

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION,)

Petitioners,)

v.)

Docket No. 167

THE UNITED STATES OF AMERICA,)

Defendant.)

Decided: 4/24/68

Appearances:

Paul M. Niebell, Attorney for
Petitioners

Craig A. Decker, with whom was
Mr. Assistant Attorney General
Clyde O. Martz, Attorneys for
Defendant.

OPINION ON DEFENDANT'S MOTION FOR ENTRY OF JUDGMENT

Yarborough, Commissioner, delivered the opinion of the Commission.

This case involves 1,198.99 acres of Creek land erroneously surveyed and included within a tract of 175,000 acres ceded by the Creeks to the Seminoles under an 1881 Agreement. On remand from the Court of Claims, this Commission has found that the petitioner was deprived of the tract by the defendant without receiving compensation, and has ordered further proceedings to determine the date or dates of taking, and the then market value. The facts are set out in detail in the Commission's Findings of Fact and Opinion at 18 Ind. Cl. Comm. 434.

Defendant by its motion urges the Commission to find as a matter of law that the date of taking is established by the 1889 Agreement between the Creek Nation and the United States. A 1941 Opinion of the Court of Claims interpreting the 1889 Agreement construed the general release provision of the 1889 Agreement as passing title from the Creeks of this 1,198.99 acres as a part of the Seminole tract. Creek Nation v. United States, 93 C. Cls. 561. Defendant argues that this opinion is controlling and fixes the date of taking in this proceeding.

It is our judgment that the later opinion of the Court of Claims considering these same facts in the light of the Indian Claims Commission Act directs us to a different conclusion. In Creek Nation v. United States, 168 C. Cls. 483, the Court of Claims discusses the duty of this Commission to re-examine the effect of the 1889 Agreement:

"In this case, the Creeks have not had their day in court on the question of intention with regard to the 1,198.99 acres of land in dispute. All this court decided in the prior case, 93 Ct. Cl. 561, was the intention of the parties as evidenced by the specific language of the agreement. The court did not decide the subjective intention of the Indians and the Government in light of the error in the survey. Since the court could not revise the agreement to reflect the intention of the parties, the court was compelled to give effect to the Government's legal defense based upon the release contained in the agreement. Any other construction of the agreement would have run afoul of the terms of the agreement and the Supreme Court cases cited supra. The Court did find that 'For these 1,198.99 acres the plaintiff has not been compensated,' 93 Ct. Cl. at 568; that the survey included '1,198.99 acres more

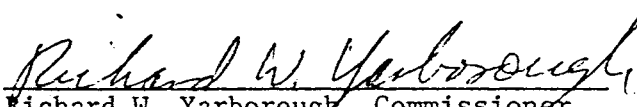
than the defendant has paid for,' id. at 569; and that 'it is true that the parties in executing this treaty acted under a mutual misapprehension of fact as to the proper location of the eastern boundary of the tract, but not as to the lands actually occupied by the Creeks,' id. at 571.

Our decision to return the case to the Commission for a hearing on the merits is buttressed by a decision of the Commission in which it considered the 1889 Agreement, supra, and held that the subjective intention of the Indians was contrary to the express wording of the release. The Creek Nation v. United States, 2 Ind. Cls. Comm. 66 (1952). There the Commission specifically found that the consideration recited in the 1889 agreement went only to those lands in the Indian Territory conditionally ceded to the United States under the treaty of 1866, supra, and that 'no part of the above consideration was paid or intended to be paid for the general release set forth in paragraph I of said Agreement of 1889 * * *.' 2 Ind. Cls. Comm. at 97. We are unable to agree that the ruling 'relative to the intent of the parties to the 1889 agreement was not necessary to the decision in that case and, therefore, not controlling here.' 12 Ind. Cls. Comm. 54, 83 (1963). In the absence of the finding made in the 1952 case, it is difficult to see how the Commission could have reached its decision for the Indians (2 Ind. Cls. Comm. 66). Nor did this court's decision reported in 93 Ct. Cl. 561 operate to invalidate the ruling made subsequently by the Commission under the provisions of the Indian Claims Commission Act, for the very reason that we find our 1941 decision in this case is not controlling today."

On remand, the Commission has made a determination of the subjective intention of the parties at the time of the 1889 Agreement, and we have found that the consideration paid the Creek Nation by the United States for that cession related only to the other lands conditionally ceded under the Creek Treaty of June 14, 1866, Creek Nation v. United States,

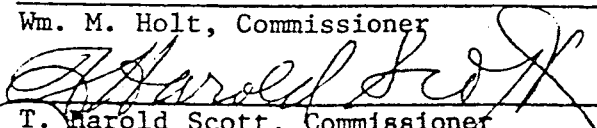
18 Ind. Cl. Comm. 434. "Nothing was paid for the release or for the 1198.99 acres included by mistake in the Seminole tract surveyed by Hackbusch. Neither party actually intended to include the 1198.99 acres in the 1889 Agreement because neither party was aware at that time of the Hackbusch error." 18 Ind. Cl. Comm. 434, at 458. Our reading of the subjective intention of the parties is that the 1198.99 acres erroneously included in the 175,000 acres was not conceived to be ceded by the 1889 Agreement and we must so revise that instrument. Hence that Agreement provides no key to a determination of the actual date of taking.

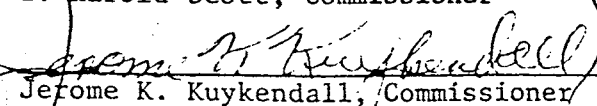
Defendant's motion is denied, and as previously ordered the case will proceed to a determination of the date or dates of taking of the 1198.99 acres, the value thereof at the time, and whether petitioner is entitled to interest from the date of taking.


Richard W. Yarborough, Commissioner

We Concur:


John T. Vance, Chairman

Wm. M. Holt, Commissioner

T. Harold Scott, Commissioner


Jerome K. Kuykendall, Commissioner