

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)	
)	
Plaintiff,)	
)	
v.)	Docket No. 276
)	
THE UNITED STATES OF AMERICA)	
)	
Defendant.)	

Decided: Dec 15, 1965

Appearances:
Paul M. Niebell,
Attorney for Plaintiff

Walter J. Muier, with whom was
Mr. Assistant Attorney General
Edwin L. Weisl, Jr.,
Attorneys for Defendant

OPINION OF THE COMMISSION

Scott, Associate Commissioner, delivered the opinion of the Commission.

The petition in this claim was timely filed by the Creek Nation of Indians of the State of Oklahoma, an identifiable group of American Indians within the meaning of the Indian Claims Commission Act.

The claim asserted in this action is for additional compensation representing the difference between the fair market value and the consideration paid by the United States for 2,037,414.62 acres of land located in what is now the State of Oklahoma, which was prior to the Treaty of August 7, 1856 (11 Stat. 699) owned in fee simple by the Creek Nation under and by virtue of a patent issued by the United States

on August 11, 1852. Under the Treaty of August 7, 1856 (11 Stat. 699) the United States paid to the Creek Nation the sum of \$1,000,000, which plaintiff alleges was a wholly unconscionable consideration.

Under the terms and conditions of the Treaty of August 7, 1856, ratified August 28, 1856, between the United States and the Creek and Seminole Tribes of Indians, the Creek Nation granted, ceded and conveyed to the Seminole Indians a tract of land in Indian Territory, later designated as Royce Areas Nos. 404 and 480. The parties to this claim have agreed that the date of valuation in this case shall be August 7, 1856.

The plaintiff contends that the area ceded at the time of the execution of the treaty was good agricultural and grazing land worth at least \$1.25 per acre and that the consideration of \$1,000,000 paid by the defendant to the plaintiff for the tract consisting of 2,037,414.62 acres was grossly inadequate and unconscionable; that a fiduciary relationship existed between plaintiff and defendant wherein the plaintiff was the ward of the United States, and accordingly, the defendant was bound by the most exacting fiduciary standards; that the transaction involved in this claim was in violation of the principles of justice and equity, of fair and honorable dealings, and of exacting fiduciary standards; and that the defendant enriched itself at the expense of the plaintiff.

The defendant, on the other hand, contends that plaintiff has failed to state a claim upon which relief can be granted; that the

relationship of guardian and ward did not exist between the plaintiff and the United States; that under the terms of the Treaty of August 7, 1856, the defendant entered into agreement with the plaintiff and the Seminole Indians whereby the plaintiff conveyed to the Seminole Indians the tract of land involved herein, and that the defendant paid the plaintiff \$1,000,000 therefor; that at the date of cession the said tract was worth no more than the consideration paid by the plaintiff; that its dealings with the plaintiff were at all times fair and honorable and in accord with recognized principles of equity and justice.

Defendant further contends that pursuant to the Treaty of June 14, 1866 (14 Stat. 785), and the Agreement of March 1, 1889 (25 Stat. 757), the lands ceded by the plaintiff to the Seminole Indians under the Treaty of August 7, 1856, were included in the lands later ceded to the defendant; that under the Agreement of March 1, 1889, plaintiff granted and released to the United States all and every claim, estate, right or interest of any and every description in and to any and all land and territory whatever; that such release bars any right of the plaintiff to recover additional compensation for the land involved in this proceeding.

As to the defendant's contention that the plaintiff has failed to state a claim upon which relief can be granted, this Commission in its findings of fact has found to the contrary, and has proceeded to adjudge the claim on its merits.

Plaintiff has stated that the Creek Nation was the owner in fee simple of a large tract of land situated in the present State of

Oklahoma, and the records establish that a patent to such tract of land was issued to the Creek Nation by the United States on August 11, 1852. It had been agreed prior to that date, i.e., under Article II of the Treaty of February 14, 1833, proclaimed April 12, 1834 (7 Stat. 417), that the United States would grant a patent in fee simple to the Creek Nation for the lands assigned to it under that Treaty (when ratified by the Senate and the President) and their rights in such land should continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned them."

The defendant has maintained that the taking of Indian lands and subsequent removal of the Indians from such lands was within the plenary powers of Congress, provided just compensation was made; that the fee to lands granted by treaty to an Indian tribe remained in the United States subject to a right of use and occupation by the Indians; that Indian title was not absolute inasmuch as they could not alienate the land without first obtaining the permission of the government.

The question of fee simple title in an Indian tribe arose in the case of Coeur d'Alene Tribe of Indians v. United States, 6 Ind. Cl. Comm. 1, 38, and this Commission held that title to land held by Indian title, or land held by recognized or reservation title, or land held by fee simple title had the same value. In support of this theory, the Commission cited, among other cases, United States v. Paine Lumber Company, 206 U. S. 467, in which case the Court observed that while usually Indian tribes were not permitted to alienate their lands "The

restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple."

It is the opinion of this Commission that the Creek Nation, holding fee simple title to the lands in question by virtue of the provisions of the Treaty of 1833, and patent issued subsequently, on August 11, 1852, held more than the mere right of occupancy, and that the United States was bound to pay fair market value for such lands. This has been clearly enunciated by the Supreme Court in United States v. Creek Nation, 295 U. S. 103, 109-110; 79 L. Ed. 133, 135.

The plaintiff alleged in its petition that at the time of the execution of the Treaty of 1856 the plaintiff and defendant "were not on an equal footing"; that the plaintiff was "wholly ignorant, weak, defenseless, unacquainted with the white man's language, laws, customs, and ways, and had no knowledge of the value of the domain thus ceded to and acquired by defendant, and therefore was required to rely solely upon defendant to see that justice was done in said transaction"; that, on the other hand, the defendant was powerful and was in a position of enforcing its demands, wishes and desires upon the plaintiff; and that, having such full knowledge of the true value of the lands involved, the defendant failed to disclose that value to the plaintiff at the time the Treaty of 1856 was executed. Plaintiff further stated that "a fiduciary relationship existed between plaintiff and defendant; that defendant was the guardian and petitioner was its Indian ward; that as such guardian, defendant generally had complete control over

the property and affairs of the plaintiff, and owed to the plaintiff the duty of the protection of its property and interests; and that defendant was bound by the most exacting fiduciary standards."

The defendant, on the other hand, maintains that the plaintiff's reliance on the guardian-ward theory is not well-founded, and that plaintiff cannot question the power of the government to take Indian property provided adequate compensation is paid to the Indians -- nor can the Indian tribe whose lands are taken base its claim on the amount it would have reasonably expected to receive had the government been required to manage the property as the legal guardian of the Indian Tribe.

The issue of the nature of the relationship between Indian tribes and the United States has been clearly enunciated by several decisions of the Court of Claims and of the Supreme Court of the United States.

In Creek Nation v. United States, 318 U.S. 629, 642; 63 S. Ct. 784;

87 L. Ed. 1046, the Court said:

Whether or not the legal relationship of guardian and ward exists between a particular Indian tribe and the United States depends, we think, upon the express provisions of the particular treaty, agreement, executive order or statute under which the claim presented arises. It is true that the word "fiduciary" and the expression "guardian-ward relationship" have been used by the courts to describe generally the nature of the relationship existing between the Indians and the Government. However, in the absence of some language in a treaty, agreement or statute spelling out such a relationship, the courts seem to have meant merely that the relationship between the Indians and the Government is "similar to" or "resembles" such a legal relationship and that doubtful language in the treaty or statute under consideration should be interpreted in favor of the weak and dependent Indians.

This principle has also been stated as follows:

The Creek Nation was under the guardianship of the United States and entitled to rely upon the United States for needed protection of interests. United States v. Creek Nation, 295 U.S. 103, 109-110.

A fiduciary relationship does in fact exist between the United States and the Indian tribes, and the dealings of the United States with Indian Tribes must be judged by the most exacting fiduciary standards. 316 U.S. 286, 295-297.

In our Findings of Fact 2 through 11 the history of the transaction involved herein is set out at length together with other subsequent treaty actions which appear to have a relationship to it.

The defendant has contended that the general release in the Creek Agreement of 1889 barred any relief which might be asked in this claim. However, this Commission has held in Creek Nation v. United States, 2 Ind. Cl. Comm. 66, 97, that the consideration of \$2,280,857.10 paid to the Creek Nation under the Agreement of March 1, 1889 (25 Stat. 757) was not intended as payment for the general release, nor could it be construed as affecting the lands ceded by the Creeks to the Seminoles in the Treaty of 1856, the subject of this claim, since the Creeks had no interest in or claim to the lands as of that date.

Article I of the Treaty of 1856 recites "The Creek Nation doth hereby grant, cede and convey to the Seminole Indians the tract of country . . ."

Article II of that Treaty contains the further provisions that "The United States do hereby solemnly guarantee to the Seminole

Indians the tract of country ceded to them by the first article of this convention . . . and likewise that the same shall be secured to and held by said Indians by the same title and tenure by which they were guaranteed and secured to the Creek Nation by the fourteenth article of the treaty of March twenty-fourth eighteen hundred and thirty-two, the third article of the treaty of February fourteenth, eighteen hundred and thirty-three, and by letters-patent issued to said Creek Nation on the eleventh day of August, eighteen hundred and fifty-two . . . Provided, however, that no part of the tract of country so ceded to the Seminole Indians, shall ever be sold, or otherwise disposed of without the consent of both tribes legally given."

Article V contains the provision that "The Creek Indians do hereby, absolutely and forever, quitclaim and relinquish to the United States all their right, title, and interest in and to any lands heretofore, owned or claimed by them, whether east or west of the Mississippi River, and any and all claims for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement."

In the light of these provisions, it would seem apparent that the Creek held no remaining vestige of interest in the lands in question as of the date of the Treaty of 1889. The only thing which could be requested of the Creeks with relation to subject tract after the Treaty of 1856 was their consent to sale or disposal by the Seminoles.

The Creeks were, therefore, entitled to maintain this action under the Indian Claims Act. They were holders of title to the land subject to control by the United States as to alienation of title. A relationship similar to that of guardian-ward existed between the parties hereto, and the defendant was bound by moral obligations of responsibility and trust to be judged by the most exacting fiduciary standards. We find it unnecessary, however, to fully explore and determine the issue of fair and honorable dealings since in our determination of market value of these lands we have found the consideration paid to be unconscionable.

In Creek Nation v. United States, 2 Ind. Cl. Comm., 66, at p. 95, this Commission found as follows:

* * *

(6) The Creek delegates accepted \$1,000,000 in settlement of all their claims, including the claim based on the Fort Jackson Treaty cession, and for a cession of 2,037,414.62 acres of Creek lands for the Seminoles, the delegates stating at the time, however, that they considered this settlement neither fair nor just, but that "we have submitted to take less, as men must ever submit to what they cannot resist."

* * *

(10) These lands were valued by the Commissioner of Indian Affairs in 1836 at \$1.25 per acre; by the President as of 1866 at \$1.25 per acre; by the Seminole delegates at \$2.50 per acre as of 1866; and when opened to white settlement in 1891 were sold to homesteaders at \$1.25 per acre. When first placed on the open market in 1892 these lands sold at public auction at from \$5.52 to \$8.22 per acre, or for the average of \$7.50, and the fair market value was fixed by the Court of Claims at \$7.00 an acre in 1892.

* * *

In the opinion in the same case, 2 Ind. Cl. Comm. 66, at p. 113, this Commission, referring to the 1856 Treaty, further stated:

* * *

The treaty which contains the release involved also provides for the cession of 2,037,414.62 acres of Creek lands in the present State of Oklahoma. The total consideration received by the Creeks for the cession of this land and (emphasis supplied) the release of all claims was \$1,000,000. The information provided in the record as to the value of this land is convincing that the land at the time of its cession was of greater value than the \$1,000,000 paid, * * *

It is obvious that each claim must be judged on its own merits, no exact formula having been provided by the Courts or the Indian Claims Commission. From the decisions of the Indian Claims Commission and the Court of Claims, it appears that the only criterion is whether the consideration is so much less than the true value of the property as to "shock the conscience."

The total consideration to be paid to the Creeks under the Treaty of 1856 was \$1,000,000, which was compensation for certain claims and cession of 2,037,414.62 acres of land. If the claims are ignored as "generally not well founded", as described by the Commissioner of Indian Affairs, and the moneys paid are to be considered as payment for cession of lands only, the consideration would be about 49 cents per acre. This would represent a consideration far below the going price for public lands, i.e., \$1.25 per acre.

The tract of land to be evaluated by this Commission at this time

consisted of 2,037,414.62 acres of land located in the west-central section of what is now the State of Oklahoma between the two Canadian rivers. The tract was long and narrow, about 175 miles in length, running from a little east of the 97th parallel to the 100th parallel. On the west it abutted on the Texas Panhandle. It varied from about 7 miles in width to about 43 miles at its widest point. On the date of evaluation, i.e., August 7, 1856, it was bounded on the east by Creek lands, on the south by Leased Lands and Chickasaw lands, and on the north by the Cherokee Outlet and some Creek lands.

The lands in question were generally level to gently rolling prairie, with the western part being rough and broken. The elevation varied from about 900 feet in the east to about 2,000 feet in the west. The lands in the eastern part of the area were fairly well watered and drained by the principal streams in the area, i.e., the Canadian and the North Canadian rivers. The average yearly rainfall varied from about 36 inches in the eastern area to about 22 inches in the western area, with the greatest rainfall occurring from April through September. Temperatures varied from about 35 degrees in January to about 83 in July. However, the summers were and are sometimes very hot, with little precipitation, causing drought conditions at times.

Soils found in subject tract were generally like those of the central and western part of the State of Oklahoma, including some

alluvial bottom lands, prairie, rolling plains and so-called Bluestem Hills. Most of the eastern portion of the lands was capable of producing farm crops, while the thinner soils to the west were more adaptable to use as pasturage. At the time of evaluation there were no known minerals in the area. There was abundant timber along the streams, but virtually none of it was of commercial size and quality. It did, however, furnish posts for fencing and firewood, and in some cases it was adequate for construction of small buildings. Its presence would have added considerably to the value of the lands in the eyes of prospective purchasers of that day.

Soil surveys covering Cleveland County in the eastern part of subject area, Canadian County located more nearly in the center of the area, and Dewey County located in the western part of the area, are a part of the evidence which has been considered by this Commission in arriving at its decision. The soil surveys of these counties, while made in 1919, 1954 and 1963, and while varying in their technological approach from the original land surveys made in 1871-74, are remarkably corroborative. The later soil surveys indicate changes in the subject lands created by erosion and cultivation, and depletion of soils and resources, such as timber in some instances, as well as general improvement and increased use of some areas, because of modern methods of farming now in use.

As of the date of valuation, the area in question was in Indian Territory, and surrounded by lands of other Indians, except on the west where, as we have already stated, it touched the State of Texas.

There were no railroads crossing the area, nor were there any in adjacent territory, and there were no wagon roads crossing the area. The surveyors' notes made in 1871-73 showed only a very few "old roads" along the eastern boundaries. To the south of the subject tract, the road over which the California migration took place ran parallel to the southern border of the tract.

The plaintiff has relied on the report and testimony of its expert witness, Professor Eldridge A. Tucker, who is a qualified appraiser and who has appeared before this Commission in other claims. Mr. Tucker testified at length as to his evaluation of the lands in question and prepared a report on such lands, which was received in evidence and marked as Plaintiff's Exhibit #23. In this testimony he stated that, considering the reports of the Indian Agents, the climate, soil, water resources, nature of the country, and topography, he had come to the opinion that the highest and best use of the subject tract as of 1856 would be for subsistence farming in the eastern portion supplemented by range-type livestock grazing in the western one-third.

The appraiser for the plaintiff, in making his appraisal of the lands, reviewed maps of the subject tract, its physical resources and subsequent development, the historical background including reports by various explorers, Indian Agents, and other persons familiar with it. In addition to a study of these details as known in 1856 and prior thereto he considered reports subsequent to the treaty date, recent

soil maps, weather information, timber, and water potentials. In addition to these, he considered the economic climate prior to August 7, 1856, and the years immediately following the general demand for lands and the prices paid therefor between 1856 and 1866.

His conclusion as to the highest and best use of the tract on August 7, 1856, was division into small tracts for subsistence farming, with smallest units in the eastern area which was more fertile and adapted to raising crops, with larger units in the middle one-third with a greater portion in grazing lands, and the largest tracts in the western one-third where the land was predominantly grazing land or less in quality.

The appraisers for the defendant, H. J. Garrett and Roscoe Sears, on the other hand, after considering substantially the same evidence, including the surveyors' notes made in 1871 to 1875, concluded that the highest and best use of the subject property was for subdivision into grazing units.

The remaining Creek lands which the government bought in 1866 which lay to the north and northeast of the subject tract were the subject of supplemental legislation in 1889 whereby the Creeks received \$1.25 per acre.

The subject tract, received by the Seminoles in 1856 at the time of the cession by the plaintiff involved herein, was ceded by the Seminoles to the defendant in 1866, and was, likewise, the subject

of supplemental legislation in 1889 whereby the Seminoles received \$1.03 per acre.

Parts of the Chickasaw tract which lay to the south and east of the subject tract, together with part of the Choctaw tract, were purchased by the government for an average price of \$1.23 per acre for the Cheyenne and Arapahoes under the Treaty of April 28, 1866 (26 Stat. 989), as modified by the Acts of March 3, 1891 and January 11, 1893.

Although the normal forces of economics of an open market could not operate in either 1856 or 1866 in this Indian Territory, the record shows that times outside the Territory where there was an open market were more prosperous in 1856 than in 1866.

The disposition of public lands began with the Revolutionary War when the Continental Congress offered tracts of lands to those enlisting in the army, and the policy continued through the Civil War period.

Up to 1820, grants, military bounties, cash sales, and credit sales were the methods used, but in 1820 credit sales were no longer extended to buyers. Sales were conducted by private negotiations and public auctions, with a fixed minimum price in the case of public auction. In 1820, the minimum price was \$1.25 and continued so until the passage of the Graduation Act in 1854. Under the Pre-emption Act of 1841, the settlers who had made unauthorized entries on public domain were offered an opportunity to obtain title to the lands which

they occupied by payment of \$1.25 an acre when the land was surveyed and made available by the government.

Sales of lands in 1855 and 1856 included both \$1.25 land and lower priced land. The following tabulation indicates the trend:

Government Land Sales

<u>Year</u>	<u>Acres at \$1.25 or More</u>	<u>Acres</u>	<u>Acres at Lower Price Av. Price</u>
1853	1,083,495		--
1854	7,035,735	--	--
1855	7,009,050	8,720,475	\$0.27
1856	5,230,584	3,997,294	\$0.40
1857	1,622,730	2,520,015	\$0.40

Statistics as to lands available for private entry as of August 4, 1854, show a total of 77,561,007 acres, with 29,890,079.24 acres being disposed of in 1855.

The trend in government land sales both as to volume and price is shown in the following:

Government Land Sales

<u>Year</u>	<u>Acres</u>	<u>Price Per Acre</u>
1854	7,035,735	\$1.30
1855	15,729,525	.73
1856	9,227,879	.96
1857	4,142,744	.84
1858	3,804,908	.56
1859	3,961,581	.41
1860	3,461,204	.53
1861	1,465,604	.60
1862	144,850	.86
1863	91,354	1.49
1864	432,773	1.59
1865	557,212	1.34
1866	388,294	1.41

This would indicate the years 1855 and 1856 as those in which the demand, as indicated by sales, was the greatest in the 13 year period. The fact that the average price per acre in 1855, the year after the Graduation Act was enacted, when 15,729,525 acres were sold, was 73¢, and in 1856 when 9,227,879 acres were sold, was 96¢, would reasonably indicate a value in this particular tract in excess of either or both figures. However, the tract in question was not available for public sale at that time and for many years thereafter.

The later Acts under which the settlers acquired title to land were enacted after the date involved in this claim, and therefore need not be considered as factors in this claim. Even the Homestead Act of 1862 was amended to prescribe payment of \$1.25 per acre.

There is no doubt that the evidence and testimony presented herein establishes that as far as physical characteristics and use and occupancy of the subject lands are concerned, there was little or no change in the subject tract between 1856, the year in which we seek to evaluate this land and 1866, or even 1889. However, in the intervening years there were many changes in the surrounding areas. As of the date of evaluation, it was a part of a large area set aside for Indian use and occupancy in which white settlers were forbidden to enter and occupy lands. In the next ten years railroads were built through nearby areas, the Civil War brought on influx of white settlers into nearby lands, and the push for more lands for migrating settlers was a determining factor in the acquisition of lands by the government as public lands to be sold to ready buyers.

The lands in question were the type sought by settlers inasmuch as they had a relatively mild climate, were relatively well watered, were adaptable to farming as well as to grazing and stock raising, and had sufficient timber to provide for the basic needs of settlers but not of such size and density as to require extensive clearing before the land could be used for agricultural purposes.

These were all elements which were considered in determining the fair value of the lands as of August 9, 1856. These elements were recognized by both the plaintiff and the defendant, and have been given proper weight in consideration by this Commission.

Having carefully considered all of the evidence presented in this claim, and the testimony of the expert appraisers for both the plaintiff and the defendant, this Commission can come to no other decision as to the value of the lands involved as of August 7, 1856 than that it was greater than the consideration paid under the Treaty of 1856; that the consideration paid was enough less than the actual value as to make it unconscionable; that the value which this Commission finds would have been conscionable as of August 7, 1856 was not less than \$1.00 per acre; and that the plaintiff is entitled to the difference between that amount, i.e., \$2,037,414.62 and the actual consideration paid of \$1,000,000, or a net amount of \$1,037,414.62, less such credits as the defendant may be entitled to under the provisions of the Indian Claims Commission Act.

T. Harold Scott
Associate Commissioner

We concur:

Arthur V. Watkins
Chief Commissioner

Wm. M. Holt
Associate Commissioner