BEFORE THE INDIAN CLAIMS COMMISSION

CLYDE F. THOMPSON, WILLIAM FULLER, HERBERT A. BELLAS, HENRY MILLER, MANUEL CORDOVA, ARCHIE McVINNEY, LLOYD HARRINGTON, SANTIAGO E. CALAC, W. G. WALKER, LAWRENCE BURCELL, FRANKIE MOOREHEAD and ARTHUR TEMPA, members, and as the representatives of, and on the relation of the INDIANS OF CALIFORNIA,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 31

Ernest L. Wilkinson and John W. Preston, with whom were Francis M. Goodwin, Frederick A. Baker, Sam Clammer, Paul M. Niebell and John W. Preston, Jr., Attorneys for the Petitioners.

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

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission:

The amended petition in this case is filed by individuals "as members of, and on relation of the Indians of California, Petitioners." A motion of the defendant was filed praying for its dismissal on the ground that the plaintiff was not such an identifiable group as was contemplated by the Indian Claims Commission Act. The Commission

overruled said motion on the ground that important issues of fact were involved in said question which should only be determined when raised by appropriate pleadings and after hearing upon the issues of fact so raised.

Thereafter the defendant filed an answer to the amended petition on the issue of capacity of plaintiffs to maintain the action. Trial was had on that issue only.

The action is a representative one brought by individual plaintiffs in their behalf and on behalf of the "Indians of California," who are alleged to constitute an identifiable group of Indians composed of all Indians who were residing in the State of California on June 1, 1852, and their descendants now living, as set forth by the act of May 18, 1928 (45 Stat. 602), as amended by the acts of April 29, 1930 (46 Stat. 259), and June 30, 1948 (Public No. 852, 80th Congress, 2nd Sess.). The petition alleges that said group "includes the descendants of members of what have sometimes been loosely described as tribes, bands, rancherias, and villages of Indians of California, and other individual Indians, who resided in California at the time of the promulgation of the Treaty of Guadalupe Hidalgo in 1848 (9 Stat. 922.)." Petitioners also allege that members of the group who were born prior to May 18, 1928, were enrolled as Indians of California by direction of the act of Congress approved May 18, 1928 (45 Stat. 602), as amended by the act of April 29, 1930 (46 Stat. 259); and that members of the group who were born subsequent to May 18, 1928, are to be enrolled by direction

of the act of Congress approved June 30, 1948, (Public Law No. 852, 2nd Sess., 80th Congress).

Petitioners further allege that the "Indians of California" have no tribal organization recognized by the Secretary of the Interior with authority to represent such identifiable group.

Petitioners allege that suit is instituted by virtue of authority contained in properly executed and approved contract.

Petitioners allege that the "Indians of California" have been known and recognized as an identifiable group and legal entity by administrative and legislative action of defendant including, without limitation, the act of May 18, 1928 (45 Stat. 602), as amended by the acts of April 29, 1930 (46 Stat. 259), April 25, 1945 (59 Stat. 77, 94), and by the acts of July 1, 1946 (60 Stat. 348, 361), August 13, 1946 (60 Stat. 1049) commonly known as the Indian Claims Commission Act, and June 30, 1948 (Public Law 852, 2nd Sess., 80th Congress.) That they constitute an identifiable group, as contemplated by the Indian Claims Commission Act, and as such are authorized to maintain the cause of action sued on herein before the Indian Claims Commission.

The defendant in its answer denies the allegations of plaintiffs as hereinabove set out, and alleges that the "Indians of California" are not now, nor have they ever been, a "tribe, band, or other identifiable group of American Indians" within the meaning and intent of section 2 of the act of August 13, 1946 (60 Stat. 1049).

The defendant alleges that from time immemorial the Indians located

in the present State of California have been recognized by the Government of the United States and its agents as being composed of separate and distinct tribes, bands, rancherias, and villages; and that except for the purposes authorized by the act of Congress approved May 18, 1928 (45 Stat. 602), and its amendments—subsequent acts of Congress relating specifically thereto--the Government of the United States and its agents have never recognized the "Indians of California" as one separate and distinct entity, tribe, band, or identifiable group of American Indians; that the Indians of California have no common communal or group claim against the United States which can be compensated for in one action under the act of August 13, 1946; that if the Indians located within the State of California have any claim or claims against the United States under and by virtue of any of the acts of omission or commission alleged in the amended petition herein, that said claim or claims must be prosecuted by the individual tribes, bands, rancherias, or other identifiable groups of Indians whose rights have been denied or destroyed.

As heretofore determined by this Commission in its Docket No. 1, styled The Loyal Creek Band vs. The United States, and Docket No. 25, styled The Creek Freedmen Association vs. The United States, a controlling question involved in determining whether or not any plaintiff can maintain the action asserted is "whether the claimant group can be identified and that it has a common claim." In each of these cases the legislative history of the Indian Claims Commission act is reviewed and discussed at

considerable length, as are the other questions in determining what was intended by Congress by the phrase "identifiable group." In Docket No. 1 the Commission held that "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. * * * 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." In Docket No. 25 the Commission used this language "the jurisdiction of the Commission is limited to tribal, band or common group claims in which the members of the group have a common interest in the subject matter."

In the instant case the recovery sought is for "the acreage owned, used, occupied and possessed, in the accustomed Indian manner, by the Indians of California and (1) taken and sold for its (the defendant's) own account and (2) taken and appropriated for its (defendant's) own use * * *." In other words, the suit is based on the alleged aboriginal possession of lands in California by the Indians of California.

This Commission has heretofore held, in its Docket No. 10, styled The Pawnee Indians vs. The United States, that under the authority of United States vs. Santa Fe Railroad Co., 314 U.S. 339, and Alcea Band of Tillamooks vs. United States, 103 Ct. Clms. 494, affirmed 329 U.S. 40, and others, that "it is well settled that where a claim is based on original Indian title, occupancy of the claimant tribe to the exclusion

of other tribes, necessary to establish aboriginal possessory title, is a question of fact to be determined as any other fact." After quoting from the cases above cited and others cited in that opinion, this Commission held that "it is clear from these decisions that in order to establish an original Indian title, the Indians must prove their exclusive occupancy and use of a definable area of land."

It is admitted by petitioners that "the question is whether they have a common claim under (on) which they are suing" (statement of Attorney Goodwin, Transcript, 1st Sec., p. 38). Quoting further from Attorney Goodwin:

> "When you come down to proof, a specific tract for any one particular band even in one of the best of the Indian cases of aboriginal possession, you are up against a pretty hard proposition, and in this case you would be up against an insuperable proposition in my judgment."
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> (Transcript, 1, p. 44)

In Cause No. 37, pending before this Commission, (wherein the Indians of California are plaintiffs) in plaintiffs' answer to defendant's motion to dismiss and brief in support of answer (p. 31), it is admitted that the Indians of California "must establish their rights today as one group or not at all." (Causes No. 37 and 31 were submitted together.)

It would seem, therefore, that the plaintiffs have, by their pleadings and argument, admitted that proof of exclusive occupancy of definite areas by specific tribes or bands is impossible; that their relief, if any can be had, is as a group of all the Indians of California;

and that the loss of ownership of specific and definable areas of land by the separate tribes has, because the Indians have been "scattered to the four winds and that with possibly one exception no tribes or bands or groups that can be identified as tribes or bands or groups" exist (quoting Attorney Arnold, an attorney representing plaintiffs in Cause No. 37), creates in the Indians of California, as a group, under the Indian Claims Commission Act, the cause of action asserted.

Until passage of the Jurisdictional Act of 1928, hereinafter discussed, all proposed legislation authorizing suit on behalf of California Indians was in behalf of tribes or bands in California (Tr., Vol. 2, p. 54).

Contention is made by briefs and argument that the Jurisdictional Act of 1928 and its amendments authorizing suit by the Indians of California, by virtue of which the Court of Claims rendered judgment (102 Ct. Clms. 837-39) was such a recognition and designation as constituted the Indians of California an identifiable group as contemplated by the Indian Claims Commission Act. In this connection, attention is called to the fact that the Jurisdictional Act of 1928 specifically provides "that for the purposes of this act (italics supplied) the Indians of California shall be defined to be all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State." It could hardly be made more certain that it was the intention of the legislation that the term "the Indians of California" are identified as all the Indians in California in 1852 and their descendants only for the purposes of the act. And in the decision of

the Court of Claims, rendered by reason of said Jurisdictional Act, the court says:

> "There was no Nation, band or tribe known or identified as the 'Indians of California.' As the defendant so aptly says, it is a term of art. But the jurisdictional act designates the Indians of California as 'all Indians who were residing in the State of California on June 1, 1852 and their descendants now living in said State.'"

Said Jurisdictional Act, as further described by the Court of Claims (quoting), "does not in any place set out a legal claim. It is the recognition of an equitable claim and is repeatedly so referred to in the jurisdictional act. * * * the Congress not only has recognized an equitable claim but has gone still further. The amount of recovery has been almost definitely defined. * * * This case does not involve the payment for land of which the Indians had a cession, or use and occupancy. * * * The amount awarded would only be in full settlement of a recognized equitable claim which the Congress has ordered the Court to ascertain, and, after ascertainment, to enter a decree." It is contended that the legislation constituting said jurisdictional act is still the law. That is, of course, true but it is merely the law controlling the judgment rendered thereunder and the funds made available to the Indians by reason thereof.

In the 1928 Jurisdictional Act the Congress recognized the loss to the particular tribes involved by the failure to ratify the 18 unratified treaties as an equitable claim of all the Indians in California.

Likewise, the Congress could and did recognize as an equitable

claim of all the Indians of California, as a group, the losses of many bands and tribes. It could merge the present claims of each and all the separate and distinct tribes and bands and create an equitable claim in petitioners,--and the Indian Claims Commission Act must be held to have done just this in order for petitioners to maintain the claims asserted. This Commission, as hereinafter set out, cannot agree that the Indian Claims Commission Act does this.

The evident purpose of the act creating the Indian Claims Commission and providing its jurisdiction was to enable Indians to act collectively, as tribes, bands or identifiable groups, in presenting claims, common to the claimant group, against the United States.

It is essential of course that there must have existed such a group at the time the claim arose and that there are members of that group, or descendants of such members, living at the time the claim is submitted for adjudication. It is not necessary for jurisdictional purposes to determine who are the individual members of the claimant group, although such a determination might later be necessary in order to distribute any award that might be made. The act creating the Indian Claims Commission nowhere authorizes the submission of a claim otherwise than by a tribe, band or identifiable group of Indians, or by a member thereof as the representative of all its members.

But, the petitioners argue that Congress intended that the phrase "identifiable group" should and does include the petitioners. They plead that the petitioners, Indians of California, are those

Indians who were residing in the State of California on June 1, 1852, and their descendants now living, as set forth by the act of May 18, 1928 (45 Stat. 602), as amended by the acts of April 29, 1930 (46 Stat. 259) and June 30, 1948 (62 Stat. 1166). In other words, it is those Indians who were residing in the State of California on June 1, 1852, and their descendants living in said State on May 18, 1928, and the children of those who were enrolled under the act of 1928 and their descendants living on June 30, 1943 (62 Stat. 1166). The act of 1928, as amended, was again amended, after the filing of the amended petition herein, by the act of May 24, 1950 (ch. 196, Pub. L. 524, 81st Cong., 2nd Sess.) by which additional persons are to be added to the roll of Indians of California, but such persons must be descendants of Indians residing in California on June 1, 1852, and alive on May 24, 1950.

The above definition is artificial because it does not include members of any of the Indian tribes, bands or groups who were not living in California on June 1, 1852, nor does it include the descendants of those California Indians who were not alive on June 1, 1852. Surely there were members of groups of California Indians who were not living in what is now the State of California on June 1, 1852, and surely there were descendants of members who were not alive on June 1, 1852, but whose descendants were alive and living in California at said time. Yet they are excluded by the definition.

The above definition originated in the act of May 18, 1928 (45 Stat. 602), and its application was further restricted by section 7

of that act which required an enrollment of the Indians of California and provided that those Indians coming within the definition must apply for enrollment within a fixed time or be barred from enrollment. Thus, it will be seen, those who did not apply for enrollment, although qualified, were not included as Indians of California.

That Congress by special legislation may create a suing entity and authorize a limited recovery, as it did by the 1928 act, is not questioned, but we find nothing in that special act which makes the Indians enrolled under it, or its amendments, an identifiable group under the Indian Claims Commission Act. To do that, it seems to us, would require the abrogation of group claims, that is, claims by tribes, bands, or rancherias, and vest in that artificial group, Indians of California, the exclusive power to assert a claim for aboriginal rights of all California Indians. It is true, of course, that the roll made under the 1928 act includes members of many of the tribes, bands and rancherias of California Indians - the roll shows that - but that fact does not make the Indians of California the exclusive representatives of the Indian groups who may have claims based upon aboriginal occupancy, or deny the right of groups to assert claims for loss of land to which they have had original Indian title.

It is inconceivable that Congress had any such intention in passing the 1928 act. It is plain that that act was special and limited for the purpose of at least partially rectifying a loss suffered by California Indians.

The definition is restrictive in another respect: It limits the claims to a specified area--the State of California. The treaty of Guadalupe Hidalgo, July 4, 1848, (9 Stat. 922), ceded to the United States a vast area of land, including the present State of California, which was occupied by numerous Indian groups. The ceded territory was not subdivided into distinct areas but apparently included a part of New Mexico, and all of Arizona, Nevada and California, all as Alta California. The Indian groups occupying this vast territory did so without regard to internal boundaries of the area for there were none until it was acquired by the United States and state and territorial boundaries established. So, limiting the claims and claimants to a particular area and to descendants of residents thereof was arbitrary and not in accord with the generally recognized practice of establishing Indian group rights, for Indian groups did not aboriginally occupy land with respect to state or territorial boundaries.

Under the Indian Claims Commission Act claims of Indians, based upon aboriginal occupancy, are not restricted by political boundaries or by definition of claimant groups. Hence, in our judgment, the petitioners cannot be considered as an identifiable group under the act which governs us.

It is argued that the legislative history of the Indian Claims Commission Act shows that the situation of the Indians of California was in mind and that the language of the act was so drafted as to bring them within its terms as an identifiable group. It is stated in plaintiffs' answer to defendant's motion to dismiss (p. 45) "the

history of the bill which ripened into the present Act shows that members of the House and Senate Committees in charge of the bill actually understood that it comprehended the claim here involved." Then, in the brief, it refers to the Indians of California as in contemplation, and Mr. Collett, representing the Indians, is quoted as asking this question: "I would like to ascertain whether or not the non-treaty Indians of California may assert a claim under this bill or under the amendment proposed here." To which the Chairman replied: "I see no language in the bill that would exclude them." Thereafter, Mr. Stormont, representing the Department of Justice, said in reply to the question as to whether or not the non-treaty Indians would be excluded from the bill: "I do not think so." There is, of course, nothing in this colloquy that encompasses all the Indians of California. The inquiry was limited to the situation of the non-treaty Indians.

It is further argued that when the legislation was finally being considered on the floor of the House (Answer to motion to dismiss, pp. 38-39) Chairman Jackson, in charge of the bill, again made it plain that the Committee contemplated that the bill would cover every kind of Indian claim. In Chairman Jackson's statement he concluded by saying that "It was the unanimous opinion of the Committee that the jurisdiction of the Commission ought to be broad enough so that no tribe (italics supplied) could come back to Congress 10 years from now and say that it had a meritorious claim which the claims commission was not authorized to consider."

This law suit is not in behalf of a tribe, but it is in behalf of all the Indians in California enrolled as descendants of Indians residing in California on June 1, 1852, who, regardless of the number of tribes from which they descend, sue as a group and assert that their cause of action is a common or group claim. It is rather far fetched, it seems to this Commission, to construe the language used with reference to the purpose of this bill and the possible rights of the non-treaty Indians, as having in mind by conscious consideration the petitioners herein.

Under the construction heretofore made by this Commission in the cases cited, a claim must be a group or common claim in order that this Commission have jurisdiction. As previously stated, the cause of action asserted herein is based on the alleged aboriginal ownership of lands in California by the petitioners. It is not contended however in petitioners' allegations, argument or proof, that the lands for which compensation is sought were owned by the petitioners as a group. The only evidence introduced is to the contrary. The testimony of C. Hart Merriam of the Smithsonian Institution, an acknowledged authority on the Indians of California, was introduced by both the petitioners and the defendant. His testimony was given to the Congress when it was considering legislation which ultimately became the Jurisdictional Act of 1928, previously referred to herein. Dr. Merriam, in part, says:

> "In California the various tribes have definite tracts of land, the boundaries of which are as fixed as the boundaries of our States and counties. An Indian of one tribe

> would not dare enter the territory of another tribe unless under circumstances of mutual agreement except in pursuit of a wounded animal, which he was allowed to follow for a certain distance. He would not pick manzanita berries or gather a basket of acorns, or shoot any deer or rabbit or quail in the territory of another tribe, nor catch a fish in any of their waters. The tribal boundaries were definite and thoroughly understood--in former years by every member of the tribe, men, women, and children; but nowadays the young people do not always know the boundaries."

For the claim of petitioners to be considered a common or group claim it would be necessary to hold that the rights of the descendants of any tribe, by virtue of the aboriginal ownership of certain acreage by the tribe from which he descended, inured to the benefit of other Indians besides those descended from the original tribal owners. The Commission cannot agree to this contention.

Another difficulty in construing respective tribal rights as being the property of all the Indians of California, is the fact that claims based on alleged aboriginal ownership of lands have been filed with this Commission in behalf of seventeen alleged bands of Mission Indians, who claim that said bands are within the meaning of the Indian Claims Commission Act, and that said bands have their own separate band claims which they desire to press before this Commission. It is alleged that these seventeen bands, and each of them, have entered into contracts with attorneys which have received the unqualified approval provided by the law. What rights if any these seventeen bands or any other that might be filed have is not now under consideration, but only the fact that separate band and tribal claims are asserted.

It is difficult to see how all the Indians of California could be considered as having a common and group claim which would include the claims of separate and distinct bands of Indians in California and would, thereby, absorb the claims of the distinct bands; and it is equally difficult to see how all the Indians of California could maintain a group claim and at the same time permit separate bands to maintain separate band claims.

It might be admitted that a group whose membership may be determined by proof of ancestry, enrollment, or geographical location, in a sense, can be thus identified; however, such a type of identification is more a matter of description than an indication of common group rights.

As indicated, it is the opinion of this Commission that the claims being asserted herein are not common group claims, but that the cause of action, if any, had by reason of the taking of lands of which Indians had aboriginal title are separate tribal or band claims of the several tribes or bands for the specific lands alleged to have been owned by each, and that such several tribal claims cannot be combined under the jurisdictional provisions of the Indian Claims Commission Act and made the basis of a common or group claim in behalf of all the Indians of California.

The above does not leave the California Indians without a remedy for such groups thereof who have had aboriginal occupancy of land in the state may still make claim therefor. Whether such group claims are now barred, or if they have in any way lost them, presents a question

on which we intimate no opinion, for such question is not now before the Commission.

It is ordered that the amended petition be dismissed.

Commissioners O'Marr and Holt concur in the above opinion.

December 15, 1950