BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION, Petitioner,	)	
v.	)	Docket No. 173-A
THE UNITED STATES, Defendant.	)	
CHEROKEE FREEDMEN, and CHEROKEE FREEDMEN'S ASSOCIATION, ex rel EDWARD CURLS, RUTH CLAGGETT, JACKSON SMITH, GLADYS LANNAGAN, and WILBERT ROGERS, Plaintiffs,	)	
v.	)	Docket No. 123
THE UNITED STATES, Defendant.	)	

Decided: October 5, 1966

Appearances:

Paul M. Niebell, with whom were Earl Boyd Pierce, George E. Norvell, and Dennis W. Bushyhead, Attorneys for Petitioner in Docket No. 173-A

Alan W. Farley, Attorney for Plaintiffs in Docket No. 123

Frederick C. Ward, Jr., with whom was Mr. Assistant Attorney General Edwin L. Weisl, Jr., Attorneys for Defendant

O P I N I O N

PER CURIAM: Docket No. 123 was filed by the Cherokee Freedmen's Association and others to recover monies not distributed to the

individuals comprising that Association, and others equally situated, when assets of the Cherokee Nation were distributed per capita among the members of the said Nation. The plaintiffs in Docket No. 123 were omitted from that distribution because they (or their ancestors) were not enrolled members of the Cherokee Nation on the final (Dawes Commission) Cherokee Roll. The claim for distribution (Docket No. 123) was dismissed by this Commission on the ground that the suit comprised a series of individual claims over which the Commission lacked jurisdiction. Cherokee Freedmen, et al. v. United States, 2 Ind. Cl. Comm. 231 (1952); id., 10 Ind. Cl. Comm. 109 (1961).

When the 1961 dismissal was appealed to the Court of Claims, that court affirmed the dismissal on the stated ground. Cherokee Freedmen et al. v. United States, 161 C. Cls. 787 (1963). However, the Court of Claims remanded Docket No. 123 to this Commission to dispose of an issue not heretofore considered by this Commission (id., pp. 790, 791). That issue is whether the Docket 123 plaintiffs, by reason of their prior enrollment on the Wallace Cherokee Roll or the Kern-Clifton Cherokee Roll, are entitled to participate in awards which may be made by this Commission to the Cherokee Nation at some future date. The Court of Claims suggested that one way to resolve this issue would be to permit the Docket 123 plaintiffs to intervene in some pending Cherokee Nation docket, and Docket No. 173 was mentioned as a possibility (id., p. 791).

On November 1, 1963, the plaintiffs in Docket 123 filed a motion for leave to intervene in the Cherokee Nation's Docket No. 173. That

motion was denied on January 6, 1964, for by that time the Commission no longer had jurisdiction over the judgment funds involved in Docket No. 173 (13 Ind. Cl. Comm. 33). The Commission suggested that the Cherokee Nation's Docket No. 173-A was (then) still within the jurisdiction of this Commission and offered to consider and rule upon an intervention motion for that case by the Docket 123 plaintiffs if and when such a motion should be filed.

In a document filed on March 30, 1964, the Docket 123 plaintiffs moved:

> Come now the plaintiffs above named /the Docket 123 plaintiffs/ and respectfully move the Court /the Indian Claims Commission/ for an order allowing plaintiffs to intervene in Docket No. 173-A, The Cherokee Nation vs. United States, as suggested in the Opinion of this Court in the above entitled action (13 Ind. Cl. Comm. 39-40) and in the Opinion of the Court of Claims Appeal No. 2-62 entered May 10, 1963.

The Cherokee Nation (original plaintiff in Docket No. 173-A) and the defendant filed responses in opposition to this motion. Thereafter, and on May 6, 1964, the Docket 123 plaintiffs refiled their motion for intervention, adding:

> . . . , for the reason that plaintiffs are so situated as to be adversely affected by disposition of the property involved by this Court.

The Docket 123 plaintiffs' motion to intervene in Docket No. 173-A was granted by this Commission in an order dated October 12, 1964, and on November 12 of the same year, the intervening petition of Cherokee Freedmen, et al., was filed.

In March of 1966, the Cherokee Nation, plaintiff in Docket No. 173-A, filed a motion to dismiss the intervening petition of Cherokee Freedmen, et al., filed in Docket No. 173-A. The intervenors have responded. The defendant did not file any response. The issue now to be decided is whether this Commission, after permitting the Docket 123 plaintiffs to file an intervening petition, ought to dismiss that intervening petition. The Docket 173-A plaintiff's motion contains allegations and arguments which are urged in support of an affirmative answer to that particular question.

The first ground stated in the motion to dismiss is that the question of the right to intervene has been settled by prior litigation here and in the Court of Claims. The movant's reason from this litigation that the doctrine of res judicata precludes any further consideration of intervention by this Commission.

The doctrine of res judicata is predicated on one basic assumption: that precisely the same cause of action is involved. It is certain that Indian litigation brought in the Court of Claims under any jurisdictional act seldom involves the same remedies -- hence the precise causes of action -- as are available under Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a). Seminole Nation v. United States, 10 Ind. Cl. Comm. 461 (1962), at pages 464, 465. Thus the various stages of the Whitmire litigation are not dispositive of the instant act of intervention.

The other contention regarding res judicata -- that this Commission's decisions on intervention in Dockets 2 and 24 control the

instant act of intervention -- flies in the face of recent decisions. The Court of Claims remanded Docket 123 to this Commission specifically to deal with a "new aspect", that is, new to the Indian Claims Commission. Cherokee Freedmen, et al. v. United States, 161 C. Cls. 787 (1963), at page 791. And in granting the motion to intervene, this Commission stated unequivocally that Docket 123 was remanded

> . . . for the purpose of determining an issue raised by petitioners in said case for the first time in the Court of Claims . . .

Under these circumstances, there is little doubt that the doctrine of res judicata is not available to the Docket 173-A plaintiff to forestall intervention by the Docket 123 plaintiffs.

The Docket 173-A plaintiff next argues that it, and only it, has a paramount right to represent Cherokee Freedmen before the Indian Claims Commission. We believe they misapprehend the thrust of the intervening petition. As this Commission views the situation, the Docket 123 plaintiffs do not seek to supplant the Docket 173-A plaintiff in the further prosecution of Docket 173-A, but only seek to ensure that whatever interest the intervenors may be found to have in Docket No. 173-A be protected. The right to ensure that protection was granted the Docket 123 plaintiffs by this Commission in its order granting motion to intervene in Docket No. 173-A of October 12, 1964. That, and no more.

The third, fourth, sixth, and seventh grounds for dismissal of the intervening petition are intertwined with a single thread. The thread is an allegation that ultimately -- actually, when Docket No. 173-A is successfully concluded -- that intervention will be found to be a

futile act. Futile, because the Docket 123 plaintiffs will not be able to share in the proceeds of the judgment. The speculative argument, progresses thus: First, the Docket 123 plaintiffs are not Cherokee Indians and never will be Cherokee Indians. Second, that the only Cherokee Indians are and will be enrolled Cherokees. Third, that Congress, whose business it is to determine which individuals are Cherokee Indians, will for the purpose of distributing the proceeds of any judgment, determine that only the Docket 173-A plaintiffs are "real, true, and only" Cherokee Indians.

This Commission accepts wholeheartedly one segment of the argument. If there are any proceeds of judgment, Congress will have the competence to ascertain the recipients. But verification of the accuracy of the speculative elements of this argument must await future events.

The fifth ground for dismissal of the intervening petition is the oft-repeated allegation that the Kern-Clifton roll was superseded by the roll made by the Dawes Commission. This is an issue of fact, disputed by the Docket 123 plaintiffs. As such, it may be properly disposed of in the course of a trial on the merits, rather than in a preliminary motion to dismiss the intervening petition.

The eighth ground for dismissal is a summation of the decisions of the Commission and of the Court of Claims in Docket No. 123. While the summation is factually accurate, it does not touch upon the rights, if any, which the Docket 123 plaintiffs seek to protect by intervening in Docket No. 173-A.

Likewise, the ninth and tenth grounds for dismissal relate to the merits, or lack of merits, of Docket No. 123 as heretofore unsuccessfully prosecuted. The Commission would have thought that the merits of Docket No. 123 as prosecuted had been laid to rest permanently by its decision and by the affirmance of the Court of Claims. What the Docket 173-A plaintiffs hope to gain by disturbing that decision is unclear. Perhaps it would suffice for the Commission to admit that as to the merits of Docket 123 as heretofore prosecuted, the Commission is not prepared to reverse that decision.

From the foregoing brief summary it will be seen that an issue of fact has been raised by the pleadings which we are asked to determine on what is in reality a motion for summary judgment. The above is sufficient, we believe, to show the need for hearing the evidence on the issues of fact involved.

In view of the above, it follows that the motion of plaintiff in Docket No. 173-A must be denied.

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner

T. Harold Scott
Associate Commissioner