BEFORE THE INDIAN CLAIMS COMMISSION

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

Decided: June 30, 1969

Appearances:

Paul M. Niebell, Attorney for the Plaintiff

Craig A. Decker, with whom was Acting Assistant Attorney General Glen E. Taylor, Attorneys for the Defendant.

OPINION OF THE COMMISSION

Yarborough, Commissioner, delivered the Opinion of the Commission.

During the course of its dealings with the Creek Nation, the United States made a treaty with them February 14, 1833, 7 Stat. 417, under which 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 Interior February 5, 1872.

In the meantime, by the Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation purchased from the United States a tract of land within this area subsequently ceded by the Creek Nation to the United States. The 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 that a line due north and south between these two rivers would enclose 200,000 acres. However, during the fall of 1866 before the Bardwell line was surveyed and ablished, 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. Thereafter, when the Bardwell line was 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, 22 Stat. 265, and the amount of $175,000 was thereafter appropriated and paid to the Creek Nation for these lands.

In 1888 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. The agreement was ratified by Congress March 1, 1889, 25 Stat. 757.

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 for the allotment of lands and the issuance of patents thereto to enrolled members of the Seminole Nation, and for the disposal of some of the 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, 1149.51 acres of the subject lands were alloted to Seminoles in the years 1901-1906, and were patented to these Seminole allottees in the years 1912, 1913 and 1914. A few acres were patented in 1922. Some 29.28 acres of the subject lands were included in the Townsite of Wewoka. The Agreement of July 1, 1898, 30 Stat. 567, 568, provided for the sale of the Wewoka Townsite as follows:

> "The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the general council of the Seminole Nation, approved April 23rd, 1897, relative thereto; and on extinguishment of the tribal government, deeds of conveyance shall issue to owners of lots as herein provided for allotees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior."

On February 12, 1900 the Seminole Townsite Commission conveyed the unsold townlots of the entire townsite of Wewoka to John F. Brown and his brother, A. J. Brown, Principal Chief and Tribal Treasurer, respectively, of the Seminole Nation, for $12,000.00. By Act of March 3, 1905, 33 Stat. 1048, 1088, Congress confirmed title of Wewoka townsite in the Browns, as follows:

> "That the resolution of the Seminole Council, passed and approved on April eighteenth, nineteen hundred, accepting and ratifying the contract and sale made by the Seminole townsite commissioners to John F. Brown, of the unsold lots in the town of Wewoka, Indian Territory, for the sum of twelve thousand dollars, and also providing for the distribution of the said money among the Seminole people per capita, be, and the same is hereby, ratified and confirmed."

Some 20.20 acres of these Creek lands were included in the Emahaka Mission School tract, sold and patented by the United States to the purchaser on December 22, 1924. In 1930, at the request of Counsel for plaintiff, the General Land Office 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 1,198.00 acres of Creek land which had not been ceded by the Creek Nation under the Agreement of February 14, 1881.

In a prior hearing of this case the Commission has determined that plaintiff was never compensated for the 1,198.99 acres which the defendant took from plaintiff as a result of the erroneous Hackbusch survey and subsequent events. The Commission also treated the 1889 agreement as revised so as to exclude any cession of these 1,198.99 acres under that Agreement. The Creek Nation v. United States, 19 Ind. Cl. Comm. 127, 130 (1968). The issues now before us for determination are the dates these lands were taken from plaintiff by defendant and whether or not plaintiff is entitled to just compensation or interest from the date of taking.

Plaintiff contends that the date of the issuance of patents is the correct taking date and relies on Creek Nation v. United States, 302 U.S.

620 (1938), and United States v. Creek Nation, 295 U.S. 103 (1935). Defendant argues that the holding of the Court of Claims in Creek Nation v. United States, 93 Ct. Cls. 561 (1941), that the subject lands were ceded under the 1889 agreement, is binding on the Commission and, therefore, that the taking or valuation date is March 1, 1889, when the agreement was ratified by Congress. Alternatively, defendant argues that the dates of the allotments to the Seminoles rather than the patent dates are the taking dates. The Seminole Nation v. United States, 102 Ct. Cls. 565, 618, 619 (1944), cert denied 326 U.S. 719, is quoted as authority for this view.

The defendant is correct in stating that under the provisions of a jurisdictional act the Court of Claims declared the subject lands ceded by the terms of the 1889 agreement. However, in reversing and remanding our previous decision (12 Ind. Cl. Comm. 54) in this case, the Court of Claims ruled that "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." The Creek Nation v. The United States, 168 Ct. Cls. 483, 496 (1964). The Commission subsequently found on remand that there was no intention to cede the subject lands under the 1889 agreement and has treated that agreement as revised so as to exclude such a cession. 18 Ind. Cl. Comm. 434 (1967).

We agree with plaintiff that the decision of the Supreme Court in Creek Nation v. United States, 302 U.S. 620 (1938) is controlling here. The facts in that case are very similar to the present one. Both involved fee simple title lands belonging to the Creek Nation which were mistakenly assigned to

other Indian tribes because of an erroneous survey by a United States surveyor. In both cases the United States became aware that a mistake had been made. In both cases the United States alloted and issued patents to the lands, or the lands were otherwise disposed of, pursuant to Acts of Congress, and the United States failed to cancel the patents and permitted them to stand with a knowledge that a mistake had undoubtedly occurred. However, the Court of Claims application of the two Creek decisions in the Supreme Court cited above leads us to the conclusion that the date of the certificate of allotment rather than the date of patent should control here. In United States v. Creek Nation, 295 U.S. 103, 111, (1935), after stating that the United States did not appropriate the Creek lands by approving an erroneous survey, the Court said:

> "But not so of the disposals under the Act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issuance of patents, the most accredited types of conveyance known to our law. True they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time and not, as ruled below, on the value when the suit was begun."

On remand, the Court of Claims interpreted the above language to dictate a holding that the Creek lands were taken on February 3, 1891, the date of the approval of the Act of Congress under which the lands were erroneously transferred. The same case came to the Supreme Court again on the issue of the

correct date of taking and in Creek Nation v. United States, 302 U.S. 620, 622 (1938), the Court said:

> "The court below has misinterpreted that decision. The act of 1891 did not dispose of the lands. Its erroneous application and the consequent disposals of the lands to adverse holders constituted the taking by the United States. The petitioner is entitled to the present full equivalent of the value of the lands, without improvements, as of the date of the patents of the various parcels, if, as we assume, the patent in each instance issued promptly after the delivery of the final certificate; but if a substantial interval elapsed between the date of certificate and of patent, then as of the date of the certificate."

The Seminole Nation v. The United States, 102 Ct. Cls. 565, 618 (1944), cert. denied, 326 U.S. 719, involved an erroneous survey whereby several thousand acres of Seminole lands were mistakenly thought to belong to the Pottawatomies. By an agreement ratified by the Act of March 3, 1891 (26 Stat 989, 1016), the Pottawatomies ceded these lands to the United States and the agreement and ratifying act provided for the allotment of portions of these lands to the Pottawatomie Indians in severalty and for the opening of the other lands to settlement by white settlers. In that case the Court said on page 618:

> "Under the foregoing facts we are required by the opinions of the Supreme Court in Creek Nation v. United States, 295 U.S. 103, and 302 U.S. 620, to hold that the defendant exercised ownership over and appropriated to its own use these lands from the date it alloted them to the Pottawatomies in severalty in 1892 and from the dates of the patents to white settlers, as set out in finding 27. There is no material distinction between the facts in the Creek case and in this."

We also find the present case materially indistinguishable.

In cases such as the present one where there are many small tracts of land with different valuation dates, the Supreme Court has suggested that

> "A fair approximation or average of values may be adopted to avoid burdensome detailed computation of value as of the date of disposal of each separate tract." Creek Nation v. United States, 302 U.S. 620, 622 (1938).

The defendant has suggested that this "fair approximation or average" might be achieved by valuing the alloted acres as of 1904. We agree with this suggestion. The allotment certificates to 1149.51 acres of the subject lands having been issued during the period 1901-1906 with 47% of the allotments occurring before 1904, 27% during 1904 and 26% after 1904, we believe a valuation date of June 30, 1904 to be an equitable one. It may be argued that an "average of values" is different than an average evaluation date. However, in this case it appears to be a distinction without a difference. It would be difficult to get an "average of values" in a literal sense and still avoid the "burdensome detailed computation of value as of the date of disposal of each separate tract."

The 20.20 acres included in the Emahaka Mission School tract and patented to the purchaser by the United States December 22, 1924, should be valued as of that date. The 29.28 acres included in the Townsite of Wewoka should be valued as of March 3, 1905, the date Congress confirmed the title of this townsite in the purchaser.

We now come to the question of whether or not the plaintiff is entitled to just compensation. The law is clear that no interest can be charged against the United States unless it has expressly consented by statute or by agreement to pay such an increment or unless the taking is under the Fifth

Amendment to the Constitution. Plaintiff asserts that the taking of the subject lands by the United States required just compensation. Plaintiff again relies on United States v. Creek Nation, 295 U.S. 105, 111-112 (1935), and Creek Nation v. United States, 302 U.S. 620, 622 (1938), where just compensation was awarded. Defendant denies liability for just compensation on two basic grounds.

The first contention is that such a claim is res judicata based on the earlier decision in The Creek Nation v. United States, 93 Ct. Cls. 561 (1941), wherein the plaintiff was denied recovery under a special jurisdictional act. Defendant avers that the recent decision of the Court in The Creek Nation v. The United States, 168 Ct. Cls. 483 (1964) has not affected this particular point.

Secondly, defendant contends that revision of treaty actions under the Indian Claims Commission Act do not warrant just compensation with an interest increment. Defendant quotes from Osage Nation v. United States, 119 Ct. Cls. 592, 671-672 (1951), cert. denied 342 U.S. 896, Kiowa, Comanche and Apache Tribes v. United States, 143 Ct. Cls. 534 (1958), cert. denied 359 U.S. 934, and Blackfeet and Gros Ventre Tribes v. United States, 2 Ind. Cl. Comm. 302, 314 (1952), aff'd. 127 Ct. Cls. 807 (1954), cert. denied 348 U.S. 835, to sustain this position.

We believe the plaintiff is entitled to just compensation in this case. In the Creek case to which we have alluded earlier in this opinion, the Supreme Court said on pages 111 and 112,

> "We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe... But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include an addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amoung to be added." United States v. Creek Nation, 295 U.S. 105, 111-112 (1935).

The essential facts are no different here.

Defendant's arguments that the issue of just compensation is res judicata are not applicable in this case. Just compensation was never a specific issue in the earlier 1941 Creek decision by the Court of Claims. There the 1889 release was held to bar the claim; an adjudication of the taking itself was never reached. In any event, the Court indicated in its later decision (The Creek Nation v. United States, 168 Ct. Cls. 483, 488 (1964)) that neither res judicata nor collateral estoppel were applicable and specifically said "...our 1941 decision is not controlling today." (p. 497). The Court also said:

> "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." (p. 496)

As we have noted above, the Commission found on remand that the Creeks did not intend to cede the 1,198.99 acres under the 1889 agreement as the Court of Claims had previously held and so revised that instrument. The Commission finds that these lands were taken when allotment certificates and patents were issued by the United States.

With reference to defendant's argument that revision of agreement actions do not warrant an interest increment we want to make it clear that plaintiff is not receiving a just compensation recovery specifically under the revised 1889 agreement. The Commission revised the 1889 agreement so as to exclude the cession of the subject lands thereunder. Therefore, it has been the nature of the Creek interest in the lands and the character of the taking, apart from the 1889 agreement, which have led us to the conclusion that just compensation is required here. In the words of the Supreme Court

> "...the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe." United States v. Creek Nation, 295 U.S. 105, 111 (1935)

In effect, the Commission sua sponte has amended plaintiff's petition so as to include a claim and recovery under Section 2, Clause 1 of the Indian Claims Commission Act.

Richard W. Yarborough, Commissioner

We concur:

Jerome K. Kuykendall, Chairman

John T. Vance, Commissioner

Margaret H. Pierce, Commissioner

Brantley Blue, Commissioner