

*Plucking file
filed 7-25-57*

BEFORE THE INDIAN CLAIMS COMMISSION

CLYDE F. THOMPSON, et al.,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 31

and

ERNEST RISLING, et al.,)
)
 Petitioners,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 37

THE PIT RIVER INDIANS)
 OF CALIFORNIA,)
)
 Petitioner,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)

Docket No. 347

and)
 Dockets No. 80, 87, 88, 100,)
 176, 215, 283, 288, 295, 319,)
 330, 333, and 351.)

RESPONSE OF PETITIONERS IN DOCKETS 31 AND 37 TO
MEMORANDUM OF THE PIT RIVER INDIANS ON THE
RIGHT TO ASSERT TRIBAL CLAIMS

The Pit River Tribe, by its counsel, has submitted a number of contentions. Prior briefs of Dockets 31 and 37 have treated them. We confine our present Memorandum to a

few limited points, to avoid unnecessary duplication.

1. The first contention considered is a challenge as to representation of the Indians in the Pit River area in California. Pit River Tribe, in effect, contends that the individuals named as representatives of the Indians of California are asserting a right to represent the Pit River Tribe. This contention is not correct factually or legally.

Factually, not one of the individuals named as representing the Indians of California, nor counsel for the Indians of California, at any time asserts a right to represent the Pit River Tribe.

Legally, the Pit River memorandum, by its own statement of the law of representation, destroys its contention, thus:

"As in the case of any representative suit, the representative must fairly represent all the members of the class, the class itself must in truth constitute a class in that it has unity of interest and is of such a nature that a single set of representatives can adequately represent all the members."

The individual Indians named as representatives of the Indians of California were officially enrolled by the United States (Exs. GMB 11 and 12, R. 3377-8, Dkts. 31 and 37) as members of that statutory group of Indians, described by the Court of Claims as "a distinct entity" in

connection with the duties of this Commission to give notice to tribes and bands. (122 C. Cls. 348, 361). They represent, therefore, 36,095 descendants of ancestors resident in California on June 1, 1852. (Ex. CDW-1, R. 1647, Dkts. 31 and 37). The petitioning individuals, therefore, represent all officially enrolled Indians of California regardless of what tribe or tribelet their respective ancestors were members. They do not claim to represent the tribe of any ancestor nor any existing tribe or its members as such. That the Indians of California are properly and adequately represented is considered in former briefs. That its enrolled members have unity of interest is attested by the per capita payments which have been made.

It is also conclusively established by the Court of Claims (98 C. Cls. 583) that promises made to existing tribelets and groups who entered into 18 unratified treaties were held to be equitable claims of the Indians of California and not claims of the tribal groups named in the unratified treaties, and the Court awarded judgment therefor, under the Act of 1928, to the Indians of California.

In this connection, it should be noted that to make certain that no descendant of 1852 California resident Indians would be missed in enrollment, the Act of 1928 was several times amended. The descendant requirement for registration, however, was not changed. (See these provisions in

proposed finding No. 5 of Dockets 31 and 37). It took the United States, by the exercise of this care, 27 years to complete the enrollment, namely, to June 30, 1955. (See Ex. CDW-1, above and R. 1647). There is no evidence in any record in any California case before the Commission which shows that the Government failed or refused to enroll every Indian it could locate and who could show California ancestry.

2. The second contention of the Pit River Tribe reads: "Theirs is a tribal claim and they have always wanted it presented as such." The question to which the Commission sought an answer by its recent order was not what the tribe wanted done by its counsel, but whether the tribe had proved a tribal claim and is entitled to recover. Has the tribe proven such a claim? That must be determined by the testimony the tribe submitted. Did the United States take any land which the Pit River Tribe owned or possessed at the time of the taking? As pointed out in the response of Dockets 31 and 37 to the motion of the Pit River Tribe to amend its petition, this taking by the United States ended with the Act of March 3, 1853. The only testimony as to the formation or the beginning of the present Pit River Tribe is that of Dr. Omer C. Stewart. He fixed the time as 1857, after the establishment of Fort Crook. (This evidence is found in the Pit River transcript, pp. 134-137, 248, 257-8, and 357-8). A good part of this examination was by Chief Commissioner

Witt. At p. 248, Dr. Stewart fixes the tribal organization as 1857, based on the report of the first U. S. Indian Agent to the Pit River area.

Dr. Stewart testified that the actual owners of the Pit River area were the 11 existing bands in that area prior to formation of the Pit River tribal government, and it follows, consequently, that these bands were the land owners of the Pit River area in 1853.

3. The Pit River brief contends that the Indians of California "are not and never have been a juristic entity". (p. 5). Based on this the brief then concludes: "To characterize Messrs. Thompson and Risling, et al., directly, as The Indians of California is to confer upon them a dignity which is not theirs." The Indians of California, as hereinbefore stated, was held superior in "dignity" to the bands and groups or entities which became parties to the 18 unratified treaties, and promises made to these treaty entities became the basis of an award to the Indians of California (98 C. Cls. 583).

Since, however, Dockets 31 and 37 have not designated the Indians of California as a juristic entity, but as a statutory entity, the Pit River brief later therein (p. 18) states positively that the "Act of 1928 Did Not Create a Statutory Legal Entity", the Court of Claims (98 C. Cls. 583, 588, 597) to the contrary notwithstanding.

The 1928 Act by its first section designates the group of Indians in question as "The Indians of California", and then defines the composition of the Indians of California. Dockets 31 and 37 are more interested in having the Commission determine who is entitled to recover for the Pit River area than in establishing the "dignity" of the name used to describe the first petitioners to claim this area before the Commission. However, if an Act of Congress and the aforesaid award of the Court of Claims are not sufficient dignity we have no quarrel coming!

In its proposed findings (Nos. 2,3,4 and 5 of Dockets 31 and 37) we recite the Acts of Congress relative to the creation and defining of the Indians of California, and ask the Commission to find that it is an identifiable group of American Indians acting under specific statutory powers and having a claim against the United States.

In its first brief (p. 5) Dockets 31 and 37 refer to the creation by statute of a group designated therein as "The Indians of California" and that "the statutory group so created is a legal statutory entity" for the clearly defined purposes set out therein. This is followed by another paragraph wherein it is pointed out that the "Indians of California has been" adjudicated to be "an identifiable group of American Indians" within the intendment of the Indian Claims Commission Act.

The Pit River memo rather sarcastically asks if this "entity born in 1928 was intended to continue existence forever". The answer is that it was intended to exist until the purpose of its creation and continuance by amendments are carried into full effect and that the latest interpretation thereof is the provisions of the Act of August 4, 1955, (69 Stat. 640), which appropriated funds deposited in the Treasury of the United States to the Indians of California, using the following language: "from funds to the credit of the Indians of California as defined and enrolled under the Act of May 18, 1928 (45 Stat. 602), as amended, the successors in interest to claims against the United States as therein provided."

4. A. The brief of Docket No. 319 devotes some pages to the consideration of what are termed the limitations of the Act of 1928 (pp. 9-12). It first asserts that Dockets 31 and 37 disregard statutory rules of construction (p. 9). This is not a correct conclusion. Docket No. 319 fails to realize that the 1928 Act is remedial or relief legislation and should be construed only as such. Dockets 31 and 37, in their opening brief (pp. 40-44) give extensive citation of authorities as to rules of construction of remedial or relief statutes. The same rules of construction apply to the Indian Claims Commission Act.

The Pit River brief, however, considers the California Indian Case (122 C. Cls. 348) as that of individuals by designating it as the Thompson or the Risling case (pp. 9-10); this ignores essential factors thereof. It is not the Thompson or the Risling case, as Thompson and Risling are merely acting as enrolled representatives of the Indians of California. The statutory designation of the 1928 Act is "Indians of California". As hereinbefore set out the individual enrollees, named in petitions 31 and 37, are, under the Commission Act, representatives of all the enrollees, regardless of the tribe of any ancestor. This meets the requirement set out in the Pit River brief.

The Court of Claims opinion comprises much more than the Pit River brief contends. The suit of Dockets 31 and 37 is against the United States and the government, in its certiorari proceedings, which the Supreme Court denied, set out as two questions whether the Indian Claims Commission Act "confers jurisdiction to hear a suit by the Indians of California which by its own definition is an aggregation of unrelated individuals and does not represent the tribes and bands in California which owned the lands and tidelands claimed ..." (see footnote 3, reply brief). The denial of certiorari with this question before the Supreme Court destroys the contention of the Pit River Tribe as to suit by individuals and also its views that the existence of bands and tribes affects the rights vested by the Act of

1928 in the Indians of California.

The Pit River brief also ignores the statement of the Court of Claims, viz.:

"The decision of the Commission was based upon the view that at the time the claims ... arose, ... there existed in California various groups ... commonly known as tribes, nations, bands, rancherias, and villages, and that each such group of Indians used and occupied a definite area of land in the State of California, and that ... the claim in order to come within the jurisdiction of the Commission would have to be presented by a petition by or on behalf of each such tribe or band. In our opinion this interpretation of the language and intention of the jurisdictional provision of Secs. 2 and 10 of the Act is too restrictive." (122 C. Cls. 348, 355-6)

The Pit River brief then gratuitously states that the Court of Claims did not have the benefit of the true situation with respect to the Indians of California (p. 11). The Court of Claims had the record and the official reports as to the conditions in California before it. The Pit River brief records no review of this data by its counsel as a basis for this statement and presents no testimony which changes the conclusions of the Court.

The Pit River brief then draws this conclusion of what the Court intended in that case, namely: "... the Court held that suit [meaning Dockets 31 and 37] could be filed on behalf of tribes or bands that had ceased to exist" (p. 11), and then added that the Court did not have before

it that in California there were tribes that continued to exist and retained their identity and that the Pit River Indians are such a tribe. (p. 12). There are two answers to this contention:

(1) The Pit River Tribe may continue to exist, but was that tribe in existence and in possession as a tribe of the lands claimed when the lands were taken in a process which ended with the Act of March 3, 1853, as previously set out herein and in our reply brief (pp.91-93).

(2) The Court of Claims in its findings of fact (No. 3) in 1942 expressly found that the Indians of California and not tribes and bands were entitled to recover as to claims asserted under the 1928 Act. (98 C. Cls. 583, 585) This harmonizes with the conclusions of the Court of Claims in the Thompson case (122 C. Cls. 348, 356) which are contrary to the conclusions of the Pit River brief. The conclusions of the Court in that case were based on the case record and exhibits, including the testimony of Dr. Merriam (Def. Ex. 13) and the report of the Senate Indian Committee as to the 1928 Act, both of which report the dispersal and destruction of Indians and the consequent general lack of Indian organizations to sue. The Act of 1928 was intended to be for the common benefit of all the Indians of California, as the best and fairest and most available method to permit all land claims to be presented and litigated.

B. The Pit River brief (pp. 11-12) seeks to change the nature of the 1928 Act. The first step is to cite the Tee-Hit-Ton case. The Tee-Hit-Ton case does not relate to Secs. 2 or 10 of the Commission Act. It was brought in the Court of Claims under a procedure which requires proof of legal claims.

The Pit River brief cites "Webb v. United States, 98 C. Cls. 583", which case is by the Court entitled "The Indians of California, claimants". Pit River states that this case decided a moral claim created by the 1928 Act (p. 11). What the Pit River brief does not state is that the claim asserted in that case is part of the claim which the Indians of California entity is authorized by the Act of 1928 to assert; and that, as hereinbefore stated, it relates to compensation for promises made to existing bands who entered into unratified treaties. The Court held that the existing bands could not recover and that the real plaintiff under the 1928 Act was the Indians of California. The award for promises to existing bands and groups was granted to the Indians of California. Under the Pit River contention the descendants of members of said existing bands alone should have been awarded judgment, which the Court denies.

It should be noted that the contention of the Pit River Tribe is that a surviving tribe is entitled to assert claims against the United States whether that tribe was in

actual existence and in actual tribal possession of the lands claimed or not at the time of the taking. What Dockets 31 and 37 contend is that the Acts of 1928 and 1946 are in pari materia and must be construed together and that is what the Court of Claims established was the only conclusion to draw.

C. The Pit River brief contends that the Act of 1928 is repealed by the Commission Act. Its theory is that the Commission Act is much broader in scope than the 1928 Act, but it cites no authority for the repeal of a relief or remedial Act on this basis alone. What the Pit River brief overlooks is that the Commission Act is intended to embrace Indian claims of this very nature, and that past jurisdictional Acts were reviewed by the Committees of Congress to obtain classifications which would cover all Indian claims. The House Report states:

"Accordingly, your committee has thought it wise to be most explicit in setting out all of the classes of cases -- even though they may be mutually overlapping -- which have heretofore received Congressional consideration in the form of special jurisdictional acts." (H. Rept. No. 1466, 79th Cong., 1st sess., at p. 10).

The Act of 1928 certainly describes the lands and interests taken from the Indians of California, and authorizes the Indians of California to sue the United States therefor.

It should also be noted that under the fair and honorable dealings provisions of the Act all transactions

are considered, even failures of the United States to protect the interests or land holdings of the Indians. To this end former jurisdictional Acts are in effect recognized by the Commission Act, as it provides (Sec. 25) for the repeal of any inconsistent provisions to the extent of such inconsistency, to permit the claims formerly described or recognized in former jurisdictional Acts to be litigated. The former jurisdictional Acts were certainly not repealed by such a limited provision.

D. Pit River contends that claims based on the 1928 Act may not be brought before the Commission. This is utterly inconsistent with the provision for repeal of former jurisdictional Acts as to any inconsistent provisions to the extent of the inconsistency, as set out herein under above Section (C).

E. The Pit River brief (pp. 18-19) also contends that the Indians of California are not a statutory or legal entity. This has been already fully covered herein.

F. The Pit River brief contends that the 1928 Act did not merge the claims of California tribes. With possibly rare exceptions, the tribes who formerly possessed California lands exclusively at the time of the taking or prior thereto were no longer in existence in 1928. Furthermore, if, by any chance, any tribe was in existence and possession in 1928, it would have been unfair to confine suit

to that tribe and deny relief to all the rest. The 1928 Act, therefore, provided for a common suit for a common claim for all California lands taken from all of them, for the benefit of all of them. The Act speaks for itself and the Committee reports sustain this conclusion.

The Committees of Congress, in recommending the 1928 Act, reported in part as follows: H. Rept. 951, 70th Cong., 1st sess., at p. 1 states -- "Your committee has gone into the subject matter of this bill in considerable detail, it being first considered by a subcommittee and upon two different occasions by the full committee." (See Pets. Ex. No. 4). The Senate Committee in its Report No. 1055, at the same session, states:

"... Following the discovery of gold in 1848 there was a rush of gold seekers to California. It is estimated that within three years more than 150,000 persons went into that State. The Indian's rights to his possessions were disregarded. He was constantly compelled to retreat before the aggressions of the white man. In a few years the Indian population became mostly homeless and vagrant."

"The rights of the Indians to their lands in California had been guaranteed by the treaty of the United States with Mexico. Congress had also passed certain statutory enactments for the protection of Indian titles ...

"These laws were all disregarded as to the California Indians." (p. 2)

"This bill is a belated but commendable attempt to rectify in part the injustice that was done the California Indians." (p. 3, - Pets. Ex. No. 3)

The first citation of Pit River to sustain its 1928 Act view is again the newly-dubbed Webb v. United States case. The quotation therefrom (p. 20) is unique. Of course that case did not involve payment for Indian lands. The suit was solely for reservation areas promised the Indian tribes or other groups in the unratified treaties and other relief therein promised. This case, on the contrary, sustains the merger of all claims in the Court's finding of fact No. 3, which reads:

"3. The plaintiffs, herein designated as The Indians of California, comprise all those Indians of the various tribes, bands and rancherias who were living in the State of California on June 1, 1852, and their descendants living in the state on May 18, 1928 -- such definition and designation having been prescribed in the Jurisdictional Act." (98 C. Cls. 583, 585)

G. Pit River again tries to designate the claims of the Indians of California as individual claims, because Indians are named in a representative capacity. The Pit River brief asserts, in effect, (pp. 22-23) that claims under the Commission Act "are tribal". The Act speaks for itself. It authorizes suits by "identifiable groups" which certainly does not mean tribal, and the Indians of California, an adjudicated identifiable group, never at any time performed tribal functions. Certainly Dockets 31 and 37 never contended that individual Indians could sue under the Commission. This is simply another Pit River smoke screen!

H. The Pit River brief presents a new contention

in its assertion that the Indians of California do not fully and fairly represent the interests of the Pit River Indians because of conflicts of interest (pp. 24-27). The Indians of California do not claim to represent the interests of the Pit River Indians as such. The only interests that it or its named representatives claim to or do represent are the interests of the Indians of California. If the Pit River Indians so-called as descendants of resident Indians of California on June 1, 1852, are enrolled as Indians of California, then the individuals named as representing the Indians of California also represent such enrollees and these enrollees are entitled to share in any award for any or all lands in California for which recovery may be awarded. If the Indians in the Pit River area, after 1853, the final date of taking, have organized a Pit River Tribe, then that tribe is in the same situation as the Yuchi band of the Creek Nation which sought to assert a separate band claim for lands in a common land area. This claim was denied by the Commission (3 Ind. Cl. Com. 524); denial was sustained by the Court of Claims on appeal (145 Fed. Supp. 206) and certiorari was denied by the Supreme Court February 25, 1957.

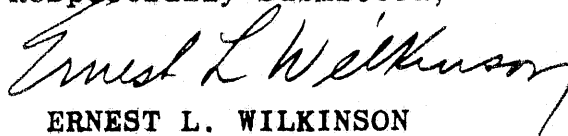
CONCLUSION

The contentions of the Pit River Tribe are not well founded. Congress has directed the Indians of California, as a statutory group, to assert the claims involved.

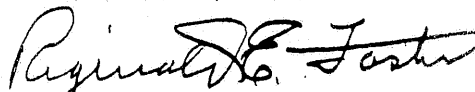
No exception is made as to the Pit River Tribe. As stated by the Court of Claims (122 C. Cls. 348, 361):

" . . . We hold, therefore, that the claim or claims presented by the amended petition are within the jurisdiction of the Commission to hear and determine . . ." (Emphasis supplied)

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 25 day of July, 1957, copies of the foregoing response of petitioners in Dockets 31 and 37 to memorandum of the Pit River Indians on the right to assert tribal claims were mailed to each of the following attorneys, postage prepaid:

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