BEFORE THE INDIAN CLAIMS COMMISSION

THE CADDO TRIBE OF OKLAHOMA, IN ITS OWN RIGHT AND DAN MADRANO, LLOYD TOUNWIN AND ANDREW DUNLAP ON RELATION OF THE CADDO TRIBE OF INDIANS AND THE CADDO TRIBE OF OKLAHOMA EACH ON BEHALF OF OTHERS SIMILARLY SITUATED AND ON BEHALF OF THE CADDO TRIBE AND VARIOUS BANDS AND GROUPS OF EACH OF THEM COMPRISING THE CADDO TRIBE AND NATION,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant,

THE ALABAMA-COUSHATTA INDIANS OF TEXAS and the COUSHATTA INDIANS OF LOUISIANA,

Applicants for Intervention.

Docket No. 226

Decided: January 12, 1972

Appearances:

Rodney J. Edwards, Attorney for Plaintiffs.

Bernard M. Sisson, with whom was Mr. Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

Alan H. Minter, Attorney for the Alabama-Coushatta Indians of Texas, Applicants for Intervention.

Jim D. Bowmer, Attorney for the Coushatta Indians of Louisiana, Applicants for Intervention.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

The Alabama-Coushatta Indians of Texas and the Coushatta Indians of Louisiana have moved for leave to intervene in this claim of the Caddo Tribe presently before the Commission. The two groups first named are alleged to be separate groups of descendants of a single aboriginal entity, and will be referred to as "applicants." The plaintiff, the Caddo Tribe, is claiming aboriginal title to a large tract of land in northeastern Texas, southeastern Oklahoma, southwestern Arkansas and northwestern Louisiana. The applicants allege aboriginal occupancy of fifteen counties in east-central Texas running north from a line between Houston and Beaumont as well as ten counties in western Louisiana. The area alleged by the applicants to be theirs substantially overlaps that claimed by the Caddo petition.

The plaintiff and defendant oppose the present motion to intervene on the grounds that (1) the claim of the applicants is res judicata by virtue of the Commission's prior dismissal of Docket 26 on the merits; and (2) intervention here by the applicants is not justified under the general rules of law applicable to intervention.

In suits before the Commission, intervention may be granted where it can be established that the applicant's claim relates back to the timely filing of the plaintiff's original petition. In order to establish this relation back, the applicant must show a common interest in the claim of the original plaintiff, that the defendant had sufficient

notice of the applicant's possible claim and that intervention will not unduly delay the progress of the case. In the matter of Lipan Apache Tribe v. United States, Docket 22-C, 22 Ind. Cl. Comm. 1 (1969), the Commission held that a common alleged source of injury, namely transfer of public lands by the United States to the State of Texas without requiring the State to protect aboriginal property rights of the Indian occupants, was sufficient to permit intervention, and that the filing of the original claim therein had the effect of putting the Government on notice that it might be required to litigate the question of title to all the land in Texas in the original claim, which included the land claimed by the Tigua applicants for intervention. In Lipan, the Commission permitted intervention three months before the date set for trial. We believe that our decision in Lipan, which was followed in Kiowa, Comanche and Apache Tribe v. United States, Docket 257, 24 Ind. Cl. Comm. 405 (1971) (permitting the Wichita Tribe to intervene), is controlling on the general question of whether intervention is appropriate in this case.

The defense of res judicata necessitates further comment. In the well-known case of Commissioner v. Sunnen, 333 U.S. 591, 597 (1948), the rule of res judicata was stated to be as follows:

> *** The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' Cromwell v. County of Sac, 94 U.S. 351, 352. ***

In short, there must be an identity of parties as well as an identity of cause of action before the doctrine applies. In the opinion of the Commission, neither the cause of action nor the parties in the motion now before us are identical with those in the previously dismissed Docket 26. 1/

1/ The Commission has recently, in Texas-Cherokees v. United States, Docket 26, 26 Ind. Cl. Comm. 78 (1971), denied motions filed by these same tribes, the Alabama-Coushatta Indians of Texas and the Coushatta Indians of Louisiana, for relief from the opinion of the Commission at 2 Ind. Cl. Comm. 516 (1953), dismissing a claim brought by "The Texas-Cherokees and Associate Bands, on the relation of W. W. Keeler, Homer L. Smith, Frank M. Carr, Paul Johnson and Joe Rogers, members of its Executive Committee." The applicants, in the motion in Docket 26, alleged that they never knew they were parties to the claim nor were they ever notified of the Indian Claims Commission Act or of their rights thereunder, as is required by section 13(a) thereof, 60 Stat. 1049, 1052. They further alleged they were among the "Associate Bands" by reason of a reference contained in a treaty entered into on February 23, 1836, between the Provisional Government of Texas and the "Cherokees and their associate bands now residing in Texas * * * to wit: Shawnees, Delawares, Kickapoos, Quopaws, Choctaws, Bolupies, Jawanies, Alabomas, Cochaties, Caddoes of the Noches, Tahovcattokes, and Unatuquouous." The claim originally filed in Docket 26 was for the value of 1,640,000 acres of land in east-central Texas (surrounding the present city of Tyler) title to which was alleged to have been granted the Indians by the governments of Spain, Mexico and, later, the Republic of Texas, and from which it was alleged that the Texas-Cherokees and Associate Bands were driven into Oklahoma in 1839 by military forces of the Republic of Texas. The claim in Docket 26 was dismissed on the grounds that (1) the entity represented by the plaintiffs therein did not constitute a tribe, band or other identifiable group within the meaning of section 2 of the Indian Claims Commission Act, 60 Stat. 1050, and (2) there could be no recovery, in any case, against the United States for the taking of Indian lands by the Republic of Texas. The applicants' motions in Docket 26 for relief from the Commission's opinion were denied on the ground that the Commission, under section 22(b) of the Act, 60 Stat. 1055, ceased to have jurisdiction over the subject matter of said claim on May 25, 1954, on which date the final determination dismissing the claim was reported to the Congress pursuant to section 21 of the Act, 60 Stat. 1055.

The pleadings in Docket 26 reveal a claim by descendants of a group of Indians consisting mainly of Cherokees who had migrated to Texas from Arkansas Territory in 1819 and 1820, but including "scattered remnants of Indians from such tribes as the Cherokees, Creeks, Caddoes, Kickapoos, Shawnees, Delawares, Choctaws, and members of a few other Indian bands" (Defendant's Amended Answer, p. 1), all of whom left Texas in 1839 and migrated to Indian Territory where they were absorbed into the Cherokee Nation. The claim alleged that these Indians received grants of title to a defined area of 1,640,000 acres in Texas from the Spanish, Mexican, and Republic of Texas governments during the period they were residing in Texas and that they were forcibly expelled from Texas in 1839 by armed forces of the Republic of Texas.

The complaint in intervention filed in Docket 226 by the Alabama-Coushatta Indians of Texas and the Coushatta Indians of Louisiana presents a claim by tribes allegedly never informed of the Indian Claims Commission Act and of their rights thereunder, who are alleged to have migrated to Louisiana during the late 18th Century and to Texas around 1800 from the general area of Alabama and Mississippi, established villages therein, remained in Texas and Louisiana to the present day, and whose existence in Texas has been acknowledged by the United States in this century. (See 45 Stat. 883, 900 (1928), where Congress appropriated funds for the Alabama and Coushatta Indians of Texas and authorized the purchase of land in the name of the United States in trust for them, and 68 Stat. 768, 769 (1954), where the Federal trust relationship

to the Alabama and Coushatta Indians of Texas was terminated.) The claim of these Indians is based upon alleged aboriginal title to a tract which very slightly overlaps the area claimed in Docket 26 and encompasses a substantial area in eastern Texas and western Louisiana.

The rights alleged in each claim are different, the wrongs alleged in each are different, and the facts underlying each claim are different. Clearly, therefore, the causes of action are not identical. Rhodes v. Jones, 351 F.2d 884 (8th Cir. 1965), cert. denied, 383 U.S. 919 (1966).

Furthermore, analysis of the pleadings under Docket 26 and of the Commission's opinion and findings of fact, supra, dismissing the claim of the plaintiffs therein shows that said plaintiffs represented an entity whose ancestors were absorbed into the Cherokee Nation in Indian Territory in 1839. This entity is not identical with the Indians filing the present motion, whose ancestors never migrated to Indian Territory, but have lived in Texas and Louisiana since at least the beginning of the 19th Century, and whose existence in Texas in this century the United States has acknowledged.

Accordingly, the Commission will this day enter an order granting the motion of the applicants for intervention.

Richard W. Yarborough

Richard W. Yarborough, Commissioner

We Concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner