 180, 192-95 (1957), that by the Treaty of August 18, 1804, 7 Stat. 81, the United States agreed to acknowledge the title of the Delaware to Royce Area 56, which adjoins Royce Area 25 on the north, east and west; that by the Grouseland Treaty of August 21, 1805, 7 Stat. 91, the Delawares relinquished their claim to Royce Area 56 in favor of the Miami, and the United States confirmed the 1795 Greeneville Treaty recognition of title to Royce Area 56 in the Miami, Eel River Miami and Wea; and that subsequently, by the Treaty of September 30, 1809, 7 Stat. 113, the Miamis acknowledged that the Delawares had equal rights with them to the country watered by the White River, north of Royce Area 56.

On the basis of these prior determinations of the Commission the plaintiffs conclude that, since it is not possible to draw lines of division among the Miamis, Eel River Miamis, Weas, Piankeshaws and Delawares, who possessed Clark's Grant as of the time of the 1795 Greeneville Treaty, it should be determined that these tribes had equal interests in Clark's Grant; i.e., a two-fifths interest in the Miami tribes represented in Dockets 130 and 252, a two-fifths interest in the Wea and Piankeshaw nations represented by the Peoria Tribe of Oklahoma in Docket 338, and one-fifth interest in the Delaware Tribe represented in Dockets 27-B and 338.

The evidence of aboriginal use and occupancy of Royce Area 25 is sparse. The defendant has introduced no evidence relating to such use and occupancy, relying on the arguments described above. The prior determinations of the Commission cited and relied upon by the plaintiffs are, except for a few broad findings relating to longtime use and occupancy of the general area of southern Indiana, useful only in determining use and occupancy of the area surrounding Royce Area 25 shortly before and after the 1795 Greeneville Treaty. This is so because all those cases cited involved the determination of those tribes in whom title to said surrounding areas was recognized by the 1795 Greeneville Treaty, as identified and described in certain later treaties.

We have diligently studied the available source material, including the prior determinations of this Commission, and, on the basis of our analysis, are unable to find evidence to support a claim of aboriginal

title to any portion of Clark's Grant at the time of the 1795 Greeneville Treaty by any of the claimants herein.

We have found that no tribes possessed aboriginal title to Royce Area 26 (the Vincennes Tract) at the time of the 1795 Greeneville Treaty. The evidence cited in our finding of fact No. 32, infra, supports the conclusion that the Indians at the 1795 Greeneville Treaty and at the Treaty of Fort Wayne of June 7, 1803, 7 Stat. 74, acknowledged that Indian title to the tract described in the first article of the Fort Wayne treaty had been extinguished prior to the 1795 Treaty of Greeneville. The Commission, in Peoria Tribe v. United States, Docket 289, 19 Ind. Cl. Comm. 107, 121-22 (1968), found as follows with respect to the effect of the Greeneville and Fort Wayne Treaties:

The Commission therefore finds that both the Delaware and Piankeshaw tribes duly participated in the 1795 Greeneville Treaty, the consequence being, that tribal ownership of lands then used and occupied by them was recognized by the United States. We find and conclude further that the Fort Wayne Treaty of June 7, 1803 (7 Stat. 73) [sic], the Delaware and Piankeshaw treaties of cession of August 8, 1804 (7 Stat. 81) and August 27, 1804 (7 Stat. 83), and the Grouseland [sic] Treaty of August 21, 1805, determined and confirmed the boundaries and ownership of the lands previously recognized as belonging to the Delaware and Piankeshaw tribes under the 1795 Greeneville Treaty.

The position of this Commission and of the Court of Claims has consistently been that the boundaries of lands, title to which the United States recognized at Greeneville, were identified in the several subsequent treaties with the Indians. See Miami Tribe v. United States, supra, at 442. Thus in the Peoria case, supra, title to the areas surrounding

the territory defined in the Fort Wayne treaty as the Vincennes Tract was identified as recognized in the appropriate tribes present at Greeneville in 1795. As a necessary corollary to this, the boundaries of the Vincennes Tract described in the Fort Wayne treaty, and agreed to by the Indians therein, constituted an acknowledgment by the Indians that the Vincennes reservation to which the Indians agreed at Greeneville they then possessed no title, consisted of the area described in the first article of the Fort Wayne treaty. See Peoria Tribe v. United States, Dockets 99, et al., 16 Ind. Cl. Comm. 574, 582 (1966). We therefore conclude that evidence of Indian use and occupancy of the Vincennes tract is immaterial.

Our finding of fact with respect to Royce Area 27, Illinois (Fort Massac) needs little comment. The facts set forth therein lead to our conclusion that at the time of the 1795 Greeneville Treaty, this area was aboriginally owned by the Kaskaskia Indians, who are now a constituent part of the Peoria Tribe of Indians of Oklahoma, plaintiffs in Docket 338.

One more point should be made in this opinion in connection with our analysis of the ownership of certain of the enclaves ceded to the United States under the 1795 Greenville Treaty. We have recently held in the cases of James Strong v. United States, Dockets 13-E, et al., 30 Ind. Cl. Comm. 6 (1973) and James Strong v. United States, Dockets 13-F, et al., 30 Ind. Cl. Comm. 337 (1973) that the areas adjoining certain of the 1795 Greenville Treaty enclaves were jointly owned under recognized title by more than one

Indian entity. We do not believe that our conclusions in the above-cited cases regarding recognized title interests in the areas adjoining these enclaves are inconsistent with the conclusions herein as to aboriginal ownership of the enclaves in 1795. These enclaves were very small areas where use and occupancy was easily observable and definable. In addition, they were strategic locations familiar to white observers who recorded their observations. The evidence in the instant case showed that, as to these particular small areas, certain groups held aboriginal title. However, in dealing in the above-cited cases with the division of recognized title interests to much larger areas, the evidence did not warrant any division of particular tribal interests on the basis of geographical boundaries within said areas.

In summary, the Commission has reached the following conclusions with respect to the lands ceded by the tribes signatory to the 1795 Treaty of Greeneville, title to which is at issue in these proceedings:

1. As of 1795, the Delaware Tribe, represented in these proceedings by the Delaware Tribe of Indians in Docket 27-B and the Absentee Delaware Tribe of Oklahoma, et al., in Docket 338, possessed aboriginal title to that portion of Royce Area 11 included within the presentday counties of Tuscarawas, Coshockton and Muskingum, in southeastern Ohio.

2. As of 1795, the Shawnee Tribe, represented in these proceedings by the Shawnee Tribe of Indians of Oklahoma, et al., in Docket 64 and the Eastern Shawnee Tribe of Oklahoma, et al., in Dockets 335 and 338,

possessed aboriginal title to that portion of Royce Area 11 circumscribed by a line beginning at the town of Highland in northern Highland County, Ohio, thence easterly in a straight line to the city of Athens in Athens County, Ohio, thence in a northwesterly direction up the Hocking River to the town of Lancaster, thence northeasterly in a straight line to a point on the South Fork of the Licking River, 4-1/2 miles southwest of the city of Newark in Licking County, Ohio, thence west on the 40th degree north latitude to a point one mile east of the town of Catawba in northeastern Clark County, Ohio, thence in a straight line south to the place of beginning.

3. As of 1795, the Miami Tribe possessed aboriginal title to Royce Areas 16 and 17 in Indiana and to that portion of the fifth "passage" that is described in the last paragraph of Article III of the 1795 Treaty of Greeneville running from Royce Area 16 west to the Wabash River over a distance of approximately two miles. The Miami Tribe is represented in these proceedings by Ira Sylvester Godfroy, et al., ex rel., The Miami Indian Tribe, plaintiffs in Docket 130, and the Miami Tribe of Oklahoma, et al., plaintiffs in Docket 252. The Weas, who were a part of the Miami Tribe in 1795, are represented here by the Peoria Tribe of Indians of Oklahoma, et al., plaintiffs in Docket 338.

4. As of 1795, the bands or groups of Ottawa Indians known as the Ottawas of the Maumee, Blanchard's Fork, AuGlaize and Roche de Boeuf, represented in these proceedings by the Ottawa Tribe of Oklahoma, et al., plaintiffs in Docket 338, possessed aboriginal title to Royce Areas 18 and 19 in Ohio.

5. As of 1795, the Wyandot Tribe, represented in these proceedings by Lawrence Zane, et al., ex rel., Wyandot Tribe, et al., plaintiffs in Docket 120, possessed aboriginal title to the unsurveyed area near Sandusky, Ohio, delineated by a dotted black line on Royce's Map of Ohio (Fort Sandusky) and to Royce Area 20 in Ohio.

6. As of 1795, the Potawatomi Tribe, represented in these proceedings by The Pottawatomie Tribe of Indians, The Prairie Band of the Pottawatomie Tribe of Indians, et al., plaintiffs in Docket 15-E, the Hannahville Indian Community, et al., plaintiffs in Docket 29-C, and the Citizen Band of Potawatomi Indians of Oklahoma, et al., plaintiffs in Docket 338, possessed aboriginal title to Royce Area 24 (Chicago) in Illinois, to those portions of the areas described in the fifteenth and sixteenth clauses of the second paragraph of Article III of the 1795 Treaty of Greeneville (the mouth of the Illinois River and the "old Piorias fort and village") located north and west of the Illinois River, and to that portion of the fourth "passage" that is described in the last paragraph of Article III of the 1795 Treaty of Greeneville running, for a distance of approximately seven miles, from Royce Area 24 to the Illinois River.

7. As of 1795, the Kickapoo Tribe, represented in these proceedings by The Kickapoo Tribe of Oklahoma, The Kickapoo Tribe of Kansas, et al., plaintiffs in Docket 338, possessed aboriginal title to those portions of the areas described in the fifteenth and sixteenth clauses of the second paragraph of Article III of the 1795 Treaty of Greeneville (the mouth of the Illinois River and the "old Piorias fort and village") located south and east of the Illinois River.

8. As of 1795, the Kaskaskia Tribe, represented in these proceedings by the Peoria Tribe of Indians of Oklahoma, et al., plaintiffs in Docket 338, possessed aboriginal title to Royce Area 27 (Fort Massac) in Illinois.

9. None of the predecessors of any of the plaintiffs in these consolidated proceedings aboriginally owned any other portions of the territory ceded to the United States by the Six Nations at Canandaigua in 1794 and by the tribes signatory to the 1795 Treaty of Greeneville, nor did any of such predecessors possess recognized title to any of said territory.

Therefore, on the basis of this opinion and the accompanying findings of fact, the Commission will, this day, issue an order that the claims in Dockets 13-G, 18-M, 40-F and 89 be dismissed, and that the claims under the remaining dockets in these consolidated proceedings proceed to a determination of the acreage and fair market value, as of August 3, 1795, of the lands found herein to have been aboriginally owned by the

predecessors of the various plaintiffs and to a determination of the consideration paid by the United States at the 1795 Greeneville Treaty.

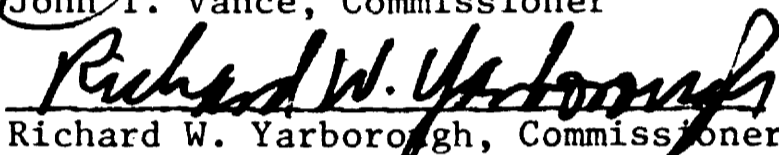


Margaret H. Pierce, Commissioner

We Concur:



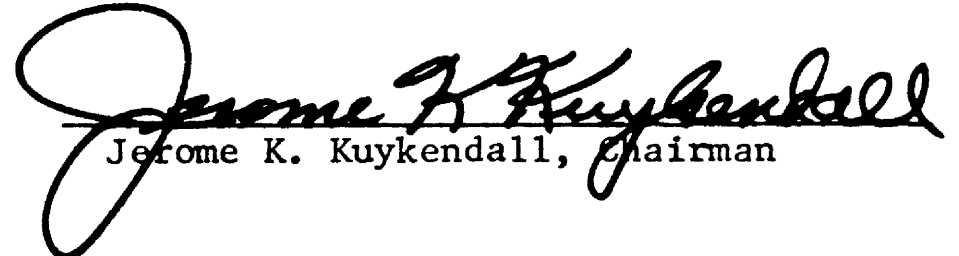
John T. Vance, Commissioner



Richard W. Yarborough, Commissioner

Kuykendall, Chairman, and Blue, Commissioner, concurring:

We concur, but point out that in our opinion the "Potawatomi Tribe" consisted of politically autonomous landowning bands during the relevant treaty making periods described ante. See the dissenting opinion in Citizen Band v. United States, Dockets 71, et al., 27 Ind. Cl. Comm. 187, 328 (1972). Since, however, we are bound by the majority's opinion in this above cited case, we concur herein.


Jerome K. Kuykendall, Chairman


Brantley Blue, Commissioner