BEFORE THE INDIAN CLAIMS COMMISSION

THE SEMINOLE INDIANS OF THE STATE OF FLORIDA,	)	
and	)	Docket Nos. 73 and 151
THE SEMINOLE NATION OF OKLAHOMA,	)	
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant,	)	
C. W. McGHEE, ET AL., (CREEK NATION EAST),	)	Docket No. 280
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

Decided: July 5, 1973

Appearances:

Paul Niebell, Attorney for Plaintiff in Docket No. 151.

Roy L. Struble, Effie Knowles, and Charles Bragman, Attorneys for Plaintiff in Docket No. 73.

Carl Elliot, Attorney for Plaintiffs in Docket No. 280; C. LeNoir Thompson, Micah H. Naftalin, and Tobias Naftalin were on the briefs.

Craig A. Decker and Lester Reynolds, with whom was Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the opinion of the Commission.

This matter is before the Commission on the motion of the Creek Nation East plaintiffs (Docket 280), filed on December 15, 1972, to amend the petition to conform with the evidence, and on the Seminole plaintiffs' (Dockets 73 and 151) motion to dismiss and for summary judgment, filed January 18, 1973. On January 23, 1973, defendant joined in the Seminole motion to dismiss. Both parties plaintiff have filed responses to the respective motions. A review of the recent history of these consolidated claims and the proceedings before the Commission will show the present posture of these claims in relation to the pending motions.

On July 16, 1969, plaintiff Creeks filed a motion for leave to amend their petition. The essential ground of that motion was that prior to and during 1823[1/] the Seminoles were a constituent part of the Creek Nation and that only the Creek Nation could alienate its lands. The Commission denied the motion to amend on the ground that the amendment constituted a new cause of action which the Commission was without jurisdiction to consider. The denial was affirmed on appeal. McGhee ex rel. Creek Nation v. United States, 194 Ct. Cl. 86, 437 F.2d 995 (1971) aff'g in part, rev'g in part, Docket 280, 22 Ind. Cl. Comm. 10 (1969).

1/ On September 18, 1823, the United States and the "Florida Tribe of Indians" entered into the Treaty of Camp Moultrie, 7 Stat. 224, under which the Indians ceded to the United States all title they had to the territory of Florida. In return for the cession, the Indians received a protected reservation within the ceded territory and certain monetary consideration.

On February 18, 1972, the Court of Claims entered its decision on an appeal in the matter of the Seminole Indians v. United States, 197 Ct. Cl. 350, 455 F. 2d 539 (1972).[2/] In the Seminole case, which to that point had proceeded independently to decisions on title and value, it had been determined that the Seminoles had aboriginal title to all of the State of Florida (exclusive of certain areas in northern Florida). The Creeks' claim in Docket 280 overlaps a portion of the lands found to have been owned by the Seminoles. The Court of Claims, in remanding the Seminole case, supra, to the Commission, directed that the Creek and Seminole claims be consolidated for the purpose of resolving the overlapping claims. On March 15, 1972, the claims were consolidated and trial on the issue of title was held on June 15, 1972. At that time the Creeks reasserted their claim with respect to the composition of the Creek Nation, i.e., that it included the Seminoles. Upon objection such evidence was excluded and the Creek plaintiffs made an offer of proof in support of their contentions. On December 15, 1972, the Creek plaintiffs filed their briefs and proposed findings of fact based on their evidence, accompanied by the motion to amend which is now under consideration. Should the Commission allow the amendment, the evidence would be admitted.

The entire thrust of the Creek plaintiffs' case, as stated in their proposed findings and brief, is to demonstrate that the Seminoles, or more exactly the "Indians of Florida"who ceded Florida by the Treaty of Camp Moultrie of 1823, 7 Stat. 224, were in fact constituents of the Creek Nation and that all of their land occupancy accrues to the Creeks.

2/ The Court's remand of Dockets 73 and 151 by the February 18, 1972, decision involved the following Commission decisions: 13 Ind. Cl. Comm. 326 (1964), 19 Ind. Cl. Comm. 179 (1968), 23 Ind. Cl. Comm. 108 (1970), and 24 Ind. Cl. Comm. 1 (1970).

Creek plaintiffs contend that a separate Seminole entity did not exist until after 1823, when the Seminoles were segregated and placed on a reservation in central Florida. The Seminole plaintiffs contend that the Seminole entity was separate from the Creek Nation sometime before 1823; how long before is discussed generally in a prior decision of the Seminole case. See United States v. Seminole Indians, 180 Ct. Cl. 375 (1967), aff'g. 13 Ind. Cl. Comm. 326 (1964), Dockets 73 and 151. The Creek plaintiffs contend that their evidence standing alone proves their contention as to the entity and that it should not be denied on the basis of the record in the prior Seminole case to which they were not a party.

The Creek position appears to us no different from that which was previously rejected by the Commission and the Court of Claims: they seek to amend their petition to claim Creek ownership of all areas under Seminole occupancy. McGhee ex rel. Creek Nation v. United States, supra. As found before we think that this states a claim not contained in their original petition; they seek to change the entity in whose behalf they are suing. In paragraph 2 of the petition filed on August 9, 1951, the plaintiffs identify themselves with the Creek Nation so familiar in Indian claims litigation. In paragraph 7 of the petition they refer to the Creeks from the United States that fled to Florida and joined the Seminoles after the Creek War. In paragraph 15 of the petition they assert that "the United States by its treaty with the Florida tribes of Indians obtained the lands of the original Creek Nation south of the 31st parallel. . ." As before, we find no notice

in the petition that the Seminoles or Florida Tribes of Indians would be claimed to be components of the Creek Nation rather than regarded as one or more separate entities.

The amendment is asserted under our rule 13(b), which permits amendments to conform to the evidence.[3/] The Commission's rule 13(c) provides that when claims asserted in such amended pleadings "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Since we find that the amendment states a claim not contained in the original petition, rule 13(c) does not apply and the amendment must be considered as one embodying a new cause of action asserted on December 15, 1972.

3/ The Commission rule 13(b) states as follows:

> (b) Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues. If evidence not within the issues made by the pleadings is offered at a hearing held by a Commissioner or an Examiner, upon objection such evidence shall be rejected; whereupon the party may make an offer of proof. Upon motion to amend the pleading the Commission shall after notice to the adverse party allow the pleading to be amended to conform to the offered evidence and shall do so freely when the presentation of the merits of the claim or defense will be subserved thereby and the objecting party fails to satisfy the Commission that the amendment of the pleading and the admission of such evidence would prejudice it in maintaining its claim or defense. The Commission may grant a continuance to enable the objecting party to meet such evidence. (25 C.F.R. §503.13(b) (1973)).

This brings us again to the jurisdictional bar set forth in Section 12 of the Indian Claims Commission Act, 25 U.S.C. § 70k (1964). That section limits the filing of claims before this Commission to a five-year period after August 13, 1946. It is well settled that this limitation period for bringing suit is no mere statute of limitations but a fixed statutory jurisdiction period. See Snoqualmie Tribe of Indians v. United States, 178 Ct. Cl. 570, 372 F. 2d 951 (1967).[3/] It cannot be waived by consent of the parties or enlarged by the Commission. Cf. Yankton Sioux Tribe v. United States, 175 Ct. Cl. 564, 568 (1966).[4/] Thus any claim brought for the first time after August 13, 1951, is barred.

The pending motion under rule 13(b) is identical in effect and in the result it is intended to achieve as the July 1969 motion filed under rule 13(a). Creek plaintiffs argue that unlike the situation in the earlier motion, the Commission has a record which was not before it previously. In other words, since they have now presented evidence in support of their claim, they contend that the motion to amend to conform to the proof must be allowed under rule 13(b). We find no merit in the argument. Our decision is the same as we made with respect to the first motion, which decision was affirmed on appeal. The amendment states a new cause of action and thus cannot relate back to the original pleading under rule 13(c). The evidence offered in support of an impermissible pleading is not admissible. Since the Commission is without jurisdiction to consider this new cause of action, the motion to amend must be denied.

The Seminole plaintiffs have moved that the petition in Docket 280 be dismissed for lack of substantial evidence to support the claim

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3/ Aff'g in part, rev'g in part 15 Ind. Cl. Comm. 267 (1965), Docket 93.
4/ Rev'g on other grounds, 10 Ind. Cl. Comm. 137 (1962), Docket 332-A.

of the petition and this motion has been joined in by the defendant. As the Creek Nation East proposed findings and brief now stand, we are disposed to grant the motion for dismissal. Assuming that there is some Creek occupancy in northern Florida, the findings and brief do not delineate with any specificity where the area might be if it is conceived that there is another entity in the area also claiming occupancy.

Theoretically the Creek Nation East by appropriate proof could show exclusive use and occupancy of areas north of the previous Seminole boundary, and could contest the previously established boundary by, for instance, showing errors in the previous attribution of individual village political adherence. However, as the case now stands they have not sought to do that in their findings and brief, but instead have concentrated the thrust of their evidence upon absorbing the entire Seminole entity as a Creek component. Thus there is no alternative statement as to whether their evidence shows any area of exclusive use, as opposed to possible Seminole use. Their evidence is not presented in a form from which the Commission could make any supportable findings of Creek occupancy.

Rather than dismiss the petition out of hand, we prefer to provide the Creek Nation East plaintiffs an opportunity to recast their proposed findings and rebrief the issues that are legally permissible at this stage. In the main the pertinent issues would be those relating to the various locations, if any, that were under Creek rather than Seminole occupancy. If the Creek Nation East would attempt to deny

existence of a separate Seminole entity, the plaintiffs' attempt comes too late.

Therefore we will deny the motion to amend the petition. However, we will hold in abeyance our ruling on the motion for summary judgment for the purpose of allowing the Docket 280 plaintiffs a period of 60 days from the date of this order within which to rebrief the case for demonstrating any areas of Creek (as opposed to Seminole) occupancy.

Richard W. Yarbo[illegible]ugh, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner