BEFORE THE INDIAN CLAIMS COMMISSION

THE POTTAWATOMIE TRIBE OF INDIANS, THE PRAIRIE BAND OF THE POTTAWATOMIE TRIBE OF INDIANS, and WILLIAM EVANS, ELLEN NOGAHNKOUK VIEUX, and LISA (NAGONBA) CLAYBEAR, as individuals-plaintiff, Plaintiffs,	Docket No. 15-D
THE POTTAWATOMIE NATION OF INDIANS, THE PRAIRIE BAND OF THE POTTAWATOMIE NATION OF INDIANS, and WILLIAM EVANS, ELLEN NOGAHNKOUK VIEUX, and LISA (NAGONBA) CLAYBEAR, as individuals-plaintiff, Plaintiffs,	Docket Nos. 15-P and 15-Q
HANNAHVILLE INDIAN COMMUNITY, WILSON, MICHIGAN; FOREST COUNTY POTAWATOMI COMMUNITY, CRANDON, WISCONSIN; POTAWATOMI TRIBE OR NATION OF INDIANS; FRANK WANDAHSEGO, SR., ELIJAH PETONQUOT, IKE GEORGE and VALENTINE RITCHIE, Plaintiffs,	Docket Nos. 29-B, 29-N, and 29-O
THE PEORIA TRIBE OF INDIANS OF OKLAHOMA and MABEL STATON PARKER on behalf of THE PIANKESHAW NATION	Docket No. 99
IRA SYLVESTER GODFROY, WILLIAM ALLOLA GODFROY, JOHN A. OWENS, on relation of THE MIAMI INDIAN TRIBE and MIAMI TRIBE OF INDIANA and each on behalf of others similarly situated and on behalf of the MIAMI INDIAN TRIBE and various bands and groups of them comprising the MIAMI TRIBE AND NATION, Plaintiffs,	Docket No. 124-H
THE MIAMI TRIBE OF OKLAHOMA, also known as THE MIAMI TRIBE, and HARLEY T. PALMER, FRANK C. POOLER and DAVID LEONARD, as representatives of the MIAMI TRIBE and of all the members thereof, Plaintiffs,	Docket No. 254

CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, and POTAWATOMI NATION, represented by CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, and by DAN NADEAU, MAY FAIRCHILD and A. B. PECORE, members of such Band and such Nation, and DAN NADEAU, MAY FAIRCHILD and A. B. Pecore, on the relation of POTAWATOMI NATION, Plaintiffs,	)	Docket Nos. 306, 309, and 311
THE PEORIA TRIBE OF INDIANS OF OKLAHOMA, GUY FROMAN on behalf of the PEORIA NATION, and FRED ENSWORTH on behalf of the KASKASKIA NATION, Plaintiffs,	)	Docket No. 313
THE PEORIA TRIBE OF INDIANS OF OKLAHOMA and AMOS ROBINSON SKYE on behalf of the WEA NATION, Plaintiffs,	)	Docket No. 314-A
THE KICKAPOO TRIBE OF KANSAS, THE KICKAPOO TRIBE OF OKLAHOMA, THE KICKAPOO NATION, et al., Plaintiffs,	)	Docket No. 315
v.	)	
UNITED STATES OF AMERICA, Defendant.	)	

Decided: August 29, 1973

Appearances:

Robert Stone Johnson, Attorney for the Plaintiffs in Docket Nos. 15-D, 15-P, and 15-Q.

Robert C. Bell, Jr., and James N. Beery, Attorneys for Plaintiffs in Docket No. 29-B.

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket Nos. 29-N and 29-O.

Albert C. Harker, Attorney for
Plaintiffs in Docket No. 124-H.

Edwin A. Rothschild, Attorney
for Plaintiffs in Docket No. 254.

Louis L. Rochmes and Giddings Howd,
Attorneys for Plaintiffs in Docket
Nos. 306, 309, and 311.

Jack Joseph, Attorney for Plaintiffs
in Docket Nos. 313 and 314-A.

Allan Hull, Attorney for Plaintiffs
in Docket No. 315.

Bernard M. Newburg, William H. Lundin,
and Milton Edward Bander, with whom
were Assistant Attorneys General
Clyde O. Martz and Shiro Kashiwa,
Attorneys for Defendant.

OPINION OF THE COMMISSION ON GRANTING DEFENDANT'S MOTION TO FILE OUT OF TIME, AND DENYING DEFENDANT'S MOTION FOR REHEARING

Pierce, Commissioner, delivered the opinion of the Commission.

On April 4, 1973, we issued our decision on title in this proceeding. On June 21, 1973, the defendant moved for leave to file out of time a motion for rehearing. The Hannahville plaintiffs in Docket Nos. 29-B, N, and O, responded in opposition on July 29, 1973. The Peoria plaintiffs in Docket Nos. 313 and 314-A, responded in opposition on July 2, 1973.

By the order accompanying this opinion, we have granted the defendant's motion to file out of time, and have denied the defendant's motion for rehearing.

The defendant's counsel states that the reason for the late motion for rehearing, is that he did not receive a copy of our amended General

Rules of Procedure, limiting the time for filing a motion for rehearing. We do not find that this is sufficient reason for non-compliance with the rules. Nevertheless, in this instance, we waive our amended Rule 33, in the interest of settling the substantive questions raised by the motion for rehearing. Since the motion is denied by the accompanying order, the plaintiffs are not prejudiced thereby.

Defendant's Motion For Rehearing

In its motion for rehearing, the defendant charges that in its decision of April 4, 1973 (30 Ind. Cl. Comm. 42), this Commission committed errors of law:

(1) in interpreting Article IV, exception 3 of the Greeneville Treaty of August 3, 1795, 7 Stat. 49[1/]; and

(2) in determining that the valuation date[2/] of recognized undivided interests in Indian lands should, in all instances, be the date[3/] of cession of the undivided interests.

1/ Specifically, the defendant charges Commission error in finding "recognition of Indian title" to Tract A of Royce Area 48, numerous areas of which the defendant alleges were excepted under Article IV, exception 3 of the Greeneville Treaty. Defendant alleges that, although not specified by metes and bounds in Article IV, exception 3, said areas were occupied and possessed by settlers and in many instances were held by settlers under good legal title under the law of prior sovereigns or of the United States, or both.

2/ The word "date" should be read in the plural.

3/ The word "date" should be read in the plural.

Interpretation of the Greeneville Treaty

By Article IV of the Treaty of Greeneville of August 3, 1795, the United States, with four exceptions, relinquished to the Indians its claims to lands on the Indians' side of the Greeneville boundary line. The third exception excepts the following lands from the relinquishment:

> 3d. The lands at all other places in possession of the French people and other white settlers among them, of which Indian title has been extinguished as mentioned in the 3rd article. [Emphasis added.]

The third article of the Greeneville Treaty of August 3, 1795, lists 16 small pieces of land thereby ceded by the Indians from lands on their side of the Greeneville boundary line. Items (12) and (13) thus ceded by the third article were the only pieces of land of which Indian title had been extinguished, i.e., the posts of Detroit and Michillimackinac and the surrounding lands,

> . . . of which the Indian title has been extinguished by gifts or grants to the French or English governments; [Emphasis added.]

In our decision of April 4, 1973, we construed the 3d. exception of Article IV of the Greeneville Treaty as referring to items (12) and (13) of Article III, and as being synonymous therewith. We pointed out that neither area is within the lands claimed in this proceeding.

The defendant now alleges that the reference in Article IV to extinguishment of Indian title, "as mentioned in the 3rd article", is to the method of extinguishment and not to the areas thus extinguished.

We concede that this is a logical interpretation. The question remains whether the method of extinguishment "as mentioned in the 3rd article", refers generally to any and all extinguishment of Indian title, or, as stated in the 3rd article, to extinguishment of Indian title "by gifts or grants to the French or English governments." In our opinion the latter interpretation must prevail. Expressio unius est exclusiva alterius.

The weight of the case law is to the effect that any treaty ambiguity or doubtful expression must be resolved in favor of the Indians.[4/] The rule has its basis in the obligation which the Government has assumed as guardian of its Indian wards, who in treaty times were generally illiterate, and wholly dependent on the Government's good faith and protection. Accordingly we hold that the 3rd exception of Article IV of the 1795 Greeneville Treaty, at most includes "other lands"[5/] of which Indian title had been extinguished by gifts or grants to the French or English governments.[6/] It is implicit that such gifts or grants be by the Indians rather than by another government or third party.

4/ Peoria Tribe of Indians v. United States, Docket No. 99, 16 Ind. Cl. Comm. 574, 603 (1966); United States v. Nez Perce County, C.C.A. Idaho, 95 F. 2d 232 (1958), rehearing denied 95 F. 2d 238; United States v. Hibner, 27 F. 2d 909, 911 (1928); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Choate v. Trapp, 224 U.S. 664, 675 (1912).

5/ In the possession of French or other white settlers. The defendant contends that the term "other", in the third exception of Art. IV, refers to lands other than those enumerated in Article III. It appears more probable that the term refers to lands other than those in the first two exceptions of Article IV.

6/ See also United States v. Hibner, n. 4, supra, for the precept that Indian treaties require liberal application of the principal that grants by Indians should be regarded as strictisimi juris, and all uncertainties resolved in their favor.

The defendant has failed to show any land involved in this proceeding, the Indian title to which was extinguished by gifts or grants to the French or English governments, so as to come within the 3rd exception of Article IV of the Greeneville Treaty of August 3, 1795. Indeed, the defendant admits that historic documents do not disclose any gifts or grants of the settled lands to the French or British governments.[7/]

The defendant would bridge this fatal flaw in its case, with the argument that the treaty parties intended the 3rd exception of Article IV of the treaty to mean:

> The lands at all places on the Indian side of the boundary other than those mentioned in the 3d article where, like them, Indian title has been extinguished by possession of the French people and other white settlers.[8/] [Emphasis added.]

There is, however, no such language in the treaty. Indian treaties must be construed as the Indians understood them at the time of the agreement.[9/] The defendant has not shown that the Indians' understanding differed from the clear terms of the treaty.

7/ Defendant's Brief on Motion for Rehearing, p. 6. At p. 8 of the same document, defendant indicates that during the Greeneville treaty negotiations General Wayne alleged that the Indians had sold various areas to the French and English. The examples given by Wayne appear to be limited to the various enclaves enumerated in Article III of the 1795 treaty, or to lie outside of the area of this proceeding. Def. Ex. G-22, pp. 573-574, Docket No. 315.

8/ Defendant's Brief on Motion for Rehearing, p. 15.

9/ Confederated Tribes of Umatilla Indian Reservation v. Maison, D.C. Or., 262 F. Supp. 871 (1966).

The evidence which the defendant has amassed to show white occupancy of Illinois prior to the Treaty of Greeneville of August 3, 1795, falls short of the requisite showing of extinguishment of Indian title by gifts or grants to the French or English governments. For example, the defendant relies on allegations of grants by LaSalle in the Peoria area, under letters patent from the French monarch; on the presence of French settlements at Kaskaskia, Cahokia, and Fort de Chartres, ostensibly under land grants not to, but from the French authorities;[10/] and on two sales by Indians, not to the French or English governments, but to private land companies (the titles conveyed were held to be unsustainable in Johnson v. McIntosh, 8 Wheat 541 (1823)).

The defendant stresses the fact that the Virginia cession of the northwest Territory to the United States on March 1, 1784, provided that the French and Canadian inhabitants who had professed themselves to be citizens of Virginia, should have their possessions and titles confirmed. As the Peoria plaintiffs have pointed out, the provision was not self executing and did not obligate the United States to make the confirmations at the expense of other title holders.

The defendant alleges that the Northwest Ordinance of July 13, 1787[11/] guaranteed the possession and titles of the French, Canadian, and other settlers as provided for in the aforementioned Virginia cession of the

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10/ The Peoria plaintiffs have pointed out at p. 17 of their original reply brief, that the settlement of the French had not driven out the Indians, and that the Illinois Indians had permitted the first whites to settle among them without raising the issue of titles to their land.

11/ Def. Ex. A-16, pp. 39-50, Docket No. 315; 1 Stat. 51, n. (a).

Northwest Territory to the United States on March 1, 1784. We find no such guarantee in the Northwest Ordinance. The passage relied upon by the defendant merely provided that the French and Canadian inhabitants and other settlers who had professed Virginia citizenship, and their laws and customs then in force relative to descent and conveyance of property, were excepted from the laws of descent and property conveyance otherwise prescribed by the ordinance. This provision falls short of the confirmation of title called for by the Virginia cession of March 1, 1784, and in no wise constitutes extinguishment of Indian title by gifts or grants to the French or English governments within the meaning of the 3rd exception of Article IV of the 1795 Greeneville Treaty.

The defendant also relies on a congressional committee report[12/] of June 20, 1788, for evidence of lands excepted under Article IV, exception 3, of the Greeneville Treaty of 1795. The committee recommended that out of lands proposed for sale in Illinois, separate tracts be reserved for the ancient French and other settlers who had professed United States citizenship before 1783. The reservations were to be made in tract A of Royce Area 48,[13/] within an area stretching from the mouth of the Marie River below Kaskaskia to a line two miles north of Cahokia. Within this area, the committee recommended that the tracts rightfully claimed by the ancient settlers, be laid off. The committee also recommended that three additional parallelograms be set aside adjoining the villages of Kaskaskia,

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12/ Def. Ex. G-12, p. 112, Docket No. 315.

13/ See map at 30 Ind. Cl. Comm. 79, Docket 15-D, et al.

La prarie do roches (Peoria), and Kahokia. The latter indefinite tracts were to contain 400 acres for each family then living at the three villages and at fort Chartres and St. Philips. An additional tract one mile square around and including fort Chartres, was also to be reserved. None of these proposed reserves constituted extinguishment of Indian title by gifts or grants to the French or English governments within the meaning of the 3rd exception of Article IV, of the 1795 Greeneville Treaty.

We cannot agree with the defendant[14/] that the 1788 committee report defined the areas excepted under Article IV, exception 3, of the 1795 Greeneville Treaty, or that the areas involved in the report were described in the report as specifically as the 16 enclaves were described in Article III of the Greeneville Treaty. Nor do we agree with the defendant that the participants at the 1795 Greeneville Treaty had the proposed land reserves of the 1788 committee report in mind, thus rendering unnecessary a specific description of the areas excepted in Article IV, exception three of the 1795 treaty.[15/] If such were the treaty makers' intent, it is logical that the 3rd exception of Article IV of the 1795 treaty would not have concluded, ". . . of which Indian title has been extinguished as mentioned in the 3d article," but instead would have referred to the 1788 congressional committee report. We have seen no evidence that the 1795 Greeneville Treaty parties were even aware of the 1788 committee report.

14/ Def's. Brief on Motion for Rehearing, p. 26.

15/ Id.

That the 1788 committee was not certain of the extent that Indian title had been extinguished in Illinois, is evident from its further recommendation that measures be taken immediately ". . . to extinguish the Indian claim, if any exists, to the land bordering on the Mississippi from the mouth of the Ohio to a determined station on the Mississippi, that shall be sixty or eighty miles north from the mouth of the Illinois river and extending from the Mississippi as far eastward as may be."

Lastly the defendant cites the Act of March 3, 1791, 1 Stat. 221, as evidence of the division between Indian land and lands "subject to grant." The act directed that various tracts of land be given to various classes of persons, and authorized the territorial governor to confirm land to persons who had improved it under a supposed grant by any commandant or court claiming grant authority. The act stipulated that no claim founded upon purchase or otherwise be admitted within a tract of land theretofore occupied by the Kaskaskia nation of Indians, and including their village, which was thereby appropriated to the use of the Kaskaskia Indians. We see nothing in this act relating to extinguishment of Indian title by gift or grant to the French or English government within the meaning of Article IV, exception 3, of the Greeneville Treaty of 1795.

Article III of the Treaty of Greeneville of August 3, 1795, lists with meticulous detail the 16 small Indian cessions of land which constituted United States enclaves on the Indians' side of the Greeneville Treaty line. In Article IV of the treaty the United States relinquished its claims to the balance of the land on the Indians' side of the treaty line,

with the explicit exception of the Clark grant (Royce Area 25), the post of Vincennes (Royce Area 26), and the post of fort Massac (Royce Area 27). It is inconceivable to this Commission that the government would not also have explicitly identified the comparatively large areas which the defendant now alleges were excepted under the third exception of Article IV, if such areas were in fact existent and identifiable. Mr. Charles C. Royce, the government's expert who mapped the treaty areas, apparently was unable to identify or map these areas, and the defendant has been unable to point to any such areas to which Indian title was extinguished by gifts or grants to the French or English governments within the meaning of the third exception of Article IV of the 1795 Treaty. We accordingly reiterate our recent finding that these lands are impossible to define.[16/]

Our finding number 7[17/] concerning the Kaskaskia tribe's recognized title interests in Royce Area 48 must stand.

The Valuation Dates of Undivided Recognized Title Lands

In our April 4, 1973, title decision herein, wherever we found that two or three plaintiffs had recognized title to a particular area, we credited each with a recognized undivided one-half or one-third interest in that area. Recognition of title stemmed principally from

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16/ James Strong v. United States, Docket No. 13-G et al., 31 Ind. Cl. Comm. 89, Finding 15, n. 14 at 188, and n. 5 at 126 (1973).

17/ Docket 15-D et al., 30 Ind. Cl. Comm. 7.

participation in the Treaty of Greeneville of August 3, 1795.[18/] All of the tribes which were represented at that treaty, gained recognized title simultaneously thereunder.

As the Court of Claims pointed out in affirming our prior holding of recognized title in the Miami tribe:

> General Wayne had found it impossible in 1795 to define the boundaries enclosing the various areas used and occupied by the signatory tribes. But these boundaries were established by subsequent treaties. . .[19/]

The treaties which established tribal boundaries were the separate cession treaties whereby the tribes ceded their undivided recognized interests in the territory to which they had gained recognized title at the 1795 Greeneville Treaty. In our title decision herein, we held that the effective date of cession (and inferentially the valuation date) of the various tribal interests, was determined by the respective cession treaties.

In this, the defendant charges error. The defendant argues that where several tribes successively ceded the same area, the valuation date for the several cessions should be the date on which the first tribe ceded the area. The defendant theorizes that since the first tribe ceded the entire area, there was nothing left for the other tribes to cede, and their cessions amounted to mere quit claims. In theory an earlier

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18/ The recognition was confirmed in the tribes which also participated in the Treaty of Grouseland of August 21, 1805, 7 Stat. 91.

19/ Miami Tribe of Oklahoma v. United States, 146 Ct. Cl. 421, 422 (1959), aff'g Docket Nos. 64, 124, 4 Ind. Cl. Comm. 346, 408 (1956), 2 Ind. Cl. Comm. 617, 645 (1954).

valuation date will result in a lower valuation.

It is apparent that the defendant has misconstrued the facts, the law, and the Commission's decision.

In our opinion, the first of several tribes to cede an area, ceded no more than its undivided one-half or one-third recognized title interest therein, and that is all that the United States acquired. The interests of the other tribes in the area were not extinguished until subsequently ceded by them. It is immaterial that each treaty of cession may have been couched in terms of the entire area.[20/]

The defendant errs in characterizing our title decision herein as holding that successive separate ownerships of undivided "Indian interests"

20/ Cf. defendant's brief on motion, p. 33. Therein the defendant points to the Kaskaskia cession on August 13, 1803, 7 Stat. 78, as conveying to the United States the whole ownership of Royce Area 48. The defendant argues that the subsequent Kickapoo cessions overlapping a portion of Royce Area 48 must be regarded as mere quitclaims. In fact the 1803 Kaskaskia cession, with two exceptions, was of ". . . all the lands in the Illinois country, which said tribe has heretofore possessed, or which they might rightfully claim. . ." The cession, which was also described by metes and bounds, was prefaced with the comment that they were reduced to a very small number and unable to occupy the country. The Kickapoo cession of October 2, 1818, 7 Stat. 185, was of land described by metes and bounds, and to ". . . every portion of their lands which may have been ceded by any other tribe or tribes. . ." and to ". . . all other tracts of land to which they have any right or title on the left side of the Illinois and Mississippi rivers." The Kickapoo cession of August 30, 1819, 7 Stat. 202, was also of lands described by metes and bounds, and to ". . . all the lands which the said tribe has heretofore possessed, or which they may rightfully claim, on the Wabash river, or any of its waters." It is thus seen that the language of the Kickapoo cessions was as broad as that of the Kaskaskia.

in Tracts A',D, E, G, H and I, came into being at different times.[21] The defendant also errs in indicating that this Commission espoused a theory of "subsequent recognitions of undivided interests."[22] On the contrary, we held that the tribes represented at the 1795 Treaty of Greeneville thereby acquired simultaneous recognized title in the lands on the Indians' side of the Greeneville treaty line.

The defendant concedes that the Court of Claims has held that the recognition at Greeneville was accorded "to a whole group of tribes."[23] We agree with the defendant[24] that a nexus was necessary to perfect the recognized title conferred by the Greeneville Treaty. In our opinion that nexus was demonstrated by tribal representation at the Greeneville Treaty, and by subsequent tribal cession of some portion of lands to which recognized title was conferred at the Greeneville Treaty.

In an apparent effort to avoid liability for recognized title, the defendant erroneously imputes that our decision herein was based upon undivided or shared interests in "Indian title" rather than on "recognized title", as we have held.[25] Having set up this straw man, the defendant

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21/ Id.

22/ Id., p. 31.

23/ Id., p. 30.

24/ Id., p. 30.

25/ Dfn's. Brief on Motion for Rehearing, pp. 29-30, including n. 47 at p. 29. See also the defendant's reference to "undivided Indian interests", discussed supra at n. 21.

appropriately proceeds to destroy it. The record, in our opinion, does not support the defendant's allegation that the plaintiff tribes never amicably and simultaneously occupied the land and that the entire record shows that occupancy was in waves, with one group succeeding another.[26/] At any rate amicable and simultaneous occupancy, or an absence of successive occupancy, are not requisite to establishing undivided "recognized title" in two or more tribes.

For these reasons the defendant's motion to file out of time will be granted, and the defendant's motion for rehearing will be denied.

An appropriate order will issue.

Margaret H. Pierce, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Richard W. Yarbrough, Commissioner

Brantley Blue, Commissioner

26/ Def's. Brief on Motion for Rehearing, pp. 29-30. Cf. our opinion on title, 30 Ind. Cl. Comm. 49.