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Institution: Inter-American Commission on Human Rights
File Number(s): Report No. 6/97; Case 11.071
Title/Style of Cause: Cherokee Nation v. United States
Doc. Type: Decision
Decided by: Chairman: Ambassador John Donaldson;
First Vice Chairman: Dr. Carlos Manuel Ayala Corao;
Members: Ambassador Alvaro Tirado Mejia, Dr. Oscar Lujan Fappiano, Dr. Jean Joseph Exume.
Commissioners Dean Claudio Grossman and Prof. Robert Goldman took no part in the proceedings, in accordance to Article 19.2 of the Commission's Regulations. Dean Grossman is a U.S. resident, and Professor Goldman is a U.S. national.

Dated: 12 March 1997
Citation: Cherokee Nation v. United States, Case 11.071, Inter-Am. C.H.R., Report No. 6/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1997)

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I. ALLEGATIONS IN PETITION

1. The following allegations of facts which form the basis of the petition, are referred to in several communications submitted to the Inter-American Commission on Human Rights ("the Commission"), June 18, 1992, August 24, 1992, and October 30, 1992. On June 18, 1992, the Commission received a communication from the Petitioner alleging violations of the human rights of the Cherokee Nation by the United States. These allegations were later reiterated in a petition, which was received by the Commission, on August 24, 1992, and which was filed on behalf of the Cherokee Nation west of the Mississippi River. On October 30, 1992, the Commission received additional information from the petitioner which is included in the allegations found in the petition.

2. The Petitioner alleged that a claim was filed on behalf of the entire Cherokee Nation, west of the Mississippi River against the United States for its attempt to deny their rights as Indians in their ancestors' homelands. The claim arose out of a lawsuit in which the government sued the Cherokee Nation in the Indian Claims Commission, to quiet the Cherokee Nation's title in their former homelands. It is alleged that the government told the Cherokee Nation that their homelands consisted of one million acres, and that it would pay them \$1.00 per acre for a one million acre claim when, in fact, the area was in excess of a million acres, and most of the land had a value of over \$100.00 an acre. In the lawsuit settlement, the government said that their agreement would be withdrawn if any other Indians objected. The date of the letter containing the lawsuit settlement agreement between the United States and the Eastern Band of Cherokees, was "June 15, 1972." This letter was composed by Kent Frizzell and addressed to Paul M.

Niebell. This letter can be found in the Indian Claims Commission Decisions, which is available at the Library of Congress, Volume 28, page 391.

3. The Petitioner also alleged, that this agreement was with the Eastern Band, however, it constituted an acknowledgement of liability to the Cherokee Nation, for half of the Western Band. It is also alleged that according to the Bureau of Indian Affairs, the Eastern Band was that portion of the Cherokee Nation that refused to forfeit their lands in the eastern half of the United States, and the Western Band, complied with the demands of the U.S. Government, which were often made at gunpoint. Furthermore, it is alleged that all of the Indian Nations recognized that the exclusive negotiating authority rested within the Federal Government, and not with the States because of this published rule of law in the United States. It is also alleged that "when and if the Western Band reaches a settlement with the United States Government, it will be treated as if it had been with each state wherein they currently reside, the major state being Oklahoma."

4. The Petitioner further alleged, that the western Cherokees attempted to object with no effect, and the petitioner was compelled to file a lawsuit against the United States over their objection, in Creek County in northeast Oklahoma. The Government chose not to appear in the case nor to defend it. It is also alleged that the petitioner sought and was granted a Default Judgment on September 11, 1991, by Judge Thompson, to protect the Cherokee Nation from the wrongs which had been committed against them. The petitioner further alleged that the judgment was a valid judgment which set aside the Indian claims case which was brought by the United States. It further alleged that there is a global due process rule which requires a state judge to relinquish jurisdiction over a case after thirty days, and this rule was published in the case of *McNac. v. Kinch*.^[FN1]

[FN1] 238 P.424.

5. Moreover, the Petitioner alleged, that the U.S. Government conspired with the Bank of Oklahoma's attorney, Christopher L. Coyle, to deny the petitioner due process of law, and that on the 15th day of May, 1992, Judge Thompson of the District Court continued to deny the petitioner due process of law when he vacated the previous valid Default Judgment and stated that his justification for doing so, was defective service. It is also alleged that the requirement of service of process on the United States was waived when it made a General Appearance in the Court in Oklahoma to set aside the Default Judgment. This rule of law which cured any defect in service was published by Mr. Justice Brandeis in *Richardson Machinery Co. v. Scott*.^[FN2] It is alleged that the rule stated that "failure to follow this rule by Oklahoma would constitute a denial of the Cherokee Nation's right to due process of law."

[FN2] 48 S.Ct. 264.

6. Furthermore, the Petitioner alleged, that the Cherokee Nation west of the Mississippi River was denied due process in the State Court of Oklahoma, in Creek County, and was

discriminated against by the Court because of their Indian Nationality. The petitioner alleged violations of Article II, (discrimination against the Indians) Article XXVI, paragraph 1, and Article XVIII, of the American Declaration of the Rights and Duties of Man. The petitioner claimed that for five years it has provided legal services and financial resources in the amount of \$50,000 in pursuing this claim on behalf of the Cherokee Nation, while the Government has paid the attorney for the eastern Cherokees \$100,000.00 to obtain this fraudulent settlement. The petitioner claimed that it is unable to exhaust further remedies in the United States courts, because it has exhausted its resources to the extent that it has lost home, cars, and its spouse, and cannot give any more, and nothing more should be expected of it. Moreover, the petitioner alleged that, in the interim, the Government has filed several dilatory pleadings in the Creek County Court in pursuing its tactics. During this period, two-tenths of the organizers of the Thrift Coop have died.

II. ARTICLES OF THE AMERICAN DECLARATION ALLEGEDLY VIOLATED

7. The Petitioner alleged violations of Article II, (right to equality before the law,) XXVI, paragraph 1, (right to due process of law,) and Article XVIII, (right to a fair trial.

III. PETITIONER REQUESTS THAT:

8. The Commission uses its office to obtain a friendly settlement in this matter. The Petitioner offers to accept \$100,000,000, which it alleged is substantially less than the amount dictated by the United States Government in the Court of Claims suit which attempted to settle this matter.

IV. PROCEEDINGS BEFORE THE COMMISSION

A. Receipt of Documentary Materials

9. Upon receipt of the petition dated August 24, 1992, additional information, and up to the presentment of the petition, the Commission has complied with the procedural requirements of its Regulations. It has studied, examined, and considered all information submitted by the parties.

10. During this period it communicated with the Petitioner and the United States Government by notes. It sent the pertinent parts of the petition on October 19, 1992, and additional information to the United states Government with requests that it supply information which it deemed appropriate to the allegations referred to in the petition, and additional information, and which addressed the issue of exhaustion of domestic legal remedies. The Commission qualified these requests by stating that "the request for information did not constitute a decision as to the admissibility of the communication."

11. The Commission received several notes from the United States' Government including its Reply to the petition, and Rebuttal to the Petitioner's Response and which are referred to below.

12. The Commission also received several notes from the Petitioner including documents of Court proceedings in the United States Courts, and its responses to the United States Government's Reply to the petition, which are referred to below.

B. The United States Government's Reply to the Petition

13. The United States Government replied to the petition on March 19, 1993 and provided the following historical background to the Petition: "From time immemorial, the entire Cherokee Nation lived east of the Mississippi River, and resided primarily in what are now the States of Georgia, Alabama, North Carolina and South Carolina. In the early part of the nineteenth century, a portion of the Cherokee Nation sought permission to exchange their then present lands for lands west of the Mississippi River. Treaties concluded in 1817 and 1819 set aside lands west of the Mississippi for use of those Cherokees who wished to move westward. In 1828, the United States agreed to exchange the lands already ceded to them under the treaties of 1817 and 1819 for other lands west of the Mississippi located in what was then known as the Indian Territory." This western group became commonly known as the "Western Cherokees." [FN3]

[FN3] The United States Government added the following footnote in its reply: "In his complaint, petitioner purports to represent the entire Cherokee Nation. Pursuant to federal law, any one who seeks to represent the Cherokee Nation in legal or financial matters must have such agreement committed to a written contract that bears the approval of the Secretary of the Interior and the Commissioner of Indian Affairs. See 25 U.S.C. Section 81; 25 C.F.R. Section 89.30. According to the Department of the Interior, there is no such contract. Petitioner is therefore presumed to act alone and all references herein are to Petitioner in his capacity as an individual."

14. The United States stated that in 1835, those Cherokee Indians remaining east of the Mississippi River (then known as the "Eastern Cherokees") executed a treaty with the United States whereby all remaining lands east of the Mississippi River were ceded to the United States in consideration of \$5,000,000. These Cherokees then moved westward across the Mississippi to join with the "Western Cherokees." By 1838, the bulk of the "Eastern Cherokees" had emigrated westward - some voluntarily, some involuntarily - into the lands of the "Western Cherokees." On August 6, 1846, the various groups west of the Mississippi entered into a treaty with the United States which provided that all lands west of the Mississippi River ceded to the Western Cherokees would become the common property of the "whole Cherokee People."

15. The United States also stated that, about 1400 Cherokees refused to emigrate and remained in North Carolina. This group became federally recognized as the "Eastern Band of Cherokees of North Carolina." In 1959, in the case of the Eastern Band of Cherokee Indians v. United States, this group sued the United States in the Indian Claims Commission, claiming money owed to the Band for lands ceded to the United States as a result of twelve treaties concluded by the Cherokee Nation and the United States between 1785 and 1835. The Commission ordered the matter severed into twelve separate dockets. After appropriate pleadings were filed, the Commission ordered all dockets tried on the issue of liability. The parties

compromised this issue by a joint stipulation filed in each docket on February 27, 1970. The matter was then ordered to be tried on the issue of value.

16. Furthermore, the United States stated that, the two parties entered into negotiations, and by resolution agreed to a settlement finding in favor of the Eastern Cherokees of 1,686,595 acres of land at the fair market value at the time of the taking of \$1.10 per acre. This represented 1/15 of the total land implicated in the twelve treaties, and reflected the parties agreement that this represented the fair share of compensation due to the fraction of the Cherokee Nation which had not migrated to the west. The Band agreed to accept \$1,855,254.50 for its claim. The offer of the Cherokee's claims was to be withdrawn if any other party intervened in the case. The compromise settlement was approved by the Commissioner of Indian Affairs on August 17, 1972. Funds to satisfy the award were appropriated by the Act of October 31, 1972.[FN4]

[FN4] (86 Stat. 1498).

17. The United States also stated, that the Petitioner's complaint was based on the following events: On July 26, 1991, James L. Fisk of Tulsa, Oklahoma, ("plaintiff") filed a petition on behalf of the First American Thrift Coop. Assn. v. Commissioner of Indian Affairs in the State of Oklahoma's District Court of Creek County, Oklahoma, which alleged that the Cherokee Indians living west of the Mississippi had a valid claim "for compensation of being deprived of their homelands in North Carolina." The plaintiff also claimed that the settlement agreement approved by the Indian Claims Commission in the Eastern Band of Cherokee Indians v. United States wrongfully excluded participation by the Western Band of Cherokees and that the negotiations between the Eastern Band of Cherokees and the United States was kept secret from the Western Band. The plaintiff sought an injunction against the Commissioner of Indian Affairs which enjoined him from further negotiations of the claims by either the Eastern Bands or the Western Bands of Cherokees, and granted the Western Band of Cherokees one-half of all the funds authorized to be paid for any claims arising from the treaties.

18. The United States further stated that, the complaint was sent by regular mail to the Commissioner of Indian Affairs in Washington, D.C. No summons accompanied the petition, and neither the United States Attorney for the Northern District of Oklahoma nor the Attorney General of the United States was served with notice of the lawsuit as required by federal law. Because of this lack of proper notice, the Commissioner did not appear on the date set for the hearing. On September 11, 1991, Judgment by Default was entered by the Court for the Petitioner. In the Affidavit of Judgment filed November 13, 1991, the plaintiff was awarded judgment in the amount of \$27 million. The United States filed a Motion to vacate the Default Judgment on March 16, 1992, based upon insufficiency of both process and service. The motion specifically stated that the complaint had not been mailed to the Commissioner of Indian Affairs by certified mail with return receipt requested, that there was no summons attached and that neither the Attorney General nor the United States Attorney had been served with a copy of the summons.

19. Moreover, the United States stated that, on May 11, 1992, a hearing was held in the District Court for Creek County, Oklahoma on the motion of the United States to vacate the Default Judgment. The Court ruled that it did not have jurisdiction over the federal defendant in the absence of proper issuance and service of process and ordered the Default Judgment vacated. First American Thrift Cooperative Association did not appeal from that order. The United States argued that First American Thrift has not pursued these claims against the United States in any other state or federal court and that the Petitioner's complaint should be dismissed under Articles 37 and 41(a) of the Commission's Regulations because the Petitioner has failed to invoke and exhaust available remedies under domestic law.

20. The United States also argued that, the policies and practices of the United States Government which form the basis of the Petitioner's complaint before the Commission were initially the subject of litigation in domestic courts in the United States in the case of First American Thrift Coop. Assn. v. Commissioner of Indian Affairs. The Default Judgment in this case, which was in favor of the Petitioner was vacated, without prejudice, in later judicial proceedings. First American Thrift could have filed a timely appeal of the order vacating the earlier default judgment, but failed to do so. The Petitioner should be barred from alleging that such a remedy has been exhausted when the Petitioner has failed to invoke his right to pursue a domestic remedy at the time when it was available. Most importantly, the Petitioner continues to have the right to pursue his initial claim in the Oklahoma District Court. First American Thrift Cooperative Association has not been deprived of a forum to examine the merits of its claims. It simply is required to follow the rules of service and notice of the forum which it has selected.

21. Moreover, the United States argued that the Petitioner should not be allowed to avoid the exhaustion of domestic remedies required by Article 37(2) of this Commission's Regulations. First, domestic law in the United States clearly provided due process of law for protection of the rights claimed by the petitioner. A mechanism through which to seek compensation for a wrongful taking of the kind alleged by the Petitioner, is available. The availability of this remedy is vividly illustrated by the earlier Default Judgment in favor of the Petitioner. Second the Petitioner has not been denied access to domestic remedies or prevented from exhausting them. The Petitioner could have filed a timely appeal of the decision to vacate the Default Judgment, but failed to do so. In addition, the order vacating the Default Judgment has not prejudiced the petitioner from once again filing suit in either state or federal court. Finally, there has been no unwarranted delay in rendering final judgment under the aforementioned remedies. The only delay in the adjudication of the Petitioner's claims is the result of the Petitioner's failure to pursue available remedies.

22. Finally, the United States argued that, since the Petitioner's claim has not been fully adjudicated in the domestic courts of the United States, and because the Petitioner continues to possess a judicial remedy in the wake of the District Court's decision to vacate the earlier default judgment, clearly the Petitioner has failed to exhaust judicial remedies available in this country. Therefore, the Petitioner fails to satisfy the exhaustion requirement of Article 37, and the United States respectfully requests the Commission to declare the petition inadmissible, in accordance with Article 41(a). The United States stated that, because it believes that the complaint is inadmissible, it did not address in detail the interpretations of law and factual assertions presented in the petition.

C. The Petitioner's Response to the Government's Reply to Petition

23. The Petitioner responded to the Government's Reply to the petition in three communications dated April 14, April 21, and May 10, 1993, and argued that the United States Government has claimed lack of service as an excuse for denying the Cherokee Nation a day in court. The Default Judgment reflected a finding that the defendant (U.S) had been properly served, the Motion to Vacate the Judgment was filed by the United States on March 16, 1992, which was 187 days after the Judgment. In every legal system in America, judgment becomes final and non-attackable in 30 days. Furthermore, the enclosed court minute reveals, that the appearance was general, and both of these general appearances obviated service or cured any service defects. Therefore, the United States, cannot be heard on the quest of whether a sheriff of Creek County, Oklahoma, appeared and personally served the United States Government.

24. The Petitioner also argued that, on the question of exhausting judicial remedies, the United States will have to be more specific as to which remedies it refers to, and whether it will guarantee the rights to pursue said remedies and cease its harassment of the American Indians in the pursuit of their remedies. The United States has for the first time interposed a supposed substantive defense to the claims of the Western Cherokees, that they have been paid by the offer of the Oklahoma Territories. The United States has admitted that the Western Cherokees never accepted this offer for removal, and it further admitted that these agreements were broken. The said admissions can be found in the excellent Government document entitled "Federal Indian Law." [FN5]

[FN5] Id. at 172, et seq., 1958 volume published by the Government Printing Office, and compiled by James Bennet, solicitor.

25. Furthermore, the Petitioner argued that the United States has stated that it has paid the Eastern cherokees, and the Western Cherokees and has not denied the possibility that, the Eastern Cherokees have been paid for the residual. All of the foregoing representations were resolved in a judgment of the Court of Creek County, Oklahoma, which the United States Government submitted to, by the General Appearance of Mr. Pinnell, United States Assistant District Attorney. It is interesting to note that the United States Government stated that it has never revealed a delay of several terms of Court before it appeared and destroyed the human rights vested in the Indians, of their right to a day in Court, when it enforced the said final judgment.

26. The Petitioner further argued that, if the United States Government was giving additional remedies in the judicial process, and, which it specifically enumerated the said rights, it would be necessary for the United States Government to provide immediate funds for the Petitioner to exercise these rights, because all of its resources have been depleted. The compensation requested would be one-half of the funds which the United States gave Mr. Nibell for his expenses in representing the Eastern Cherokees. The Petitioner further stated that "it offers to accept, \$100,000,000 as a friendly settlement in this matter." The Petitioner also stated that it

hoped that the United States Government would see that this amount was substantially less than the amount dictated by the United States Government in the Court of Claims suit which attempted to settle this matter. The Petitioner stated that the said amount of \$1.00 per acre for land which was worth \$10.00 per acre, of which the aggregate amount of acres were well in excess of 1,000,000,000 acres.

27. Moreover, the Petitioner stated that, insofar as the question of its authority to represent the Cherokees, the Government has cited 25 USCS Section 81. The Petitioner argued that the said Statute provided an exception which constituted sufficient compliance with the section. Petitioner also argued that, it agreed to comply with the compensation stated, and that it was not necessary to show that a contract was required because it would show by separate cover that it was an heir of an enrolled Cherokee named L.B. Butler with roll No. 13690.

D. U.S. Government's Rebuttal to Petitioner's Response

28. On June 23, 1993, the United States replied to Petitioner's response to its Reply and referred the Commission to its full reply dated March 19, 1993, and reiterated its arguments raised therein. The United States stated that, the Petitioner has made repeated references to a "global rule of due process" making any court judgment final and non-challengeable after thirty days." It argued that it is not aware of, nor has the Petitioner made any citation to, any such rule in international law. The United States argued further that, internal rules of procedure within some States recognize much longer periods of time for modification of judgments. The State of Oklahoma had Jurisdiction in the domestic Western Cherokee case. The Oklahoma Statutes, Title 12, Section 1031, has a rule which specifically and unequivocally allows a judge to vacate or modify his judgment upon specific findings. The Oklahoma provision states that "a district court shall have the power to vacate or modify its own judgments or orders" within one to three years of the judgment, which depends upon the specific error found to have occurred.

29. The United States also argued that, its motion to vacate the Default Judgment was filed within six months after it was entered, and that it acted well within the applicable time limits established by Oklahoma law for such motions. The Oklahoma court in the Western Cherokee case found that the plaintiff's failure to follow state law in serving the United States with a complaint had denied the Government due process, and that this denial of due process rendered the Default Judgment invalid. The United States further argued that, the Petitioner's argument which asserted that "a general appearance" by the United States had cured any defects in the service of process, was without merit as demonstrated by the facts of the case. It stated that, as argued previously in its March 19, 1993 communication, due to inadequate service of process, the United States made no appearance whatsoever when the Default Judgment was entered on September 11, 1991. Based on the erroneous Default Judgment, a garnishment proceeding was instituted against the Bank of Oklahoma, which was properly dismissed by the court upon a finding that the bank did not hold any United States funds at the time.

30. The United States reiterated its argument that, service of the proceedings on it was defective, and argued that the rules of procedure and due process applicable in Oklahoma are neither unreasonable nor unusual. The procedures for proper legal service of the United States Government in this case, which the Petitioner failed to follow, are referred to in Title 12, Section

2004 of the Oklahoma statutes. Such procedures, together with the rule which allows the court to vacate its judgments for cause, are designed and enforced to ensure fair and accurate judicial verdicts, with due respect to the principle of res judicata. It also argued, that the purpose of the procedures, was to increase the likelihood that a case will be tried on its merits by parties who were fully prepared to present their cases.

31. The United States rejected the Petitioner's assertion that the Western Cherokees have been denied their day in court, and argued that it was the United States which was denied through the plaintiff's unlawful service, the opportunity to present the merits of its case to the court. Further, the judgment in this case was set aside without prejudice to the plaintiff, who is free to re-file the case in Oklahoma, properly serve the United States with notice, and have its day in court. The United States reiterated that the Petitioner's claim should be deemed inadmissible in this case, because it has not yet attempted to exhaust the available domestic remedies. It argued that the Petitioner has not only failed to file a timely appeal after the vacation of the Default Judgment, but has also chose not to re-file the lawsuit with fair and proper notice to the opposing side.

32. The United States stated that the Petitioner raised several other issues in its supplemental communications which the United States wished to briefly address. First, the United States is not required to provide the Petitioner with additional remedies beyond those which remain available to it under U.S. law. Furthermore, no defendant in our legal system, including the United States Government, is required to provide advance attorney's fees to parties wishing to bring suit against it. It argued that the Petitioner's assertions on these issues are therefore plainly without merit. Finally, the United States argued that it noted that there was a significant discrepancy in Petitioner's claim to the value per acre of the land in question, which has been alternately given at \$10 per acre and at \$100 per acre. The United States concluded by stating that it believed that the petition is inadmissible pursuant to Article 37 of the Commission's Regulations.

V. COMMISSION'S DECISION ON ADMISSIBILITY

A. Issues Raised as to Admissibility of Petition

33. The contested issues raised by the parties on admissibility of the petition are the following:

- (a) Has the Petitioner invoked and exhausted domestic remedies?
- (b) Does the claim of indigence by the Petitioner excuses it from invoking and exhausting available domestic remedies?

B. Analysis

34. The Commission has reviewed, studied, and considered the record, including arguments, and exhibits submitted by the parties in this case in accordance with its Regulations. It has determined that this petition "is not pending settlement in another procedure under an international governmental organization of which the State concerned is a member, and it does not essentially duplicate a pending petition or already examined and settled by the Commission

or by another international governmental organization of which the state concerned is a member." [FN6] The Commission now examines below whether the Petitioner has invoked and exhausted domestic remedies pursuant to Article 37 of the Commission's Regulations, and, or is excused from so doing because of a claim of indigence.

[FN6] See Article 39 of the Commission's Regulations.

(a) Have Domestic Remedies been Invoked and Exhausted

35. Article 37 of the Commission's Regulations provides:

1. For a petition to be admitted by the Commission, the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law.

2. The provisions of the preceding paragraph shall not be applicable when:

a. the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated;

b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them;

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

3. When the petitioner contends that he is unable to prove exhaustion as indicated in this Article, it shall be up to the government against which this petition has been lodged to demonstrate to the Commission that the remedies under domestic law have not previously been exhausted, unless it is clearly evident from the background information contained in the petition.

36. Upon reviewing the record, the Commission notes that the Petitioner has alleged that a valid Default Judgment was obtained on behalf of the Cherokee Nation west of the Mississippi river on September 11, 1991, in the State Court of Oklahoma, against the United States who failed to appear at the hearing. The Petitioner also alleged that the United States was properly served in accordance with the State laws. Petitioner submitted several exhibits to the Commission, including a copy of a Court Order dated August 21, 1991, signed by the District Judge of the District Court of Creek County, in the State of Oklahoma, entitled "Order-Setting Hearing Date on Application For Preliminary (Temporary) Restraining Order-Directing Clerk To Issue Notice." The Order stated that "the verified petition and motions were set down for hearing at the Courthouse at Sapulpa, Oklahoma, Creek County, State of Oklahoma, in accordance with this order, on September 11, 1991, at 9.30 a.m., and the Clerk shall also mail or cause to be mailed to the Defendant a Certified copy of this order by United States Mail (registered or certified) with return receipt requested. Address to be supplied by Plaintiff."

37. The Court Order stated that "Copies of this Order to be sent to Mr. James Fisk, Attorney, and the Commissioner of Indian Affairs." The record before the Commission also included a

document entitled "Certificate of Service," dated September 3rd, 1991, which stated the following: "I, Pat Hobbs, Court Clerk of Creek County, Oklahoma, certify that a true, correct and exact copy of the foregoing Order Setting Hearing was by me duly enclosed in an envelope addressed to the above named defendant__, with postage thereon prepaid, and the same mailed to said defendant__, or service agent of said defendant__, by certified mail with a request for a return receipt from addressee only on the 21 day of August, 1991, (and that attached hereto is the certified mail receipt) and the return receipt card with the date of receipt of said return card by the Court Clerk endorsed hereon." The exhibit was signed by the Deputy. The exhibit also had attached to it a copy of a document entitled "Attached Return Receipt Card Received This 3rd day of Sept. 1991." The Article No. is P778-588-964. In the Address section of the Return Receipt, stated that "Article Addressed to David Matheson, Department of Interior, Washington, D.C., 20240," and was delivered on 8/27/91.

38. The record before the Commission reflects that the United States appeared before the Oklahoma Court and had the Default Judgment set aside on May 11, 1992, and a "Motion To Reconsider" the Court's decision was filed by the plaintiff before the Court on April 9, 1992, in which it was argued that the Court should apply the 30 day Rule, and that the United States had made a "general appearance" before the court when it appeared, which waved and cured any jurisdictional defects, and that failure to apply the 30 day rule was a denial of due process. The Court did not reinstate its Default Judgment of September 1991.

39. The Commission also notes the United States's argument which has merit, that the Petitioner has not invoked and exhausted the available domestic remedies in the United States, that these remedies were still available to the Petitioner, and therefore, the Commission should find the petition inadmissible pursuant to Article 37 of the Commission's Regulations. In the case of Velásquez Rodriguez, the Inter-American Court of Human Rights, in construing the exceptions to the exhaustion of domestic remedies as provided by Article 46 of the American Convention, stated that: "the State claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective."[FN7]

[FN7] Velasquez Rodriquez Case, Preliminary Objections, Judgment of June 26, 1987. Series C No.1 at 23 at para. 88.

40. In the Inter-American Court's later decision, it stated that: "The Court now affirms that if a State which alleges non-exhaustion proves the existence of specific domestic remedies that should have been utilized, the opposing party has the burden of showing that those remedies were exhausted or that the case comes within the exceptions of Article 46(2). It must not be rashly presumed that a State party to the Convention has failed to comply with its obligation to provide effective domestic remedies."[FN8] The Inter-American Court of Human Rights further stated that: "The rule of prior exhaustion of domestic remedies allows the state to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction."[FN9]

[FN8] Velasquez Rodriguez Case, Judgment of July 29, 1988, 35-80, at 48, Annual Report of the Inter-American Court of Human Rights 1988, OAS/SER.L/V/III.19, doc 13, August 31, 1988.

[FN9] Id. at 48, para. 62.

41. The Commission finds that Article 37 of its Regulations is the controlling instrument in deciding the issue of admissibility and its provisions are applicable. The Petitioner has not met its burden of sufficiently demonstrating that the Courts of the United States do not afford due process of law for protection of its rights. There are still available, domestic remedies in the United States to be invoked and exhausted. The decision of a single judge granting a Default Judgment on a procedural issue in the Petitioner's favor, and who later vacated the Default Judgment at the request of the United States based on legal rules, does not in itself negate the fact that these remedies are still available to be pursued and exhausted. The Petitioner has not demonstrated that he has been denied access to the remedies under domestic law, or he has been prevented by the United States from exhausting them. Furthermore, he has not demonstrated that there has been unwarranted delay in rendering a final judgment under the domestic remedies. According to the record before the Commission, the United States courts have not rendered a final decision on the merits, and the United States has argued that the Petitioner still has this option.

42. The Commission notes that the Petitioner has also argued that it was unable to pursue, and exhaust the available domestic remedies because it is indigent. Furthermore, it has pursued this claim for the past five years, its legal and financial resources are depleted, and have expended \$50,000 in pursuing the said claim, and in the interim the Government has filed several dilatory pleadings in the Creek County Court in Oklahoma in pursuing its tactics.

43. The question therefore, is, should the Petitioner be excused from invoking and exhausting the available domestic remedies because of indigence. The Inter-American Court of Human Rights considered the question of "indigence" in an Advisory Opinion requested by the Commission.[FN10] The Court construed Article 46 of the American Convention which applies to States Parties, which is similar to Article 37 of the Commission's Regulations. The Court stated that:

The Commission states that it has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal representation or, in some cases, the obligatory filing fees. Upon applying the foregoing analysis to the examples set forth by the Commission, it must be concluded that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigence, that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the state provides some alternative mechanism.

[FN10] Advisory Opinion OC-11/90 of August 10, 1990.

44. The Court finally concluded by stating that "Once a State Party has shown the existence of domestic remedies for the enforcement of a particular right guaranteed by the Convention, the burden of proof shifts to the complainant, who must then demonstrate that the exceptions provided for in Article 46(2) are applicable, whether as a result of indigence"[FN11]

[FN11] Id. at 12.

45. The Commission notes that the Petitioner has alleged that it is indigent and has expended \$50,000 in pursuing the claim on behalf of the Cherokee Nation, however, the record before the Commission is insufficient to establish that "indigence" prevented the Petitioner from invoking and exhausting domestic remedies in the United States Courts pursuant to Article 37 of the Commission's Regulations. Allegations of indigence are insufficient without other evidence produced by the Petitioner to prove that he was prevented from invoking and exhausting the domestic remedies of the United States.

46. Conclusion: The Commission concludes that this petition is inadmissible for failure to invoke and exhaust domestic remedies in the United States.

BASED ON THE FOREGOING REASONS, THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS CONCLUDES THAT:

47. This petition is inadmissible pursuant to Article 37 of the Commission's Regulations.

48. This case be closed.

49. This Report will be transmitted to the parties.

50. This Report will be published in the Commission's Annual Report to the General Assembly.