

BEFORE THE INDIAN CLAIMS COMMISSION

THE DELAWARE TRIBE OF INDIANS,)
)
 Petitioner,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 27-A

ABSENTEE DELAWARE TRIBE OF)
)
 OKLAHOMA, DELAWARE NATION,)
)
 ex rel. W. E. EXENDINE and)
)
 MYRTLE HOLDER,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 241

Decided: October 23, 1952

Appearances:

Wesley E. Disney and Charles B. Rogers, with whom was Lawrence H. Gall, Attorneys for Petitioner, Docket No. 27-A.

Stanford Clinton, with whom was Richard Schifter, Attorneys for Petitioners, Docket No. 241.

Ralph A. Barney, Fred B. Ugast and L. L. Yost, with whom was Mr. Acting Assistant Attorney General, Ralph J. Luttrell, Attorneys for Defendant in Dockets Nos. 27-A and 241.

OPINION OF THE COMMISSION

PER CURIAM. The cause of action asserted in Docket No. 27-A is on behalf of the "Delaware Tribe of Indians," also referred to as the "Delaware Nation." The claim asserted is based on the alleged ownership of lands in Kansas, known as the "Outlet"; which lands are alleged to have been guaranteed to the Delaware Nation by treaty of September 24, 1829 (7 Stat. 329); and by a treaty of May 6, 1854 (10 Stat. 1048) to have been ceded to the defendant Government for an unconscionable consideration, by reason whereof petitioner is entitled to recover.

Subsequent to the filing of the petition in Docket No. 27-A there was filed as Docket No. 241 by the Absentee Delaware Tribe of Oklahoma, et al, in behalf of the Delaware Nation, a claim for the value of the same lands and by reason of the same facts.

The petitioners in both cases claim to be successors to, and assert claim on behalf of, the Delaware Nation.

In view of the conflicts by reason of the aforesaid, the defendant filed on September 14, 1951, a motion requesting the Commission to hold a preliminary hearing in the two docket numbers on the questions: (a) whether the respective petitioners, or either of them, are entitled to maintain the aforesaid claim or claims; and (b) whether either of the petitioners is an identifiable tribe, band, or group within the meaning of Section 2 of the Indian Claims Commission Act, and entitled to maintain the action asserted. The defendant filed motions to dismiss in both Dockets Nos. 27-A and 241. The petitioners in both 27-A and 241 filed a written consent to defendant's motion for preliminary hearing. A hearing was held upon the questions

thus raised on October 19, 1951, at which time the petitioners in 27-A introduced their evidence. On March 31, 1952, a single hearing was held in the two cases. At this time, with the consent of all parties, the Commission ordered that the record show that "the evidence taken in either case may be considered as evidence in the other case;" and, on the defendant's motion, further ordered that the "record in Docket No. 27-A is to be considered a part of the record in No. 241." Thereupon, the petitioners in No. 241 and the defendant presented their evidence. At the close of the hearing the Commission requested the parties in both cases to file requests for findings of fact and briefs. These requests for findings of fact and briefs were thereafter filed, and the questions raised were presented to the Commission in oral argument by attorneys for both parties plaintiff and defendant.

Questions Presented

1. Whether the petitioner in either case has the capacity to maintain the present claim as a "tribe, band, or other identifiable group" within the meaning of the Indian Claims Commission Act.

2. Whether or not the petitioner in either case is entitled to maintain the claim asserted to the exclusion of the petitioner in the other.

The petitioner in Docket No. 27-A claims to be the successor to and the descendant of those Delawares who, following the treaty of September 24, 1829 — whereby the United States conveyed to the said Delaware Nation a tract of land in Kansas — removed to said reservation so provided for them in Kansas and remained there until 1867; and who, following the agreement

of April 8, 1867, between the Cherokee Nation and the Delaware Tribe of Indians, removed to the lands acquired under said agreement from the Cherokees in Indian Territory, where those so removing and their descendants continued to live and where they are at the present time.

The petitioners in Docket 241 claim to be an identifiable and organized group of Indians and the descendants of those who refused to join those who became merged with the Cherokee Nation but who have continued to maintain a tribal existence, some of whom lived with the Wichitas and Caddos and became attached ultimately to the Wichita Agency around 1859 and now reside among the Wichitas and Caddo Indians in western Oklahoma, and to have been recognized by the Department of Interior as an existing and functioning Band of Delaware Indians and to have been variously known as the Absentee Delawares, Southern Delawares, Delawares of Indian Territory, and Absentee Delaware Tribe of Oklahoma.

Finding No. 8 of the Findings of Fact herein is to the effect that petitioner in Docket 27-A has at all times maintained identity as a group and constitutes an identifiable group within the meaning of the Indian Claims Commission Act.

Finding No. 9 is to the effect that petitioners in Docket 241 have maintained group identity and constitute an identifiable group of Delaware Indians within the meaning of the Indian Claims Commission Act.

It is undisputed that the main body of the Delawares and the group with whom the defendant dealt as representing the Delaware Nation following the treaty of September 24, 1829, removed to the reservation ceded to the Delawares in Kansas, and that following the agreement of April 8, 1867, this group removed to the Cherokee Territory and its

members, or most of them, became incorporated and merged for many purposes with the Cherokees. Nevertheless, this incorporation and merger did not result in the destruction of the continued activities of those so incorporated with the Cherokees as a distinct identity. They continued to maintain their tribal customs, practices, and their hereditary form of Delaware government. They received annual payments for many years from their own tribal funds, separate from the Cherokees. They had separate tribal funds in the hands of the United States as late as 1906. They were governed by hereditary tribal chiefs until the death of Charles Journeycake in 1895. Thereafter they maintained a tribal council and business committee to perform the functions and duties previously performed by their chiefs. This tribal council and business committee have continuously functioned as an identifiable group as stated in Finding No. 8 until and at the present time.

Notwithstanding the fact that the Delaware Indians previously residing on the Kansas reservation, and thereafter removing to the Indian Territory upon lands purchased from the Cherokees, constituted a majority of the members of the Delaware Tribe or Nation and constituted the group dealt with by the Government as representing the Nation subsequent to the treaty of 1829, nevertheless there were Delaware Indians who were recognized as members of the Delaware Nation or Tribe in 1829 and thereafter who did not remove to the Kansas reservation nor to the territory acquired from the Cherokees. Many members of the Delaware Tribe, prior to 1829 and thereafter, roamed over various portions of Arkansas, Oklahoma, and Texas, and became known as Southern Delawares, and the descendants of these Indians now constitute the group who are petitioners

in Docket No. 241. These Indians have also maintained a group identity through the years and do so at the present time, as stated in Finding No. 9.

That the Delawares on the Kansas reservation who made the agreement with the Cherokee Nation on the 8th day of April, A. D. 1867, did not consider themselves as constituting all members of the Delaware Nation or Tribe is indicated by the provision in said agreement that the provisions of same should not be limited to those then registered (and only residents of the Kansas reservation were at the time so registered), but it provided that the beneficiaries thereof should consist of those then registered "with such additions as may be made within one month of the signing of this agreement."

The question of whether or not the Delawares south of the Arkansas River had maintained their membership in the Delaware Nation was raised in 1858 by the Choctaws and Chickasaws with whom they were living, and with reference to their status Charles E. Mix, Acting Commission of Indian Affairs in the Department of Interior, by letter dated May 10th, 1859, to Elias Rector, Superintendent of Indian Affairs at Fort Smith, Arkansas, stated that they were regarded as a portion of their tribe which resided in Kansas and that they had rights in common with that tribe, both as to land and as to annuities. The Commissioner further stated that the case of Connor illustrated the connection of Delawares not residing in Kansas with the said Delaware Nation as he (Connor) became its principal chief by descent while he lived with the Delawares away from the Kansas reservation and south of the Arkansas.

By treaty of May 30th, 1860 (12 Stat. 1129), which provided for allotments to individual Indians of lands previously set apart for their reservation in Kansas, Article 4 recites that "Whereas * * * many of the Delawares went down among the Southern Indians, and * * * are still there, * * * it is hereby agreed that eighty acres each be set apart for them, to be allotted to them as they return, and certificates to be then issued to them, in the same manner as to those now within the reservation, and in every respect to be governed by the same rules and regulations * * *."

That those who formed the Cherokee-Delaware group became a distinct identity notwithstanding the incorporation into the Cherokee Tribe, but that they did not constitute the whole of the Delaware Tribe or Nation is evidenced by the language of the Court of Claims in the decision of that Court reported in the case of *Journeycake v. Cherokee Nation and The United States*, 28 C. C. 281 (affirmed 155 U. S. 197). Statement is made in said opinion (p. 310) that "it is apparent that the Delawares retained their separate national fund of \$389,191 in the Treasury of the United States as their separate property." On page 307 of that decision reference is made to the quantity of the land being acquired by the Delawares as being an amount "fixed at and limited to 'one hundred and sixty acres of land for each individual of the Delaware Tribe'; that is, 'of the Delawares who elect to remove to the 'Indian Country','" — meaning the Cherokee Country — (underscoring supplied). The obvious inference is that there might be members of the tribe who would not come to the Cherokee lands.

The opinion of the Supreme Court, by Mr. Justice Brewer, affirming the Journeycake case, points out that the provisions of the 1867 contract involved "an absorption of individual Indians into the Cherokee Nation" and contemplated "a personal selection of separate tracts by individual Delawares." (Page 205 -- underscoring supplied). Again quoting from this opinion (p. 213), "The individual Delawares took their homes in and remaining in the Cherokee reservation"; (underscoring supplied) and, with reference to the retention of a portion of the Delaware national fund, this was held to be for the benefit of Delawares who might remove to the Cherokee purchase, and other Delawares, with the language "that there was no certainty that all the members of the Delaware Tribe would elect to remove to the Cherokee country, and that those who remained in Kansas were entitled to their share in the Delaware national funds." While no reference is made to Delawares who might be elsewhere remaining other than in Kansas -- if there were any -- the proof introduced indicates that there were others, to wit, the ancestors of those constituting petitioners in Docket No. 241. There is nothing in the record to show a loss of Delaware tribal membership to any Delawares because of failure to remove to the Cherokee territory.

That those Delaware Indians who immigrated to the Cherokee territory, and their descendants, did not and do not constitute the whole of the Delaware Nation is further evidenced by a later decision of the Court of Claims and the Supreme Court, to wit, Delaware Indians v. Cherokee Nation, 38 C. C. 234, affirmed by the Supreme Court as

modified, 193 U. S. 127. In discussing the agreement of April 8, 1867, made between the Delawares and the Cherokees, Judge Weldon in the Court of Claims decision (p. 245) uses this language, to wit: "There is a class of Indians, perhaps very insignificant in numbers, who are not provided for, and that is the Indian who was in being on the 8th of April, 1867, and who was not on the register roll, and who did not within one month thereafter remove to the Indian country. As to such Indians no provision is made, so that the classification becomes the registered Indians and children born after said date to said registered Indians." This language is certainly recognition of the fact that those who became what might be called the Cherokee-Delawares were not necessarily all the members of the then Delaware Nation or Tribe.

As the injury, if any, complained of in Dockets Nos. 27-A and 241 was to the Delaware Nation or Tribe as it was constituted in 1829, then as stated in the opinion of the Court of Claims (Appeals Docket No. 14, Indian Claims Commission Docket 21), "any recovery for such injury (to the Creek Nation) should be for the benefit of all the descendants of that nation." As neither the petitioner in Docket No. 27-A nor the petitioners in Docket No. 241 can be called "the full successor" to the Delaware Nation, so far as the treaties of 1829 and 1854 are concerned, under the decision of the Court of Claims in the above cited case neither group can be accorded the exclusive right to prosecute the claim; but, as held in the said opinion, said causes of action must be consolidated and any recovery for such injury must be

for the benefit of all the descendants of the Delaware Nation as constituted in 1829 and 1854.

Therefore, in keeping with this opinion and the findings of fact, it is the conclusion of the Commission that the motions of the defendant to dismiss in each of the cases, Docket No. 27-A and Docket No. 241, should be overruled, and the motions to consolidate the cases should be granted. It is so ordered.

The Commission will hear counsel as to the form of the order or orders to be entered in accordance with the above decision.

Approved:

EDGAR E. WITT
Chief Commissioner

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner