American Indian Law Review

Volume 11 | Number 2

1-1-1983

# Judgements: "Brothers" Fighting Over Indian Money: The Right of Seminole Freedmen to a Portion of the Indian Claims Commission Judgement Fund

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# NOTES

## JUDGMENTS: "BROTHERS" FIGHTING OVER INDIAN MONEY: THE RIGHT OF SEMINOLE FREEDMEN TO A PORTION OF THE INDIAN CLAIMS COMMISSION JUDGMENT FUND

*Aaron R. Brown*

Andrew Crocket rested his lanky, overall-clad frame on a quilted-covered couch, entwined his long fingers and shook his head in dismay.

"When we all started out, we started out as brothers. We fought together as brothers. Our blood ran together the same. When we settled we were still brothers. We were brothers until this money came up and then they went to pulling away."

The "brothers" Crocket refers to are the Seminole Indians, a group whose history dates back to Spanish Florida and the American Revolution with some 800 unique people, who like Crocket, are black.

They call themselves Seminole Indian Freedmen, a name taken from a treaty signed in 1866 declaring them free and voting members of the Seminole tribe. But they contend they were free and tribal participants long before the U.S. Government said so.

What has saddened Crocket and his people, as well as some Seminoles, was a 1976 federal government decision excluding the freedmen from a $16 million judgment awarded to Oklahoma and Florida Seminole tribes as payment for Florida lands.

The judgment—from the Indian Claims Commission—was quickly followed by a direction from the Department of Interior that 75 percent of the money would go to the Oklahoma Seminoles, 25 percent to Florida tribes and none to the freedmen because they were slaves.[1]

On April 27, 1976, the Indian Claims Commission approved a settlement of Seminole Indian claims as compensation for aboriginal lands taken by the United States under provisions of the Treaty of Camp Moultrie[2] and entered a final award, in consolidated dockets 73 and 151, in the amount of $16 million on

1. Daily Oklahoman, Oct. 6, 1980, at 1.

2. Treaty of Camp Moultrie, Sept. 18, 1823, United States-Florida Tribes, 7 Stat. 224, 2 C. KAPPLER, INDIAN AFFAIRS, LAWS, AND TREATIES 203 (1904).

behalf of the "Seminole Nation as it existed in Florida on September 18, 1823."[3] This settlement and award gives rise to the question of whether the Seminole freedmen can be considered a part of the Seminole Nation as early as that September, 1823 date in order to qualify for distribution of the above specified funds. In order to illuminate the rights of the freedmen to a portion of these funds in settlement of the land in Florida taken by the United States, this note will discuss the Indian Claims Commission and its jurisdiction, various acts of Congress as they bear on the question of who is to be considered an Indian, the March 21, 1866 treaty with the Seminole Indians, the historical background of the Seminole land rights in Florida, and the social and legal position of the Seminole freedmen today.

*The Indian Claims Commission: Description and Jurisdiction*

The Indian Claims Commission was established in 1946 to enable tribes to pursue treaty-based claims against the federal government.[4] Before that time, the Court of Claims was expressly prohibited by law from entertaining suits based on treaties.[5] Thus it was necessary for Congress to pass special acts granting the Court of Claims jurisdiction to adjudicate tribal claims on a case-by-case basis. Dissatisfaction with this basis of jurisdiction led to enactment of more comprehensive legislation in the form of the Indian Claims Commission Act establishing the Indian Claims Commission as a more permanent forum for hearing and deciding claims.[6]

Suits authorized under the Act included all those claims over which the Court of Claims then had jurisdiction for non-Indian claimants, as well as those cases in law or equity arising under the Constitution, laws, and treaties of the United States, or under executive orders of the President. In addition, the Commission was granted jurisdiction over claims arising from takings by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment of compensation agreed to by the claimant.[7]

3. Seminole Indians of Florida & Seminole Nation of Oklahoma v. Unites States, 38 Ind. Cl. Comm. 91, Nos. 73, 151, consol. (May 8, 1964), *aff'd* (June 9, 1967), final award remanded (Feb. 18, 1972).

4. Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified as amended at 25 U.S.C. §§ 70-70v-2 (1976). Note: These sections are omitted from the current Code because of the termination of the Indian Claims Commission on Sept. 30, 1978.

5. Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767.

6. Act of Aug. 13, 1946, *supra* note 4, at 1049.

7. 25 U.S.C.A. § 70a (1978).

All claims accruing before August 13, 1946, were included within the jurisdiction of the Commission.[8] Indian tribes were given until August 13, 1951 to file their claims with the Commission.[9] This grant of authority was extended until September 30, 1978, at which time the unfinished work was transferred to the Court of Claims for completion.[10]

After the Indian Claims Commission Act was passed in 1946, the Bureau of Indian Affairs decided that the Seminoles should present a claim for compensation for their lands in Florida. The suit was initiated by the superintendent of the Seminole Indian Agency, Kenneth A. Marmon.[11] Subsequently, on March 1, 1954, a petition entitled the "Buckskin Declaration" was presented to President Dwight D. Eisenhower that stated:

> Our history tells us that in the past treaties have been made with the Nations of Great Britain and Spain, recognizing and entitling us to vast portions of lands in what is now known as the State of Florida.
>
> When your Nation in 1821 made a treaty with the country of Spain you agreed to recognize our property rights in such of those lands that at that time were recognized by Spain. Subsequently your Nation made treaties with our independent Nation, all of which were dishonored by your Nation either by failure to act or by provoked wars.
>
> There has been filed before the Indian Claims Commission in your government, a claim to compensate our Tribe with money for lands taken from us by the United States Government in the past.[12]

Under the Indian Claims Commission Act, if the United States was held liable to a tribe, the amount of damages was based upon the value of the land at the time of its taking as determined through consideration of the location of the land, the sale price of similar lands, actual use, and disposition after the taking.[13] Interest generally was not recoverable,[14] unless extinguishment of tribal title was a result of a violation of the tribe's fifth amend-

8. *Id.*

9. 25 U.S.C. § 70k (1976).

10. 25 U.S.C. § 70v (1976).

11. This claim became known as Docket 73. Tullberg, *Seminole Land Rights in Florida*, 4 AM. INDIAN J. 2, 12 (1978).

12. *Id.* at 15.

13. Sioux Tribe v. United States, 146 F. Supp. 229, 238 (Ct. Cl. 1956).

14. United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951).

ment rights.[15] Under this exception, interest was to be awarded on the judgment from the date of the taking.[16]

The claim allowed by the Commission was offset by the appropriate deductions for previous payments made by the United States. However, the Act declared the policy of Congress to be that "money spent for the removal of the tribe from one place to another at the request of the United States shall not be a proper offset against any award."[17]

On April 27, 1976, the Indian Claims Commission approved a compromise settlement and entered a final award in the amount of $16 million "on behalf of the Seminole Nation as it existed in Florida on September 18, 1823."[18] Congress appropriated monies in satisfaction of the award and the judgment then became subject to preexisting use or distribution plans for award funds.[19]

Before October 19, 1973, the use or distribution of judgment funds was largely determined by special legislation enacted to approve tribal distribution plans for specific tribal claims awards.[20] Funds appropriated to satisfy tribal claims were distributed to tribal members on a per capita basis determined by the roll of tribal members entitled to share in the proceeds of the judgment,[21] or by a per capita distribution of a specified portion of the judgment award, with the balance credited to the tribe itself.[22]

However, on July 23, 1980 (legislative day, June 12), United States Senator Henry Bellmon (R-Oklahoma) introduced a bill that provided for the distribution of Seminole judgment funds among "blood members" of the Seminole Nation.[23] Although

15. *Id. See also* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 570 (1970).

16. ACKERMAN, *supra* note 15.

17. Act of Aug. 13, 1946, *supra* note 4, at 1050.

18. Seminole Indians of Florida & Seminole Nation of Oklahoma v. United States, 38 Ind. Cl. Comm. 91, Nos. 73, 151, consol. (May 8, 1964), *aff'd* (June 9, 1967), final award remanded (Feb. 18, 1972).

19. Act of June 1, 1976, 90 Stat. 597, based on guidelines set forth in the Act of July 22, 1969, Pub. L. No. 91-47, 83 Stat. 49, 62.

20. Act of Sept. 27, 1967, Pub. L. No. 90-93, §§ 4-5, 81 Stat. 229 (codified at 25 U.S.C. § 1141 (1976)).

21. *See, e.g.*, Act of July 17, 1959, Pub. L. No. 86-97, § 2, 73 Stat. 221, 222 (codified at 25 U.S.C. §§ 911, 912 (1976)) (Quapaw judgment); Act of Oct. 14, 1966, Pub. L. No. 89-659, § 4, 80 Stat. 909 (codified at 25 U.S.C. § 1114 (1976)) (Miami judgment).

22. Act of Oct. 27, 1972, Pub. L. No. 92-586, § 1, 86 Stat. 1295 (codified at 25 U.S.C. § 993 (1976)) (Osage judgment).

23. S. Res. 2952, 96th Cong., 2d Sess., 126 CONG. REC. 19208 (daily ed. July 23, 1980):

the bill seems noncontroversial on its face, by designating only members of the Seminole Tribe of Oklahoma who qualify to enroll as members by quantum of blood, it deliberately excludes the members of the Seminole Tribe on the freedmen roll who

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A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding any provision of the Act of October 19, 1973 (87 Stat. 466), or any other law, or any regulation or plan promulgated pursuant thereto, the funds appropriated by the Act of June 1, 1976 (90 Stat. 597), in satisfaction of a judgment awarded to the Seminole Indians in dockets numbered 73 and 151 before the Indian Claims Commission, shall be used and distributed as provided herein.

SEC. 2. The funds in dockets numbered 73 and 151, less attorney fees and litigation expenses, and including all interest and investment income accrued, shall be divided by the Secretary of the Interior (hereinafter in this Act referred to as the "Secretary") in terms of 75.404 per centum to the Seminole by blood members of the Seminole Nation of Oklahoma and 24.596 per centum to the Seminole Indians of Florida.

SEC. 3. After the division of the funds as provided above, the share of the Seminole by blood members of the Seminole Nation of Oklahoma shall be used and distributed as follows:

1. The roll of the Seminole by blood members of the Seminole Nation shall be brought current to the date of the enactment of this Act using criteria specified in the tribal constitution and procedures adopted by the tribal governing body and approved by the Secretary. Sixty-four per centum of the principal of the share shall be distributed in the form of per capita payments, in a sum as equal as possible, to all Seminole tribal members by blood who were born on or prior to and living on the date of the enactment of this Act.

2. Twenty per centum of the principal of the share shall be invested by the Secretary for the benefit of Seminole tribal members by blood and the use of the interest and investment income accrued shall be authorized by the tribal governing body on an annual budgetary basis, subject to the approval of the Secretary, for elementary, secondary, and higher education services; community development; health services; tribal executive operations; land acquisition and development; social services; and other tribal and community social and economic programs. Such 20 percentum portion of the principal shall not be available for per capita or dividend payments.

3. Sixteen per centum of the principal of the share, plus all interest and investment income accrued on the Oklahoma share of the judgment funds, and any amounts remaining after the per capita payment provided above, shall be invested by the Secretary for the benefit of Seminole tribal members by blood. The use of the interest and investment income accrued shall be authorized by the tribal governing body, subject to the approval of the Secretary, for periodic dividend payments to Seminole tribal members by blood.

4. In administering all programming elements of this section, the tribal governing body shall maintain a Standing Judgment Fund Committee comprised of Seminole tribal members by blood and representative of the twelve Oklahoma Seminole by blood bands. Such Committee shall number twelve and be authorized on at least an annual budgetary basis to make recommendations regarding the implementation of any programming elements. [Text on microfiche.]

constitute two of the fourteen bands of the Seminole Nation of Oklahoma.

Section 1401 of title 25 of the United States Code includes the word "band" as a proper group to receive a portion of the use or distribution of funds appropriated in satisfaction of the Indian Claims Commission. The Dosar Barkus and Burner bands of the Seminole Nation of Oklahoma, composed of black freedmen, are designated by the tribe's constitution as part of the legislative body of the Seminole Nation.[24] These members of the Seminole Nation are descendants of the blacks that arrived in Florida by escaping slavery before 1819. The freedmen began living with the Seminole Tribe in Florida and were included in the 1838 removal to Oklahoma. This removal brought about the relinquishment of the Florida lands that are the subject of the claim at issue.

Before the Seminole judgment funds can be distributed, a civil action brought by the freedmen requires the determination of whether the freedmen were actually members of the Seminole Tribe in 1823 or merely living with the Seminoles. To be recipients of the funds, the freedmen must have assumed the status of an "Indian" of the Seminole Nation.

### *The Construction of Indian Acts and Statutes: Who Is An Indian?*

In interpretation of statutory language, general case law holds that reference should first be made to the plain and literal meaning of the words, although it is the court's overriding duty to give effect to the intent of the legislature. The circumstances triggering this duty were summarized as follows by the Fifth Circuit Court of Appeals in *United States v. Scrimgeour*[25]:

> The Supreme Court has looked beyond the plain meaning of the words used in a statute to the purpose of the act where that meaning produced an unreasonable result "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Assns., supra*, 310 U.S. at 543-44, 60 S.Ct. at 1063-64 (footnotes omitted). Where the policy of the act is at such variance with the plain meaning of the words of the statute, the Court has followed the purpose of the statute rather than the literal words. *Id. See Medler v. United States, Bureau of Reclamation*, 616 F.2d 450, 453 (9th Cir. 1980);

24. Const. of the Seminole Nation of Oklahoma, art. IV, § 31.
25. 636 F.2d 1019, 1023 (5th Cir. 1981).

*Church of Scientology v. United States Department of Justice*, 612 F.2d 417, 422 (9th Cir. 1979); *United States v. Tex-Tow, Inc.* 589 F.2d 1310, 1313 (7th Cir. 1978).

The sources cited indicate that should the plain and ordinary meaning of words used in the Indian Claims Commission Act be unreasonable, given the surprise of that Act as determined by reference to history[26] and other indicia of congressional intent, an interpretation more consistent with that intent should prevail.[27]

The term "Indian" may be used in an ethnological or in a legal sense. Racial composition is not always dispositive in determining who are Indians for the purpose of Indian law. In dealing with Indians, the federal government is dealing with the descendants of political entities, not with persons of a particular race.[28] The history of the Seminole Tribe shows the freedmen existed with the Indian members as a political entity—two distinct races living and working together for the benefit of the community.

Each tribe, as a distinct political community, has the power to determine its own tribal membership.[29] Thus, a tribe may determine who are to be considered members by written law, custom, intertribal agreement, or treaty with the United States. At the time of the passage of the Indian Reorganization Act, 1934, when most tribes did not keep formal written rolls, the Seminole Nation of Oklahoma recognized freedmen as members of the tribe by custom and by treaty with the United States. Tribal membership was determined by a tribal roll, including freedmen members whose ancestors would have been accepted by the tribe as members.[30] Such acceptance of the freedmen as a part of the tribe has been portrayed throughout the history of the nation.

The Indian Claims Commission Act satisfied the need for an opportunity to assert claims against the government by creating an Indian Claims Commission and giving it jurisdiction to hear claims "on behalf of any Indian tribe, band or other identifiable group."[31] Legislative history indicates that Congress intended to provide the Commission with jurisdiction "broad enough to in-

26. Train v. Colorado Pub. Interest Research Group, Inc., 426 U.S. 1, 9-10 (1976).

27. United States v. Native Village of Unalakleet, 411 F.2d 1255, 1257 (Ct. Cl. 1969).

28. F. COHEN, FEDERAL INDIAN LAW (U.S.G.P.O. 1942, rep. 1980).

29. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71-72 (1978); Delaware Indians v. Cherokee Nation, 193 U.S. 127 (1904).

30. 1 Op. Sol. 508, 510 (1935).

31. 25 U.S.C. § 70a (1976).

clude all possible claims."[32] The words "tribe" and "band," in addition to the word "Indian," would have been unnecessary language if the legislature only intended the inclusion of those members of a specific race or geographical location.

These issues were explored by the United States Court of Claims in *United States v. Native Village of Unalakleet*,[33] a case involving claims by technically non-Indian Eskimo and Aleut natives of Alaska. The court's opinion contains this pertinent historical analysis:

> At the time Congress was considering H.R. 4497, the bill which became the Indian Claims Commission Act, both the Justice Department and the Department of the Interior were invited to comment on the bill. Among the changes considered by the Justice Department was the deletion of the phrase "other identifiable group" from the classes of potential claimants. The then Acting Solicitor of the Department of the Interior, Felix Cohen, objected to this deletion in a memo to the Secretary of the Interior for the reason that: "The omission of this phrase might very well be construed to exclude from the scope of the bill Pueblos and other town or village organizations, such as exist among the Creeks and among certain Alaskan Indian and Eskimo groups, which cannot be brought within the definition of 'tribe' or 'band' without considerable straining. *The exclusion of any native group from the scope of this bill would not only be an unfair discrimination, but would destroy the main objective of the bill*, which is to achieve a final and comprehensive solution of the Indian claims problem." The Congress apparently agreed with this and retained the phrase "other identifiable group."[34]

Given that the plain language of the Act must be interpreted in light of the legislative intent, it remains to be determined whether the Seminole freedmen in particular are justified in calling themselves "native" blacks, an identifiable group of the Seminole Nation.

### *Treaty with the Seminole Indians, March 21, 1866*

On March 21, 1866, the United States made a treaty with the Seminole Indians for a cession of Seminole lands in Florida in ex-

32. H.R. REP. No. 1466, 79th Cong., 1st Sess. 10 (1945).
33. United States v. Native Village of Unalakleet, 411 F.2d 1255 (Ct. Cl. 1969).
34. *Id.* at 1258 (emphasis added).

change for a reasonable price and new adequate lands. Article 2 provided that:

> [I]nasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants . . . shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color, who may be adopted as citizens or members of said tribe.[35]

In construing bilateral Indian agreements between the United States and the Indian tribes, courts seek to arrive at what the parties to the agreement intended.[36] However, in the case of the 1866 Seminole Treaty it is not clear whether the Seminole Tribe intended to include the freedmen as "members" of the tribe for the purpose of property distribution and money judgments. The term "citizen" is unclear. However, "[i]f the words are ambiguous, then resort may be had to such evidence, written or oral, as will disclose the circumstances attending the execution of the instrument and place the court in the situation in which the parties stood when they signed the writing to be interpreted."[37]

Some indication of the intended meaning of the 1866 treaty may be derived from the language used in an agreement between the United States and the Seminoles some thirty-three years later.[38] As ratified by Congress it provided that:

> [T]he Commission to the Five Civilized Tribes, in making the rolls of Seminole *citizens*, . . . shall place on said rolls the names of all children born to Seminole *citizens* up to and including December 31, 1899, and the names of all Seminole *citizens* then living; and the rolls so made, when approved by the Secretary of the Interior . . . shall constitute the final rolls of Seminole *citizens*, upon which allotment of lands and distribution of money and other property belonging to the Seminole Tribe shall be made, and to no other persons.[39]

35. Treaty with the Seminole, Mar. 21, 1866, art. II, 14 Stat. 755, 756 (emphasis added).

36. Jones v. Meehan, 175 U.S. 1, 10-11 (1899); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

37. United States v. Choctaw & Chickasaw Nations, 179 U.S. 494, 531 (1900).

38. Act of June 2, 1900, 31 Stat. 250; S.BLEDSOE, INDIAN LAND LAWS 110-11 (1979).

39. Act of June 2, 1900, 31 Stat. 250 (emphasis added).

Since the 1866 treaty declared that the freedmen were to have the rights of Seminole citizens,[40] the freedmen were subject to enrollment and thus were eligible for land allotments and money distributions as such citizens.

It is also significant that the 1866 treaty clearly acknowledged that the freedmen lived "among" the Seminoles prior to its execution. However, to participate in receiving a portion of the judgment fund at issue, the freedmen must have been a part of the Seminole Nation as early as 1823.

*Historical Background of the Seminole Land Rights in Florida*

At the time of the earliest settlement in Florida by the Spanish in 1512, the area was inhabited by more than twenty-five indigenous groups totaling more than fifty thousand persons.[41] In the early 1600s, the population declined dramatically from exposure to new strains of disease brought to the Florida settlement by Spanish missionaries.[42] By 1708, the Spanish governor reported that only three hundred aborigines remained.[43]

In the early eighteenth century, Creek Indians north of Florida began migrating into Florida.[44] The earliest use of the word "Seminole" was in 1765, when an English document called a Creek group "Seminole."[45] By the mid-1700s, the term was extended to include essentially all the Creek emigrants in Florida. For more than half a century, the Seminoles considered themselves to be a part of the Creek Confederacy, but by 1804, the Florida Seminoles were acting independently of the Creeks.[46]

In 1763, Spain ceded its rights in Florida to Great Britain by the Treaty of Paris. Great Britain then began its policy of giving express legal recognition and protection to Indian land titles throughout the Americas. This policy was first enunciated in the Royal Proclamation of 1763. Britain subsequently consummated several treaties with the Seminoles in Florida guaranteeing the Seminoles' right to the soil. Spain, which reacquired the European rights in Florida in 1783, continued the practice of treaty-

40. Treaty with the Seminole, *supra* note 35, at 756.

41. United States v. Seminole Indians, 180 Ct. Cl. 375 (1967); Seminole Indians v. United States, Findings of Fact, 13 Ind. Cl. Comm. 326 (May 8, 1964).

42. Tullberg, *supra* note 11, at 3.

43. J. Opala, "A Brief History of the Seminole Freedmen," 3 (1980) (unpub. ms.).

44. Tullberg, *supra* note 11, at 3.

45. Opala, *supra* note 43, at 3.

46. *Id.*

making with the Seminoles. This was done by the Treaty of Pensacola in 1784 and the Treaty of Walnut Hills in 1793.[47]

The history of the Seminole freedmen as a segment of the Seminole Tribe can be traced from the American Revolution. Blacks were included in the tribe by acquisition as gifts from the British to tribal chiefs, from plantation raids, and through promises of freedom to former slaves. The blacks were the chief agriculturists of the tribe, remitting a portion of their crops to the Indians from the harvest of the blacks' land. The consensus of the American soldiers who dealt with the Seminoles prior to removal from the Florida lands was that the Indians' Negroes were "vassals and allies" of the Seminoles, not their slaves.[48]

In the Treaty of Camp Moultrie on September 18, 1823,[49] the Seminoles relinquished all claim and title to their land except for a district in the interior. In 1832 a provisional removal treaty was signed at Payne's Landing.[50] In 1833 some of the Seminole chiefs signed an obligatory removal treaty at Fort Gibson.[51] This removal of the Seminole Tribe from Florida lands included nearly five hundred black Seminoles.[52]

The Indian Claims Commission has already established the rights of the Seminole Tribe to governmental payment for the Florida lands taken. History reveals that the ancestors of the freedmen occupied those lands alongside the ancestors of other modern-day Seminoles prior to 1823 and were removed to Indian Territory as members of the "Seminole Tribe." However, the question of whether the position of the black members of the tribe in 1823 was sufficient to include their descendants in the award of this judgment fund may depend on modern perceptions of the status of these blacks in pre-removal tribal society. Though it is distasteful to contemplate the possibility that a modern court or legislature would act to perpetuate the discriminating burden of racist social institutions on the past, it may be helpful to determine whether such institutions did in fact exist in pre-removal Seminole society.

### *The Social and Legal Position of the Seminole Freedmen*

Seminole freedmen were accepted as members of the Seminole

47. Tullberg, *supra* note 11, at 3.
48. Opala, *supra* note 43, at 3.
49. 7 Stat. 224.
50. Treaty with the Seminoles, May 9, 1832, 7 Stat. 368.
51. Treaty with the Seminoles, Mar. 28, 1833, 7 Stat. 423.
52. Opala, *supra* note 43, at 17.

Tribe, and their rights of participation in the lands were accepted.[53] Although they lived separately, farming their own crops and paying tribute to the Indians, each person enjoyed the fruits of his own labor.[54] The acceptability of intermarriage between blacks and Indians was evidenced by the fact that the wife of Osceola, one of the most noted, brave, and celebrated Seminole chiefs, was a descendant of a fugitive slave.[55] In addition, the blacks fought alongside the Seminole warriors and generally enjoyed the personal freedom of a system of "primitive democratic feudalism, involving no essential personal inequality."[56]

Congressional leaders in 1852 referred to the role of the freedmen in Seminole society prior to removal to Indian Territory as having no evidence of slavery, the freedmen never having had a white master.[57] Representative Thomas Bartlett of Vermont concluded that he did "not find any proof to show that the institution of slavery existed amongst the Seminole Indians, either de facto or de jure."[58] Thus, the ancestors of the freedmen blacks now living in Seminole County, Oklahoma, who migrated from Florida to Indian Territory with the Indian members of the Seminole Tribe, were not considered slaves but members of the Seminole Tribe before 1823.[59]

Although the Curtis Act of June 28, 1898 stipulated that two

53. F. SEATON, FEDERAL INDIAN LAW 1010 (U.S.G.P.O. 1958).

54. K. PORTER, THE NEGRO ON THE AMERICAN FRONTIER 302-03 (1971), as quoted in J. Opala, "The Social Position of the Seminole Freedmen Prior to Removal in 1838," 2 (1980) (unpub. ms.).

55. Seminole Nation v. United States, 73 Ct. Cl. 455 (1933).

56. PORTER, quoted in Opala, *supra* note 54, at 3:

> The Negroes were thus in the position of dependents of the Indians, rather than that of slaves, the understanding being that in return for a tribute of corn and other agricultural products from the Negro, the Indian master would protect him against being claimed as a slave by any white man. The Negroes not merely lived apart from their masters, in their own villages—an evidence of independence which they greatly prized—frequently possessed large herds, and were under no supervision by their masters or patrons, but also dipped their spoons into the sofky pot with their lord and his family, . . . habitually carried arms, went into battle along with the Seminole warriors, . . . and save for the slight annual tribute, were under no greater subjection to the chiefs than were the Seminole tribesmen themselves. The relationships might be described as one of primitive democratic feudalism, involving no essential personal inequality.

57. CONG. GLOBE, Feb. 25, 1852, Mar. 27, 1852, Apr. 12, 1852, *quoting* Rep. William A. Sackett of New York, Feb. 20, 1852, at 611-12, and Rep. John W. Howe of Pennsylvania, Feb. 20, 1852, at 615-16, as cited in J. Opala, "Seminole Blacks and a Congressional Debate of 1852," 5-8 (1981) (unpub. ms.).

58. CONG. GLOBE, Apr. 9, 1852, at 1036.

59. Covington, *A Refuge with the Seminoles*, FLORIDA ACCENT 12 (Sept. 1978).

rolls should be made for each of the Five Civilized Tribes,[60] one tracing the freedmen and the other the Indians,[61] the Seminole Nation exists as a total unit comprised of fourteen bands, twelve purely Indian and two purely freedmen. The social makeup of the tribe is based upon clan or band membership and the freedmen bands are included in all council activities and decisions. In addition, case law shows that placing a member of a tribe on the freedmen roll indeed did fix his status sufficiently for the allotment of land.[62]

At this time, the Florida Seminoles have proposed to the Seminole Nation of Oklahoma General Council a 25 percent (Florida)/75 percent (Oklahoma) split of the funds. This proposal was accepted on June 20, 1983.[63] Although further clarification will be necessary, it is believed that the Council approved the proposal with the right to take up the issue of distribution to the freedmen at a later time. By drawing upon the historical aspect of freedmen and Seminoles acting in concert prior to 1823 and the subsequent removal of both freedmen and Indians in 1838 as Seminoles, the continued embracement of the freedmen as an integral part of the Seminole Nation[64] justifies a proportionate division of the funds among the black and Indian members of the Seminole Tribe.

## *Conclusion*

Practicing a communal concept of farming prior to September 18, 1823, Indians and freedmen established a relationship of

60. 30 Stat. 495.

61. Act of Apr. 21, 1904, § 1, 33 Stat. 189, 204.

62. Tiger v. Fewell, 22 F.2d 786 (8th Cir. 1927).

63. Interview with James Milam, chief of the Seminole Nation of Oklahoma (June 28, 1983).

64. William W. Dawson, Oklahoma State Senator, Memorandum to the Secretary of Interior, June 30, 1977 (unpub.):

> It appears to have been more than a comfortable alliance which had Negroes and Seminole Indians acting in concert in defense of their towns, families and farms against invaders. And, indeed, their interests became so intertwined that the Negro was unhesitantly removed along with his Indian brethren to the new home in Oklahoma, beginning in 1838. The only justification for the Negro's removal was that he was recognized as "Seminole." And the extent to which the Negro continued to be embraced as a part of the Seminoles in Oklahoma is shown by the fact that 987 Freedmen were included in the Dawes Commission or Final Roll of the Seminoles of Oklahoma (as prepared in 1906 and slightly amended in 1914), by far the largest proportion of Freedmen to be "citizens by blood" of any of the Five Civilized Tribes of Oklahoma.

"vassals and allies" in an Afro-Indian tribe. Both races owned their own land, while working and fighting together as an identifiable group of Seminoles. The Treaty of March 21, 1866, recognized the rights of the freedmen to be considered a part of the Seminole Nation by the United States government, as they were by their Indian brothers. This citizenry/membership status is exemplified today by the legislative and recordation procedures followed by the Seminole Nation.

The sixteen million dollar settlement for lands in Florida ceded by the Seminoles to the United States is to be distributed fairly and indiscriminately between the descendants of the Seminole Nation as it existed on September 18, 1823. The history of the tribe, both oral and written, reveals a sufficient status of the freedmen in the tribe and equal possession of the Florida lands before this time to require inclusion in the distribution of the Seminole Nation judgment funds. To do otherwise would make a mockery of the tribal procedures and social structure that have existed since the Revolutionary War.