

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,

Plaintiff,

v.

Docket Nos. 273, 277

THE UNITED STATES,

Defendant.

Decided: February 28, 1967

Appearances:

Paul M. Niebell, Attorney for  
Plaintiff

Craig A. Decker, with whom was  
Mr. Assistant Attorney General  
Edwin L. Weisl, Jr., Attorneys  
for Defendant

O P I N I O N

PER CURIAM: The above-styled suits are here considered together only because, momentarily, they present a single issue: Whether prior litigation compels application of the doctrine of res judicata to the exclusion of further litigation. This issue is raised by the defendant's motions for summary judgment.

Docket No. 273 seeks recovery for the "true value" of town lots which, the plaintiff contends, were under-appraised by townsite commissioners who had been appointed by the defendant. Docket No. 277 seeks recovery for various "trespasses" committed by railroads and their personnel without effective opposition from the defendant. Some background facts relevant to Docket No. 273 may be found in Creek Nation

v. United States, 97 C. Cls. 602 (1942), cert. den. 318 U.S. 787 (1943).

Other background facts relevant to Docket No. 277 may be found in Creek Nation v. United States, 97 C. Cls. 591 (1942), aff'd 318 U.S. 629 (1943).

These citations comprise the prior litigation which, the defendant contends, compels application of the doctrine of res judicata to the exclusion of further litigation.

Docket No. 273 is based on the alternatives of revision of the underlying treaties and agreements (Clause 3) or recovery upon fair and honorable dealings (Clause 5) supplied by Section 2 of the Indian Claims Commission Act of 1946 (25 U.S.C. 70a). Docket No. 277 is predicated solely upon a lack of fair and honorable dealings. These are causes of action which were not available in any forum prior to passage of the Act. Creek Nation v. United States, 168 C. Cls. 483 (1964). An absolute requirement for application of the doctrine of res judicata is unity of parties, facts, and causes of action. The instant suits are predicated upon causes of action not available in prior litigation in the Court of Claims. It follows that the pleas of res judicata cannot prevail.

There is one further matter, pertaining solely to Docket No. 277, which merits mention. The defendant contends, at the top of page 2 of the motion for summary judgment, that

"1. The facts alleged by plaintiff hereto, even if true, state no cause of action against the United States."

This is a contention not found in the defendant's motion for summary judgment in Docket No. 273. Inferentially (and there is nothing in the motion or the supporting brief to controvert or to support it), the defendant is urging that the wrongs, if any, were committed by the

railroads and not by the defendant. It would follow that the plaintiff should look to the wrongdoers, and not to the defendant, for compensation.

The plaintiff's theory of recovery in Docket No. 277 is that a tort was committed by the railroad, or by several railroads, and that the defendant participated in that tort (Tr. 60). In a similar situation, this Commission held that, conceivably, a cause of action against the defendant could exist if it could be demonstrated that the defendant participated in the commission of the wrong of which the plaintiff complains. Osage Nation v. United States, 16 Ind. Cl. Comm. 190 (1965). Whether that participation were malevolent or inactive would not seem to be controlling.

In view of the foregoing discussion, it is apparent that both motions for summary judgment must be and the same are hereby denied.

The original of this Per Curiam Opinion shall be filed in Docket No. 273 and a copy, certified by the Clerk of the Commission, shall be filed in Docket No. 277.

Arthur V. Watkins  
Chief Commissioner

Wm. M. Holt  
Associate Commissioner

T. Harold Scott  
Associate Commissioner