

BEFORE THE INDIAN CLAIMS COMMISSION

THE PRAIRIE BAND OF THE POTTAWATOMIE)	
TRIBE OF INDIANS, ET AL.,)	
)	
Plaintiffs,)	
)	
v.)	Docket Nos. 15-C, 18-H,
)	29-A, 71
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: September 20, 1972

Appearances:

Robert S. Johnson, Attorney for Plaintiffs in Docket No. 15-C,

Robert C. Bell, Jr., Attorney for Plaintiffs in Docket No. 29-A,

Louis L. Rochmes, Attorney for Plaintiffs in Docket Nos. 15-C and 71, Giddings Howd was on the Brief.

Howard G. Campbell, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

SCOPE OF THIS PROCEEDING

The Commission presently has before it the question of the title to lands relinquished by the Indians under the Treaty of September 26 and 27, 1833 (7 Stat. 431 and 442); the extent of the lands so relinquished; and specifically, whether the respective petitions are limited geographically to a claim for additional consideration for

Royce Area 187, located in Illinois and Wisconsin, and ceded under the 1833 treaty, or whether they gave the defendant notice that like claims also were being asserted or were likely to be asserted for Royce Area 160 in Wisconsin, and for Royce Areas 188, 189 and 190 in Michigan, all of which were relinquished under the same treaty.

IDENTITY AND CONTENTIONS OF THE PARTIES

Findings 1 through 4 involve the identity of the plaintiffs and of the intervenor, and their capacity to sue. These findings are self-explanatory and will not be repeated here other than to state that we have found that the Chippewa plaintiffs, i.e., the Red Lake Band, et al., in Docket No 18-H, are not proper parties to this proceeding and have no compensable interest in the subject matter herein. Their claim is dismissed by the accompanying order.

The Prairie Band of Pottawatomies, plaintiff in Docket No. 15-C, bases its cause of action herein upon the Treaty of September 26, 1833 (7 Stat. 431), and upon the supplements thereto dated September 27, 1833 (7 Stat. 442), and October 1, 1834 (7 Stat. 446). This plaintiff has not specified which clause of Section 2 of the Indian Claims Commission Act, 60 Stat. 1049, it seeks to invoke. It appears from the facts alleged in its petition and proved in the trial, that it is bringing this action under clause (3) of Section 2 of the Act, covering claims which would result if the treaties were revised on the ground of fraud, duress, unconscionable consideration, etc. The petition is broad enough to invoke also, clauses (1), (2) and

(5) of Section 2 of the Act. Specifically it alleges that under the Treaty of September 26 and 27, 1833, the United Nation of Chippewas, Ottawas and Potawatomis was compelled to cede to the defendant all of its land along the western shore of Lake Michigan more particularly described in Article 1 of the treaty, containing about five million acres. Article 1 of the 1833 Treaty describes only Royce Area 187.

Similarly the Hannahville Indian Community and the Forest County Potawatomi Community, plaintiffs in Docket No. 29-A, have not specified which clauses of Section 2 of the Indian Claims Commission Act, they seek to invoke. It appears from their petition however, that they alternatively seek to invoke clauses (1) through (5) of Section 2 of the Act. In their petition they allege inter alia, that the defendant coerced and compelled the Potawatomi Tribe through fear, duress, fraud, misrepresentation, and other illegal and unfair acts, to participate in the Treaty of September 26 and 27, 1833, and that by these means, the defendant, with no compensation, or without "just compensation" to the tribe, "took" from the United Nation of Chippewas, Ottawas and Potawatomies approximately five million acres of land, more particularly described in Article 1 of the Treaty of September 26, 1833, and defined and delineated as Royce Area 187.

The Citizen Band of Potawatomis, plaintiff in Docket No. 71, by its petition, alleges the right to recover alternatively under clauses (1) through (5) of Section 2 of the Indian Claims Commission Act. Its allegations include charges of wrongful taking by threats,

duress, fraudulent misrepresentation, and bribery, and for unconscionable consideration, of Royce Areas 187, 188, 189 and 190 under the Treaty of September 26 and 27, 1833. It further alleges that the \$110,000 paid to individuals under Schedule A of the treaty constituted a fraud upon the Potawatomi Nation and that the monies were properly payable to the Potawatomi Nation.

The defendant is content to leave the resolution of the question of recognized title to this Commission, and interposes no argument in respect thereto. The defendant moves, however, to strike all testimony relating to any Royce Area other than Royce Area 187 (1969 Tr., pp. 69, 186).

NOTICE OF AREAS CLAIMED

We shall first consider whether the defendant had adequate notice that claims were being made or might be made for Royce Area 160 in Wisconsin and for Royce Areas 188, 189 and 190 in Michigan. The combined petitions clearly state a claim for Royce Areas 187, 188, 189 and 190. The principal question is whether the defendant was given sufficient information to put it on notice that a claim also was made, or might also be made, for all or part of Royce Area 160. In our opinion this question must be answered affirmatively.

The claim for Royce Area 160 was first raised specifically in this case on December 18, 1968, in the pretrial statement of the Hannahville plaintiff. The claim was expounded in the Hannahville

brief, filed on May 21, 1969. The defendant, in its brief, argues that the plaintiffs cannot claim Royce Area 160 for the first time at the trial, and that the defendant at least is entitled to be served with amended petitions by the plaintiffs, setting out the claims, and that defendant be allowed time to have an expert witness prepare a complete defense to be presented at a formal hearing. If the plaintiffs were to amend their petitions so as to clearly set forth a claim to Royce Area 160, there is no doubt but that such amendments would relate back to their original petitions, and would thus be allowed by this Commission. ^{1/} However we do not feel that such amendment is necessary. Applying the rule of the Snoqualmie case, ^{2/} it is clear that the September 26, 1833, Treaty is the "transaction" giving rise to the claims for Royce Area 160. The Government can be charged with notice of the possibility of these claims through its authority as administrator of Indian Affairs, through its whole course of action in acquiring the rights of the plaintiff's ancestors and of other tribes to the lands in question, ^{3/} and from the petitions in this proceeding, which are based on the 1833 treaty.

Royce Area 160 was ceded to the United States initially by the Menominee Tribe by a treaty in Washington, D. C., on February 8, 1831

^{1/} See Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570, 586, 372 F.2d 951 (1967), rev'g Docket 93, 9 Ind. Cl. Comm. 25 (1960), 15 Ind. Cl. Comm. 267 (1965).

^{2/} Id.

^{3/} See id., 178 Ct. Cl. at 588.

(7 Stat. 342), at which the Potawatomi Tribe was not represented. ^{4/}

An indication that the defendant was aware that the Potawatomis had a negotiable claim to at least a portion of the Menominee cession is found in the following instructions from the Secretary of War to the commissioners appointed in 1833 to obtain the cession of Potawatomi lands along the west shore of Lake Michigan:

. . .[A]s it is possible the Melwakee Indians may set up pretensions interfering with some of the Southern part of the Menominee cession, I will thank you to investigate that subject, and quiet any just claim you may ascertain to exist.^{5/}

The Melwakee Indians thus referred to were a mixed band at Milwaukee, Wisconsin. The band was essentially Potawatomi in political identity although its membership also included individuals of other tribes, including Chippewas, Ottawas, and Menominees. ^{6/}

^{4/} See Finding 9.

^{5/} Finding 10. Appendix to Plaintiff's Proposed Findings, Docket 71, et al., p. 67: Cong. Doc. Series No. 246, Sen. Doc. No. 512, pp. 651-53.

^{6/} A similar band was located along the Manitowoc River in the center of Royce Area 160. The Potawatomi political identity of these bands is further evidenced by the Treaty of August 19, 1825 (7 Stat. 272), which is shown by Finding 8, to have been conducted with several tribes, including "a portion of the Ottawa, Chippewa, and Potawattomie, Tribes," i.e., a portion of the United Nation Band of the Potawatomi Tribe. Article 9 of the 1825 treaty recognized Royce Area 147 as secured to the "Ottawa, Chippewa, and Potawatomie tribes of the Illinois," i.e., to the United Nation Band of Potawatomis. Article 9 also described this group's just claim to other areas including part of Royce Area 187, and stated that the claim was recognized in the Treaty of August 24, 1816 (7 Stat. 146), but concluded that the boundaries of the latter areas could not be then settled, as the "Millewakee and Manetoo-walk" bands were not represented at the council. (See Finding 8.) The 1816 treaty was with the "[U]nited tribes of Ottawas, Chipawas and Pottowatomees, residing on the Illinois and Melwakee rivers, and their waters, and on the southwestern parts of Lake Michigan. . . .", i.e., with the United Nation Band and the Prairie and Kankakee Band of the Potawatomi Tribe. (See Finding 7.)

On September 14, 1833, the treaty commissioners convened a treaty council which was to culminate in the Treaty of September 26 and 27, 1833. As the proceedings commenced, the treaty signatory Wah-mix-i-co (described in the treaty journal as "Way-mick-say-go a Chippeway Chief") asked about their lands which had been sold by the Menominees. Wah-mix-ico was by birth a Chippewa but politically a Potawatomi and chief of a group of mixed Chippewa, Ottawa and Potawatomi Indians along the Manitowoc River in Royce Area 160. ^{7/} His speech ^{8/} evidenced that he had complained previously over the "sale of our lands by the Menominees," and that his warriors would not be satisfied without an explanation. Governor Porter replied that Col. Owen had written to the President about this, that the commissioners were invested with full power to adjust the matter, that he was fully advised and prepared to settle the business satisfactorily, and that the Menominees had sold land as far south as the Milwaukee River, but if Wah-mix-i-co's people were entitled to any part of those lands (Royce Area 160) they would be amply paid.

On September 21, near the close of the treaty council, Governor Porter described the boundaries of the lands which the Government sought to purchase. The description included Royce Areas 187, 188, 189, and 190. Governor Porter reminded the Indians that on the first day of the council they had been informed that the Government wished to

^{7/} See n. 6, supra.

^{8/} See Finding 11.

buy all their lands. He added:

We have heard my children, that you want us first to arrange with the Chippeways the difficulty which has been occasioned as you say, by the Menominees having sold to your Great Father a part of the lands of the Chippeways. We explained to you at our first council the instructions of your Great father on this point. . . . He has informed his Commissioners that he understands the difficulty and has instructed us to enquire into it, and if it be found that the Menominees have sold land which was the property of his red children the Chippeways, they should be satisfied for it. Ah-be-te-ke-zhich, one of your speakers asked us for our instructions on this subject & we gave Caldwell a copy of them. 9/

This must convince you that your Great father will do you justice. 10/

Governor Porter then related the events pertaining to the Prairie du Chien Treaty of August 19, 1825 (7 Stat. 272), and the agreement of the tribes thereat that the boundary of the Menominee country extended as far south as the Milwaukee River. 11/ He stated:

But as the Millwauky and Manetowalk bands were not present at the Treaty at Prairie Du Chien, it may be that the true boundary of the Menominee Country was not correctly represented to the Council. When your Great father was informed that the Millwauky band set up a claim to this land, he directed us to investigate the matter --But we are not authorized to treat seperately for it. 12/

9/ The 1833 treaty signatory, Ah-be-te-ke-zhich, or Half Day, was a Potawatomi chief whose village was located at the site of the present village of Half Day, near the present Chicagoland airport north of Chicago in Royce Area 187.

10/ Pl. Ex. 2, Journal of Proceedings of Treaty of Chicago, Sept. 26, 1833, p. 30, Docket Nos. 71 & 15-C; Finding 11.

11/ See n. 6, supra, and Findings 11 and 8.

12/ Pl. Ex. 2, Treaty Journal, supra, p. 31, Docket Nos. 71 & 15-C; Finding 11.

The third article of the ensuing Treaty of September 26, 1833, provided for settlement of the Indians' claims to Royce Area 160. The article specified that in further consideration of the cession made under Article 1 (Royce Area 187), the United States would pay \$100,000 to sundry individuals in lieu of reservations, and

also to indemnify the Chippewa tribe who are parties to this treaty for certain lands along the shore of Lake Michigan, to which they make claim, which have been ceded to the United States by the Menominee Indians. . . . [Emphasis added.]

In our opinion, the "Chippewa tribe" thus referred to in reality was composed of the mixed bands of Ottawas, Potawatomis, and Chippewas, et al., in Royce Area 160, principally the aforementioned Milwaukee and Manitowoc bands. Significantly there was no separate Chippewa tribal participant at the Treaty of September 26 and 27, 1833. The caption of that treaty designates the Indian participants as the United Nation of Chippewa, Ottawa and Potawatomi Indians. They were otherwise known as the United Nation Band of Potawatomis, and politically were Potawatomi, and an integral part of the Potawatomi Tribe or Nation. When interpreted in the light of the instructions to the treaty commissioners, and in view of the dialogue during the treaty council meetings, the above-quoted provision of Article 3 of the September 26, 1833, Treaty is tantamount to a cession by the Potawatomi Tribe (including its amalgamated Chippewa members) of an undesignated portion of Royce Area 160. That the United States viewed

the provision in this light, is seen from the subsequent correspondence of treaty commissioner Col. Thomas J. V. Owen. On June 25, 1834, Col. Owen, who was also the Indian Agent at Chicago, wrote to "Waumixico, ^{13/} Te-she-shing-ge-bay, ^{14/} and others of the Chippewa Tribe of Indians."

Col. Owen stated:

Your Great Father, the President of the United States, purchased of the Menomonees all the country in the neighborhood of Sheb-y-a-gun-river. This purchase was made at Washington City five or six years since.

My children--I know you claimed this land, and told me that the Menomonees had no right to sell it, and you told us the same thing at the trade held last Fall at Chicago; and although your Great Father had bought it of the Menomonees, yet your Fathers, the Commissioners of the Chicago treaty, purchased your rights to it again last Fall. [Emphasis added.] ^{15/}

It is thus clear that the defendant, from its own course of dealings with the plaintiffs' ancestors, was aware that it had purchased their claim to all or a portion of Royce Area 160 under the Treaty of September 26, 1833. Any ambiguity over the identity of the treaty participants and the territory involved in that treaty appears to be the fault of the defendant and must be resolved in favor of the Indians involved. ^{16/} In our opinion the defendant should have known that any claim before this Commission, for land ceded under the Treaty of September 26 and 27, 1833, was likely to include claims for Royce Area 160. It does not appear that the

^{13/} The treaty signatory, Wah-mix-i-co. See discussion at p. 460, supra.

^{14/} Wah-mix-i-co's brother, War Chief Thunder of Sheboygan.

^{15/} Hannahville Brief, pp. 22, 23, Docket 29-A (1964); Finding 15, infra.

^{16/} Peoria Tribe of Indians v. United States, Docket 99, 16 Ind. Cl. Comm. 574, 603 ff. (1966).

defendant has been prejudiced by not being served with amended petitions setting forth in each, claims for Royce Areas 160, 188, 189, and 190. The defendant is entirely willing to stand on the report of its anthropological expert, Dr. J. A. Jones.^{17/} Dr. Jones' report contains a map showing a dotted line extending through Royce Area 160.^{18/} The line is approximated by the dashed line on Map Appendix I, at page 494, infra. Dr. Jones testified that south and east of his dotted line there were Potawatomi villages from the first white contact on, that the Potawatomis had a better claim to Royce Area 160 than to Royce Area 187, and that on the eastern side of the Door Peninsula in Royce Area 160, there were no other Indians but Potawatomis.^{19/} Dr. Jones felt that the 5,000,000 acres ceded under the 1833 treaty would have included all of Royce Area 187 and an amount of Royce Area 160 equivalent to the portion thereof which lies east and south of the dashed line shown on Map Appendix I, at page 494, infra.^{20/} The defendant's motion to strike all testimony relating to areas other than Royce Area 187 accordingly is denied, by the accompanying order.

^{17/} Def. Brief, p. 7.

^{18/} Def. Ex. 34, p. 72, Docket Nos. 13, et al.

^{19/} 1969 Tr., pp. 106-A, 111, 118, 189, 190; Hannahville Brief, p. 20; and Findings 13, 16, infra.

^{20/} 1969 Tr., pp. 106, 189, 190; Def. Ex. 34, pp. 74-5; Hannahville Brief, pp. 20-21; and Finding 13, infra.

RECOGNIZED TITLE TO AREAS CLAIMED

The Treaty of Greeneville, Ohio, of August 3, 1795 (7 Stat. 49), was the first in a series of treaties which, considered together, established recognized title in the Potawatomi Tribe or Nation to various territories including Royce Areas 187, 188, 189, 190 and most of 160. By that treaty and the "follow-up" boundary setting and cession treaties, the United States recognized title in the participating tribes, including the Potawatomi Tribe, to lands north of the Ohio River and east of the Mississippi River, including the aforementioned Royce Areas.

By the Treaty of August 24, 1816 (7 Stat. 146), the United States relinquished to the Potawatomi Tribe part of the 1804 Sac and Fox cession of Royce Area 50 in Illinois and Wisconsin, including the portion thereof which is overlapped by Royce Area 187. ^{21/} The area thus further recognized as territory of the Potawatomi Tribe, included the southwest corner of Royce Area 187, shown on Map Appendix I, at page 494, infra, as the area lying west of the Fox River. The recognition of title to this portion of Royce Area 187 in the Potawatomi Tribe is reiterated in Article 9 of the Treaty of August 19, 1825 (7 Stat. 272). ^{22/}

^{21/} See n. 6, supra, and Finding 7, infra.

^{22/} See n. 6, supra, and Finding 8, infra.

That the title of the Potawatomi Tribe (as recognized at the Treaty of Greenville of August 3, 1795) extended to Royce Area 187 in Wisconsin and Illinois, to Royce Areas 186, 189 and 190 in Michigan, and to a portion of Royce Area 160 in Wisconsin, is evidenced by the cession thereof under the Treaty of September 26 and 27, 1833.^{23/} The extent to which Potawatomi recognized title extended to Royce Area 160 cannot be determined however solely from the cession thereof under the Treaty of September 26, 1833. This is because, as previously explained, Article 3 of that treaty does not specify the exact location or the extent of the "certain lands along the shore of Lake Michigan," the Potawatomi title to which was ceded thereunder. Article 3 merely states that they were part of the lands (Royce Area 160) previously ceded to the United States by the Menominee. The difficulty stems from the fact that the Government did not know the

^{23/} On September 26, 1833, "the United Nation of Chippewa, Ottawa and Potawatomi Indians," ceded to the United States, Royce Area 187, as well as their claim to an indefinite portion of Royce Area 160. The latter claim is referred to in Article 3 of the Treaty as the claim of the "Chippewa tribe" (see discussion at p. 9, supra). On September 27, 1833, the United States negotiated supplementary articles with "the Chiefs and head-men of the said United Nation of Indians, residing upon the reservations of land situated in the Territory of Michigan, south of the Grand river. . . ." By Article 1 thereof, the "said chiefs and headmen" ceded to the United States, the Notawasepe reservation (Royce Area 188) which had been reserved by the Treaty of August 21, 1821 (7 Stat. 218); the ninety-nine sections (Royce Area 189) added to the Notawasepe reservation by the Treaty of September 19, 1827 (7 Stat. 305); and Royce Area 190 containing the villages of Topenebe and Pokagon, who were chiefs of the St. Joseph Band of Potawatomis. Topenebe was also the hereditary chief of the entire Potawatomi Tribe or Nation.

extent of the Potawatomi territorial claims. Under such circumstances it is appropriate to look to evidence of Potawatomi use and occupancy of Royce Area 160 to determine the portion of that area which the tribe ceded under the 1833 Treaty.^{24/} The evidence of such use and occupancy, as summarized in Finding 16, infra, establishes that the Potawatomi Tribe had recognized title to all of Royce Area 160, including the Potawatomi Islands at the tip of the Door Peninsula, except for a portion of Royce Area 160 along Lake Winnebago and south of Green Bay. The latter, excluded area, which was predominantly the realm of the Winnebago and Menominee Tribes, is indicated by shading on Map Appendix II, at page 495, infra. The unshaded portion of Royce Area 160 constituted the "certain lands," the Potawatomi title to which was purchased under the Treaty of September 26, 1833.^{25/}

The area thus purchased is described by metes and bounds in Finding 17, infra. In drawing the boundary between the Potawatomi portion of Royce Area 160 and the shaded portion of Royce Area 160 which was predominantly the realm of the Winnebago and Menominee Tribes, we used a series of straight lines, which, insofar as possible, approximate the dotted line established by the defendant's anthropological expert,

^{24/} See Sac and Fox Tribe of Indians v. United States, Docket 158, 5 Ind. Cl. Comm. 438, 443, 448 ff. (1947).

^{25/} The fact that the Menominee had ceded the area previously, in no way affects the Potawatomi recognized title thus established. The Government had within its power to have convened all of the tribes with an interest in the area, and to have ascertained their interests prior to taking cessions of the territory. This is one of those situations where the Government chose to recognize the claims of several tribes to a territory and to purchase their interests separately.

Dr. J. A. Jones (see discussion at p.464, supra, and Map Appendix I).

The straight lines, which are measured from specific section corners, are requisite to a readily ascertainable boundary.

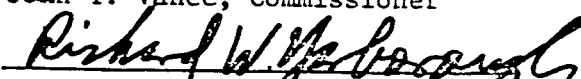
In Citizen Band of Potawatomi Indians v. United States, Dockets 71, et al., 27 Ind. Cl. Comm. 187, 194, 323 (1972), we held in effect, that during the treaty period from August 3, 1795, when the Treaty of Greenville was negotiated, through the Treaty of September 26, 27, 1833, the Potawatomi political structure was that of a single tribe or nation with an overall ownership interest in all Potawatomi lands. In that decision we also held, in effect, that during that period, where a certain group or groups of Potawatomis participated in a particular treaty they acted on behalf of the whole tribe. Accordingly we find that the recognized title which was purchased by the defendant under the Treaty of September 26 and 27, 1833, was in the Potawatomi Tribe or Nation and that the Indian parties to that treaty were representatives of the Potawatomi Tribe or Nation and acted on its behalf in making the cessions under that treaty.

This case shall now proceed to a determination of the fair market value of the lands ceded by the Potawatomi Tribe or Nation as of the effective date of the 1833 Treaty, the amount, if any, of the consideration paid to the tribe, and all other questions bearing upon the extent of defendant's liability to the plaintiffs.

Concurring:


Margaret H. Pierce, Commissioner


John T. Vance, Commissioner


Richard W. Yarborough, Commissioner