

BEFORE THE INDIAN CLAIMS COMMISSION

THE CREEK NATION OF INDIANS OF)	
THE STATE OF OKLAHOMA,)	
Plaintiff,)	
)	
v.)	Docket No. 275
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: April 15, 1970

Appearances:

Paul M. Nichell, Attorney for the Plaintiff.

Lester Reynolds, with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant.

Lester Reynolds was on the briefs.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

The Creek Nation has brought suit under Section 2(1) and (4) of the Indian Claims Commission Act (60 Stat. 1049, 25 U.S.C. Sec. 70a), to recover for the alleged taking of some 1,500,000 acres of land located in the northern part of Alabama and the northwestern part of Georgia immediately south of the Tennessee River. Plaintiff's claim under Section 2(1) of the Act is based on its contention that by virtue of the Treaty of August 7, 1790 (7 Stat. 35), and the Treaty of

August 9, 1814 (7 Stat. 120), the United States recognized the Creeks' right to permanently occupy the land in suit and that the United States subsequently deprived the Creeks of their lands without payment therefor. Accordingly, the Creek Nation contends it is entitled to recover just compensation. In the alternative, plaintiff urges that it had owned the land by so-called Indian title for a long time prior to the taking of the lands by the United States and that under Section 2(4) of the Act it has a claim for the value of the land so taken.

We shall first consider plaintiff's claim that it held the land by recognized (or, as plaintiff terms it, "guaranteed title") and is therefore entitled to recover just compensation for its taking. The standards for determining recognized title have been set forth in numerous decisions of this Commission, the Court of Claims and the Supreme Court. The source of recognition is the Congress of the United States. There must be a definite intention evidenced by congressional action or authority to grant, accord, "acknowledge" or "recognize" legal rights of permanent occupancy of the land in question. Tee-Hit-Ton Indians v. United States, 348 U. S. 272 (1955); Northwestern Bands of Shoshone Indians v. United States, 324 U. S. 335 (1945); Hynes v. Grimes Packing Co., 337 U. S. 86 (1949); The Sac and Fox Tribe of Indians of Oklahoma, et al. v. United States, 161 Ct. Cl. 189, 315 F. 2d 896 (1963), cert. denied, 375 U. S. 921; The Miami

Tribe of Oklahoma, et al. v. United States, 146 Ct. Cl. 421, 439, 175 F. Supp. 926 (1959), affirming in part 2 Ind. Cl. Comm. 617, 645 (Docket Nos. 67 and 124).

Plaintiff's claim to recognized or "guaranteed" title is based in part upon the Creek Treaty of August 7, 1790 (7 Stat. 35). Article IV of the treaty established a boundary between the citizens of the United States to the east and the Creek Nation to the west. The treaty effected a cession of certain of the Creek lands east of that line.^{1/} With respect to those lands to the west and south of this boundary line, Article V of the treaty provided:

The United States solemnly guarantee to the Creek Nation, all their lands within the limits of the United States to the westward and southward of the boundary described in the preceding article.

An examination of the history of this treaty indicates that it was not intended to be a grant of legal rights of permanent occupancy to the Creeks. Rather it was an undertaking by the United States to protect the Creeks' aboriginal occupancy rights against incursions by the State of Georgia and white settlers. The instructions for treating with the southern Indians directed by President Washington and Secretary of War Knox to the treaty commissioners, make this clear:

The first object of your mission is to negotiate and establish peace between the State of Georgia and the Creek Nation. * * *

You will find the ostensible, and probably the real cause of hostilities between Georgia and the Creeks, to consist in a difference of judgment of three treaties, stated to have been made between the said parties [in 1783, 1785 and 1786] (IV Amer. State Papers 65)

^{1/} This cession is shown on Royce's map of Georgia as Cession 7.

The Commissioners were ordered to examine all the circumstances surrounding the making of these treaties between the Creeks and the State of Georgia to determine if they were properly entered into with full understanding and without coercion. They were further instructed:

Should, therefore, the result of your investigation be unfavorable to the claims of Georgia, it would be highly embarrassing to that State to relinquish the said lands to the Creeks.

Hence it will be an important accommodation to Georgia to obtain from the Creeks a regular conveyance of said lands (IV Amer. State Papers 65)

In addition to purchasing the lands, the United States was also concerned with assuring Creek loyalty to the United States. The Commissioners were instructed:

If you should find the measure necessary, in order to accomplish the before recited objects, you will further stipulate a solemn guarantee of the United States to the Creeks of their remaining territory, to be supported, if necessary, by a line of military posts. (IV Amer. State Papers 66).

Following their instructions, the commissioners made the following statement to the Creeks during negotiations on September 24, 1789:

[General Washington] has commanded us to tell you, that while the General Government of confederated America will vindicate the right of every member of the Union, it will also see that justice is done to the nations of Indians situated within the limits of the United States. And we are authorized to declare and make known, that the United States will guaranty and defend to you, all the lands of your nation within the limits aforesaid, and which shall not be clearly ceded to any part of the Union. (IV Amer. State Papers 73).

In presenting the treaty to the Senate, President Washington indicated that it would serve to bring peace to the southern frontier, attach the Creeks and neighboring tribes to the interests of the United States and:

At the same time it is to be hoped, that it will afford solid grounds of satisfaction to the State of Georgia, as it contains a regular, full, and definitive relinquishment, on the part of the Creek nation, of the Oconee land, in the utmost extent in which it has been claimed by that State, and thus extinguishes the principal cause of those hostilities, from which it has, more than once, experienced such severe calamities. (IV Amer. State Papers 81).

That the concern of the treaty negotiators was the boundary between the State of Georgia and the Creeks is also indicated by the provisions of Article IV. The boundary drawn was that between citizens of the United States and the Creek Nation. The surveying of the disputed portion of the boundary was to be carried out by a surveyor for the United States who was to be assisted by three persons appointed by the governor of Georgia and three persons appointed by the Creek Nation. Thus the federal government was acting as a neutral arbitrator between the State of Georgia and the Creek Nation. It was not making a Federal grant to the Creeks. Having determined the disputed boundary between the Creeks and Georgia, the United States then gave to the Creeks a "solemn guarantee" of "all their lands within the limits of the United States to the westward and southward of the boundary described" (Article V).

The plaintiff also relies on the Creek Treaty of Fort Jackson of August 9, 1814 (7 Stat. 120), in support of its recognized title claim.

This treaty, concluded at the close of the Creek War, was executed under protest and as the result of duress. The Creeks were required to indemnify the United States for losses suffered and expenses incurred in subduing the hostile Creeks by ceding to the United States a major portion of their domain in Georgia and Alabama. That portion of the northern boundary of the cession which lay in Alabama was not finally determined in the 1814 Treaty. It was described only as beginning at the point on the east bank of the Coosa River where the southern boundary of the Cherokee Nation crossed the same; but the southern boundary of the Cherokee Nation had not yet been determined and was not determined until two years later in the Cherokee Treaty of March 22, 1816 (7 Stat. 139).

We find nothing in the Treaty of August 9, 1814, or in the negotiations leading up to it which indicate that the United States intended to recognize Creek title to any lands. Article 2 of the treaty merely "guaranteed" the "integrity" of the remaining unceded Creek lands in the face of significant concessions by the Creeks of certain rights to the United States. Article 4th "demanded" that the Creeks acknowledge the right of the United States to establish military posts, trading houses and roads within Creek country, and the right to free navigation of waters within the unceded area. Article 6th limited the sanctuary of Creek lands by requiring that certain instigators of the war found in Creek territory be surrendered to the United States.

A letter of March 17, 1814, from Secretary of War Armstrong to Major General Pickney, which outlined the treaty terms to be proposed to the Creeks, said nothing of even a "guarantee of integrity" of

remaining unceded Creek lands. (IV Am. State Papers 836-837). On March 20, 1814, Secretary Armstrong wrote Pickney that "the proposed treaty with the Creeks should take a form altogether military, and be in the nature of a capitulation." (IV Am. State Papers 836)

In examining the Creek treaties of 1790 and 1814 and attempting to determine whether or not they could be interpreted as treaties of recognition, we were particularly impressed with the differences between their provisions and those in the Treaty of Greeneville negotiated between the United States and several groups of Indians on August 3, 1795 (7 Stat. 49), and held by this Commission and the Court of Claims to have been a treaty of recognition. Miami Tribe of Oklahoma, et al. v. United States, supra.

Like the 1790 Creek Treaty, the Treaty of Greeneville did not define the boundaries of the territory acknowledged to belong to the Indian treaty parties. In its decision on the appeal of the Miami Tribe of Oklahoma case, supra, the Court of Claims undertook to analyze the various rights which were conferred upon the signatory Indians respecting the undefined area of land relinquished by the United States in the 1795 Treaty, which rights included, among others, the right of the Indians to permanently occupy that land without interference from the United States, with the United States reserving to itself only the right to buy the land from the Indians if the Indians should later desire to dispose of their lands. The Court pointed out that since the United States had no obligation to compensate the Indians for Indian title land, an agreement to permit the Indians to occupy the land

permanently or until they were disposed to sell it to the United States, appeared both to the Commission and to the Court to be a clear indication of an intention on the part of the United States to recognize in the Indian treaty parties certain legal rights to permanently occupy the land in question. Neither the 1790 Creek Treaty nor the 1814 Creek Treaty contains any of these indicia of recognition.

Further, in Miami Tribe of Oklahoma, supra, the Court noted that the Greeneville Treaty did not fix or define the areas owned by the separate participating tribes. The necessary fixing of the intertribal boundaries was to be accomplished by subsequent treaties. In the Miami Tribe of Oklahoma case the later Treaty of Grouseland (1805) (7 Stat. 91), and the Treaty of Fort Wayne (1809) (7 Stat. 113), identified and located the areas which were owned by plaintiffs in that case. There was no treaty involving the Creek Indians which fixed any boundaries for the area claimed in the instant case.

We conclude that neither the 1790 Treaty nor the 1814 Treaty accorded the plaintiff recognized title to any of the lands in suit. ^{2/}

^{2/} It is noted that defendant did not respond in any way to plaintiff's assertions regarding its recognized title claim but treated the case as one resting solely on plaintiff's alternate claim to aboriginal use and occupancy (Indian title) title to the land in suit. While in another case brought by the Creek Nation, Docket 272, involving Royce Area 172 in Alabama ceded by the Creeks in 1832, the defendant appears to concede that the 1790 Creek Treaty recognized Creek title to the land in that suit (see defendant's brief of November 4, 1969, pp. 1-2), the Commission is not bound by such a concession when, as here, a question of law is involved. Swift & Co. v. Hocking Valley Railway Co., 243 U. S. 281 (1917); Sac and Fox Tribe v. United States, 161 Ct. Cl. 189, 315 F. 2d. 896, cert. denied, 375 U. S. 921 (1963).

We turn now to plaintiff's claim of aboriginal or Indian title to the land shown on the attached map and described in Finding of Fact No. 2. This title must rest on actual, exclusive use and occupancy for a long time prior to the loss of the lands claimed. In the findings of fact we have set forth the pertinent details of the Creek Nation's history as it relates to the subject claim. Commencing with De Soto's encounters with the Creeks in 1540, and continuing through the early 19th Century, we have considered the evidence of Creek use and occupancy of the lands claimed; the long continuing conflicts with the neighboring Cherokees and Chickasaws; the Creek conflicts with the whites; the many conventions and treaties with the Choctaws, Chickasaws, Cherokees and Creeks; and the efforts of the United States to resolve the conflicting boundary claims between the competing tribes.

Plaintiff has relied upon evidence of use and occupancy of portions of the claimed area by the Chisca or Yuchi Tribe; by the Koasati Tribe; and by the Tali Tribe. The Yuchi Tribe was not a part of the Creek Nation when De Soto encountered it in 1540. Early in the 18th Century the Yuchi left Tennessee and moved in among the Lower Creeks in southern Georgia and then became a part of the Creek confederacy. The history of the Yuchi does not support plaintiff's aboriginal title claim.

The Koasati Tribe occupied the town of Costa at the big bend of the Tennessee River in the claimed area. However, in the mid-1700's a large part of the Koasati migrated south and settled along the

Alabama River far south of the claimed area. A remnant of the tribe that remained lived with a mixed group of Creek and Cherokee Indians in a village called Coosada which was established around 1784 on the Tennessee River in Royce Area 203 ceded by the Cherokees in 1835. The Koasati, after joining the Creek Nation, did not exclusively use and occupy any portion of the claimed area for "a long time."

It is not established by the record that the Tali Tribe, also encountered by De Soto south and west of the big bend in the Tennessee River, was a part of the Creek Nation.

We have concluded from the evidence that the western portion of the claimed area was variously occupied by Chickasaws, Creeks, and Cherokees. Commencing in 1765, there were villages occupied by Chickasaws along Big Bear Creek. There was a jointly occupied Creek-Cherokee village in the area about 1780. In the late 1700's, there were also Cherokee settlements south of the Tennessee River in the Muscle Shoals area. In fact those lands were part of a common hunting ground of the Choctaw, Chickasaw, Creek, and Cherokee Indians.

To the east of the Muscle Shoals area, in the central portion of the claimed area, there were a number of Cherokee, Creek, and mixed Cherokee-Creek settlements. As set forth in our Finding of Fact No. 9, it is not established that the areas dominated by those villages, all of which were located just south of the big bend of the Tennessee River in the north central area of the claimed lands, were exclusively used and occupied by the Creek Indians.

The lands located in the forks of Wills Creek and the Coosa River, in the eastern portion of the claimed area, were part of the aboriginal homeland of the Creeks. In about 1793 the lands were partially occupied by Cherokee Indians who had been driven south in a war between the Cherokees and the citizens of Tennessee. However, the Creek Nation had given permission for that Cherokee occupation. Under the circumstances the Cherokee presence in that area, with Creek permission, did not defeat the aboriginal title of the Creek Nation.

In 1811 civil war erupted among the Creeks. Hostile Creeks began to raid and terrorize white settlements. At the request of those Creeks who were friendly to the United States, Major General Andrew Jackson intervened and finally defeated the hostile Creeks with a force of white volunteers and loyal Creeks. The hostile Creeks vacated the lands in suit in advance of Jackson's army. At the end of the war, in 1814, many of the hostile Creeks fled to Florida.

On August 1, 1814, General Jackson initiated a treaty convention with representatives of the Creek Nation including one chief from the hostile Creek element. By the resulting treaty (7 Stat. 120) the Creeks were forced to cede, without compensation, the major portion of their vast domain in Georgia and Alabama as indemnity for the expenses incurred and losses suffered by the United States in prosecuting the campaign against the hostile Creeks. The northern boundary of the cession in Alabama was not then fixed but was to be determined by persons to be designated by the President. The line was subsequently determined

in a treaty with the Cherokee on March 22, 1816 (7 Stat. 139).

By a series of events commencing with the Creek war, the United States was finally to deprive the Creeks of whatever rights they had to lands within the claimed area. In our findings we have set forth in some detail the history of treaty negotiations and conventions following the Creek war. At most those negotiations demonstrate the continuous conflict between the neighboring Indian tribes concerning their respective boundaries in the general area of the claimed lands. The competing Indians persisted in their land claims. The United States officials were never consistent in dealing with the boundary problems. Of primary concern to the United States, of course, was the preservation of peace in the area. At various times these government officials would favor the Chickasaw, the Choctaw, the Cherokee, or the Creek claims. The pattern of treaty dealings can furnish little evidence of aboriginal use and occupancy of the claimed lands.

The various treaties and conventions do, however, provide a better insight into the contemporaneous problems involving Indian use and occupancy of the area. The treaties were a most important part of the series of events which, culminating in the March 22, 1816 Cherokee Treaty, supra, deprived the Creek Nation of its Indian title to lands in the claimed area.

By the March 22, 1816, Cherokee Treaty (7 Stat. 139), the northern boundary of the lands ceded by the Creek Nation under the 1814 Fort Jackson Treaty was finally fixed. This, we have concluded, was the

final act by which the defendant deprived the Creek Nation of what lands they owned in the claimed tract. The ratification date of that treaty was April 8, 1816, which date was the taking date of the lands involved in this proceeding.

In our Finding of Fact No. 25 we have described the area which we have found the Creek Nation to have exclusively used and occupied for a long time prior to April 8, 1816. The described area includes the lands in the eastern portion between the forks of Wills Creek and the Coosa River. It embraces roughly the southern half of the claimed lands extending as far west as the dividing ridge between the waters of the Tennessee and Tombigbee Rivers. As to the remainder of the claimed lands the evidence does not support the plaintiff's claim based on aboriginal title.

In its brief defendant has urged that the treaty between the United States and the Creek Nation on August 7, 1856 (11 Stat. 699), contained a release which would bar any recovery on the claims presented herein. The release is contained in Article 5, which reads:

The Creek Indians do hereby absolutely and forever quit-claim 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 claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement * * *. [emphasis added; Finding 27]

In support of its argument the defendant cites Creek Nation v. United States, 77 Ct. Cl. 226, 263 (1933), brought under a special

jurisdictional act. In that suit, which involved Creek claims under the Treaty of March 24, 1832 (7 Stat. 336), the Court of Claims determined that by Article V of the Treaty of August 7, 1856, the Creek Nation expressly waived all tribal claims and demands against the United States. It must be borne in mind that this decision was rendered under a limited jurisdictional act which did not contain the broad remedial provisions embodied in Section 2 of the Indian Claims Commission Act, 25 U.S.C. §70a (1946). Cf. The Loyal Band or Group of Creek Indians v. United States, 118 Ct. Cl. 373, 384-385 (1951), and the informative discussion in The Creek Nation v. United States, 168 Ct. Cl. 483, 487-498 (1964). In Docket 21, Creek Nation v. United States, 2 Ind. Cl. Comm. 66, at 92-97, 112-114 (1952), the Commission determined that the release contained in Article V of the Treaty of August 7, 1856, was not a bar to claims asserted under Section 2(3) and (5) of the Indian Claims Commission Act. In that case the Commission, in deciding a claim stemming from the Treaty of Fort Jackson of August 9, 1814, reviewed the events leading to the Treaty of August 7, 1856, and concluded that the \$1,000,000 paid thereunder was accepted by the Creek Nation under protest and duress for settlement of nine claims valued at approximately \$3,700,000 as well as for the 2,037,414.62 acres of their lands in Oklahoma. The Creek delegates stated at the time that they considered the settlement neither fair nor just, adding: "we have submitted to take less, as men must ever submit to what they cannot resist." The Commission reasoned that since the Oklahoma land


alone was valued in excess of \$1,000,000, the Creek really had received no consideration for the release of the Treaty of Fort Jackson land claim. With reference to the \$1,000,000 treaty consideration the Commission stated:

On the ground that said consideration was unconscionable, if for no other reason, the release should be held as no bar to the claim herein asserted.

The release might well be held ineffective because of the disparity of position of the parties and of the fiduciary relationship existing calling for a most exacting fairness in their mutual dealings. (2 Ind. Cl. Comm. at 113, 114)

For the same reasons, we are of the opinion that the release in the Treaty of August 7, 1856 is no bar to recovery in the instant suit under Section 2(4) of the Indian Claims Commission Act.

This case will now proceed to a determination of the acreage of the lands described in Finding of Fact No. 25 and their fair market value as of April 8, 1816.

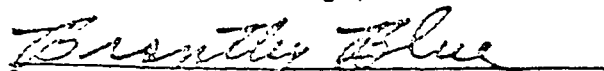

Margaret A. Pierce, Commissioner

We concur:


Jerome K. Kuykendall, Chairman


John I. Vance, Commissioner

Richard W. Yarborough, Commissioner


Brantley Blue, Commissioner