

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)	
)	
Petitioner,)	
)	
v.)	Docket No. 167
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: July 6, 1967

Appearances:

Paul M. Niebell, Attorney for the
Petitioner

Aaron Shannon Bennett, with whom was
Mr. Assistant Attorney General,
Edwin L. Weisl, Jr., Attorneys for
the Defendant

OPINION OF THE COMMISSION

Commissioner Watkins delivered the opinion of the Commission.

This case is back before the Commission on remand from the Court of Claims. The case was originally heard before the Court of Claims under the provisions of the original jurisdictional Act of May 24, 1924 and relief was denied. Petitioner then brought the same claim before this Commission under the Indian Claims Commission Act. Defendant made a motion for summary judgment based on the ground that the claim was res judicata. This motion was granted by the Commission February 23, 1963. Petitioner appealed to the Court of Claims and said Court reversed the decision of the Commission in its opinion dated December 11, 1964, and remanded it to the Commission, ordering the claim to be heard on its

merits under the provisions of the Indian Claims Commission Act. In accordance with these instructions from the Court of Claims, a further hearing was held before the Commission on September 27, 1965, wherein documentary evidence relating to the liability of the United States for said claim was presented.

The essential facts in the case are not in controversy. They are briefly as follows:

During the course of its dealings with the Creek Nation, the United States made a treaty with said nation February 14, 1833. Under this treaty the Creek Nation received from the United States certain lands in fee simple, including the lands involved in this suit. These lands, located in what was then called "Indian Territory," are now situated in the present State of Oklahoma. Subsequently, on June 14, 1866, the Creek Nation ceded the "west half" of these lands to the United States, ". . . to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon." (14 Stat. 785) The Creek Nation received thirty cents per acre for this conditional cession. The line dividing the lands of the Creek Nation into two equal parts as provided in the treaty of June 14, 1866, was surveyed and established by Frederick W. Bardwell in 1871 and approved by the Secretary of the Interior February 5, 1872.

In the meantime, by the treaty of March 21, 1866, the Seminole Nation purchased from the United States a tract of land within this area ceded by the Creek Nation to the United States. The west boundary of this Seminole tract was to begin with the Creek dividing line on the east and continue west, between the North and South Canadian Rivers for a

sufficient distance to make 200,000 acres by running a line due north and south between these two rivers. However, during the fall of 1866 before the Bardwell line was surveyed and established, the Seminoles had moved to what was then believed to be their new 200,000-acre tract purchased under the Seminole treaty of March 21, 1866. But when the Bardwell line was later established, it was discovered that many of the Seminoles were occupying a large area of land, then estimated to be 175,000 acres, east of the Bardwell line, which land was reserved and owned by the Creek Nation. By the time this was discovered the Seminoles had made substantial improvements on these lands.

After some negotiations the Creek Nation agreed to cede to the United States an additional 175,000 acres of Creek domain on which the Seminoles had settled, for the sum of \$175,000 or \$1.00 per acre. This land was so ceded under the agreement of February 14, 1881, and the amount of \$175,000 was thereafter appropriated and paid to the Creek Nation for these lands.

In 1888 Henry C. F. Hackbusch, United States Surveyor, was employed to survey this 175,000-acre tract ceded under the agreement of February 14, 1881. He was instructed to retrace the Bardwell line from the point of beginning on the Canadian River to its intersection with the North Fork thereof, to meander both rivers, and to establish the eastern boundary of said tract at such place so as to include 175,000 acres. After Hackbusch completed his survey it was approved by the Commissioner of the General Land Office on December 22, 1888.

As we have previously stated, the Creek Nation ceded the western half of their lands, including the subject lands, to the United States under the treaty of June 14, 1866 for thirty cents an acre. However, this cession limited the use which the United States could make of these lands, namely, ". . . to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon . . .". The time arrived when the United States wanted to dispose of these lands free from any limitation as to their use. Consequently, on January 19, 1889, delegates of the Creek Nation and the Secretary of the Interior entered into an agreement whereby the United States received "full and complete title" to these lands in return for a payment of \$2,280,857.10.

In addition to granting the United States ". . . full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty six . . .", the Creek Nation, under this same 1889 agreement, released to the United States ". . . all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation."

At the time this 1889 agreement was executed, both parties labored under the misapprehension that the 175,000-acre Seminole tract as surveyed by Hackbusch in 1888 contained only the 175,000 acres ceded by the Creek

Nation to the United States under the 1881 agreement. Subsequent events disclosed a mutual mistake of fact on this matter.

An agreement between the Seminole Nation and the United States, ratified by Act of July 1, 1898 (30 Stat. 567), provided that the United States divide and allot the lands of the Seminole Nation equally among the members thereof, and for the disposal of some of said lands for other purposes specified in the agreement. Pursuant to this agreement, the United States Geological Survey sectionized the Seminole domain in 1897 and 1898. As a result of these surveys it became evident that errors had been made in establishing the boundaries of the Seminole domain. An examination in 1900 by the General Land Office of the records of these same surveys disclosed that the eastern divisional line of said 175,000-acre tract established by Hackbusch in 1888 was in error, and it was estimated that several hundred acres had been excluded from the Creek national domain and erroneously included in the Seminole domain.

Even though the United States had knowledge that there were errors in the surveys of the Seminole domain, the United States, through its administrative officers, allotted and patented lands along the eastern boundary of the 175,000 acre tract to Seminole Indians, permitted a portion of said lands to be sold by the Seminole townsite commission in 1900, and retained a portion of said lands within the Emahaka Mission School tract for school purposes under said Seminole Agreement, and later sold the same in 1920 at public auction. However, it was not until 1930 that the General Land Office, at the request of counsel for petitioner,

reviewed the survey of the Seminole domain and definitely determined the errors in the surveys. The General Land Office surveyors made a further examination on the ground in 1941 and discovered that the field note record of the Bardwell survey did not conform to the markers of said survey found on the ground as located and traced by Hackbusch in 1888, and that the Hackbusch survey of the eastern boundary of the 175,000-acre Seminole Tract actually included 176,198.99 acres, or 1,198.99 acres of Creek land which had not been ceded by the Creek Nation under the agreement of February 14, 1881. Petitioner now claims compensation from the United States for these 1,198.99 acres of land under Section 2 Clause (3) or (5) of the Indian Claims Commission Act.

Petitioner claims that these 1,198.99 acres of land were taken from the Creek Nation by the United States as a result of the erroneous survey by United States Surveyor Hackbusch in 1888 and the United States-Seminole Agreement of July 1, 1898, whereby these lands were included by mistake in the Seminole domain and later patented and sold to others by the administrative officers of the defendant. Petitioner also alleges that the Creek Nation has never received compensation for these lands.

Defendant agrees that the Hackbusch survey was erroneous in including this additional 1,198.99 acres of land within the Seminole domain in what should have been only a 175,000-acre tract under the United States-Creek Nation Agreement of February 14, 1881. However, defendant contends that the Creek Nation has been compensated for these 1,198.99 acres under the United States-Creek Nation Agreement of January 19, 1889. As

part of this contention defendant alleges that under the 1889 agreement it was the intention of the Creek Nation to convey the entire tract as surveyed by Hackbusch even though it contained slightly more than the 175,000 acres ceded under the 1881 agreement. As evidence of this intention defendant quotes from the 1889 agreement that the Creek Nation

"... absolutely cedes and grants to the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six, and also grants and releases to the United States all and every claim, estate, right, or interest of any and whatever description in or to any and all land and territory whatever, except so much of the said former domain of said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation. (Emphasis supplied.)

Defendant argues that the above language indicates that ". . . it was the area occupied by the Seminoles that was to be conveyed by the Creeks rather than a specific acreage." (Def. Brief, p. 11) The logical result of this approach is that the Creek Nation ceded and was compensated for the 1,198.99 acres under the 1889 Agreement.

We cannot accept this argument for the following reasons. When the 1889 agreement was made neither party knew that there had been a mistake in Hackbusch's survey of the 175,000-acre Seminole tract. It was assumed by both parties to the agreement that the Hackbusch line was correct and that both the Creeks and Seminoles were occupying lands which were rightfully theirs. As evidence of this, the 1889 agreement made no specific provision in the consideration received by the Creek Nation for a possible error in the survey. The 1889 agreement did include a general release

by the Creek Nation. However, none of the \$2,280,857.10 consideration received by the Creeks under this agreement was actually paid for the release itself. The total amount of the consideration was in payment for an adjustment in the price of lands previously ceded by the Creek Nation to the United States. Part of the consideration under the 1889 agreement, totaling \$957,787.64, was paid as an adjustment of \$0.75 per acre for 1,277,050.19 acres, and the rest of the consideration totaling \$1,323,069.46 was paid as an adjustment of \$0.95 per acre for 1,392,704.70 acres. Nothing was paid for the release or for the 1,198.99 acres included by mistake in the Seminole tract surveyed by Hackbusch. Neither party actually intended to include the 1,198.99 acres in the 1889 agreement because neither party was aware at that time of the Hackbusch error. Had the error been known, an adjustment for it would doubtless have been made. Such an adjustment was made under the July 7, 1884 agreement when the erroneous Bardwell survey included an excess area of 151,870.48 acres west of the Creek dividing line provided for in the 1866 Treaty. (See Findings 8 and 10 herein.) It is therefore clear, as the Court of Claims found when this case was before it in 1941, that "For these 1,198.99 acres the plaintiff has not been compensated," 93 Ct. Cls. 568.

In the past, Congress, by agreement and appropriate legislation, has provided a remedy for erroneous surveys as shown in Finding No. 8 herein. We believe that one of the purposes of the "mutual or unilateral mistake" provision of Sec. 2 Clause (3) of the Indian Claims Commission Act was to provide a remedy for just such a situation as we have here.

We have held, therefore, that defendant must compensate petitioner for the 1,198.99 acres of land as claimed herein based on Section 2 Clause (3) of the Act, said land to be valued as of the date it was taken from petitioner by the United States.

Since it was not clear from the proposed findings, briefs or testimony of the parties the specific date or dates alleged to be the date of taking for valuation purposes, or whether petitioner is at this date still claiming just compensation, including interest from defendant, for the taking of these lands, these questions are left for a future hearing before the Commission or stipulation by the parties. An order will be entered accordingly.

/s/ Arthur V. Watkins
Commissioner

We concur:

/s/ Wm. M. Holt
Commissioner

/s/ T. Harold Scott
Commissioner