

**(6) Final Determination Documents**

**- September 17, 1981**

## memorandum

DATE: ~~Acting~~ SEP 17 1981REPLY TO  
ATTN OF: Director, Office of Indian Services

SUBJECT: Recommendation for Final Determination that the Lower Muskogee Creek Tribe - East of the Mississippi, Inc., does not exist as an Indian tribe pursuant to 25 CFR 54

TO: Assistant Secretary - Indian Affairs

## 1. RECOMMENDATION

We recommend that the Lower Muskogee Creek Tribe - East of the Mississippi, Inc., not be acknowledged as an Indian tribe entitled to a government-to-government relationship with the United States. We further recommend that a letter of such determination be forwarded to the leadership of the group, and that a notice of final determination that they do not exist as an Indian tribe within the meaning of Federal law be published in the Federal Register.

## 2. INTRODUCTION

On February 10, 1981, the Assistant Secretary - Indian Affairs of the Department of the Interior published proposed findings to decline to acknowledge that the Lower Muskogee Creek Tribe - East of the Mississippi Inc., exists as an Indian tribe within the meaning of Federal law. This finding was based on a determination that the group does not meet four of the seven mandatory criteria set forth in 25 CFR 54.7.

During the 120-day comment period which followed publication, two rebuttals were submitted challenging the proposed findings pursuant to 25 CFR 54.9(g). The first was submitted on May 18, 1981, over the signature of Neal McCormick of Cairo, Georgia, chief of the petitioning Lower Muskogee Creek group (hereinafter referred to as LMC-Georgia). A second and separate rebuttal was submitted on June 9, 1981, by John Wesley Thomley of Molino, Florida, vice chief of the petitioning group (hereinafter referred to as LMC-Florida). Subsequent to publication of the proposed findings, Mr. Thomley notified the Acknowledgment staff that he was severing all connections with the McCormicks and that he intended to file a separate rebuttal contending that the original petition omitted substantial amounts of important evidence.

Three letters were received in support of the findings: one from the Director of the McIntosh Reserve of Carroll County, Georgia; one from the Director, Office of Indian Heritage for the State of Georgia; and one from the Principal Chief of the Muskogee (Creek) Nation of Oklahoma.

## 3. SUMMARY CONCLUSIONS IN RESPONSE TO REBUTTAL ARGUMENTS PRESENTED

Both rebuttals were carefully considered; the new evidence submitted was checked and material in the original petition reconsidered in light of the arguments. The rebuttals were not only considered separately but also together to determine whether the sum of the evidence and arguments would strengthen the group's petition for

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acknowledgment. The rebuttals, whether considered separately or together, did not present evidence which would warrant changing the conclusion that the LMC does not meet four of the criteria set out in 25 CFR 54 (specifically Section 54.7 (a, b, c, and e)); and therefore, does not exist as an Indian tribe within the meaning of Federal law.

Although both rebuttals spoke to some degree to the four criteria which the LMC had failed to meet, neither rebuttal addressed the following major factual conclusions set out in the proposed findings: 1) the unstable membership which shows great fluctuations in size and composition; 2) the lack of historical data for most geographic areas and for many time periods, and the concurrent lack of evidence of political continuity; 3) the apparent recent institution of "clan" organizations; and 4) the lack of historical connections or association between families that would be expected from the asserted historical tribal character. The conclusions regarding the limited historical identification of the group as Indian and the lack of proven Creek ancestry for a large part of the group's membership were either not addressed or were answered by restating earlier arguments. No information was provided in either rebuttal in response to the finding that the membership provisions, though they might be technically adequate, were vague and ill-defined and contained no specific requirements for establishing Creek Indian ancestry as a basis for inclusion in the membership list. Some of the factual conclusions in themselves were sufficient to deny tribal status to the group, but collectively they were overwhelmingly against the LMC assertion that they are a tribe.

Implicit in both rebuttals is the argument that because approximately 7,000 Creek descendants in the Eastern United States received payment under Indian Claims Commission Docket Number 21, there exists an Indian tribe which could be acknowledged under 25 CFR 54. This argument appears at many points to be based on the idea of the existence of a general "Creek Nation East of the Mississippi" before the formation in 1950 of an organization which took that name in 1951. Taking the Claims Commission contacts as Government recognition, the petitioner in effect projects the group backward from that point to argue for its historical existence. These Government contacts do not constitute recognition of the group as a tribe or a determination that the group has had a continuing historical existence as a tribe. Similarly, the existence of a current organization is not evidence for the existence of an organization in the past.

The presence of large numbers of Indian descendants scattered throughout a given region does not necessarily mean that these descendants constitute an Indian tribe within the meaning of the regulations. While a large portion of the United States population may have knowledge of their Indian ancestry, most do not consider themselves members of an Indian tribe.

The LMC is not a tribal community which has functioned as an autonomous entity throughout history until the present, but is rather a group of individuals who believe themselves to be of Indian ancestry, most of whom did not conclusively establish this fact. The members are scattered widely throughout the South and have had little or no association with the group as a whole until they were recruited by the leaders of the LMC group. No evidence could be found that a sense of tribalness or community exists.

Several specific arguments were raised in the LMC-Georgia and -Florida rebuttals. These arguments are dealt with individually in the paragraphs which follow.

#### 4. LMC-GEORGIA ARGUMENTS (McCormick Appeal)

Mr. McCormick claims that three separate states (Georgia, Florida, and Alabama) "recognize" the LMC as a corporate entity and that such recognition establishes the covert existence of the group over a long period of history. The McCormick rebuttal also suggests that such incorporation far outweighs any scholarly studies which suggest that the group does not exist as a tribe.

Researchers could find evidence of only two corporations, both using the name of Lower Creek Muskogee Tribe - East of the Mississippi, Inc. (sic): one in Florida, listing John W. Thomley as President Director; the other in Georgia, listing Neal McCormick as President. The Georgia corporation is presently not in good standing with the State as the corporate fee has not been paid for 1981. Notwithstanding this, the simple filing of corporate papers and the payment of the appropriate fee does not establish the historical continuity of a group or that a group currently exists as an Indian tribe. The matter of tribal existence, historical and political continuity, and Indian ancestry must be established through appropriate documentation.

The negative conclusions in the proposed findings do not rest solely, as is suggested by the LMC-Georgia rebuttal, on the limited length of time the corporate entities of the LMC have existed. Extensive evidence and arguments were presented in the proposed findings to show that the group did not meet the criteria even for the period during which the corporations have been in existence. There is strong evidence that the group was created in 1972 and incorporated in 1973, rather than formalizing previously existing communities, and that it has been a limited and unstable organization that does not resemble a tribal community.

The overt existence of the LMC, which has been for only nine, rather than 30 years as claimed in the appeal, provides no evidence that there was a predecessor organization or entity, covert or otherwise. There was no evidence to indicate that predecessor entities existed before the corporations or that the ancestors of the present group were part of units which met the requirements of the regulations. As noted, the LMC is one of several organizations of Creek descendants and claimed descendants which organized after the Eastern Creek claim was filed in 1950. Some of its members may have had links with the organization which initiated that claim. Each organization must be judged separately, however.

Mr. McCormick cites out of context a statement from the proposed findings that there was "strong evidence of Indian identity or knowledge of Indian descent" as evidence of the covert survival of the tribe. This statement, as used in the findings, was made in regard to the region in general rather than about specific ancestors of the LMC or about ancestors of Eastern Creek claimants in general. The strong evidence referred to in the proposed findings was most prevalent for areas where there were the fewest LMC members.

Mr. McCormick reasserts in the LMC-Georgia rebuttal that prohibitive laws passed against the Creeks after Removal forced the Indians to live covertly and prevented the tribe from openly identifying itself. This argument was dealt with at length in the proposed findings. No new evidence was provided to refute the total lack of documentation for any period before the 1950's of the covert or overt existence of any type of community for even part of the group which could be identified as Indian.

An examination of the group's genealogy showed almost no intermarriage between families and dispersed historical residence patterns, both of which indicate that families were historically unconnected and had little or no social interaction. This, when coupled with the finding that the majority did not establish Creek Indian ancestry and that many had no previous identity as Indian or even knowledge of Indian ancestry, indicates that the LMC is not derived from a stable tribal community.

No attempt was made to rebut the conclusion that the LMC "recruited" its members. The word "recruitment" in the proposed findings is used to mean the gaining of members from the general public, i.e., individuals who believed themselves to be of Creek ancestry, as opposed to enrolling people who were socially part of an existing group but who were not formally enrolled. Evidence for this included several documents from the LMC itself.

The McCormick rebuttal questions the anthropological portion of the findings since it does not recognize that before Removal Creek towns, clans or families shifted from place to place and "mixed and mingled." Contrary to the LMC assertion, the reports clearly took into account that there was considerable intermarriage and contact between non-Indians and Creeks before, as well as after, Removal. This fact does not affect the finding that no evidence could be found that any Creek communities continued to exist among ancestors of the LMC after Removal.

The LMC asserts that the Creek Nation East has been recognized as an Indian Tribe in Florida Statute F.S. 1979, Chapter 285, Indian Reservations and Affairs. The cited chapter of the Florida Statutes, in mentioning "Muskogee or Cow Creek," is clearly referring to bands of the Seminole Tribe of Florida. The statute does not pertain to the LMC as a group (F.S. 1979:Ch 285:061(2) & Ch 285:07(1)).

Recent resolutions submitted from one Georgia and two Florida counties which recognize the LMC as a Creek tribe are not based on research and documentation. They do not establish the historical existence of the group as an Indian tribe.

Numerous historical documents were submitted with the LMC-Georgia appeal. Five of these documents duplicated material in the original petition. Twelve additional documents, although new, pertain to Creek history before or during Removal and thus are of no value in documenting the survival of Creek Indian communities after the Removal. Four of the documents which were submitted are discussed below: the 1920 voter registration roll; the Ward letter of August 28, 1861; the list of "Frinley (sic) Creeks;" and the William Brown affidavit.

The LMC argues that continued existence of the tribe is evidenced by Calhoun County, Florida, voting records which purport to show Creek Indians voted in State elections in 1920 and later. A page was submitted from an October 9, 1920 voter registration roll, listing two individuals designated as "C.I.," apparently an abbreviation for Creek Indian. According to current county officials, this was probably self-identification. Subsequent research could not identify these two individuals as Creek Indians or as being related to the current LMC membership without further documentation. No evidence was found or presented in the voting records which would indicate that there was a continuing community of Creek Indians in Calhoun County or that governmental bodies, scholars, or others even identified the presence of such a community.

The LMC argues that the Ward letter, when taken in conjunction with the Ward Record (submitted with the petition), proves the existence of covert Creek Indian groups in southern Alabama and western Florida. Since the Ward letter, dated August 28, 1861, was mentioned in the Ward Record, it can be used to validate parts of the Ward Record itself as well as a few of the individual Ward family relationships. However, since the record identifies no one as Indian, much less as Creek, and since it appears to deal with Ward family members and their gatherings almost exclusively, it cannot be used to establish the existence of covert Creek Indian groups as is asserted by the LMC.

A list which contained 35 names and was entitled "Frinley Creeks" was included to demonstrate the existence of an historical tribe. However, no information was provided regarding the origins of the list, its purpose, its author, or the date when it was prepared. Based solely on identification by name, nine of the 35 names appear to be similar to those of established Eastern Creek ancestors. Any connection between the names on this list and the LMC ancestors, however, is impossible to substantiate without further information. For this reason, the list of "Frinley Creeks" cannot be used to prove Creek ancestry or to document the historical existence of a covert Creek group.

The William Brown affidavit was submitted to prove that a Creek Indian community existed in Decatur County, Georgia, in 1863. The affidavit purports to show that a man who was identified in the document as a Creek Indian was going to a meeting of the "nation." Staff research could not identify William Brown on the Eastern Creek rolls or as an LMC ancestor. No additional documentation was submitted and subsequent analysis could not identify which "nation," the location of the meeting he was to attend, who William Brown represented if anyone other than himself, and whether a Creek Indian community existed in Decatur County, Georgia, at that time. Based on the information provided no weight could be attached to the document.

Various other historical documents submitted contained no specific reference to Creek Indians and most of the individuals named could not be identified as Creek or as ancestors of current LMC members without further documentation.

No evidence was provided in the appeal to substantiate the LMC assertion that an undergraduate thesis used as one source of evidence for the proposed findings was deliberately distorted to please the academic supervisors of the writer. The materials in the thesis were found to be entirely consistent with other sources of evidence used, including a report written at about the same time by Peggy McCormick for a VISTA project at the Tama Reservation.

##### 5. LMC-FLORIDA ARGUMENTS (Thomley appeal)

The Thomley rebuttal to the proposed findings raised several additional issues which deserve discussion.

The central argument presented by the Lower Muskogee Creek-Florida group is that the award of funds under Docket 21 of the Indian Claims Commission to Eastern Creeks in effect recognized a Creek Nation East of the Mississippi and that their own political existence in turn came about through a formal division of this group and transfer of authority from the previous organization.

The award of funds under Docket 21 made to both Oklahoma and Eastern Creeks was not, as contended, made under "eligibility criteria substantially similar to those demanded for Federal Recognition." Two steps were involved for this claim, one to determine standing to pursue the claim, the other to determine what group or individuals were eligible to receive payment for it. Neither of these steps required showing of continuous political existence as a community since the time of removal. Docket 21 was originally filed in 1948 by the Oklahoma Creek Tribe. A petition to intervene was filed in 1951 by an organization of Eastern Creeks initially using the name of Perdido Friendly Creek Indian Band of Alabama and Northwest Florida. The name was subsequently changed to Creek Nation East of the Mississippi (CNEOM). One activity of this group was the creation of a list of as many Eastern Creek descendants as could be located, as a step toward submission of these names for payment under Docket 21 and later Docket 275.

The Claims Commission initially denied intervention by the Eastern Creeks but was overruled in 1952 by the Court of Claims. The Court held that the Eastern Creek organization constituted an "identifiable group" of Indians under the Claims Commission Act, which allowed suits by any "Indian Tribe, band or other identifiable group." It specifically held that the Claims Commission was unreasonable and incorrect in making the category "identifiable group" the same as "a recognized tribe or band." It held that "if a group presenting a claim under the act is capable of being identified as a group of Indians consisting of descendants of members of the tribe or bands which existed at the time the claims arose, the jurisdictional requirements of the statute, in our opinion, have been met." Thus the requirement for the Eastern Creeks to be included in Docket 21 was only that it was a group of Creek descendants and not that it show continuity of tribal political organization. On this basis, the group was also allowed to intervene in Docket 275. The Bureau of Indian Affairs and the Claims Commission dealt with the Creek Nation East of the Mississippi only as a group representing Creek descendants in matters such as legal representation in pursuing these claims.

While the Indian Claims Commission had the responsibility for determining claims, the responsibility for determining which persons or groups were eligible to share in the award was that of the Bureau of Indian Affairs. The recipients of the award are not necessarily identical to or limited to those groups which originally petitioned. In Docket 21 and subsequently Docket 275, entitlement to share in the distribution of funds was based solely on documenting Creek Indian ancestry. Under provisions of the Act authorizing distribution of the funds in Docket 21, payment was made on a per capita basis because "the Eastern Creeks comprise an unorganized descendant group." Docket 275 payments will be made on a per capita basis for the same reason.

In the process of reaching an agreement on plans for the disbursement of the funds awarded for Docket 21 and 275, the Bureau of Indian Affairs held public meetings in several areas to discuss the plans with Eastern Creek claimants in those areas. The meetings were announced in advance in the newspapers. Various Eastern Creek descendant organizations were apparently also contacted. At a meeting in Pensacola in 1974, Wesley Thomley was elected to speak for those present at a subsequent hearing to be held in Oklahoma. It is apparently this meeting that is referred to in the LMC-Florida appeal when it mentions an example of the tribe "instructing the chief and council" concerning important tribal matters and functioning according to Creek tradition.

Part of the LMC-Florida argument is based on the idea that the CNEOM organization that intervened in Docket 21 and promoted Eastern Creek claims was in effect a single tribe which represented all Eastern Creeks and was the tribe from which the LMC-Florida separated in 1973. While the CNEOM organization appears to have served as the original umbrella organization promoting Eastern Creek claims, there is no evidence to show that its membership included all Eastern Creek descendants in the Southeast or that the organization claimed that it did. A large portion of the current LMC membership do not appear to have been a part of the CNEOM organization in the 1950's and 60's, although some of the leaders of the LMC were active for awhile.

Since the LMC-Florida argument which states that Docket 21 determined that CNEOM constituted a tribe dating from the time of Removal is invalid, the "transfer of authority" in 1973 cannot be used to support their claim to a continuous political existence on this basis. In any event their interpretation of the immediate facts of this "transfer" is in itself incorrect. It did not establish the Florida Creek Indians as a group autonomous from the CNEOM but made Thomley "chief" under the jurisdiction of the CNEOM chief and required him to uphold its laws.

The LMC-Florida appeal gave further reinforcement to the conclusions of the proposed findings that the group is a recent organization which does not form a stable community and is one to which major units have been, and continue to be, added and subtracted. Eight of the 13 "clans" clearly active in 1980 submitted statements that they were now affiliated with LMC-Florida. Two to these were recent additions, added after the petition was submitted. Four new "clans" have been added since staff research was done on the petition. There is no evidence that these new "clans" have any substantial historical existence or association with each other. The group's leadership acknowledges a process of organization building. A limited description of community activities is given to show existence "as a functioning community," such as powwows, teaching crafts, dancing at public functions, and the procurement of grants. These are at best limited functions, documented only for the past seven years, and contain no indication of extensive participation by the "members" listed on the roll.

The LMC-Florida rebuttal also argues that a treaty made in 1833 recognized the existence of the "greater body of the Creek Nation" which at that point remained on the eastern side of the Mississippi. This treaty predates the removal of the majority of the Creek Nation and hence does not indicate acknowledgment of a continuing body of Eastern Creeks after the 1830's. The acts of 1887 and 1906, referred to in the appeal, were allotment acts which do not apply to the Eastern Creeks.

The LMC-Florida rebuttal included a list containing the names of roughly 2,700 members who it stated had been omitted from the membership roll submitted with the original petition. Creek Indian ancestry could not be established for the majority of these members, however, based on the limited information provided. Only 24% of the individuals named could be reasonably identified as having shared in Docket 21 and thus as having established their Creek ancestry. Of the remaining 76%, 24% appear to have applied to share in the award to be made under Docket 275; however, until accepted for payment, these applicants cannot be considered to have established their Creek ancestry. Fifty-two percent could not be accounted for based on information presented. These findings reinforce the initial conclusion set out in the proposed findings that a majority of the LMC membership are unable to establish Creek ancestry. The submission of a list of members who were omitted which is 2-1/2 times larger than the membership roll submitted with the petition, only serves to further emphasize the instability of the group.

The genealogical findings do not dispute the fact that there were, and still are, many Eastern Creek descendants in the tristate area of Georgia, Florida and Alabama. They do dispute, however, that the group entitled the Lower Muskogee Creek Tribe - East of the Mississippi, Inc., has a stable membership or is a political organization which knows, or is selective, about its membership.

#### 6. OTHER OPTIONS

In accordance with Section 54.9(j) of the Acknowledgment regulations, an analysis was made to determine what, if any, options other than acknowledgment are available under which the Lower Muskogee Creek Tribe - East of the Mississippi, Inc., could make application as a tribe for services and other benefits available to recognized Indian tribes. No viable alternatives could be found due to the group's uncertain Indian ancestry, the geographical dispersion of its membership, and the group's lack of inherent social and political cohesion and continuity. This conclusion is based on independent research conducted by the Acknowledgment staff and on the factual arguments and evidence presented in the LMC petition and in the two rebuttals which challenged the proposed findings. A detailed analysis of this research and the evidence relied upon will be found in the foregoing report and in the report which was prepared to support the proposed findings which were published in the Federal Register on February 10, 1981.

As individuals, however, those who shared in Docket 21 will also share in the per capita award to be made under Docket 275. Persons who did not share in Docket 21 who have applied and meet the requirements of the judgment fund distribution plan could share in Docket 275. With regard to future awards to individual Eastern Creek Indian descendants, we are unable to say what the eligibility requirements for sharing in such awards might be or who the eligible beneficiaries would be.

