BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No. 168
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	

Decided: March 18, 1963

Appearances:

Paul M. Niebell, Attorney for Plaintiff.

Keith Browne, with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant.

OPINION AND DECISION OF THE COMMISSION

Holt, Associate Commissioner, delivered the opinion of the Commission.

Plaintiff, an Indian tribe residing within the territorial limits of the United States, timely filed a petition under the Indian Claims Commission Act (August 13, 1946; 60 Stat. 1049, referred to below as "the Act"), setting forth a claim against defendant. Defendant timely filed its answer denying liability.

Defendant later filed a motion for summary judgment, stating that there is no issue of controlling material fact; that the issues raised in the petition were finally determined in Creek Nation v. United States, 92 C. Cls. 269, certiorari denied, 313 U.S. 581; and that the matter is

res judicata. Plaintiff filed objections to the motion, and defendant filed its reply to the objections. Defendant's motion was argued orally before the Commission and taken under advisement.

Defendant filed the motion for summary judgment to dispose of the case as a matter of law. The hearing on the motion was not to try issues of fact (although some such issues may have been raised in the pleadings), but rather to decide whether there was any issue of controlling material fact. The defense of res judicata is available to the defendant, and that defense will be the subject of this opinion. Western (Old Settler) Cherokee Indians, et al., v. United States, 116 C. Cls. 665 (1950).

The subject of this case is the beds of the Arkansas, Cimarron, and Canadian rivers, in the present State of Oklahoma, containing approximately 28,875 acres, which we shall refer to as "riverbed lands."

Defendant issued a patent August 11, 1852 to the Muskogee or Creek Tribe of Indians to a large body of land including the riverbed lands. The grant was to the Creek Nation (plaintiff), distinguished from individual members of the tribe. It was "in fee simple . . . so long as they (plaintiff) shall exist as a nation and continue to occupy the country hereby assigned to them." The grant (including the quoted language) was pursuant to the 1833 Treaty (7 Stat. 417, II Kapp. 388) between the United States and the Muskogee or Creek Nation.

The tribe, as an entity, occupied the lands some 50 years. Thereafter, the lands, including those contiguous to the riverbed lands, were allotted to tribal members or sold to other people under agreements of March 1, 1901 (31 Stat. 861) and June 30, 1902 (32 Stat. 500).

The allotments and sales conformed with a survey made by defendant before the 1901 and 1902 agreements. Neither the survey nor the sales and allotments mentioned the riverbed lands; the survey, and the sales and allotments, meandered the banks of the rivers.

In 1912 and 1913, after oil had been discovered in parts of the riverbed lands, the State of Oklahoma (claiming ownership of the riverbed lands as beds of navigable streams) granted oil and gas development leases on parts of the riverbed lands.

In 1922, the Supreme Court held that the Arkansas River was not navigable, and that accordingly the riverbed to the thread of the river was the property of the riparian owners. Brewer Oil Co. v. United States, 260 U.S. 77, 86.

Defendant sued in the United States District Court for the Eastern District of Oklahoma on behalf of plaintiff here, and against allottees and other owners of riparian land, to quiet title in the riverbed lands. The court held for the riparian owners, following Brewer Oil Co. v. United States, supra.

In 1927, the Circuit Court of Appeals, Eighth Circuit, affirmed, concluding that "it was the intention of all the parties that the title of these riparian allottees (and purchasers of unallotted lands) conveyed by meander lines should extend to the thread of the stream and that no interest or title was reserved or retained by the Creek Nation." United States v. Hayes, 20 F. 2d 873, 890.

In 1940, plaintiff brought suit against defendant under a jurisdictional act of May 24, 1924 (43 Stat. 139) asking $150,000,000 as just

compensation for the riverbed lands. Creek Nation v. United States, 92 C. Cls. 269.

The plan of the allotments under the 1901 and 1902 agreements, supra, was to give each tribal citizen an equal share, in value, of the Creek lands; 160 acres at $6.50 an acre supplemented by tribal funds in cases where the value per acre was less than $6.50.

Plaintiff's theory of the suit was that riparian grantees got somewhat more than 160 acres. This meant (plaintiff said) that granting the riverbed lands to the riparian owners was in violation of the plan of allotments, that this damaged plaintiff, and that defendant is liable for such damage.

Plaintiff alleged and defendant agreed that defendant controlled the surveys and the drafting of patents, deeds, and allotments, and that defendant did not reserve the riverbed lands in any of these documents.

Plaintiff alleged that its assent to the 1901 and 1902 allotment agreements was induced by mistake of fact and law; that defendant's failure to reserve the riverbed lands was a failure in its fiduciary duty to its wards (plaintiff); that defendant's dealings with plaintiff were not for but against plaintiff's interest; and that defendant appropriated, condemned, and took plaintiff's riverbed lands without compensation.

Since plaintiff's issues had been raised and discussed in United States v. Hayes, supra, the court turned to that case. The Eighth Circuit Court of Appeals said, page 887:

> The heart of the contention of the United States as to the construction of these two (allotment) Agreements is as follows: The allotment was to be so as to give to each tribal citizen an equal share, in value, of the whole; the standard of value was 160 acres at $6.50 per acre; each citizen was to have 160 acres; values between tracts to be equalized from tribal funds; the acreage was determined and limited by the survey lines; these lines meandered these streams; to permit an allottee to have the additional land between the meander line and the thread of the stream would give him more than his acreage of 160 acres and an added value not accounted for; such additional acreage and value would violate the above standards of allotment based upon a definite acreage and valuation.

The Court of Appeals discussed the purpose of the allotment Agreements and said, at page 889:

> Therefore, we have this situation: A long pursued purpose of Congress to allot all of these lands and distribute all tribal funds so that the tribal government and associations should rapidly cease; full knowledge by the Indians of that purpose; formal agreement thereto; necessity of such allotment and distribution, both as benefits to the Indians and as a prerequisite step in accomplishing such tribal dissolution; a plan of allotment based on equality of value in land; such allotment to follow survey lines which meandered streams; stream bed lands of no then known value unless as appurtenant to riparian ownership; allotments and patents which have, as to all the parties, fully executed these Agreements as to these riparian lands and vested rights in such allottees and purchasers.

The Court of Claims then said, at page 274:

> We are entirely satisfied with the discussion of this question by the Eighth Circuit Court of Appeals in the case of United States v. Hayes, supra. We agree with that court that there was no evidence before it of any intention on the part of the Nation to reserve to itself title to any of its lands, but that, on the contrary, it was the evident intention of all parties that all of its lands should be disposed of and that the Nation should go out of existence and its citizens should become citizens of the United States.
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> But the plaintiff says the additional proof introduced for the first time in this case shows that this was not the intention of the parties. This proof is that riparian rights were not discussed when the allotments were made. That the

> title of a riparian owner is presumed to extend to the thread of a nonnavigable stream, we have no doubt, was not mentioned, because the river beds, in the light of what was then known, were valueless, except to the adjoining landowner, and no thought would have been given to it; or, if thought of, it would never have been assumed that the Nation meant to reserve it. Had this matter been mentioned, we cannot conceive that it would have made the slightest difference to the Nation or its members whether the title stopped at low water-mark or went to the thread of the stream.
>
> The fact that it was not discussed is the strongest indication that there was no intention on the part of the grantor to reserve title to it. Would it not be supposed that when the allottee received his patent to the land he took it for granted that he received with it the right to use the adjoining river, that he should have the right of ingress and egress thereby, that he might water his stock therein, and otherwise use and enjoy it? Did the Creek Nation intend to deprive him thereof, as it would have been able to do had it retained title to the river? We can think of no reason why it should have.

The Court of Claims has held that its prior decisions were res judicata not only on matters raised in its previous decisions, but also on matters which could have been (but weren't) raised. Western (Old Settler) Cherokee Indians, et al. v. United States, 116 C. Cls. 665 (1950).

The court had held in previous suits that plaintiffs in Western (Old Settler) Cherokee Indians, et al. v. United States, supra, were entitled to a recovery of certain interest (Eastern or Emigrant Cherokees v. United States, 82 C. Cls. 180; Western or Old Settler Cherokees v. United States, 82 C. Cls. 566. The cases were reported in 1935 and 1936).

The plaintiffs had brought two separate suits before this Commission (Western (Old Settler) Cherokee Indians v. United States, 1 Ind. Cl. Comm. 20; and Eastern (Emigrant) Cherokee Indians v. United States, 1 Ind. Cl. Comm. 31). This Commission had granted defendant's

motions for summary judgment on the ground of res judicata in both cases. These judgments in effect foreclosed plaintiffs from trials on the merits to establish rights to about $2,000,000 added interest by a new method of computation. The Court of Claims affirmed the summary judgments (Western (Old Settler) Cherokee Indians, et al. v. United States, supra). The Court said at page 676:

> What the appellants are now asking is that notwithstanding these prior decisions with reference to the matter of interest, the Indian Claims Commission should permit them to open up the question of interest and again consider their agreements with the Government with reference thereto, and allow appellants a greater amount of interest on a basis or theory different from that on which the matter of interest was litigated and allowed in the prior cases, under the terms of the treaty of 1846. The appellants contend, in effect, that the Indian Claims Commission has authority to do this under clause (5) of the Act of August 13, 1946 (25 U.S.C. 70a), which directs the Commission to hear and determine "claims based upon fair and honorable dealings that are not recognised by any existing rule of law or equity", for the reason that the claims which they now seek to litigate were not and could not have been decided on the merits in the cases of Eastern or Emigrant Cherokees v. The United States, 82 C. Cls. 180, and Western or Old Settler Cherokees v. The United States, 82 C. Cls. 566.
>
> We cannot agree. This contention overlooks the effect of prior decisions on the question of interest . . .

The Court added at page 677:

> We think it is clear that appellants have heretofore had their day in court upon their claims for interest on the principal sums on which they now seek to recover additional interest in these proceedings before the Indian Claims Commission. In addition, we think it is clear from the history of the Act of 1946 that Congress did not intend to confer upon the Commission jurisdiction to permit claims, such as are here involved, to be re-litigated under clause (5) of Section 2 on the basis of fair and honorable dealings. Clause (5) obviously has reference to the fundamental character of the claim rather than to the theory on which an Indian tribe or band may seek to invoke the jurisdiction of the Indian Claims Commission. Cf. Sioux Tribe of Indians v. The United

> States, 112 C. Cls. 39, 45, 46; Sioux Tribe of Indians v. The United States, 112 C. Cls. 50, 57. If the claims made by appellants in these cases could be again heard and determined by the Indian Claims Commission, it would be difficult to imagine a claim, even though previously considered and decided on the merits by this court, which could not be relitigated before the Commission merely by basing the claimed right of recovery on the provision of clause (5), supra. Clause (5) was intended, as its language clearly shows, when considered in the light of its history and other provisions of Section 2, to cover only moral claims based on justice and fair dealings or broad principles of equity and justice, with respect to which no court had theretofore made a determination on the merits, or could have made such a determination under the terms of prior jurisdictional acts . . .

It is agreed that the parties and the subject matter of the instant case are identical with those of Creek Nation v. United States, 92 C. Cls. 269. But plaintiff says the instant case presents a different cause of action, and that therefore it should be litigated before this Commission.

The previous suit in the Court of Claims was litigated under the jurisdictional act of May 24, 1924 (43 Stat. 139), which gave the court jurisdiction ". . . to hear, examine and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States."

Plaintiff says the Court of Claims did not have jurisdiction to look behind the grants and allotments and give relief to plaintiff for mutual or unilateral mistake of fact or law or lack of fair and honorable dealing.

Plaintiff supports his general contention by quoting from Choctaw Nation v. United States, 128 C. Cls. 195, 201: "A prior decision is not res judicata if there was lack of jurisdiction or if revision of the treaty or agreement was necessary to a decision in favor of the Indian Tribe."

The Court of Claims also said in Choctaw Nation v. United States, supra, at page 202:

> In the prior case this court examined and considered all of the facts then before it relating to the intent and understanding of the parties, in an effort to interpret properly the language which they had used. Guided by the above precepts, and after full consideration, we concluded that the understanding of the representatives of the tribe and the real intention of the parties to the agreements was, and that they therefore contemplated and understood, that the Choctaw Nation was to bear the burden of payment from its funds of the expenses there and here in suit.
>
> We think that this decision as to a fact which was material to the issues then before us precludes appellant from again litigating the issue, notwithstanding the passage of Section 2 of the Indian Claims Commission Act, supra. We are of the opinion that the Indian Claims Commission rightly held that the claim asserted before it had previously been considered and adjudicated on its merits, and that the prior decision was res judicata.

The court upheld this Commission's dismissal of the petition on the ground of res judicata.

In Chickasaw Nation v. United States, 132 C. Cls. 359, the Court of Claims reversed this Commission's decision granting summary judgment to defendant on the ground that the matter was res judicata because it had been decided in a former decision of the Court of Claims and an appeal to the Supreme Court.

In the former case the Court of Claims had construed the Atoka Agreement of 1898 and the Supplemental Agreement of 1902 (both agreements having as parties the Chickasaws, the Choctaws, and the United States) favorably to the Chickasaws. This construction negated a proviso to the supplemental agreement of 1902 because the court felt, considering the history of the Chickasaw-Choctaw dispute, that the language was "not well chosen for the purpose for which plaintiff claims and we find it was inserted." (Chickasaw Nation v. United States and Choctaw Nation, 95 C. Cls. 192, 207, December 1, 1941).

The Court of Claims said, 132 C. Cls. 359, 361:

> In this court, in the prior suit, we decided that the Supplemental Agreement of 1902, considered in the light of its history, and the circumstances of its making, contemplated that the Chickasaw should not contribute gratis one-fourth of the lands which the Choctaw were obligated to furnish to the Choctaw freedmen. We would not have had the temerity to rewrite or revise the 1902 agreement, to make of it a fairer agreement or one more nearly in accord with the subjective intentions of the representatives of the Chickasaw. We thought, however, that in view of the accepted rules of liberal construction applicable to writings embodying agreements between the Government and its quasi wards, the Indian tribes, the words of the 1902 agreement, though "not well chosen" to express the meaning which we found, could bear that interpretation.

The Supreme Court, reversing the Court of Claims, said that even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Choctaw Nation v. United States and Chickasaw Nation, 318 U. S. 423, 87 L. Ed. 877. The Supreme Court remanded the case and said the petition of the Chickasaw Nation must be dismissed. The Court of Claims accordingly dismissed the petition. Chickasaw Nation v. United States and Choctaw Nation, 99 C. Cls. 809.

The situation in that case (when the Commission rendered summary judgment) was: The issue of intent had not been resolved. The Supreme Court had reversed the former Court of Claims decision because that court construed the 1902 agreement as showing an intent contrary in sense to the wording of the agreement; and revision of the 1902 agreement was beyond the powers conferred on the Court of Claims under the enabling act of June 9, 1924 (43 Stat. 537).

But in the instant case, the situation is not comparable. United States v. Hayes, supra, and Creek Nation v. United States, supra, show thorough exploration and clear decision on the intent of the parties and the circumstances surrounding the allotments and sales of the riverbed lands; and no revision of the written agreements was necessary to do this.

It is well settled that a fact or question which was in issue in a former suit and there determined by a court of competent jurisdiction cannot again be litigated between the parties on either the same or a different cause of action.

Southern Pacific Railroad v. United States, 168 U.S., 1, 48, 49, and cases there cited; United States v. Moser, 266 U.S. 236, 241; Tait v. Western Maryland Ry. Co., 289 U.S. 620, 623, and cases there cited; National Bondholders Corporation v. Seaboard Citizens Nat. Bank of Norfolk, Virginia, 110 F. 2d 138, 143; George H. Lee Co. v. Federal Trade Commission, 113 F. 2d 583, 586.

The mere assertion of a new "cause of action" is not sufficient authority to litigate a subject matter already decided by a court of competent jurisdiction. Gaitan v. United States, 295 F. 2d 277, 279;

certiorari denied, 356 U.S. 937. Nor is the mere assertion of a possible cause of action under clause (5) of section (2) of the Act. Western (Old Settler) Cherokee Indians, et al. v. United States, 116 C. Cls. 665 (1950).

This Commission is of the opinion that the instant claim is the same claim which was asserted, considered, and adjudicated on its merits by the Court of Claims in Creek Nation v. United States, 92 C. Cls. 269, certiorari denied, 313 U.S. 581; and we hold that the decision in that case is res judicata of the instant claim. An order will be entered dismissing the petition.

Wm. M. Holt
Associate Commissioner

I concur:

Arthur V. Watkins
Chief Commissioner

Scott, Associate Commissioner, dissenting:

The petitioner herein, through counsel, has assured the Commission that it has evidence relative to its allegations under Clauses 3 and 5 of Section 2 of the Indian Claims Commission Act which was not presented to the Court of Claims in a prior proceeding (Creek Nation v. United States, 92 C. Cls. 269) and that this evidence could not have been considered by that Court because of the limitations of the Jurisdictional Act of May 24, 1924, 43 Stat. 139. Petitioner therefore presses its right to have this evidence presented to and considered by the Commission.

Based on the evidence before the Court of Claims within the limits of the said Jurisdictional Act it could have come, in my opinion, to no other conclusion than it did. However, it would appear from the language of its decision that there were no facts presented to the Court as to whether or not the tribe understood or intended that the riverbed lands should remain the property of the tribe. This is implicit from the language of the Court which reads:

> "As to the second ground, to wit, the rule of construction in favor of the Indian. No reason or facts are presented to show that these Indians, individually or as a tribe, understood or intended that these river bed lands should remain the property of the tribe. 'While the dependent character of the Indians makes it the duty of the court to closely scrutinize the provisions of the treaty and to interpret them "in the light of the larger reason and the superior justice that constitute the spirit of the law of nations" (Choctaw Nation v. United States, 119 U.S. 1, 28, 7 S. Ct. 75, 91, 30 L. Ed. 306), the court must take care, when using its power to ascertain the intention of the parties, not to disregard the obvious import of the words employed, and thereby, in effect, determine questions of mere governmental policy.'" United States v. Choctaw, etc. Nation, 179 U.S. 494, 538, 21 S. Ct. 149, 166 (45 L. Ed. 291)." (Emphasis supplied)

However, any evidence which might be brought in by the petitioner in this matter at a hearing which is not substantially different than that which was before the Court of Claims would not, in my judgment, be sufficient to support a favorable decision by this Commission.

The Jurisdictional Act of 1924 conferred upon the Court of Claims jurisdiction:

> "* * * to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States." (emphasis supplied)

Paragraph XII of the petition and the prayer thereof read as follows:

> "That should the commission hold that the plaintiff is not entitled to redress from defendant for the mistakes herein complained of, and for the negligence and failure of defendant to protect plaintiff in its riverbed lands, or under the rules of exacting fiduciary standards, the plaintiff avers that it is entitled to redress under the principles of fair and honorable dealings between plaintiff and defendant, without regard to any existing rule of law or equity, for the loss of its lands under the circumstances set forth herein.
>
> "WHEREFORE, the plaintiff prays:
>
> "1. That the Commission consider the said allotment Agreements as if revised on the ground of mistake of fact or law, or both, or upon other applicable equitable grounds, and that plaintiff be awarded judgment against defendant for the actual and potential value of said riverbed lands of which plaintiff has been deprived because of the failure of defendant to carry out the true intention and understanding of the parties to said Agreements -- that the riverbed lands remain the property of the Creek Nation, and that said lands were not intended to pass by the allotment patents to the riparian allottees; or for such other amount as may be required in equity and good conscience to be paid in order to do substantial justice to plaintiff; or