

BEFORE THE INDIAN CLAIMS COMMISSION

CHEROKEE FREEDMEN, and CHEROKEE)	
FREEDMEN'S ASSOCIATION, ex rel)	
EDWARD CURLS, RUTH CLAGGETT,)	
JACKSON SMITH, GLADYS LANNAGAN,)	
and WILBERT ROGERS,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 123
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: January 6, 1964

Appearances:

Alan W. Farley,
Attorney for Plaintiffs

Frederick C. Ward, Jr., with
whom was Mr. Assistant Attorney
General, Ramsey Clark,
Attorneys for Defendant

O P I N I O N

PER CURIAM. This matter is now before the Commission upon the motion of petitioners in Docket No. 123, Cherokee Freedmen, et al v. The United States of America for leave to intervene in Docket No. 173, The Cherokee Nation v. The United States of America. This motion was filed on November 1, 1963. The response in opposition to said motion was filed by the defendant on November 27, 1963, and said petitioners' response thereto was filed on December 16, 1963. Defendant filed a further response on December 27, 1963. The Cherokee Nation, petitioner in Docket No. 173, has not filed a response to said motion.

This phase of the proceedings in this matter is the result of an issue urged for the first time by petitioners in Docket No. 123 upon their appeal to the Court of Claims of the decision of this Commission in that case. The Commission held in that opinion that the cause of action asserted by petitioners therein constituted individual claims and was therefore beyond the jurisdiction of this Commission. See Cherokee Freedmen, et al. v. The United States, 10 Ind. Cl. Comm. 109. The Court of Claims upheld the ruling of the Commission with regard to this question but remanded the case to the Commission for further proceedings with the following statement on pages 3 and 4 of the slip opinion handed down on May 10, 1963:

* * *

However, appellants also press upon us another contention which is claimed to be adequate to keep them in court. They say that, as a matter of law, the Cherokee Freedmen rejected by the Dawes Commission constitute a class still entitled to participate in funds or properties of the Cherokee Nation other than those relating to the land allotments with which the Dawes Commission was concerned. The line of their argument is as follows: (a) Prior to the Dawes Commission's enrollment work there were earlier rolls of the Cherokees on which appellants' Freedmen admittedly appeared, particularly the Kern-Clifton roll; (b) this Kern-Clifton roll was drawn up as a result of litigation in which this court held the Cherokee Freedmen, as a class, entitled to participate on an equal basis with the blood Cherokees in the funds and properties of the Nation (Whitmire v. Cherokee Nation and United States, 30 Ct. Cl. 138, 180 (1895), see 223 U.S. 108, 114-115); (c) appellants' Freedmen received benefits from being on the Kern-Clifton roll, including participation in the monies paid for the so-called Cherokee "strip" or "outlet" sold by the Cherokee Nation in 1893; (d) the Dawes Commission subsequently struck their names from the Cherokee rolls for the purposes of land allotments, but this court has said that nevertheless "the Kern-Clifton roll was good and valid for the purpose for which it was made

and was in nowise affected by the subsequent enrollment by the Dawes Commission made in the manner provided by Congress" for allotment purposes (Cherokee Nation v. United States, 85 Ct. Cl. 76, 100 (1937)); (e) it follows, appellants argue, that the Freedmen who were on the Kern-Clifton roll but were later removed from the Dawes roll remain a group entitled (as a matter of law) to participate in monetary benefits coming to the Cherokee Nation -- aside from benefits connected with land allotments; and finally (f) this claim is covered by the petition filed by appellants in the Indian Claims Commission.

Appellants emphasize that this claim to other funds, if valid, has a special significance at the present time. The Indian Claims Commission has approved a stipulation awarding the Cherokee Nation over \$14,000,000 additional compensation for the sale of the Cherokee "strip". The Cherokee Nation v. United States, 9 Ind. Cl. Comm. 435 (Docket No. 173) (1961). Appellants say that their Freedmen are automatically entitled to participate in this award, just as they did in the original distribution of the funds received in the 1890's on account of the "strip". Appellants also claim participation in other outstanding Cherokee funds.

We do not pass at the present stage upon the validity of this argument but remand the case to the Indian Claims Commission (which has not yet dealt with the contention) so that it may consider this new aspect. If the Commission finds that this part of the claim is available and has merit, it should make an appropriate disposition. It might, for instance, wish to permit the appellants to intervene in its Docket No. 173 or it might consolidate the present case with No. 173. We leave the course of the further proceedings to the Commission. The interested parties can seek review, at the proper stage, from the Commission's disposition of this claim.

In pursuance of this remand the aforementioned motion was filed by the petitioner. The sequence of events which preceded this remand and the filing of the motion were as follows:

On April 3, 1961 this Commission entered Findings of Fact and Opinion, which may be found at 9 Ind. Cl. Comm. 162, wherein it was determined that the Cherokee Nation was entitled to a recovery of \$14,789,476.15, less allowable offsets, for their lands known as

the Cherokee Outlet. On September 6, 1961 the Cherokee Nation filed a motion for final judgment in that case based upon a stipulation between said Cherokee Nation and defendant. The Commission on September 14, 1961 wrote Findings of Fact and Opinion approving said stipulation and entered an order for final judgment in the amount stated above. On September 30, 1961 the Congress passed an appropriation act (75 Stat. 733) in satisfaction of said final judgment. On October 9, 1962 the Congress in pursuance of its plenary power over Indian affairs, passed an act for the disposition of these judgment funds wherein it was provided, inter alia, that there would be a per capita distribution of the funds less an amount which by stipulation of the parties was to be reserved for the payment of offsets which might be determined to be due and less an unspecified amount for payment of attorneys' fees and expenses. Since that time said offsets and counterclaims have been compromised between petitioner in Docket No. 173 and defendant and hearings have been held on the matter of attorneys' fees.

The Act of Congress providing for the disposition of the judgment funds in that matter contained the following language:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is authorized and directed to distribute per capita to all persons whose names appear on the rolls of the Cherokee Nation, which rolls were closed and made final as of March 4, 1907, pursuant to the Act of April 26, 1906 (34 Stat. 137), and subsequent additions thereto, all funds which were appropriated by the Act of September 30, 1961 (75 Stat. 733), in satisfaction of a judgment that was obtained by the Cherokee Tribe in the Indian Claims Commission against the United States in

docket numbered 173, together with the interest accrued thereon, except \$1,432,084.17 which by stipulation of the parties has been set aside for the payments of any offsets that are finally determined to be due the United States, and except the amount allowed for attorney fees and expenses.

Sec. 2. (a) Except as provided in subsections (b) and (c) of this section, a share or proportional share payable to a living adult shall be paid directly to such adult; (b) a share payable to a deceased enrollee shall be distributed to his heirs or legatees upon the filing of proof of death and inheritance satisfactory to the Secretary of the Interior, or his authorized representative, whose findings and determinations upon such proof shall be final and conclusive: Provided, That proportional shares of deceased heirs amounting to \$10 or less shall not be distributed, and no inherited share amounting to \$5 or less shall be paid, and the money shall revert to the tribe: (c) a share or proportional share payable to a person under twenty-one years of age or to a person under legal disability shall be paid in accordance with such procedures as the Secretary determines will adequately protect the best interests of such persons.

Sec. 3. (a) All claims for per capita shares, whether by a living enrollee or by the heirs or legatees of a deceased enrollee, shall be filed with the Area Director of the Bureau of Indian Affairs, Muskogee, Oklahoma, not later than three years from the date of approval of this Act. Thereafter, all claims and the right to file same shall be forever barred and the unclaimed shares shall revert to the tribe.

(b) Tribal funds that revert to the tribe pursuant to this Act, including interest and income therefrom, may be advanced or expended for any purpose that is authorized by the principal chief of the Cherokee Nation and approved by the Secretary of the Interior.

Sec. 4. No part of any funds which may be distributed in accordance with the provisions of this Act shall be subject to Federal or State income tax.

Sec. 5. No part of any of the funds which may be so distributed shall be subject to any lien, debt, or claim of any nature whatsoever against the tribe or individual Indians except delinquent debts owed by the tribe to the United States, or owed by individual Indians to the tribe or to the United States.

Sec. 6. Payments made under this Act shall not be held to be "other income and resources", as that term is used in sections 2(a) (10) (A), 402 (a) (7), 1002(a) (8), and 1402(a) (8) of the Social Security Act (42 U.S.C. 302(a) (10) (A), 602(a) (7), 1202(a) (8), and 1352(a) (8)).

Sec. 7. All costs incident to making the payments authorized by this Act shall be paid by appropriate withdrawals from the judgment fund and interest on the judgment fund, using the interest fund first.

Sec. 8. The Secretary of the Interior is authorized to prescribe rules and regulations to carry out the provisions of this Act.

Approved October 9, 1962.

In accordance with this bill the per capita distribution to the Cherokee Nation was begun and is now in progress.

From the above events it may be seen that this Commission has lost jurisdiction over Docket No. 173 and this fact makes the motion of petitioners in Docket No. 123 untimely. It is true that certain funds are subject to the decision of this Commission as to attorneys' fees and expenses. It is also the fact that those funds were specifically earmarked by Congress for that purpose and that the Commission may do nothing with those funds except allow attorneys' fees and expenses as Congress has provided. The same reasoning applies to that part of the funds which were held for payment of offsets.

The Commission is therefore of the opinion, and so holds, that it cannot entertain the motion of petitioners in Docket No. 123, Cherokee Freedmen, et al. v. The United States, for permission to intervene in

Docket No. 173, Cherokee Nation v. The United States, on the grounds that, except as noted above, it no longer has jurisdiction over the judgment funds involved in said Docket No. 173.

In the course of the decision of this Commission in Docket No. 173 it was determined that there was an area of some 2,121,928.74 acres to which petitioner Cherokee Nation did not have title as of December 19, 1891. This area was severed under the following language of the Interlocutory Order entered on April 3, 1961:

* * *

(a) That the petitioner Cherokee Nation as of December 19, 1891, had no title to the 2,121,928.74 acres of its outlet lands in Oklahoma previously set apart and occupied by other Indian tribes pursuant to the Treaty of July 19, 1866 (14 Stat. 799) and for which lands deeds had been executed prior thereto by the Cherokee Nation to the United States in trust for other Indian tribes; that under the agreement entered into on December 19, 1891 and ratified on March 3, 1893, the defendant paid petitioner \$8,595,736.12 of which sum \$799,884.12 was additional compensation for the aforesaid lands, and, there is not sufficient evidence now before the Commission of the value of said lands when taken for other Indian tribes to determine whether the consideration paid was unconscionable.

* * *

(a) That the parties may submit evidence of the value of the 2,121,928.74 acres of outlet lands in the reservations of other Indian tribes on the dates of taking thereof, or, if the petitioner so elects, its claim for additional compensation for aforesaid lands may be severed and filed in a separate petition to be described as Docket No. 173-A.

The petitioner in Docket No. 173 chose to file this claim under a separate petition numbered 173-A. That claim is still within the jurisdiction of this Commission. Therefore, if petitioners in Docket No. 123

desire to intervene in said Docket No. 173-A for the purpose of determining the merits of their contention as set forth in the per curiam opinion of the Court of Claims, Appeal No. 2-62, entered May 10, 1963, this Commission will consider and rule upon a motion for such purpose at that time.

An order to that effect will be entered.

/s/ Arthur V. Watkins
Chief Commissioner

/s/ Wm. M. Holt
Associate Commissioner

/s/ T. Harold Scott
Associate Commissioner