

BEFORE THE INDIAN CLAIMS COMMISSION

THE WESTERN (OLD SETTLER) CHEROKEE
INDIANS, on the relation of Dorothea
Owen, Thomas Roach, Ellis Crowell
Duncan, Elizabeth Schrimsher-Lewis,
Alice Flourney-Smith and Maxine
Woodall,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 24

Appearances: Woodson E. Norvell with whom was
George E. Norvell and Wilfred A. Hearn,
Attorneys for Plaintiffs.

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

OPINION OF THE COMMISSION

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

This claim is presented by "The Western (Old Settler) Cherokee Indians, on the relation of Dorothea Owen" and five other named individual Indians against the United States to recover the value of lands alleged to have been taken from the Western Cherokee by the defendant without adequate compensation.

Taken literally, the title would indicate that the Western Cherokee Indians are considered a legal entity having capacity to prosecute the claim, however, the following allegations of the petition show that the suit has been brought by descendants of members of a group, known as the Western Cherokee Indians, for the benefit of all members of that group or their descendants:

"That Dorothea Owen and the individuals therein associated with her, are severally descended from a member of that group of Indians identified as the Western, or Old Settler, Cherokees, hereinafter called the Western Cherokees. That such group has been so identified and recognized by the defendant for more than one hundred twenty-five years past. That this proceeding is instituted on behalf of such group of Indians, and for themselves as individuals, and for the use and benefit of all others who are similarly situated and have like interests. That the name of each relator appears upon the final rolls of Cherokees by blood, as approved, promulgated and published by the Secretary of the Interior."

We shall, therefore, for the purposes of this determination, treat the named individuals as suing for the benefit of all members, or their descendants, of a group of Indians known as the Western Cherokees, as authorized by section 10 of the Indian Claims Commission Act. (25 U.S.C.A. 70i). See *Loyal Creek v. United States*, Docket No. 1.

The defendant has challenged the right of the plaintiff to present this claim and the jurisdiction of the Commission to entertain it by a timely motion to dismiss the petition on the ground that the Western Cherokee Indians is not an identifiable group of American Indians under the Indian Claims Commission Act. This requires us to determine whether the group is of the character permitted to prosecute a claim against the United States before this Commission.

If the Western Cherokees is not an identifiable group as contemplated by the Act, the claim is not maintainable and we are not permitted to adjudicate it, and it makes no difference whether it is presented by the named individuals as representatives of the Western Cherokees or by the Cherokee Nation on behalf of the Western Cherokees. So the first question to be determined is whether the Western Cherokees are an "identifiable group of American Indians". If they are then and then only is it necessary to determine whether the suit may be brought by the individual Indians in a representative capacity or by the Cherokee Nation.

We gather from the facts alleged in the petition, from the documents referred to therein and facts we may judicially notice, that

the Cherokee Indians long prior to 1817 inhabited part of what was or is now the States of Tennessee, Alabama, Georgia and North Carolina. Early in the nineteenth century the Cherokees living in the Southern part of their domain desired to continue the hunter life west of the Mississippi river, game having become scarce where they lived, and the President, in order to satisfy the wishes of those Cherokees desiring to move west, authorized a party of those Indians to explore the country between the Arkansas and White rivers, in what is now the State of Arkansas, for the purpose of locating a new home. As a result of the explorations the Indians chose the territory in Arkansas and on July 8, 1817 (7 Stat. 156) a treaty was concluded between the United States "and the chiefs, headmen and warriors, of the Cherokee Nation, east of the Mississippi river, and the chiefs, headmen and warriors of the Cherokees on the Arkansas river" by which there was ceded to the United States by the "Chiefs, headmen and warriors of the whole Cherokee Nation" a part of the Cherokee domain east of the Mississippi river in exchange for an equal area of land lying in Arkansas. Art. 5 of that treaty reads:

"The United States bind themselves, in exchange for the lands ceded in the first and second articles hereof, to give to that part of the Cherokee Nation on the Arkansas as much land * * *", as was ceded by the Indians. (Italics supplied)

This whole treaty, which was made by the Cherokee Nation, shows a division in that nation between those remaining east (who became known as the Eastern Cherokees) and those who emigrated west (who became known

as the Western or Old Settler Cherokees) of the Mississippi river and is a plain recognition of the Western group by the United States as being a distinct part of the Cherokee Nation. This recognition becomes more pronounced by the acts of the United States following the 1817 treaty.

A treaty was concluded by the Cherokee Nation and the United States on February 27, 1819 (7 Stat. 195) by which further territory east of the Mississippi river was ceded to the United States and certain agreements were made. This treaty seems to have been made by the Eastern Cherokees alone for it seems to affect the Eastern Cherokees mainly. However, in Art. 6 provision is made for dividing the annuity of the Nation "two-thirds to the Cherokees east of the Mississippi, and one-third to the Cherokees west of that river."

Coming to the treaty of May 6, 1828 (7 Stat. 311) we find the "chiefs and Head Men of the Cherokee Nation of Indians, west of the Mississippi, they being duly authorized and empowered by their Nation", making a treaty with the United States by which the Indians cede their Arkansas lands to the United States in exchange for lands located in the Indian Territory. This treaty was made with the Western Cherokees to provide them, and such of the Eastern Cherokees who may wish to join them, a permanent home. That in concluding this treaty the Government was dealing with the Western Cherokees only, see Supplementary treaty of February 14, 1833 (7 Stat. 414) and United States v. Western Cherokees, 148 U.S. 426, 470.

Following the two treaties referred to above, the "chiefs, Head Men and People of the Cherokee tribe of Indians" concluded a treaty by which they ceded all their lands east of the Mississippi river, and most of the Eastern Cherokees moved west and were united with the Western Cherokees. This treaty was signed December 29, 1835, and was agreed to on December 31, 1835, by a delegation of Western Cherokees. (7 Stat. 478; 7 Stat. 487).

Then there is the treaty of August 6, 1846 (9 Stat. 871) whereby it was intended to settle the disputes existing between the two sections of the Cherokees, and it provided a formula for determining the value of the interest of the Western Cherokees in the lands east and west of the Mississippi and in the funds of the Nation, which interest of the Western Cherokees was expressly recognized by the fourth Article of the treaty. That article also defined the Western Cherokees as "all those Cherokees west of the Mississippi, who emigrated prior to the treaty of 1835," and Articles 4 and 5 required that the amount ascertained to be due Western Cherokees be distributed per capita to "each individual of said party of 'Old Settlers' or Western Cherokees." Incidentally, the Congress appropriated money to pay the Western Cherokees the value of said interest found to be due them.

The above is sufficient to show that throughout the long and troubled history of the Cherokee Indians the Government and the Indians themselves recognized the Western Cherokees as a well defined division of the Cherokee tribe, namely, "those Cherokees west of the Mississippi

who emigrated prior to the treaty of 1835." Whether they can be otherwise identified does not appear important at this time because the definition will serve to distinguish the Western Cherokees from the other members of the Cherokee tribe.

The related question for determination is the character of the claim here presented. We decided in the Loyal Creek case, Docket No. 1, on May 6, 1949:

"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."

and that identifiability was not in itself sufficient to permit the prosecution of a group claim unless such a claim is one common to the group and not simply a common suit for individual claims. Fortunately, all questions as to the character of the claim and the capacity in which the claimants come before this Commission have been set at rest by the Court of Claims and the Supreme Court in the Old Settler case, 27 C. Cls. 1, 148 U.S. 427. That case was filed in the Court of Claims under a jurisdictional Act reading, in so far as pertinent, as follows:

"That the claim of that part of the Cherokee Indians known as the Old Settlers or Western Cherokees is referred to court of claims * * to determine what sum or sums of money, if any, are justly due from the United States to said Indians, arising from or growing out of treaty stipulations and acts of Congress relating thereto, * * *."

It will be seen that the "Cherokee Indians known as the Old Settlers or Western Cherokees" were authorized to sue, however, the

suit was brought by three persons "for themselves and as Commissioners of the Western Cherokees" and they alleged that the claimants are the remaining part of those Cherokee Indians who formed and composed the Western Cherokee Nation. Both courts decided that the Western Cherokees, as such, had no legal capacity to sue but that the members of the Cherokee Nation known as the Western Cherokees had a common claim which could be prosecuted by their representatives, and judgment was accordingly rendered and the amount of the award was ordered paid out to "each individual of the claimants entitled to participate in said per capita fund." 27 C. Cls. 1, 61; approved by the Supreme Court, 148 U.S. 427, 480-1.

The effect of the decisions by the Court of Claims and the Supreme Court in the Old Settlers case, 27 C. Cls. 1, 148 U.S. 427, above referred to, was to permit a suit in a representative capacity by an identifiable group of Indians, part of a tribe, having a common claim, for the benefit of the members of the group, or their descendants, even though (as the Supreme Court said at page 479 of its opinion) "The 'Old Settlers', or Western Cherokees, are not a body politic, nor have they a corporate existence, nor any capacity to act collectively." In that case it was necessary to apply the equity rule permitting class suits.

It would seem that if the equity rule applies to suits to enforce a claim such as that adjudicated in the Old Settlers case, supra, there can be no question about the right of the named individual plaintiffs to prosecute their claim in view of Section 10 of the Indian Claims Commission Act (25 U.S.C.A. 701), which expressly provides for representative suits upon

behalf of an identifiable group of American Indians, unless limited by the provision respecting tribal organizations hereafter to be considered.

Counsel for defendant further contend, as they did in the Loyal Creek case, Docket No. 1, that an identifiable group must be of a political character. We decided in that case that an identifiable group need not be political in character and we believe our decision in that case applies to the question here advanced.

Our conclusion is, therefore, that the Western Cherokees is an identifiable group of American Indians under Section 2 of the Indian Claims Commission Act.

The defendant also contends that the instant claim cannot be prosecuted by the Western Cherokees because they are members of the Cherokee Nation or tribe which has a tribal organization recognized by the Secretary of the Interior as having authority to represent all its members, which includes the Western Cherokees, and therefore has, under the statute, the exclusive privilege of representing the Western Cherokees. For the purpose of this discussion we will assume that the Cherokee Nation has a tribal organization which is recognized by the Secretary as having authority to represent that tribe in its dealings with the United States in all tribal matters. The defendant does not claim that the Western Cherokees are organized, in fact it seems to be conceded by both parties that they are not.

Having decided that the Western Cherokees are an "identifiable group of American Indians" the question arises as to how the claim must be presented,

that is, (1) in the name of the Western Cherokees, (2) by members or descendants of members of that group, or (3) by the Cherokee Nation of Indians.

We have already determined that the Western Cherokees have no capacity to act collectively in that name, so further space will not be devoted to that question.

Section 10 of the Act reads as follows:

"Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."

The obvious purpose of this section was to provide a procedure for submitting the claims of the Indian groups, namely, tribes, band, or other identifiable groups, who, by Section 2 of the Act, are authorized to present claims against the United States and have them adjudicated by the Commission. Two methods are provided. By the first, a member of the claimant group may present the claim as the representative of all the members of the group. It would seem that a member of a claimant group may also present a claim when an organized group (which will be discussed later) fails to do so because of fraud, collusion or laches.

The second method provided by said Section 10 applies to cases where a tribal organization exists, and in such cases it is provided that if such

tribal organization is recognized by the Secretary of the Interior as having authority to represent the claimant "such organization shall be accorded the exclusive authority to represent" the claimant. It is the application of this part of the section that presents the difficult problem and which the defendant insists requires the claim to be presented by the Cherokee Nation instead of representatives of the Western Cherokees.

It will be noticed that the statute refers to "tribal organization" as being accorded the exclusive privilege of representing the claimant, be it a tribe, band, or identifiable group. Identifiable groups are rarely, if ever, organized like a tribe or band, which are generally of a political character, in fact no organization of an identifiable group has been brought to our attention, except organizations formed for the purpose of presenting claims, but we are not aware of any case where such an organization has been recognized by the Secretary of the Interior, and it can hardly be said that an organization created for the purpose of presenting a claim is a "tribal organization" as that term is generally understood. So, it would appear that what Congress had in mind was to give "tribal organizations" the exclusive right to present tribal claims of the tribe or band it is organized to represent. Considered in this sense there would be a sound and logical reason for according the tribal organization the exclusive privilege of pressing its claim rather than permitting a member of the claimant group to do so, for it would be the orderly and representative way to handle claims of an organized tribe, band or identifiable group, and, as we have stated above, it is to such claims the provisions we are considering apply. But the fact that a

tribal organization shall have the exclusive privilege (in the absence of fraud, collusion and laches) to present tribal claims does not lead to the conclusion that the provision was intended to give the tribal organization the exclusive right to present a claim of an unorganized identifiable group composed of a segment of the members of an organized tribe. Identifiable groups (as we indicated in the Loyal Creek Case, Docket No. 1) are not organized as are tribes or bands, but may have collective rights which are enforceable, if they can be established, by a representative suit under the express provisions of the first part of Section 10; we find nothing in the subsequent provisions of the section that changes the right to submit claims through the medium of members of the unorganized group. The statute authorizes submission of claims by such groups (Sec. 2) by a member thereof (Sec. 10) and through attorneys retained to represent its interests (Sec. 15); language much more definite than that used would be necessary to convince us that the Congress intended that only a tribal organization may represent an identifiable group within a tribe and thus control the handling of a claim which neither it nor its full membership have an interest in.

Another objection to the claim being presented by representatives of the Western Cherokees was made by the Government on the ground, as we understand the argument, that the Western Cherokees lost their autonomy by uniting with all the other elements of the Cherokee Nation in the treaty of 1846, and, as a consequence, lost their right to present their claim except through or by the Cherokee Nation. Our determination that the Western Cherokees

are an identifiable group and entitled to submit a claim through a member or descendant of a member, acting in a representative capacity, would seem sufficient answer to the objection.

For the reasons set forth above, the defendant's motion will be overruled.

Chief Commissioner Witt and Commissioner Holt concur in the above opinion.

September 13, 1949