

BEFORE THE INDIAN CLAIMS COMMISSION

THE LOYAL CREEK BAND OR GROUP OF)
CREEK INDIANS, AND THE LOYAL CREEK)
CLAIMANTS' COMMITTEE, on the relation)
of Joseph Bruner, S. W. Brown, Jesse)
McDermott, Lasley Haynes, Ben Johnson,)
Robert Severs, Hosa Holley, Noley Buck,)
John H. Jones, Elmer Hill, Thompson)
King, and Seborn Smith,)

Plaintiffs,)

vs.)

Docket No. 1)

THE UNITED STATES OF AMERICA,)

Defendant.)

Woodson E. Norvell, with whom was
S. R. Lewis, William N. Maben,
George E. Norvell and W. A. Hearn,
Attorneys for Plaintiffs.

Ralph A. Barney, with whom was
Mr. Assistant Attorney General
A. Devitt Vanech, Attorneys for
Defendant.

MAY 6 1949

OPINION OF THE COMMISSION

O'Marr, Commissioner, delivered the opinion of the Commission:

1. The claim here involved is presented by the Loyal Creek Band or Group of Creek Indians, and the Loyal Creek Claimants' Committee, on the relation of twelve persons who are alleged to be descended from and are heirs of individuals whose names appear on the roll of Loyal Creek Indians. It is further alleged that the petition herein "is filed for the use and benefit of themselves, and for all others similarly situated and having like interests."

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We shall consider this claim, for the purposes of the motion hereafter to be referred to, as a class action brought by the named individuals on behalf of themselves and all other descendants and heirs of the group of Creek Indians who have been described in various public documents, legislation and Congressional hearings, as "soldiers that enlisted in the Federal Army and the loyal refugee Indians and Freedmen," or Loyal Creeks. Hereafter, we will refer to this group as Loyal Creeks.

2. The allegations of the petition may be summarized as follows:

(a) During the civil war the conflict was carried on with great fury within the boundaries of the Creek Nation and, as a result 1523 members of the nation loyal to the Union were driven from their homes and their livestock, food, implements and habitations were destroyed or lost to them, and they were forced to abandon their homes and seek refuge in the State of Kansas.

(b) After the close of the civil war the United States recognized the losses sustained by the Loyal Creeks through a treaty dated June 14, 1866 (14 Stat. 785), made with the Creek Nation of Indians which, among other things, provided that a roll of the names of the Loyal Creeks should be made and that certain named officers of the United States "shall proceed to investigate and determine from said roll the amounts due the respective refugee Indians, and shall transmit to the Commissioner of Indian Affairs for his approval, and that of the Secretary of the Interior, their awards * * * *". The awards were to be for the property losses sustained by the Loyal Creeks during the civil war and provision was made in the treaty for their payment out of the sales of lands ceded by the Creek Nation. (Art. 4)..

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(c) Pursuant to the provisions of the treaty the Loyal Creeks submitted to the officers designated to determine the amounts due them, individual claims aggregating \$5,090,808.50, and such officers awarded to said 1523 enrolled claimants the aggregate sum of \$1,836,830.41, of which sum \$100,000 was paid out of the funds of the Creek Nation of Indians, as required by the treaty.

(d) On March 8, 1900, the United States and the "Muscogee or Creek Tribe of Indians" (Creek Nation) concluded an agreement, which was ratified by the Congress on March 1, 1901. (31 Stat. 861), which contained this provision (Art. 26):

All claims of whatsoever nature, including "Loyal Creek claim" under Article Four of the Treaty of eighteen hundred and sixty-six, and the "Self-emigration claim" under Article Twelve of the treaty of eighteen hundred and thirty-two, which the tribe or any individual thereof may have against the United States, or any other claim arising under the treaty of eighteen hundred and sixty-six, or any claim which the United States may have against said tribe, shall be submitted to the Senate of the United States for determination; and within two years from the ratification of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said tribe, or any citizen thereof, provision shall be made for immediate payment of same.

Of these claims the "Loyal Creek claim", for what they suffered because of their loyalty to United States Government during the Civil War, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.

(e) And the Senate, acting under the authority of the quoted provisions of the 1900 agreement; determined the civil war losses of the Loyal Creeks to be \$1,200,000, having deducted the \$100,000 previously paid and the further sum of \$536,830.40 from the total of \$1,836,830.40 awarded by the Commission

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provided for in the 1866 treaty, and recommended to the Congress the payment of said sum of \$1,200,000. The Senate included that amount with certain other items which were added to the Indian appropriation bill of 1903. (Senate Report No. 3088, 57th Cong., 2nd Sess.). But, notwithstanding the determination and recommendation of the Senate, the Congress made an appropriation to satisfy said Loyal Creek claims, as follows:

In pursuance of the provisions of section twenty six of an act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes, approved March first, nineteen hundred and one, there is hereby awarded, as a final determination thereof, on the so-called "Loyal Creek claims" named in said section twenty-six, the sum of six hundred thousand dollars, and the same is hereby appropriated out of any money in the Treasury not otherwise appropriated, and made immediately available. And the Secretary of the Treasury is hereby authorized to pay, under the direction of the Secretary of the Interior, to the Loyal Creek Indians and freedmen named in articles three and four of the treaty with the Creek Nation of Indians of June fourteenth, eighteen hundred and sixty-six, the said sum of six hundred thousand dollars, to be paid to such Indians and freedmen only whose names appear on the list of awards made in their behalf by W. B. Hazen and F. A. Field, as commissioners on behalf of the United States to ascertain the losses of said Indians and freedmen as provided in said articles three and four; and such payments shall be made in proportion of the awards as set out in said list; Provided, That said sum shall be accepted by said Indians in full payment and satisfaction of all claim and demand growing out of said Loyal Creek claims, and the payment thereof shall be a full release of the Government from any such claim or claims:

(f) The plaintiffs seek recovery of the sum of \$600,000, being the balance of the \$1,200,000 award made by the Senate, with interest from July 1, 1903.

(g) The plaintiffs also ask for an additional sum of \$90,000 the Loyal Creeks paid to the Attorneys who represented them in pressing their claim before the committees of Congress resulting in the appropriation mentioned above.

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3. It seems to be conceded that the \$600,000 was paid in accordance with the terms of the appropriation act of 1903.

4. To the petition, above summarized, the Government filed its motion to dismiss on two main grounds:

(1) That the plaintiff is not an "Indian tribe, band or other identifiable group of American Indians" within the contemplation of the Indian Claims Commission Act; and

(2) That the claim here presented is not a tribal, band or group claim but, in reality, individual claims of a class of Creek Indians who lost property destroyed or taken by Confederate soldiers during the Civil War.

5. For the purposes of the motion to dismiss the allegations contained in the petition will be considered as true. *Gulf etc., v. Trapp*, 165 Fed. (2d) 343, *Porter v. Karavas*, 157 Fed. (2d) 884.

6. We encounter no serious difficulty in determining the meaning of the words "tribe" or "band", as used in the Act creating the Indian Claims Commission (60 Stat. 1049; 25 U.S.C.A. 70), for those terms have been fairly well defined by the courts and the administrative agencies of the Government. The words suggest continuity of a collective or communal existence, common leadership and the exercise of political authority characteristic of Indians living in the United States. *Montoya v. United States*, 33 C. Cls. 349, 180 U. S. 521. A distinction between a "tribe" and a "band" of Indians has been made in some cases, especially in depredation cases where it was necessary to determine whether a group of depredators was in amity with the United

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States, but we are not here called upon to make any such distinction because the plaintiffs do not contend that they are either a "tribe" or a "band" of Indians, nor do the allegations of the petition bring plaintiffs within the definition generally applied to those terms. However, the plaintiffs do insist that they are an "identifiable group of American Indians" and as such entitled to prosecute their claim before this Commission. Thus, we are required to determine whether the plaintiffs have shown themselves to come within the meaning of that category of claimants.

7. The substance of the defendant's position is that to constitute an "identifiable group of American Indians" such group must possess the characteristics of a "tribe" or "band", which are, mainly, a common government or leadership, continuity of existence and concert of action. This must be so, it is reasoned, because the phrase "identifiable group" is associated with the names "tribe" and "band", which are now and have been recognized as political entities.

8. The rule e.jusdem generis, which counsel for the Government would have us apply here, of course limits general terms of a statute, which follow specific ones, to matters similar to those specified, 50 Am. Jur. 244, Sec. 249, and if applicable to the phrase "identifiable group" would exclude all Indian groups which have group claims but whose legal status is not political in character. This rule, like other rules of construction, is not final or conclusive, but is an aid in arriving at the legislative intent and is never used to defeat the real purpose of a statute, as the purpose is gathered

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from the whole enactment. ^{1/} The Act was intended to finally determine all possible Indian group claims. ^{2/} As stated above, according to the Government's construction, the use of the terms "tribe" and "band" connotes political entities and therefore the phrase "other identifiable group" must be construed as having like characteristics. It would seem that the groups denominated as "tribes" and "bands" embrace all the political groups generally recognized as such by the Congress and administrative agencies of the Government, and, therefore, there are no groups of the same class left. In those circumstances we must either treat the phrase as meaningless, or give it a meaning outside the class indicated by the words "tribe" or "band". It is too obvious to require discussion that we cannot read the phrase out of the statute, ^{3/} so the only alternative is to give the phrase "identifiable group"

^{1/} 50 Am. Jur. 246, Sec. 250.

^{2/} The House Committee on Indian Affairs in its report on the bill under which we function had this to say as the purpose of the bill: "In order that the decisions reached under the proposed legislation shall have finality it is essential that the jurisdiction to hear claims which is vested in the Commission be broad enough to include all possible claims. If any class of claims is omitted, we may be sure that sooner or later that omission will lead to appeals for new special jurisdictional acts. And if the class of cases omitted is one which the Congress has in the past declared to be worthy of a hearing, in one or more jurisdictional acts, it is probable that future Congresses will likewise grant a hearing to such claims, and the chief purpose of the present bill, to dispose of the Indian claims problem with finality, will have been defeated." (House Report No. 1466, 79th Congress, 1st Session, page 10.)

^{3/} 50 Am. Jur. 219, Sec. 231.

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a meaning outside the groups generally considered by the Government and dealt with as political groups.

9. Congress did not define the phrase "identifiable group", but the association of the words used to describe claimants who are permitted to assert claims against the United States, indicates very plainly that it is group claims that the Commission may hear and determine. However, that common characteristic of the three classes of claimants does not, in our opinion, require that they must be political groups in order to obtain a hearing before this Commission, on the contrary, the Congress evidently intended to add to the generally recognized political groups, a third class of claimants, namely, a class which can be identified as a group, that is, a body of Indians having similar rights which are not shared by other Indians, even though of the same tribe or band to which such group may belong. The controlling question is whether the claimant group can be identified and that it has a common claim. If such a group can be identified and it has a common claim it is, in our opinion, an "identifiable group of American Indians" within the intent of the Act and it need not be a political group in character.

10. According to the alleged facts the Loyal Creek group was first recognized in the treaty of June 14, 1866 (14 Stat. 785), wherein it was provided that they be enrolled and the amount of their individual losses, sustained through rebel action, be ascertained. The enrollment was made and 1523 members of the Creek Nation who had been loyal to the Union were placed on the roll. These enrolled Creeks comprised but a part of the

Creek Nation and became known as the Loyal Creeks. The losses of the individual Indians were determined and approved in the manner provided in the treaty and the sum of \$100,000 was applied on such losses. The roll, which by reference is made a part of the petition, shows the names of all "loyal Creek Indians and freedmen" with the loss sustained by each; they are otherwise identified therein by showing their sex, age, marital status, etc. (Senate Document No. 420, 57th Congress, 1st Session). It is difficult to imagine a clearer or more definite identification of the Loyal Creeks. The "Loyal Creek claim" was recognized in the Act of June 28, 1898 (30 Stat. 495) and the agreement of 1900 (31 Stat. 861) to which we will refer later, but in the Indian appropriation act of 1903 (32 Stat. 982, 994-995) in which the appropriation of half the award made by the Senate, was passed, the roll of the Loyal Creeks was recognized by the Congress by directing that the money appropriated be apportioned only among the Indians and freedmen whose names appear thereon, or to their heirs (Par. 2(e) above). Thus we find the Loyal Creek group was created by the treaty of 1866 (Art. 4) and expressly recognized by the Act of 1903 and referred to in the Act of 1898 and the agreement of 1900 (ratified by Congress on March 1, 1901, 31 Stat. 861). Certainly, with this historical background, we encounter no difficulty in determining the identity of the group known as the Loyal Creeks. We are not to be understood, however, as implying that the enrollment of a number of Indians is in all cases sufficient to make them an "identifiable group" under our Act, for it could be that the members of a tribe or band are enrolled, or that two or more different tribes or bands are included in a single roll;

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this possibility, obviously, would not change their status from a tribe or band to an identifiable group, or permit a suit otherwise than as a band or tribe or on behalf of a tribe or band. What we have concluded is that in this case the Loyal Creeks are an identifiable group. But such identification does not in itself permit the prosecution of all claims against the United States, for closely associated with the question of the identity of such a claimant is the question of the kind of claims the Commission may entertain.

11. It is charged by the Government that the claim here submitted is simply a common suit for individual claims and therefore, the Commission has no power to entertain it, since our jurisdiction under the Act is limited to the consideration of common claims, that is, claims in the subject matter of which the members of the group have a common interest. It must be admitted that the treaty of 1866 contemplated the ascertainment of the individual and independent claims of those members of the Creek Nation who remained loyal to the Union and who suffered losses through enemy depredations, and for the payment of the same, at least to the extent of \$100,000. If that treaty were solely relied upon as the basis for this suit we would have to agree with the Government's contention and dismiss the petition. But we believe the Government by the 1900 agreement with the Creek Nation, and the ratification thereof by the Congress, created a common claim which may be asserted in this proceeding, for by the agreement of 1900 (see paragraph 2(d) above) it was agreed that the "Loyal Creek claim" under Article 4 of the 1866 treaty should be submitted to the Senate of the United States for final determination

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and it was therein further agreed that in the event of an award "provision shall be made for the immediate payment of the same." The Senate, accordingly, made an award of \$1,200,000 but the Congress appropriated, and there was paid, only \$600,000 of the award. The effect of the agreement was that the Government became obligated to pay the full amount determined by the Senate, and violated its agreement by paying only half thereof. In suing for the balance of the award it would not be necessary to prove or pass upon the validity of the individual claims of the Loyal Creeks. Nor does the fact that any award which might be recovered might have to be distributed among the members, or their heirs, in proportion to the individual losses (which, according to enrollment, differ in amounts) change the common character of the claim in this case because the agreement of 1900 established it as a group claim and the Indian Claims Commission Act authorizes the Loyal Creeks to submit it for adjudication. Moreover, this case is not presented as one for individual claims but one for the enforcement of an alleged obligation of the Government. It is true, that there are allegations in the petition which, if taken alone, would indicate a different theory, but considering the petition as a whole, as we must, we believe it can be considered as a common claim of the Loyal Creeks for the balance of the Senate's award.

12. The Government relies strongly on the case, *Blackfeather v. United States*, 37 Ct. Cls. 233, 190 U.S. 368, as authority for its position that the claim here asserted is simply a common suit for individual losses.

13. In the *Blackfeather v. United States* case, *supra*, it appears from the opinions that the white citizens of the United States committed depredations upon the property of individual Shawnee Indians in the State of Kar

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and Indian Territory, amounting in the aggregate to over one-half a million dollars. In 1854 the Shawnees and the United States entered into a treaty which, among other things, acknowledged the losses of the individual Shawnees resulting from the depredations of the white people and the United States paid \$27,000 to apply on such losses. The treaty also required these Shawnees who sustained loss to file their claims therefor with the Indian Agent for submission to the Shawnee council for approval. In 1890 and 1892 the Congress passed special acts authorizing the Shawnees to sue the United States and the Cherokee Nation in the Court of Claims for "their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, express or implied under such treaties, * * *." (27 Stat. 86). A suit was brought by the Shawnees in the name of their principal chief (sec. 3, 26 Stat. 636) in which the Court of Claims decided "the plaintiff, by the allegations of the petition, has asserted an individual obligation existing between the United States and each of the claimants, and, in order to recover, it must appear that such relation exists." (37 Ct. Cls. 233, 240). On appeal the Supreme Court in its opinion stated that by the petition the petitioner sought the recovery of the individual claims (scheduled in the petition) of the Indians sustaining losses and asked for judgment in "favor of the Indians mentioned for the respective sums set opposite their names." (p. 370 and 373, 190 U.S. 368.) Thus, we see, a common suit was instituted for individual claims, and both courts held the action was not a tribal claims (which under the jurisdictional

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act was the only kind of claim the Court of Claims could consider) but private claims of individual Shawnee Indians, and therefore dismissed the petition.

14. It is clear that the Blackfeather case, supra, does not apply here for that case was, under the pleadings, a common action for individual and independent claims, and under a jurisdictional act which only permitted suits for tribal claims. While here, as we have pointed out above, the claim is for the enforcement of an alleged obligation in which the Indians, or their heirs, who composed the Loyal Creeks, have a common interest in the subject matter.

15. It is also the position of the Government (and that of the Solicitor of the Department of the Interior) that if the Loyal Creeks have any claim at all (which the Government denies) it can only be enforced through an action by the Creek Nation because the treaty (1866), in which the claim was first recognized, was made by the Creek Nation and the contract of 1900 was also made with that Nation.

16. It is of course true that the Loyal Creeks were not parties to the treaty of 1866 or the 1900 contract, but it is also true that they were made beneficiaries of those agreements as respects the claim here asserted, and we believe the rule is now well settled that a party for whose benefit a contract is made may enforce the same by an action in his own name, although not a party to it. 12 Am. Jur. 825, sec. 277; *McKee v. Lamon*, 159 U.S. 315. (See cases under 277 above.)

17. The attorneys for the Government further submit that this claim

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may not be maintained by the Loyal Creeks because that name is used for descriptive purposes only. We do not understand that the names used in the title and allegations of the petition, "The Loyal Creek Band or Group of Creek Indians, and the Loyal Creek Claimants' Committee" are of any special significance for it is apparent the action is a representative one brought by members by descent of a certain segment of Creek Indians, who sustained losses through enemy depredation, for the benefit of the group. *National Hair Dressers v. Philad.*, 34 Fed. Supp. 264. Such an action is provided for by Section 10 of the Act, August 13, 1946, which provides:

Any claim within the provisions of this Act may be presented to the Commission by any member of an * * * * identifiable group of Indians as the representative of all its members.

That is what has been done here, as shown by the allegations of the petition. The fact that the title includes names that are merely descriptive of the group or that the allegations of the petition use similar descriptive words is not conclusive. What is important and necessary is that the petition disclose that the named individual parties are members of the group for which the claim is made, and that the claim is for the group. We think it does so. (See General Rules of Procedure, Sec. 7(3)(c).)

18. It was suggested by counsel for the Government, during the oral argument, that the Creek Nation of Indians is an organized tribe recognized by the Secretary of the Interior as having exclusive authority to represent such Loyal Creeks and therefore, under the provisions of Section 10 of the

Act of August 13, 1946, this claim cannot be prosecuted by the plaintiffs. In support of this contention counsel offered a resolution, adopted by the National Council of Muskogee Creek Nation on May 23, 1903, by which it accepted the \$600,000 appropriated by the Indian appropriation act of 1903, referred to in the petition, as in full payment and satisfaction of the demands growing out of the Loyal Creek claims and finally released the Government from all such claims. We believe the question thus raised should be determined only when formally presented by an appropriate pleading and after a full hearing upon that issue.

The motion of the defendant will be overruled.

Commissioner Holt concurs in the above opinion.

May 6, 1949.