

BEFORE THE INDIAN CLAIMS COMMISSION

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| OTTAWA-CHIPPEWA TRIBE OF MICHIGAN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Docket No. 364 |
| |) | |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |

Decided: February 14, 1974

Appearances:

Rodney J. Edwards, Attorney for Plaintiff. James R. Fitzharris was on the brief.

Roberta Swartzendruber, with whom was Mr. Assistant Attorney General Wallace H. Johnson, Attorney for Defendant.

OPINION OF THE COMMISSION

PER CURIAM:

On May 9, 1973, we entered findings of fact in this case and issued two orders to show cause. 30 Ind. Cl. Comm. 288. The first order was directed to the representatives and attorneys of the Ottawa and Chippewa Indians of Michigan who were plaintiffs in Docket 58. It ordered them to show cause, if any they had, why they should not be instructed to assume prosecution of this case. They did not respond at all; and on July 11 the Commission ordered them to assume the prosecution.

The second order was directed to the Government, ordering it to show cause on or before June 4, 1973, why a certain General Accounting Office report, at the time on file under Docket 18-E, should not be placed in the file of this case, to constitute, insofar as relevant, a part of the defendant's answer herein. On May 31, the Government filed a document entitled "Renewed Motion to Dismiss for Lack of Prosecution." This was the Government's only response; it has not otherwise shown cause why the accounting report in question should not be refiled under the instant docket number.

The new attorneys for the plaintiff, directed to assume prosecution by our order of July 11, have appeared and filed a memorandum in opposition to the renewed motion to dismiss. Their memorandum states that Robert Dominic and Waunetta Dominic, two of the tribal representatives in Docket 58, accept substitution for the deceased tribal representative in this docket and are prepared to and will proceed with the prosecution herein.

Two previous motions to dismiss, filed by the defendant on June 29, 1962, and March 11, 1968, respectively, remain undisposed of, as does a motion for more definite statement or for summary judgment which the defendant filed on March 22, 1961. The Commission considers these motions stale and will deny them to clear the record.

The Renewed Motion to Dismiss for Lack of Prosecution is now before us for disposition.

The defendant states, correctly, that eleven years have passed since the original attorney for the plaintiff filed anything in this case. Defendant cites section 27(b) of the Indian Claims Commission Act, 25 U.S.C. §70v-1(b) (Supp. II, 1973), as an expression of congressional policy that pending claims are to be concluded expeditiously.

Eleven years is indeed an inordinate delay. But length of time by itself is not a sufficient ground for dismissing an action for failure to prosecute; the question must be determined by all the facts and circumstances of the case. 24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit §59 at 51 (1966). The amendment of §27(b) of the Indian Claims Commission Act by the act of March 30, 1972, Public Law 92-265, 86 Stat. 114, removes the former mandatory aspect of the section. As the annotation in 80 ALR 2d 1399, 1402 states:

Except where a dismissal is required after a certain time by statute, the dismissal of an action for failure to prosecute is generally regarded as within the discretion of the court and will be reversed only where an abuse of discretion is found.

The unique combination of facts in this case incline our discretion toward not dismissing.

The Ottawa-Chippewa Tribe of Michigan is a long-defunct organization. Although descendants of its members survive, its corporate existence was terminated by Article 5 of the Treaty of July 31, 1855, 11 Stat. 625. In such a situation, section 10 of the Indian Claims Commission Act (25

U.S.C. §70i) empowered any of the tribe's surviving members, or their descendants as members of an identifiable group of Indians, to present the claim. In effect, this left selection of the attorneys to self-appointed individuals, who frequently were of limited education and ignorant of legal proceedings. Such a situation, coupled with the lack of tribal organization which brought it about, militated against effective supervision of the lawyers, once chosen, even when the tribal representative survived.

In the instant case, the representative died and, for that reason, the attorney was unable to get her contract renewed after it expired on August 16, 1961. Plaintiff's failure to prosecute the case after that date resulted not from unwillingness, but from inability to act.

Most of the delay between the date of filing of the original petition and the date of expiration of the attorney contract was the defendant's responsibility. The petition, calling for an accounting, was filed on August 13, 1951. The General Accounting Office completed its accounting report on March 21, 1952. But the defendant did not serve this report on the plaintiff until February 17, 1961.

This is the accounting report referred to in our second order to show cause of May 9, 1973. The defendant has never filed it with the Commission under the instant docket number.

When nothing had been heard from the plaintiff in several years, the Commission, by order of July 7, 1971, referred this case to the Investigation Division, which discovered, by examining the files, that

the real Indian party in interest in this case and in Docket 58 is identical, and also discovered that the contract of the attorney in Docket 58 covered several claims asserted in this docket. Our findings and orders to show cause followed. 30 Ind. Cl. Comm. 288.

The defendant asserts that we cannot assign claims to "plaintiffs who are no longer before the Commission," referring to our directive to the tribal representative in Docket 58 to take over prosecution of this docket.

The short answer is, a tribal representative is not a plaintiff. The Ottawa-Chippewa Tribe of Michigan, plaintiff in this docket, has never ceased to be before the Commission; its claim no more abated at the death of the old representative than the claim of a corporation in an ordinary court would abate at the death of the corporate officer who verified the complaint. As the Court of Claims stated in Snoqualmie Tribe v. United States, 178 Ct. Cl. 570, 581-82, 372 F.2d 951, 957 (1967):

. . . Where there is no existing tribal organization, a claim "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 of its members." This language has been given the meaning that a showing that there exist some living members or descendants of members of an "identifiable group of Indians" will be a sufficient predicate for maintenance of a claim. Peoria Tribe of Indians v. United States, 169 Ct. Cl. 1009, 1012-1013 (1965); Spokane Tribe of Indians v. United States, 163 Ct. Cl. 58, 72 (1963); Minnesota Chippewa Tribe v. United States, 161 Ct. Cl. 258, 270-271, 315 F.2d 906, 913-914 (1963).

Two points should be noted in this connection. The first is that a person may be a "member" of an Indian tribe even though the tribe no longer has an organization. In this sense tribal membership might be considered to be ethnic and hereditary, not political. The second is that claims brought by descendants must be representative. Awards are for all members of the group and not to be shared only by successful descendant-claimants. "How the award is to be paid and precisely who can participate * * * are questions for Congressional and administrative determination." Peoria Tribe of Indians v. United States, supra, at 1011-1012.

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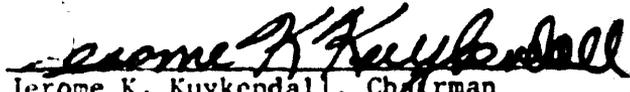
. . . We realize our theory of representation may present certain conceptual difficulties, and that it is a different tack from that adopted by the Commission members and argued by the parties. The theory recognizes that it is possible to be a "member" of two tribes--or perhaps even more, for purposes of presenting claims and participating in judgments. Perhaps this is not a result dictated on the face of the statute. It is **really** neutral on the matter. However, it is a result consistent with the statute, and its purpose. See generally H. Rep. No. 1466, 79th Cong., 2d Sess., U.S. Code Cong. Serv. 1347-1359 (1946). The Act creating the Indian Claims Commission was "primarily designed to right a continuing wrong to our Indian citizens * * *." Ibid., at 1347. [Emphasis in original, footnote omitted].

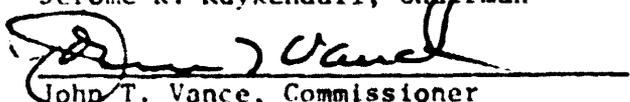
The Ottawa-Chippewa Tribe of Michigan is an identifiable group of Indians having living descendants and a right to prosecute its claims before this Commission. Red Lake Band v. United States, Docket 18-E et al., 7 Ind. Cl. Comm. 576 (1959). Two of the descendants are now before the Commission in this docket. That they arrived here at the suggestion of the Commission rather than on their own initiative is immaterial. They are now ready, willing, and able to prosecute this case. For us to deny them the opportunity to do so under the unique circumstances of this case would, we believe, violate the remedial purpose of the Indian Claims Commission Act.

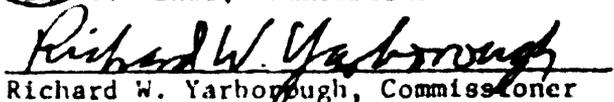
The defendant's Renewed Motion to Dismiss for Lack of Prosecution will be denied.

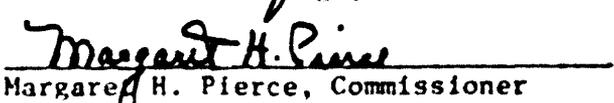
The defendant having failed to show cause to the contrary, the GAO report of March 21, 1952, will be filed under this docket number. The plaintiff shall have until the close of business on April 1, 1974, to file exceptions thereto. The defendant will have until and including May 1 to answer the exceptions. The schedule of further proceedings is given in the accompanying order.

The exceptions and the answer thereto should be accompanied by appropriate motions for summary judgment, so that all questions in connection with the accounting upon which there is no genuine issue of material fact may be disposed of in advance of trial.


 Jerome K. Kuykendall, Chairman


 John T. Vance, Commissioner


 Richard W. Yarborough, Commissioner


 Margaret H. Pierce, Commissioner


 Brantley Blue, Commissioner